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Article 1

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NOVA LAW REVIEW



WHATEVER HAPPENED TO THE UNIFORM LAND TRANSACTIONS ACT?

SYMPOSIUM ARTICLES

- Whatever Happened to the Uniform Land Transactions Act? . . . *Ronald Benton Brown*
- Letter to the Editor *James M. Pedowitz*
- The Uniform Land Transactions Act and the Uniform
Simplification of Land Transfers Act Twenty Years Later:
Why Have There Been No Adoptions *Richard B. Amandes*

Wasted Days and Wasted Nights: Why the Land Acts Failed *Marion W. Benfield, Jr.*

ULSIA—Modified for Minnesota *John D. Healy, Jr.*

Seller's Damages from a Defaulting Buyer of Realty:
The Influence of the Uniform Land Transactions Act on the Courts *Gerald Korngold*

The Uniform Simplification of Land Transfers Act and the
Politics and Economics of Law Reform *Peter B. Maggs*

ULTA and USLTA in Coursebooks and Classrooms *Barbara Taylor Mattis*

The Future of American Real Estate Law: Uniform
Foreclosure Laws and Uniform Land Security Interest Act *Patrick A. Randolph, Jr.*

The Influence of the ULSIA on the Proposed
New Brunswick Land Security Act *Norman Siebrasse
Catherine Walsh*

Markets and Law Reform: The Tension Between
Uniformity and Idealism *James Charles Smith*

ADDITIONAL ARTICLES

State AIDS-Related Legislation in the 1990s:
Adopting a Language of Hope Which Affirms Life *Karen S. Lovitch*

Baseball's Antitrust Exemption: It's Going, Going . . . Gone! *Joseph A. Kohm, Jr.*

Florida Capital Cases: July 1, 1994 - July 30, 1995 *Gary Caldwell*

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City of North Miami v. Kurtz—Is It Curtains for Privacy in Florida *Deborah Lynn Stewart*

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Whatever Happened to the Uniform Land Transactions Act?

Ronald Benton Brown*

"The report of my death was an exaggeration."

—Mark Twain

Cable from Europe to the Associated Press¹

The Uniform Land Transactions Act ("ULTA")² was approved by the National Conference on Uniform State Laws ("NCCUSL") in 1975.³ The Conference proposed that every state enact it. The Act was designed to simplify, clarify, modernize, and make uniform nationwide the real estate sales and sales financing law like the Uniform Commercial Code ("UCC") had done for the law of transactions in goods. Article 1 of the ULTA paralleled Article 1 of the UCC covering general provisions. Article 2 of the ULTA covered the sales of land in a manner similar to the way Article 2 of the UCC covered the sales of goods. Article 3 of the ULTA and Article 9 of the UCC covered secured transactions. In the late 1970s, the ULTA appeared to be the wave of the future for real estate, ready to duplicate the widespread acceptance accomplished by the UCC. When I began to teach property in 1976, that was the way I presented the ULTA to students. I also remember advising an even more junior colleague to focus her scholarly efforts on the ULTA so she would be on the leading edge of Real Estate Law.⁴ In the early 80s, my representations seemed to be justified. Law students and recent graduates eagerly anticipated the replacement of the confusing rules of the common law and maxims of equity with an easily understood code.⁵

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1. THE OXFORD DICTIONARY OF QUOTATIONS 554 (3rd ed. 1979).

2. 13 U.L.A. 539-714 (1980).

3. See Norman Geis, *Introduction to UNIFORM REAL PROPERTY ACTS* (1990); U.L.S.I.A. prefatory note, 7A U.L.A. 220 (Supp. 1995), reprinted in *UNIFORM REAL PROPERTY ACTS* 558-65 (1990).

4. Amazingly, this advice was followed, a fact which this author has never been allowed to forget. See Barbara J. Britzke, *Residential Real Estate Transactions: Comparison of Uniform Land Transactions Act and Maryland Law*, 13 U. BALT. L. REV. 43 (1983). However, Professor Britzke suffered no ill effects from the advice other than developing a severe antipathy to Real Estate Law.

5. For example, students were delighted to read, at the conclusion of a section of text explaining that under traditional doctrine the contract of sale merged into the deed, that:

But widespread enactment never happened. In fact, no enactment ever occurred. The ULTA was not adopted by any state. Fifteen years later, in 1990, the NCCUSL withdrew it. Before that happened, the mortgage part, Article 3, had been extracted and fashioned into a new act of its own, the Uniform Land Security Interest Act (“ULSIA”), which was presented to the states. But ULSIA has not been enacted either. The most recent attempts to convince a state legislature to adopt the ULSIA that I know of occurred in Connecticut and Minnesota last year. In Connecticut, the bill failed to emerge from committee.⁶ In Minnesota, an active bar committee, having developed a modified version ULSIA to deal with local concerns, is optimistic for its chances in the next session.⁷ For simplicity sake, I will refer to both the ULTA and ULSIA as being included in the term ULTA for the remainder of these remarks.

Whatever happened? I wanted to know. So did many lawyers, law students, and other law professors. I proposed to the editors of the *Nova Law Review* that we try to find out and print the results in the form of a symposium. I solicited the information by writing⁸ directly to everyone listed in the *Uniform Laws Annotated* as having been involved at any stage with the ULTA or ULSIA. I also sent the solicitation letter to the Internet discussion groups for law professors⁹ and real estate professionals.¹⁰ I followed up leads, no matter how remote. The responses varied. I anticipated *post mortems* analyzing the causes of the ULTA’s untimely death. Many of the responses, especially the brief ones fit my expectations. Based upon those, I compiled a list of what seemed to be the “Top Ten Reasons for the Demise of the ULTA” (with apologies to David Letterman). In reverse order they are:

“Uniform Land Transactions Act sect. 1-309 abolishes the doctrine of merger. Acceptance of a deed does not relieve any party of the duty to perform all of his obligations under the contract.” JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 580 (2d ed. 1988). The students concluded they no longer had to worry about the doctrine because it no longer existed. Great was their disappointment at being reminded that the ULTA was not yet the law anywhere.

6. This information was obtained from attorney William Breetz, an NCCUSL commissioner from Connecticut and an advisor to the ULSIA Drafting Committee, and Mr. David Biklen, the executive director of the Connecticut Law Review Commission.

7. See John D. Healy, Jr., *ULSIA—Modified for Minnesota*, 20 NOVA L. REV 1063 (1996).

8. See Appendix C for a copy of the solicitation letter.

9. The LawProf discussion group.

10. The Dirt discussion group.

10. Almost no one understood it.
9. It would not do for real estate what the UCC did for the sale and sales financing of goods.
8. It would do for real estate what the UCC did for the sale and sales financing of goods.
7. It was drafted by commercial law people rather than conveyancers.
6. No one ever heard of it.
5. It was only another boondoggle by law professors.
4. It was almost totally ignored by law professors.
3. Real property lawyers did not want to learn something new.
2. Real property lawyers were afraid that it might hurt them economically.
1. Real estate is too local in character for the nationwide uniformity.

Each of these had some immediate appeal to me. The responses from our distinguished panel of commentators have placed them in the proper perspective.

I start the discussion with reason number 10, that almost no one understood the ULTA. I have taught the UCC courses in Sales and Sales Financing. In many law schools, Sales and Sales Financing are two separate courses, each getting three credit hours. That means each course meets a minimum of three hours per week over a fourteen-week semester for a total of eighty-four class hours. Some schools combine the two topics into one four-credit course for a minimum of fifty-six class hours. It is apparent that law school faculties believe that it takes upper level law students, under the skilled guidance of a law professor, at least fifty-six hours to understand these acts. Of course, a prior understanding of the UCC might make it easier for a lawyer or law student to figure out the parallel parts of the ULTA, but it also might lead to confusion because the provisions are not exactly the same. Besides, not every lawyer or law student understands Articles 2 and 9 of the UCC, not even if he or she has taken the course(s). So a significant obstacle to adoption would be the time and effort required for the critical parties (e.g., study committees, legislative staffs, legislators, and interested members of the public, such as, potential lobbyists) to figure out what these acts would do.

This obstacle was probably magnified by the fact that the NCCUSL promulgated another act, the Uniform Simplification of Land Transfers Act ("USLTA"),¹¹ at the same time as ULTA. The USLTA covered the mechanics of transfer, liens, recording, and priorities. As originally

11. This Act is also referred to as "USOLTA."

formulated, these were included in the ULTA¹² but they were moved to a separate act to prevent the ULTA from becoming unwieldy. Professor Maggs points out that the USOLTA generated political and economic opposition of its own. I speculate this opposition might have inured to the detriment of the ULTA. Moreover, figuring out the USOLTA would have been just as big a study project as figuring out the ULTA and would also have generated questions as to how the acts would interrelate. Being created at the same time, they were probably viewed, at least on a subliminal level, as a package since many of the authors in this *Symposium* discuss them together.¹³ That should not have surprised me considering how often they were lumped together in prior academic discussions.¹⁴ Perhaps this package was simply too big for any legislature to swallow, particularly when one remembers that being a state legislator is only a part-time job in many states and there was no emergency pressing legislators to deal with these proposals.

Reason number 9 reflects the idea that the UCC was intended, *inter alia*, to simplify, clarify, and modernize the law.¹⁵ The ULTA was intended to do the same thing¹⁶ but doing that for real estate law would be more difficult than it was for transactions in goods. Probably, this is connected to reason number 1 (i.e., real estate law is too local in nature to be suitable for a uniform act). Perhaps it is connected to the historical

12. The original vision was to have one uniform act which would cover all aspects of real estate law. Other topics which were removed and eventually became the subject of separate acts were condominiums and common interest ownership.

13. See Richard B. Amandes, *The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act Twenty Years Later: Why Have There Been No Adoptions?*, 20 NOVA L. REV. 1033 (1996); Peter B. Maggs, *The Uniform Simplification of Land Transfers Act and the Politics and Economics of Law Reform*, 20 NOVA L. REV. 1091 (1996); Barbara Taylor Mattis, *ULTA and USLTA in Coursebooks and Classrooms*, 20 NOVA L. REV. 1095 (1996).

14. The 1981 symposium in the *Southern Illinois University Law Journal* included six articles of which three focused exclusively on USLTA and two others involved both USLTA and ULTA. The symposium in the *Stetson Law Review* was divided almost equally between USOLTA and ULTA.

The Uniform Land Security Interest Act suffered similarly by being grouped with other Uniform Real Property Acts in the Symposium on Uniform Real Property Acts, 27 WAKE FOREST L. REV. 325 (1992), with the stars of the show being the Uniform Common Interest Ownership Act and the Uniform Construction Lien Act. However, the ULSIA was the sole focus in a 1992 symposium in the *Connecticut Law Review*.

15. UCC § 1-102.

16. ULTA § 1-102(1).

nature of land law.¹⁷ Even the name “real estate” has medieval roots that lawyers both enjoy and hate. It takes on an almost mystical aura which lawyers hold in awe and, deep down, may not want to exorcise with a sanitized “land” law.

Reason number 8, doing for real estate law what the UCC had done for the sale of goods, was supposed to be one of the reasons for states to adopt the Act. But many lawyers still remember the negative side of the process. It was not easy for lawyers and judges to learn the newly enacted UCC. Some lawyers and judges could afford to simply hire recent graduates who had taken one or more UCC courses to be their clerks or associates. Others struggled to understand the new code, but the struggle was often made worse by confused judges who produced tortured and baffling precedents.

I remember being a very young lawyer in Connecticut in 1973 and winning my first “big” case because the outcome was based upon the UCC. My client was being sued for failing to pay for a set of encyclopedias. Upon reading the complaint I noticed that the encyclopedias had been delivered almost six years earlier. Eureka! The statute of limitations on a contract for the sale of goods under the UCC was four years. I filed my notice of affirmative defense. My motion for summary judgment was in the typewriter when the plaintiff’s attorney called. “How can you say the statute of limitations has run when the six years aren’t up?” he demanded. I replied that under Article 2 of the UCC, the statute of limitations was four years. “What’s the UCC?,” he asked, although it had been the law in Connecticut for over twelve years (TWELVE YEARS!).¹⁸ Either embarrassed or, perhaps more likely, just unwilling to look up the statute for the amount of money at issue, he agreed to dismiss the case with prejudice. He went on to explain that he had a large collection practice and the UCC had never come up before in any case. I am certain that he did his best to forget about it immediately. I heard similar stories from contemporaries who encountered lawyers and judges who neither knew nor cared that the UCC existed. Remembering or just having heard of these times, lawyers and legislators might be justified in not wanting to repeat the experience. Others might justifiably interpret this as proof that lawyers do not want to be bothered learning something new (i.e., reason number 3).

Reason number 7 was that it was drafted by commercial law people rather than conveyancers. Perhaps that was true but it sounds like an *ad hominem* argument. A number of the ULTA draftsmen had worked on parts

17. See Geis, *Introduction*, *supra* note 3, at 3.

18. 1959 Conn. Acts 133 (Reg. Sess.) (effective 1961) (codified at CONN. GEN. STAT. ANN. §§ 42a-1-101 to -10-109 (West 1990 & Supp. 1996)).

of the UCC,¹⁹ but why should that disqualify them or diminish the product? The notes to the Act indicate that they received input and advice from what appears to be every facet of the real estate community.²⁰ Moreover, the act itself was approved by the NCCUSL and I have found nothing to suggest that the Conference was the captive of commercial law interests.

As indicated above, I communicated with everyone whose name I found mentioned in any reference or cross reference to the ULTA. I was pleasantly surprised by how nice people were about replying, but I was also quite surprised by how many responded that they either had not heard of it or could not recall anything about it. Land sales and financing may be an eminently forgettable topic and it was twenty years ago, but the degree of nonrecognition was astonishing. Perhaps reason number 6 does have some validity.

Reason number 5 blames the law professors, something we have learned to bear. Law students frequently respond to new assignments by asking, "Why do we have to learn this?" or "Do we really have to learn this?" (although the favorite question is still, "Will this be on the exam?"). They suspect that law professors invent the unpleasant and difficult material simply to torture them. Reason number 5 may be an extension (logical or not) of this syndrome, i.e., it was simply something dreamed up by law professors because they have nothing better to do with their days in their ivory towers than to dream up miseries for law students. I assure you that, based upon my experience, it is not so. In fact, if the ULTA had been adopted, it would eventually have made life far easier for everyone, but admittedly the transition period would have taken some enduring. Besides, if one examines the list of people involved in the drafting and consideration of the ULTA, it becomes readily apparent that these were busy, successful professionals who had no need to invent busywork to fill up their days.

Reason number 4, that professors ignored the ULTA, is in some ways the converse of number 5, but it has more basis in fact. Law professors

19. Some of these draftsmen included: professors Marion Benfield, Peter Maggs, and Fairfax Leary.

20. The prefatory note to the ULTA in the 1986 edition of the *Uniform Laws Annotated* reveals, *inter alia*, a list of advisors from the following associations: the Federal Home Loan Bank Board, the National Association of Real Estate Boards, the National Association of Home Builders of the United States, the Department of Housing and Urban Development, American Bar Association, the Mortgage Bankers Association of America, the American Land Title Association, the Public Interest Research Group, and the American Subcontractors Association.

wrote a surprisingly small number of law review articles about the ULTA despite the considerable efforts of Dean Richard Amandes to drum up scholarly interest.²¹ Only ten articles and five student comments focused on the ULTA during the fifteen years between the Act's approval and withdrawal.²² Even counting student notes, this symposium will almost double that number! Why were there so few articles on such an important subject and did that have a negative effect? Dean Amandes, in his article, explains his theories noting that the most important factor may have been that the UCC, in contrast to the ULTA, had predecessor acts to set the stage for its enactment.

Casebook authors did not ignore the Act. As Professor Mattis explains, all of the basic Property casebooks included discussions of the Act, and, as she explains, the act was used as an educational vehicle in her class. If students could have been won over to the cause of the ULTA, eventually they would have been the lawyers who would control the growth of the law. However, the Act was withdrawn before many law student who had learned about it in class could have achieved positions where they could have a significant impact. Moreover, there is no way to know how many professors gave attention to the Act in class or in reading assignments, or whether the attention was positive or negative.

Finally, reason number 2 is that many real estate lawyers were against the ULTA because it might hurt them economically. It might, for example, decrease the need for lawyers through the use of power of sale rather than judicial foreclosure. It would also involve a significant retooling of their practices. Mr. Pedowitz supports this view.²³ He was actively involved in what happened, so he must know.

Reason number 2 might explain why the Uniform Land Security Interest Act did not meet with success after it was spun-off from the ULTA. The ULSIA was smaller, more focused, and easier to learn than the ULTA, but even the attempts to modify it to meet local needs and expectations have

21. The author still has in his possession a letter he received from Dean Amandes which was typical of his efforts to find law professors interested in writing about the ULTA and/or the Uniform Simplification of Land Transfers Act.

22. See Appendix A, *infra*, for articles in which the focus was the ULTA. Appendix B lists articles in which the Uniform Security Interest Act, a derivative of the ULTA, was the focus. See also Mattis, *infra*, for a complete list of articles in which the ULTA, ULSIA, and USLTA were discussed. The latter, commonly referred to as the USOLTA or USLTA, concerned recording and priorities, a subject which was part of the original concept of the ULTA but made into a separate act before the ULTA was approved by the NCCUSL.

23. See James M. Pedowitz, *Letter to the Editor*, 20 NOVA L. REV. 1029 (1996).

yet to produce adoption.²⁴ Perhaps the ULSIA had been tainted by its connection with the ULTA and USOLTA, or it is simply too late to regain the necessary momentum.

But the fact that the ULTA was never adopted by a state does not necessarily mean that it was a failure or that it had died. It has performed and continues to perform some important functions. The Act stimulated discussion over what the law should be. Professors Walsh and Siebrasse explain that it is a major influence on the Proposed New Brunswick Land Security Act.²⁵ Professor Maggs mentions it in his attempts to help Armenian jurists in their efforts to draft a civil code explaining that it has been useful in the education of an entire generation of law students and, I would add, law professors. Professor Korngold demonstrates that the Act has played a role in the process of law reform in the courts.²⁶ Some state legislatures have enacted small parts of it.²⁷ Professor Randolph explains that the Act will play a role in the next generation of legislative proposals being developed by the NCCUSL. The Act may even pave the way for eventual adoption of that next generation of uniform real estate laws.²⁸ It is obvious that we owe a great debt of gratitude to the pioneers who invested so much time, effort, and thought into the creation and presentation of the ULTA. Their dedication to the orderly development of the law and through it our common welfare is truly remarkable.

Personally, and on behalf of the Nova Law Review, I want to thank the commentators who have participated in this *Symposium*. I have enjoyed learning from them and I appreciate their efforts and insight. Thanks to them, I now have the answers to my questions and the opportunity to share this knowledge with our readers.

24. See Healy, *infra*, for a discussion of attempts to modify the act for adoption in Minnesota.

25. Norman Siebrasse & Catherine Walsh, *The Influence of the ULSIA on the Proposed New Brunswick Land Security Act*, 20 NOVA L. REV. 1133 (1996).

26. See also Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992).

27. California and Virginia have "cherry-picked" the anticlogging section and enacted it. See Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP. PROB. & TR. J. 289, 315 n.99, 317 (1995).

28. See Amandes, *infra*, regarding the role played by the Negotiable Instruments Law, Bulk Sales Act, and Uniform Warehouse Receipts Act in paving the way for the adoption of the UCC.

Appendix A

Law Review Articles about the Uniform Land Transactions Act

Marion W. Benfield, Jr., *Future Advances Lender: Status Under Present Illinois Law and Under ULTA and USOLTA*, 1981 SO. ILL. U. L.J. 451.

Barbara J. Britzke, *Residential Real Estate Transactions: Comparison of Uniform Land Transactions Act and Maryland Law*, 13 U. BALT. L. REV. 43 (1983).

Ronald Benton Brown, *Article 1 of the Uniform Land Transactions Act: Is Inconsistency with the U.C.C. an Unnecessary Obstacle?* 1981 SO. ILL. U. L.J. 585.

Jon W. Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976).

Jon W. Bruce, *Overview of Uniform Land Transactions Act and Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980).

Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992).

Allison Dunham, *Reflections of a Statutory Draftsman: Land Transaction Acts*, 1981 SO. ILL. U. L.J. 549.

William H. Henning, *Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures*, 63 N.C. L. REV. 257 (1985).

Gerald Korngold, *Construction loan advances and the subordinate purchase money mortgage: An appraisal, a suggested approach, and the ULTA perspective*, 50 FORDHAM L. REV. 313 (1981).

Student Notes or Comments:

Comment, *Real Property-Warranties in Uniform Land Transactions Act of 1975*, 49 TEMPLE L.Q. 162 (1975).

Meredith Craig, *The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act: Potential Impact on Florida Law*, 10 STETSON L. REV. 21 (1980).

William J. Fields, *Housing Defects: Homeowners' Remedies—A Time For Legislative Action*, 21 WASHBURN L.J. 72 (1981).

Patricia E. Rant, *ULTA and Non-judicial Mortgage Foreclosure in Texas*, 12 ST. MARY'S L.J. 1104 (1981).

Maureen M. Rayburn, *The Uniform Land Transactions Act: Pennsylvania Property Law and Sellers' Remedies for Breach of Contract for Sale of Real Estate*, 55 TEMPLE L.Q. 577 (1982).

Appendix B

Law Review Articles about the Uniform Land Security Interest Act

Curtis J. Berger, *ULSIA and the Protected Party: Evolution or Revolution*, 24 CONN. L. REV. 971 (1992).

Roger Bernhardt, *ULSIA's Remedies on Default—Worth the Effort*, 24 CONN. L. REV. 1001 (1992).

Marc B. Friedman, *Rentals Roulette: The Mortgagee's Rights to Rent under Connecticut Law and the ULSIA*, 24 CONN. L. REV. 1093 (1992).

Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP. PROB. & TR. J. 289 (1995).

Jan Z. Krasnowiecki, *Uniform Land Security Interest Act and the Bankruptcy Courts: Bivergent Policies*, 24 CONN. L. REV. 1075 (1992).

Michael E. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261 (1991).

John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA section 511(B)*, 27 WAKE FOREST L. REV. 455 (1992).

Appendix C

The Letter Soliciting Participation in this Symposium

Dear _____:

Whatever happened to the Uniform Land Transactions Act (and its offspring, the Uniform Land Security Interest Act)? What can be learned from its uniform lack of enactment? Did it produce any lasting effects? The answers to these questions are not currently available.

Because I would really like to learn the answers to these questions, I have convinced the editors of the *Nova Law Review* to schedule a symposium issue on the ULTA. We would like the people with the information to share it with us and the legal community. Contributions could be in the form of traditional law review articles or could be in the form of reminiscences, essays or whatever.

The editors need to plan, so please let me know no later than September 15, 1995 if you would like to participate. You may contact me by E-mail, fax, letter or telephone at the numbers listed below.

If you would like to discuss the possibility before making a commitment, feel free to call me.

Please share this information with your colleagues. If you know someone who is not on this list who was involved with the ULTA (or ULSIA) at some stage, e.g., drafting or legislative consideration, please alert them of this project.

Thanks,

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Letter to the Editor

James M. Pedowitz*

September 1, 1995

Professor Ronald Benton Brown
Nova Southeastern University
3305 College Avenue
Fort Lauderdale, FL 33314

Dear Professor Brown:

I read your letter of August 14, 1995 with extreme interest. As you may already know, at various times I acted as an advisor to the Commissioners on behalf of the American Land Title Association and later on behalf of the Real Property Probate and Trust Law Section of the American Bar Association. In addition, I was an original member of the Joint Editorial Board and remained active thereon until a couple of years ago.

I am fairly sure that all or almost all of the people that you may interview or hear from who actually worked on the promulgation of these Acts will assure you that they are both excellent products and worthy of uniform adoption. You may have some dissent with respect to portions of the Uniform Land Transactions Act ("ULTA") on the ground that it was patterned too closely to the Uniform Commercial Code and that it did not sufficiently appreciate the differences between real and personal property.

As you probably already know, the original Uniform Land Transactions Act encompassed not only what was ultimately adopted under that name but also the provisions that subsequently were spun off into the Uniform Simplification of Land Transactions Act ("USLTA"), the Uniform Condominium Act, the Uniform Common Interests Ownership Act, the Uniform Land Security Interest Act ("ULSIA"), the Uniform Construction Lien Act and the Uniform Marketable Title Act.

* Of counsel, Berkman, Henoch, Peterson & Peddy, P.C., New York, New York. B.A., 1935, New York University, J.D., 1938, New York University School of Law.

Mr. Pedowitz was a Board member of the Joint Editorial Board for the Uniform Land Transactions Act/Uniform Simplification of Land Transfers Act. He has also acted as an advisor to the National Conference of Commissioners on Uniform State Laws on behalf of the American Land Title Association and the Real Property, Probate, and Trust Section of the American Bar Association.

In my opinion, both from working with the American Bar Association and the New York State Bar Association, the basic underlying resistance to ULTA and USLTA was that it made academic and practical sense but was not conceived by the Bar and other interest groups as being in their economic best interests.

Except for the Condominium Act, which found favor mainly because there was an urgent need for some guidance in this new and burgeoning field, those attorneys who practice real estate law, either as their primary practice, or as incidental to their other practice, were reluctant to discard the "old shoe" of their current practice and knowledge and undertake the learning of new terminology and new concepts, notwithstanding that they were better. As an example, when attorneys who specialize in mortgage foreclosure in New York State were approached with respect to ULSIA, the typical response was that they were far less interested in improving the antiquated process than their concern about what it might do to their income stream under the existing procedures.

Real estate law is single-stat oriented. Each of the states and local bar groups are jealously protective about their own forms, procedures and customs. The Bar, with very few notable exceptions, has been far less interested in reform and improvement than in the effect of those changes on their income.

Perhaps the best answers could be obtained from the various Commissioners who failed to arrange for the introduction of any of this legislation into their state legislatures. Many of them may tell you that they did not vote for many of these uniform Acts, and if my recollection serves me correctly, some of them passed by only narrow majorities. The plain fact seems to be that no matter how worthwhile this legislation, there never was a groundswell of support for it, nor a generally recognized need for it. Both the Bar and the business community seem to be content to leave well enough alone.

In retrospect, I have no regret with respect to all of the time and work that I put into working on and supporting these acts. If our various state legislatures and those interests that influence them could be convinced to set aside their parochial prejudices and the self-interests of certain groups, the widespread adoption of these Acts would ultimately be proved to be of tremendous benefit to a 21st century economy.

At my stage in life, I am disinclined to sit down and attempt to write a more comprehensive analysis of why these Acts were not adopted. You will certainly find literature both in support of these Acts, and critical of them. Many of the critical comments were certainly made in good faith and out of sincere conviction. However, I remain of the opinion that most of the reasons for the failure to adopt these Acts is a combination of natural inertia, and what the various bar groups conceived as their individual self-interest.

You have my permission to utilize this letter as part of your symposium.

Very truly yours,

James M. Pedowitz

The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act Twenty Years Later: Why Have There Been No Adoptions?

Richard B. Amandes*

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") has been in existence since 1892.¹ It has drafted more than 200 uniform laws during that period.² Some are major in scope, the Uniform Commercial Code ("UCC") being the outstanding example. Others cover almost infinitesimal, and many would say inconsequential, areas of the law. Some achieve a significant number of adoptions; others obtain none. The uniform laws that are expected to have a broad scope and impact tend to have a larger number of commissioners and staff appointed for their development and ultimate promulgation by the NCCUSL than is true for subject matter of more limited scope or prospective interest.

All states are entitled to have at least three commissioners, and larger states are entitled to more. Each state must fund its own commissioners at whatever level it deems appropriate. Commissioners usually are appointed by state governors. Governors vary in their zeal in obtaining and appointing the most competent, diligent, and politically effective commissioners. The funding available for commissioners must be appropriated by state legislatures, and the sums and rates of support vary greatly from state to state. Understandably, states with long term, strong, well funded commissioners tend to adopt more uniform laws than do states without such individuals. Clearly, states vary in the degree to which they believe in the uniform laws process.

Inherent in the variances alluded to in the opening paragraphs is the fact that personalities and politics play a significant part in whether and to what degree uniform acts, like any other legislation, is enacted. Advocates are at least as necessary for uniform acts as for legislation which is developed within each state. The likelihood of finding strong advocates for

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Mr. Amandes was the Educational Director for the Joint Editorial Board for the Uniform Land Transactions Act/Uniform Simplification of Land Transfers Act.

1. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR at 395 (1989) (July 28-Aug. 4 1989 meetings).

2. *Id.*

any uniform act in a large number of states is small, unless the subject matter of the uniform act has significant impact across state lines.

The UCC was such an act. It encompassed the entire field of transactions involving movable property. The development of the Uniform Land Transactions Act ("ULTA"), before and after parts of it were split off into the Uniform Simplification of Land Transfers Act ("USLTA"), was conceptualized as the equivalent for immovable property. Both the UCC and the ULTA/USLTA went through numerous drafts and many years as they made their way through the legislative process within the NCCUSL. The UCC has been adopted in all fifty states to some degree, in one form or another. Uniform acts do not necessarily remain in their original form—they are revised and amended, just as is other legislation.

Although the UCC now has at least partial adoption in all fifty states (Louisiana was the last state to adopt parts of it, in four steps between 1974 and 1988), its early years were not encouraging. Promulgated by the NCCUSL in 1951, it was first adopted by Pennsylvania in 1953, effective in 1954.³ The New York Law Revision Commission declined to propose it in 1956,⁴ a stop that was then said to be the death knell of the UCC. However, Massachusetts came aboard in 1957, Kentucky in 1958, Connecticut and New Hampshire in 1959. By 1967 when Arizona and Idaho adopted the UCC, every state but Louisiana had adopted it.

Although it took several years for the UCC to take hold, what is there in its background that enabled it to become a truly uniform law that has eluded ULTA and USLTA? One need look no further than the predecessors of the UCC. The Negotiable Instruments Law ("NIL"), the Bulk Sales Act and the Uniform Warehouse Receipts Act, containing substantial areas of law of what later were included in the UCC, had been adopted in every state and some territories for many years.⁵ Other acts, uniform or common, whose areas were included within the UCC, also had been enacted in more than thirty states. Thus the concept of the UCC was not wholly new. It is merely an updated and revised version of uniform and common law and principles with which those who operated in the commercial community were familiar and comfortable.

3. GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE, *reprinted in* 1 U.L.A. at xv (1989).

4. WILLIAM A. SCHADER ET AL., REPORT NO. 1 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, *reprinted in* 1 U.L.A. at xxxvii (1989).

5. See ROBERT BAUCHER & ARTHUR SUTHERLAND, *COMMERCIAL TRANSACTIONS* at x-xi (1968).

Such a commonality did not exist in the area of real property or immovable property. There was no common body of similar uniform laws with which those who dealt in the area were familiar. True, there was the essentially uniform secondary security market, but there also were community as distinct from common law property; mortgages vis a vis deeds of trust; title insurance and abstracters; and even significant parts of the law going back to feudal times. There were many vested interests who did not wish to see change.

At the law school level, there were individuals who were interested in the implementation of ULTA and USLTA,⁶ but they were relatively few and far between. Professors did attend panel discussions on ULTA and USLTA at annual and regional meetings of the Association of American Law Schools, but impetus from the law schools also requires student support. Real property does not rank high on the interest level of most law students. Of course, commercial law does not either, but the UCC did have the impetus of the NIL and the Uniform Sales Act to get it by without significant law faculty and student assistance. Students and faculty can get much more excited about constitutional law, criminal law and procedure, and race or sex discrimination.

As suggested earlier, the uniform act process, just like any other legislation, is political. The brief thoughts and beliefs presented here were multiplied many times over, by objections from vested interests in each state, when ULTA and USLTA were tendered by the various commissioners to their respective legislatures for consideration and adoption. The necessary support groups have not been present to overcome the objections and achieve any adoptions.

6. See Barbara J. Britzke, *Residential Real Estate Transactions: Comparison of Uniform Land Transactions Act and Maryland Law*, 13 U. BALT. L. REV. 43 (1983); Jon W. Bruce, *Overview of Uniform Land Transactions Act and Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980).

Wasted Days and Wasted Nights: Why the Land Acts Failed

Marion W. Benfield, Jr.*

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I. INTRODUCTION

In the years from 1969 to 1978 the National Conference of Commissioners on Uniform State Laws ("Conference") engaged in a massive project, the drafting of uniform laws covering the selling of, and creation of security interests in, real estate, and most of the public record and priority aspects of real estate conveyancing. The initial result of that project was three acts:

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the Uniform Land Transactions Act ("ULTA"),¹ the Uniform Simplification of Land Transfers Act ("USLTA"),² and the Uniform Condominium Act ("UCA").³ The ULTA covers sales and the creation of security interests. The USLTA covers various aspects of the conveyancing system including formal requisites for land transfers, recording and priority rules, marketable title, mechanics liens, and provisions concerning the operation of the recording office. Later, in the face of massive indifference of legislatures to the ULTA and the USLTA, the Conference separated from the ULTA the part on security interests and promulgated it, with some changes, as the Uniform Land Security Interest Act ("ULSIA"),⁴ and separated from USLTA the mechanics lien provisions as the Uniform Construction Lien Act,⁵ and the provisions on marketable title as the Uniform Marketable Title Act.⁶ The Uniform Condominium Act project led to three other related acts: the Model Real Estate Cooperative Act,⁷ the Uniform Planned Community Act,⁸ and the Uniform Common Interest Ownership Act.⁹

After promulgation of the three original acts, the Conference and the American Bar Association established the Joint Editorial Board for the Uniform Real Property Acts ("Board"). The Board is now composed of members from the Conference, the American Bar Association, and the American College of Real Estate Lawyers. The Board was largely responsible for the promulgation of Article 3 of the ULTA as the Uniform Land Security Interest Act and of Article 5 of the USLTA as the Uniform Construction Lien Act ("UCLA").¹⁰ With the exception of the UCLA and related acts which have been adopted in a total of fourteen states,¹¹ the

1. 13 U.L.A. 469 (1975) (amended 1977).

2. 14 U.L.A. 249 (1975) (amended 1977).

3. 7 U.L.A. 421 (1985 & Supp. 1995).

4. 7A U.L.A. 220 (1985 & Supp. 1995).

5. 7 U.L.A. 330 (1987 & Supp. 1995).

6. 13 U.L.A. 112 (1990 & Supp. 1995).

7. 7B U.L.A. 225 (1981).

8. 7B U.L.A. 1 (1980).

9. 7 U.L.A. 231 (1982) (current version at 7 U.L.A. 171 (1994 & Supp. 1995)).

10. See UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1995-96 REFERENCE BOOK [hereinafter NATIONAL CONFERENCE] (naming current members of the Joint Editorial Board).

11. These states include: Alabama, ALA. CODE §§ 35-8A-101 to -417 (1990); Arizona, ARIZ. REV. STAT. ANN. §§ 33-1201 to -1270 (1985); Connecticut, CONN. GEN. STAT. tit. 33, §§ 47-200 to -293 (1983); Maine, ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (West 1981); Minnesota, MINN. STAT. §§ 515A.1-101 to .4-117 (1980); Missouri, MO. STAT. ANN. §§ 448.1-101 to .4-120 (Vernon 1983); New Mexico, N.M. STAT. ANN. 1978 §§ 47-7A-1 to -7D-20 (Michie 1982); North Carolina, N.C. GEN. STAT. §§ 47C-1-101 to -4-120

other land acts have had only one adoption, Article 5 of the USLTA (Construction Lien Act), in Nebraska,¹² and little legislative activity in the other states.¹³

During the years from 1970 to 1975, the participants in the process spent a collective total of tens of thousands of hours drafting, re-drafting, reading, and debating the acts. The result was one enactment of one spin-off act. If the hours spent on the project had been billed at lawyers' average hourly rates, they would have cost, no doubt, millions of dollars. That extensive effort made a tiny impact on the law in this country. Since the author was a major participant in the process and a disproportionate number of those hours were his, it is with particular pain that he recalls those "wasted days and wasted nights."

This article will review the background and drafting of the uniform land acts, summarize briefly the major provisions of the ULTA and the USLTA, and discuss the reasons for the failure of those acts, and the separately promulgated Uniform Land Security Interest Act and Uniform Construction Lien Act, to receive legislative acceptance.¹⁴

II. BACKGROUND

The Conference was organized in 1892 and is composed of commissioners from all the states, Puerto Rico, the Virgin Islands, and the District of Columbia. The commissioners are appointed by the governor or other officials of the jurisdiction, the number of which are left to the appointing

(1986); Pennsylvania, PA. CONS. STAT. §§ 3101-3414 (1980); Rhode Island, R.I. GEN. LAWS §§ 34-36.1-1.01 to -4.20 (1982); Texas, TEX. PROP. CODE ANN. §§ 82.001-.164 (West 1993); Virginia, VA. CODE ANN. §§ 55-79.39 to .103 (Michie 1974); Washington, WASH. REV. CODE §§ 64.34.010 to .950 (1989).

12. NEB. REV. STAT. § 52-125ff (1984). Nebraska adopted Article 5 of the USLTA before the separate promulgation of Article 5 as the Uniform Construction Lien Act.

13. In the early 1990s the Connecticut Law Revision Commission attempted to achieve a consensus among borrowers and lenders regarding modifications to the Uniform Land Security Interest Act which would make it acceptable in that state. The effort failed because of inability of lenders to agree among themselves. Interview with William Breetz, Chair of the Connecticut Law Revision Commission, in San Antonio, Tex. (July 12, 1993). There have also been Bar Association study committees in Illinois, New York, Minnesota, and Oregon studying the possibility of introducing a form of the ULSIA in their states. See Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP. PROB. & TR. J. 289, 314-17 (1995) (discussing the efforts in Illinois, Minnesota, and New York).

14. This article will not further discuss the Uniform Condominium and related acts.

jurisdiction. Currently, the Conference has over 300 members.¹⁵ The stated purpose of the Conference is to “promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”¹⁶ The Conference strives for that goal through the drafting of uniform or model acts which are then offered to the states for adoption.¹⁷ Since 1892, the Conference has drafted hundreds of uniform or model acts, many of which have received widespread adoptions.¹⁸ However, many other acts have had few or no adoptions.¹⁹ Acts in the areas of commercial law, judicial procedure, and interstate cooperation have had the most success. The first product of the Conference, the Uniform Negotiable Instruments Law, promulgated by the Conference in 1896, just four years after the Conference was founded, was adopted in all states.²⁰ The Uniform Sales Act, promulgated in 1906, was adopted in thirty-two states.²¹ The Uniform Commercial Code (“UCC”), first promulgated in 1951 (but amended a number of times), has now been adopted in all states and the District of Columbia. The Uniform Arbitration Act has been adopted in forty-nine jurisdictions, the Child Custody Jurisdiction Act in fifty-two jurisdictions, and the Enforcement of Foreign Judgments Act in forty-seven jurisdictions. There are other procedural acts with similar records.²² On the other hand, the Conference has been least successful

15. See NATIONAL CONFERENCE, *supra* note 10, at 6-20 (listing of present commissioners).

16. *Id.* at 56.

17. *Id.* at 82. An act is designated as a “uniform act” if achievement of uniformity among the states is a principal objective and there is reason to expect adoption in a large number of jurisdictions. An act is designated as a “model” act if uniformity is not a principal objective, or the act may promote uniformity and minimize diversity even though a substantial number of jurisdictions may not adopt the act in its entirety, or the purpose of the act can be achieved, though it is not adopted in its entirety by every state. That is, the Conference designates acts as uniform acts only if it believes that a substantial number of states will adopt the act. However, many uniform acts have few adoptions. The reference table of uniform acts in the 1995-96 version of the *National Conference* indicates that 43 uniform acts have been adopted in fewer than 10 jurisdictions, and that 10 acts have no adoptions. *Id.* at 84-88.

18. *Id.* (listing all current uniform acts and states in which they have been adopted).

19. Twenty acts promulgated more than three years ago have been adopted in three or less states, including several which have no adoptions. NATIONAL CONFERENCE, *supra* note 10, at 84-88.

20. See WILLIAM E. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 10-11 (2d ed. 1961).

21. See LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES 6 n.33 (2d ed. 1959).

22. NATIONAL CONFERENCE, *supra* note 10, at 84-90 (listing all acts which the conference is still sponsoring and the states in which they are adopted).

when it proposes uniform legislation dealing with issues which are the subject of intense public debate and disagreement or involve strong lobbying by opposing interests. The Uniform Marriage and Divorce Act²³ for example, was adopted in only eight states, and the Uniform Consumer Credit Code²⁴ in only eleven.

III. DECISION TO DRAFT A PARTICULAR STATUTE

The Conference process for approving drafting projects is careful and thorough. Proposed drafting projects must be approved by two committees, the Scope and Program Committee, and the Executive Committee. Under the Conference rules, the Scope and Program Committee first considers proposals for drafting projects. If it approves, the proposal is then presented to the Executive Committee. Some drafting projects approved by the Scope and Program Committee are rejected by the Executive Committee, either because the Executive Committee disagrees with the Scope and Program Committee evaluation of the proposal, or because the Conference has other more pressing projects.²⁵ The committees act on proposals made either by members of the Conference, or by groups or persons outside the Conference. A substantial number of proposals made to the two committees are rejected. A major criterion in deciding whether projects should be undertaken is the likelihood that the resulting uniform law will be widely adopted.²⁶ However, as the above review of the acceptance of conference acts indicates, the Conference has drafted and promulgated a significant number of acts which would not have been approved by the Scope and Program and Executive Committees had they known the actual degree of acceptance the acts would receive.

If a drafting project is approved, a drafting committee and a reporter are appointed for the act. Sometimes two or three reporters (usually law professors) serve as drafters for a drafting committee. Under Conference procedure, the reporters to a committee prepare drafts which are thoroughly discussed and criticized at committee meetings. The reporters then follow the instructions of the committee in preparing additional drafts. All members of the drafting committee must be members of the Conference. However, the Conference makes intensive efforts to secure input from

23. 9A U.L.A. 147 (1970) (amended 1971 & 1973).

24. 7A U.L.A. 1 (1968) (amended 1974).

25. The author has personal knowledge from having been a member of both committees in recent years.

26. See NATIONAL CONFERENCE, *supra* note 10, at 80.

interested groups outside the Conference. A drafting committee with seven or so committee members will often have thirty or more observers and advisors attending a committee meeting. Those advisors and observers will have privileges of the floor, and often they are asked to vote on issues before the committee, so that the committee can be advised as to the views of those in attendance. Committees will typically meet three times a year, for two and a half day meetings, for two or more years, before an act is finally approved. Also, all acts have to be read line by line at two annual meetings of the Conference before they are approved. At those readings there is often intense debate on the floor regarding various provisions of the act and, frequently, committee positions are rejected by the full Conference.

A. *Beginning of the Land Acts Process*

In the late 1960s, Allison Dunham, Professor of Law at the University of Chicago and Executive Director of the Conference from 1963 to 1969, proposed that the Conference undertake the drafting of a uniform land transactions act. The Conference was celebrating its crowning achievement and greatest success, the UCC, which by then had been adopted in fifty jurisdictions,²⁷ with only Louisiana not in the fold.²⁸ Professor Dunham had been, along with Grant Gilmore, the drafter of Article 9, the most imaginative and ground-breaking article of the UCC. Professor Dunham had for many years taught real property and mortgages courses and was author of a casebook, *Modern Real Estate Transactions*.²⁹ His dual experience as drafter of Article 9 of the Code, and expertise in real estate transactions, led him to believe that a national uniform law governing real estate transactions in the way that the UCC governs sales of, and security interests in, personal property, would encourage a national mortgage market, better protect buyers and sellers of real estate, and modernize the law of real estate transactions. He also believed that the UCC was a good model for a uniform law governing real estate transactions.

In 1969, the Scope and Program and Executive Committees of the Conference approved a proposal by Professor Dunham that a drafting committee be appointed to prepare the Uniform Land Transactions Act.³⁰

27. *See id.*

28. Forty-nine states and the District of Columbia have adopted the UCC. *See* 1 U.L.A. 1 (1989) (table of enactments).

29. ALLISON DUNHAM, *MODERN REAL ESTATE TRANSACTIONS: CASES AND MATERIALS* (2d ed. 1958).

30. *See* U.L.T.A. prefatory note, 13 U.L.A. at 469.

Approval was given even though the Conference had attempted earlier to secure adoption of legislation in the real estate area without success. In the 1920s, 30s, and 40s, acts proposed by the Conference in the real property area had met with dismal success (or lack thereof). In 1927, the Conference proposed a Uniform Real Estate Mortgages Act which received no adoptions.³¹ The Conference was so desperate to show action in the real estate area that in the 1930s it listed Minnesota as adopting the Real Estate Mortgages Act, though Minnesota in fact adopted only one of the forty-three sections of the Act.³² The section Minnesota adopted set out a statutory short-form mortgage.³³ In 1932, a Uniform Mechanics' Lien Act was proposed³⁴ and was adopted in Florida.³⁵ Florida amended the Uniform Act in 1953 so extensively that it was, in effect, replaced.³⁶ Finally, in 1940, the Conference proposed a Model Power of Sale Foreclosure Act which apparently had no adoptions.³⁷ The Real Estate Mortgage Act and the Mechanics' Lien Act were withdrawn by the Conference in 1943.³⁸ History certainly suggested danger ahead regarding the proposed land acts, but there was a belief that the continuing integration of the national economy would make things different this time.

B. *The Drafting Process*

In 1969, the ULTA special drafting committee was appointed³⁹ and the following year drafting commenced. Professor Dunham, who initially

31. UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 459 (1927).

32. UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 66 (1943) [hereinafter 1943 NATIONAL CONFERENCE].

33. *Id.*

34. UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 50 (1932).

35. *Id.*

36. See Myron H. Lewis, *The Recent 1953 Amendments to the Uniform Mechanics' Lien Act*, FLA. B.J., March 1954, at 99.

37. See UNIFORM LAW COMMISSIONERS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 256 (1940).

38. 1943 NATIONAL CONFERENCE, *supra* note 32, at 68-69.

39. The members of the original committee include: Harold E. Read, chair, Robert Braucher, professor of law at Harvard Law School, William Campbell, United States District Court Judge, and attorneys Henry S. Fraser, John F. Hanson, George C. Keely, Ellsworth E. Lonabaugh, Talbot Rain, Hiroshi Sakai, and William H. Wood.

served as reporter, recruited the present author as co-reporter.⁴⁰ As is usual Conference practice, a large group of advisors representing various industry groups and consumer representatives were appointed and asked to meet with the committee.⁴¹

The reporters commenced work by using Articles 1, 2 and 9 of the UCC as a template within which to fit cognate real estate rules. The basic assumption of the drafters was that the UCC rules should be adopted unless the difference between real estate and personal property required a different rule.

In the years from 1970 to 1975, many draft versions of the Act were prepared and reviewed by the drafting committee. The representatives of industry and consumer groups were invited to, and attended, Committee meetings, and offered their comments and suggestions as the drafting proceeded. The following groups were represented: the American Bar Association, the National Association of Real Estate Boards, the American Bankers Association, the Center for Responsive Law (a consumer group), the National Association of Home Builders, the American Land Title Association, the American Life Convention, the United States Savings and Loan League, the National Association of Mutual Savings Banks, the American Subcontractor's Association, and the Life Insurance Association of American. Representatives from the following federal agencies and instrumentalities also attended committee meetings: Federal Home Loan Bank Board, U.S. Department of Housing and Urban Development, and the

40. Professor Dunham wanted a co-reporter who had Commercial Code experience and some real estate experience. I had been teaching the Code courses at the University of Illinois and had also taught the first year property course.

41. These representatives include: Charles Allen (Fed. Home Loan Bank Bd.), Alan L. Austin (Am. Life Convention), Ira L. Burleson (Life Ins. Ass'n of Am.), Thomas Hal Clarke (Fed. Home Loan Bank Bd.), George H. Coffin, III (Nat'l Ass'n of Real Estate Bds.), A. S. Coan, Jr. (Nat'l Ass'n of Home Builders of the United States), Herbert S. Colton (Nat'l Ass'n of Home Builders of the United States), Robert Elliot (Dep't of Hous. and Urban Dev.), Joseph F. Fahey, Jr. (Am. Bankers Ass'n), Thomas F. Gallivan, Jr. (Am. Bar Ass'n), Raymond A. Jensen (Mortgage Bankers Ass'n of Am.), Oliver H. Jones (Mortgage Bankers Ass'n of Am.), Robert Kratovil (Am. Land Title Ass'n), David Krooth, Fairfax Leary (Ctr. for Responsive Law, Public Interest Research Grp.), George Lefcoe, C. Malcolm Moss (Am. Life Convention), William D. North (Nat'l Ass'n of Real Estate Bds.), James Pedowitz (Am. Land Title Ass'n), William Prather (The United States Sav. and Loan League), Robert Newton Reid (Fed. Nat'l Mortgage Ass'n), P. James Riordan (Nat'l Ass'n of Mut. Sav. Banks), Dan Sheehan (Nat'l Ass'n of Real Estate Bds.), John A. Spanagole, Jr. (Ctr. for Responsive Law, Pub. Research Grp.), John M. Steinmuller (Life Ins. Ass'n of Am.), McNeill Stokes (Am. Subcontractors Ass'n), Earl Talbot (Nat'l Ass'n of Real Estate Bds.), Hobart Taylor, Jr., Louis R. Vicenti, and Adolph Zwerner.

Federal National Mortgage Association.⁴² As the list of groups suggests, essentially all relevant perspectives on the law of land transfer and finance were represented.

It is fair to say that, with the exception of mortgage lenders, federal agencies included in mortgage lending, and a small number of other individual advisors, the attitude of the advisors was one of wary caution. Some were opposed to a uniform law in the area and others were skeptical of either the need for such an act, or of the willingness of states to accept it, or both. All, however, wanted to keep an eye on the project to protect what they perceived as their interests in case the Act was adopted in the states.

C. *The Content of the Acts*

1. Article 2 of the ULTA

As noted above, the ULTA was patterned after Articles 2 and 9 of the Uniform Commercial Code. Therefore, many provisions of the Code were carried over to the ULTA without change. For example, section 2-202 of the UCC on the parol evidence rule appeared in the ULTA nearly verbatim as section 1-306. Section 2-209 of the UCC on contract modification appeared essentially unchanged as section 1-310 of the ULTA. Other concepts of the Code such as the right to cure (section 2-508), and the right to demand assurances (section 2-609), were carried over to the ULTA and modified to fit land transactions.⁴³ The ULTA, anticipating the later adoption of Article 2A of the UCC to cover personal property leases, included leases within the coverage of Article 2 of the ULTA.⁴⁴ The Act also contained express and implied warranty of quality provisions modeled on those contained in Article 2.⁴⁵ Under section 2-309:

a seller, other than a lessor in the business of selling real estate, impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by [the seller] . . . and completed no earlier than 2 years before . . . [the sale of] the contract to convey is made, will be free from

42. See U.L.T.A. prefatory note, 13 U.L.A. at 469.

43. U.L.T.A. §§ 2-305, -403, 13 U.L.A. at 543.

44. *Id.* art. 2, 13 U.L.A. at 680. In the Act, "real estate" is defined as including the interest of a landlord or tenant, and Article 2 of the ULTA applies to contracts to convey real estate. Therefore, leases are contracts to convey real estate under the Act. *Id.*

45. *Id.* §§ 2-308, -309, -311, -312, 13 U.L.A. at 531-39.

defective materials; and [is] constructed in accordance with applicable law, according to sound engineering and construction standards; and in a workmanlike manner.⁴⁶

Warranty disclaimers are permitted under rules similar to those of section 2-316 of the UCC, but with respect to home purchasers (called a "protected party"):⁴⁷

no disclaimer of implied warranties of quality in general language or in the language of the warranty provided in this Act is effective, but a seller may disclaim liability for a specific defect or failure to comply with applicable law if the defect or failure entered into and became a part of the basis of the bargain.⁴⁸

Under the Act, warranties of quality automatically pass to subsequent purchasers and disclaimers of warranties are not effective against subsequent protected party purchasers unless the subsequent party had reason to know of the disclaimer at the time of purchase.⁴⁹ These warranty provisions are no doubt the most important substantive provisions of Article 2. However, the warranty provisions were only a little different from the implied warranty of habitability in the sale of new homes being developed by the courts during the 1960s and 70s.⁵⁰

In addition to the warranty provisions, Article 2 makes several significant changes in the remedies rules as they exist in most states. First, under the ULTA, if a buyer wrongfully rejects, repudiates, or otherwise materially breaches, so that a seller is excused from conveying to a buyer, the buyer can recover as damages the difference between the resale price and the original contract price, if the seller conducts a resale which complies with the statutory requirements.⁵¹ However, under the common law in

46. *Id.* § 2-309, 13 U.L.A. at 533.

47. The definition of protected party is somewhat complex; the term includes those who buy for close relatives and corporations that buy residences for controlling shareholders, but excludes real estate of more than three acres, or real estate which contains more than four dwelling units, or which contains non-residential units for which the protected party is a lessor. U.L.T.A. § 1-203, 13 U.L.A. at 490-92.

48. *Id.* § 2-311(c), 13 U.L.A. at 536.

49. *Id.* § 2-312(c), 13 U.L.A. at 538. The subsection further provides that the subsequent purchaser has reason to know of a disclaimer if it appears in the recorded deed in the original transaction.

50. E.F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L. REV. 835 (1967).

51. U.L.T.A. § 2-504, 13 U.L.A. at 552.

most states, a seller's remedy for buyer's breach is a recovery of the difference between the contract price and the market price, and the actual resale price is only evidence of the market price.⁵² Second, under the law in many states "earnest money" deposits made by a buyer can, on breach by the buyer, be retained by the seller without proof of actual damages or a valid liquidated damages clause. Under the Act, such amounts must be returned to the breaching buyer unless they can be retained under a valid liquidated damages clause or the seller proves actual damages.⁵³ Third, the Act rejects the merger by deed doctrine under which a buyer who accepts a deed of conveyance is treated as having waived any rights he had under the contract of conveyance if they are not repeated in the deed.⁵⁴ Under the merger by deed doctrine, if, for example, a seller promised to convey fifty acres and the buyer accepted a deed conveying only forty, the buyer would be precluded from asserting a breach based on the shortage in acreage.⁵⁵ Fourth, an unconscionability section, similar to section 2-301 of the UCC, is included.⁵⁶

The Act also liberalized the requirements for enforcing contracts with incomplete terms by providing that a contract of sale could be enforced even though the price was not fixed, or other terms were missing, so long as the court could provide an appropriate remedy.⁵⁷ The Act also contains a modern statute of frauds which provides a new start for judicial interpretation, replacing the 300 year accretion of cases and qualifying rules under the original real estate statute of frauds in effect in most states.⁵⁸ There are also other, more modest changes, from the usual common law rules.⁵⁹

52. See *Zareas v. Smith*, 404 A.2d 599 (N.H. 1979).

53. U.L.T.A. § 2-516, 13 U.L.A. at 565.

54. *Id.* § 1-309, 13 U.L.A. at 500.

55. See *Weiland v. Bernstein*, 192 N.Y.S.2d 340 (1959) (applying the merger by deed rule in a shortage in acreage situation), *rev'd*, 210 N.Y.S.2d 916 (App. Div. 1961); see also *McSweyn v. Mussellshell County*, 632 P.2d 1095 (Mont. 1981) (applying the merger by deed doctrine over a dissent which argued that the rule of ULTA should be adopted).

56. U.L.T.A. § 1-311, 13 U.L.A. at 502.

57. *Id.* §§ 2-202, -203, 13 U.L.A. at 514-16.

58. *Id.* § 2-201, 13 U.L.A. at 512; see ARTHUR L. CORBIN, CORBIN ON CONTRACTS 355-433 (1952) (devoting 98 pages to a discussion of the original real estate statute of frauds). The original English statute of frauds was adopted in 1677 and all states except Louisiana, Maryland, and New Mexico have adopted a statute similar to the English statute. Maryland and New Mexico have treated the English statute as a part of their common law. See RESTATEMENT (SECOND) OF CONTRACTS 281-83 statutory notes (1977).

59. For example, under § 2-302, form contract provisions reading "time is of the essence" are not sufficient to effectively provide that failure to perform on the specified day is a material breach.

2. Article 3 of the ULTA and ULSIA

Article 3 of the ULTA (and the ULSIA) is patterned after Article 9 of the UCC.⁶⁰ Because of major differences in the issues which arise in personal property security and in real estate security, there is much less congruence between the ULSIA sections and those of Article 9 of the UCC, than there is between UCC Article 2 and ULTA Article 2. However, the ULSIA adopts the basic terminology of Article 9 of the UCC. The single term "security agreement" replaces "mortgage," "deed of trust," "contract for deed," "installment land contract," and other terms for land security devices in use in various states.⁶¹ Also, following Article 9 of the UCC, the ULSIA applies the same rules to all forms of land security interests. Therefore, there is no difference in the Act between the rights of the parties under a mortgage and their rights under an installment land contract or deed of trust.⁶² The Act's major changes from existing law are found in the foreclosure rules.⁶³ However, there were a few significant changes in other areas, some pro-mortgagee and some pro-mortgagor. One pro-mortgagor provision allows a mortgagor, after granting the security interest, to enter into leases which take priority over the mortgage, if the term is not longer than two years, and a reasonable rent is reserved and is paid quarterly or more often.⁶⁴ A pro-mortgagee provision gives the mortgagee a security interest in: 1) rights which the mortgagor has against a seller for breach of warranty or other breach; 2) any claim of the mortgagor for payment for parts of the real estate taken by eminent domain; 3) insurance payable to the mortgagor because of loss or damage to the real estate; and 4) any claim of the mortgagor against third parties because of loss or damage to the real estate.⁶⁵ ULSIA also contains a provision which clarifies the law regarding the priority of future advances over intervening parties.⁶⁶ It repeals any existing usury statute which applies to commercial loans secured by real estate, but allows states to set usury rate for consumer transactions.⁶⁷

60. As noted earlier, in 1985 the Conference carved out Article 3 of the ULTA as a free standing act, the Uniform Land Security Interest Act ("ULSIA"). In the following discussion, citations will be to the ULSIA and, where there is a difference between ULTA and ULSIA, the substantive provision referred to will be that of ULSIA.

61. U.L.S.I.A. § 111 cmt., 7A U.L.A. 220, 232 (Supp. 1995).

62. *Id.* § 102(b).

63. See discussion *infra* accompanying notes 67-75 and 114-121.

64. U.L.S.I.A. § 207, 7A U.L.A. at 24.

65. *Id.* § 210, 7A U.L.A. at 243.

66. *Id.* § 301, 7A U.L.A. at 245.

67. *Id.* § 403 alt. B, 7A U.L.A. at 249.

By far the most important provisions of the ULSIA are those permitting a mortgagee (secured party) to foreclose a mortgage (security interest) by non-judicial sale.⁶⁸ At the time the ULTA was being drafted, about half the states permitted non-judicial power of sale foreclosure.⁶⁹ All those power of sale states contained a statutorily prescribed method of sale which typically required an auction sale at some specified place, often the county courthouse, after a prescribed series of auction announcements in the legal advertisement section of a local newspaper.⁷⁰ The remaining jurisdictions required a judicial action to foreclose.⁷¹ Of the twenty-seven states which used non-judicial power of sale foreclosure, nine permitted the mortgagee to redeem after the sale, within periods ranging from seventy-five days to two years.⁷² The ULSIA, as noted, permits private power of sale foreclosure, but under rules very different from those that apply under the power of sale statutes of most states. The ULSIA, does not set out in detail how the sale is to be conducted, but, following Article 9, requires only that the sale be held in a reasonable manner.⁷³ The ULSIA comments say that for a sale to be made in a reasonable manner, the foreclosing party must to advertise in the same manner that a seller selling his own property would advertise.⁷⁴ The Act also permits sale by private negotiation, which could include listing the property for sale through a real estate agent. Also, the ULSIA does not permit redemption after sale.⁷⁵ The ULSIA denies a deficiency judgment after foreclosure of purchase money security interests in homes occupied by the debtor or persons related to the debtor.⁷⁶

68. *Id.* §§ 505-508, 7A U.L.A. at 255-60.

69. A committee of the section on Real Property, Probate, and Trust Law of the American Bar Association reported in 1968 that in 27 jurisdictions power of sale was the usual method of foreclosure. In Maine, the foreclosure method was described as "public notice" but it seems to have been a non-judicial procedure. See Committee on Mortgage Law and Practice, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP. PROB. & TR. J. 413, 414 (1968). [hereinafter Committee on Mortgage Law and Practice].

70. GEORGE OSBORNE ET AL., REAL ESTATE FINANCE LAW §§ 7.19-.21 (1978).

71. See Committee on Mortgage Law and Practice, *supra* note 69, at 414.

72. *Id.*

73. U.L.S.I.A. § 509(a), 7A U.L.A. at 261. The UCC requires that the sale be "commercially reasonable." U.C.C. § 9-504. The ULSIA requires only that the sale be "reasonable." The drafters concluded that the addition of the word "commercially" in the context of real estate was not helpful.

74. U.L.S.I.A. § 509 cmt. 1, 7A U.L.A. at 261.

75. U.L.S.I.A. § 513 cmt. 1, 7A U.L.A. at 266.

76. *Id.* § 511(b), 7A U.L.A. at 264; see *Id.* §§ 111(18), 113-114, 7A U.L.A. at 231, 235-36 (stating the precise transactions in which the anti-deficiency rule applies).

The ULSIA provisions on foreclosure are based on the assumption that it is beneficial to both the creditor and the debtor that foreclosure sales be efficient, inexpensive, and handled in a manner that is likely to produce as high a sales price as possible. Judicial foreclosure is expensive and is likely to result in substantial delay. Power of sale foreclosure, with an auction sale at the courthouse after advertisement in the legal notices section of a local newspaper, is not conducive to creating the degree of prospective buyer interest which a person selling her own land would wish to generate. Giving the debtor a right to redeem the property for some period after the foreclosure sale surely depresses the price which a buyer would be willing to pay since possession and use must be effectively delayed until the end of the redemption period. The ULSIA drafters believed that the Act's power of sale provisions would minimize the cost of foreclosure and maximize the price received.⁷⁷

Foreclosure procedures which delay the time of foreclosure and periods of redemption after the sale during which the defaulting mortgagor can redeem the property (retain possession) are clearly advantageous to mortgagors who default. In a partial trade-off for taking away from home mortgagees the advantages of longer foreclosure periods and right of redemption, the ULSIA denies deficiency judgments to home mortgagees in the case of purchase money mortgages.⁷⁸

77. See U.L.T.A. prefatory note, 13 U.L.A. at 470-71.

78. U.L.S.I.A. § 511(b), 7A U.L.A. at 264. Deficiencies are available for foreclosure of non-purchase money mortgages because lenders may be willing to lend sums in excess of the value of mortgaged property and there was no wish to discourage that practice.

3. The USLTA⁷⁹

The USLTA brings together in a single statute a number of provisions relating to the land transfer system: priorities,⁸⁰ liens against land including mechanics' liens,⁸¹ recording,⁸² *lis pendens* notice,⁸³ formal requirements for deeds,⁸⁴ marketable title,⁸⁵ and land records.⁸⁶ Other than the mechanics' lien provisions, there is little in the USLTA that is controversial.

The mechanics' lien article, called Construction Liens in the ULSIA, is a detailed, relatively complete coverage of liens against real estate on behalf of persons whose labor or materials go into improvements on real estate. All states have mechanics lien statutes under which contractors, subcontractors, and materialmen, even those who did not contract directly with the owner of the real estate under certain circumstances, have a lien against the real estate being improved for any part of the price of their work or materials not paid for by the person with whom they contracted.⁸⁷ Under many of those statutes, the priority of the lien dates from commencement of the work, a non-record event.⁸⁸ Under such systems, a lender or buyer cannot by a search of the public land records determine whether a mechanics' lien claim might exist. Also, under many statutes, the lien of an unpaid subcontractor or materialman attaches to the owner's land even

79. U.S.L.T.A. art. 3, pt. 2, 14 U.L.A. 249, 280-90 (1976) (amended 1977). This very brief description of the coverage of the USLTA (and the subsequent spin-off, the Uniform Construction Lien Act) is intended merely to give the reader a basis for understanding the comments later made regarding the acceptability of the Acts. For fuller discussion of the substantive provisions of the ULSIA and the UCLA see, among others, the following: Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Wither, and Why*, 27 WAKE FOREST L. REV. 527 (1992); Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 S. ILL. U. L.J. 491; Taylor Mattis, *The Uniform Simplification of Land Transfers Act: Article 2-Conveyancing and Records*, 1981 S. ILL. U. L.J. 511; Note, *The Uniform Simplification of Land Transfers Act, Areas of Departure from State Law*, 73 NW. U. L. REV. 359 (1978); Symposium, *The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act: Potential Impact on Florida Law*, 10 STETSON L. REV. 21 (1980).

80. U.S.L.T.A. art. 3, pt. 2, 14 U.L.A. at 280-90.

81. *Id.* art. 4, 5, 14 U.L.A. at 302-63.

82. *Id.* art. 2, pt. 3, 14 U.L.A. at 270-79.

83. *Id.* art. 4, pt. 3, 14 U.L.A. at 305-08.

84. *Id.* art. 2, pt. 2, 14 U.L.A. at 266-69.

85. U.S.L.T.A. art. 3, pt. 3, 14 U.L.A. at 290-95.

86. *Id.* art. 6, 14 U.L.A. at 363.

87. See U.C.L.A. prefatory note, 7 U.L.A. 330 (Supp. 1995); see also Benfield, *supra* note 79, at 527-31.

88. Benfield, *supra* note 79, at 583 n.102.

though the owner in good faith, without knowledge of the lien claim, paid the full price of the improvement to the prime contractor.⁸⁹ The drafters of the UCLA concluded that both rules were unfair to owners and third parties who deal with the land. Therefore, under the UCLA (and Article 5 of ULSIA) an owner is protected to the extent the owner pays the prime contractor without notice of a lien claim by a subcontractor or materialman,⁹⁰ and the lien claimant's priority against third parties who deal with the owner dates from the time of a public filing, which indicates that construction lien claims may exist.⁹¹

D. *Reasons for Failure of Jurisdictions to Adopt the Land Acts*

1. Generally

The drafters assumed that uniformity of land transactions law in the various states would be beneficial to both parties in real estate transactions, just as the near universal adoption of the UCC has been beneficial in personal property transactions. While land does not move, people do, and mortgage lenders often lend in more than one jurisdiction. Therefore, uniformity of laws would simplify the operations of persons who have real estate transactions in various states, and make the law more understandable for those who move from state to state and buy real property. Further, the existence of a national secondary mortgage market in which lenders who generate mortgages can sell them, could make more money available to finance land, particularly home purchases.⁹² At the time the ULTA was being drafted, federal mortgage agencies were supportive of the effort. They believed that uniformity of law would be beneficial to the further development of a national secondary market in mortgages.⁹³ Particularly, it was believed differences in losses on mortgage foreclosure arising out of differences in state laws would make underwriting of mortgages in different

89. *Id.* at 540 n.72.

90. U.C.L.A. § 207 alt. A, 7 U.L.A. at 348. There is a slightly less owner-protective alternative offered to the states under which a subcontractor or materialman has a lien claim against the owner for goods or services rendered within 20 days before he notifies the owner. *Id.* § 207 alt. B, 7 U.L.A. at 351.

91. *Id.* § 208(b), 7 U.L.A. at 353.

92. *See* U.L.T.A. prefatory note, 13 U.L.A. at 469; *see also* U.L.S.I.A. prefatory note, 7A U.L.A. at 220.

93. *See* James E. Murray, *The Proposed Uniform Land Transactions Act*, 7 REAL ESTATE REV. 64 (1977). At the time he wrote the article, Mr. Murray was Senior Vice-President and General Counsel of the Federal National Mortgage Association.

states difficult, and would discourage lenders from lending in states with unfamiliar foreclosure laws. Similarly, it was believed that secondary market participants would be discouraged from buying mortgages from states whose laws were unfamiliar.⁹⁴

However, after the acts were promulgated, no significant support appeared for uniformity in land transactions law. Banks and other lenders apparently did not consider uniformity sufficiently important to urge adoption of the ULTA, even though the substantive provisions of the ULTA could hardly have been viewed as harmful to lenders. In fact, nationalization of the mortgage market occurred rapidly beginning in the 70s, without the benefit of uniform real estate law.

Secondary mortgage market activity exploded during this period. From 1970 to 1984, the proportion of all fixed rate residential mortgage loans sold through the secondary market increased from 32% to 61%. In the early 1980s less than 5% of all newly originated, conforming conventional fixed rate home mortgage loans were securitized. This proportion increased to over one-half by 1987.⁹⁵

Therefore, it appears that lack of uniformity is not a substantial impediment to a national mortgage market. Further, it can be argued, though this author does not agree, that the differences in economic, social, and political conditions in the various states are so substantial that uniform real estate transactions law in all of them would be bad public policy, and that the costs of non-uniformity are trivial.⁹⁶

In any event, no ground swell for uniformity developed, though some lawyers continue to stress uniformity as a value to be achieved through the adoption of, at least, the ULSIA.⁹⁷ The following discussion of Article 2 of the ULTA, Article 3 of the ULTA-ULSIA, and of the USLTA-UCLA, focuses on substantive objections to those acts which, in the eyes of many, made them unacceptable.

94. See U.L.S.I.A. prefatory note, 7A U.L.A. at 220.

95. Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1272 (1991) (citations omitted).

96. Michael Schill makes exactly that argument. *Id.*

97. Geis, *supra* note 13, at 289.

2. Article 2 of the ULTA

Many real estate lawyers disagree with a number of the policy choices made in the Act, including the use of the UCC template for the legislation. They are reasonably satisfied with existing law, believing that the costs of learning and applying new law outweigh the benefits to be derived from the law, and are reasonably satisfied with existing law. Disagreement with policy choices made in Article 2 of the ULTA is well represented by a resolution of the Real Property Law Section of the New York Bar Association ("Section") prepared for consideration at a Section meeting on June 19, 1976.⁹⁸ The resolution proposed that the New York State Bar Association vote against approval of ULTA at the American Bar Association's annual meeting in July, 1976. The Section disagreed with most of the changes in the law which the drafting committee viewed as desirable modernization of the law. Some examples follow. The ULTA proposes to abolish the doctrine of merger by deed.⁹⁹ The Section rejected abolition of merger by deed as an erosion of "the certainty which is desirable when dealing commercially with substantial interests in real estate."¹⁰⁰ The Section also objected to the revision of the statute of frauds,¹⁰¹ the grant to the court of the power to fill in contract terms if there is a reasonable certain basis for giving a remedy,¹⁰² and a provision making options enforceable without consideration.¹⁰³ They also objected to the idea in the ULTA that warranties of quality would automatically pass to subsequent purchasers.¹⁰⁴

In the years when the ULTA was being adopted, if there was one thing which nearly all commentators agreed on, it was that the old *caveat emptor* rules which had generally been applied to real estate sales, were no longer appropriate. Therefore, one might have thought that the quality warranty

98. New York State Bar Ass'n, Resolution of Real Property Law Section for Action by House of Delegates at Its Meeting on June 19, 1976, at 1 (July 21, 1976) (unpublished resolution, on file with NYSBA, Albany, N.Y.).

99. U.L.T.A. § 2-517, 13 U.L.A. at 566.

100. See New York State Bar Ass'n, Report of the Special Committee to Review the Uniform Land Transactions Act 5 (July 21, 1976) (unpublished report, on file with NYSBA, Albany, N.Y.) [hereinafter Committee on ULTA].

101. *Id.* at 8-9.

102. *Id.* at 10. "The Committee is shocked that [ULTA] gives a judge the power to fill in a contract where the parties have omitted terms." *Id.* The rule in question has been a part of U.C.C. § 2-204 since its inception and opposition has died away.

103. *Id.* at 11.

104. Committee on ULTA, *supra* note 100, at 16; see U.L.T.A. § 2-312 (a), 13 U.L.A. at 538.

provisions of the ULTA would be a substantial plus factor leading to enactments. However, adoption of the Act would have merely accelerated a development which was already in progress in the courts. By the mid-1970s, a number of courts had abandoned the traditional *caveat emptor* rule in real estate sales and had instead imposed a warranty of habitability on professional sellers of real estate, at least as to new construction.¹⁰⁵ Therefore, a proponent of implied warranty liability in sales of real estate might reasonably have concluded that there was a better chance of rapid adoption of that rule in the courts, than through attempts to secure the adoption of the ULTA,¹⁰⁶ or that there was no significant advantage in adopting the Act to achieve changes which were likely to come in short order anyway.

The Section was, however, opposed to the warranty of quality provisions of Article 2 of the ULTA.¹⁰⁷ But those favorable to quality warranties also attacked the Act. Professor John A. Spanogle, speaking on behalf of the Public Interest Research Group, a consumer oriented research group, attacked the Article 2 warranty provisions (and the abolition of the merger doctrine) as not being sufficiently protective of consumers.¹⁰⁸ As is not uncommon when changes in law are proposed, the ULTA quality warranties alienated both those representing sellers and those representing consumer buyers.

Lawyers, particularly, are understandably wary of changes in the law which render their learning obsolete and which require that they learn new and unfamiliar concepts with the attendant pain and possibility of error.¹⁰⁹

105. Carlyn M. Chittenden, *From Caveat Emptor to Consumer Equity—The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 571 (1992).

106. As of July 1994, at least 29 states had imposed implied warranties of habitability or similar warranties on sellers of new homes. Those states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Washington, and Wyoming. See *Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Caused by Defective Condition Thereof*, 25 A.L.R. 3d 383 (1968 & Supp. 1994).

107. Committee on ULTA, *supra* note 100, at 4.

108. John A. Spanogle, Remarks at the Hearings of the Drafting Committee of the Uniform Land Transactions Act (Apr. 5, 1975) (transcript available at Nova Law Review).

109.

Rightly or wrongly, there are those who are opposed to any change in the law; [sic] however, because the existing law is known and understood, and any new statute will take new learning and new interpretations before it can be relied

Many lawyers, therefore, no doubt preferred the old land law which they knew, over the new law which they did not know.

In short, there has been essentially no support for Article 2 of the ULTA. It is worth noting, however, that the quality warranties of the ULTA, slightly modified, appear in the Uniform Condominium Act,¹¹⁰ the Uniform Common Interest Ownership Act,¹¹¹ the Uniform Planned Community Act,¹¹² and the Model Real Estate Cooperative Act.¹¹³

3. Article 3 of the ULTA and ULSIA¹¹⁴

The key provisions of Article 3 (Security Interests) of the ULTA (and of the ULSIA) are their provisions on foreclosure. The drafters of the ULSIA strongly believed that real estate mortgage foreclosure sales should be reasonably rapid, free from the costs of judicial procedure, and there should be no right of redemption by the mortgagor after a foreclosure sale. Also, the drafters believed that foreclosure sales need not be conducted as auctions with elaborate statutory procedures which effectively withdraw mortgage foreclosures from the usual real estate market. Therefore, the ULTA permits mortgages to contain a power of sale clause under which the foreclosing mortgagee need not institute a judicial proceeding, and there is no right of redemption by the mortgagor after a foreclosure sale. At the same time, the mortgagee's obligation is to conduct a reasonable sale using methods which might be used in the usual, non-foreclosure sale context. The drafters believed that foreclosing real estate lenders should not be prevented, by rigid statutory foreclosure rules, from being able to sell in the

upon. This does not mean that any new legislation is to be rejected out of hand, but it does mean that such new laws or proposed laws must be critically analyzed, particularly in connection with land law. Land historically has been so important to our agrarian economy that there is a certainty in that law in most states that may be lacking in other law.

Stanley B. Balbach, *The Uniform Land Transactions Act: Articles 1 and 2*, 11 REAL PROP. PROB. & TR. J. 1, 2 (1976).

110. UNIF. CONDOMINIUM ACT §§ 4-113 to -116, 7 U.L.A. 421, 556-563 (1977) (amended 1980).

111. UNIF. COMMON INTEREST OWNERSHIP ACT §§ 4-113 to -116, 7 U.L.A. at 270-73 (Supp. 1995).

112. UNIF. PLANNED COMMUNITY ACT §§ 4-113 to -116, 7B U.L.A. 1, 125-130 (1980).

113. MODEL REAL ESTATE COOPERATIVE ACT §§ 4-113 to -116, 7B U.L.A. 225, 330-336 (1981). As noted earlier, those acts have been adopted in a total of 14 states. *See supra* note 11.

114. Recall that in 1985, Article 3 of the ULTA, with some changes, was promulgated as a separate act, the Uniform Land Security Interest Act.

way best calculated to secure the same price that a seller, selling on the seller's own behalf, could achieve. Therefore, the ULSIA encourages foreclosing sellers to sell through real estate brokers and requires that they advertise, not just in the legal advertising section of a local newspaper, but in places in which a real estate seller selling for her own account would advertise.¹¹⁵

Unfortunately for the prospects of the ULSIA, there is a sharp division of opinion concerning whether mortgagees should be permitted to foreclose without judicial supervision.¹¹⁶ In the early 1970s, about half the states permitted private power of sale foreclosure, and about half required judicial foreclosure.¹¹⁷ Though there were significant variations among the power of sale statutes, particularly regarding the time required to complete the sale and gain possession,¹¹⁸ the time periods in the ULSIA were not sufficiently different from those acts to create a strong incentive for adoption of the ULSIA provisions in states which already had a power of sale foreclosure. States which required judicial sale were not likely to be easily convinced that power of sale was better.¹¹⁹

The underlying assumption of the ULSIA was that quick, inexpensive foreclosure procedures translated into lower costs for lenders and therefore, into lower interest rates, or lower credit standards for borrowers on real estate collateral. Unfortunately for the prospects for the ULSIA, there are no good studies which controlled for other variables, and which are able to document a clear difference in rates between states with long, expensive foreclosure proceedings and those with short, less expensive procedures.¹²⁰ One analysis suggests that requiring judicial foreclosure and increasing the time to foreclose by one year would increase mortgage costs (spread over all home mortgages) by only eighteen basis points.¹²¹ Other studies have indicated a somewhat higher figure for anti-deficiency legislation and long (one year or so) periods for mortgagor redemption after sale.¹²² In any

115. See *supra* text accompanying notes 72-77.

116. Patrick B. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit*, 71 IOWA L. REV. 1 (1985); Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1991).

117. Bauer, *supra* note 116, at 3 n.7.

118. *Id.*

119. *Id.* at 1.

120. See Schill, *supra* note 116, at 496-500 (discussing some of the studies).

121. *Id.* at 505.

122. *Id.* at 496-97. The studies summarized suggest a statutory right of redemption that delayed by 11 months a buyer's right to possession of property bought on foreclosure would

event, there are no good studies which show that states which are committed to judicial sale or long statutory redemption periods after sale, or both, are imposing significant additional costs on borrowers of that state.

However, in recent years, Congress has passed legislation which preempts state foreclosure law as to certain Housing and Urban Development ("HUD") insured mortgages, and permits non-judicial sales with no right of redemption. In 1981, such a statute applicable to multi-family (apartment) mortgages was passed.¹²³ In 1994, the Single Family Mortgage Foreclosure Act of 1994,¹²⁴ which gives HUD the power to foreclose some HUD related mortgages on single family homes by power of sale with no right of redemption, was passed. The first section of the 1994 Act states, that "Congress finds that . . . the disparate State laws under which mortgages are foreclosed on behalf of the Secretary [of Health and Human Services] . . . increase the costs of collecting obligations; and . . . generally are a detriment to the community in which the properties are located."¹²⁵ Further, the Act states that long redemption periods lead to deterioration in the condition of the properties involved, necessitate substantial federal holding expenditures, increase the risk of vandalism and waste of the properties, and adversely affect the neighborhoods in which the properties are located.¹²⁶

The justifications for power of sale foreclosure given by Congress are equally applicable to any foreclosure, but as noted, they have not led to enactment of the ULSIA, nor in any change in the number of states in which power of sale foreclosure is available.¹²⁷ However, there has been some reduction in the number of states in which there is no right of redemption after the foreclosure sale.¹²⁸ In spite of the reduction in the

increase mortgage costs by 17.42 basis points.

123. See Multi Family Mortgage Foreclosure Act of 1981, Pub. L. No. 97-35, § 362, 95 Stat. 422 (1981) (codified at 12 U.S.C. § 3701 (1994)).

124. See Single Family Mortgage Foreclosure Act of 1994, Pub. L. No. 103-327, § 801, 108 Stat. 2316 (codified at 12 U.S.C. § 3751 (1994)).

125. 12 U.S.C. § 3751(a).

126. *Id.*

127. Geis, *supra* note 13, at 321-22. This article lists 33 states in which power of sale foreclosure is available. The number is based on a state by state summary of foreclosure laws in SIDNEY A. KEYLES, FORECLOSURE LAW & RELATED REMEDIES (1995). However, an examination of the state summaries in Keyles indicates that of the 33 states with power of sale statutes, the procedure is not used in seven. The seven are: Hawaii, Iowa, Maryland, New Mexico, New York, Oklahoma, and Wisconsin. See *generally id.*

128. In 1968, a summary of state laws indicated that there was a statutory right of redemption after foreclosure in 23 states. Committee on Mortgage Law and Practice, *supra* note 69, at 414. In 1995, it was reported that 16 states have a statutory right of redemption

number of states which permit redemption by the mortgagor after the foreclosure sale, the evidence is that states which have judicial sale and redemption periods are hesitant to change their law.

In states which already have power of sale statutes, there would be a relatively small gain from adoption of the ULSIA. The provisions of the ULSIA permitting foreclosure by private sale, rather than at auction, and requiring advertisement of the foreclosure sale in the real estate sections of newspapers,¹²⁹ would probably tend to produce higher prices. However, many mortgagors would still probably prefer to sell at auction and might view the uncertainties of the requirement that their sale be "reasonable" to be a detriment.

Other provisions of ULSIA, such as the right to take possession without the appointment of a receiver, or the priority rules as to future advances, might be valuable but law review comments on the non-foreclosure provisions of ULSIA were mixed.¹³⁰

Several years ago, the American College of Real Estate Lawyers Law Reform Committee, under the leadership of Norman Geis, a Chicago attorney, undertook to secure adoption of the Uniform Land Security Act in the various states.¹³¹ The effort led to substantial studies of the act in New York, Illinois, Minnesota, Oregon, and other states, but no enactments.¹³² Mr. Geis is still actively working for adoption of the ULSIA and there is a current effort in Minnesota to adopt a modified version of the ULSIA which may be successful.¹³³

after the foreclosure sale. Geis, *supra* note 13, at 321-22.

129. See also *supra* notes 114-23 and accompanying text.

130. Several articles have generally favorable discussions of the ULTA, e.g., Jon W. Bruce, *Mortgage Law Reform under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976); James M. Pedowitz, *Mortgage Foreclosure under ULSIA (Uniform Land Security Interest Act)*, 27 WAKE FOREST L. REV. 495 (1992); George M. Platt, *The Uniform Land Security Interest Act: Vehicle for Reform of Oregon Secured Land Transactions Law*, 69 OR. L. REV. 847 (1990). *Contra* Roger Bernhardt, *ULSIA's Remedies on Default—Worth the Effort*, 24 CONN. L. REV. 1001 (1992); Anthony B. Kuklin, *Uniform Land Transactions Act: Article 3*, 11 REAL PROP. PROB. & TR. J. 12 (1976).

131. Telephone Interview with Norman Geis, Counsel, Miller, Shakman, Hamilton, Kurtzon & Schlifke, Chicago, Illinois.

132. See REPORT OF THE ACREL 1990-91 UNIFORM REAL PROPERTY ACTS COMMITTEE (on file with the Nova Law Review).

133. See Geis, *supra* note 13, at 314.

4. The USLTA

The most important part of the Uniform Simplification of Land Transfers Act is part 5, Construction Liens. As noted earlier, in 1987, the Uniform Laws Conference promulgated Article 5 of the USLTA as a freestanding act, the Uniform Construction Lien Act. The rest of this discussion will consider only mechanics liens. The other provisions of the USLTA would make modest improvements in the conveyancing and real estate lien law, but probably not enough to justify the inevitable disruption caused by a wholesale revision of conveyancing and real estate lien law.¹³⁴

All states have acts called mechanics lien acts or construction lien acts, under which persons who supply labor or materials for specific construction on real estate can, without the owner's consent, acquire a lien against the property to secure the money owed to them for their work on the project. There is much diversity among the states as to exactly which parties get liens, the extent of the lien, the liability of the owner, the priority of the lien over third parties, the requirements for perfection of the lien, and the foreclosure procedures.¹³⁵ Therefore, the Construction Lien Act would have brought order out of chaos, but it would also have changed, more or less significantly, the law of every state. The huge difference in the laws of the various states in the mechanics lien area is the result of continual ferment and change as the different interest groups involved (lenders, subcontractors, contractors, and title companies) secure legislation favorable to the interest group. Therefore, the major impediment to the enactment of the USLTA is the presence of the construction lien article. Since the political power of the different interest groups varies from state to state and from time to time, and since the interest groups are well organized and active, it would be exceedingly difficult to secure wide enactment of a uniform version of a construction lien law.¹³⁶

IV. CONCLUSION

This article has tried to provide some answers to the question of why the Uniform Land Transactions Act, the Uniform Simplification of Land

134. *But see* Taylor Mattis, *The Uniform Simplification of Land Transfers Act: Article 2—Conveyancing and Recording*, 1981 S. ILL. U. L. J. 511 (arguing that Article 2 of USLTA would be a valuable change in the law of Illinois and other states).

135. *See generally* Benfield, *supra* note 79, at 531-35.

136. In spite of the truth of the comments in the text, the UCLA provisions of USLTA are so far the only parts of the USLTA to be adopted. *See* NEB. REV. STAT. § 52-125ff (1984).

Transfers Act, and their spin-offs, the Uniform Land Security Interest Act and the Uniform Construction Act, have had a total of only one adoption in the various states. I have suggested that there is no constituency for the acts. There is no group of buyers or sellers who are natural constituencies for Article 2 of the ULTA. Buyers and sellers of real estate act in that capacity so rarely that they are not likely to develop views regarding the desirability of legal change. Consumer lobbying groups might be thought to be interested in changes which are more protective of home buyers than existing law. However, even though there were such provisions in Article 2 of the ULTA, no consumer group support has developed. Other than consumer groups, the only people likely to be interested in Article 2 are lawyers, and many lawyers do not agree with the changes in law made by Article 2, or if they do agree with some changes, they think that the costs of changing the legal rules outweigh any benefits.

Lenders are a natural constituency for Article 3 of the ULTA and its spin-off, the Uniform Land Security Interest Act. The drafters believed that the benefits of uniformity and of a rapid, inexpensive foreclosure process would cause lenders to be sufficiently interested in adoption of the Act to lead to an effort to secure adoptions in the various states. That has not occurred. Perhaps the benefits of uniformity were over-estimated by the drafters, or perhaps lenders have not yet realized that there are substantial benefits from uniformity. In any event, a strong national secondary market for mortgages has developed without the benefit of uniform mortgage laws. Similarly, lenders who lend in states with expensive, time-consuming judicial foreclosure of mortgages, have not been sufficiently interested in the advantages of the ULTA-ULSIA foreclosure system to press for adoption of one of the Acts. That failure may be due, in part, to the belief that states with judicial foreclosure so strongly believe in the additional protection it provides to defaulting mortgagors that change is not likely to be secured in any event.

The UCLA covers an area in which there are strong competing, even opposite, interest groups: lenders, owners, contractors, subcontractors, and materialmen. Presently, mechanics lien laws are diverse, and frequently changing as one interest group or another convinces a legislature to give it an advantage. Because of the strong opposing interests, and the varying attitudes toward those interests in the various states, mechanics' lien law is a particularly unpromising area for national uniformity.

If the drafters had thought more about the hurdles they faced in securing enactment of the land acts, they might have initially chosen to undertake some more modest efforts such as a Uniform Real Estate Quality Warranty Act or a Uniform Power of Sale Act. The Uniform Commercial

Code, after all, dealt with areas in which there was previous piece-meal legislation which could be modernized and unified into a single Code. The Uniform Sales Act was the precursor to Article 2, the Uniform Negotiable Instruments Act to Article 3, the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act to Article 7, and the Uniform Conditions Sales Act to Article 9. There was similar history of uniform codification in the land area.

Perhaps the continuing efforts to secure enactments of the ULSIA will eventually bear fruit. Passage of other parts of the land acts package seems more unlikely. Perhaps, in another thirty years, the Uniform Laws Conference will return again to law reform and unification in the land area. I hope someone then reads this article, or they may have "wasted days and wasted nights."

ULSIA—Modified for Minnesota

John D. Healy, Jr.*

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I. INTRODUCTION

In the early 1990s, a panel of the American College of Real Estate Lawyers (“ACREL”) discussed the difficulties of drafting, closing, and foreclosing multi-state commercial mortgages. It was clear that state laws had to be reformed to preserve and enhance the value of commercial real estate as loan collateral. During the question period of the ACREL discussion, Norman Geis of Chicago urged that ACREL members from each state support enactment of the Uniform Land Security Interest Act (“ULSIA”).

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Minnesota's basic mortgage law dates from the nineteenth century. Though often patched, it has never had a comprehensive recodification. Lawyers and lenders from other states find it difficult to comprehend. After talking with several ACREL colleagues from Minnesota, I agreed to look at the possible benefits of the ULSIA for our state. Preliminary review indicated:

1. The ULSIA was very well thought out. Many of its concepts would improve and clarify Minnesota's mortgage law.
2. Since ULSIA deals comprehensively with its subject, enactment would be difficult.

About the same time, Daniel W. Hardy, Executive Vice President and General Counsel of the Mortgage Bankers Association of Minnesota ("MBAM"), became interested in the ULSIA through national meetings of the Mortgage Bankers Association. I was referred to the MBAM when I inquired about the ULSIA in Minnesota. The MBAM was interested in the ULSIA only for commercial and industrial real estate loans. It declined to pursue changes in the law which governs home loans or agricultural loans.

Robert Tennesen, a former Minnesota State Senator and a Commissioner on Uniform State Laws from Minnesota, caused the ULSIA to be introduced in the 1992 session of the Minnesota Legislature. That bill was the 1985 ULSIA proposed by the Commissioners on Uniform State Laws, except that loans on agricultural and homestead properties were excluded from coverage. Loans less than \$500,000 also were excluded, so that only major borrowers would be involved in the changeover.

The 1992 bill was introduced to focus discussion of mortgage law reform. It was not scheduled for committee hearings.

Late in 1992, I undertook to chair a subcommittee of the Legislative Committee of the Real Property Section of the Minnesota State Bar Association. The subcommittee was formed to study the ULSIA and to report on its feasibility for Minnesota. Subcommittee members included: Kevin J. Dunlevy, J. Kenneth Myers, William T. Norton, Jerry O. Relph, Mary E. Senkus, John R. Wheaton, and Constance L. Wilson-Steele. During three years of meetings, the subcommittee concluded that the ULSIA would significantly improve Minnesota mortgage law, and recommended several modifications to the ULSIA.

II. MODIFICATIONS

A. Coverage

The subcommittee's draft of the ULSIA retained broad exclusions for loans on one-to-four family residential property and for loans on agricultural property, as well as the \$500,000 minimum for the ULSIA. These exclusions from coverage made the "protected party" concept of the ULSIA inoperative. All protected party provisions were deleted. The subcommittee came to agree with the MBAM that there is a fundamental distinction between loans to those in personal possession of homes and farms versus loans to developers and investors who are not occupants.

B. Usury

Article IV of the ULSIA addressing "usury" was deleted. In Minnesota, usury is not an issue in business loans that would be affected by the ULSIA.

C. Foreclosure Period

The 1985 draft of the ULSIA allowed foreclosure sales to occur five weeks after default. The subcommittee extended that time to sixty days to conform to the cancellation period applicable to contracts for deed in Minnesota, and to allow time for the creditor's meeting.

D. Contracts for Deed

The subcommittee recommended that contracts for deed not be covered by the ULSIA. Minnesota has a non-judicial, statutory cancellation procedure for contracts for deed. It provides the equivalent of strict foreclosure; title reverts immediately to the contract vendor sixty days after the notice of cancellation is served.

E. Creditors' Meeting

The subcommittee adapted an alternative dispute resolution procedure from Minnesota's farm mortgage law. The secured creditor would be required to call a meeting to be held within three to four weeks after the notice of foreclosure is issued. All "interested persons," including the debtor, guarantor, other senior and junior creditors, and mechanic's lienors would be notified. Those who attend the creditors' meeting would be

required to state the source and amount of their claims and their claim of priority. The meeting would be most useful for defaulted construction loans. It may be possible to salvage the project if all concerned can be brought together promptly.

F. *Priority of Nonobligatory Advances*

Members of the Construction Law Section of the Minnesota State Bar Association pointed out that the 1985 ULSIA would eliminate mechanic's lienors' claims of priority over the secured creditor, to the extent of nonobligatory advances made by the secured creditor. The MBAM agreed that the lienors' priority should be retained.

G. *Notice to Mechanic's Lien Claimants*

Minnesota allows mechanic's lienors to file 120 days after the last labor or material is supplied. The recommended sixty-day foreclosure period would eliminate many mechanic's liens before they were even filed. After consulting with the Construction Law Section of the Minnesota State Bar Association, the subcommittee recommended that provision be made for early notice by potential lien claimants, so that they can participate in the creditors' meeting and in reinstatement.

H. *Reinstatement*

The 1985 ULSIA did not allow reinstatement of a defaulted loan after acceleration. The subcommittee recommended that reinstatement be allowed during the first forty-five days of the sixty-day foreclosure period.

I. *Receivers*

Minnesota allows the creditor a court-appointed receiver as a matter of right. The subcommittee recommended that this remedy not be disturbed.

J. *Effective Date*

The subcommittee recommended that the ULSIA become effective on January 1 of the second year following enactment. The delay would allow time for technical corrections during the intervening legislative session, and for continuing legal education, revision of loan documents, and orderly negotiation of loan commitments.

III. MAJOR CHANGE FOR MINNESOTA—ABOLISH REDEMPTION

Minnesota allows a period of redemption after foreclosure sale. For most commercial loans, the redemption period is six months. Although the receiver remedy enables a secured creditor to promptly curtail “milking” of an income property, the lengthy redemption period is a problem. Ownership and long-term management decisions are kept in suspense for a minimum of eight months after foreclosure is commenced. This delay can be devastating to construction contractors, apartment residents, and shopping center and office building tenants and their employees.

IV. PROCEDURE & RESOLUTION

State Senator David Knutson, the primary legislative sponsor of the ULSIA, sought broad support for comprehensive mortgage law reform prior to conducting legislative committee hearings. While the recommended sixty-day foreclosure period approximates the six weeks published notice now required for a nonjudicial foreclosure by advertisement in Minnesota, abolition of the six-month redemption period would extinguish the debtor’s last hope in two months instead of eight.

The subcommittee recommended a sixty-day foreclosure period in the belief that sixty days would be enough time for the creditor to conduct a sale at a price that would approach market value. The foreclosure statute should provide positive incentives for a new party to purchase the troubled property and end the involvement of the creditor and debtor. The new purchaser will be able to make improvements, write leases, and make other management decisions on a long-term basis. Neither receivers nor creditors intending to resell can take the long-term approach.

At a public meeting held to discuss the ULSIA, considerable doubt was expressed whether prospective purchasers could complete their due diligence in sixty days. There also was a doubt whether many prospects would even begin due diligence without control of the property through an option or a contingent purchase agreement.

If a near-market sale to a new party is not feasible in sixty days, or if the process of getting a defaulted property back into commerce will not even begin until the creditor has complete control of the property, it may be better for Minnesota to adopt a shorter foreclosure period. Must the debtor’s interest be completely eliminated before marketing to third parties can begin?

The MBAM has requested that hearings not be held in the 1996 Minnesota Legislative Session and that those involved in the real estate industry consult further to develop a fair and efficient time frame for the foreclosure process.

Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts

Gerald Korngold*

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I. INTRODUCTION

[A] statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.

—Chief Justice Harlan Fiske Stone¹

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1. *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

The Uniform Land Transactions Act ("ULTA")² was initially approved by the National Conference of Commissioners on Uniform State Laws in 1975³ and recommended for enactment in all states. The drafters had great aspirations for the Act. It would provide uniformity in state doctrine on real estate matters, thus encouraging the growth of the secondary mortgage market, facilitating lending across state lines, and providing a national real estate law for a mobile population and expanding businesses.⁴ A second goal was the modernization of real estate law, with the legislation striking down hoary rules that courts were unable to abolish.⁵ ULTA was to be the Uniform Commercial Code ("UCC") of real estate law.⁶

The goals of uniformity and national reform through legislation were not realized, as ULTA was never enacted by any state legislature. This, however, is not the end of the story. ULTA, while not adopted, has been an influential authority for various courts facing novel issues of law or considering new rules to replace existing doctrine.⁷ There are various levels of irony here. ULTA was intended to supplant judge made law with legislation,⁸ yet it has been used to support, encourage, and even embolden judicial lawmakers. Moreover, only through the decisions of these courts have portions of ULTA's substantive reforms of real estate rules become law in some states. While this is not the script that the National Commissioners and ULTA's drafters had in mind, ULTA has played a noticeable role in law reform. The Act has proven to be, in the words of Chief Justice Stone, "a new and powerful"—albeit indirect—"aid in the accomplishment of its appointed task of accommodating the law to social needs."⁹

2. 13 U.L.A. 469 (1986). The act was extensively amended in 1977.

3. *Id.* at 470-71 prefatory note.

4. *Id.*

5. *Id.*

6. For comment on ULTA, see Marion W. Benfield, Jr., *The Future Advances Lender: Status Under Present Illinois Law and Under ULTA and USOLTA*, 1981 S. ILL. U. L.J. 451; Ronald Benton Brown, *Article 1 of the Uniform Land Transactions Act: Is Inconsistency with the UCC an Unnecessary Obstacle?*, 1981 S. ILL. U.L.J. 585; Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980); Allison Dunham, *Reflections of a Statutory Draftsman: The Land Transaction Acts*, 1981 S. ILL. U. L.J. 549; Gerald Korngold, *Construction Loan Advances and the Subordinated Purchase Money Mortgagee: An Appraisal, A Suggested Approach, and the ULTA Perspective*, 50 FORDHAM L. REV. 313 (1981); Patrick A. Randolph, Jr., *The Mortgagee's Interest in Rents: Some Policy Considerations and Proposals*, 29 KAN. L. REV. 1 (1980).

7. See discussion *infra* part I.

8. U.L.T.A. prefatory note, 13 U.L.A. at 470-71.

9. See Stone, *supra* note 1, at 15.

This article examines the use of ULTA by the courts. It focuses on *Kuhn v. Spatial Design, Inc.*,¹⁰ which represents the boldest use of ULTA by a court in adopting a new rule of law. Moreover, *Kuhn* is an important case in real estate transactions law since it (correctly) rejects existing doctrine on the calculation of the seller's damages when the buyer breaches a contract of sale. This article uncovers the underlying substantive and policy disputes concerning seller's damages, and argues that damages should be calculated based on the value of the property at resale, rather than the date of breach. Additionally, *Kuhn* and its judicial adoption of ULTA section 2-504 provide a context to compare the advantages and disadvantages of legislative, as opposed to judicial, law reform. Although legislation, such as ULTA may be preferable, this article argues that judicial lawmaking of the type in *Kuhn* is appropriate in light of policy and tradition.

II. ULTA IN THE COURTS

Approximately twenty-five reported cases cite the Uniform Land Transactions Act.¹¹ These courts have treated the Act in different ways. On one extreme, some courts reject the statute's solution or otherwise give it little weight. For example, a number of decisions distinguish the ULTA rule on a particular issue from the jurisdiction's position and then proceed to apply existing state law.¹² While not directly rejecting the Act, one court expressed an apparent lack of enthusiasm, prefacing its summary of the ULTA approach on future advances doctrine with the following

10. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

11. A far fewer number cite the Uniform Simplification of Land Transfers Act ("USLTA"), 14 U.L.A. 249 (1990). USLTA is cited in *Volpe Construction Co. v. First Nat'l Bank*, 567 N.E.2d 1244, 1248 n.6 (Mass. App. Ct. 1991); *Action Heating & Air Conditioning, Inc. v. Petersen*, 429 N.W.2d 1, 3-4 (Neb. 1988); and *Haner v. Bruce*, 499 A.2d 792, 793-94 (Vt. 1985).

12. *E.g.*, *Gerdin v. Princeton State Bank*, 384 N.W.2d 868, 871 (Minn. 1986) (noting that Minnesota law does notice by mail or personal service in foreclosure actions as prescribed in ULTA § 3-508(a)); *Donovan v. Bachstadt*, 453 A.2d 160, 164-65 n.5 (N.J. 1982) (rejecting the dissent's reliance on the rule of buyer's damages in ULTA § 2-510 stating that "[n]o state has enacted this proposed law"); *Cook v. Salishan Properties, Inc.*, 569 P.2d 1033, 1036 (Ore. 1977) (finding that ULTA § 2-309 does not extend to defects in land itself as opposed to construction); *Tanenbaum v. Sears, Roebuck & Co.*, 401 A.2d 809, 814 n.4 (Pa. Super. Ct. 1979) (rejecting the position of ULTA § 2-302(c) and holding that phrase "time is of the essence" in and of itself indicates that failure to perform exposes that party to default of contract interest); *see American Mechanical Corp. v. Union Machine Co. of Lynn*, 485 N.E.2d 680, 684 n.3 (Mass. App. Ct. 1985) (indicating ULTA rule on calculation of buyer's damages differs from Massachusetts and most other jurisdictions).

qualification: “*For what it may be worth*, the National Conference of Commissioners on Uniform State Laws in 1975 promulgated the Uniform Land Transactions Act.”¹³ The statute also has appeared in cases without judicial endorsement as part of the court’s citation of a law review article that includes ULTA in its title.¹⁴

Other decisions are more embracing of ULTA, but to varying degrees. Some refer to a section of the Act to provide general background to the legal issue confronting the court.¹⁵ A number of cases cite the statute as support for a proposition of law that is otherwise established in the jurisdiction by case law or statutory provisions.¹⁶ Several opinions cite ULTA along with cases from other jurisdictions and secondary sources as a basis to declare a new rule of law. These latter cases cover a wide range of issues including the adoption of an implied warranty of fitness by a builder-vendor of a house;¹⁷ the analogy of installment land contracts to mortgages subject to the protections of the law of foreclosure;¹⁸ rejection

13. *Shutze v. Credithrift of Am., Inc.*, 607 So. 2d 55, 65 n.20 (Miss. 1992) (emphasis added).

14. See, e.g., *In re J.B. Van Sciver Co.*, 73 B.R. 838, 847 (Bankr. E.D. Pa. 1987) (citing Maureen M. Rayborn, Comment, *The Uniform Land Transactions Act: Pennsylvania Property Law and Sellers’ Remedies for Breach of Contract of Real Estate*, 55 TEMPLE L.Q. 577, 591 (1982)); *In re Stardust Inn, Inc.*, 70 B.R. 888, 892 n.9 (Bankr. E.D. Pa. 1987); *Burkons v. Ticor Title Ins. Co.*, 798 P.2d 1308, 1314 (Ariz. Ct. App. 1989) (citing Korngold, *supra* note 6), *vacated* 813 P.2d 710 (Ariz. 1991).

15. See, e.g., *Miller v. Pepper*, 638 P.2d 864, 866 n.5 (Haw. Ct. App. 1982) (referring to statute of frauds); *Armstrong v. Csurilla*, 817 P.2d 1221, 1223 (N.M. 1991) (referring to inadequacy of price at foreclosure sale); *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541, 551 n.12 (Wyo. 1980) (referring to auction bidding procedures).

16. See, e.g., *In re National Envtl. Sys. Corp. v. Long Pond Realty Trust*, 111 B.R. 4, 10 n.3 (Bankr. D.N.H. 1989) (discussing conduct of foreclosure sale); *McHugh v. Church*, 583 P.2d 210, 217 n.33 (Alaska 1978) (discussing conduct of power of sale foreclosure sale); *DeLuca v. C.W. Blakeslee & Sons, Inc.*, 391 A.2d 170, 174 (Conn. 1978) (referring to statute of frauds); *Kelly/Lehr & Assocs., Inc. v. O’Brien*, 551 N.E.2d 419, 425 (Ill. App. Ct. 1990) (discussing protection of tenants against foreclosing mortgagee); *Egbert v. Freedom Fed. Sav. & Loan Ass’n*, 440 N.E.2d 22, 27 (Mass. App. Ct. 1982) (regarding money due on sale clause); *Murphy v. Financial Dev. Corp.*, 495 A.2d 1245, 1251 (N.H. 1985) (noting notice requirements in non-judicial foreclosure); *Wartux Assocs. v. Kings College*, 616 N.Y.S.2d 417, 420 (1994) (discussing vendor’s lien).

17. See, e.g., *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1982); *Kirk v. Ridgway*, 373 N.W.2d 491, 495 (Iowa 1985); *McDonald v. Miannecki*, 398 A.2d 1283, 1289 (N.J. 1979).

18. See, e.g., *Skendzel v. Marshall*, 301 N.E.2d 641, 648 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974); *Anderson Contracting Co. v. Daugherty*, 417 A.2d 1227, 1232 (Pa. Super. Ct. 1979).

of the doctrine of merger by deed,¹⁹ permitting a party to request adequate assurance of performance where reasonable grounds for insecurity arise,²⁰ and elimination of the election of remedies doctrine in enforcing real estate contracts.²¹

III. SELLER'S DAMAGES ON BUYER'S DEFAULT

Of all the cases citing ULTA, the court in *Kuhn v. Spatial Design, Inc.*²² relied to the greatest extent on the Act as the basis for its decision. The *Kuhn* court followed ULTA to break from the general rule for calculating a seller's damages for a buyer's breach of a contract of sale.²³ This section reviews the general rule and the policies for rejecting it.

A. The Cases

Courts typically declare that the measure of a seller's damages for a buyer's failure to perform under a contract of sale for realty is the difference between the contract price and the market value of the property on the date of the breach.²⁴ Commentators echo this rule.²⁵ However, an examination of these cases indicates that despite the general statement, the timing question is not clearly settled in a good many of them. Similarly, the courts fail to explain why they supposedly prefer the value at the date of breach over the resale price.

First, in some decisions the timing of the valuation of the property is not an issue, and timing is only mentioned as part of a general statement of contract remedies.²⁶ Moreover, in some circumstances it is not important

19. See, e.g., *McSweyn v. Musselshell County*, 632 P.2d 1095, 1103 (Mont. 1981).

20. See, e.g., *Romig v. deVallance*, 637 P.2d 1147, 1151 (Haw. Ct. App. 1981).

21. See, e.g., *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 670 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982).

22. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

23. See discussion *infra* part III.

24. See, e.g., *Telfener v. Russ*, 145 U.S. 522 (1892), *rev'd*, 162 U.S. 170 (1896); *SePark v. Caswell Builders, Inc.*, 434 S.E.2d 502, 503 (Ga. Ct. App. 1993); *Construction Enter., Inc. v. Schaeffer*, 562 S.W.2d 799, 800 (Mo. Ct. App. 1978); *Chris v. Epstein*, 440 S.E.2d 581, 583 (N.C. Ct. App. 1994); *Olmo v. Matos*, 653 A.2d 1, 3 (Pa. Super. Ct. 1994).

25. See, e.g., ARTHUR CORBIN, *CONTRACTS* § 1098A (1964); MILTON FRIEDMAN, *CONTRACTS AND CONVEYANCES OF LAND* § 12.1(a) (5th ed. 1991); SAMUEL WILLISTON, *CONTRACTS* § 1399 (3d ed. 1968). These sources do not explain why time of breach is preferable to resale price.

26. See, e.g., *Duncan v. Rossuck*, 621 So. 2d 1313 (Ala. 1993) (failing to court does not refer to resale price); *Gordon v. Pfab*, 246 N.W.2d 283, 288 (Iowa 1976); *Brouillard v. Allen*,

which date—breach or resale—is used. Thus, where the market price on the date of the breach is the same as the contract price and the market price increases rather than decreases after that point, there is no issue of whether date of breach or resale is used since in either case the seller has no loss of bargain damages.²⁷ Alternatively, where the value of the realty at the date of breach is equal to the resale price, it would not matter which one a court uses.²⁸

Other decisions reveal a gap between a court's statements and actions concerning timing. Some courts claim that they follow the time of breach rule, but actually compare the resale price to the contract amount. These courts do not merely use the resale price as evidence of the market value at the time of the breach; rather, they simply and without discussion, plug the resale price into the equation as the market value at the time of breach.²⁹ For example, the Eighth Circuit Court of Appeals quoted the general rule, but instead of looking to the value at the time of breach, the court concluded that the seller could recover no loss of bargain damages since the seller resold the property two years later for the same amount as the original contract price.³⁰ The court appeared unaware that its action contradicted its statement of the law.

The use of resale price, despite a statement to the contrary is illustrated by a case which involved a contract of sale executed by a trustee in bankruptcy for the sale of a hotel property owned by the debtor.³¹ The contract price was \$4,840,000 and closing was set for January 5, 1990. The buyer defaulted, and on March 30, 1990, the first lienholder on the property foreclosed. The property was subsequently sold by the lienholder, at a date not specified by the court, for \$3,455,000. The court quoted the relevant

619 A.2d 988, 991 (Me. 1993).

27. See *Turner v. Benson*, 672 S.W.2d 752, 754-55 (Tenn. 1984) (noting fact that court chose date of breach did not affect seller where contract price and market value on date of breach were both \$75,000, and the property was resold one year later at \$76,000).

28. See, e.g., *Duncan*, 621 So. 2d at 1316 (relying on appraiser's express testimony that the property did not change in value).

29. See, e.g., *A-S Dev., Inc. v. W.R. Grace Land Corp.*, 537 F. Supp. 549, 558-59 (D.N.J. 1982) (stating rule but permitting seller to recover interest on its investment in land tied up until property could be resold five years after breach), *aff'd*, 707 F.2d 1388 (3d Cir. 1983); *Loda v. H.K. Sargeant & Assocs., Inc.*, 448 A.2d 812, 818 (Conn. 1982) (calculating damages by deducting price of resale which occurred over two months after breach from the contract price).

30. *Cote v. Chesley*, 577 F.2d 71, 73 (8th Cir. 1978).

31. *In re Gatlinburg Motel Enters.*, 127 B.R. 814 (Bankr. E.D. Tenn. 1991).

state law rule referring to “time of the breach”³² for calculating the fair market value of the property, but then awarded the trustee-seller damages in the amount of \$1,385,000. These damages were calculated by taking the difference between the contract price and the foreclosure sale price that took place at least two and a half months after the breach. It thus appears the court did not focus on the timing question, despite its embracing of the general rule.³³ Furthermore, the case may indicate that finding value at the time of a reasonable resale is intuitively pleasing to a court dealing with property in a soft market.³⁴

Some courts, however, squarely face the timing issue and insist on the date of breach rather than resale.³⁵ For example, in one case, *Webster v. DiTrapano*,³⁶ the court reversed the trial court’s calculation of damages where the property was resold eleven months after breach, since the trier

32. *Id.* at 820 (quoting *Turner v. Venson*, 672 S.W.2d 752, 755 (Tenn. 1984)).

33. Although some courts state that the resale price might be *evidence* of the value of the property at the time of breach, *e.g.*, *Gardner v. Armstrong*, 31 Mo. 535 (1862), the *Gatlinburg* court gave no indication that it was using the foreclosure sales price for that purpose. Moreover, to be useful evidence, the resale must come within a reasonable time. *See, e.g.*, *Hazelton v. Le Duc*, 10 App. D.C. 379 (1897); *Kempner v. Heidenheimer*, 65 Tex. 587 (1886); *Glezos v. Frontier Invs.*, 896 P.2d 1230, 1235 (Utah Ct. App. 1995). The *Gatlinburg* court never stated when the foreclosure sale took place nor discussed whether that was within a “reasonable” time.

34. Sales of distressed property by definition involve a soft market. *See BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) (“[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value.”).

35. *See, e.g.*, *Brett v. Wall*, 530 So. 2d 797, 798-99 (Ala. 1988) (holding trial court’s use of date of trial rather than time of breach was reversible error); *Young v. Redman*, 128 Cal. Rptr. 86, 89-90 (Ct. App. 1976) (stating general rule and finding that testimony of seller and appraiser supported trial court’s determination of value at time of breach); *Margaret H. Wayne Trust v. Lipsky*, 846 P.2d 904, 912 (Idaho 1993) (holding that it was error to find damages by comparing contract price and amount of resale that took place one year after breach); *Macal v. Stinson*, 468 N.W.2d 34, 35-36 (Iowa 1991) (declaring general rule and finding damages in amount equal to offer for resale received one month after breach and rejected by sellers rather than amount of the actual resale, which was made over a year later); *Regent Int’l v. Lear*, 732 P.2d 861, 861-62 (Nev. 1987); *Mohen v. Mooney*, 614 N.Y.S.2d 737, 738 (App. Div. 1994) (reversing computation of damages that used value as of May 15, 1989, rather than October 31, 1988, when breach occurred).

36. 494 N.Y.S.2d 550 (App. Div. 1985).

used the \$55,000 resale price rather than the value of the property at the time of breach, i.e., \$57,500.³⁷

As a further complication, even courts that calculate value as of the date of breach will use a subsequent resale price as evidence of the earlier value, as long as market conditions are similar and too much time has not passed.³⁸ Therefore, it is sometimes difficult to tell whether a court is using the resale price only as evidence of value at the time of breach, or as part of the damages formula.

B. *Policy Justifications*

The courts which embrace the general rule do not explain why it is sensible. Rather, the courts follow it without explanation, apparently on the belief that the rule is well established. One decision relied on *stare decisis* to reject a shift away from the time of breach doctrine:

Defendants propose that this Court should create a new standard of formulation for damages which would include the resale value. We do not deem it our place to change the formula for damages that has been set by precedent, where there has not been a plausible argument for such a change.³⁹

1. Supporting the General Rule

Although the courts do not offer reasons for preferring value at the time of breach, several policies can be offered in support of this rule. First, this result appears consistent with general damages theory. For example, assume the contract price is \$100 and the value at the date of breach is \$80, under

37. *Id.* at 551. Some New York courts, however, permit the use of the resale price. *E.g.*, *Tesmer Builders, Inc. v. Cimato*, 629 N.Y.S.2d 594 (App. Div. 1995) (upholding judgment using resale price but noting that damages claim was not controverted by buyer).

38. *See, e.g.*, *Lipsky*, 846 P.2d at 912 (rejecting use of resale price to show value at date of breach because resale came one year late); *Gryb v. Benson*, 406 N.E.2d 124, 126 (Ill. App. Ct. 1980) (holding use of resale price at later unspecified date was appropriate evidence); *Kasten Constr. Co. v. Jolles*, 278 A.2d 48, 51 (Md. 1971) (holding sale 14 months later was not probative of value at time of breach); *Glezos v. Frontier Inv.*, 896 P.2d 1230, 1235 (Utah Ct. App. 1995) (holding use of price three years after default was error as evidence was "simply too attenuated"); *cf. Showalter, Inc. v. Smith*, 629 N.E.2d 272, 276 (Ind. Ct. App. 1994) (holding although breach occurred in August 1990, resale price accepted in November 1991 was not too attenuated to be admissible evidence of value at time of breach); *Gerhardt v. Fleck*, 256 N.W.2d 547, 551 (N.D. 1977) (holding auction sale held after default was valid evidence even though property listed in different manner).

39. *Chris v. Epstein*, 440 S.E.2d 581, 583 (N.C. Ct. App. 1994).

the general rule the seller would receive damages in the amount of \$20. This supposedly protects the seller's expectation and puts the seller in as good of a position as the seller would have been if the buyer had performed.⁴⁰ Under this theory, the seller is left with the expected \$100, either in the form of the land now worth \$80 along with the \$20 in cash or the seller could resell the property in the marketplace at its \$80 value and, together with the \$20 in damages, have \$100 in cash.

Moreover, the result under the general rule would appear to be consistent with the mitigation of damages doctrine.⁴¹ Since the seller will only receive the value at the date of breach, the seller is at risk for further declines in the value of the property. So, the argument goes, the seller will act quickly to resell. In contrast, if the resale price was used for damages calculation, the seller would have no incentive to resell in a timely manner. Thus, the damages owed by the buyer would increase if the market continued to drop.

Finally, proponents of the time of resale rule would claim that the seller's concerns about a declining market are addressed by the specific performance remedy that is available to all sellers under real estate contracts.⁴² If the court orders the buyer to close under the contract, the seller will receive the contract price in exchange for the deed and thus obtain the full benefit of the contract.

2. Rejecting the General Rule

These arguments supporting the use of the value on the date of breach ignore many practical concerns of disappointed sellers, as well as theoretical considerations. The general rule wrongly places the risk of a declining market after breach on the seller of land. A seller of fungible goods should be able to quickly resell in the market and make himself whole since there is a clear and active market for most commodities. However, real estate is another matter. Realty is unique, with many complicated features, such as location, size, architectural style, layout, and included items. Since buyers also have their individual lists of desired attributes in a property, the process of matching buyers to properties is, therefore, complicated.

40. See E. ALLAN FARNSWORTH, *CONTRACTS* 840-41 (2d ed. 1990) (describing the expectation interest).

41. See *RESTATEMENT (SECOND) OF CONTRACTS* § 350 (1979) (describing general mitigation rule).

42. *Id.* § 360 cmt. e (discussing seller's right of specific performance); see PAUL GOLDSTEIN & GERALD KORNGOLD, *REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE* 138-39 (3d ed. 1993).

Moreover, the operation of the real estate market is complex. After the buyer's breach, the seller typically must go through many steps to remarket and resell the realty. For example, the seller usually must employ a new broker or make a new arrangement with the original broker. This may include consideration of various proposals, negotiations, and execution of an agreement with a broker which may require consultation with a lawyer.⁴³ The seller and broker must re-price the house in light of the current market, which involves a process requiring some study. The property must be marketed again with new advertising, multiple listings, and previews of the property for other brokers and potential buyers.

The sales process itself takes time. Buyers typically require several viewings of the property before making an offer to purchase. Often they will have a professional inspector review the realty before they make an offer, and the buyer may need other professionals, such as architects, designers, and contractors, to examine the property before purchase.⁴⁴

Additionally, the timing of the resale effort may be disadvantageous to the seller because of a cyclical market. For example, since many homes are sold in the late spring and early summer in order to allow people to move before the school year, if a buyer breaches late in that selling season there may be only a limited number of potential new buyers in the market.

All these factors reduce the likelihood of a quick resale.⁴⁵ As a result, the risk of a declining market is shifted to the seller. Thus, if the buyer breaches late in the selling season and the market value drops after the time of breach from \$80 to \$70 at the time of resale, the seller will not receive the full benefit of the bargain. The seller will end up with \$90 (\$20 in damages and \$70 obtained on resale) rather than the \$100 provided in the contract.

This result conflicts with basic policies of contract law. To the extent that we enforce contracts because we believe there is a moral obligation on

43. See John Payne, *A Typical House Purchase Transaction in the United States*, 30 CONV. & PROP. LAW 194 (1966).

44. For commercial properties, the review may be even more complex, since the viability of the location and the structure for the enterprise's operations must be ascertained.

45. See cases cited *supra* note 38 (describing delays in resale).

the promisor,⁴⁶ it is inconsistent to allow a wrongdoing buyer to pass the risk of a declining market to the innocent seller.

Moreover, using the value at the date of breach frustrates the efficiency benefits of a contract.⁴⁷ The time of breach rule creates an incentive for the buyer to breach in declining markets. If the buyer had performed as obligated and had then unloaded the property because of the declining market, the buyer would have suffered a \$30 loss (i.e., the difference between the contract price and the resale amount). The general rule, however, does not force the buyer to live with the buyer's poor prediction of the future value of the property. Rather, it permits the buyer to limit the loss to \$20 since payment of damages is based on the value at the time of breach. The additional \$10 of loss is instead shifted to the seller. Given the general rule, it is hard to see why a rational buyer would close in a rapidly declining market. The general rule, therefore, appears to weaken rather than enhance the efficient allocation of resources in the market.

Freedom of contract also permits individuals to make choices and enables them to create a network of consensual relationships that maximize their happiness.⁴⁸ We should not allow the acts of one party to the

46. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 9-17 (1981); Morris Cohen, *The Basis of Contract*, 4 HARV. L. REV. 553, 571-85 (1933) (stating "common sense does generally find something revolting about the breaking of a promise, and this, if a fact, must be taken into account by the law"); L.L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936) (protecting expectation carries a "quasi-criminal aspect, its purpose being not so much to compensate the promisee as to penalize the breach of promise by the promisor").

47. See FARNSWORTH, *supra* note 40, § 1.7 (arguing that freedom of contract encourages individual entrepreneurial activity that benefits society as a whole); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 94 YALE L.J. 97 (1989); ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979) ("The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable resources. . . . The principle that voluntary exchange should be freely permitted in order to maximize value is frequently summarized in the concept (or slogan) 'freedom of contract.'"); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEG. STUDIES 88, 89 (1977) ("A law of contract not based on efficiency considerations will therefore be largely futile.").

48. See Cohen, *supra* note 46, at 571-85 (stating "[a]ccording to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect"); Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) ("We may not understand why property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reason should be advanced before *our* intentions are allowed to

contract (i.e., the defaulting buyer) to destroy the free choices of the other (i.e., the seller). Consider, for example, that the seller in our hypothetical transaction was counting on the \$100 consideration from the sale of the home to purchase a new house, finance a child's education, or pay for any other lawful activity that would give the seller satisfaction. It would be troubling if the time of breach damages rule frustrated the seller's plans by leaving the seller with only \$90 total consideration for the property after a breach by the buyer.

The argument that the seller could avoid the harshness of the time of breach rule by obtaining a decree of specific performance is flawed.⁴⁹ If the buyer breaches because the buyer lacks the funding to close, an injunction action is an essentially meaningless and expensive exercise. The seller would prefer to keep the property and obtain a judgment for the full amount of damages, including the loss of value during the time preceding resale. The defaulting buyer may be able to pay that amount even if the buyer is unable to produce the entire purchase price in an injunction action.

IV. *KUHN V. SPATIAL DESIGN, INC.*

*Kuhn v. Spatial Design, Inc.*⁵⁰ presented the Appellate Division of the New Jersey Superior Court an opportunity to consider this oft stated, but logically flawed, time of breach rule for calculation of damages. *Kuhn* involved a vivid story of breach by buyers in a declining market. The Kuhns signed a contract to purchase a home from defendant Spatial Designs. The sale was contingent on the buyers obtaining financing. The Kuhns applied for a mortgage through a mortgage broker. Prudential Home Mortgage Company ("Prudential") issued a mortgage commitment but later withdrew it. The Kuhns attempted to cancel the contract of sale based on their inability to obtain financing but Spatial Design refused to return their deposit. The Kuhns commenced an action to recover the deposit and Spatial Design counterclaimed for damages for breach of contract.

The trial court found that the Kuhns, and employees of the mortgage broker, intentionally filed a mortgage application that was materially false with respect to the Kuhns' financial picture since they believed that the buyers' actual financial situation was insufficient to obtain the loan that they

control."); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 454 (1984) (discussing freedom of choice).

49. See discussion *supra* part II.B.1.

50. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

sought. The application indicated that Mr. Kuhn was an Air Force colonel but did not show that he had already been approved for retirement. It also stated that Mrs. Kuhn “had a substantial income from ‘Plants-R-You,’ a florist business which existed only in the minds of the Kuhns and [the mortgage brokers’] people.”⁵¹ The Kuhns knew that other key information was also shown incorrectly in order to make their mortgage application stronger.

The Kuhns developed misgivings about the deal when they found a weak market for the sale of their current home, discovered an uninviting job market for Mr. Kuhn, and heard that Spatial Design had sold a house across the street for much less than they were paying. Mr. Kuhn “therefore decided to climb down from the shaky limb he was on.”⁵² He called Prudential and informed them that he would be retiring from the Air Force and would lose \$40,000 in annual income.⁵³ Prudential then canceled the mortgage commitment because of the new information relying on an express provision permitting withdrawal if any new material facts were revealed.

The trial judge found in favor of the seller and assessed damages against the buyers of almost \$100,000, less the retained deposit of \$50,000. The appellate court upheld this award and discussed the measure of damages for loss of bargain. The contract price was \$515,000, less \$27,750 for real estate broker commission. The property was resold for \$434,000 free of commission. The opinion does not indicate how long it took to resell, but found that “[t]here was no reason suggested by the evidence to doubt the reasonableness either of the time it took to resell the house or the sale price obtained.”⁵⁴ The court also did not indicate the value of the house at the date of the Kuhns’ breach. From the data included in the opinion, the seller suffered a decline in the value of the property from the time of contract to resale in the amount of \$53,250: \$515,000 contract price (less \$27,750 for the commission), less the \$434,000 resale price.

The buyers urged that the seller’s damages should be calculated according to the difference between the contract price and the value at the time of breach. The court distinguished the New Jersey cases cited by the buyers since they did not deal with damages from a breach in a falling

51. *Id.* at 969.

52. *Id.* at 970.

53. This was inaccurate on two counts—Mr. Kuhn had already been approved for retirement when he submitted the mortgage application and almost simultaneously with his call to Prudential he wrote the Air Force seeking to withdraw his approved retirement. *Id.*

54. *Id.* at 970. At one point, the opinion indicates that resale took place “many months” after either the contract or the breach. *Kuhn*, 585 A.2d at 971.

market.⁵⁵ The court then adopted a new rule for damages in a falling market, stating: "where the seller puts the property back on the market and resells, the measure is not contract price less value at the time of breach, but rather the resale price, if it is reasonable as to time, method, manner, place and terms."⁵⁶ The court held that questions of reasonableness are for the trier of fact, and noted that the trial court found, on sufficient credible evidence, that the resale was reasonable.⁵⁷

The support and the sources cited by the *Kuhn* court to reject the general rule and adopt the time of resale approach are most interesting. The court made little use of precedent. The court did not cite cases from New Jersey or other jurisdictions following the time of resale rule.⁵⁸ The court in *Kuhn* did refer to the New Jersey statute adopting section 2-706 of the Uniform Commercial Code which permits a seller of goods to resell and recover the difference between the contract price and resale amount.⁵⁹ While section 2-504 of ULTA is expressly based on that UCC provision,⁶⁰ the UCC of course does not apply to sales of real estate.⁶¹

Moreover, there was no full discussion of the policy considerations. The *Kuhn* court merely stated: "In the usual course of things, a \$515,000 house cannot be resold the instant a contract buyer breaches, and a reasonable time for resale must therefore be allowed. . . . In a falling market, buyers take longer to find, and they buy at reduced prices."⁶² There was no development of the competing policies concerning the timing of damages.⁶³

55. The Kuhns cited *Oliver v. Lawson*, 223 A.2d 355 (N.J. Super. Ct. App. Div. 1966), and *Thomas F. Ruane Dev. Corp. v. Cullere*, 339 A.2d 229 (N.J. Super. Ct. App. Div. 1975). Subsequent to the *Kuhn* decision, both cases were overruled, on other grounds, in *Kutzin v. Pirnie*, 591 A.2d 932 (1991) (overruling on issue of seller's right to retain deposit on default of buyer). These cases are discussed *infra* note 83 and accompanying text.

56. *Kuhn*, 585 A.2d at 971.

57. *Id.*

58. As discussed below, the attempt to distinguish the New Jersey cases following the general time of breach rule is not convincing. See *infra* note 83 and accompanying text.

59. *Kuhn*, 585 A.2d at 971; U.C.C. § 2-706; N.J. STAT. ANN. § 12A:2-706 (1961) (adopting UCC). See JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 7-6 (3d ed. 1988) (discussing U.C.C. § 2-706 and suggesting that a commercially reasonable resale may be found more easily under § 2-706 as opposed to resale under U.C.C. § 9-504(3) where secured creditor has greater power as compared to secured debtor).

60. U.L.T.A. § 2-504 cmt.

61. U.C.C. § 2-102, 1 U.L.A. 172 (1989).

62. *Kuhn*, 585 A.2d at 971.

63. See *supra* text accompanying notes 39-49 (discussing the policy choices).

Instead of precedent or policy, the court relied on the ULTA to support its decision. Unlike other cases that cite to ULTA,⁶⁴ section 2-504 is central to the court's determination in *Kuhn*. The court expressly adopted that provision, and its statement of its rule closely tracks the language of the statute.⁶⁵ Thus, resale must be reasonable as to method, manner, time, place, and terms; the defaulting buyer must have notice of the time after which resale will take place; controls are placed on public sales; and the seller will receive damages to the extent of the difference between the contract amount and the resale price plus consequential and incidental damages, less expenses avoided due to resale.

The ULTA therefore emerges as the fundamental source for the *Kuhn* court. Uniform laws have been used as sources of law in other situations, as well.⁶⁶ For example, federal courts have relied on the Uniform Commercial Code as a source of federal law, not only because the UCC has been adopted in all the states (obviously not the case with ULTA) but also because the UCC provides a modern and better approach to outdated rules.⁶⁷ Justice Traynor described the success of the UCC as a source of law for federal courts and for state courts in dealing with issues not directly covered by the Code:

Therein lies the key to the Code's success as a model for judicial lawmaking. It was the culmination of years of scholarly work. The scholars were beholden to no one and to no cause. Their project was sponsored by the American Law Institute and the Commissioners on Uniform State Laws, two groups that were likewise eminently unbecom- ing. Everyone concerned had notice of the project and full opportunity to be heard. . . . The final draft was of a piece and it had the look of having been out in the open. . . . Even a diehard judge, resistant to the

64. See *supra* text accompanying notes 16-22 (describing the use of ULTA as background or general support for a proposition of law that is otherwise well supported).

65. Compare *Kuhn*, 585 A.2d at 971 (beginning at paragraph starting with "[w]here a buyer of real estate wrongfully rejects") with U.L.T.A. § 2-504. The *Kuhn* court also indicated that if the seller chose to resell, the damage rule of U.L.T.A. § 2-505 would apply.

66. See Richard E. Coulson, *The National Conference of Commissioners on Uniform State Laws and the Control of Law-Making—A Historical Essay*, 16 OKLA. CITY U. L. REV. 295 (1991) (stating the history of the National Conference of the Commissioners on Uniform State Laws and the various acts); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

67. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 422-23 (1968) (discussing the use of the UCC by federal courts); see *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (noting that the UCC "embodies the foremost modern legal thought concerning commercial transactions").

use of statutes in the formulation of common-law rules, could hardly ignore so rich a source of law.⁶⁸

The ULTA similarly emerged from an extensive drafting process with representation from many constituencies including the bar, lenders, the real estate industry, and the public, and was subject to study and comment by various organizations.⁶⁹ Moreover, the approach of ULTA section 2-504 adopted by *Kuhn* is superior to the general rule that limits damages to value as of the date of breach. The ULTA's requirement of reasonableness in the manner of resale meets the mitigation of damages concerns of supporters of the general rule.⁷⁰ At the same time, the resale price rule recognizes the practical realities and timing problems of real estate sales, and is consistent with the moral, economic, and freedom of choice theories that underpin contract enforcement.⁷¹

V. COMPARISON OF REFORM BY LEGISLATION OR JUDICIAL DECISION

In *Kuhn*, the judicial adoption of a statute, which the New Jersey Legislature did not enact, provides an interesting context to reconsider the ongoing debate over the comparative advantages and disadvantages of law reform by legislatures as opposed to courts.⁷²

A. Benefits of Legislation

Proponents have advanced various reasons for law reform by the legislature rather than by the courts. Legislatures are better able to fully consider an issue, engage in fact finding through testimony and study, and

68. See Traynor, *supra* note 67, at 424.

69. See U.L.T.A. prefatory note, 13 U.L.A. at 469-75; Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992); Norman Geis, *Preface to Symposium on the Uniform Real Property Acts*, 27 WAKE FOREST L. REV. 325 (1992); see also Dunham, *supra* note 6.

70. See *supra* text accompanying note 41 (discussing mitigation).

71. See *supra* text accompanying notes 46-49.

72. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (describing the tension between judge made law and legislation).

then as a representative body determine public policy and priorities.⁷³ Courts, on the other hand, are limited in these endeavors.⁷⁴

Moreover, the legislature can fully consider the broad ramifications of a problem and craft a comprehensive solution to the larger issue.⁷⁵ A statute that sets clear and precise rules, addresses the full range of related issues, and indicates the outcomes in various scenarios can be relied on by people in planning their affairs.⁷⁶ In contrast, courts can only decide the particular question before them. They cannot paint in broad strokes, nor can they address related matters and provide an overall solution.⁷⁷ Because of the dichotomy between holding and dictum and the doctrine of *stare decisis*, a judicial opinion can only set the law for the particular factual situation before it.⁷⁸ It may be difficult for parties to predict the law's response when the facts are altered.

Additionally, there are concerns of retroactivity and reliance. Usually legislation applies only prospectively, so that people can plan future transactions based on the new legal environment.⁷⁹ However, when a court declares a new rule of law, it may rearrange the rights of parties under contracts executed under the prior rule, thereby causing economic reallocation and dissatisfaction with the judicial system.⁸⁰

73. See *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1051 (Colo. 1983) (Rovira, J., dissenting); Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A.J. 587, 590 (noting that courts need a new institution to provide data that litigants do not, providing information on social impact of competing rules).

74. See James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1579 (1991) (finding that "fairness" and "rightness" concerns were most cited in judicial opinions to support products liability and "efficiency" norms were not as important); Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VALPARAISO L. REV. 821, 827-28 (1994) (arguing that courts do not adequately develop public policy in their opinions).

75. See Roger J. Traynor, *Comment on the Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48-51 (Monrad G. Paulsen ed., 1959).

76. See U.L.T.A. prefatory note, 13 U.L.A. at 471 (suggesting that benefit of reduction of rules to statutory form). Often, however, statutes do not accomplish these broad goals. See Traynor, *supra* note 67, at 402.

77. See Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 249 (1970).

78. See Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12 (1968) ("A court does not select the materials with which it works. It is not self-starting.").

79. See *id.* at 15 (describing, but questioning, the reliance argument).

80. The drafters of the ULTA noted: "In spite of the fact that the inappropriateness of many existing rules to modern circumstances has been recognized for years, courts have been understandably hesitant to change by judicial decision rules on which parties will have relied in structuring the transaction before the court. Changing rules by statute, of course, does not

Finally, some commentators maintain that legislation is the only legitimate means to achieve law reform.⁸¹ The principles of separation of powers and representative democracy require that the elected legislature make important policy choices.

The *Kuhn* opinion does exhibit some of the limitations of judicial law reform as compared to legislation. First, like other judicial decisions, the *Kuhn* rule does not provide a comprehensive solution to the various possible scenarios where sellers seek remedies for breach of contract.⁸² *Kuhn* is ambiguous about whether its time of resale rule will apply in all types of markets. The court attempted to distinguish two earlier New Jersey decisions⁸³ that declared that damages should be based on the time of breach by stating that those cases did not deal with a declining market.⁸⁴ The intermediate appellate court in *Kuhn* may have felt constrained or hesitant to directly contradict another intermediate appellate decision.⁸⁵ Thus, the distinction *Kuhn* offered is meaningless, since a seller will only suffer loss of bargain damages if the market is declining.⁸⁶ So, rather than declaring a clear rule that all buyers and sellers (and their attorneys) can recognize and make bargains, the *Kuhn* court left ambiguity as to whether there may be a different rule when the market is not declining. In contrast,

have the drawback of defeating the expectation of parties to completed transactions, since the statute will operate prospectively only." U.L.T.A. prefatory note, 13 U.L.A. at 471.

81. See, e.g., Linde, *supra* note 74, at 855 ("Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.").

82. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 42-43 (Oceana 1951) (describing limitations on judicial opinions: "[t]he court can decide only the particular dispute which is before it").

83. *Thomas F. Ruane Dev. Corp. v. Cullere*, 339 A.2d 229 (N.J. Super. Ct. App. Div. 1975); *Oliver v. Lawson*, 223 A.2d 355 (N.J. Super. Ct. App. Div. 1966). Subsequent to the *Kuhn* decision, both cases were overruled on other grounds in *Kutzin v. Pirmie*, 591 A.2d 932 (N.J. 1991) (overruling on issue of seller's right to retain deposit on default of buyer).

84. *Kuhn*, 585 A.2d at 970-71.

85. Additionally, the facts of *Cullere*, actually indicate that the market was declining. 339 A.2d at 229. Moreover, the court awarded damages in the amount of the difference between the contract price of \$175,000 and the "market value of \$170,000, the price received . . . on resale less than a month" after breach. *Id.* at 232. This holding looks a great deal like basing damages on the time of resale.

Oliver, 223 A.2d at 357-58, discusses the timing of damages in what can most fairly be described as dictum, since the issue before the court was whether a seller may retain, as liquidated damages, buyer's deposit after buyer's default.

86. See *supra* text accompanying notes 28-29.

a statute, such as ULTA section 2-504, states a rule of resale damages without (misleading) qualification about rising, falling, or steady markets.

Similarly, it is unclear whether *Kuhn* is limited to the specific facts that the court noted. The court, as discussed above, described in detail the buyers' unsavory dealings with the mortgage lender, including misleading and false information and behavior by the buyers.⁸⁷ It is unclear whether the *Kuhn* court's rule is limited to situations of bad actors, or whether it extends to all defaulting buyers. What did the court mean when it referred to a buyer who "wrongfully"⁸⁸ fails to perform? A subsequent court could find that the *Kuhn* court meant that any breach of contract without a defense is "wrongful." Alternatively, a subsequent court could refuse to apply *Kuhn* on the theory that, given the facts of that case, a "wrongful" breach occurs only when the buyer has also failed to act in good faith and in accordance with fair dealing norms.⁸⁹

B. Judicial Lawmaking

Even though there may be advantages to legislative law reform as compared to judicial efforts, this does not mean, however, that the *Kuhn* court should not have reached the result that it did. Indeed, the decision illustrates some of the benefits of judicial lawmaking over the legislative process. Our common law reflects a long and beneficial tradition of courts evolving innovative solutions to new factual solutions based on emerging social needs and public policy.⁹⁰ This flexibility has enabled the courts to achieve just results in disputes among parties.⁹¹ While predictability and

87. See *supra* text accompanying notes 51-52.

88. *Kuhn*, 585 A.2d at 971.

89. U.L.T.A. § 2-504 also uses the term "wrongful" breach, but as a statute its meaning is not constrained by the specific wrongdoing of a particular buyer.

90. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 31-32 (Little Brown 1963) (1881) (maintaining that common law courts have always acted in a "legislative" manner, based on the courts' view of what is expedient for the community; courts have developed new rules and provided new life for old ones in this manner); Schaefer, *supra* note 78, at 23 ("If . . . [the judge] views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.").

91. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103-04 (paperback version 1921) (arguing that through centuries courts have made choices as to shape of common law based on "fitness to an end"); Linde, *supra* note 74, at 822 (describing arguments for courts to make tort policy, including "courts made the law what it is, and if

reliance arguably may suffer at times when a decision is overruled,⁹² justice sometimes requires that result.⁹³

Moreover, judicial solutions have the advantage of speed, conclusiveness, and focus.⁹⁴ Judicial decision making has been praised as rational, based on reason and not on polls, a majority vote of those affected, or expediency.⁹⁵ In fact, courts must act since legislatures often fail to enact comprehensive statutes due to institutional and political pressure favoring the status quo.⁹⁶ It is further argued that even when legislatures do act, courts must still make law since "statutes can never embrace within their sweep all human activity that law is called upon to order."⁹⁷

Kuhn is an example of good judicial lawmaking; the court refused to ignore realities of the situation and hide behind the existing general rule. Rather, it declared a new rule of law, after careful consideration and reasoning, based on emerging public policies exemplified in ULTA section 2-504.

Moreover, concerns about reliance, predictability, and retroactivity are not triggered by *Kuhn*.⁹⁸ It is hard to see how many, if any, people had acted in reliance on a rule calculating damages based on the value at the time of breach as opposed to resale price. People, especially consumer home buyers, usually do not enter contracts with the thought of breaching them. It is theoretically possible that there were a few buyers under executory contracts of sale in New Jersey at the time *Kuhn* was decided who had breached based on an attorney's advice that damages would be limited to value at the time of breach. The reliance of these few, if any, people, who after all were breaching a contractual obligation, was not reason enough

they do not remake it, no one else will. The axiom that courts make law has been American orthodoxy for a century.").

92. See BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 122 (1924) (disputing notion that overruling a common law precedent interferes with people's expectations; "The only rules there is ever any thought of changing are those that are invoked by injustice after the event to shelter and intrench itself. In the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen.").

93. See *United States v. Shaughnessy*, 234 F.2d 715, 719 (2d Cir. 1955) ("Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude [sic] were substituted for quest of justice.").

94. Rosenberg, *supra* note 73, at 587.

95. Charles Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772 (1965).

96. See Linde, *supra* note 74, at 835.

97. James M. Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 213 (1934), reprinted in 2 HARV. J. ON LEGIS. 7, 8 (1965). Judges must also interpret statutes where the meaning is unclear. *Id.*

98. See *supra* notes 78-79 and accompanying text.

for the *Kuhn* court to have refrained from its decision. Additionally, the reliance issue would become moot in a brief time, since most contracts of sale of land contemplate only a short time between contract and closing (perhaps six to ten weeks), and the contracts in existence at the time *Kuhn* was decided would soon expire. Bargains in contracts signed after *Kuhn* would be made in light of the new damages rule.⁹⁹

Finally, any ambiguity about the situations to which the *Kuhn* opinion extends¹⁰⁰ does not mean that the court should have deferred the decision to the legislature. Attorneys are accustomed to making predictions from prior cases, especially well written decisions like *Kuhn*, and judges know their role in the ongoing evolution of the common law.

Would it have been better for the system of justice if the New Jersey Legislature had adopted the Uniform Land Transactions Act and the court in *Kuhn* had simply applied section 2-504 to reach its conclusion? Yes. In the absence of adoption of the Act, would it have been better for the legal system if the *Kuhn* court had applied the general rule and limited the seller's damages to the value of the land at the time of the breach? Clearly, no.

VI. CONCLUSION

Although the Uniform Land Transactions Act was not adopted by any legislature, the Act nevertheless has been an important law reform instrument. A number of courts have relied on ULTA to declare new common law rules. In this unintended way, ULTA serves as a means of modernizing the substantive law of real estate transactions.

99. In *Cook v. Salishan Properties, Inc.*, 569 P.2d 1033 (Or. 1977), the court refused to rely on U.L.T.A. § 2-309 to extend the implied warranty of fitness placed on builder-vendors of new homes by prior judicial decision to the sale of developed but unimproved land. The court stated that "[i]f this problem requires attention insofar as any serious unmet need for the protection of purchasers or lessees of subdivided land is concerned, the legislature is capable of correcting the situation." *Id.* at 1036. Other courts, however, have extended the warranty of fitness to similar lots rather than deferring to the legislature. *See, e.g.*, *Buchanan v. Scottsdale Envtl. Constr. & Dev. Co.*, 787 P.2d 1081, 1083 (Az. Ct. App. 1989); *Rusch v. Lincoln-Devore Testing Lab., Inc.*, 698 P.2d 832, 834 (Colo. Ct. App. 1984).

100. *See supra* text accompanying notes 83-90.

The Uniform Simplification of Land Transfers Act and the Politics and Economics of Law Reform

Peter B. Maggs*

Late in 1995 I had the privilege of working with a group of Armenian jurists who were preparing a draft of a new Civil Code for their newly independent country. I remarked to them that the dynamics in the group session were very similar to what I had experienced two decades earlier. I was a co-reporter, first for the Uniform Land Transactions Act (ULTA),¹ and then for the Uniform Simplification of Land Transfers Act (USLTA).² One of them asked me about the fate of these acts. I admitted that these uniform acts had not achieved adoption and wished them greater success with the new Armenian Civil Code. The discussion then turned to why the uniform acts had problems and how they might save their draft code from the same fate. Here is what I told them.

Under the history of the Uniform Land Transactions Act there has been significant movement. ULTA started as a grand idea of a codification of all land law, then moved to a more limited goal of separate codification of major segments of land law to, finally, an even more limited goal of codification of discrete limited areas of land law. There have been three reasons for this change. The first reason for the change was purely technical. The rules of the National Council of Commissioners on Uniform State Laws required a reading of a proposed Uniform Act at a meeting of the Commissioners. The draft of the Uniform Land Transactions Act grew to the point where such a reading would have been impossible to achieve within the limits of the agenda of a single annual meeting of the Commissioners. The second change related to the drafting process. A draft of a full-fledged Uniform Land Transactions Act would have to be completed by a single deadline. Drafting of individual Uniform Acts on issues of land law could proceed on independent schedules. Given the many conflicting commitments of the Commissioners, the more flexible schedule made sense. The third reason had to do with politics and economics. The overall reform of land law would bring diffuse and hard-to-communicate benefits to the general public. However, changes proposed for each subarea of the law

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1. 13 U.L.A. 469 (1986).
2. 14 U.L.A. 249 (1990).

might upset a small, well-informed, and well-organized group. Thus, the broader the Uniform Act, the more opposition it might be expected to create.

An initial result of these considerations was the decision to split the Uniform Land Transactions Act into several parts, including a much abbreviated act still called the Uniform Land Transactions Act, and a number of other acts, including USLTA. The basic cause of the non-adoption of USLTA was a combination of economic and political factors. Economically, USLTA favored property buyers over construction enterprises and holders of dormant mineral claims. Politically, the group it favored, property buyers, was much more diffuse and unorganized than the groups it disfavored, construction and energy resource companies. A second political problem was the basic conservatism of land title lawyers, who tended to be resistant to change. These problems were compounded by the combining of the marketable title and construction lien provisions into a single act. This resulted in consolidating two very strong opposing forces.

Some years later there followed a decision to create three new acts, the Uniform Construction Lien Act,³ the Uniform Dormant Mineral Interests Act,⁴ and the Uniform Marketable Title Act,⁵ each covering part of the much broader subject area of USLTA. The drafting of separate acts offered important advantages over the USLTA projects in which I participated. It allowed the creation of three drafting committees each having more specialists in the relevant area of law, such as the highly technical area of mineral interests. It gave the possibility for a second try at accommodating conflicting stakeholders. It reduced the number of interest groups that each act would have to satisfy. The best example of the new approach is the Uniform Dormant Mineral Interests Act. This Act is based on careful analysis of existing laws on mineral interests. It incorporates an elaborate compromise instead of the all or nothing options offered by section 3-301(5) of USLTA. Under USLTA, if section 3-301(5) is omitted, mineral interests are cut off by marketable title; if section 3-301(5) is included, mineral interests survive in full. The compromise in the Uniform Dormant Mineral Interests Act is designed to appeal to an important interest group—owners actively engaged in the exploitation of their mineral interests. It allows them to move ahead without resolving all the problems of outstanding dormant mineral interests. Another example is the Uniform Construction Lien Act. It uses “trust funds” to try to reconcile the interests of owners, lenders, and construction contractors. Therefore, it seeks to overcome the

3. 7 U.L.A. 330 (Supp. 1995).

4. 7A U.L.A. 60 (Supp. 1995).

5. 13 U.L.A. 112 (Supp. 1995).

conflict of interests that prevented the widespread adoption of USLTA's lien provisions.

Just as decades of drafting of separate uniform acts (such as the Uniform Sales Act) preceded the enactment of the Uniform Commercial Code, it seems likely that it will take decades of work on uniform land legislation before the ultimate goal of a comprehensive uniform land act can be reached. The various acts that are the descendants of the original Uniform Land Transaction Act are a great beginning. Eventually the late Professor Allison Dunham's⁶ grand vision of a comprehensive land code will be realized.

6. Allison Dunham was the co-reporter for the Uniform Land Transactions Act and Chair of the Special Committee on the Act.

ULTA and USLTA in Coursebooks and Classrooms

Barbara Taylor Mattis*

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I. INTRODUCTION

Although neither the Uniform Land Transaction Act ("ULTA")¹ nor the Uniform Simplification of Land Transfers Act ("USLTA")² has been adopted by any state, both may have had an impact on the way we think about modernizing state real property law. The Acts have been cited as

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The author expresses thanks to her research assistant Jennifer Gomberg.

1. U.L.T.A. (1975).
2. U.S.L.T.A. (1976).

secondary authority in judicial opinions,³ studied and analyzed in law review articles,⁴ and referenced in reporter's notes in various Restate-

3. Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069 (1996).

4. See, e.g., Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293 (1993); Roger W. Andersen, *Conveyancing Reform: A Great Place to Start*, 25 REAL PROP. PROB. & TR. J. 333 (1990); Marion W. Benfield, Jr., *The Future Advances Lender: Status Under Present Illinois Law and Under ULTA and USOLTA*, 1981 S. ILL. U. L.J. 451; Curtis J. Berger, *ULSIA and the Protected Party: Evolution or Revolution?*, 24 CONN. L. REV. 971 (1992); Roger Bernhardt, *ULSIA's Remedies on Default—Worth the Effort?*, 24 CONN. L. REV. 1001 (1992); Alan J. Blocher, *Due-on-Sale in the Secondary Mortgage Market*, 31 CATH. U. L. REV. 49 (1981); Barbara J. Britzke, *Residential Real Estate Transactions: A Comparison of the Uniform Land Transactions Act and Maryland Law*, 13 U. BALT. L. REV. 43 (1983); Ronald B. Brown, *Article 1 of the Uniform Land Transactions Act: Is Inconsistency with the UCC an Unnecessary Obstacle?*, 1981 S. ILL. U. L.J. 585; Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980); Jon W. Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976); Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992); Robert D. Brussack, *Reform of American Conveyancing Formality*, 32 HASTINGS L.J. 561 (1981); K. Tate Chambers, Comment, *A Comparison Between Article 5 of the Uniform Simplification of Land Transfers Act and Present Illinois Mechanics' Lien Law*, 1981 S. ILL. U. L.J. 563; Caryn M. Chittenden, Comment, *From Caveat Emptor to Consumer Equity—The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 571 (1992); Michael Cox & Michael McCue, Comment, *The Nebraska Construction Lien Act: Which Way to Lien?*, 62 NEB. L. REV. 86 (1983); Meredith Craig, Symposium, *The Uniform Land Transactions Act and The Uniform Simplification of Land Transfers Act: Potential Impact on Florida Law*, 10 STETSON L. REV. 21 (1980); Allison Dunham, *Reflections of a Drafter: Allison Dunham*, 43 OHIO ST. L.J. 569 (1982); Allison Dunham, *Reflections of a Statutory Draftsman: The Land Transaction Acts*, 1981 S. ILL. U. L.J. 549; Allison Dunham, *Statutory Reformation of Land Obligations*, 55 S. CAL. L. REV. 1345 (1982); Sara E. Dysart, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 ST. MARY'S L.J. 113 (1980); William J. Fields, *Housing Defects: Homeowners' Remedies—A Time for Legislative Action*, 21 WASHBURN L.J. 72 (1981); Edwin M. Ginsburg, *The Doctrine of Merger with Respect to Real Estate Transactions: Taking the Bull by the Horns*, 16 NOVA L. REV. 1171 (1992); Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure Process—A Proposal to Reconcile the Procedures Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code*, 43 SW. L.J. 1061 (1990); William H. Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C. L. REV. 257 (1985); James B. Hughes, Jr., *Future Advance Mortgages: Preserving the Benefits and Burdens of the Bargain*, 29 WAKE FOREST L. REV. 1101 (1994); Gerald Korngold, *Construction Loan Advances and the Subordinated Purchase Money Mortgagee: An Appraisal, a Suggested Approach, and the ULTA Perspective*, 50 FORDHAM L. REV. 313 (1981); Robert Kratovil, *Mortgage Law Today*,

ments.⁵ This article focuses on the use of these proposed Acts in law school classes and coursebooks.

Over a decade ago it was noted:

13 J. MARSHALL L. REV. 251 (1980); Andrew Lance, *Balancing Private and Public Initiatives in the Mortgage-Backed Security Market*, 18 REAL PROP. PROB. & TR. J. 426 (1983); Linda M. Libertucci, Comment, *Builder's Liability to New and Subsequent Purchasers*, 20 SW. U. L. REV. 219 (1991); Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 S. ILL. U. L.J. 491; B. Taylor Mattis, *The Uniform Simplification of Land Transfers Act: Article 2—Conveyancing and Recording*, 1981 S. ILL. U. L.J. 511; John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61 (1992); John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(B)*, 27 WAKE FOREST L. REV. 455 (1992); Sue Ortman, *USLTA: Marketable Record Title Act—A New Title Theory and Its Effect on Texas Law*, 12 ST. MARY'S L.J. 462 (1980); James W. Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP. PROB. & TR. J. 696 (1978); James M. Pedowitz, *USLTA—ULTA Perspective*, 57 TITLE NEWS 23 (1978); Patricia E. Rant, *ULTA and Non-Judicial Mortgage Foreclosure in Texas*, 12 ST. MARY'S L.J. 1104 (1981); Maureen M. Rayborn, Comment, *Uniform Land Transactions Act: Pennsylvania Property Law and Sellers' Remedies for Breach of Contract for Sale of Real Estate*, 55 TEMPLE L.Q. 577 (1982); Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261 (1991); David P. Schwartz, Note, *BFP v. Resolution Trust Corporation: Critiquing the Supreme Court's Method of Determining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures*, 31 CAL. W. L. REV. 345 (1995); Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists under One Roof*, 1993 WIS. L. REV. 13 (1993); Paul Teich, *A Second Call for Abolition of the Rule of Merger by Deed*, 71 U. DET. MERCY L. REV. 543 (1994); Craig D. Tindall, *The Obligatory Advance Rule in the Construction Lending Context*, 12-JAN CONSTRUCTION LAW 13 (1992); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U. L. REV. 359 (1978); Note, *Real Property—Warranties in the Uniform Land Transactions Act of 1975—Progression or Retrogression for Pennsylvania?*, 49 TEMPLE L.Q. 162 (1975).

An interesting spin-off from an idea presented in one of these law review articles illustrates the value of comparison of a uniform act and present state law. An article dealing with the formalities of conveyances under USLTA made the point that under the Act, a writing is required for an effective transfer of an interest in real estate. No such requirement was found in the Illinois statutes. Mattis, *supra*, at 514-16. A 45 page law review article thoroughly analyzed the rather startling situation that no Illinois law prohibits the oral transfer of land or makes such transfers unenforceable between the parties. Patrick M. McFadden, *Oral Transfers of Land in Illinois*, 1988 U. ILL. L. REV. 667.

5. RESTATEMENT OF PROPERTY (SERVITUDES) § 2.7 reporter's note (Tentative Draft No. 1, 1989); RESTATEMENT OF PROPERTY (MORTGAGES) §§ 2.4, 3.1 reporters' notes (Tentative Draft No. 1, 1991); RESTATEMENT OF PROPERTY (MORTGAGES) § 5.5 (Preliminary Draft No. 5, 1995).

The Uniform Commercial Code suffered the same early rejection that now threatens the proposed uniform property laws. A large part of the solution for the rejection of the UCC was the widespread teaching of the UCC in law schools. The same solution is now being used to counter the rejection of ULTA and USOLTA. Those Acts have already been the topics of panel discussions by the drafters and other experts at meetings of property law teachers held during the annual meetings of the Association of American Law Schools. Many property teachers, including the author, regularly assign sections of ULTA and USOLTA for comparison and analysis in the classroom. The better property casebooks and hornbooks also utilize these Acts. As a result of this exposure, future generations of lawyers will be familiar with ULTA and USOLTA and will readily perceive their simplicity.⁶

The uses of ULTA and USLTA in coursebooks and classrooms vary from brief presentations of the history of the development of the Acts⁷ to informational references to, or quotations of, various provisions.⁸ Sometimes, the use is aimed at supporting a "better view" espoused by an author. Sometimes, the purpose is to provoke thought on how the provision, if adopted, would affect judicial decisions previously discussed.⁹ Sometimes,

6. Mattis, *supra* note 4, at 512.

7. See JON W. BRUCE & JAMES W. ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* 456-57 (3d ed. 1994) (noting that the Acts have had an indirect impact on the development of the law although neither has been adopted); JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* 978-79, 1356 (6th ed. 1990) (suggesting that the Acts be used as supplemental material); CHARLES DONAHUE, JR., ET AL., *PROPERTY* 572 (3d ed. 1993); PAUL GOLDSTEIN, *REAL PROPERTY* 155 (1984) (discussing the costs of complexity and noting that "states have not rushed to adopt" USLTA, among the objects of which are to reduce the costs of title examination and the risks of title defects).

8. CURTIS J. BERGER & QUINTIN JOHNSTONE, *LAND TRANSFER AND FINANCE* 580 (4th ed. 1993) (quoting U.L.T.A. § 2-302); EDWARD H. RABIN & ROBERTA R. KWALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 799-801 (3d ed. 1992) (quoting U.L.T.A. § 2-201); *id.* at 911 (summarizing marketable record title act provisions of U.S.L.T.A. part 3, art. 3).

9. See, e.g., BERGER & JOHNSTONE, *supra* note 8, at 437 (asking whether the ULTA approach treating installment land contracts as mortgages is the best solution); RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 868 (1988) (discussing foreclosure procedures under ULTA); *id.* at 915-17 (discussing provisions on warranties of quality); CRIBBET, *supra* note 7, at 1015-16, 1020, 1031-32, 1075-76, 1207 n.5, 1279-80 (referring to U.L.T.A. § 2-309 as strongest position so far suggested for implied warranty of quality); *id.* at 1281, 1356; DONAHUE, *supra* note 7, at 574; SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 1081, 1099, 1171, 1180 (2d ed. 1993).

the Acts are used as richer and creative tools to spur students' thinking. Examples of the latter treatment are explored in this article.

II. STATUTE OF FRAUDS

At some point during the first-year property law course, the statute of frauds comes up. In teaching it, and the jurisprudence that goes with first-year courses generally, I try to lead students to consider whether certain judge-made doctrines are usurpations of legislative prerogatives.

A typical statute of frauds may provide that "[n]o action shall be brought . . . upon any contract for the sale of lands . . . unless the agreement . . . or some note or memorandum thereof shall be in writing . . .,"¹⁰ or "[e]very contract . . . for the sale of any lands . . . shall be void unless the contract, or some note or memorandum thereof . . . is in writing . . ."¹¹ Judges apply doctrines of their own creation, such as part performance or estoppel, to "take" certain situations "out of" the statute of frauds. Do not courts contradict the legislature when they create and utilize doctrines to enforce contracts for the sale of land absent a writing? In most states, these doctrines are not mentioned in the statute, which pretty clearly speaks in terms of "no action" and "every contract." Here, section 2-201 of the ULTA makes the point for me. It provides for what, if adopted, would be a legislative pronouncement of the doctrines.

(a) [E]xcept as provided in subsection (b), a contract to convey real estate is not enforceable by judicial proceeding unless there is a writing

....

(b) A contract not evidenced by a writing . . . is enforceable if: .

...

(2) the buyer has taken possession of the real estate and has paid all or a part of the contract price;

....

(4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to the extent that an unreasonable result can be avoided only by enforcing the contract¹²

Students, seeing a legislative enactment of the doctrines that takes the situation "out of" the general rule of the statute, can be persuaded that the

10. FLA. STAT. § 725.01 (1995).

11. MINN. STAT. § 513.05 (1988).

12. U.L.T.A. § 2-201.

exceptions are properly within the legislative, rather than judicial, domain. Professor Goldstein uses section 2-201 of ULTA to make a similar point when he asks, just before quoting the section, whether there are “better devices than the present statutes of frauds ‘to avoid perjury on the one hand and fraud on the other’?”¹³

In their coursebook, *Real Estate Transfer, Finance and Development*, Professors Nelson and Whitman use ULTA’s statute of frauds provision for a different purpose.¹⁴ They make the point that part performance usually requires at least two of three acts: payment of part (or all) of the purchase price; going into possession of the realty; and making substantial improvements. The commissioner’s comment is then quoted: “Mere taking possession of the real estate is not sufficient to satisfy the statute, but possession with part payment or possession with the change of position described in subsection (b)(4) is sufficient.”¹⁵ Nelson and Whitman pose the query whether the commissioner’s comment is consistent with the text of section 2-201(b)(4). This exercise presents an excellent opportunity for students to consider the weight of the drafter’s commentary in interpreting uniform statutes. All the while, students may think they are merely studying real property law. Giving students a hefty dose of jurisprudence or statutory interpretation in the context of substantive courses can go a long way in training future lawyers to be professionally competent.

III. OTHER FORMALITIES OF A CONVEYANCE

Section 2-201 of USLTA dispenses with the requirements of an acknowledgment, seal, and witnesses. Having presented a problem in which these formalities were omitted¹⁶ and relevant cases, Professors Rabin and Kwall quote section 2-201 of USLTA and refer to the official comments following it. They then ask whether dispensing with these formalities takes care of the issues in the problem posed. They discuss Brussack’s arguments supporting the USLTA position and his suggestion that USLTA would prevent litigation from arising when these ceremonies are improperly

13. PAUL GOLDSTEIN, *REAL ESTATE TRANSACTIONS* 70 (Rev. 2d ed. 1988); GOLDSTEIN, *supra* note 7, at 194-95.

14. GRANT S. NELSON & DALE A. WHITMAN, *CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* 38 (4th ed. 1992). These authors cite to ULTA on 18 pages of the coursebook, and to USLTA on 2 pages, many pages of which cite the uniform acts numerous times. These citations occur in the first 276 pages of the coursebook in the part dealing with real estate transfer.

15. *Id.* (quoting U.L.T.A. § 2-201 cmt. 3)

16. RABIN & KWALL, *supra* note 8, at 773-74.

performed.¹⁷ The student is then asked to consider whether, if all formalities are abolished, other than the requirement of a written instrument signed by the grantor, issues similar to those in the principal problem would be more likely to arise.¹⁸

IV. RISK OF LOSS

Careful reading of statutes means learning to discern what a statute does not provide, as well as what it does. Playing off the Uniform Vendor and Purchaser Risk Act ("UVPRA"),¹⁹ in comparison with ULTA's provision dealing with destruction of premises,²⁰ can work well to teach that lesson. The former, adopted in about a dozen states, specifies the purchaser's remedy when all or a material part of improvements is destroyed after the execution of a contract of sale but before title or possession has been transferred.²¹ It also specifies the purchaser's lack of remedy when all or any part of improvements is destroyed after title or possession has been transferred.²² I ask students for UVPRA's solution when, before title or possession is transferred, a casualty diminishes the value of the improvements only to a nonmaterial extent. Frequently, I get a non-existent UVPRA solution. Contrasting section 2-406(b)(2) of the ULTA, which provides for this eventuality, with the UVPRA, which does not, should clinch the lesson.

Professor Goldstein contrasts the UVPRA's and ULTA's treatments of risk of loss for a different purpose. The former provides that, when the loss occurring before title or possession is transferred is material, the vendor cannot enforce the contract and the purchaser is entitled to recover her down payment.²³ The latter gives the purchaser, under the same circumstances, the option of cancelling the contract and recovering any down payment or enforcing the contract and accepting the property with an abatement in purchase price.²⁴ Goldstein calls for students to think critically about ULTA by asking "[c]an you think of situations in which it would be plainly

17. *Id.* at 784 (discussing Brussack, *supra* note 4, at 561). Similarly, the author of this article took the position that the formality of acknowledgment creates more problems than it cures. See Mattis, *supra* note 4, at 528.

18. RABIN & KWALL, *supra* note 8, at 784.

19. U.V.P.R.A. (1935).

20. U.L.T.A. § 2-406(b).

21. U.V.P.R.A. § 1(a).

22. *Id.* § 1(b).

23. *Id.* § 1(a).

24. U.L.T.A. § 2-406(b)(1).

unfair to require the seller to give up her property in return for a sharply reduced price?"²⁵

Professors Rabin and Kwall also compare ULTA with the UVPRA, noting that ULTA is more comprehensive. The authors quote section 2-406 of ULTA and ask several questions about it, the most provocative of which is whether the lack of specificity of UVPRA might make it a more attractive alternative than the ULTA provision.²⁶

Professor Chused quotes section 2-406 of ULTA to illustrate the trend toward rejecting the traditional rule placing the risk of loss on the buyer after the execution of a contract to purchase land.²⁷ He then focuses on the buyer's option of price modification or obtaining the benefit of seller's insurance coverage under ULTA. Chused suggests that ULTA's allocation of insurance proceeds to the buyer, when the value of the premises has not been affected by the casualty, may be inappropriate. This suggestion, together with background facts Chused has uncovered²⁸ about his chosen lead case,²⁹ makes the students' critical examination of the issue irresistible.

V. REMEDIES

A. *Specific Performance*

The old notion of the specific performance remedy was that mutuality required the remedy to be available to sellers because it was available to buyers. To illustrate a setting in which the old rule has become difficult to sustain, Professor Chused uses a case in which a buyer breached a contract to buy a unit in a high-rise condominium project. Indeed, the court denied

25. GOLDSTEIN, *supra* note 13, at 64; GOLDSTEIN, *supra* note 7, at 236. The issue is also discussed in the hornbook by ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 743-44 (2d ed. 1993).

26. RABIN & KWALL, *supra* note 8, at 1040-41.

27. CHUSED, *supra* note 9, at 847-48.

28. Chused frequently enriches and brings reality to his material by digging up background information concerning the lives and histories of the characters in the cases. For example, through a telephone conversation with the buyers of a condominium unit, Chused found out why they really breached their contract. *Id.* at 822 (discussing *Centex Homes Corp. v. Boag*, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974)). Chused also discovered why the seller of the condominium unit sought specific performance. *Id.* Through the transcript of the trial testimony of the sellers' agent in *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582 (Mo. 1963), Chused discovered the value to the buyer of a building that was destroyed by fire between execution of the contract and closing. CHUSED, *supra* note 9, at 850.

29. CHUSED, *supra* note 9, at 834 (discussing *Skelly Oil Co.*, 365 S.W.2d at 582).

the remedy to the seller.³⁰ In his notes following the case, Chused quotes sections 2-506 and 2-511 of ULTA, which treat the seller's action for the price differently from the buyer's right to obtain title. The student, when asked how the case would be decided under ULTA, is led to consider the ramifications of abandoning the mutuality of remedy doctrine.³¹

Professor Goldstein notes that "section 2-506(b) of the ULTA would give seller specific performance only if she is unable after reasonable effort to resell . . . at a reasonable price or the circumstances reasonably indicate the effort would be unavailing."³² Section 2-504 provides that if seller resells the land reasonably and in good faith, her damages are measured from the time of resale rather than from the time of breach.³³ Professor Goldstein wants the student to consider whether the two sections, taken together, will produce results different from those produced by seeking specific performance and damages under existing law.³⁴

B. *Seller's Obligation to Provide Marketable Title and Buyer's Remedies for Breach of that Obligation*

In their assignment about failure of marketable title, Professors Rabin and Kwall present a problem and cases with which to solve the problem. At the conclusion of the cases, the authors set forth the substance of the relevant ULTA sections on seller's obligation to provide marketable title at the time of conveyance.³⁵ The student is then given an opportunity to contrast ULTA's provisions with leading case law and apply both to solve the problem.

When a seller is unable to convey because of a title defect of which the seller had no knowledge at the time of entering into the contract, should the buyer only be entitled to restitution of any amounts paid on the contract price and incidental damages; or should the buyer be entitled to loss of bargain damages, regardless of seller's good faith? Rabin and Kwall use section 2-510(b) of the ULTA to illustrate the former position,³⁶ derived from the eighteenth century English case of *Flureau v. Thornhill*.³⁷ In

30. *Centex Homes Corp.*, 320 A.2d at 194.

31. CHUSED, *supra* note 9, at 828-29.

32. GOLDSTEIN, *supra* note 7, at 226.

33. U.L.T.A. § 2-504.

34. GOLDSTEIN, *supra* note 7, at 226.

35. RABIN & KWALL, *supra* note 8, at 910-11 (citing U.L.T.A. §§ 2-304, -305, -510).

36. *Id.* at 883, 911.

37. 96 Eng. Rep. 635 (C.P. 1776); *see also* GOLDSTEIN, *supra* note 7, at 226 (discussing ULTA position limiting buyer to restitution where seller is unable to convey because of title

contrast, the *California Civil Code* provides for loss of bargain damages in the case of a breaching seller (as well as of a breaching buyer), regardless of seller's knowledge of a title defect when seller executed the contract.³⁸ The authors ask the student to consider which rule is preferable.³⁹

Discussions about remedies can lead students to think about the practical ramifications to plaintiffs of civil wrongs, the proper role of defendants' culpability, and where theoretical consistency fits into the picture.

VI. RECORDING

Property law teachers sometimes use recording acts to emphasize the nature of acquisition of title by adverse possession. Recording acts usually provide that "instruments" or "conveyances" must be recorded in order for the taker of an interest in real property to maintain first-in-time priority against subsequent takers. If A's interest is acquired by possession adverse to O, it is not derived from an instrument or conveyance; rather it is an original title. Hence, it is not affected by the recording act. If O later conveys to B, even though A is no longer in possession, B is not protected. Rejecting that result, USLTA provides that "a purchaser for value who has recorded his conveyance [B] also acquires the real estate free of *any subsisting adverse claim*, [e.g., that of the adverse possessor A] . . . unless the adverse claim is . . . inconsistent with the record title to the extent the use or occupancy would be revealed by reasonable inspection or inquiry."⁴⁰ This would mean that the adverse possessor not wishing to remain in possession would have to bring a quiet title action to place her title on record to avoid the possibility of a recording subsequent purchaser's prevailing over her. Professors Rabin and Kwall use this context to stimulate the discussion of whether the USLTA rule should be generally adopted. In the process, students revisit the basic difference between derivative title, acquired by an instrument or conveyance, and original title.

Sailing on a different tack in the sea of recording, Professor Browder and coauthors explore the mechanics of recording.⁴¹ They quote from the prefatory note of USLTA, indicating that USLTA gives "[c]onsiderable

defect unknown to seller at time of entering into contract).

38. See CAL. CIV. CODE §§ 3306, 3307 (Deering 1996).

39. RABIN & KWALL, *supra* note 8, at 883.

40. U.S.L.T.A. § 3-202(a)(2) (emphasis added).

41. OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 846-47 (5th ed. 1989).

attention . . . to the mechanics of the recording system and to the division of functions among the various participants in the process."⁴²

The recording officer is given discretion in the development of systems for modernization and automation of recording operations and is given the responsibility for moving toward a system of at least limited geographic indexing. At the same time, in anticipation of the eventual computerization of the recording system, the recording office is relieved of all responsibility for making conclusions about the legal effects of documents submitted for recording. The office of state recorder is created to allow for coordination and sharing of experience in the modernization of recording practices.⁴³

After stating that, unfortunately, state legislatures have shown little interest in USLTA or its concepts,⁴⁴ the authors imply a possible reason—at least for the lack of interest in modernizing the mechanics of the recording system. In many areas of the nation, there is little search activity in the average recorder's office. Title plants, owned by abstract or title insurance companies, have taken over most searches. They arrange their records on a tract-index basis, obviating chain-of-title problems that so plague first-year law students trying to understand grantor-grantee searches. The importance of expensive reform of public records is diminished by computerization and tract indexing in the private sector.

VII. MARKETABLE RECORD TITLE ACTS

One topic usually introduced in first-year property law courses is the various marketable record title acts adopted in some eighteen states. Informing students about the attempts to limit title searches to a reasonable period of time can be a daunting task. Some coursebooks attempt to do this by presenting a case or two discussing one or more particular provisions of a particular state statute. At least three coursebooks make efficient use of USLTA as a teaching device by setting forth Article 3, Part 3, "Marketable Record Title," in its entirety, or virtually in its entirety.⁴⁵ In the clearest

42. *Id.* (quoting U.S.L.T.A. prefatory note).

43. U.S.L.T.A. prefatory note.

44. The authors note that § 119.07 of the *Florida Statutes* is an exception. It provides for protection of computer software developed by public agencies to facilitate access to records. BROWDER, *supra* note 41, at 847.

45. *Id.* at 895-99; BRUCE & ELY, *supra* note 7, at 581-85; DONAHUE, *supra* note 7, at 622-24. The Donahue coursebook also sets forth USLTA curative provisions. *Id.* at 620-21.

form of statutory exposition, this part of USLTA gives students a model marketable title act, which is derived from legislation originally adopted in Michigan,⁴⁶ and subsequently in several other states. The Donahue coursebook follows quotation of the relevant provisions of USLTA with four problems exploring whether the Act would render a title marketable and whether a searcher could safely rely on a search back to "the root of title."⁴⁷ The coursebook by Bruce and Ely asks questions to test the students' understanding of the Act and to explore possible constitutional problems.⁴⁸

A fourth coursebook sets forth the prefatory note to USLTA's marketable record title provisions, describing what the Act attempts to accomplish.⁴⁹ In notes following the quotation, the authors then discuss whether a thirty or forty-year time period is preferable, who benefits and what interests are protected under the Act, and exclusions from the Act.⁵⁰

VIII. EXCEPTIONS AND RESERVATIONS

Distinctions between exceptions and reservations in deeds have long been arcane. Cases dealing with whether an exception or reservation can be made in favor of a third-party are grist for the mill of study about the creation of servitudes. In Rabin and Kwall's first-year property law coursebook, the authors present a problem containing such an issue,⁵¹ followed by relevant cases.⁵² The clear solution of section 2-204(b) of USLTA is quoted: "An exception or reservation of an interest in real estate may be made in favor of a person not a party to the conveyance or who has no other interest in the real estate."⁵³ The authors follow with the question, provocative to a first-year law student: "If a court faced with the

46. See U.S.L.T.A. § 3 pt. 3, cmt.

47. DONAHUE, *supra* note 7, at 624-25.

48. BRUCE & ELY, *supra* note 7, at 585. This coursebook also contains excerpts from *Report, Residential Real Estate Transactions: The Lawyer's Proper Role — Services — Compensation*, 14 REAL PROP. PROB. & TR. J. 581, 595-98 (1979), referring to USLTA's marketable title act as deserving "serious consideration by the organized bar and state legislatures." BRUCE & ELY, *supra* note 7, at 577, 579.

49. BERGER & JOHNSTONE, *supra* note 8, at 947-48.

50. *Id.* at 950-53.

51. RABIN & KWALL, *supra* note 8, at 362.

52. *Willard v. First Church of Christ, Scientist, Pacifica*, 498 P.2d 987 (Cal. 1972) (holding that a "reservation" can be made in favor of third-party, but an "exception" cannot vest part of grantor's interest in third-party); *Estate of Thomson v. Wade*, 509 N.E.2d 309 (N.Y. 1987) (finding no reservation in favor of third-party).

53. RABIN & KWALL, *supra* note 8, at 378 (quoting U.S.L.T.A. § 2-204(b)).

Principal Problem wanted to follow the rule of section 2-204(b), could it draw any support from this section even if the legislature has not adopted this section?"⁵⁴ Indeed, courts have drawn support from the ULTA and USLTA sections, even though the Acts remain unadopted by legislatures.⁵⁵

IX. RECASTING LAND FINANCING DEVICES

Professor Goldstein uses ULTA's goal in its secured transactions sections to kindle students' thinking about whether the immense variety of land finance devices could be unified and made more coherent. Goldstein leads students through the history of mortgage law from the dead pledge through the equity of redemption and foreclosure developments and discusses the deed of trust, the installment land contract, the lease with option to buy, and the equitable mortgage. Doctrinal distinctions, such as title, intermediate, and lien theory of mortgages, with little practical consequence, further complicate the picture. At the conclusion of this section in his coursebook, Goldstein's discussion of ULTA's Article 3, "Secured Transactions," is refreshing. Article 3 is aimed at consolidating the various forms of land finance into a single, integrated system. A simple and unified structure would "go forward with greater certainty and less transaction costs," than the present variety of land finance forms, often used to obscure their intent to create security interests in real estate.⁵⁶ The fact that the ULTA has not been adopted by any state should not obscure the drafters' vision that the proposed law could provide a better way.⁵⁷

54. *Id.* A similar question is posed with regard to the ULTA provision that all covenants of title, whether present or future, run in favor of remote grantees. U.L.T.A. § 2-313(a). Can this provision be used for the benefit of a remote grantee even though no legislature has adopted it?

55. Korngold, *supra* note 3, at 1071-73.

56. GOLDSTEIN, *supra* note 7, at 419 (quoting introductory comment to Article 3 of ULTA).

57. Goldstein uses other sections of ULTA to describe, clarify, summarize, or compare various approaches. *See, e.g.*, GOLDSTEIN, *supra* note 13, at 96 (citing U.L.T.A. § 2-301—rejection of time is of the essence enforcement); *id.* at 128-29 (citing U.L.T.A. §§ 2-504, -506—innovations in vendors' remedies); *id.* at 178-79 (citing U.L.T.A. § 1-309—abolition of doctrine of merger; U.L.T.A. § 2-402—possibilities that preclosing undertakings may govern post-closing rights; U.L.T.A. § 2-306—implication of title warranties in deed; U.L.T.A. §§ 2-308, -309—warranties of quality); *id.* at 397 (citing U.L.T.A. § 3-208—prevention of lender double-dipping by exercise of due-on-sale acceleration and collection of prepayment penalty from protected party); *id.* at 405 (citing U.L.T.A. § 1-313—exception to holder in due course status favoring protected parties executing second or more junior liens); *see also* GOLDSTEIN, *supra* note 7, at 280-81 (discussing abolition of merger doctrine and implication of title

Professor Chused compares the holding of a leading Indiana case⁵⁸ with ULTA's definition of "security interest," requiring the use of foreclosure in installment land contracts and all settings in which land is used as collateral for credit.⁵⁹

X. CONCLUSION

This author is not so optimistic as she was in 1981⁶⁰ about teaching ULTA and USLTA in law schools as a method of countering their rejection by state legislatures. The use of the uniform acts in law classrooms and coursebooks has achieved admirable goals tangential to the purpose of the Uniform Commissioners in undertaking their task.

The use of ULTA and USLTA in classrooms and coursebooks has provided a context for thinking about the proper roles of the legislative and judicial branches; for preventing or curing caseblindness (perhaps better termed "statute blindness") as students learn to read statutes; for interpreting statutes, including considering the weight of drafters' commentary; for thinking about the efficacy of proposed solutions to solve perceived problems without creating worse ones; and of practical or economic ramifications of civil wrongs and remedies. If the uniform acts, though unadopted, facilitate these and other opportunities for learning, good for them and the coursebook authors and classroom teachers who use them.

warranties in deeds).

58. *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974) (holding a conditional land sales contract to be in the nature of a secured transaction, the provisions of which are subject to all proper and just remedies at law and in equity).

59. CHUSED, *supra* note 9, at 854, 863-64. Chused analyzes the ULTA's definition of "security interest," recognizing that legal arrangements established under one legal construct, like a lease, may actually serve the purposes of a quite different legal construct, like a mortgage. *Id.* at 870. "But [the ULTA] is very indefinite about the circumstances in which the language used in the documents will be 'pierced.'" *Id.*

60. *See Mattis*, *supra* note 4, at 512; *see also supra* text accompanying note 6.

The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act

Patrick A. Randolph, Jr.*

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I. INTRODUCTION

The Uniform Land Security Interest Act (ULSIA)¹ is an idea whose time has come. Political and market conditions now indicate that we will have universal private foreclosure laws across the nation in the relatively near future. There will be increasing pressure to have these laws “relatively” uniform. In fact, ULSIA is likely to be the “least uniform” approach to responding to the pressure for reform. If ULSIA is not seriously pursued by states with existing foreclosure practices that require judicial sale, it is quite possible that the Congress will make the change for them. Federally preemptive legislation likely will deprive the states of the discretion to tailor a private foreclosure bill that effectively balances political and economic interests in the given state or region. ULSIA, although written as a Uniform Act, need not be adopted precisely in uniform language. It should be the preferred alternative.

II. THE RATIONALE FOR UNIFORM LENDING PRACTICES

The basic argument for a uniform approach to foreclosures and other secured lender’s remedies has existed for a long time. It can be stated in two words: “Money talks.” It is the same argument that led every American state to adopt the Uniform Commercial Code, including Article 9, the Personal Property Financing Act. One wonders what is so special about real estate finance that the argument, to date, has not prevailed.²

1. U.L.S.I.A., 7A U.L.A. 220 (Supp. 1995). ULSIA is similar to provisions appearing as Article 3 of the Uniform Land Transactions Act, but in 1985 NCCUSL elected to establish a separate land security act and made certain amendments to the original Article 3 in formulating ULSIA. While the Uniform Land Transaction Act was initially intended to be a single, uniform statute embracing the whole of land law, by 1975 it was clear that a series of discrete statutes would better serve the states’ interests. In 1978 the National Conference created a Joint Editorial Board on Real Property Acts to provide coordinated oversight. Uniform regulation of real property acts was driven by the need to modernize and simplify the laws applicable to secured real property transactions consistent with the growth of the secondary market for real estate mortgages, to encourage increased primary lending, to benefit borrowers in our increasingly mobile society by providing uniformity, and to reduce cost to all elements of society upon foreclosure. U.L.S.I.A. prefatory note, 7A U.L.A. at 208-09; see also James M. Pedowitz, *Mortgage Foreclosure Under ULSIA (Uniform Land Security Interest Act)*, 27 WAKE FOREST L. REV. 495 (1992).

2. Although ULSIA has largely been enacted as the land security law of British Columbia, Canada, it has not been enacted in recognizable form in any American jurisdiction. It has influenced revisions of real estate laws in a number of states, particularly California and Virginia. It is now under active consideration by law reform groups in a number of states, including Connecticut, Minnesota, Illinois, Michigan, and Kansas.

The argument is one of competitive advantage for available capital. Money for real estate projects comes from national and international sources unrelated to the location of the project. Lenders who supply this money are more likely to lend it if they can readily predict the performance of their investment. The “babble” of real estate foreclosure provisions in American law is a significant impediment to making these predictions.³ One would assume, therefore, that fewer lenders would be willing to commit large sums to real estate lending, making the supply lower and thereby raising the cost.⁴

One would further assume that parties interested in attracting capital into the real estate marketplace and, necessarily, away from other investment choices, would work to provide the most uniform and predictable system of legal controls possible. There are other good arguments for uniformity: overall fairness, predictability of title, avoidance of misunderstandings, and application of collected wisdom. But the argument that this author expects will ultimately carry the day is the basic argument of economic efficiency.

Why then, have we not seen uniformity develop to date? One answer is, of course, that we have. There has been creeping uniformity in real estate lending practices over the past twenty-five years, ever since the private secondary market for housing loans got a “kick start” with the establishment of the Federal Home Loan Mortgage Corporation (“FHLMC”) and the reorganization of the Federal National Mortgage Association (“FNMA”) in the early 1970s.

But complete uniformity, similar to the UCC model, has not arrived. The explanation as to why development in this area is slower than in the areas regulated by the UCC lies in a whole variety of social institutions affected by real estate and not affected by other investment choices. Although there may be some argument as to the future, there is general agreement that in the past, land meant something special in our legal system. Beginning in 1066, the ownership of land meant holding of status in society; land ownership, *seizin*, was the essence of nobility. Since that era, and to

3. For a summary of the widely varying real estate foreclosure laws state-by-state, see SIDNEY A. KEYLES, *FORECLOSURE LAW & RELATED REMEDIES, A STATE-BY-STATE DIGEST* (1995).

4. As most commercial real estate lenders are also insurance companies who do business in various states, they are understandably reluctant to publicly criticize borrower-protective foreclosure laws in these states. They have voiced their concerns privately to the author, however, and have admitted that in some cases they either devalue a proposed loan or avoid making it at all because of the foreclosure laws that would govern a default. Some lenders have policies (again, unstated) of refusing to lend in given states for the same reasons.

some degree because of it, our legal system has treated land ownership and land transactions with special rules. Land today is more than a commodity; it is a home, a place; it is raw potential. It is privacy. To some, it is freedom.

As our country spread across the continental landscape, land laws in individual states developed to reflect the special political values that the citizens of those states held.⁵ Because they were pioneers, who chose to leave their homes to strike out to new territories, these citizens often had values that differed markedly from the values held by those who remained at home. Needless to say, the special economic needs of a developing frontier created the need for other unique laws, and as individual states developed, the interaction of these specialized laws, together with accidents of time and place, created other legal institutions and approaches that differed not only from the eastern states, but from those of other states in the same region as well.⁶

These specialized state laws spawned social conditions that made them resistant to out of state pressures for change. Specialized institutions grew to deal with transactions in land according to the special needs of individual state legal systems. Today, these institutions, including title insurers, local lenders, appraisers, and brokers, regard with suspicion and distrust proposals for sweeping reforms that would do away with the many specialized rules. Although, job security is an issue, one need not ascribe such crass motivations to those who oppose conversion to a uniform system. Even those who are most secure are nevertheless comfortable with what they have and suspicious of the unknown. Unlike UCC-style transactions, when people think of land, they do not just think of commerce. They have deeper, richer values at stake, and they are much less likely to accept change for the sake of commerce alone.

Nevertheless, change has come, and change will continue. The demands of commerce simply are too strong. In fact, perhaps the special nature of real estate in our society also is disappearing. Both as a cause and effect of the securitization movement described below, land increasingly is becoming regarded as a commodity.

5. See Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 299-307 (1993).

6. See Patrick B. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit*, 71 IOWA L. REV. 1, 6, 12-14 (1985).

III. UNIFORM LENDING INSTRUMENTS: THE FIRST PHASE

Faced with the reality that vested interests in every state had strong reasons to "protect their turf" and resist changes in their individual jurisdiction's real estate practices, and lacking, at the time, the convincing economic evidence of an established investor's pool, the "true believers" who started the private secondary market worked instead to bring about uniformity of contract.

The story has been told many times,⁷ and the punch line is something that we all know quite well. Almost ninety percent of the home mortgages written in the United States today are written on the uniform mortgage instruments promulgated jointly by FNMA and FHLMC. These instruments spurred the development of a vast international financial web that delivers money from, say, an Arab oil sheikdom to the buyers of a two bedroom cottage in Peoria, all because uniform instruments make it possible for financial intermediaries to assure the sheikdom of a reasonably predictable (and therefore secure) investment performance. Because the sheikdom is in the market, the Peoria buyers gets money when they want it at terms they can afford. They lose their right to bargain over various contract terms they probably do not understand anyway and likely would not have bargained over if they could.⁸

Why did we not see a development of uniform lending practices in the commercial lending market parallel to those in the housing market during the same time frame? Initially, it could be said that the commercial loans were more difficult to standardize. However, the difference probably was due to the involvement of the federal government in housing loans. As part of the New Deal, the federal government became deeply involved in housing finance, with the objective of maintaining stability in housing opportunity,

7. See, e.g., Raymond A. Jensen, *Mortgage Standardization: History of Interaction of Economics, Consumerism and Governmental Pressure*, 7 REAL PROP. PROB. & TR. J. 397 (1972); James E. Murray & Henry L. Judy, *The Federal National Mortgage Association and Federal Home Loan Mortgage Corporation Uniform Multifamily Mortgage Instruments*, 33 BUS. LAW. 2302 (1978); Patrick A. Randolph, Jr., *The FNMA/FHLMC Uniform Home Improvement Loan Instruments: A Commentary and Critique*, 16 Real Prop. Prob. & Tr. J. 546 (1981); Robin P. Malloy, *The Secondary Mortgage Market: A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991 (1986).

8. See generally, Arthur W. Liebold, Jr., *Uniform Conventional Mortgage Documents: FHLMC Style*, 7 REAL PROP. PROB. & TR. J. 435, 436 (1972); James E. Murray, *The Developing National Mortgage Market: Some Reflections and Projections*, 7 REAL PROP. PROB. & TR. J. 441, 443-45 (1972); Diana G. Browne, *The Private Mortgage Insurance Industry, the Thrift Industry and the Secondary Mortgage Market: Their Interrelationships*, 12 AKRON L. REV. 631, 644 (1979).

which it saw as a key to a healthy and optimistic consumer class. First, the Federal Housing Administration (“FHA”), and later the Veteran’s Administration (“VA”), loan programs became dominant factors in housing finance. In fact, the federal government even established the “thrift” industry as a vehicle to carry out these housing subsidy programs. Later, of course, the thrifts and the banks moved to conventional lending as well. It is likely that private lenders, the banks and thrifts that processed insured loans with relatively standard provisions, tended to follow the same basic contract format in preparing documents for conventional housing loans. They therefore were receptive to the development of uniform lending instruments for use in the secondary market.

The government has not been involved with commercial loans in the same way it has been involved with housing. Consequently, different lenders, primarily major commercial banks and insurance companies, made most of the commercial real estate loans. Each individual loan represented a significant economic risk to the lender, and therefore, the lender worked hard to limit risk and adopted lending practices with which it felt most comfortable. There was no particular need for uniformity, and there were no established formats to use as guides. Consequently, the commercial real estate market was not as readily adaptable to the requirements of the “money talks” argument as the housing market.

Many commercial lenders in the late 70s and early 80s argued that commercial real estate lenders were too idiosyncratic to ever be bottled in standard formats. There really was nothing about the variety of laws among the various states that prevented commercial lenders from doing the same thing that housing lenders did. They just did not see it in their individual interests to do so.

Another important obstacle to the development of the commercial secondary market was the lack of data about the performance of commercial loans. Major lenders regarded this information as proprietary, as it gave them the ability to make risk/return decisions in a competitive market that others, lacking the same data, might not be able to make. In the housing arena, of course, the dominance of FHA and VA lending, and the readily available data as to the performance of those loans, made it possible for market makers to predict performance more readily.

Then came the late 80s, and the cozy, closeted world of commercial lending came tumbling down. Whether the root cause was deregulation, economic “cowboys,” tax reform, or just endemic carelessness finally showing through, all lenders in all segments were devastated. The good projects were taken down by the bad ones. No one survived unscathed. In

this bleak landscape, there was room for new ideas to bloom. And we saw the development of the "securitized" commercial mortgage.

One important source of product in the securitized lending market was the very economic devastation that gave it room to grow. The Resolution Trust Company ("RTC") came to market with major securitized lending packages as a strategy to liquidate its far flung inheritance of commercial loans. The huge RTC offerings both defined and legitimized the securitized mortgage market by providing enough economic activity to permit trading institutions to develop. Once they developed, these institutions were able to approach other institutions who had survived the 80s, but only barely, and had a surfeit of loans, many of them under-performing, that they needed to "cash out" in order to move ahead whether or not they intended to remain in real estate lending.

Due to the special nature of the circumstances which gave the securitized lending movement its greatest push, the mortgage loans that traded in these transactions have not been written on uniform documents. But now that market institutions have been formed, the push for predictable performance has taken over. The "securitized" mortgage permits far less negotiation. There probably is less uniformity at present than there will be in the future because market factors have yet to work completely. But securitized loans are more and more meeting uniform standards. Perhaps securitized loans would not have been able to compete effectively with the comfortable relationships and well-established and varied practices of traditional commercial lenders. But many of those lenders are out of the business, and others are just returning. There has been adequate time for growth of an independent securitized commercial mortgage market, even without the significant presence of the federal government that sheltered the securitized home mortgage market in its infancy.

IV. THE ARGUMENT FOR PRIVATE FORECLOSURE REMEDIES

The arguments in favor of private, non-judicial foreclosure are many and have been made before.⁹ All four arguments can be summarized as follows. First, the cost of private foreclosure is about one-tenth the cost of

9. See, e.g., Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP. PROB. & TR. J. 289 (1995) (attacking on what the author views as ill conceived and antiquated state mortgage laws); Jo Anne Bradner, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 EMORY L.J. 971, 993-1003 (1987).

judicial foreclosure.¹⁰ We should evaluate this argument carefully from the perspective of practical reality in the marketplace. Most real estate defaults are “worked out.” Either the borrower transfers the property “in lieu of foreclosure” in exchange for avoidance of deficiency, or the borrower actually avoids loss of the property entirely by restructuring the debt. This is true of both commercial and residential financing. In the “bad times” of the 1980s, however, actual foreclosure of troubled real estate investments became necessary in far greater numbers than had been the case for some time. Lenders started to take a serious look at the additional cost such foreclosures added to the bottom line. Judicial foreclosures require far more of an attorney’s time and, of course, generally take longer. Both of these tend to run up costs.

Lenders complain that these increased costs of foreclosure are ultimately passed on to borrowers.¹¹ The author candidly doubts that this is really the case.¹² The number of foreclosures is really a very small percentage of real estate loans in place, and surely many other factors control the pricing of these loans to a far greater degree than the tiny increment of costs associated with foreclosures. Further, in many jurisdictions, costs of foreclosure are recoverable as part of the debt. Finally, the preforeclosure sale cost is probably only a relatively small factor in the overall cost of dealing with defaulted property. Cost of management of the “real estate owned” department and costs of resale, which would be the same either in a judicial foreclosure or nonjudicial foreclosure state, probably are far greater than foreclosure costs themselves.

Although lenders may not be able to pass the costs of judicial foreclosures directly to borrowers, there is little doubt that they exist, and the costs are borne by more than the lenders. All of us, through our support of the court system, are called upon to supply the judges, bailiffs, clerks, sheriffs, and courtrooms involved in the judicial foreclosure practice. Again, these costs may be small when compared to court costs overall, but they

10. See Geis, *supra* note 9, at 300 and authorities cited.

11. Kahn & Yavas, Office of Real Estate Research, The Economic Role of Foreclosure (ORER Paper No. 90) (Nov. 1991) (unpublished manuscript, on file with University of Illinois at Urbana-Champaign).

12. For an economic analysis consistent with the author's views on this issue, see Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1993). The author does not necessarily endorse Professor Schill's conclusion that strong mortgagor protections serve the salutary function of driving risk averse lenders to acquire mortgage insurance — thus more properly distributing the risk of a borrower's default among all participants in the mortgage market. The author believes that borrowers should be held responsible for the payment of their contracted debts.

clearly exist. And they may in fact be paying for a system that is unneeded and leads to greater economic waste of other kinds.

Second, judicial foreclosure takes more time than private foreclosure, leading to waste.¹³ In most jurisdictions, judicial foreclosure will take four months at a minimum, and often as long as eight months to a year.¹⁴ Delays arise primarily due to calendaring difficulties at the courthouse, not because the issues at stake require elaborate discovery and motion practice.

The "waste" concern here represents more than economic waste to the lender itself, although that is certainly part of the lender's concern. The community at large has a significant concern about the economic viability of each plot of real estate, as each plot represents an important piece of the overall capital available to the economic society in the community. If buildings deteriorate, if landscaping disappears, if fires occur, if "crack houses" arise, the community at large is directly affected. The longer a foreclosure property languishes in the hands of a defaulted borrower, the more likely it becomes that these kinds of things will happen.

Lenders have the option, of course, of seizing property through receivership to prevent this kind of waste. But receiverships add additional costs that lenders might not be willing to incur. And the concern here is not simply about lenders. It is more difficult for society at large to protect itself from deterioration, even though it may pay the ultimate price.

We should remember that, typically, a borrower faced with foreclosure has already exhausted many avenues that might lead to the cure of the problem. The borrower is virtually at the end of the rope. Shortening the remaining length of the rope is unlikely to make a dramatic difference to the borrower, but it may make a significant difference both to the lender and others with an interest in the property. If the borrower truly had a significant chance at rehabilitation, it is very likely the lender would not be foreclosing. Lenders do not want foreclosure property, they want healthy borrowers.

Third, where there is a significant borrower's interest, the borrower can force a judicial proceeding. Persons supporting judicial foreclosure frequently make the argument that borrowers who are concerned with uncertainty as to the appropriateness of foreclosure, or other parties who wish to challenge priorities, are deprived of a significant opportunity to do so because of the rapid and summary nature of the foreclosure process.

13. This has been a particularly popular argument with parties supporting preemptive federal foreclosure legislation. See, e.g., Bradner, *supra* note 9, at 995-1000.

14. See Geis, *supra* note 9, at 321-23.

Lenders respond that such borrowers have the right to enjoin the foreclosure and raise the issues in a lawsuit.

In fact, the process of enjoining a private foreclosure can be a very expensive process in many jurisdictions.¹⁵ Sometimes a borrower is required to post a rather extensive bond. As the borrower may also be faced with attorney's fees, and as the borrower likely would not be in the situation in the first place if the borrower had extensive assets, an injunction likely would be impossible as a practical matter even in cases where it would be appropriate.

The author believes that states moving toward private foreclosure may want to rethink the standards for injunction of such foreclosures in order to provide a more realistic right to contest foreclosures when there is just cause. But there is another "brake" on inappropriate foreclosures, the right of a borrower to sue a lender for wrongful foreclosure or even to contest the validity of the title created by the foreclosure sale.

States considering enactment of private foreclosure statutes might give consideration to these adjustments to the current state of affairs relating to injunctions and other remedies for wrongful foreclosures. Although justice would be served by providing reasonable remedies here, the number of cases in which a wrongful foreclosure is likely to arise is a small percentage of overall foreclosures, most of which are uncontested as a practical matter. Consequently, concerns in this area should not justify avoiding the private foreclosure remedy altogether.

Fourth, private foreclosure can be tailored to avoid inappropriate deficiency claims. We should differentiate between a rightful foreclosure, where title is sold in satisfaction of a debt claim, and the deficiency claim that follows such a foreclosure. The real concern of many who support judicial foreclosure is the concern that borrowers may be exposed to an inappropriate deficiency judgment by a rapid, inadequately noticed or managed sale, without appropriate judicial supervision.¹⁶ When such persons resist moving to private foreclosure formats entirely as a response to concern about deficiency judgments, their aim is askew.

Most lenders who foreclose on real estate have little or no expectation of having meaningful deficiency claims, and, in states where the law so requires, cheerfully forfeit deficiency rights in exchange for the opportunity

15. The procedures are summarized and criticized in GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 535-38 (3d ed. 1994).

16. See Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosures Sales*, 53 S. CAL. L. REV. 843 (1980).

to have a fast, final, and inexpensive private foreclosure.¹⁷ If lenders believe that the borrower has the capacity to respond to a deficiency claim, they always have the option to foreclose judicially. No state requires private foreclosure as the sole remedy available to lenders. Judicial foreclosure is always available.¹⁸

Certainly, any state moving to a private foreclosure format would have the option, consistent with ULSIA or any other statutory format, to restrict deficiency judgments by requiring judicial review of any proposed judgment to ascertain that the property sold at private foreclosure for a "fair value" or to even prohibit deficiency judgments.¹⁹ ULSIA, for instance, prohibits deficiency claims against homeowners who are foreclosed privately,²⁰ as do many private foreclosure statutes around the country.

Although lenders have lobbied in some states to protect their deficiency rights in private foreclosure situations,²¹ the fact is that the trade of unlimited deficiencies for private foreclosure is a political exchange that most lenders would find quite palatable.²²

In short, looking at the overall pattern of mortgage loan failures and the practices of mortgage lenders nationwide, the cost of judicial foreclosure is

17. See Grant S. Nelson, *Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151 (1982); John Mixon, *Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism That Increases Personal Tragedy, Impedes Regional, Economic Recovery, and Means Little to Lenders*, 22 TEX. TECH. L. REV. 1 (1991). Examples of statutory schemes that bar deficiency judgments following private foreclosure include: ALASKA STAT. § 34.20.100 (1990); ARIZ. REV. STAT. ANN. § 33-814(E) (1990); CAL. CIV. P. CODE § 580(d) (Deering 1972 & Supp. 1996); WASH. REV. CODE ANN. §§ 61.24.010, .040 (West 1990 & Supp. 1996).

18. It should be noted that a few states, like ULSIA, bar deficiency judgments absolutely in the case of purchase money mortgages against owner occupied residential property, see, e.g., ARIZ. REV. STAT. ANN. § 33-729(A) (1990); N.C. GEN. STAT. § 45.21.38 (1991); OR. REV. STAT. 88.070 (1995); S.D. CODIFIED LAWS ANN. §§ 44-8-20 to -25 (1983 & Supp. 1995), or in cases of purchase money mortgages of any kind, CAL. CIV. P. CODE § 580(b).

19. For an exhaustive summary of the many devices used to control deficiency judgments, most of which do or could apply to private or judicial foreclosures equally, see NELSON & WHITMAN, *supra* note 15, at 579-609.

20. U.L.S.I.A. § 511(b); see John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455 (1992).

21. In a recent attempt to adopt ULSIA in Connecticut, for example, an important stumbling block was the last minute opposition by mortgage lenders who were unwilling to accept even the limited restrictions on "protected party" deficiency judgments provided for under the Act.

22. Such a "trade" has already been made in a number of states. See, e.g., ALASKA STAT. 34.20.100 (1990); ARIZ. REV. STAT. ANN. § 33-814(E) (1990); CAL. CIV. P. CODE § 580(d); WASH. REV. CODE ANN. §§ 61.24.010, .040.

far out of proportion to the number of borrowers truly protected from unfair or overreaching foreclosure practices. The interests of these borrowers could be protected adequately by “fine tuning” private foreclosure practices to permit practical injunctions, suits for wrongful foreclosure, and meaningful protection against unfair deficiency claims.²³ With these protections in place, there are few policy grounds justifying the continued cost and delay to the system of judicial foreclosure.

V. FEDERAL INTERVENTION IN THE INTERESTS OF UNIFORMITY

A. *Early Intervention*

Federal involvement with private finance dates back to Alexander Hamilton. There has always been a strong government interest in the well being of the lending climate in the nation. In recent history, however, the most dramatic federal intervention in private money markets occurred in the 1930s with the “New Deal” activity.²⁴ As described above, the primary involvement of the federal government in private real estate markets at this time was in the housing finance area. Institutions created at that time have continued to influence the character and development of the private real estate economy ever since.

B. *1980s Preemption Activity*

As the secondary market became more of a success in delivering housing money across the nation, it became apparent that certain state laws were not only a drag on the system, they became actual bars to its functioning. The answer was simple. The federal government had already committed hugely to the development of a successful housing finance market, so it was easy to make the argument to Congress that it should preempt inconvenient local laws that were major impediments. After all, the “American Dream” was at stake.

The “breakthrough” legislation was certainly the Depositor Institutions Deregulation and Monetary Control Act of 1980 (“DIDIMAC”),²⁵ which

23. NELSON & WHITMAN, *supra* note 15, at 579-609.

24. For a summary of the twentieth century history of federal intervention, see Alexander, *supra* 5, at 310-23. Alexander contends that there was virtually no direct federal involvement in real estate lending until the Twentieth Century. There has, of course, always been a profound federal presence in banking regulation, from which most real estate finance sources emanate. *Id.*

25. Pub. L. No. 96-221, § 501, 94 Stat. 132, 161-62 (codified at 12 U.S.C. § 1735f-7a).

preempted dramatically all state usury laws on institutional first lien residential mortgage loans and made significant changes to other usury restrictions as well.²⁶

DIDIMAC “opened the floodgates” in many jurisdictions for secondary market money to flow in. It was enacted at an historically high point in interest rates, caused at least in part by the Arab Oil Embargo of the 70s. Money simply was not available within the limits set by many state statutory and constitutional lending limits. But money was certainly available to be loaned at higher rates, vast stores of it resting in bank accounts controlled by foreign beneficiaries of the oil crisis, among others, who were looking for new investment opportunities.

Although local lenders might have been able to “stunt,” to develop special devices to get around the usury laws to keep money flowing, or to partially rollback the usury laws to a level they could work with, they lacked the funds to service the need. And the money straining for release from secondary market sources could not be loaned through “stunts.” There had to be a uniform, predictable flow to make the market work.

The argument worked with Congress, which in one fell swoop did away with a century of carefully worked out state debtor protections in the housing market. Of course, Congress was told that this really was the will of the state legislatures, but they lacked the political will to cast what might be seen as an “anti-consumer” vote. But they welcomed Congressional intervention. Although states had the power to “re-preempt” DIDIMAC’s limitations, few, if any, did.²⁷

Flushed with that success, the national and international managers of the American housing finance markets then turned to another set of nagging problems, the infamous state regulation of the “due on sale” clause. Lenders, of course, hated the “anti-clause” state statutes and cases because they cost lenders valuable opportunities to upgrade their mortgage return when property turned over. But the variety of enforcement practices concerning this clause was a problem in and of itself. Loan “packagers”

26. It has been argued that DIDIMAC was in turn influenced by Congress’ earlier intrusion into the real estate finance market in the enactment of the Truth in Lending Act and the Real Estate Settlement Procedures Act. Alexander, *supra* note 5, at 313-15. Although DIDIMAC, in fact, uses for convenience some definitions adopted in those acts, DIDIMAC represents an economic control designed to assist lenders, not borrowers, and as such represents a distinct new move in federal legislative policy concerning real estate.

27. For a summary of the impact of federal preemption of mortgage laws, with an identification of the remaining “loopholes,” see Patrick A. Randolph, *Home Finance in the Shadow World: Unsolved Missouri Usury Problems Affecting Adjustable Rate and Wraparound Loans*, 51 U. MO. KAN. CITY L. REV. 41 (1982).

were unable to combine loans from “pro-clause” states and “anti-clause” states. Again, in one deft stroke, Congress rewrote the law of a score of states to clear out the impediment. As part of the omnibus Garn-St. Germaine Act,²⁸ Congress again established uniform federal lending laws to serve secondary market needs.²⁹

A less noticed, but potentially equally important aspect of the Garn-St. Germaine Act was the Alternative Mortgage Instruments Parity Act,³⁰ which created the possibility of uniform federal regulation of “economic factors” of adjustable rate loans and virtually every other variety of housing loan other than long term fixed rate loans.

The crisis of the late 1980s and the infamous “bail out” of the lending industry caused Congress to be a bit more circumspect about assuming what was good for lenders was good for the country. Therefore, other efforts to get helpful new legislation have not been as successful. But in another quarter, tracks were being laid for an additional Congressional intrusion on state laws: preemptive federal foreclosure statutes.

C. *Federal Intervention in Mortgage Foreclosure*

The arguments favoring national uniformity in private housing finance were not lost on federal policy makers involved in more direct federal lending activities. The same impediments to efficient collection processes that many state foreclosure statutes imposed upon private lenders were also a thorn in the side of the United States Department of Housing and Urban Development (“HUD”) and the Small Business Administration (“SBA”), and other federal agencies when they attempted to foreclose on direct mortgage loans made to carry out discrete federal policies, such as low income housing.

These lenders commonly argued to local courts that inconvenient local foreclosure protections got in the way of “uniform” federal lending programs, and therefore should be brushed aside under the Supremacy Clause of the United States Constitution. They enjoyed some limited degree of success with this tactic. But in 1979, in *United States v. Kimbell Foods, Inc.*,³¹ the United States Supreme Court concluded that a government agency, without express Congressional authority, could not preempt local

28. 12 U.S.C. § 1701j-3 (1994).

29. NELSON & WHITMAN, *supra* note 15, at 311-26.

30. 12 U.S.C. § 3801-3806 (1994).

31. 440 U.S. 715 (1979). For a thorough discussion of *Kimbell Foods* and its somewhat unpredictable progeny, see Alexander, *supra* note 5.

laws just because they made government lending activity more expensive. The government would have to demonstrate in the particular program a clear need for national uniformity and demonstrate how this need outweighed state concerns.

Perhaps it was due to this decision that HUD was able to push through Congress the following year a preemptive federal foreclosure statute for multi-family low income housing projects.³² This statute, of course, threatened to be a template for other uniform federal foreclosure provisions, but in and of itself, did not implicate too many adverse local interests. Subsidized low income housing projects were the unique province of the federal government, which fed them from many directions, and closely regulated their behavior. Although private interests were involved, these interests had clearly entered the "federal kitchen" and ought to "stand the heat." Further, it took the federal government many years to develop regulations to carry out the statute, and many simply forgot that it existed.

After HUD got around to issuing its regulations and conducting a few foreclosures under them, and after a few test cases were resolved "blessing" the federal procedure, federal policy makers decided to reach further.

In 1994, HUD again shepherded through Congress a preemptive federal foreclosure bill, this time for all HUD single family mortgages.³³ Again, the bill passed the Congress with barely a word from the real estate industry. Most, perhaps, assumed that HUD was focussing on that relatively small group of direct loan mortgages that represent a healthy government subsidy to low and moderate income owners. The federal interest in such loans is strong. The borrowers are not part of the conventional finance marketplace, and represent a small number of people who likely otherwise would not own a home at all. This may have explained the lack of interest in the national real estate community.

What few realized (outside of the select federal regulators who drafted the bill), however, was that the 1994 Act potentially could reach a wide range of conventional housing borrowers. One group of loans covered by the 1994 Act includes FHA guaranteed loans. Although FHA does not guarantee the high proportion of the American home loans that it once did, it necessarily is a significant factor in the first loan market. Further, it is a major guarantor in home improvement loans. The borrowers in these cases were standard "Joe and Jill America." They could afford to buy their own home and, although they likely benefitted from the presence of FHA

32. Multifamily Mortgage Foreclosure Act of 1981, Pub. L. No. 97-35, 95 Stat. 422 (current version at 12 U.S.C. §§ 3701-3717 (1994)).

33. Single Family Mortgage Foreclosure Act of 1994, 12 U.S.C. §§ 3751-3768 (1994).

insurance, they would not have viewed themselves as “federally subsidized.” More to the point, they represented a substantial segment of the home-owning public; a segment that did not really expect that it would be treated any differently from other citizens of the state if and when they should have difficulty paying their mortgage.

But, in fact, in most states, the treatment would be radically different. The 1994 Act provided for preemption of all state foreclosure requirements, beginning with the requirement for judicial foreclosure, but hardly ending there. All statutory redemption³⁴ was preempted, as well as many important notice and cure provisions, which are particularly common in consumer statutes addressed to junior lien home improvement loans. Under the 1994 Act’s provisions, Joe and Jill could be out of their house, without recourse, and with only minimal notice, within less than a month of the day they missed their loan payment.

Of course, federal regulators point out that the foreclosure statute is only the “endgame,” that HUD mortgage loan procedures in fact involve a heavy dose of counseling, notice, and various other devices. In the typical case, HUD would foreclose only as a last resort. Unfortunately, anyone who has ever been swept up in a blind bureaucratic net can testify that there is scant guarantee that one will be treated as “the typical case.” Consider, for example, the experience that many individuals have had dealing with federally guaranteed student loan programs, not to mention the IRS. If Joe and Jill are not ready to believe that the government is simply “here to help,” they may be very unhappy to know that the government will not be kept under the same controls that other mortgage lenders face if and when there is a mortgage default.

Buoyed by their 1994 success, in late 1995 the Department of Justice attempted to engraft another statute to the federal budget bill that would, in essence, create a single federally preemptive foreclosure law for all federal agency mortgages. This bill retroactively preempted all anti-deficiency legislation, provided limited notice to junior lenders, and as before, a token notice period (by the standards of most state laws) prior to foreclosure. This

34. Statutory redemption laws appear in about twenty states, and generally extend the period of foreclosure following judicial foreclosure. The primary purposes were to give farmers a “third chance” to salvage their property from redemption and to prevent “cheap foreclosure sales” that created unfairly large deficiency judgments. The statutes arose from the depressions of the late nineteenth century, largely in agricultural states. Modernly, many such statutes have been amended to apply to residential and farm property only, and can be avoided by waiver of deficiency (i.e., California) or use of a private foreclosure device that, by terms of other statutes, does not result in a deficiency.

time, however, someone was watching, and at present, the new federal foreclosure law is not in a "live bill." It has, however, passed the House of Representatives and is likely to be the subject of Senate hearings this spring. Numerous organizations, including the American College of Real Estate Lawyers and the American Bar Association Section on Real Property, Probate and Trust Law, have requested the opportunity for review and comment.

VI. EVALUATING FEDERAL PREEMPTION AS THE PROCESS OF UNIFORMITY

There are only a few in the home finance industry who would criticize the federal preemption of home mortgage usury limits under DIDIMAC. Clearly, usury laws at the time were an obstacle to the efficient flow of funds across state lines and the operation of the secondary market. Also, it was clear that state legislatures would have difficulty expunging these laws entirely. Even if they had altered the laws, they likely would have enacted piecemeal modifications that would have created similar obstacles to the marketplace.

As discussed above, there is increasing pressure for a movement toward private foreclosure procedures. If we accept the notion that the national real estate market would benefit from a non-judicial foreclosure, is it also appropriate to conclude that the federal preemption of mortgage foreclosure laws is also the best way to get to a desired result? Certainly existing and proposed federal agency foreclosure laws would provide a template for a uniform preemptive foreclosure statute. In fact, if the most recent proposed legislation passes, and federal agency foreclosures are conducted pursuant to its requirements, then state institutions dealing with real property might be forced to realign their procedures to deal with the federal model, making it easier for them to convert the balance of their practices to that model as well.

The author concludes that federally preemptive foreclosure laws are not the answer. There are better ways to reach the goal of a uniform private power of sale procedure that will satisfy the needs of the developing secondary market and remain consistent with the diversity of views that states may have regarding the appropriate balance of mortgage lenders and borrowers. The authors even conclude that the proposal for federal agency foreclosures should not be enacted, in part because of the disruptive impact such an enactment would have on title and other real property issues in many states.

Although the United States is no longer an expanding frontier, with dramatic differences between developed and undeveloped states, it is still a country with a vast geography that compels distinct differences in values. Diversity of state laws is not something that ought to be abandoned easily. The differences in state laws continue to reflect not only value differences but differences in the way in which business is conducted. Massive change to a uniform foreclosure approach will create dissonances in systems which have grown up around established foreclosure methodologies. It is impossible to anticipate, and therefore to resolve, all of the conflicts that might arise. What is the relationship, for instance, of foreclosure practices to homestead laws? What is the relationship to marital property laws? Or to probate laws and practices?

Perhaps even more significant from a policy standpoint, one might ask why the federal government should be in the business of forcing all borrowers and lenders in all states into a common mold. If there is a likelihood that gross differences in foreclosure practices can be resolved, so that private foreclosure becomes the norm, and the time and cost of foreclosure is substantially the same throughout the land, does it matter whether all states march in lockstep?

If the Kansas Legislature believes that there should be judicial review of a foreclosure sale before a deficiency judgment is ordered, this may be because Kansas farmers, from hard experience, understand that farm foreclosures are subject to manipulation due to massive market fluctuations, and unsophisticated farm borrowers can easily be exposed to ruinous judgments by inappropriate foreclosure practices even when the borrowers have equity in their farms. These same concerns may not be true in Rhode Island or New Jersey.

If Illinois requires foreclosure notice to junior interest holders at the "last known address," rather than placing the burden on the interest holders to maintain an accurate notice address of record, perhaps this reflects conditions about the public records or the availability of address information in Illinois that would not be true of, say, Missouri.

If Alaska believes that foreclosure title should be conclusively presumed final, notwithstanding the danger of a failure of notice or a defect in the sale process, but Arizona does not agree, yet is willing to make a certificate executed by the trustee presumptive evidence of good title, why should either state have to alter its perception of fundamental fairness? Even if we were to establish a "lockstep" approach to foreclosure, is the best forum in which to design this uniform foreclosure process the United States Congress? Or the United States Department of Justice?

The authors propose that a device exists by which differing state values can be accommodated and even preserved, while still achieving the uniformity necessary to meet the needs of the secondary mortgage market in home loans and commercial loans. The device is the Uniform Land Securities Interest Act, a product of the National Commissioners on Uniform State Laws.

VII. THE UNIFORM LAND SECURITY INTEREST ACT

A. *Benefits of the Uniform State Law Approach*

ULSIA provides for a rapid, clean foreclosure has been available for state consideration for over a decade. No state has adopted it fully, but it has influenced the thinking of a number of states as they have considered and revised their mortgage laws since ULSIA was adopted. Basically modeled after the UCC, but with significant changes to accommodate the special nature of real estate transactions, ULSIA provides for a quick, efficient foreclosure process, with clear notice provisions and good title. It protects homeowners from deficiencies judgments resulting from private foreclosures, but provides the option to lenders to proceed with judicial foreclosure where appropriate.

The process by which ULSIA was developed insured that the competing values of various states were taken into account. The National Commissioners include representatives from every state, frequently persons who themselves are or have been legislators and who are familiar with the political values of their local legislatures. Uniform laws are designed to be fair and balanced, but also to pass in all state legislatures.

Persons familiar with the process of uniform law adoption know that there is a "little secret" that makes it possible to achieve widespread adoption of many of the Commissioner's products: the secret is that states do not really have to adopt the exact uniform language. Although, of course, uniformity is the goal, the Commissioners recognize, as they must, that each state has its idiosyncracies that will prevent it from accepting every "uniform" pronouncement completely. In fact, the Commissioners build some choice of nonuniform exceptions into their laws. ULSIA, for instance, expressly permits states to include agricultural landowners within the class of "protected parties" entitled to special notice and anti-deficiency protection. It also provides for some flexibility with respect to particular notice requirements. Further, in the process of deliberation by state legislatures, advocates for uniform laws often propose further nonuniform amendments to achieve substantial uniformity goals while still accommodat-

ing special state concerns. Persons familiar with the UCC are quite aware that there is wide variation among the states as to many provisions of the UCC, even though we do enjoy substantial uniformity.

The process of adoption for uniform state laws takes into account the richness and diversity of our legal system and tries to adapt that system to the needs of the modern international marketplace without destroying completely the fundamental fairness that each state legislature can best provide to its own constituents.

Further, as each state legislature processes a proposed uniform law, it is in the best position to make an evaluation as to how that law will impact on other elements of the state's legal framework. Thus, instead of a preemptive federal blunderbuss shredding the overall system while achieving a limited uniform result, the uniform state laws approach permits an evaluative process that achieves necessary compromises both in the uniform law and parallel adjustments in other state laws and practices to insure a workable framework.

B. *If ULSIA Has Not Succeeded Yet, Why Will It?*

ULSIA has succeeded in achieving significant movement in state foreclosure laws in a number of jurisdictions, and even in Canada. A number of state law reform groups have recommended ULSIA for adoption, and it is under active consideration in several state legislatures today. But no state has enacted a version of ULSIA that is similar enough to the uniform act language to permit it to be called "uniform."

As indicated above, there is considerable resistance to reform of real estate laws in many jurisdictions. Without a very good reason to do so, the institutions that work with and protect the existing system of laws in a given state will oppose change. These institutions are far more entrenched in the real estate industry than, for example, in the areas of commerce governed by the UCC. It is easy, therefore, to understand why ULSIA has not enjoyed the acceptance that financing sections of the UCC enjoyed.

Further, in prior times, advocates for ULSIA in some state legislatures pushed harder for uniform language adoption in the belief that uniformity was a significant enough priority that ULSIA should stand or fall on its precise language. This, of course, was a strategy that made adoption far more difficult, even if the basic premise were sound. In recent years, advocates of ULSIA have adopted a more moderate posture. A particular sticking point has been ULSIA's notice provisions, which did not give assured notice to junior interests to which practitioners in judicial foreclosure states have been accustomed. A Joint Editorial Board for Uniform

State Laws formed under the aegis of the Commissioners has devised alternative language that states might view as an acceptable compromise in this area.

But the most significant new factor that may lead to many states reconsidering ULSIA is the new pressure for movement toward private foreclosure that the commercial mortgage secondary market will produce. This pressure is new, far beyond any impact that might have existed when the only true secondary market was in home mortgages. Home mortgages have infinitesimally small foreclosure rates. Further, any one mortgage is a tiny part of a whole mortgage package. As a consequence of these two facts, delays in foreclosure resulting from variations in state foreclosure laws were unlikely to have a significant impact on the overall performance of mortgage portfolios. Secondary market purchasers were content with uniform instruments, and not particularly concerned about uniform state laws except in cases where portfolio performance would be directly affected, such as in the case of the due on sale clause.

There is about to be a change, however, in the message that states receive from commercial lending sources. Individual commercial mortgages, of course, constitute considerably larger commitments of mortgage dollars than home mortgages, and any one mortgage will be a more significant part of a given portfolio. Most traditional commercial lenders have been cognizant of the major differences in foreclosure cost and delay between private foreclosure and judicial foreclosure states, and have taken those considerations into account in pricing their mortgage loans. But although insurance company loan underwriters will admit privately to these considerations, and even sometimes confess that they have avoided certain states entirely because of difficulties in foreclosure statutes, these lenders have been unwilling to take a uniform stance in opposition to judicial foreclosure practices. Such confrontations were "not the style" of the insurance companies who typically made major commercial loans, particularly because the same companies were interested in selling their insurance products in the same states that provided difficult lending climates.

Modern "securitizers" are primarily in the business of placing and collecting mortgage loans. They will have fewer compunctions about letting loan originators know about the market view of their "slow foreclose" commercial loans. Indeed, several major rating agencies even now are developing matrices of factors to standardize the evaluation of loan portfolios, and foreclosure delay will be a quantifiable factor in these evaluation models. Even today, it is possible, if securitizers were willing to disclose their practices, to identify the precise increase in interest rate that borrowers under securitized mortgages will pay in judicial foreclosure states

versus private foreclosure states. But to date, industry participants have been unwilling to disclose this information, partly for competitive and partly for political reasons.

If commercial lending follows the model of home lending, the bulk of commercial loans will trade as securitized loans within a decade. The economics of the industry eventually will lead commercial borrowers in judicial foreclosure states to recognize the higher price they pay for their special foreclosure protections. To most such borrowers, this is a price that they will be unwilling to pay, and they will so inform their state legislatures.

Thus, market institutions in judicial foreclosure states are likely, within the next decade, to seriously evaluate their past resistance to private foreclosure methods. In evaluating what type of private foreclosure process to adopt, many such states are likely to view ULSIA as a useful, integrated approach that solves the problem and is most likely to provide the necessary degree of uniformity with other state practices to insure the broadest acceptance on the secondary market.

In fact, it is likely that if states do not recognize that their best interests are served by moving to some form of private foreclosure, the United States Congress, goaded by the same interests that persuaded it to preempt state due on sale regulations and state usury laws, will impose a private foreclosure system on them. States should view the proposals for a uniform federal mortgage foreclosure statute, even one limited to federal agency mortgages, as a distinct threat to their independent judgments about the best balance between mortgage borrowers and lenders. By moving to ULSIA, tailored appropriately to their own special needs, states can achieve a state-centered foreclosure approach that meets the need for uniform and efficient foreclosure, but preserves special state values and is consistent with existing state practices.

C. *The Special Problem of "State Action" Foreclosures and Notice*

One problem with ULSIA in its present form is the possibility that it would not provide adequate "due process" notice if the statute is measured by Constitutional standards. Although most decided cases have found that an ULSIA-style private foreclosure would not constitute state action, there are still some concerns. First, of course, there is the possibility that at some future time courts would find that foreclosures involved state action. Second, there is the reality that most courts have viewed foreclosure of certain government owner mortgages as state action, and the uniform commissioners ought to have a statute that would be available for foreclo-

sure of such interests. Finally, there is a concern that notice to parties with real interests is more than a technical requirement, it represents fundamental fair treatment and ought to be part of any foreclosure statute.

The new Joint Editorial Board on Uniform Real Property Laws recognizes these concerns, and has drafted a “non uniform” amendment to ULSIA that is an acceptable amendment for states considering adoption of ULSIA. This amendment is designed to provide full and fair mailed notice to all parties with a significant interest in the property. The Joint Editorial Board stands ready to work with state legislatures who are considering ULSIA to formulate this amendment or some other amendment to address the real concern of notice.

There is a secondary concern, of course, as to whether a “hearing” must be required before any “due process” foreclosure. There is no definitive answer to this question, although the author’s view is that “some form of hearing” certainly is required. ULSIA does not provide for such a hearing, instead it relies upon the right of a borrower, or other party seeking to avoid foreclosure, to seek an injunction. Government agencies who are foreclosing their own mortgages can likely satisfy any requirement for a hearing by providing one as part of their preforeclosure procedures. The members of the Joint Editorial Board, like the Commissioners, have not viewed the likelihood that private foreclosures will generally be regarded as “government action” to be so high that a hearing provision is warranted as part of every private foreclosure. And, unlike with respect to the notice issue, the Joint Editorial Board does not regard a separate hearing to be necessary to ensure “fundamental fairness” in foreclosure practice.

VIII. SUMMARY AND CONCLUSION

Private foreclosure is cheaper, surer, and ultimately better for the vast majority of mortgage borrowers as well as mortgage lenders. The small degree of extra protection provided by complex judicial foreclosure provisions is not worth the increased cost and delay.

A developing international marketplace for mortgage money is going to bring the harsh judgment of the marketplace to bear upon judicial foreclosure procedures in ways that states have not experienced in the past. When states see that lenders are likely to pass directly to their state’s borrowers the cost of judicial foreclosure delays, they will seek alternative modes of foreclosure that make possible full participation in the secondary market.

The Uniform Laws approach afforded by ULSIA is a device that permits states to make their own state-tailored decision about foreclosure methods but still come to a result that fits the need for efficiency and

uniformity dictated by the marketplace. Forces are now at work that will drive states to accept a move to private foreclosure whether they like it or not. Federal preemption is a real threat. Judicial foreclosure states are well advised to consider taking control of their own destiny by resisting politically, movements toward federal preemption and by considering a uniform private foreclosure law like ULSIA.

The Influence of the ULSIA on the Proposed New Brunswick Land Security Act

Norman Siebrasse* and Catherine Walsh**

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I. INTRODUCTION

The Uniform Land Secured Interest Act ("ULSIA")¹ may well be the proverbial "prophet [which] hath no honour in [its] own country."² Although apparently not yet adopted by any of the United States, it provided the Canadian authors of this paper with a valuable resource in the development of our just-completed "Proposal for a New Brunswick Land Security Act".³ The actual prototype for the Land Security Act ("LSA") was the

1. U.L.S.I.A., 7A U.L.A. 220 (Supp. 1995).

2. See *John* 4:44 (King James).

3. NORMAN SIEBRASSE & CATHERINE WALSH, NEW BRUNSWICK GEOGRAPHIC INFORMATION CORPORATION, TENTATIVE PROPOSAL FOR A NEW BRUNSWICK SECURITY ACT

province's recently-proclaimed Personal Property Security Act ("PPSA").⁴ However, the New Brunswick PPSA was derived from PPSAs previously enacted elsewhere in common law Canada,⁵ all of which were derived, in turn, from Article 9 of the Uniform Commercial Code.⁶ Because the ULSIA was inspired by Article 9, it was of obvious and direct relevance to our own efforts to simplify and consolidate land security law along modern personal property security lines.⁷

(Feb. 1996) [hereinafter SIEBRASSE & WALSH]. The proposal was commissioned by the New Brunswick Geographic Information Corporation, the Crown corporation responsible for the administration of real and personal property registration in the province. The proposal has not yet been accepted by the government of the province, and consequently nothing in this article can be taken to reflect official policy of the province. We owe a great debt both in terms of conceptual inspiration and detailed advice to Rod MacKenzie, the Vice President, Legal, of NBGIC and to Mary Kimball, Deputy Registrar of Deeds and Registrar of Land Titles for the province. However, they do not necessarily share all of the views expressed in this article.

4. Personal Property Security Act, S.N.B. ch. P-7.1 (1993), *amended by* ch. 22, 1994 S.N.B. 1 & ch. 33, 1995 S.N.B. 1 (Can.). For a section-by-section review of the purpose and operation of the Act, see CATHERINE WALSH, AN INTRODUCTION TO THE NEW BRUNSWICK PERSONAL PROPERTY SECURITY ACT (1995).

5. PPSAs derived from Article 9 are in operation currently in seven Canadian jurisdictions: in Ontario, R.S.O. ch. P-10 (1990) (Can.); in Manitoba, R.S.M. ch. P-35 (1987) (Can.); in Saskatchewan, S.S. ch. P-6.2 (1993) (Can.); in the Yukon Territory, R.S.Y. ch. 130 (1986) (Can.); in Alberta, S.A. ch. P-4.05 (1988) (Can.); in British Columbia, S.B.C. ch. 36 (1989) (Can.); and now New Brunswick, S.N.B. ch. P-7.1 (1995). The legislation is not entirely uniform from one jurisdiction to the next. Note that the Northwest Territories and Nova Scotia have both enacted PPSAs, with implementation expected sometime in 1996, once the electronic personal property registries now under construction in each jurisdiction are complete; differences in the computer and legal environment in each jurisdiction coupled with the rapid pace of technological change have made it impossible for new PPSA jurisdictions to simply import the registry software already in use in an existing PPSA jurisdiction. S.N.W.T. ch. 8 (1994) (Can.); S.N.S. ch. 13 (1995-96) (Can.). In addition, Book 6 of Quebec's new Civil Code establishes rules for conventional hypothecs on movables which, while reflecting the property concepts and legal style of that province's civilian legal tradition, also contains many substantive features that will be familiar to lawyers versed in Article 9/PPSA law. See C.C.Q. book 6, tit. 3, ch. 2, § IV, arts. 2702-2709 (1994) (Can.). This leaves only two Canadian jurisdictions, Newfoundland and Prince Edward Island, without a reformed personal property security law either in operation or pending proclamation.

6. U.C.C. art. 9 (1977). For an American perspective on the Canadian counterparts to Article 9, see Bernard J. Roth, *Article 9 North of the 49th: Its Development in Canada's Personal Property Security Acts*, 27 UCC L.J. 251 (1995).

7. Another valuable resource was the ONTARIO LAW REFORM COMMISSION, MINISTRY OF THE ATTORNEY GENERAL, REPORT ON THE LAW OF MORTGAGES (1987) [hereinafter OLRC REPORT].

In any law reform project, the initial gathering of political and institutional support for change is often the greatest challenge. Therefore, this article begins its comparative review of the ULSIA and its Canadian relative with a brief explanation of why the drafters think New Brunswick offered a hospitable climate for the reform of land security law at this particular time.

II. THE REFORM CONTEXT

New Brunswick, with a population of only about three quarters of a million people and located in the geographically and politically marginalized Atlantic Region, is traditionally one of Canada's "have-not" provinces. In 1987, the Liberal Party swept to power under the leadership of Premier Frank McKenna, with a strong mandate to "open the province for business," while increasing government efficiency and eliminating deficit financing. But clearly, if the government was to achieve its primary goal to attract business investment, it could not also reduce the cost of governing if this meant a concomitant decline in the quality of the province's already fragile business infrastructure. So while steps were taken to reduce the size of government, they were accompanied by significant institutional changes intended to improve the efficiency with which government services were delivered. To a significant extent, "re-engineering government" in New Brunswick proved to be more than a slogan to mask indiscriminate across-the-board cuts.

The institutional change relevant to the creation of New Brunswick's proposed LSA was the creation of a Crown corporation, New Brunswick Geographic Information Corporation, which is responsible for operating the real and personal property registration systems in the province.⁸ In Canadian legal parlance, a Crown corporation is a corporation wholly owned by the provincial or federal government that legislates it into existence. Legally, it remains an agent of the government but in structure and operation it is given a significant degree of autonomy akin to that enjoyed by a private corporation with the aim of achieving service to its clientele on a cost-recovery basis. It is true that in any monopoly, and particularly a publicly-owned monopoly, service to clients and cost-recovery can be

8. See New Brunswick Geographic Information Corporation Act, S.N.B. ch. N-5.01 (1989) (Can.). The corporation also has responsibility for real property tax assessment information and for the province's geographic information database, a consolidation of responsibilities that is meant to allow land registry information to be incorporated and updated efficiently with the physical and fiscal cadastre. *Id.* § 4.

hollow mottos, but in the authors' perhaps biased experience, they have been taken to heart in the case of New Brunswick Geographic Information Corporation ("NBGIC").

NBGIC's first major initiative in the secured financing area was to contract for the construction of a Personal Property Registry ("PPR") to support the implementation of the province's Article 9-inspired PPSA.⁹ However, reform of the province's cumbersome and antiquated land registration system was also a standing item on the corporation's agenda. Additionally, and in the prevailing atmosphere of budget and resource constraints, it struck the vice president for legal policy that at least some aspects of the work done on the PPSA/PPR project might well perform double duty on the land security side.

From the corporation's perspective, perhaps the most immediately attractive feature of the PPSA approach was its replacement of "document-filing" with "notice-filing." Rather than having to file a copy of the actual mortgage or other security documentation in the PPR, secured parties simply enter a notice of the security agreement¹⁰ that contains only the bare information necessary to alert a searcher of the possible existence of a security interest in the described collateral. If notice-filing was carried over to land security interests, there was no reason to think that it would not produce the same advantages as had been demonstrated by experience in PPSA jurisdictions. These advantages include: a reduced administrative and archival burden on the registry; greater flexibility in the drafting, amendment, and rollover of security agreements; enhanced confidentiality of the debtor's financial affairs; and simplified informational requirements for registration with a correspondingly reduced risk of invalidating error.

9. Personal Property Security Act, S.N.B. ch. P-7.1. In May 1987, the Law Society of New Brunswick, the self-regulating professional organization that represents the province's lawyers, recommended the enactment of a modern PPSA to the province's Attorney General. That recommendation fit well with the new government's expressed desire to create a positive and efficient business environment for outside investment and a PPSA proposal was commissioned. Draft legislation, adapting the western Canadian version of the PPSA to the New Brunswick legal and policy environment, was submitted to the Department of Justice in August 1993 and, following approval by the department's former law reform division, turned over to NBGIC for implementation. One of the authors of this paper, Walsh, was the author of the PPSA proposal and worked closely with NBGIC in its implementation. The other author of this paper, Siebrasse, has been the corporation's principal external research and policy advisor on land law issues.

10. The agreement is called a "financing statement," in compatibility with the Article 9 terminology. See S.N.B. ch. P-7.1, § 1.

A second appealing feature of the PPSA registry model was its relatively sophisticated registration and searching capabilities. Registrations in the PPR are entered directly by clients¹¹ into a computerized data-base that is indexed and searchable according to debtor name as well as collateral serial number in the case of 'large ticket' goods for which a reliable serial number is universally available.¹² In contrast, although a land titles registry indexed by parcel identification number operates in one county in New Brunswick,¹³ the principal land registry is an antiquated deed depository system organized according to a rudimentary grantor/grantee index.¹⁴ While considerable developmental work had been done on the automation of the land records through the use of scanning and optical disk storage, it became increasingly clear to certain of NBGIC's senior administrators that a full electronic conversion of the mechanics of registration and searching coupled with a redesign of the indexing structure was needed. Thus, in the short term, adaptation of the PPR model to the land context presented a welcomed opportunity to implement a geographic parcel indexing system for the whole province, without having to make a wholesale conversion from a deed registry to a land titles system. In the long term, it might even be possible to adapt the PPR software design to at least the security aspects of the land records, thereby effecting a partial conversion

11. While all the Canadian PPSA registries incorporate an electronic database, New Brunswick has gone somewhat further than its sister jurisdictions in making the system completely client-administered. Clients are wholly responsible for entering their own registrations into the registry database and for conducting their own searches with direct access made available either through computer terminals located in each of the 15 registry offices maintained by NBGIC in the province or from the client's own premises in the case of frequent users who have the resources and demand to establish the necessary on-line communication links. Direct electronic access benefits both system administrators and system users: administrators benefit because the legal responsibility for and administrative burden of registration is transferred wholly to the client, and users benefit because the time lag between submission of the relevant information to the registry and its entry in the database is eliminated, enabling registrants to control the effective time of registrations and searchers to obtain search results on "real time."

12. The general regulation under the PPSA, S.N.B. ch. P-7.1, Reg. 95-57 (1995) (Can.), currently defines "serial numbered goods" to mean motor vehicles (including combines, tractors, and road building machinery), trailers, mobile homes, boats, outboard motors for boats, and aircraft (as there is no national aircraft register yet in place at the federal level in Canada). Serial number searching is considered essential to ensure disclosure of a security interest granted by a predecessor in title of the immediate transferor of goods-collateral since a search according to the more usual debtor name criterion will not disclose the registration.

13. Land Titles Act, S.N.B. ch. L-1.1 (1981) (Can.).

14. Registry Act, R.S.N.B. ch. R-6 (1973) (Can.).

to electronic registration and searching without having to incur the heavy costs normally associated with ground-up software development.

A final important impetus to NBGIC's commissioning of the LSA proposal was the ready availability and adaptability of the PPSA substantive law model. The corporation recognized that it would be more efficient to simply codify land security law along PPSA lines, using the experience and resources it had recently developed, than to try to rewrite the existing complex statutory and judicial rules to fit a modern registration environment, or to develop a new substantive code from scratch. Of course, the PPSA model was also thought to offer an appropriate model, even independent of efficiency concerns. The legislation had already proved its substantive worth in the personal property financing context. Moreover, prior to the PPSA, the rules governing the relations of debtor and secured party were practically identical in the two contexts. Thus, harmonization of land security law with the PPSA would respect the historical identity between the two contexts, while greatly simplifying the legal process for secured financing. This is particularly true in the field of commercial transactions, where real and personal property are routinely assigned as common collateral for the same debt.

III. ORGANIZATIONAL STRUCTURE OF THE LSA

Just as the ULSIA¹⁵ adopts the organizational framework of Article 9,¹⁶ the proposed New Brunswick LSA¹⁷ adopts that of the PPSA.¹⁸ The act is therefore divided into seven parts, roughly chronicling the various stages through which a security interest may pass, from its initial attachment and perfection through to its enforcement as against both the debtor and third parties.

Parts I, II, and V correspond generally with parts 1, 2, and 5 of the ULSIA. Part I, "Interpretation and Application," defines terms, establishes interpretation principles, and delineates the scope of application of the act. Part II, "Validity of Security Agreement and Rights of Parties," addresses the pre-default relationship of the secured party and debtor, including the formality and evidentiary rules governing their security agreement, the validity of future advance clauses and the requirements for attachment of an effective security interest. Part V, "Default Rights and Remedies," codifies

15. U.L.S.I.A., 7A U.L.A. at 220.

16. U.C.C. art. 9 (1977).

17. SIEBRASSE & WALSH, *supra* note 3.

18. S.N.B. ch. P-7.1.

the procedural and substantive obligations of both parties, should the debtor's default necessitate enforcement of the security agreement.

Although part III of the LSA and part 3 of the ULSIA both cover "Perfection and Priorities," the LSA coverage is far more comprehensive.¹⁹ As a model uniform act that must be integrated with individual state land law policy and systems, the ULSIA is forced to defer to the registration statutes of the various states on issues of perfection and priorities. In contrast, as the law reform initiative of a single jurisdiction, the New Brunswick LSA incorporates a comprehensive self-contained perfection and priority regime to regulate ranking, both as among consensual security interests and as against other classes of proprietary claims.²⁰

Part IV of the LSA, "Registration," deals with the procedural and substantive aspects of registering and searching land security interests, consistent with New Brunswick's decision to effect reform of the registration framework as part of its general reform of land financing law.²¹ The LSA has no equivalent to part IV of the ULSIA on "Maximum Finance Charges and Usury." Issues under these heads were considered to be adequately regulated by the competitive market, supplemented by existing statutory and equitable sources, such as the provincial Unconscionable Transactions Relief Act.²²

Part VI of the LSA, "General and Miscellaneous," addresses such significant general issues as the applicable supplementary law, the parties' overriding obligations to conduct themselves in good faith and in a commercial reasonable manner, and civil liability for breach of any statutory obligation imposed by the act.²³ Part VII, "Transitional," establishes rules to regulate perfection and priority in transitional situations involving pre-LSA security interests.²⁴

The balance of this paper compares the LSA with the ULSIA in a relatively detailed fashion. In the interest of conserving space, the authors have emphasized the differences rather than the similarities between the two acts. In general, if no mention is made of a particular provision of the ULSIA, it is because the LSA is substantially identical to the ULSIA on that point.

19. See SIEBRASSE & WALSH, *supra* note 3, at 33-65.

20. *Id.*

21. *Id.* at 66-84.

22. R.S.N.B. ch. U-1 (1973) (Can.).

23. SIEBRASSE & WALSH, *supra* note 3, at 137-46.

24. *Id.* at 147-57.

IV. INTERPRETATION AND SCOPE OF APPLICATION

A. *Generic Functional Terminology*

Like the ULSIA, the LSA adopts generic terminology consistent with the Article 9/PPSA functionalist approach to the conceptual structure of secured financing.²⁵ Regardless of whether a particular transaction involves a conventional mortgage or some less self-identifying form of security, the interest created is uniformly referred to as a security interest if its substantive function is to secure payment or performance of an obligation. Generic terminology is carried over to the identification of the parties ("secured party" and "debtor"), their underlying contract ("security agreement"), and the property that is the subject of the security interest ("collateral").

The substitution of a functionalist approach to the characterization of security interests in land does not constitute as radical a departure from the *status quo* as the same change presented in the personal property security area. The significantly more complex nature of personal property made the evolution of personal property security law a correspondingly complex process with different security devices developed over the years for different categories of property. Thus, the PPSA introduced a rationalizing influence into what had become an extraordinarily fragmented and confused area of the law.²⁶ In contrast, secured financing against land, at least in common law Canada, is relatively straightforward and typically involves the use of one of only two relatively well-understood transactional forms, the mortgage or the equitable charge, the legal characteristics of which have become largely assimilated over the years. Although not unknown, the use of other transactional forms, such as agreements of sale and lease, is rare in contemporary practice. This rarity reflects the dominance of the Canadian chartered banks in the secured lending field, a dominance which is owed in part to the privileged position chartered banks were afforded from an early date under federal banking legislation, and in part to the diminished risk they face in low equity financing transactions because of the ready availability of mortgage insurance under the Canada Mortgage and Housing Corporation Program.²⁷

25. *See id.*

26. *See* Personal Property Security Act, S.N.B. ch. P-7.1.

27. *See* JAMES E. HATCH, *THE CANADIAN MORTGAGE MARKET* (1975).

B. *General Scope of Application*

The application of the LSA, like the ULSIA, is restricted to *consensual* transactions that function to create a *security* interest in land. But while non-consensual and non-security transactions are thus excluded from the direct reach of both regimes, the comprehensive sweep of the LSA's part III priority code means that the proposed legislation will nonetheless apply to resolve ranking between a consensual security interest and all forms of competing third party interests in the collateral, whether consensual or secured in character.²⁸ Moreover, complementary amendments to existing legislation will authorize the registration on a notice-filing basis of a variety of non-consensual "security interests" in land (e.g., the claim of a judgment creditor of the debtor), as well as integrate the rules governing their priority and enforcement with the substantive and policy framework of the LSA. In the longer term, it may become feasible to bring tax liens within the scope of the act. At present the greatest impediment to registration of tax liens is the administrative burden which would be involved in registering large numbers of the liens annually. But because the records of the taxation office are computerized, and it is anticipated that the LSA will soon be automated, registration of a tax lien in the LSA system can potentially be as administratively convenient as entering it in the current records of the taxation office. In this indirect way, the LSA is intended, to a far greater extent than the ULSIA, to establish the legislative basis and impetus for a comprehensive consolidation of the law governing the rights of all classes of creditors (outside of bankruptcy, which is federally regulated) against the debtor's land.

C. *Application to Security Interests in Land-Related Rights to Payment*

A significant issue in the United States has been whether an assignee's security interest in a note and mortgage must be perfected according to local real estate law, in addition to perfection under Article 9. This issue has not arisen in Canada because the promise to pay and the security interest are generally evidenced by a single document, and real property law clearly governs its assignment. The LSA and PPSA are complementary in their scope: the LSA applies to any instrument creating a security interest in land or land-related interest (e.g., a right to a stream of rental payments, or payments owing under a mortgage) where the land is specifically identified

28. SIEBRASSE & WALSH, *supra* note 3, at 33-65.

in the instrument. The PPSA applies in all other cases. Thus assignment of mortgage-backed securities is governed by the PPSA, but assignment of a specific mortgage is governed by the LSA.

V. VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO

A. *Freedom of Contract in the Making of a Security Agreement*

The LSA closely tracks the ULSIA in affirming freedom of contract.²⁹ The LSA provides that the agreement is effective according to its terms, unless otherwise provided in the LSA or any other act. In addition, it specifically abolishes doctrines relating to clogs on the equity of redemption and collateral advantage.³⁰ Options to purchase which are not dependent on default are specifically approved.³¹

The LSA provides for an obligation of commercial reasonableness as well as an obligation of good faith in the performance of security agreements,³² as there are some Canadian cases which suggest there may be a difference between the two, with good faith being a less stringent standard. These obligations may not be disclaimed.

B. *Formal and Evidentiary Requirements for Security Agreements*

The formal requirements for attachment are essentially the same as in section 203 of the ULSIA. Namely, value must be given, the debtor must have an interest in the collateral, and the debtor must have signed a security agreement describing the collateral.³³ The LSA has no equivalent to section 204 (Use or Disposition without an Accounting), as Canadian law has never had a rule similar to that in *Benedict v. Ratner*.³⁴

C. *Defense Against Assignee of Obligation*

The LSA departs somewhat from section 206 of the ULSIA in its treatment of defenses against an assignee of the an obligation. Under the ULSIA, modifications are binding only if the assignee specifically empowers

29. *Id.* at 15, 17.

30. *Id.* at 16.

31. Cf. U.L.S.I.A. §§ 201, 211, 7A U.L.A. at 236, 244.

32. SIEBRASSE & WALSH, *supra* note 3, at 137-38.

33. *Id.* at 18-21.

34. 268 U.S. 353 (1925).

the assignor to “act as a servicing agent.”³⁵ In contrast, under the LSA, following our PPSA, modifications generally are effective, subject to stipulations in the contract of assignment and subject to the overriding obligation to act in good faith and in a commercially reasonable manner.³⁶ Further, to protect the tenant or obligor, who may not be sophisticated and is generally an innocent bystander in a dispute between assignee and assignor, the LSA provides detailed provisions governing conflicting demands for payment.³⁷ While the LSA allows the obligor to demand proof of the assignment, the drafters did not wish to burden the obligor with the obligation of correctly assessing the proof in order to be relieved of potential liability for double payment. Therefore, the LSA provides that when faced with conflicting demands, the obligor may pay amounts owing into court, or, in the case of residential tenants, into the Rentalman’s office. In New Brunswick, the Rentalman’s office is already set up to administer damage deposits for residential tenants, and any interested party may apply to the court for direction.³⁸ In order to ensure that an obligor is made aware of its rights, the notice from the secured party demanding payment must inform the obligor of its rights in the case of conflicting demands.³⁹ A notice which does not contain this information is not valid, and the obligor is not obliged to make payment pursuant to it.⁴⁰

D. *Power of Debtor to Lease*

The LSA does not provide a specific power to lease equivalent to that found in section 207 of the ULSIA,⁴¹ but relies on supplementary common law to imply such a power where appropriate. Unlike the ULSIA, the LSA does not make a reasonable residential lease which is subordinate to the security interest binding on a secured party.

E. *Alienability of Debtor’s Interest: Right to Accelerate on Transfer*

The LSA closely reflects section 208(a) of the ULSIA, in that it provides that, while the security agreement may not prevent alienation of the

35. U.L.S.I.A. § 206, 7A U.L.A. at 238.

36. SIEBRASSE & WALSH, *supra* note 3, at 137-38.

37. *Id.* at 60-61, 63-64.

38. *Id.*

39. *Id.*

40. *See id.* at 61, 65 (stating requirements for valid notice).

41. U.L.S.I.A. § 207, 7A U.L.A. at 241.

collateral, it may provide that transfer without the consent of the secured party is grounds for acceleration of the debt.⁴² However, the policy issues addressed by section 208(b) are dealt with somewhat differently in the LSA. In order to preserve the debtor's ability to sell a favourable interest rate on transfer, the LSA provides that a secured party's consent, under a purchaser approval clause, may not be withheld simply because the prevailing interest rate is higher than the rate in the agreement, unless otherwise specified in the agreement.⁴³ That is, if the secured party intends to take advantage of a purchaser approval clause to call in mortgages which are below existing rates, it must make this intention clear in the agreement, so that the debtor will not be taken by surprise.

The LSA also deals much more extensively than the ULSIA with the rights between the secured party, the debtor, and the new owner of the collateral. In the absence of evidence of intention to the contrary, the LSA implies an obligation by the transferee to perform the obligation of the debtor, and to indemnify the transferor for any liability incurred as a result of non-performance of the debtor's obligations. This reflects existing law and practice. The LSA also allows the secured party to pursue any transferee directly rather than being required to obtain an assignment of the indemnification agreement. Perhaps most importantly, when the secured party consents to the assumption by the purchaser of the transferee's obligations, the transferee is released from all liability unless he agrees in writing, prior to the transfer, to remain liable.⁴⁴

Presently, under Canadian law, the original debtor remains liable for the debt even after the property is sold and the new owner enters into an assumption agreement with the secured party, unless a court is willing to find novation, or unless the original debtor becomes a surety and a material variation exists in the agreement. The courts are becoming more willing to so hold, but the law remains very uncertain and the debtor may be unfairly surprised to find herself liable for a mortgage which she believed had been "assumed" years earlier by the purchaser of the mortgaged property. Further, because a finding of novation or suretyship turns on the facts, and because there is no presumption in favour of such a finding, the present law is uncertain, and as such, difficult to take advantage of.⁴⁵

Under the LSA, the debtor may consent to remain liable, but the consent must be in writing and must specifically identify the transfer. This

42. *Id.* § 208(a), 7A U.L.A. at 241.

43. *See* discussion *infra* note 118.

44. *See* discussion *infra* note 118.

45. *See* discussion *infra* note 118.

means that a clause in the security agreement, which provides that the debtor will remain liable notwithstanding any subsequent transfers, will not suffice. This is to ensure that the debtor will choose between remaining liable and paying off the mortgage at the time when the property is sold.⁴⁶

F. *Request for Statement of Account*

While section 209 is reflected in the LSA,⁴⁷ the LSA's provisions dealing with the right to obtain information about the security agreement are much more extensive than those in the ULSIA, because the LSA is based on notice-based financing.⁴⁸ Since the Registry only provides the name and address of the secured party and notice that there is a charge, but no further details, the right to obtain detailed information about the debt from the secured party is essential.

VI. REGISTRATION, PERFECTION, AND PRIORITIES

A. *Relative Scope of LSA and ULSIA*

As observed earlier, the most substantial structural difference between the ULSIA and the LSA is the comprehensive treatment afforded by the latter to the registration, perfection, and priority status of security interests in land.⁴⁹ Because these issues are intimately connected to the more general land registry structure and policies of individual jurisdictions, they fall outside the reform mandate of the drafters of the ULSIA. In contrast, the New Brunswick LSA project was commissioned by NBGIC, which is vested with the overall responsibility for the operation of the general land registry system in the province, at a time when reform of both the structural and substantive incidents of that system is very much in the air.

B. *Perfection by Registration*

Like Article 9 and the PPSA, part III of the LSA uses the term "perfection" to denote the publicity step necessary to make a security interest effective against third parties on attachment.⁵⁰ However, while a

46. See discussion *infra* note 118.

47. A small change is that the debtor is entitled to a free account only every 12 months under the LSA, rather than every six months.

48. STÉBRASSE & WALSH, *supra* note 3, at 32.

49. *Id.* at 33-38.

50. *Id.* at 34.

security interest in personal property can be perfected by either registration or taking possession of the collateral—or even temporary perfection exists by operation of law in limited circumstances—registration is the sole method of perfection available under the LSA.⁵¹ This difference reflects the elevated importance of registration in land law in light of the role of the land registry as a record of both title and encumbrances against title.

C. Notice Filing

As mentioned earlier, part IV of the proposed LSA follows the Article 9/PPSA precedent in adopting notice-filing, popular with both system administrators and system users, in place of the instrument-filing approach currently used in both the Land Registry and, for most purposes, in place of the Land Titles registration systems in the province.⁵² Although the registration venue will remain the same, secured parties will no longer be required to register a copy of the security documentation itself even in the abbreviated form now sanctioned by the Standard Form of Conveyances act.⁵³ Rather, a security interest will be considered perfected on registration of a simple “financing statement” setting out the names and addresses of the debtor,⁵⁴ the duration of effectiveness of the registration and a description of the relevant collateral by its parcel identification number (“PID”).⁵⁵ Those with a legitimate interest in learning the full details of the financing arrangement can contact the secured party, either directly (where they have an existing interest in the collateral) or through the intercession of the debtor (in the case of prospective secured creditors and

51. *Id.*

52. The PPSAs do not represent the first use of notice-filing in Canadian law. Rather, a form of notice-filing has been in operation since the early part of this century for registration of the *sui generis* statutory form of security interest available to the chartered banks under what is now § 427 of the federal *Bank Act*. See *Bank Act*, R.S.C. ch. B-1.01, § 427 (1995) (Can.).

53. R.S.N.B. ch. S-12.2 (1973) (Can.).

54. The regulations under the proposed LSA will incorporate the same rules for determining the legal name of both corporate and individual debtors that apply currently under the PPSA. Thus should provide welcome guidance on what is currently a controversial question, as well as ensure, in the longer term, consistency in the electronic records in the two contexts for the purposes of computer-based searching.

55. As is the case with registrations under the PPSA, a registrant will be able to select a registration life expressed either as a term of whole years (with registration fees set according to a sliding tariff that increases with each additional year) or as infinity (subject to a single lump sum registration fee).

other transferees) under the fully elaborated disclosure process established by part II of the act.⁵⁶

D. *Manual or Electronic Filing?*

As noted at the beginning of this paper, NBGIC contemplates the implementation of a client-administered, fully electronic environment for registrations under the LSA similar to that currently available for PPSA registrations.⁵⁷ Indeed, as we have seen, it was the possibility of being able to re-use the technology and expertise developed for the PPSA on the land side that explains, in no small part, the corporation's support for the LSA project. However, to maintain flexibility and to enable incremental reform, the LSA was drafted in technologically neutral language. The drafters anticipate that it will be initially implemented using paper financing statements and manual filing.

E. *Compulsory Amendment or Discharge*

To alleviate the problem of undischarged security interests remaining on the record and clouding title, the LSA incorporates the PPSA's compulsory discharge and amendment policy under which a secured party is obligated to discharge or amend a registration, on demand by the debtor, to accurately reflect the status of the financing relationship between the parties.⁵⁸ If the obligations of the debtor have been performed, and the secured party fails to comply with a demand by the debtor to register a discharge, the debtor may register the discharge. Under the paper-based version of the LSA, a debtor who registers a discharge is required to notify the secured party within thirty days, to allow the secured party to challenge the discharge.⁵⁹ If, in the worst case scenario, the debtor registers a discharge when not entitled to do so, fails to notify the secured party, and enters into a new security agreement with a third party, the original secured party will lose its priority, but the debtor will be liable to the original secured party for any harm caused by an unwarranted discharge, and will also face criminal sanctions for fraud.⁶⁰ This is considered sufficient incentive to prevent debtors from fraudulently taking advantage of the compulsory discharge provisions. The risk of fraud under the LSA is no

56. SIEBRASSE & WALSH, *supra* note 3, at 15-32.

57. *See* discussion *supra* note 13.

58. SIEBRASSE & WALSH, *supra* note 3, at 80-82.

59. *Id.*

60. *Id.*

greater than under the current system, where registration of a fraudulent discharge is also possible.⁶¹ Thus, the compulsory discharge provisions greatly ease the burden of dealing with undischarged security interests, without increasing the exposure to fraud which exists under the current system. It is anticipated that when an automated, paperless system is implemented, the burden of sending notification to the secured party on registration of the discharge will be shifted to the registrar rather than the debtor, thus greatly reducing the risk of fraud.

F. *Priorities Generally*

In contrast to the rather complex set of priority rules found in the PPSA and Article 9, the priority scheme of the LSA is straightforward. Regardless of whether the contest involves competing security interests or a security interest and some other type of claim, registration is paramount in assessing priority.⁶² Thus, ranking generally turns on the order of registration; an unregistered interest is subordinated to a registered interest, and it is only when neither interest is registered that priority reverts to the ordinary common law *nemo dat* rule of order of attachment.⁶³ The relative complexity of the Article 9/PPSA rules compared to the simple first-to-register rule in the LSA⁶⁴ is primarily a function of the less comprehensive scope of personal property registry systems. While a land registry ordinarily records both ownership interests and encumbrances on ownership, a personal property registry is usually limited to encumbrances and even then rarely purports to be comprehensive.⁶⁵ Since a first-to-register priority rule is

61. *Id.*

62. SIEBRASSE & WALSH, *supra* note 3, at 33-55. Two qualifications should be mentioned. The first relates to the priority status of tenants of leased collateral. Although the order of registration normally decides priority between the rights of the tenant in the collateral and the rights of the secured party, leases for a term of less than three years need not be registered to be valid and effective against third parties. Accordingly, in this one case, priority under the LSA instead turns primarily on whether the tenant is in possession when the financing statement is registered. *Id.* at 44-46. The second qualification relates to security interests taken in leased or mortgaged land. The security interest in the land is deemed to include a security interest in the payments made under the lease or mortgage, without the need for a fresh registration, for the purposes of determining priority as against a secured party holding an assignment of the payments as independent collateral. *Id.*

63. *Id.* at 33-34.

64. *Id.* at 34-35.

65. Under complementary legislation enacted at the same time as the PPSA went into effect, the Personal Property Registry in New Brunswick was made the registration venue for a variety of personal property interests other than PPSA security interests, most notably, the

possible only if the competing interests are all registerable in the first instance, the PPSA and Article 9 necessarily incorporate supplementary rules to resolve priority between secured parties and third party claimants outside the registry system, such as purchasers and lessees of the collateral.⁶⁶

G. *General Abolition of Doctrine of Actual Notice*

Although the New Brunswick Registry Act on its face adopts registration as the principal ranking mechanism for priority, actual notice of the existence of a prior unregistered interest can still invert priority.⁶⁷ The doctrine of actual notice injects an unwelcome level of uncertainty into property transactions and undermines the reliability of the public record as a mechanism for ordering priority. The LSA project was therefore seen as creating a welcome opportunity to enact a wholesale abolition of the actual notice qualification. Complementary amendments to the Registry Act will extend the pure first-to-register rule found in the LSA to resolve the priority of competing land claims generally.

H. *Priority of Security Interests in After-Acquired Land*

Under the PPSA, the registration of a financing statement covering the debtor's after-acquired personal property generally gives priority over

interest of an unsecured creditor who has recovered a money judgment against the debtor. But while all jurisdictions have made similar efforts to expand the scope of the PPR, no jurisdiction has yet succeeded in subjecting all non-possessory personal property claims to a registration requirement in the first instance, let alone to a requirement to register in a common venue. The most notable exclusions from any registration requirement, though this is changing gradually, are the statutory liens created by both federal and provincial legislation in favour of government entities to secure their tax and other revenue claims.

66. Nor can we expect greater harmony to develop over time. The establishment of a comprehensive title registry is an impractical and even undesirable proposition in view of the often mutable and temporary character of personal property and varied forms it takes. And even if a title register were feasible, it would still not be possible to adopt a universal first-to-register rule for personal property interests. Exceptions would inevitably have to be created to give effect to other policies, such as free negotiability for instruments, securities, and the like, or to accommodate the choice of law problems created by the mobility of personal property, problems for which no counterparts exist in land financing.

67. A decision by the Supreme Court of Canada, in *United Trust Co. v. Dominion Stores Ltd.*, 71 D.L.R.3d 72 (1977), introduced an element of the doctrine of actual notice into the theoretically pure land titles acts of some jurisdictions. However, the New Brunswick Land Titles Act was drafted subsequently to this decision and incorporates wording designed to ensure that the doctrine of actual notice does not apply. This wording has not yet been tested in the courts.

subsequently registered interests.⁶⁸ However, an exception exists for serial-numbered goods that are held by the debtor as either consumer goods or equipment. Unless the goods are registered and searchable by specific serial number, the security interest is vulnerable to subordination to subsequent third-party interests.⁶⁹

In developing the LSA proposal, the drafters gave some thought to extending the PPR data base of debtor names so as to allow the registration of a security interest covering any land subsequently acquired by the debtor to bind third parties. But after considerable discussion among the drafters, and with NBGIC, it was decided that the LSA should approach land in the same manner as the PPSA approaches serial numbered goods. Accordingly, in order to perfect a security interest in land, the LSA requires the secured party to register a financing statement that discloses the specific parcel index number ("PID") of the collateral.⁷⁰ In other words, the registration of a financing statement that describes the collateral simply as "all present and after acquired lands" will not constitute adequate perfection, and the security interest will be subordinated to subsequent interests that *are* registered according to the relevant PID.⁷¹

Several considerations supported the drafters' final decision on this point. First, the drafters feared that the contrary rule would complicate the process of searching title to a degree that had to be considered unacceptable in a modern reformed registry system. Second, the drafters recognized that to allow the first-registering secured party to take a prior-ranking security interest in a debtor's after-acquired lands creates what amounts to a situational monopoly over the debtor's future financing needs even if an exception is made for purchase money financing.⁷² The same problem exists of course in the personal property context, but it is less troublesome there because the negotiable and transient character of personal property necessitates the creation of significant exceptions to the after-acquired property financier's priority over third parties, thereby diminishing the monopoly problem. Finally, the drafters felt that in view of the role of the Land Registry, in contrast to that of the Personal Property Registry, as a record of both ownership interests and encumbrances on ownership, the law should generally discourage the proliferation on the record of future interests

68. Personal Property Security Act, S.N.B. ch. P-7.1, § 35.

69. *Id.*

70. SIEBRASSE & WALSH, *supra* note 3, at 68-69.

71. *See id.* at 36-37.

72. *See id.* at 37.

with the impediments to the integrity and operation of the system that they inevitably pose.

I. *After-Acquired Land and the Claims of Judgment Creditors*

Under the Registry Act, as it presently reads, the registration of a “memorial” of judgment binds the interest of the judgment debtor identified in the memorial in any lands acquired within five years of registration.⁷³ Allowing judgment creditors to bind after-acquired land in this manner prevents judgment debtors from effectively preferring new creditors by subjecting their after-acquired land to a security interest before the registered judgment was amended to specifically cover the new lands.⁷⁴ This policy also encourages the voluntary liquidation of debt, since the judgment creditor cannot deal with his or her assets without paying off the debt. At a purely mechanical level, however, the existing land registration system unquestionably presents obstacles to the effective registration of judgments against a debtor’s after-acquired lands. In the Registry Act context, searchers must depart from normal practice and search the grantor-grantee index *back* five years to determine whether a memorial has been registered against a grantee named in a later conveyance of land.

The difficulty of searching for judgment liens is exacerbated under a parcel-based indexing, such as is proposed for the LSA, because registration can be effected only against a specific parcel or parcels of registered land, and then only once the judgment debtor becomes the registered owner.⁷⁵ To maintain the integrity of the land registry, the LSA provides that a judgment, as any other interest, must be registered against a specific parcel to bind the land.⁷⁶ To maintain the advantages of self-enforcing judgments, the LSA requires that a registrant who wishes to register a transfer of a parcel of land will be required to present a current search result to the Registrar, disclosing a search of the *Personal Property Registry* according to the name of the prospective transferee.⁷⁷ According to the proposed LSA, “[i]f the name of the prospective transferee matches the name of a debtor against whom a judgment has been registered in the PPR, notice of the judgment must be registered against the relevant parcel of land when the

73. *See id.*

74. After all, as a practical matter, judgment creditors are rarely in a position to continually monitor the debtor’s estate for the acquisition of new assets.

75. *See SIEBRASSE & WALSH, supra* note 3, at 67.

76. *Id.* at 50.

77. *Id.*

transfer is registered and before any security interest in the parcel can be registered.”⁷⁸ Therefore, to fully protect its interest, the judgment creditor must first search the land registry for parcels registered in the name of the debtor⁷⁹ and register a notice of judgment against those specific parcels, thus preventing the debtor from dealing with his or her presently owned land without paying off the judgment debt. Next, the judgment creditor must register a notice of judgment in the PPR, which will indirectly bind after-acquired land.⁸⁰

J. *Priority for Future Advances as Against an Intervening Judgment Creditor*

Under the PPSA, a perfected security interest has priority over the subsequently-registered interest of a judgment creditor only to the extent of advances made before the secured party has actual notice of the intervening registration of a notice of judgment.⁸¹ Registration constitutes constructive, not actual notice. The adoption of this priority rule prevents a debtor from remaining judgment proof by increasing the share of debt owed to secured creditors even after judgments in favour of unsecured creditors have begun to accumulate. A similar policy makes evident sense for land law; the pre-PPSA law in relation to chattel mortgages on this point is identical to the pre-LSA law in the land context, and has been incorporated in the LSA.⁸²

VII. DEFAULT

A. *Rights and Remedies*

As with the ULSIA, the rights and remedies on default are confined to those which are described in part V of the act or in the security agreement.⁸³ Rights granted to the debtor or obligations imposed on the secured party cannot be waived or varied unless specifically provided for in the act.⁸⁴ The LSA recognizes and codifies five primary default remedies available to secured parties against the collateral:

78. *Id.*

79. The parcel indexed land registry will also include an auxiliary name index.

80. SIEBRASSE & WALSH, *supra* note 3, at 67.

81. Personal Property Security Act, S.N.B. ch. P-7.1, § 14(2).

82. *See* SIEBRASSE & WALSH, *supra* note 3, at 50-51.

83. *Id.* at 85-89.

84. *Id.* at 87.

1) right to collect rents from leased collateral and to collect payments owing under a security agreement covering land that is collateral under a subsequent security agreement executed by the secured party in favour of his or her financier; 2) right to take possession of the collateral; 3) right to dispose of the collateral by private sale or lease; 4) right to retain the collateral in full satisfaction of the secured debt; and 5) right to appoint a receiver to manage and realize the value of the collateral.⁸⁵

For their part, debtors are given a non-excludable:

1) right of redemption; 2) right to reinstate the security agreement outside of receiverships; 3) right to any surplus from a disposition by sale or lease; and 4) right to require disposition by sale rather than foreclosure.⁸⁶

B. *Reinstatement of the Security Agreement and Acceleration Clauses*

As explained in the commentary:

[s]ecurity agreements that provide for payment at fixed intervals commonly contain an acceleration clause under which the entire outstanding secured obligation becomes due and payable upon default in the payment of any one instalment. Such a clause is unobjectionable to this extent that it simply allows the secured party to realize in full upon a debt which is non-performing. However, it could also be invoked to allow a secured party to accelerate the entire debt as a single late payment which occurred because of some unforeseen and unavoidable delay. For this reason acceleration clauses are often considered harsh and legislation giving relief from their effect has been implemented in a number of jurisdictions as well as in the New Brunswick PPSA.

But while arbitrary invocation of the acceleration clause is possible, it is rarely in the interest of a secured party to call in an otherwise sound loan as a result of a single default, as this simply increases administrative costs to no benefit. On the contrary, in general the secured party will voluntarily make every effort to give a debtor a chance to reinstate an agreement when the default is inadvertent or the result of temporary cash-flow problems. In addition to calling in loans

85. *Id.* at 87-88.

86. *Id.* at 88.

clause to call in a loan in the face of persistent defaults which are raising the lender's administrative costs in a case where default is ultimately inevitable. In a competitive market, such as the Canadian mortgage market, this use of the acceleration clause will indirectly lower the cost of the loan to the borrower. [On the other hand], if the lender has given the debtor an informal opportunity to reinstate the agreement, and default is in fact ultimately inevitable, then the debtor will be unlikely to take advantage of a formal right of reinstatement. And . . . some unscrupulous lenders may take advantage of the clause to call in a loan after a single default if interest rates have risen sufficiently that incurring the costs of calling in the loan and relending the money at a higher rate is profitable (although reputational constraints make it unlikely that a major lender would resort to this tactic regularly). Further, all lenders do not always act rationally, and in some instances, perhaps because of bad personal relations between the debtor and the creditor, the loan might unjustifiably be called in as the result of an insignificant default.

The arguments for and against a right of reinstatement are therefore fairly closely balanced. Acceleration clauses are not routinely abused, and a right of reinstatement may simply draw out the time and expense involved in realizing on the security in instances where the clause is properly invoked; but a right of reinstatement is unlikely to be taken advantage of by large numbers of borrowers, so that the price of such a right in terms of increased lending costs is probably quite low.⁸⁷

One of the drafters, Siebrasse, is not in favour of such a right, while the other drafter, Walsh, does favour this right. In the end, the drafters decided to include a limited right of reinstatement in the proposal in order to harmonize the LSA with the PPSA, and with real property law in some other major jurisdictions. A default would be curable at any time before disposition of the collateral by tendering only the amounts past due, exclusive of any amounts owing due to the acceleration clause, plus reasonable expenses of the secured party. As explained in the commentary to this section of the act:

[t]his provides protection from arbitrary invocation by the lender when interest rates rise, for example, while retaining the secured party's right to call in a loan which is perpetually in arrears. The contemplated provision would not make such clauses void, but . . . simply provides for a right of reinstatement, so that if an acceleration clause were invoked and the default is not cured, the entire debt would be due and

87. SIEBRASSE & WALSH, *supra* note 3, at 130-31.

owing. A requirement that the debtor pay the lender's reasonable expenses would deter willful abuse of the reinstatement right by the debtor. The debtor would also be required to cure any other default by reason of which the secured party intended to dispose of the collateral. As additional protection against abuse of the right, the debtor would not be entitled to reinstate more than twice annually. Finally, in the unusual event that these protections were insufficient, the secured party would be entitled to apply under 39 to terminate the debtor's right of reinstatement.⁸⁸

The right of reinstatement is not available in the context of a receivership in a commercial debt realization.⁸⁹

In contrast, the ULSIA does not provide a right of reinstatement per se, but provides for a notice period of fifteen days before the acceleration clause may be invoked.⁹⁰ This allows the debtor to cure an inadvertent default, and reinstate the security agreement, while giving the secured party a certain cut off point, beyond which the right of reinstatement will not be exercised. However, it is unlikely that a right of reinstatement would be helpful to a debtor suffering unusual cash-flow problems of longer than two weeks' duration. On the other hand, the ULSIA is more favourable to the debtor in that there is no limit to the number of times the agreement can be reinstated, so long as the debtor acts within fifteen days.⁹¹

C. Receivership

While appointment of a receiver by the court is possible, in Anglo-Canadian practice, a power to appoint a private receiver is invariably found in commercial security agreements. Since the private receiver can be appointed more quickly, more easily, and more cheaply, the appointment is made by the secured party, and the powers of the receiver and its remuneration can be spelled out in the security agreement. A privately appointed receiver is generally preferred over a court appointed receiver throughout the Commonwealth, except perhaps in circumstances where the secured party anticipates a challenge to the receiver's authority, or other such difficulties.⁹² In view of the many advantages of a private receivership it is not

88. *Id.* at 131-32 (citations omitted).

89. *See* discussion *infra* note 118.

90. U.L.S.I.A. § 502, 7A U.L.A. at 252.

91. *See id.*

92. *See* JACOB S. ZIEGEL & D.L. DENOMME, *THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS* (1994).

clear why the practice has not caught on in the United States.⁹³ The LSA does not confer the power to appoint a private receiver, which must still be found in the security agreement, but the LSA specifically sanctions such an appointment, and places certain obligations on a privately appointed receiver, primarily with regard to record keeping.⁹⁴ The LSA also specifically provides for a judicially appointed receiver.⁹⁵

D. Collection of Rents

The treatment of the right to collect rents under the LSA differs from that found in section 505 of the ULSIA in several respects.⁹⁶ First, in the provision dealing with the obligor's rights vis-a-vis an assignee, "assignee" is defined to include a secured party.⁹⁷ The effect is that the LSA implies an assignment of rents whenever a security interest is taken in the underlying property, unless the parties agree to the contrary. The rationale for this is that the legal default rule should replicate the most commonly desired arrangement, and in practice, an assignment of rents is almost invariably taken.⁹⁸ Further, in contrast to the ULSIA, if the debtor is in default under a security agreement, the secured party is entitled to all rents, and not only those accruing after notice is given.⁹⁹ This includes all arrears, even if the rents became payable before default. This simplifies the action, as there is no need for the debtor to apportion the arrears between the secured party and the debtor, and there is no good reason for allowing the debtor to milk the property of rents which happened to accrue before default. The debtor is not, in principle, disadvantaged, as the arrears are of course applied to the debt. Under the LSA, because the secured party is deemed to be an assignee, a demand for payment on default is subject to the notice requirements which apply in the case of an assignment of the right to

93. See Jacob S. Ziegel, *The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 451 (Jacob S. Ziegel ed., 1994).

94. SIEBRASSE & WALSH, *supra* note 3, at 135.

95. *Id.* at 136.

96. The LSA follows the ULSIA in providing that a secured party need not be in possession to collect rents. The arguments are reviewed in Julia P. Forrester, *A Uniform and More Rational Approach to Rents as Security for the Mortgage Loan*, 46 RUTGERS L. REV. 349 (1993), which recommends the approach adopted by the ULSIA and the LSA.

97. SIEBRASSE & WALSH, *supra* note 3, at 60.

98. *Id.* at 93.

99. *Id.* at 92.

payment and the concomitant right to pay rents into court in the case of conflicting demands.¹⁰⁰

E. *Duties of the Secured Party in Possession*

The question of the proper scope of the duties of a secured party in possession raises difficult questions. The traditional duties are generally perceived by secured parties as onerous, and as a result, possession by the secured party is a remedy which is resorted to only reluctantly. Section 505(d) of the ULSIA addresses this issue by specifically enumerating a number of duties, including the duty to carry reasonable insurance, to maintain the property, and to make repairs, which amount to a partial codification of existing law.¹⁰¹ However, as the commentary to this section of the proposed act discusses, and as was also noted by the Ontario Law Reform Commission ("OLRC"), a specific enumeration of this sort:

sacrifices the flexibility of the existing standard, cannot be exhaustive, and may "lead to [] mechanical and therefore insufficient compliance." Further, a non-exhaustive enumeration of duties is unlikely to satisfy secured parties, who are more concerned about the standard required in relation to the performance of clearly established duties, rather than the lack of clarity as to the nature of the duties.

Consideration was given to specifically relaxing some of the existing duties, but while the duties may be burdensome, they generally address a real underlying concern. Some duties are not onerous in themselves, but give rise to uncertainty and potential litigation. For example, the duty to take reasonable care in collecting rents and ensuring that the premises are not left vacant, is sufficiently imprecise that it can always provide the basis for an attack by the debtor in deficiency proceedings, and the lost rents from vacancy in a commercial property may be very substantial, especially if considerable time is needed to dispose of a valuable property in a commercially reasonable manner. The obligation to make repairs, while denying the secured party's claims for major improvements, may result in difficult decisions for the secured party. However, the alternative, to deny the debtor the benefit of rents lost by the mismanagement of the secured party, or to permit the secured party to allow the property to fall into disrepair, is a cure worse than the disease.

The LSA therefore neither enumerates the secured party's duties, nor specifically relaxes its duties. [Rather the] LSA parallels the [New

100. See *supra* part V.C.; see also discussion *infra* note 118.

101. U.L.S.I.A. § 505(d), 7A U.L.A. at 257.

Brunswick] PPSA in providing that a secured party in possession must take reasonable care in the management and preservation of the property. This is subject to the overall standard of commercial reasonableness imposed by s. 41, so that the provision should be read as requiring "commercially reasonable" care. This is not intended to effect any specific change in existing law. It is nonetheless possible that some specific duties under existing law will be held to be commercially unreasonable.¹⁰²

F. *Methods of Disposing of the Collateral*

Under the LSA, the debtor's interest in the collateral may be terminated either through an agreement by the secured party to retain the collateral in full or partial satisfaction of the debt,¹⁰³ or by the exercise of the power of sale by the secured party. The former remedy is similar to, but more powerful than the agreement to acquire the debtor's interest contemplated in section 507,¹⁰⁴ and the latter is similar to the power provided in section 509.¹⁰⁵ There is no provision for judicial sale such as that found in section 510 of the ULSIA,¹⁰⁶ nor is there a provision equivalent to the traditional remedy of strict foreclosure, that is, a judicial declaration that the collateral is retained by the secured party in satisfaction of the debt. These remedies have not been available in New Brunswick for a number of years and were not thought to be sufficiently useful to revive.

G. *Retention of the Collateral in Full or Partial Satisfaction of the Debt*

In a remedy modelled after the PPSA, and similar to that found in Article 9, the LSA allows the secured party to propose to retain the collateral in full or partial satisfaction of the debt.¹⁰⁷ The remedy is broader than the agreement to acquire the debtor's interest which is contemplated in section 507 because it extinguishes all interests subordinate to that of the secured party.¹⁰⁸ Accordingly, a proposal to retain the

102. SIEBRASSE & WALSH, *supra* note 3, at 101-02 (citing OLRC REPORT, *supra* note 7, at 230).

103. *Id.* at 109.

104. *See* U.L.S.I.A. § 507, 7A U.L.A. at 258.

105. *See id.* § 509, 7A U.L.A. at 261.

106. *See id.* § 510, 7A U.L.A. at 262.

107. *See* SIEBRASSE & WALSH, *supra* note 3, at 144 (incorporating § 69 of the PPSA); *see also* discussion *infra* note 118.

108. *See* U.L.S.I.A. § 507, 7A U.L.A. at 258.

collateral must be sent to parties who would be entitled to be notified if a power of sale were exercised, namely all parties with a right to redeem, including the spouse of the debtor.¹⁰⁹ Any party with an interest in the collateral has fifteen days after the proposal is made to object.¹¹⁰ If no objection is made within that time, the secured party is deemed to retain the collateral in satisfaction of that part of the debt which was specified in the proposal. The interest of all subordinate parties is extinguished, except for the interest of parties who were entitled to, but did not receive notice. The interest of subordinate parties who did not receive notice will be extinguished by a subsequent sale to a bona fide third party, and their only remedy thereafter will be for damages against the secured party for failure to give notice.¹¹¹

The LSA gives the secured party the option to retain the collateral in partial satisfaction of the debt to provide additional flexibility. This option will be particularly useful if a deficiency is anticipated and the debtor is solvent: by agreeing to a proposal for retention of the collateral in partial satisfaction, expenses of the sale are avoided, thereby increasing the amount which may be credited against the debt, while the secured party retains the right to pursue the deficiency.

This drastically simplified power to retain the collateral in satisfaction of the debt is perhaps reminiscent of the strict foreclosure which was at one time granted by American courts, and which was perceived to operate so harshly that it was eventually eliminated. Abuse of the remedy under the LSA is prevented because any party with an interest which would be extinguished has the right to object; even one objection is sufficient to block a foreclosure proposal. However, the basis for objection must be a legitimate one. The objector must of course have an interest in the collateral, and the secured party is entitled to demand proof of the interest, and can proceed as if no objection was made if proof is not forthcoming. The objector must also be adversely affected by the foreclosure. Of course, the party's interest will be cut off by the disposition, but this alone is not sufficient to give a right to object, as it will not have an adverse effect on that party if the market value of the collateral is less than the debt owed to the foreclosing creditor plus its enforcement expenses. If faced with a frivolous objection, the secured party is entitled to apply to a court for a ruling that an objection is ineffective because the objection was motivated

109. See SIEBRASSE & WALSH, *supra* note 3, at 144.

110. See *id.*

111. *Id.* at 107-08, 119-20.

by a purpose other than protection of the objector's interest in the collateral. Costs in such a motion may be awarded against a party who makes a frivolous objection, thus providing sufficient disincentive for such objections.

H. *Creditor's Power of Sale*

The LSA grants the secured party the right to dispose of the collateral by sale or lease, whether or not such a right was specified in the security agreement. Other than this, the power of sale provisions of the LSA are very similar to those found in section 509 of the ULSIA, with some differences regarding timing and notice periods. The delay period between notification that the secured party intends to exercise its power of sale, and the earliest date at which the sale may be held, was set at five weeks under section 509(a) of the ULSIA.¹¹² This time period was apparently set with the goal of providing sufficient time for the debtor to obtain court relief to control any aspect of the foreclosure.¹¹³ However, the great majority of sales will not justify judicial intervention, and it is unduly burdensome to structure the process around an unusual event. The LSA contemplates that challenges to the validity of the sale can be made after the sale, with damages as a remedy. This remedy will generally be adequate, and will ensure that the secured party realizes on the security only when it has at the least a prima facie right to do so. The delay period in the LSA is intended solely to give the debtor time to cure the default or refinance the property when in a position to do so expeditiously, and the LSA therefore adopts a somewhat shorter notice period of thirty days.

The ULSIA provides that a notice of intention to foreclose may not be given to a protected party until payment is five weeks overdue. This effectively doubles the time between default and the earliest possible sale. As the OLRC points out, to the extent that the delay before the sale is intended to allow the debtor or other parties with a right to do so to redeem the collateral, there is no justification for longer notice periods for protected borrowers, since there is no connection between the type of borrower and the chance of improvement of its financial prospects in the near future.¹¹⁴ Further, secured parties typically make every effort to encourage the debtor to pay before taking steps to realize on the security. To impose an

112. U.L.S.I.A. § 509(a), 7A U.L.A. at 261.

113. James M. Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL ESTATE L.J. 179, 186 (1978).

114. OLRC REPORT, *supra* note 7, at 169.

additional formal notification period will either add to the delay when there is no hope of redemption, or will encourage secured parties to issue a formal notice at the first legal opportunity, so as not to be hampered by the notice requirement when a decision is made to realize on the collateral. This would unduly formalize the process, and in so doing, might impede informal attempts to reinstate the debt.

I. *Effect of Disposition*

As under section 512 of the ULSIA,¹¹⁵ a sale to a bona fide purchaser for value, pursuant to the power of sale in the LSA, conveys title free of all interests subordinate to that of the debtor or the secured party.¹¹⁶ It has been suggested that under the ULSIA, “a failure to observe significant statutory requirements” would “undoubtedly” result in a void sale, particularly when the secured party is not financially responsible, so that no compensation is forthcoming.¹¹⁷ Whatever the merits of this position as an interpretation of the ULSIA, it is certainly contrary to the intended interpretation of the equivalent provision of the LSA. Such an interpretation, by creating uncertainty in the title given under the exercise of a power of sale, would result in a general reduction in the selling price for such properties, thereby penalizing thousands of debtors and secured parties in cases where all reasonable steps were in fact taken. It is preferable to apply the general principle that where one of two innocent parties must suffer, the party should bear the loss who could best have avoided it. Only parties who borrow from lenders who are both unscrupulous and financially irresponsible expose themselves to the risk that they will be financially harmed by an improper sale. Because there is no dearth of responsible lenders, a decision to borrow from an irresponsible lender will typically be made to obtain a lower interest rate. There is no reason why parties who take such a calculated risk should later be compensated to the detriment of the good faith purchaser and borrowers generally. Of course, when the purchaser is a party to the bad faith sale, the same logic does not apply, and he or she should not be protected.

115. See U.L.S.I.A. § 512, 7A U.L.A. at 265.

116. SIEBRASSE & WALSH, *supra* note 3, at 107-08, 119-20.

117. Pedowitz, *supra* note 113, at 194-95.

VIII. CONCLUSION

The proposed Land Security Act will soon be brought to the New Brunswick government for approval in principle.¹¹⁸ If the proposal is approved, the drafters anticipate that it will be implemented in the near future. While, for better or for worse, the drafters have deviated from the ULSIA in a number of respects, there is no question that the guidance provided by the ULSIA helped them in fashioning a better proposed act than would otherwise have been possible. The drafters hope that some of the observations and modifications that they have recommended may likewise be of assistance to future law reformers.

118. This article was written at the same time as the final draft of the report (the tentative act) was being prepared. After this article was completed, but just prior to the submission of the report, NBGIC indicated that they viewed some of the drafters' recommendations, which they intended to make, as changes to the law which are outside the scope of their legislative mandate. Therefore, NBCIG would be unwilling to present those recommendations to the executive branch of the government for adoption as an official policy proposal. These aspects of the report, in particular, the detailed treatment of the rights of the debtor after alienation of the mortgaged property in part V.E. of this paper, the right of reinstatement of the security agreement discussed in part VII.B., and the secured party's right to retain the collateral in full or partial satisfaction of the debt discussed in part VII.G., were therefore removed from the final report to NBGIC. Discussions are currently underway between the authors, NBGIC, and the Law Reform Branch of the New Brunswick Department of Justice regarding the possibility that the Law Reform Branch will assume responsibility for bringing forward these particular recommendations.

Markets and Law Reform: The Tension Between Uniformity and Idealism

James Charles Smith*

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I. INTRODUCTION

Property law is not a realm where uniform legislation has thrived. Only a handful of efforts have impressed enough state legislatures to have meaningful impact. Of the few successes, most are narrow in scope. For example, the Uniform Simultaneous Death Act¹ deals with the transfer of property rights in cases when the sequence of deaths among multiple or competing owners is difficult to prove, and the Uniform Vendor and Purchaser Risk Act (“UVPRA”)² allocates losses from casualty and

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1. 8B U.L.A. 267 (1993 & Supp. 1995). All states except Louisiana and Ohio have enacted either the 1940 version or the 1993 version of the Act. *Id.* at 29, 41 (Supp. 1995).

2. 14 U.L.A. 469 (1990).

condemnation that occur while real property is subject to a contract of sale, prior to closing.

In property, success has befallen only two uniform acts that have breadth, in that they treat an entire topic or type of legal relationship. The Uniform Probate Code ("UPC")³ and the Uniform Residential Landlord and Tenant Act ("URLTA")⁴ stand alone in this regard. First, approximately half of the states have adopted all or a significant part of the UPC. Approved in 1969, and expanded and amended several times since, it provides comprehensive treatment for the transmission of property at an owner's death via probate and nonprobate transfers, guardianship, and related matters. Second, the URLTA, approved in 1972, has garnered adoption by fifteen states.⁵ It provides statutory rules governing all facets of the landlord-tenant relationship for residential tenancies.

The most ambitious effort at uniform property legislation ever launched was the Uniform Land Transactions Act ("ULTA")⁶ and its companion, the Uniform Simplification of Land Transfers Act ("USLTA").⁷ Both measures caught the eyes of property scholars,⁸ including law casebook authors,⁹ most of whom were generally approving. Both Acts, however, met with singular failure in the sense of uniform legislative shunning and have not substantially influenced judges in their lawmaking roles. In published

3. 8 U.L.A. 1 (1983 & Supp. 1995).

4. 7B U.L.A. 427 (1985 & Supp. 1995).

5. During the 1970s, 13 states, beginning with Hawaii in 1972, enacted the URLTA. Its sails have lost the wind; since then there have been only two adoptions, Rhode Island and South Carolina, both in 1986. *Id.* at 60 (Supp. 1995).

6. U.L.T.A. (1975).

7. U.S.L.T.A. (1976).

8. *See, e.g.*, Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980); Robert Brussack, *Reform of American Conveyancing Formality*, 32 HASTINGS L.J. 561 (1981); Jerome J. Curtis, Jr., *Simplifying Land Transfers: The Recordation and Marketable Title Provisions of the Uniform Simplification of Land Transfers Act*, 62 OR. L. REV. 363 (1983).

9. *See, e.g.*, JOHN CRIBBET & CORWIN JOHNSON, PROPERTY, at xviii (4th ed. 1978) (stating that adoption of the Acts by the Commissioners "points the way toward further reform in the law relating to the sale of land"); GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 2 (2d ed. 1981) (stating that the ULTA "represents an interesting and often useful alternative to existing legal rules," to which the authors refer throughout the book). Recent casebooks generally pay much less attention to the ULTA and the USLTA than those published in the 1970s and early 1980s.

opinions, very few courts have relied upon the ULTA or USLTA positions for analogous support.¹⁰

Why did a single state legislature, somewhere in America, not pass at least one of the Acts? More than twenty years have elapsed since promulgation, so certainly they have had time. Causation, often a prime concern of lawyers, is tricky here. When a legislature enacts a statute, it is often hard to pick one's way through the process to determine precisely why the legislature acted and why it made particular drafting choices. Legislative history for state statutes, compared to federal acts, is often sketchy. On occasion, there is no extant written history. But at least the legislature has spoken through its vote and the words of the act.

Here, we are investigating the legislature's refusal to speak or its lack of interest. When the law, in its examination of human conduct, recognizes the distinction between an affirmative act and an omission, as it often does, the distinction typically is grounded on the difficulty of ascribing intent or motivation to an omission. This raises an important caveat for our purposes. We cannot tell for sure why the legislatures eschewed the USLTA and the ULTA. There may be no single reason. In some states, there may have been more pressing legislative business for a number of sessions; in other states, there may have been no energetic proponents or available sponsors; in others, a searching study may have disclosed that the Acts' principles were not compatible with the states' perceived needs.

My purpose is not to make a comprehensive study either of the causes for legislative rejection of the Acts or of the merits of the Acts' provisions. As indicated above, one cannot be certain that lack of adoption is due to a perception that the Acts' substantive principles are deficient in terms of policy. My suggestion, however, is that one plausible explanation for the failure to garner adoptions is that the core principles of the Acts were rejected on their merits. The rejection occurred not because the principles are intrinsically flawed (which may or may not be the case), but because they embody major reforms that do not respond to contemporary market needs. Instead, the proposed reforms ignore market changes, including

10. A Westlaw search conducted by the author on January 24, 1996, revealed 30 published opinions citing the ULTA (27 in state courts and 3 in federal courts) and 3 published opinions (all in state courts) citing the USLTA. A majority of those opinions rely on the Acts to some extent, typically by pointing out that the rule they announce is compatible with or resembles the Acts' rule. Given the two decades since adoption of the Acts and the volumes of real property cases decided since, this is a small number of citations, reflecting minimal impact on the judiciary.

developing market-based solutions to legal problems concerning real estate transactions.

II. MARKET CHANGES AND LAW REFORM

The real estate markets of today, as well as those of the 1970s when the Acts were approved, are vastly different from those of the early part of this century. Earlier, both real estate sales and loans tended to be local in nature, with the parties often having continuing, and sometimes personal, relationships. Seller and buyer often lived in the same community and, if not well acquainted, they may have known of the other's reputation. The borrower, whether commercial or residential, knew his local banker. Real estate transactions involving local parties, just as today, sometimes fell apart and generated disputes, but local legal rules and local norms generally proved adequate to resolve them. Whether an outsider from a community in another state would understand those rules and norms was not considered to be of much importance. If an outsider chose to enter the local market, it was at his peril to ascertain the local rules by, for example, hiring a local agent or attorney.

This century the markets for real estate sales and finance matured, becoming mammoth in size at the national level and much larger at the local level in many American communities. Like other aspects of the American economy, the parties to transactions increasingly were strangers. Growing numbers of transactions involved parties from different communities, and as cities expanded, fewer residents knew each other. More property transactions with interstate dimensions took place.

Law evolves to respond to economic and social changes. Radically different real estate markets raised new problems, which existing property law and existing institutions were ill-equipped to handle. Persons entering large, depersonalized real estate markets needed certain legal protections, which existing law failed to provide. Buyers of new housing, who paid a price based on the assumption that the unit was satisfactory in quality and free of significant defects, no longer dealt with a local merchant who had a known track record and felt a need to preserve local goodwill.

Law and markets interact in many different ways. A particular legal problem, if and when it is solved, may be solved in any number of ways: by judicial efforts to revamp the common law, by federal legislation or regulation, by uniform or nonuniform state legislation, by private ordering accomplished by market participants, or by structural changes in markets as institutions evolve and new institutions emerge. Such approaches are not, of course, mutually exclusive. Responses to a given problem may include a mix from the above list. For example, judicial decisions may spark and

inform the drafting of legislation. In property, this combination gave birth to the URLTA. It was a reaction to the tide of judicial decisions embracing the implied warranty of habitability in residential leases. Similarly, in residential finance, reform came from the interplay between the private mortgage markets and new federal laws. During the 1970s and 1980s, the thriving secondary mortgage market created strong pressure for national standards for residential mortgage products.¹¹

The drafters of the ULTA and the USLTA naturally believed that many problems in real estate transactions were amenable to solution by uniform state legislation. A person not so persuaded, of course, would not join the effort nor expend valuable time on the project. For a number of the problems addressed by the Acts, the drafters missed the mark at this initial level of decision. They too readily embraced the idea that a state code, compared to other approaches, was a useful response. In particular, they failed to recognize that other institutions were coping with the perceived problems and with increasing effectiveness.

III. TENSION BETWEEN GOALS OF UNIFORMITY AND IDEALISM

The Acts proposed many changes to well-established property doctrines. The drafters were not timid. They strove to fashion an ideal set of reformed rules which would govern the entire system of real estate sales, titles, and finance. As a general proposition, the more major changes contained in a proposed new statute, the more difficult it is to get it enacted. Lawmakers, legislators as well as judges, are accustomed to making incremental, modest changes. When a proposal envisions an entirely new scheme, a legislature must be willing to swallow the entire thing. The broader the new scheme, the more likely it is that some part of the scheme will prove unpalatable, leading to rejection of the whole.

This general principle has special meaning when the proposed statute is a uniform act. Success is not achieved if one or a few states adopt it. The overriding hope, implicit in the title "uniform," is widespread adoption by many states. For this reason, the goal of uniformity, in the sense of widespread state adoptions, is generally incompatible with an "ideal" code that seeks a large number of major reforms. This is simply an application of commonplace notion that plans imbued with an excess of idealism are not likely to succeed. Idealism must be tempered with realism. Uniform or widespread acceptability and revolutionary legal change inherently conflict.

11. See Robin P. Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 Sw. L.J. 991 (1986).

Thus, proponents of codes and uniform laws should limit the number of major changes they propose to a relative few, picking those changes that are clearly merited in terms of policy and meaningful in terms of real-world impact. It is an uphill battle unless, prior to the proposal, there already exists a broad consensus that substantial flaws exist in the present system that the bill targets for reform. In contrast, such a consensus attended the success of other uniform legislation. Notably, both the UPC and the URLTA responded to "headline causes," as did the Uniform Commercial Code ("UCC") years earlier.¹²

With respect to real estate transactions, there was no such consensus that the system had substantial legal defects in the 1970s, nor is there one now. The proponents of the Acts, therefore, had the burden of convincing the legal community that the major reforms contained therein were necessary and important. This burden they failed to carry because the Acts attempted to reform established principles that no longer needed reformation. There simply was not sufficient market pressure to revamp the whole system. To the contrary, market forces were aligned to resist such drastic revision.

The remainder of this article explains the market context surrounding four of the Acts' reform proposals, identifying two reasons why there was (and is) relatively little need for adoption of the Acts' reforms. First, in some subject matter areas, institutions other than courts and legislatures had developed, or were developing, alternative solutions to the problems at hand. Two examples, discussed below, are warranties of quality for new homes and formal requirements for deeds. Second, in other areas, alternative solutions were being achieved by private ordering by the parties engaging in the transactions. Two examples, discussed below, are risk of loss and specific performance. Both areas are alike in that the Acts' proposals were behind the times. The major problems addressed by the Acts were serious problems earlier this century, but when the problems had reached a sufficient magnitude, the market responded by finding solutions that developed in small, incremental steps. Real estate markets and institutions had changed drastically by the 1970s, and the Acts failed to take full account of those changes. Perhaps the Acts, in the forms they were promulgated, would have succeeded in the 1940s or 1950s, but they were too late to succeed today.

12. For example, Article 9 directly responded to substantial market concerns in many states about the validity of a "floating lien" on a business' personal property. *See* U.C.C. art. 9, 3 U.L.A. 1 (1992 & Supp. 1995).

IV. SOLUTIONS FROM NONLEGAL INSTITUTIONS

A. *Protecting Buyers from Homebuilders*

The consumer protection movement came of age in the 1970s. In property law, one of its prime manifestations was the implied warranty of quality, developed by courts to protect the expectations of buyers of new homes. The implied warranty replaced the doctrine of caveat emptor, which shielded real estate sellers from post-closing liability for housing defects, except to the extent the seller gave an express warranty that survived closing.¹³

Adoption of the implied warranty followed and lagged behind reforms in the sales of personal property. Courts analogized to the protections afforded buyers of goods under the law of sales, recently codified in the UCC, reasoning that buyers of new housing deserved equivalent protection.¹⁴ This legal development recognized the changes in housing markets and methods of construction that have taken place this century. Once when many homes were custom-built by local builders who used local craftsmen, the typical purchaser might personally select a builder, based upon reputation and other factors, and become actively involved in the process of designing the house and supervising its construction. Today most homes are sold just like other commercial products. They are mass produced on a speculative basis, built according to stock plans, with the typical purchaser relying not on the personal characteristics of the builder, but solely on advertising, the salespersons' presentations, and the product appearance.

Affected by the tide of consumerism sweeping the law in the 1970s, which included the judicial implied warranty as one facet, the ULTA set forth an implied warranty for the sale of new housing by a merchant

13. For a comprehensive analysis of implied warranties, see Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists under One Roof*, 1993 WIS. L. REV. 13 (advocating system of standardized warranties, with disclosure to buyers of warranty choices, including choice of disclaiming all warranties).

14. The nature and content of the implied warranty varied somewhat from state to state, partially because of differences in how closely they tailored the new warranty to the personal property analogue. Some states called the warranty an "implied warranty of habitability," protecting the buyer only from extreme defects such as structural flaws that threatened the buyer's safety or made the unit wholly unlivable. Other courts conferred broader protection, analogizing to the UCC warranties of merchantability for the sale of goods.

seller.¹⁵ This is not exceptional, although the scope of the warranty is substantially broader than that developed by prevailing caselaw. What is exceptional, however, was the ULTA's decision to make the implied warranty incapable of disclaimer, waiver, or modification by buyers who occupy or intend to occupy the property.¹⁶ The home buyer, given the ULTA moniker of "protected party,"¹⁷ is shielded from vicissitudes of freedom of contract. The apparent rationale is that home buyers lack the ability, information, and bargaining power to negotiate for express warranties of quality, and that without a mandatory statutory warranty, home buyers would be routinely victimized by sellers who contractually disclaim all liability for housing defects.¹⁸ In making the warranty mandatory, the ULTA rejected the position taken by a majority of courts, which treat the judicial implied warranty as implied in fact and thus capable of disclaimer in accordance with general principles of contract law.¹⁹ Courts have tended to look at disclaimers and modifications on a case-by-case basis, showing a high degree of deference to parties' contracts when the disclaimer is clearly expressed and conspicuous. Instead of deferring to these evolving judicial standards, the ULTA took the blunderbuss approach of invalidating all waivers of implied warranties of quality by protected parties.

15. Under U.L.T.A. § 2-309(b):

[a] seller . . . in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any [new] improvements . . . will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

Id.

16. *Id.* § 2-311(c). The Act has a minor exception for known defects that the parties bargain over. *Id.* (stating, "seller may disclaim liability for a specific defect . . . if the defect . . . entered into and became a part of the basis of the bargain"). It has no bearing on the major problem, which is the allocation of risk between seller and buyer with respect to defects that are become evident only after the time of contracting or closing.

17. *Id.* § 1-203 (defining "protected party" to include an individual who buys improved residential real estate and who occupies or intends to occupy all or part of the real estate as a residence).

18. The ULTA position treats the home buyers the same as residential tenants, which a majority of jurisdictions protect with a nonwaivable implied warranty of habitability.

19. *See, e.g.,* Sloat v. Matheny, 625 P.2d 1031 (Colo. 1981); G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982), *overruled on other grounds by*, Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987); Schepps v. Howe, 665 P.2d 504 (Wyo. 1983). The UCC similarly permits waivers of implied warranties for the sale of new goods. U.C.C. § 2-316(2), 1A U.L.A. 465 (1989).

More importantly, the ULTA warranty of quality ignores reforms emanating from the homebuilding industry. When the ULTA was adopted in 1975, the industry was in the nascent stage of addressing the problem of new housing defects by a system of standardized, express warranties. Many builders offer their own express warranties, but more significant are warranties given or guaranteed by third-parties. The most prominent of such warranties, known as the Home Owner's Warranty ("HOW") Program, was founded by the National Association of Home Builders in 1972. The program is voluntary, and builders who meet the program's standards are eligible to enroll.²⁰ A buyer who purchases from a participating builder receives a HOW policy, which insures against a range of defects for certain time periods, which vary according to the type of defect.²¹ The builder pays the HOW Corporation approximately one-third of one percent of the sales price of the house for the policy. Over the years, the HOW plan has covered more than two million homes, a total representing approximately half of the market for third-party warranties.

There are three other major private warranty programs operated by the Home Buyers Warranty Corporation, the Residential Warranty Corporation, the Professional Warranty Corporation.²² Since 1994, the HOW Corporation has struggled with solvency problems,²³ and its competitors are assuming a greater share of the market. Today, the HOW program and other warranty programs are well known, not only among real estate professionals, but also among knowledgeable home buyers. Participation in a national warranty program is a marketing advantage, and builders often advertise this feature of their product. According to a recent estimate, in 1995 almost ninety percent of new home buyers obtained an express warranty, with one-third of them issued by warranty companies, and the rest issued by the builder.²⁴

20. The standards relate to construction expertise, financial stability, and customer relations.

21. All defects in materials and workmanship are insured for the first year. Building systems, such as plumbing, heating, and air conditioning, are insured for 3 years and major structural defects are insured for 10 years.

22. See Elizabeth Razzi, *Buying a Home Before It's Built*, KIPLINGER'S PERS. FIN. MAG., Aug. 1995, at 77.

23. In October 1994, the HOW Corporation was placed in receivership by the State of Virginia. Apparently, the premiums it charged were too low to cover the risk of housing defects it insured. The receiver has satisfied claims brought by insured homeowners at 40%. See Pat Rosen, *HOW Offering 40 Percent on Claims*, HOUSTON POST, Feb. 12, 1995, at C1.

24. See Elizabeth Birge, *A Warranty Is Only as Good as the Builder Behind It*, CHICAGO TRIB., Nov. 11, 1995, at HG1 (citing estimate of William Young, Director of Consumer Affairs for the National Association of Home Builders).

Although the HOW program has received criticism on the basis that it over protects the builder,²⁵ in a number of key respects, third-party warranties better protect buyers than would the ULTA proposal. First, like other express warranties for the sales of other products, if a defect appears within the policy time limits, it is covered. Unlike the implied warranty, the buyer does not have to prove that the defect existed at the time of closing or completion of construction. Depending on the character of the defect, proof that because something is wrong now a defect existed years ago can be a substantial evidentiary burden. Second, under the HOW plan, if there is a dispute concerning the warranty, the buyer has the right to submit the matter to an arbitrator, whose decision binds the builder, but not the buyer. Last but not least, the builder's warranty obligations are insured by the third-party warranty company. The buyer does not bear the full risk that the builder may become insolvent during the policy period, and in the home-building industry, where many small businesses fail, especially during housing recessions, this risk is material.²⁶

The HOW program was in its infancy at the time of ULTA adoption. The weakness of the ULTA approach lies not in its authors' lack of prescience; who could foresee in the 1970s that the standardized warranties would evolve to become the dominant form of quality protection for new home buyers? Rather, the problem with the ULTA approach is that it assumed that the private market could not solve the problem of new housing defects, and government-mandated warranties, forced upon market participants whether they wanted it or not, was the only viable alternative. The rigidity of the ULTA warranty rules, had they been legislatively enacted, would have effectively precluded development of national standardized warranties.

B. *Eliminating the Formalities of Conveyancing*

Formalism has long been a whipping boy in legal circles. A dominant theme of twentieth century private law is to eliminate formal rules, replacing them with flexible, case-sensitive rules that look to the substance of the

25. E.g., Thomas H. Stanton, *Consumer Protection and National Housing Policy: The Problem of New-Home Defects*, 29 CASE W. RES. L. REV. 527, 533 (1979); FTC STAFF, HOUSING POLICY SESSION BRIEFING BOOK 39 (1978).

26. The buyer reduces, but does not eliminate, the risk of an insolvent warrantor, a point illustrated by the recent receivership of the HOW Corporation. Purchasers of HOW policies, nonetheless, are in a better position than they would be with no third-party warranty at all because they receive part payment of claims from the receiver and retain the right to proceed against the builder for the deficiency.

parties' understandings and interests. The UCC exemplifies this approach. Consider two prime examples from Article 2 and Article 9. With respect to contracts of sale, title to the goods no longer serves as a linchpin to define the parties' relative rights and obligations. With respect to secured transactions, the form of the parties' security agreement is irrelevant; regardless of form, if the substance of the parties' agreement is that personal property secures the performance of an obligation, a single set of Article 9 rules govern their relationship.

Yet all vestiges of formalism have not disappeared from our legal system, and modern scholars recognize that some formal rules may promote important policies.²⁷ The law of modern real estate transfers has worked out an accommodation between the competing ideals of formalism and anti-formalism. The resulting dialectic recognizes a division between the validity of the deed as between the parties and its status within the recording system. In the former realm, the substance of the parties' deal governs regardless of formalities; in the latter realm, formal rules prevail.

The architects of the USLTA embraced the ideal of anti-formalism, applying it to conveyancing practices. The USLTA codifies the modern law of the validity of deeds between the parties since it comports with anti-formalism ideology. Thus, under the Act, the only formal requisite for a deed, other than an identification of the parties and the land, is a signature by the grantor or his representative.²⁸

When it came to recording, the USLTA also seeks to cleanse the system of formalities. The Act starkly provides: "No signature, acknowledgement, seal, or witness is required for a document to be eligible for recording."²⁹ Dropping the last two requisites reflects present state law and is sound. Dropping the first two completely reverses modern real estate practice, which bars the recording of instruments that are not both signed and acknowledged. Instead, instruments that patently are unenforceable as between the parties are entitled to recordation.

27. See, e.g., P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); Robert S. Summers, *The Formal Character of Law*, 51 *CAMBRIDGE L.J.* 242 (1992).

28. U.S.L.T.A. § 2-201. This comports with the standard principle that, as between the parties, an acknowledgement is not necessary. The USLTA also makes it clear that neither a seal nor a witness is necessary. *Id.* § 2-201(c). Again, this is not a significant change, as modern law has eviscerated the historic importance of writings under seal and only several states require third-party witnesses for deeds.

29. *Id.* § 2-301(b).

Recorded instruments under the USLTA system, provided they are signed, carry strong presumptions of legitimacy.³⁰ These presumptions do not depend on whether the instrument is notarized or otherwise acknowledged. Thus, the USLTA reform directly raises the policy question whether acknowledgement of deeds and other instruments that affect title to real estate serves a useful purpose. The drafters apparently believe acknowledgement to be worthless. A comment observes: "Whatever the office of notary public once was, other methods, in particular civil liability for slander of title and possible criminal sanctions now appear to provide more effective and less burdensome methods of discouraging fraudulent behavior."³¹ No empirical evidence bearing on the cost of notarizing real estate documents is offered, nor is any foundation given for the sanguine conclusion that real estate fraud is largely a thing of the past because modern crooks are afraid of slander of title actions and criminal prosecutions.

There are two reasons why the requirement of acknowledgement for recorded instruments may be worth retaining. First, although it obviously cannot stop all fraud stemming from forgery, it makes the forger's task at least a little harder. The forger must either dupe a notary public or obtain illegal access to the notary's tools, including his seal. Granted, a determined forger may succeed in doing this, but it is more probable that at least some will be deterred, diverted to other affairs. The USLTA recording reforms, by ridding the system of formalities, ignore the real-world reliance placed on recorded instruments and stack the cards in favor of the forger or the forger's transferee.

Second and more importantly, acknowledgement is the only reason whether a presumption of legitimacy makes sense. The USLTA, as noted above, retains the well-established concept that a recorded signed instrument is presumed to be signed by the person named as grantor and is presumed to be delivered. This presumption makes sense under present law because acknowledgement evidences that the instrument was apparently signed in the presence of a disinterested third-party who is acting in an official capacity—the notary. Without this safeguard, not only is a forged unacknowledged deed recordable, once it is recorded it is presumed valid under the USLTA. The true owner who is the victim of the forgery has the burden of proving, by a preponderance of the evidence, that he did not sign the deed.

30. *Id.* § 2-305.

31. *Id.* § 2-201 cmt. 3.

Typically, the two main problems raised when the law imposes formal requirements upon market transactions are costs of compliance and sanctions applied to noncompliers. Acknowledgement of deeds and other instruments is not costless, but the costs are not high. Most deeds are prepared by attorneys or other professionals who have ready, convenient access to employees who are licensed notary publics. The USLTA reform would benefit society by reducing notaries' workloads (but will this raise unemployment?), thus marginally reducing transaction costs for sellers and buyers of land. It is questionable, however, whether this small cost savings overcomes the probable benefits of fraud prevention and protection of true owners referred to above.

With respect to noncompliance with the formality of acknowledgement, a very small percentage of recorded instruments either are unacknowledged or defectively acknowledged. Such defects raise legal problems because the instruments are ineligible for recording, but are recorded in fact. The USLTA seeks to resolve the dichotomy, eliminating the need for courts occasionally to struggle with this problem. Solving this problem by statute is not highly important for two reasons. First, the risk is minimal in a statistical sense for several reasons. The requirement of notarization or another form of acknowledgement is extremely familiar to real estate attorneys, brokers, and everyone else who regularly deals with real estate. In most states, the risk from defective acknowledgements is substantially reduced by title curative acts and state and local bar standards that govern real estate titles. And even when there is a defective acknowledgement that is not cured by a statute or another doctrine, such as adverse possession, it is rare that loss will result. There can be a loss to the record claimant whose chain of title includes the defect only if an innocent third-party has stumbled upon the scene.³²

Second, the minor statistical risk that remains in modern real estate practice is handled satisfactorily by title insurance. Virtually all lenders and most informed buyers obtain title insurance policies, which afford economic

32. For example, assume A has conveyed to B and B has conveyed to C. The A-to-B deed is genuine (signed and delivered by A), but it is defectively acknowledged. C has no risk from A because the A-to-B deed binds C. C is subject to some third-party risk, but it is remote. Much must happen. C loses some or all of his property only if A makes an adverse conveyance by, for example, selling the land to X. In this event, X may gain paramount title versus C on the theory that the A-B deed, which should not have been recorded, does not impart constructive notice to X. But X will succeed in almost all states (which have notice or race-notice recording acts) only if: 1) C is not in possession of the land and 2) X does not order a title search of the records (if X searches the records, X will see the A-to-B deed and will be bound by actual notice).

protection against the risk that loss will result from a defect concerning acknowledgement of an instrument in their chain of title. The USLTA recording reform fails to recognize that the real-world problem of parties failing to observe recording formalities, such as acknowledgement, is substantially solved by the institution of title insurance. Whatever vices stem from formalism, in this arena they were already minimized by the impact of another institution.

V. SOLUTIONS FROM THE PRIVATE ORDERING OF PARTIES

A. *Risk of Loss under Executory Contracts*

Under an executory contract of sale, the traditional common-law rule is that the buyer bears the risk of loss from fire or other casualty from the time the contract is signed. This rule is often explained as a corollary of the doctrine of equitable conversion; the buyer has equitable title, which is the substance of ownership, and the seller has legal title only for the purpose of securing payment of the purchase price.

The ULTA reverses the traditional risk of loss rule, adopting the position of the UVPRA.³³ The UVPRA/ULTA rule allocates the risk of loss to the party who is in possession prior to closing. In other words, the seller retains the risk of loss until closing, unless the buyer takes possession

33. The National Conference of Commissioners on Uniform State Laws adopted the UVPRA in 1935. There are some differences in language between the ULTA and the UVPRA. The UVPRA shifts the risk to the seller only if "all or a material part of the property is destroyed." U.V.P.R.A. § 1(a). The ULTA, however, protects the buyer from all destruction or damage, giving him the right to cancel if the loss "results in a substantial failure of the real estate to conform to the contract." U.L.T.A. § 2-406(b)(1). For lesser losses, the ULTA buyer has the right to pick either an abatement of the purchase price or the benefit of the seller's insurance proceeds or condemnation proceeds. *Compare* U.V.P.R.A. § 1(a) (1935) *with* U.L.T.A. § 2-406(b). The UVPRA risk allocations are overridden if the loss is the fault of either party; the text of the ULTA is silent on the matter, but the Commissioner's Comment states the loss should fall on a party who is at fault. *Compare* U.V.P.R.A. § 1(a), (b) *with* U.L.T.A. § 2-406 & cmt. 1. The ULTA covers escrow closings, providing that the risk of loss passes to the buyer when the escrow conditions are fulfilled if this happens before the buyer has taken possession. U.L.T.A. § 2-406(c)(2). The UVPRA is silent on this matter. The UVPRA authorizes the parties to alter the statutory risk allocations by express contract. U.V.P.R.A. § 1. The ULTA does not discuss this matter, either in text or in the comments, although it is highly unlikely the authors meant to preclude the parties from contracting out of the ULTA scheme.

prior to closing. For most sales, this means the seller retains the risk of loss until closing because most buyers do not take possession until closing.³⁴

Twelve states have adopted the UVPRA, beginning with South Dakota in 1937. Long ago, the adoption process ground to a halt, reflecting the lack of contemporary concern about risk of loss among real estate professionals.³⁵ Why is there so little interest in the rule? The most important facet of both the traditional pro-seller equitable conversion doctrine and the UVPRA rule is that it is an implied rule, which the parties are free to alter.³⁶ And parties to written contracts of sale virtually always exercise this freedom.

A state's baseline risk of loss rule, whatever it may be, is not very significant because the parties' contract almost always has an express provision that governs risk of loss. Solving the problem this way is not expensive. With only two parties involved, transaction costs are generally low. Whenever a buyer is represented by an attorney, the contract will expressly deal with risk of loss. In a state following the traditional rule, an attorney who fails to have the contract address the issue would be guilty of malpractice. Many buyers, especially home buyers, do not hire an attorney and, accordingly, they are more vulnerable to the traditional rule. However, such buyers typically use a standard-form contract, often approved by a bar association or a brokers' association. Virtually all standard contracts address risk of loss, providing the buyer with a substantial degree of protection. In the large majority of transactions, that provision allocates all or most of the risk of loss to the seller. The implied rule thus applies to an extremely small percentage of real estate purchase transactions. This is the primary reason why so few states have bothered to change the traditional risk of loss rule. Granted, it may occasionally disappoint an unsophisticated buyer who is not represented by an attorney and who does not use a standard-form contract, but this is rare.

In essence, private ordering by parties to real property sales adequately handles risk of loss issues, making statutory reform relatively unnecessary.

34. The buyer has the right to take possession prior to closing only if both parties agree. Conceptually, this rule (that the right to possession follows legal title) is inconsistent with the doctrine of equitable conversion. Saying that the buyer has equitable title (the most important thing) from the signing of the contract implies that the buyer should have possession or its fruits.

35. Since Oklahoma became the tenth state to adopt the UVPRA in 1965, only Nevada, in 1977, and Texas, in 1989, have passed the Act. *See* U.V.P.R.A., 14 U.L.A. 469 (1990).

36. U.V.P.R.A. § 1. Oddly, the ULTA is silent on the right of the parties to change the statutory rule.

There is little real-world need for any state to change its risk of loss rule. Modern critics of the traditional rule have cogently stated their case.³⁷ They are right. The traditional rule is founded on ancient, outmoded assumptions and in principle should be discarded, even though it harms extraordinarily few purchasers. However, what rule should replace the traditional rule is far from clear.³⁸ While the UVPRA/ULTA rule is better in principle as reflecting the parties' probable expectations, for a state to switch to this rule is not costless, and for this reason it is debatable whether the costs exceed the benefits.

Two major costs of switching rules are apparent. First, the UVPRA and ULTA fail to set forth bright-line rules; their indeterminacy invites litigation much more than the relatively crisp traditional rule. Consider two examples of indeterminacy. Under the UVPRA/ULTA, the buyer can terminate due to casualty loss only if it results in a substantial failure of the real estate to conform to the contract. The term "substantial" is not defined, and in all but the easiest cases, buyer and seller will urge different interpretations. For losses that are less than substantial, the buyer cannot

37. See Robert L. Flores, *A Comparison of the Rules and Rationales for Allocating Risks Arising in Realty Sales Using Executory Sale Contracts and Escrows*, 59 MO. L. REV. 307, 311 n.20 (1994).

38. One substantial flaw of the UVPRA/ULTA rule is that it applies only if neither party is at fault in causing the casualty loss. This is not an innovation, but a continuation of a tort-based fault principle customarily followed under the traditional equitable conversion regime. This is another example of the drafters of UVPRA/ULTA ignoring institutional and market changes. In medieval England, the crucible that gave birth to the fault-modified equitable conversion doctrine, a farmer whose barn burned did not call the "good hands people" at Allstate. Prudent property management by a landowner did not include obtaining fire and extended casualty insurance.

A modern risk of loss rule should take account of the fact that today casualty insurance is widespread and its purpose is to protect the owner from all covered losses, regardless of whether they stem from the owner's negligence or the negligence of others. Most fires are caused by someone's carelessness. Negligence of either party should be immaterial insofar as insurable risks are concerned.

In any executory contract of sale where the property contains a valuable building or other improvement that may suffer casualty loss, the property should be insured and, if it is not, the allocation of the risk of loss should turn on which party should have obtained insurance, not which party might be found negligent. In the absence of the parties' expressly contracting on responsibility for obtaining insurance, the preferable rule is to put the insurance burden on the seller. In most cases the seller will have insurance at the time the contract is signed. Indeed, if the seller's property is mortgaged, as most real estate is, the sellers' mortgagee almost always requires casualty insurance in order to protect its collateral. For a seller to cancel his insurance policy after signing a contract of sale but before closing would constitute a breach under his mortgage.

terminate, but is entitled to a price abatement equal to the reduction in fair market value caused by the loss. Again, the parties seldom will agree on the number, and buyer and seller will each find real estate appraisers to support their views.³⁹

A second major switching cost is educational. Attorneys who are intimately familiar with the traditional risk of loss rule and how to protect their buyer-clients from its bite will have to learn the new rule. They, of course, will also have to learn to protect their seller-clients from aspects of the new rule that, in the context of a particular transaction, may seem undesirable. This perhaps is not much of a problem. Many states have mandatory continuing legal education for lawyers, and speakers at these affairs always need topics to address.

The need to learn the new rule is a more important concern for nonlawyers, in particular those buyers and sellers who transact without hiring a lawyer. Most of these parties use standard-form contracts, and in many states the process of revising standard realty contracts is haphazard. While, as stated above, standard-form contracts virtually always have an express provision addressing risk of loss, it is not always the case that those provisions replace the entirety of the traditional rule. Sometimes there is an interplay between the express provision and the traditional rule. This interplay, where it exists, means that the standard contract should be revised as soon as the state legislature changes the base line rule.⁴⁰ In many states,

39. Indeterminacy is also added by the ULTA's decision to retain the fault principle to override the basic rule allocating risk to the possessor. This raises another litigable issue in many cases. Usually the possessor is the party most likely to be charged with negligence, but there are potential claims against the nonpossessor. For example, buyer takes possession in January two weeks before closing and the pipes freeze and break. Is buyer at fault for not taking precautions, such as letting the faucets drip? Is seller at fault for not warning buyer to take this step when the temperatures fall to the teens?

40. For example, Georgia follows the traditional rule that places the risk of loss on the buyer. *See, e.g.,* Bleckley v. Langston, 143 S.E.2d 671 (Ga. Ct. App. 1965) (holding that buyer of pecan grove bears damages to trees from ice storm). A recent standard-form contract provides:

Should the Property be destroyed or substantially damaged before time of closing, Seller is to notify immediately the Buyer or Broker, after which the Buyer may declare this Agreement void and receive a refund of the earnest money deposited. In the event Buyer elects not to void this Agreement at this time, then within five (5) calendar days after Seller receives notification of the amount of the insurance proceeds, if any, Seller shall notify Buyer of the amount of insurance proceeds and the Seller's intent to repair or not to repair said damage. Within five (5) calendar days of Seller's notification, Buyer may (A) declare this Agreement void and receive a refund of the earnest money deposited,

standard contracts in wide use are examined and revised by legal experts only sporadically. Consequently, after a change in the law, many parties for a considerable period of time will use unrevised standard contracts that are inadequate and partially obsolete.

B. *Specific Performance of Executory Contracts*

The well-accepted baseline rule, learned religiously in first-year property, is that either party to a real estate contract of sale is ordinarily entitled to specific performance if the other party defaults.⁴¹ The ULTA retains the traditional rule for buyers, but overturns it for sellers. With respect to the buyer's remedy, a ULTA comment states that the Act

or (B) consummate this agreement and receive such insurance as is paid on claim of loss if Seller has elected not to repair said damage.

Purchase and Sale Agreement ¶ 9 (Ga. Ass'n of Realtors, Inc. 1995). With this clause under present Georgia law, who is in possession does not matter, and Buyer retains the risk of loss for damage that is less than "substantial" and for takings by eminent domain. The effect of the clause on the parties' rights is reasonably clear, given the backdrop of existing law.

Were Georgia to adopt the ULTA or UVPRA risk provision, this paragraph should be redrafted because it would create grave ambiguities in three instances. First, if the buyer took possession prior to closing and substantial damage occurred, the buyer would argue the clause applies. The seller, however, would argue the statute applies because the clause assumes the seller is in possession and does not expressly provide a risk of loss rule for the buyer pre-closing possession. *See* U.L.T.A. § 2-406(c)(1). Second, if the damage was less than "substantial," the seller would argue the clause applies to place the risk on the buyer, but the buyer would argue the statute gives the buyer the right to an abatement of the purchase price. *See id.* § 2-406(b)(2). Third, if the government condemned all or part of the property, the buyer would argue that the statute applies, but the seller would argue the clause completely displaces the statute and permits the buyer to terminate only for physical destruction or damage.

41. *See, e.g.*, JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 180 (3d ed. 1989); ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 682-83 (2d ed. 1993). A traditional principle of equity limits specific performance to situations in which damages are inadequate. As to the buyer, the justification for making specific performance freely available is that each parcel of land is unique. Typically, courts presume uniqueness, with no requirement that the buyer prove his needs cannot be met by the purchase of a substitute tract. As to the seller, the uniqueness rationale is not available because he has bargained for money, the most fungible type of property in existence. As noted below, there are not that many reported cases that address specific performance for sellers. Nonetheless, the available cases generally award specific performance to sellers, without a discrete showing of the inadequacy of damages, often based on the idea that the parties' remedies should be mutual. A few modern courts have rejected the concept of mutuality of remedy. *E.g.*, *Centex Homes Corp. v. Boag*, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974).

“continues the existing law under which a buyer of real estate is entitled to specific performance.”⁴²

For the seller, a comment asserts that under existing law “a seller of a freehold interest is automatically entitled to specific performance,”⁴³ an exaggeration given the equitable limits traditionally imposed on the remedy.⁴⁴ Departing from present law, the Act restricts the seller’s right to bring what is described as an “action for the price” to the situation where “the seller is unable after a reasonable effort to resell it at a reasonable price or the circumstances reasonably indicate the effort will be unavailing.”⁴⁵ Instead of specific performance, the seller may recover expectancy damages, based on the difference between the contract price and the fair market value of the property,⁴⁶ or the seller may resell the property and recover the difference between the contract price and the resale price.⁴⁷

The seller’s right to obtain specific performance if the buyer defaults is not very important. In modern real estate practice, it is a very rare case where it makes sense for the seller to litigate a specific performance claim to its conclusion. The prime remedy for real estate sellers is to terminate the contract, retain the earnest money already paid by the buyer, and seek another buyer.⁴⁸ There is far more litigation in the courts over whether the seller may or may not retain the buyer’s earnest money than over the question whether the seller may obtain specific performance. The ULTA

42. U.L.T.A. § 2-511 cmt. The language of the Act itself is less clear, providing only “[s]pecific performance may be decreed against a seller,” with no hint as to whether this should happen often or rarely. *Id.* § 2-511(a).

43. *Id.* § 2-506 cmt. 1.

44. Most courts, true to the historic tenets of equity jurisprudence, retain discretion to deny specific performance when the facts and circumstances show that specific performance would be unfair, harsh, or inequitable. *See, e.g., Baker v. Jellibeans, Inc.*, 314 S.E.2d 874 (Ga. 1984) (holding that a purchaser must prove value of property so court can determine if price is “fair, just and not against good conscience”).

45. U.L.T.A. § 2-506(b).

46. *Id.* § 2-505(a).

47. *Id.* § 2-504.

48. Even though the seller’s right to specific performance is seldom judicially exercised, it may serve another role. When a buyer refuses to go forward and the seller claims the buyer has breached, negotiation often ensues. The seller’s arguable right to specifically enforce the contract may serve as leverage for negotiation. This thought perhaps underlies the traditional notion of mutuality of remedies; because the buyer has the right to specific performance, on the theory that land is unique, the seller should also have that right. Mutual rights to specific performance serves to equalize the parties’ bargaining positions.

has an important provision authorizing liquidated damages.⁴⁹ This provision codifies present law, which allows the seller to retain the buyer's deposit as liquidated damages if it is reasonable in amount, considering facts such as the probable harm stemming from default and the difficulty of proving actual harm.⁵⁰

The ULTA revision may be right, as a matter of principle, in adopting a bright-line rule that generally disqualifies sellers of real property from obtaining specific performance. As a strategy for drafting a uniform statute that is likely to be enacted, this reform is not advisable. The existing rule does not have a major impact on many real-world transactions. Private ordering by buyers and sellers, reflected in the bargains they reach and document in written contracts, demonstrate that earnest money payment and retention is a key contract provision and that the seller's right to specific performance is not.

VI. CONCLUSION

The drafters of the ULTA and the USLTA were ambitious, seeking to overhaul a good many long-embedded property law doctrines. They sought to purge the law of ancient rules perceived no longer to serve the needs of modern markets. In so doing, they went too far. Instead of focusing on a small number of revisions to rules that were both obsolete and harmful, they painted with a broad brush, fashioning a code decreeing sweeping changes to the property laws of any state that chose enactment. Uniform acts succeed only if they respond to significant needs felt by market participants. For the ULTA and the USLTA, this impetus was lacking. By trying to sell a major reform package, they made nationwide adoption improbable. In so doing, the goal of uniformity was sacrificed to the goal of legal perfection.

49. U.L.T.A. § 2-516(a) states:

Damages for breach by either party may be liquidated in the agreement, but only in an amount that is not unreasonable in the light of the anticipated or actual harm caused by the breach, the time the real estate is withheld from the market, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A provision for unreasonably large liquidated damages is void.

Id.

50. It may have been more useful if the Act contained guidelines bearing on amounts that the seller may retain. Given the tremendous variety in types of contracts, including their duration, hard-and-fast rules probably would be unwise. Some courts, however, presume that the seller generally may retain a deposit of up to 10% of the purchase price. A statutory presumption along these lines would be worthwhile guidance for parties and for the courts.

In essence, the reformers aimed at too many targets. In two categories, ammunition was sent toward the wrong marks. First, they assumed that direct legislative action to solve a problem is preferable to market-based solutions, without making a careful examination as to the necessity for and costs of market intervention. The potential for solutions by other market institutions was overlooked. With respect to implied warranties of quality for the sale of new homes, the Acts mandated the use of a single standard, depriving the parties of the freedom of choosing to make their own bargain. This choice neglected the emerging response of the home-building industry in creating a system of private warranties, spearheaded by the HOW program. Similarly, the Acts' call for the elimination of formalities for recorded deeds and other recorded instruments ignored the fact that very few private parties misunderstand the formalities and that, when they do, the system of title insurance provides affordable protection from the risk at low cost to the parties.

Second, in identifying problem areas, the Acts' architects disregarded the extent to which private ordering by parties, in written real property agreements, replace implied legal rules, greatly diminishing the importance of the implied rules. With respect to risk of loss, buyers almost always contract for some modification to the doctrine of equitable conversion, which generally allocates the entire risk to the buyer. With respect to specific performance, this remedy is generally not attractive for sellers, who in case of buyer default, strongly prefer to retain the buyer's earnest money as liquidated damages.

State AIDS-Related Legislation in the 1990s: Adopting a Language of Hope Which Affirms Life

Karen S. Lovitch*

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I am not a statistic. And to reduce me to a heap of numbers is to make of me something that is no longer human. Respect must affirm personhood. It recognizes and communicates that I am a mom, not a victim; a daughter, not a tragedy; a friend, not a casualty.

—Mary Fisher, AIDS Advocate, quoted in June 1992¹

1. THE NATIONAL COMMISSION ON AIDS, AIDS: AN EXPANDING TRAGEDY, THE FINAL REPORT OF THE NATIONAL COMMISSION ON AIDS 12 (1993) [hereinafter NATIONAL COMMISSION].

I. INTRODUCTION

The medical community first recognized the Human Immunodeficiency Virus, or HIV disease,² well over a decade ago,³ and the epidemic continues to progress worldwide.⁴ Unfortunately, legislative responses across the nation have lagged far behind the epidemic's epidemiological growth.⁵ Unmotivated by the urgency of this situation, the United States government has failed to outline a national strategic plan to combat the spread of HIV disease and to address the needs of those affected by it.⁶ In the absence of

2. See Chai R. Feldblum, *Workplace Issues: HIV and Discrimination*, in AIDS AGENDA 271, 276-77 (Nan D. Hunter et al. eds., 1992) (noting that the term "HIV disease" refers to the disease as it runs on a continuum from HIV-infection to full-blown AIDS). Incidentally, the Americans with Disabilities Act ("ADA") uses this term, which reflects the current medical view that strict categories cannot describe the disease's progression accurately. *Id.*

3. Helen Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, in AIDS LAW TODAY 18, 18 (Scott Burriss et al. eds., 1993) (commenting that a 1981 Centers for Disease Control ("CDC") publication first mentioned the disease in a brief article about pneumocystis pneumonia). Researchers subsequently pinpointed the Human Immunodeficiency Virus ("HIV") as the cause of Acquired Immune Deficiency Syndrome ("AIDS"). *Id.* For an HIV-carrier to transmit the virus, the infected person's blood, semen, or vaginal secretions must come into contact with the blood or mucous membranes of an uninfected person. *Id.* at 23. The virus cannot live long outside human tissue, and household cleaning agents easily eradicate it. *Id.* at 24. The virus is not passed by casual contact. *Id.*

4. See CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS SURVEILLANCE REPORT 5, 14 (Jun. 1995) [hereinafter SURVEILLANCE REPORT] (reporting that states have reported over 476,000 cases of AIDS since the epidemic began and about 290,000 of those individuals have died); *Meeting Lays Bare the Abyss Between AIDS and Its Cure*, N.Y. TIMES, Aug. 12, 1994, at A1, A9 [hereinafter *Meeting*] (summarizing the events of the 10th International Conference on AIDS). At the time of the first conference in 1985, the United States had reported only 9285 cases. *Id.* All states have laws requiring public health authorities to report AIDS cases, but not HIV infection. See SURVEILLANCE REPORT, *supra*, at 30. Public health officials estimate that approximately one million people currently carry the virus, and may do so unknowingly. See Brett-Smith & Friedland, *supra* note 3, at 19. Even if transmission ceased immediately, the epidemic's most ominous effects would take place in the future. *Id.*

5. See NATIONAL COMMISSION, *supra* note 1, at 13 (asserting that all levels of government have shirked the responsibility of searching for legislative solutions to dilemmas posed by the epidemic). This lack of interest is a problem of international proportions. Dr. Jonathan M. Mann, professor of epidemiology at the Harvard Law School of Public Health, has warned that countries all over the world have responded inadequately to the growing pandemic. *Meeting*, *supra* note 4, at A1, A9.

6. See NATIONAL COMMISSION, *supra* note 1, at 3 (admonishing President Clinton for his lack of coordination of AIDS activities within the executive branch, as recommended by the Commission in the past); Philip J. Hiltz, *AIDS Policy Chief Quits Clinton Post After Rocky Tenure*, N.Y. TIMES, July 9, 1994, at A1, A9 (quoting an AIDS advocate who

strong leadership at the federal level,⁷ state governments must lead the way in passing Acquired Immune Deficiency Syndrome (“AIDS”)-related legislation.⁸

In its final report, the National Commission on AIDS listed a number of principles meant to guide future responses to HIV disease.⁹ Even though these tenets cover a wide range of concerns and the legislative possibilities are practically endless, this paper will concentrate on recommendations for state legislation necessary to place a “human face” on HIV disease.¹⁰ For a number of reasons, states must not lose sight of the fact that individuals, not just groups of people, suffer from HIV disease.

First, people living with HIV disease deserve special attention from state legislators because they have endured discrimination in a number of areas since the epidemic’s beginning.¹¹ Prejudice has extended from individuals actually living with HIV disease to their friends and family, and even to uninfected people perceived to carry the virus because of their membership in so-called “high-risk” groups.¹² Individuals in society often discriminate against these individuals because of a fear of transmission or

expressed dissatisfaction with Kristine Gebbie’s performance, based on her inability to build the coalitions necessary to form a national program).

7. See NATIONAL COMMISSION, *supra* note 1, at 2 (criticizing the federal government for its “complacent unresponsiveness” to the epidemic).

8. *Id.* at 13 (calling for the cooperation of leaders at all levels). The National Commission asserted that if all leaders engaged in honest discussions about HIV disease, their actions would profoundly affect the response of our nation as a whole. *Id.*

9. *Id.* at 12 (listing seven general principles that should guide specific steps in developing a more affirmative approach to the HIV epidemic).

10. *Id.* The principle reads as follows: “The human face of AIDS should be ever before us. Respecting personal dignity and autonomy, respecting the need for confidentiality, reducing discrimination, and minimizing intrusiveness should all be touchstones in the development of HIV/AIDS policies and programs.” NATIONAL COMMISSION, *supra* note 1, at 12. Upon the death of Pedro Zamora, a 22-year-old AIDS activist, President Clinton noted the importance of Zamora’s progress in teaching the nation that “AIDS is a disease with a human face.” Jon O’Neill, *AIDS Crusader Fought for Awareness*, MIAMI HERALD, Nov. 12, 1994, at A1, A18.

11. See Arthur S. Leonard, *Discrimination*, in AIDS LAW TODAY, *supra* note 3, at 297 (lamenting that “a secondary epidemic of fear” has accompanied the HIV epidemic since it began).

12. *Id.*; see also Ann Devroy & David Brown, *Clinton Assails Helms’s AIDS Stance: Anti-Gay Remarks Fuel Push for Reapproval of Treatment Program*, WASH. POST, July 6, 1995, at A6 (quoting Senator Jesse Helms (R-N.C.), who expressed such prejudice by stating that Congress should cut AIDS funding because “homosexuals get the disease through their ‘deliberate, disgusting, revolting conduct’”).

antipathy toward the groups hardest hit by HIV disease to date.¹³ As costs associated with HIV disease continue to rise, government agencies and private businesses also have engaged in AIDS-related discrimination based on financial as well as personal reasons.¹⁴

At the federal level, the Americans with Disabilities Act ("ADA")¹⁵ appears to protect persons living with AIDS and asymptomatic HIV carriers from AIDS-related discrimination.¹⁶ Because the ADA does not cover all private-sector activities, states also must offer protection from discrimination.¹⁷ In addition, state legislation is important because it may provide stronger remedies than those available under federal law.¹⁸ Discrimination

13. *Id.*; see also Allan M. Brandt, *AIDS and Metaphor: Toward the Social Meaning of Epidemic Disease*, 55 SOC. RES. 413, 425-32 (1988) (discussing AIDS in a cultural context). Brandt argues that society discriminates against persons with HIV disease for a number of reasons. First, HIV disease is the only communicable, fatal disease to surface in recent times and, as a result, has threatened society's sense of "medical security." *Id.* at 425-26. Second, many individuals morally judge those affected by the disease. *Id.* at 428. Society's historical disdain for two "high-risk" groups, homosexuals and intravenous drug users, and for promiscuity also have led to discrimination. *Id.* at 428-29, 431. These individuals often react by dividing victims into categories of "innocent" and "guilty." *Id.* at 430.

14. Leonard, *supra* note 11, at 297. For example, the United States government now requires that all service members with the AIDS virus must leave the armed services, regardless of the severity of their condition. Dana Priest, *Army Sergeant with HIV Feels Deserted by Policy*, WASH. POST, Feb. 1, 1996, at A3. Representative Robert Doran (R-Cal.), who introduced the bill, stated "that AIDS 'is spread by human God-given free will'" and that service members contract it only through intravenous drug use or unprotected sex with prostitutes or strangers. *Id.*

15. 42 U.S.C. §§ 12101-12213 (1994).

16. See *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310 (E.D. Pa. 1994) (asserting that an asymptomatic HIV-infected individual is disabled, as defined by ADA). In that case, the court denied a motion for summary judgment filed by the defendant law firm, whom Doe contended fired him after his supervisor discovered he carried the virus. *AIDS Suit Against Philly Firm Proceeds*, NAT'L L.J., Aug. 22, 1994, at A1, A10. After three weeks of federal district court testimony, the case ended with a secret settlement. Joseph A. Slobodzian, 'Scott Doe' AIDS Lawsuit Is Settled, PHILA. INQUIRER, Nov. 1, 1994, at A1, A8. In a closing speech before dismissing the jurors, Judge Robert S. Gawthrop, III announced that "if nothing else, this case has humanized the terrible disease of AIDS." *Id.*

17. See Leonard, *supra* note 11, at 311 (noting that the ADA does not apply to employers with less than 15 employees and to public accommodations that do not "affect commerce"). Further, state and local civil rights agencies historically have dealt with AIDS-related discrimination claims and, as a result, have developed expertise and efficiency in this area. *Id.*

18. *Id.* (pointing out that some state laws, unlike the federal scheme, do not cap punitive damages). In cases where discrimination is particularly overt or outrageous, a plaintiff may want to pursue a larger award under state law. *Id.*

is an underlying societal factor contributing to the spread of HIV disease, so states must act quickly to eradicate it.¹⁹

Second, states must enact legislation recognizing the individual needs of persons with HIV disease because it is a “resource-intensive” condition.²⁰ Recent treatments have prolonged the lives of many HIV-infected individuals, but a disadvantage of these improvements is that they require a great deal of time, physical and mental energy, and money.²¹ Much more than medical resources is needed to cope with HIV disease. Those infected require a host of services and forms of assistance to meet their needs.²² HIV disease not only places demands on HIV-infected individuals and their families but also on medical, social, and legal support systems.²³ States must protect all members of society from such a drain by passing appropriate legislation.

Some critics contend that “AIDS is just one disease”²⁴ and those infected by it do not deserve special attention. State governments, however, must consider the special characteristics of HIV disease before conceding to this point of view. As compared to other concerns, AIDS is an epidemic for which no cure or vaccine exists.²⁵ Even though it is theoretically preventable, AIDS is out of control; treatment can only slow its progression, and death is always its ultimate outcome.²⁶ Another way in which AIDS differs from other diseases is that it strikes mostly young, working-age individuals, and relative to other causes of death, it claims a disproportionate number of young lives.²⁷ Denial of the epidemic’s urgency is an inade-

19. See *Meeting*, *supra* note 4, at A1, A9 (quoting Dr. Jonathan Mann, who stated that discrimination, poverty, and lack of education encourage the spread of AIDS).

20. Brett-Smith & Friedland, *supra* note 3, at 42. This article provides a detailed example of the obstacles that a 40-year-old woman with HIV disease must face. *Id.* at 41-42.

21. Don Colburn, *AIDS Patients Paying a Price for Longevity*, WASH. POST, July 30, 1995, at A1, A27 (explaining that long-term survivors face medical as well as economic hardship).

22. *Id.* at 42 (listing “psychosocial support, legal advice, pastoral counseling, and someone to help with public assistance or insurance paperwork” as just a few of the needs of an individual with HIV disease).

23. *Id.*

24. NATIONAL COMMISSION, *supra* note 1, at 1 (observing that this contention is often used to argue against allocating funds to HIV disease).

25. *Id.*

26. *Id.*

27. *Id.*; see also *AIDS Becomes Main Killer of Young Adults*, WASH. POST, Feb. 1, 1995, at A2 [hereinafter *Main Killer*] (revealing that AIDS and related infections now claim more young adult lives than accidents). A Centers for Disease Control (“CDC”) official noted that the impact of AIDS deaths “goes far beyond their absolute numbers.” *Id.*

quate response;²⁸ states must consider the fact that an average of ten years separates HIV infection and an AIDS diagnosis.²⁹ Even if infection ceased immediately, the system still would face enormous challenges in caring for those already infected.³⁰

This paper discusses ways in which state legislation can embody respect for the individual plight of those living with HIV disease. To illustrate the types of laws that states must pass to meet that goal, this paper uses the most effective provisions from states across the country. Part I examines ways in which state lawmakers can eradicate discrimination, a threat to those already living with HIV disease and to future prevention and control efforts. AIDS-related discrimination can pervade many facets of life. This paper explores those in which individuals face the largest number of difficulties before and after learning of their status and recommends laws that can prevent this unfair treatment. Part II surveys specific areas in which present laws inadequately address the needs of individuals and proposes legislation that states must pass to bridge this gap. This paper concludes that, to help those living with HIV disease while simultaneously encouraging prevention and control, states must mandate comprehensive HIV education programs as well as the other suggested legislation.

II. PREVENTING AIDS-RELATED DISCRIMINATION

A. *Extension of State Disability Discrimination Laws to Specifically Cover AIDS-Related Discrimination*

In calling for HIV/AIDS policies and programs that respect the human dignity of those involved, the National Commission on AIDS declared that reducing discrimination is an integral step toward this goal.³¹ State governments must protect persons with HIV disease by adding AIDS-related discrimination to the current protection offered in state anti-discrimination or disability discrimination laws.³² Although federal disability discrimina-

28. NATIONAL COMMISSION, *supra* note 1, at 1 (asserting that the effects of continued denial include homelessness, a lack of necessary research because of underfunding, and inadequate long-term and acute care facilities).

29. *Id.* at 5 (warning that AIDS diagnoses "tell a story that is out of date").

30. *Id.* at 5-6 (forecasting that prevention efforts must improve to prevent new infections).

31. NATIONAL COMMISSION, *supra* note 1, at 12.

32. See Leonard, *supra* note 11, at 298 (noting that most states have supplemented federal disability discrimination protection by passing their own laws in the 1970s and early 1980s).

tion laws already provide vast protection, states also must show their support for individuals with HIV disease, and thereby fill the gaps left by federal laws.³³

1. The Americans with Disabilities Act

At the federal level, the ADA forbids disability discrimination in employment,³⁴ public services,³⁵ and public accommodations.³⁶ It applies to state and local governments,³⁷ and employment provisions cover private employers with fifteen or more employees.³⁸ Additionally, the ADA prohibits most all private businesses or individuals supplying goods or services to the public from engaging in public accommodations discrimination.³⁹ Although the ADA does not specifically mention HIV disease in its text, the regulations indicate that the statute's definition of "disability" covers HIV disease.⁴⁰ At least one federal court decision has agreed with this approach.⁴¹

33. See *supra* notes 15-19 and accompanying text (explaining that state laws often cover more private employers and offer more extensive remedies than federal disability discrimination laws). If an issue of sexual orientation is also involved, state law may offer better protection in that a few states forbid discrimination based on this characteristic. Leonard, *supra* note 11, at 312-13.

34. 42 U.S.C. §§ 12111-12117.

35. 42 U.S.C. §§ 12131-12165 (forbidding state and local government discrimination in public accommodations and services). This prohibition includes employment discrimination. 35 C.F.R. § 35.140 (1992).

36. 42 U.S.C. §§ 12181-12189 (directing private entities that disability discrimination in public accommodations is unlawful); *id.* §§ 12131-12165 (extending the same prohibition to state and local governments).

37. *Id.* §§ 12131-12165.

38. *Id.* § 12111.

39. *Id.* §§ 12181-12189. Examples of public accommodations include hotels, restaurants, theaters, stadiums, convention centers, museums, parks, private schools, malls, health care providers, and hospitals. 42 U.S.C. § 12181(7).

40. 29 C.F.R. app. § 1630.2(j) (1992) (noting that AIDS and HIV seropositivity may come within the classification). Individuals who are actually infected as well as those perceived to be infected receive protection because the regulations define a "person with a disability" as "(a) a person with a physical or mental impairment that substantially limits one or more major life activities; or (b) a person with a record of such a physical or mental impairment; or (c) a person who is regarded as having such an impairment." *Id.* § 1630.2(g).

41. See *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310 (E.D. Pa. 1994) (holding that asymptomatic HIV infection is a covered disability under federal law).

2. The Rehabilitation Act of 1973

Before the ADA, the Rehabilitation Act of 1973⁴² (“Rehabilitation Act”) was the only federal law that covered handicap-related discrimination, and this statute, rather than the ADA, still applies to the federal government.⁴³ When Congress adopted the ADA, it modeled many of its provisions, including its definition of a “disability,” after the Rehabilitation Act.⁴⁴ The Rehabilitation Act, like the ADA, does not expressly cover HIV disease, but courts have extended its definition of a “handicap” to cover AIDS⁴⁵ as well as HIV infection.⁴⁶

3. Federal Disability Discrimination Protection

Protection under both statutes is not absolute, but it varies depending on the situation and the particular statute.⁴⁷ In an employment discrimination situation, for example, only a “qualified individual with a disability” receives protection under both statutes.⁴⁸ To become qualified, a disabled individual may require reasonable accommodations to perform the job’s essential functions.⁴⁹ Disability discrimination laws, therefore, do not offer

42. 29 U.S.C. §§ 701-797 (1994).

43. *See* 29 U.S.C. § 791 (forbidding federal agencies to engage in discrimination in the hiring, placement, and promotion of people with disabilities). The law also applies to federal contractors. 29 U.S.C. § 793.

44. Leonard, *supra* note 11, at 301 (noting that the two definitions are “virtually identical”). Court cases interpreting the Rehabilitation Act may, therefore, serve as precedent in ADA cases. *See id.*

45. *See* School Bd. v. Arline, 480 U.S. 273, 281 (1987) (declaring that tuberculosis, a contagious disease, is a handicap as defined by the statute). The Court refused to validate discrimination based on irrational fears of contagion and considered such reactions inconsistent with the Rehabilitation Act’s goals. *Id.* at 282. Lower courts subsequently extended this landmark decision to the AIDS-related discrimination context. *See* Chalk v. United States Dist. Ct., 840 F.2d 701, 711 (9th Cir. 1988) (holding that AIDS is a handicap under the Rehabilitation Act).

46. *See* Doe v. Centinela Hospital, 57 U.S.L.W. 2034, 2034 (C.D. Cal. Jul. 19, 1988) (holding that a drug treatment program may not exclude an asymptomatic carrier of the HIV virus because of his condition).

47. Leonard, *supra* note 11, at 302.

48. *See id.* (noting that the ADA adopted this Supreme Court interpretation of the Rehabilitation Act); *see also* Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (holding that disability law only protects those who can safely perform the position’s requirements).

49. 42 U.S.C. § 12111(8); Leonard, *supra* note 11, at 303 (pointing out that the “essential functions” requirement first arose in Rehabilitation Act case law and that Congress codified it in the ADA).

protection to those who cannot perform the job's essential functions or who present a significant risk of transmission in the workplace.⁵⁰ The former limitation presents a much greater obstacle for individuals with HIV disease than the latter because courts have held, and medical evidence shows, that the risk of casual transmission is minimal.⁵¹

4. Recommendations for State AIDS-Related Discrimination Legislation

All fifty states offer some type of disability discrimination protection.⁵² However, they still should pass legislation specifically covering AIDS-related prejudice to ensure that persons with HIV disease do not suffer "irrational and scientifically unfounded" discrimination.⁵³ Florida and Kentucky, for example, both have enacted laws that extend disability-related employment discrimination coverage to individuals with AIDS, AIDS-related complex, or HIV infection.⁵⁴ Florida goes one very necessary step further to protect those perceived as having any of these conditions.⁵⁵ Both laws also forbid HIV-related testing as a condition of employment, unless the absence of infection is a bona fide occupational qualification for the job in question.⁵⁶ If a state chooses to include such

50. See 42 U.S.C. § 12113(b) (allowing employers to disqualify an employee or potential employee who may pose such a threat in the workplace).

51. See *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 701 (9th Cir. 1988) (holding that a teacher with AIDS did not pose a direct threat to students in the classroom). This paper does not address the controversy surrounding the employment of HIV-infected health care workers. See Feldblum, *supra* note 2, at 282-84 (discussing the debate about the possibilities of health care workers posing a "direct threat" in the workplace).

52. David L. Kirp & Ronald Bayer, *The United States: At the Center of the Storm*, in *AIDS IN THE INDUSTRIALIZED DEMOCRACIES* 7, 18 (Kirp et al. eds., 1991).

53. FLA. STAT. § 760.50(1) (1995). The Florida Legislature further elaborated that this discrimination causes harm to society in general and to "otherwise able-bodied persons" deprived of the ability to support themselves, to secure their own means of health care and housing, and to take advantage of societal opportunities otherwise available to them. *Id.*

54. *Id.* § 760.50(2); KY. REV. STAT. ANN. § 207.135(1) (Michie 1995); see also WASH. REV. CODE ANN. § 49.60.174(1) (West 1993) (providing that claims based on actual or perceived HIV infection should receive the same treatment as any other discrimination claim based on a disability).

55. See FLA. STAT. § 760.50(2). But see VA. CODE ANN. §§ 51.5-40 to 51.5-46 (Michie 1994 & Supp. 1995) (covering only actual, as opposed to perceived, disabilities).

56. See, e.g., FLA. STAT. § 760.50(3); KY. REV. STAT. ANN. § 207.135(2). The person requiring the test has the burden of proving that the test is necessary to determine if the individual can perform the duties of the job in a reasonable manner or presents a significant risk of transmitting the disease in the course of employment duties. FLA. STAT. §

testing provisions, it must construe them narrowly to respect individual privacy rights.

Both laws also forbid discrimination against those infected or perceived to be infected in housing, public accommodations, or governmental services.⁵⁷ Such treatment is warranted only if the person or entity can show that no reasonable accommodation can prevent transmission of the virus in the applicable context.⁵⁸ Again, states must ensure that these restrictions are applied only in limited circumstances so that HIV-infected individuals receive fair treatment.

To send a message of support to its citizens, states also must provide adequate remedies to persons aggrieved under their discrimination statutes. Florida does so in that it requires violators to pay actual damages, attorney's fees, and other appropriate relief and provides for court-ordered injunctions as well.⁵⁹

The ADA does not preclude disabled persons from bringing suit under another law that provides equal or greater protection,⁶⁰ so passing AIDS-related discrimination laws will serve a dual purpose. First, state legislatures will exhibit leadership by passing anti-discrimination laws that protect HIV-infected individuals,⁶¹ as called for in the National Commission's recommendations,⁶² and also lay the foundation for prevention efforts.⁶³ Second, if state laws include the necessary provisions as outlined above, they will complement federal laws and increase the possibility that AIDS-related discrimination will cease in all aspects of society.⁶⁴

760.50(3)(c)(1); KY. REV. STAT. ANN. § 207.135(2)(b)(1). No other reasonable accommodations short of the test may exist. FLA. STAT. § 760.50(3)(c)(2); KY. REV. STAT. ANN. § 207.135(2)(b)(2).

57. FLA. STAT. § 760.50(4); KY. REV. STAT. ANN. § 207.135(3).

58. See FLA. STAT. § 760.50(4)(c); KY. REV. STAT. ANN. § 207.135(3)(c). Both laws also prohibit adverse employment action against licensed health care professionals who treat HIV-infected individuals. FLA. STAT. § 760.50(4)(d); KY. REV. STAT. ANN. § 207.135(3)(d).

59. FLA. STAT. § 760.50(6)(a).

60. 42 U.S.C. § 12201(b).

61. See NATIONAL COMMISSION, *supra* note 1, at 13 (directing leaders at all levels to speak out because they can join communities and discover solutions to the problems posed by the epidemic).

62. *Id.* at 12 (identifying respect for personal dignity as an important part of AIDS/HIV policies and programs).

63. See *id.* at 10 (explaining that reducing discrimination and stigmatization can increase awareness, which will lead to more effective prevention efforts).

64. See Leonard, *supra* note 11, at 310 (exploring advantages of hierarchy of disability discrimination laws).

B. *Passage of Laws Requiring Voluntary Testing and Strict Confidentiality of HIV-Related Information*

One specific area in which discrimination often surfaces is in the debate surrounding HIV testing and confidentiality of HIV-related information. Because of the fears associated with transmission,⁶⁵ and disdain for the lifestyles of the majority of victims,⁶⁶ the public initially responded to HIV disease by calling for mandatory testing to identify those infected.⁶⁷

1. Voluntary vs. Mandatory Testing

For two primary reasons, the public health community,⁶⁸ and virtually all state jurisdictions,⁶⁹ agree that mandatory testing is not a viable option and that voluntary programs are more likely to increase prevention efforts. First, test results are not always reliable. The “window period” between infection and development of HIV antibodies usually lasts for at least six weeks,⁷⁰ and commonly extends to a period of six months.⁷¹ This latency period makes a negative test result virtually meaningless because the infected person may test negative even though that individual is a carrier

65. See Peter H. Berge, *Setting Limits on Involuntary HIV Antibody Testing Under Rule 35 and State Independent Medical Examination Statutes*, 44 FLA. L. REV. 767, 778 (1992) (examining the history of epidemics and asserting that human responses to them are motivated more by fear than compassion). Berge observes that:

[t]he picture of the AIDS victim is a shell of a man wasted by the opportunistic infections, his deeply recessed eyes staring out from a death's head skull in hopeless, disoriented pain. . . . This disease causes its victims to experience a hell on earth; people are terrified out of their rational minds.

Id. at 779.

66. See *id.* at 779-80 (arguing that, even though HIV disease has invaded the sanctity of most societal groups, average Americans still consider it immoral and associate it with “undesirables”).

67. See Lawrence K. Altman, *U.S. Is Considering Much Wider Tests for AIDS Infection*, N.Y. TIMES, Feb. 4, 1987, at A1 (relating that federal health officials may suggest that all persons seeking marriage licenses, hospitalization, and treatment for pregnancy or sexually transmitted disease undergo mandatory testing).

68. Berge, *supra* note 65, at 785-86 (reporting that CDC, National Academy of Sciences, American Medical Association, United States Surgeon General, United States Public Health Service, and most state and local public health services have rejected mandatory testing).

69. *Id.* at 786 (relating that most states' AIDS prevention laws center around voluntary testing provisions).

70. See Scott Burris, *Testing Disclosure, and the Right to Privacy*, in AIDS LAW TODAY, *supra* note 3, at 115, 118 (observing that the latency period in some individuals has lasted as long as two years).

71. See Berge, *supra* note 65, at 785.

and capable of transmitting the virus to someone else.⁷² In addition to the window period, human error also can compromise the reliability of testing programs.⁷³ A second reason that public health officials and lawmakers have rejected mandatory testing is that the financial costs of such programs are extremely prohibitive.⁷⁴

2. Features of Voluntary Testing Programs

Voluntary testing programs are an integral part of any state's AIDS-related legislative agenda⁷⁵ because they can prevent discrimination and deter the spread of HIV disease.⁷⁶ While most jurisdictions already require consent, or at least imply that individuals must consent to the test, states differ on the degree of confidentiality offered, the type of consent needed, and the number of exceptions allowed.⁷⁷ To encourage testing, all states must provide for written and informed consent, pre- and post-test counseling, strict confidentiality of HIV-related information, and anonymous testing, as an alternative.

a. *Written and Particularized Informed Consent*

Even though researchers have not discovered a vaccine or a cure, early detection is still vital because treatments, such as Azidothymidine ("AZT"), can prolong the lives of those affected.⁷⁸ The benefits, however, may not

72. Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 33, 41 (1990).

73. *Id.* at 40 (pointing out that human error poses a danger of false negative as well as false positive results).

74. *Id.* at 55-56 (examining the enormous costs spent in early mandatory testing programs for all marriage license applicants). Out of the 159,000 applicants tested in Illinois in 1988, only 23 individuals tested positive. *Id.* The estimated total cost was \$5.6 million, which equaled \$243,000 for each positive result. *Id.* at 56.

75. *See* Burris, *supra* note 70, at 120 (recalling that some states joined an early 1990s movement to encourage voluntary testing).

76. *See* 35 PA. CONS. STAT. ANN. § 7602(a) (1993) (recognizing that voluntary testing, coupled with informed consent and counseling, will control the spread of HIV disease if results are kept confidential). Confidential, informed, voluntary testing will encourage those most in need to seek testing and treatment. *Id.* § 7602(c).

77. *See* Berge, *supra* note 65, at 788 n.146 (supplying list of state statutes that cover HIV testing).

78. *See* Brett-Smith and Friedland, *supra* note 3, at 40 (explaining that, over the last five years, treatment strategies in the United States have evolved to emphasize AZT therapy as soon as the T4 cell count goes below 500); Philip J. Hiltz, *Drug Said to Help AIDS Cases with Virus but No Symptoms*, L.A. TIMES, Aug. 18, 1989, at A1 (providing early report on

always outweigh the negative consequences of knowing one's status. For example, once an individual tests positive, he or she may face widespread discrimination.⁷⁹

Considering the costs and benefits involved, states must allow individuals to make their own decisions about testing.⁸⁰ To ensure that individuals thoroughly weigh their options, states must follow the lead of jurisdictions such as New York, Louisiana, and Pennsylvania and require written and particularized informed consent before anyone undergoes testing.⁸¹ Mere oral consent is not enough because it leaves room for misunderstanding.⁸² Further, particularized consent, rather than blanket consent to medical treatment, is necessary to prevent those administering the tests from "tricking" individuals into having a test without their knowledge. Connecticut protects the rights of potential test subjects by providing precise standards for consent.⁸³

the merits of AZT therapy).

79. See Field, *supra* note 72, at 46 (asserting that repercussions of a positive test result may include enduring discrimination in employment, housing, insurance, and education as well as falling victim to random acts of violence). Field also notes that this discrimination may originate in response to the disease's financial burden or adverse characterization as a member of a perceived high-risk group. *Id.*

80. See Ronald L. Bayer et al., *HIV Antibody Screening: An Ethical Framework for Evaluating Proposed Programs*, 4 NEW ENG. J. PUB. POL'Y 173, 177 (1988) (emphasizing the value of respecting individual choice in the context of testing programs).

81. LA. REV. STAT. ANN. § 40:1300.13.A (1992); N.Y. PUB. HEALTH LAW § 2781 (McKinney 1993); 35 PA. CONS. STAT. ANN. § 7605(a) (1993). In the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Congress expressed approval for this approach by ordering grant recipients to seek informed, written, voluntary consent. 42 U.S.C. § 300ff-61(b) (1994).

82. See, e.g., CAL. HEALTH & SAFETY CODE § 199.22(a) (Deering 1990) (requiring informed consent but allowing for oral or written agreement); FLA. STAT. § 381.004(3)(a) (1995); N.C. GEN. STAT. § 130A-148(h) (1995).

83. See CONN. GEN. STAT. ANN. § 19a-582(a) (West 1995) (requiring particularized consent, which need only be written "whenever practicable"). Connecticut's statute sets out detailed, minimum standards for the contents of an informed consent statement: (1) an explanation of the test, including its purpose and meaning and the benefits of early diagnosis and treatment; (2) acknowledgement that consent is not a prerequisite to health care but that refusal may affect the provider's quality of treatment and diagnosis; (3) explanation of testing procedures, including its voluntary nature and the fact that anonymous testing is available; and (4) an explanation of confidentiality laws. *Id.* § 19a-582(b). The subject must also receive notification that the law permits health officials to warn known partners without disclosing the subject's identity and that HIV-related information may appear on medical charts and records. *Id.* Before consenting, subjects must receive information about the illness itself and possible risk factors. *Id.* § 19a-582(c).

b. *Pre- and Post-test Counseling*

In addition to requiring informed consent, states must mandate pre- and post-test counseling as an extra guarantee that individuals understand the costs and benefits of testing. Counseling offers a number of advantages because it can clarify misunderstandings about HIV infection; educate people about the importance of prevention; communicate the meaning of test results; and help people handle the vast consequences of a positive result.⁸⁴ Pennsylvania appropriately requires counseling before testing, so that a patient understands the test and the meaning of its results as well as the proper measures for prevention of, exposure to, and transmission of the virus.⁸⁵ If an individual tests positive, states also must afford him or her the opportunity to receive immediate, face-to-face, post-test counseling. Delaware sets an example by providing the individual with an opportunity to discuss the result's emotional effects on the individual, its meaning, and proper preventive measures.⁸⁶ Post-test counseling also should include encouragement to notify sexual and needle-sharing partners.⁸⁷

c. *Strict Confidentiality of HIV-Related Information*

A categorical rule against disclosure of HIV-related information⁸⁸ is the last necessary element for a testing program that recognizes individual rights. To reach this worthy goal, states must give individuals control over the disclosure of their own HIV-related information.⁸⁹ New York, among other states, properly mandates that before release of such data occurs, the person disclosing the information must obtain a written consent form, signed

84. See Field, *supra* note 72, at 48.

85. 35 PA. CONS. STAT. ANN. § 7605(a); see also Burris, *supra* note 70, at 123 (summarizing the provisions of Pennsylvania's pre- and post-test counseling provisions).

86. DEL. CODE ANN. tit. 16, § 1202(e) (1995).

87. *Id.*

88. See N.Y. PUB. HEALTH LAW § 2780(7) (McKinney 1993) (defining "confidential HIV-related information" as that in the possession of one who provides health or social services or who receives the information pursuant to a release of such information). This definition includes not only test results but also the mere fact that the individual took such a test and any information that could identify the individual as carrying the HIV virus or suffering from AIDS or an HIV-related illness. *Id.*

89. Interview with Dinah Wiley, Esq., Legal Services Director, Whitman-Walker Clinic, in Washington, D.C. (Dec. 14, 1994). Ms. Wiley indicated that individuals must have control over their own information and noted that, if universal precautions are used as recommended, disclosure is seldom a necessary event. *Id.*

by the subject of the data.⁹⁰ It must state who will receive the information, for what purpose, and the period of time for which the consent is valid.⁹¹

Considering the effects that a disclosure may have on the individual, states must provide strict remedies for confidentiality violations. California distinguishes between negligent and willful disclosure and subjects guilty parties to civil penalties, payable to the subject of the information. If disclosure results in economic, bodily, or psychological harm, a court may find the disclosing person guilty of a misdemeanor, punishable by a jail term and/or a fine.⁹²

3. Exceptions to Voluntary Testing and Strict Confidentiality Laws

If a state chooses to allow for exceptions, an individual's consent for testing or disclosure is no longer necessary. Consequently, legislatures and courts must create as few of them as possible and construe them narrowly.⁹³ States have created a number of exclusions, but those affecting individual rights most often deal with "medical necessity."⁹⁴ Purportedly for the benefit of the patients, some states, such as New York, allow for release of information to employees within a health care institution or to a health care provider if necessary to carry out their respective duties or to provide appropriate care or treatment.⁹⁵

Other medical necessity exceptions are for the protection of others, rather than the patient.⁹⁶ In a number of states, an emergency worker may request that an individual reveal his or her HIV status if exposure may have

90. N.Y. PUB. HEALTH LAW § 2780(9) (excluding the use of a general release form, unless it specifically reveals its dual purpose).

91. *Id.*

92. CAL. HEALTH & SAFETY CODE § 199.21(a)-(d) (Deering 1990).

93. *See, e.g.,* Field, *supra* note 72, at 49 (asserting that the New York disclosure statute's exceptions could "swallow the rule").

94. Berge, *supra* note 65, at 790. Another area where exceptions often arise is in the criminal justice system. *Id.* at 793. The consensus for voluntary testing is overwhelming in the civil setting, but similar agreement does not exist in the criminal context. *Id.* This article, therefore, will not discuss testing in that context, because the medical necessity situations are more common for the majority of individuals.

95. *See generally* N.Y. PUB. HEALTH LAW § 2782(1)(c)-(d) (McKinney 1993). The law also allows for release of information when body parts are used in medical education, research, therapy, or for transplantation. *Id.* § 2782(e); *see also* 35 PA. CONS. STAT. ANN. § 7605(g)(1)(i) (permitting testing in such situations because no privacy issue exists once the person is dead).

96. *See* Burris, *supra* note 70, at 125 (suggesting that these exceptions are contrary to a doctor's ethical duty to act in the patient's best interest, rather than his or her own).

occurred during the course of the worker's duties.⁹⁷ Because the test result will not prove whether exposure occurred, the purpose of such laws is to give the worker "peace of mind," rather than a definitive answer to questions or fears.⁹⁸

Instead of allowing for such exceptions, states must concentrate on vigorously enforcing universal precautions in health care settings.⁹⁹ If states still insist on legislating such exceptions, lawmakers must require the individual requesting the test and/or information to present evidence that exposure actually occurred and that transmission could have resulted.¹⁰⁰ Even in this context, states must not forget the patient's rights; he or she must have an opportunity to give informed consent, to receive counseling, and to decide whether he or she wishes to know the result of the test.¹⁰¹

4. Anonymous Testing Alternatives

Because some individuals may not consider confidentiality safeguards enough to encourage testing, states must provide for anonymous testing programs.¹⁰² An anonymous test subject does not give any identifying information but, instead, calls for results using a number.¹⁰³ Although pre-test counseling still occurs, anonymous testing has some disadvantages in that post-test, face-to-face counseling is not possible, and long-term epidemiological research is hindered.¹⁰⁴ Until states can guarantee strict

97. *Id.* (explaining that some of these laws assume that people with HIV disease pose an inherent danger to health care providers).

98. *Id.*

99. *See, e.g.,* Field, *supra* note 72, at 80 (advocating the use of universal precautions).

100. *See* CONN. GEN. STAT. ANN. § 19a-582(e)(5) (requiring that "a health care provider or other person, including volunteer emergency medical services, fire and public safety personnel" show that "significant exposure" occurred during the course of occupational duties before an individual must submit to mandatory testing); *id.* § 19a-583(a)(7) (1995) (imposing the same requirements to overcome confidentiality laws). *But see* ALA. CODE § 22-11A-39 (1990) (compelling disclosure to "all pre-hospital agencies" who had any contact with the infected individual).

101. *See, e.g.,* CONN. GEN. STAT. ANN. § 19a-582(e)(5) (providing for post-test counseling but allowing the patient to choose not to know the results).

102. *See* Field, *supra* note 72, at 51.

103. *Id.* (adding that subjects may need to supply basic information for epidemiological research).

104. *Id.* at 52.

confidentiality of results, legislators must provide for anonymous testing¹⁰⁵ and widely publicize all testing sites, as Georgia has chosen to do.¹⁰⁶

5. Testing of Pregnant Women and Newborns

Commentators often assert that mandatory testing within certain societal groups is necessary.¹⁰⁷ With the rise of HIV disease in women, recent attention has turned to pregnant women and newborns.¹⁰⁸ Some states, including Arkansas, Missouri, and Florida, already allow mandatory testing for pregnant women.¹⁰⁹ Like all others in society, pregnant women deserve the opportunity to decide whether to learn their HIV status, but these mandatory testing laws disregard women as individuals.¹¹⁰ Evidence shows that mandatory testing will not prevent vertical transmission,¹¹¹ and

105. *Id.* (asserting that legislators must consider ways, such as telephone counseling, to minimize drawbacks of this type of program).

106. *See* GA. CODE ANN. § 19-3-35.1(b) (1991) (instructing the Department of Human Resources to prepare AIDS education brochures that include information about confidential, anonymous testing sites). Georgia requires distribution of such information to individuals applying for marriage licenses. *Id.* § 19-3-35.1(c).

107. *See, e.g.,* A. Alyce Werdel, Note, *Mandatory AIDS Testing: The Legal, Ethical and Practical Issues*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 155, 219 (1990) (contending that mandatory testing among high-risk groups is necessary to protect those citizens outside of the affected groups).

108. *See generally* Martha A. Field, *Pregnancy and AIDS*, 52 MD. L. REV. 402 (1993) (examining the prospect of mandatory testing of both pregnant women and newborns and rejecting the idea in both contexts); Nat Hentoff, *AIDS Breakthroughs and AIDS Politics*, WASH. POST, Dec. 22, 1994, at A19 (asserting that policies against mandatory testing of pregnant women is a political one, made to satisfy AIDS advocates).

109. *See* ARK. CODE ANN. § 20-15-905(c) (Michie 1991) (allowing a physician to test an individual for HIV infection without informed consent if the patient has consented to medical care); FLA. STAT. § 384.31 (1995) (requiring prenatal HIV testing as part of law that mandates testing of pregnant women for all sexually transmitted diseases); MO. ANN. STAT. § 191.674(1) (Vernon Supp. 1996) (providing for HIV testing if "reasonable grounds" exist to believe the patient is infected and "clear and convincing evidence" shows that the person threatened the health of others). The Missouri and Arkansas laws differ from the Florida statute in that the former two states do not openly screen pregnant women, but do so under the guise of general consent. *See* Field, *supra* note 108, at 408-09.

110. *See* Field, *supra* note 108, at 409-10 (examining the social costs of learning one's HIV status and arguing that a woman has the right to make her own individual medical decisions).

111. *But see* Hentoff, *supra* note 108, at A19 (arguing that, in light of recent studies about benefits of AZT, law may need to subordinate woman's freedom to newborn's health). Research now shows that AZT taken during pregnancy has decreased transmissibility from 25.5% in women not taking the drug to 8.3% in women taking the drug. *Id.*

will not necessarily result in the woman choosing to abort.¹¹² In addition, even though AZT may slow perinatal transmission, all women may not receive such treatment.¹¹³ Mandated counseling about the benefits of AZT during pregnancy and the dangers of having an HIV-infected baby is a more effective option at this point in time.¹¹⁴

Considering the current state of medical technology, the benefits of testing newborns do not outweigh the risks at this time. Testing the newborn will reveal the mother's status, rather than that of the child, who is born with the mother's immune system.¹¹⁵ Once a child develops his or her own immune system, the question of testing becomes more difficult because recent studies show that treatments are now available.¹¹⁶ States have reacted to this testing issue in a variety of ways. For example, Illinois and Oklahoma have made childbearing a crime for HIV-infected women while Rhode Island now requires neonatal testing.¹¹⁷ A more well-reasoned decision is to give new parents the necessary information and allow them to make their own decisions about treatment for their children.¹¹⁸ States should treat pregnant women and newborns like society at

112. See Field, *supra* note 108, at 414.

113. See *id.* at 413 (contending that AZT is not available to all seeking its medical benefits).

114. See Hentoff, *supra* note 108, at A19 (quoting new AIDS czar Patricia Fleming, who favors counseling about the benefits of testing, rather than a mandatory test that violates a person's rights). Incidentally, the CDC now recommends routine prenatal counselling about HIV and voluntary testing for all pregnant women in the United States. John Schwartz, *AIDS Testing Urged in All Pregnancies*, WASH. POST, July 7, 1995, at A1, A8.

115. See Field, *supra* note 108, at 423-24 (explaining that all babies born to HIV-positive mothers will test positive but that less than one third of them will ultimately develop the infection).

116. *Id.* at 430-31 (examining the treatments, including AZT and Bactrim, available to newborns).

117. See ILL. ANN. STAT. ch. 38, para. 12-16.2(c) (Smith-Hurd 1992) (criminalizing knowing exposure, rather than actual transmission, from one person to another); OKLA. STAT. ANN. tit. 21, § 1192.1 (West Supp. 1996) (criminalizing "knowingly engaging in conduct reasonably likely to transfer the HIV virus"); R.I. GEN. LAWS § 23-6 (1989) (dispensing with informed consent and allowing an HIV test if the person is under one year of age); see generally Carol Beth Barnett, *The Forgotten and Neglected: Pregnant Women and Women of Childbearing Age in the Context of the AIDS Epidemic*, 23 GOLDEN GATE U. L. REV. 863 (1993) (discussing laws requiring neonatal testing and criminalization of vertical transmission).

118. See Field, *supra* note 108, at 431 (asserting that the state must allow parents to make decisions for their children in such situations, as long as reasonable people can differ as to the course of treatment). Governments should only intrude upon parental choice in extreme circumstances. *Id.*

large, and not subject them to mandatory testing requirements, until the benefits of testing clearly outweigh the costs of denying pregnant women and new mothers their right to privacy.

C. *Protection from Discrimination in Insurance*

After an individual learns that he or she is HIV positive, the next step is to seek health care as soon as possible to increase one's chances of prolonging life.¹¹⁹ Obtaining the best health care available is often a luxury reserved for those who have insurance that will pay for these expenses.¹²⁰ In the United States, most individuals secure private coverage through their employers.¹²¹ Because an individual is basically uninsurable once HIV infection occurs,¹²² he or she must rely on personal assets and public benefits for health care financing after leaving employment.¹²³

119. See Brett-Smith & Friedland, *supra* note 3, at 41 (giving an example of the medical treatments needed by a typical person living with HIV disease). Basically, treatment consists of certain antiviral therapies, such as AZT, which limit the virus' reproductive abilities, and secondary therapy for opportunistic infections. *Id.* at 38-41. Treatment is usually exhausting as it can include numerous pills each day and doctor visits no less than once a month, but usually more. *Id.* at 41.

Presently, researchers are focusing on study of "long-term nonprogressors," people who carry the virus but remain healthy for a number of years. David Brown, *Survivors Offer Lessons in Resisting HIV*, WASH. POST, Aug. 10, 1994, at A3. The answer to their survival is most likely found in the individual's immune system or in the strain of virus he or she carries, rather than the treatments the individual receives. *Id.*

120. Mark Scherzer, *Private Insurance*, in AIDS LAW TODAY, *supra* note 3, at 404-05.

121. See Michele A. Zavos, *Right to Work: Job Protection for People with HIV*, TRIAL, July 1993, at 41, 43-44 (reporting that about 60 million individuals have employer-based insurance, which accounts for the majority of health care financing in the United States). The system has evolved in this manner because insurers assume that those who work are the healthiest and that an evaluation of each person in the work force is, therefore, impractical. See Scherzer, *supra* note 120, at 410.

As most individuals have employer-based insurance, this article will discuss only those laws necessary to protect individual interests in this context. For recommendations on reforming public programs, readers should refer to THOMAS P. MCCORMACK, THE AIDS BENEFITS HANDBOOK 99-110 (1990).

122. See Zavos, *supra* note 121, at 43.

123. *Id.*; see Alan I. Widiss, *To Insure or Not to Insure Persons Infected with the Virus that Causes AIDS*, 77 IOWA L. REV. 1617, 1620-21 (1992) (explaining that AIDS is a "progressively debilitating" condition and will eventually leave those infected unable to work and without health insurance).

1. Federal Laws Governing the Insurance Industry

The primary federal law regulating employer-provided plans is the Employee Retirement Income Security Act of 1974 ("ERISA").¹²⁴ This legislation overrides all state laws regulating employee benefit plans,¹²⁵ but it specifically excludes state insurance regulations from this preemption.¹²⁶ At the same time, however, ERISA exempts employer-funded benefit plans¹²⁷ from conforming to state regulation because ERISA forbids states to treat them as insurance policies.¹²⁸ Notably, self-insured plans account for over sixty percent of all employer-based coverage, so state laws reach only a minority of these plans.¹²⁹

In particular, ERISA prohibits discrimination against employees who exercise rights to which they are entitled under their benefit plans.¹³⁰ *McGann v. H & H Music Co.*¹³¹ illustrates the degree of freedom afforded employers using self-insured plans, limited only by ERISA.¹³² In that case, the Fifth Circuit held that H & H did not unlawfully discriminate against McGann, an HIV-positive employee, when it replaced its group policy with a self-insured plan.¹³³ The group plan had promised payment of a one million dollar lifetime maximum per employee, but, when the employer discovered McGann had AIDS, he instituted a self-insured plan

124. 29 U.S.C. §§ 1001-1461 (1994).

125. *Id.* § 1144(a).

126. *Id.* § 1144(b)(2)(A).

127. Mark H. Jackson, *Health Insurance: The Battle Over Limits on Coverage, in AIDS AGENDA*, *supra* note 2, at 147, 148 (differentiating a self-insured plan from a group plan). A self-insured employer creates its own fund for paying employee claims whereas commercially insured employers pay a premium to an insurance company, which bears the risks of paying claims. *Id.*

128. 29 U.S.C. § 1144(b)(2)(B); *see* Jackson, *supra* note 127, at 148 (explaining that ERISA has the effect of excusing self-insured plans from compliance with state insurance regulations).

129. *See* Zavos, *supra* note 121, at 44; Jackson, *supra* note 127, at 148 (noting that over 50% of employer-based coverage is self-insured).

130. *See* 29 U.S.C. § 1140 (outlawing discharge, suspension, discipline, or discrimination against an employee to prevent him or her from taking advantage of rights under a benefit plan).

131. 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

132. *See* Scherzer, *supra* note 120, at 426 (asserting that the decision allows employers to eliminate an employee benefit as soon as an employee takes advantage of it, as long as all similarly situated employees are treated equally).

133. *McGann*, 946 F.2d at 408.

that continued to pay this maximum, unless the employee had AIDS.¹³⁴ The court reasoned that the employer acted out of financial concern, rather than a desire to personally deprive McGann of his benefits.¹³⁵

The ADA's enactment most likely will change the face of federal insurance regulation.¹³⁶ Even though the ADA prohibits discrimination in employer-based health insurance,¹³⁷ it still allows underwriting based on actuarial risk.¹³⁸ To prove that a distinction is valid, rather than disability-based, an employer must show that it provides a bona fide insurance plan.¹³⁹ Further, the employer must demonstrate that the term is not a "subterfuge"¹⁴⁰ for disability discrimination.

At the very least, the ADA prohibits disability-based distinctions in group plans, but application of discrimination laws to self-insured plans remains unsettled. ERISA specifically states that it will not "alter, amend, modify, invalidate, impair, or supersede" any other federal law.¹⁴¹ However, the courts have not yet decided on the relationship between

134. *Id.* at 403 (adding that the new plan only paid a maximum of \$5000 to HIV-infected employees).

135. *Id.* at 404. This law does not, however, allow self-insured employers to refuse claims of an HIV-infected employee when the plan does not contain caps or exclusions for HIV-related claims. *John Doe v. Cooper Investments*, 16 Pens. Rep. (BNA) 89-B-597, 766 (C.D. Colo. Apr. 18, 1989).

136. 42 U.S.C. § 12112(b)(1) (forbidding an employer from "limiting, segregating, or classifying an employee" so that his or her opportunities or status are adversely affected because of a disability). This section prohibits an employer from engaging in disability discrimination in the provision of health insurance. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE, part II, app. JJ, at 101 (Supp. Jul. 1993) [hereinafter EEOC].

137. 42 U.S.C. § 12112(a) (forbidding discrimination in "other terms, conditions, and privileges of employment"); *id.* § 12112(b)(2) (preventing employers from "participating in a contractual or other arrangement" that subjects an employee to disability discrimination). These two provisions, read together, prohibit employers from discriminating in the provision of fringe benefits, in the form of commercially-insured or self-funded plans. 29 C.F.R. § 1630.4(f) (1995).

138. 42 U.S.C. § 12201(c)(1)-(3) (permitting underwriting practices that are consistent with state law, if group coverage, and part of a bona fide plan).

139. *Id.* § 12201(c)(2); *see* EEOC, *supra* note 136, at 104 (outlining the framework for determining if a health-related term is actually disability-based and, therefore, a violation of the ADA).

140. *See* EEOC, *supra* note 136, at 107 (warning that a distinction singling out a particular disability, a discrete group of them, or disabilities as a whole violates the ADA). The EEOC offers an AIDS-related term as an example of one that singles out a particular disability. *Id.*

141. 29 U.S.C. § 1144(d).

ERISA and the ADA and which of the two laws governs self-insured plans. The EEOC has interpreted the ADA to apply to these plans, rather than ERISA, and a number of cases on the issue are currently in litigation.¹⁴²

2. Recommendations for State Insurance Regulations

As mentioned, state insurance regulations only apply to group plans, and individual coverage outside the employment context, because ERISA governs self-insured plans. States, therefore, are limited in their ability to protect individual interests in the insurance context. States are somewhat restrained in this area for the additional reason that many of these issues were addressed in the epidemic's earlier years, and these laws are now well settled.

a. *Questions Asked During the Underwriting Process*

To prevent discrimination against individuals living with HIV disease, states must limit the types of questions asked by underwriters. In the early to mid 1980s, many underwriters tried to totally deny coverage to high-risk group members.¹⁴³ The National Association of Insurance Commissioners responded by announcing underwriting guidelines to prevent this problem.¹⁴⁴ Currently, only a few states have adopted these recommendations, and those that have not should follow suit.¹⁴⁵ Florida, for one, has passed a law forbidding underwriters to consider sexual orientation or certain other

142. See *Donaghey v. Mason Tenders Dist. Council Trust Fund*, 20 Pens. Rep. (BNA) 422 (N.Y. Dist. Office Jan. 27, 1993) (holding that a union health insurance plan violated the ADA because it denied payment for AIDS-related medical expenses). *Mason Tenders* has filed for a declaratory judgment in district court on whether the union's plan must comply with the ADA, as held by the EEOC, or with ERISA. See also *Zavos*, *supra* note 121, at 43.

143. Scherzer, *supra* note 120, at 417 (recalling the controversy surrounding underwriting policies in the epidemic's early years).

144. *Id.*

145. See generally Robert J. Blendon & Karen Donelan, *AIDS and Discrimination: Public and Professional Perspectives*, in *AIDS IN THE HEALTH CARE SYSTEM* 77, 79 (Lawrence O. Gostin ed., 1990) (reporting that the American public still feels no sympathy for people living with HIV disease who contracted the virus through homosexual activity or drug use). This survey indicates that discrimination against persons in high-risk groups still exists and that they still need protection from discrimination in a number of areas, including the underwriting process. *Id.*

factors that may allow the underwriter to draw conclusions about sexual orientation.¹⁴⁶

State lawmakers also must consider whether underwriters may inquire about an individual's HIV status. They will most likely allow underwriters to ask such questions because all jurisdictions already let insurers use the HIV antibody test,¹⁴⁷ except for California, which permits them to test the health of the immune system.¹⁴⁸ States may permit underwriters to inquire about the existence of a positive result, but legislators must ban them from considering negative test results in coverage or testing decisions because individuals should not suffer discrimination for merely taking a test.¹⁴⁹

b. *Use of the HIV Antibody Test in the Underwriting Process*

The introduction of the HIV antibody test into the commercial market in 1985 reduced the debate about intrusive questions to secondary status.¹⁵⁰ Today, insurance companies commonly use the test to predict risks, and those who test positive are uninsurable on an individual basis.¹⁵¹ Those states that initially regulated the use of HIV antibody tests quickly limited or repealed those provisions.¹⁵² Even though states have decided to authorize testing in this context, they still must balance the insurance company's need to know with the individual's right to privacy. Like Ohio and Texas, all states must ensure that testing is not requested on a discriminatory basis and that insurers ask individuals to submit to testing only for

146. FLA. STAT. § 627.429(4)(d) (1995) (forbidding underwriters to consider sexual orientation, marital status, living arrangements, occupation, gender, beneficiary designation, zip code, or other territorial classification).

147. *See, e.g., id.* § 627.429(4)(a) (allowing the insurer to "use only medical tests that are reliable predictors of risk"). *But see* WIS. STAT. ANN. § 631.90(2) (West 1995) (establishing that insurers cannot use an individual's HIV status in group plan underwriting). Because insurers seldom use medical tests in the group context, these bans are "meaningless." Scherzer, *supra* note 120, at 419.

148. CAL. HEALTH & SAFETY CODE § 199.21(f) (banning disclosure of HIV antibody test in determination of insurability, but not expressly prohibiting others, such as T-Cell Suppressor test); *see* Widiss, *supra* note 123, at 1684 n.180 (stating current position, as of 1992, of various state jurisdictions on testing in determining insurance eligibility).

149. FLA. STAT. § 627.429(4)(e) (authorizing questions about positive test results but not about negative test results); KY. REV. STAT. ANN. § 304.12-013(4)(e) (Michie 1994) (providing identical protection).

150. Scherzer, *supra* note 120, at 418.

151. *See* Widiss, *supra* note 123, at 1672-81 (asserting a number of justifications for the use of HIV antibody testing in the underwriting process).

152. Scherzer, *supra* note 120, at 419.

health-related reasons.¹⁵³ In addition, states must require insurance companies to follow rules of written and particularized informed consent, to provide for post-test counseling from a physician chosen by the applicant, and to reveal the results only to the applicant, persons designated by the applicant, and employees within the insurance company. Florida has announced clear rules on consent, counseling, and confidentiality.¹⁵⁴ Similarly, Texas has enacted tough penalties for violations of confidentiality laws in the insurance context.¹⁵⁵

c. *Excluding, Limiting, and Terminating Coverage Based on an Individual's HIV Status*

To supplement federal protection, states must enact laws prohibiting insurers from treating HIV disease differently than other sicknesses and illnesses.¹⁵⁶ State legislators must send a strong message to insurers and individual citizens that they will not condone discriminatory limits or exclusions.¹⁵⁷

153. OHIO REV. CODE ANN. § 3901.46(A) (Andersen Supp. 1989) (instructing insurers that they may ask individual policy applicants to submit to HIV testing "only in conjunction with tests for other health conditions" and not on the basis of sexual orientation); TEX. REV. CIV. STAT. ANN. art. 21.21-4(b) (West Supp. 1996) (requiring insurers to base testing on "medical condition or medical history" or on underwriting guidelines that require all within a risk class to submit to testing).

154. See FLA. STAT. § 627.429(4) (enumerating the specific requirements for consent, post-test counseling, and confidentiality). Florida requires the insurer to disclose its intent to test an individual in advance. *Id.* § 627.429(4)(b). Written consent is necessary, and it must include an explanation of the test, its purpose, uses, limitations, and meaning as well as the right to confidentiality. *Id.* The applicant may receive the results from a physician of his or her own choosing or from the Department of Health. *Id.* § 627.429(4)(c). At that time, the applicant must receive post-test counseling on the meaning of the results, its consequences, prevention of future transmission, and other pertinent information. *Id.* The results must remain confidential within the insurance company. FLA. STAT. § 627.429(4)(f).

155. TEX. REV. CIV. STAT. ANN. art. 21.21-4 (j)-(o) (enumerating the remedies for a confidentiality breach). The applicant may bring a civil action, and damages will vary based on whether the disclosure is negligent, willful, or criminal. *Id.*

156. See, e.g., KY. REV. STAT. ANN. § 304.12-013(5)(a) (banning insurance contracts that "contain benefit provisions, terms, or conditions which apply to [HIV] infection in a different manner than those which apply to any other health condition"). The statute also prohibits cancellation or nonrenewal because an individual receives an HIV positive diagnosis. *Id.* § 304.12-013(5)(b).

157. See Jackson, *supra* note 127, at 162 (noting that states may show this support through statutes, regulations, or department guidelines).

Unfortunately, neither federal nor state law can prevent termination of coverage upon certain events, including the loss of employment. In 1989, the federal government amended the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA")¹⁵⁸ to allow continuation of the coverage period until a disabled individual can qualify for Medicare.¹⁵⁹ Two practical problems arise in conjunction with this law. First, the law only covers employers with twenty or more employees, so individuals working for small businesses cannot take advantage of COBRA's guarantees.¹⁶⁰ Second, former employees often cannot afford the high premiums required to continue the benefits.¹⁶¹

States must take action to remedy these problems. In the late 1980s, many states directed insurance companies to create state-subsidized "high-risk" pools for individuals who could not qualify for continuation or other coverage, but such plans have proven unsuccessful for states as well as participants.¹⁶² If states choose to pass high-risk-pool legislation, they still must take other action due to past difficulties encountered in administering these plans. One recommendation is that states, which regulate continuation rights of plans not covered by COBRA, must amend their statutes and regulations to parallel the coverage offered under COBRA.¹⁶³

To assist individuals who cannot bear the financial burden of COBRA premiums, Washington State, and others, have created COBRA assistance programs. Through such programs, the state pays COBRA premiums for

158. 29 U.S.C. § 1161-1169 (1994). COBRA amendments also help individuals in new jobs waiting to qualify under a pre-existing condition clause. *See id.* § 1162(2)(D)(i); Scherzer, *supra* note 120, at 422.

159. 29 U.S.C. § 1162(a).

160. *Id.* § 1161(b).

161. CONGRESSIONAL RESEARCH SERVICE, HEALTH INSURANCE CONTINUATION COVERAGE UNDER COBRA 8 (Nov. 1994) (summarizing COBRA's provisions and stating that the law allows employers to charge disabled individuals up to 150% of the premium for the last 11 months); Widiss, *supra* note 123, at 1730 (stating that COBRA conversion premiums are often costly).

162. *See* Scherzer, *supra* note 120, at 412 (discussing the creation of such programs to assist the medically uninsurable). Scherzer explained that over half the states had passed such laws by 1990 but that most programs had financial difficulties. *Id.* Even though the states appropriated money to assist members with payments, individuals still paid considerably more than if they had a private policy. *Id.* Another author noted that state-mandated high-risk pools are not an answer to the problem because "they do not exist in all states, the premium costs are high, the coverage is limited, and some exclude coverage for AIDS." Widiss, *supra* note 123, at 1731.

163. *See* Scherzer, *supra* note 120, at 424 (applauding New York's 1992 reforms that accomplished this goal).

qualifying individuals with HIV disease.¹⁶⁴ Such a program benefits the individual as well as the state in that the individual keeps his or her private insurance coverage, which is advantageous to the state because public benefits for the individual probably would cost a great deal more.¹⁶⁵

3. Insurance and Health Care Reform

Since the AIDS epidemic began, AIDS advocates have fought many battles over insurance issues. A number of them ended unsuccessfully, but, collectively, they have accomplished something more important: they have brought the issue of health care reform into the public forum.¹⁶⁶ The American public, as well as the federal government, must consider how to reform the current system based on underwriting¹⁶⁷ and employer-based plans.¹⁶⁸ People also have begun to realize that the insurance-related horrors suffered by people with HIV disease can happen to all individuals with chronic diseases.¹⁶⁹ As more women, children, and people of color contract the virus, the need to reform the system in response to HIV disease will become even more urgent.¹⁷⁰ In its final report, the National Commission on AIDS called for comprehensive health care reform that prudently considers HIV disease, and other chronic conditions.¹⁷¹ Until federal and

164. See, e.g., WASH. REV. CODE ANN. § 74.09.757 (West Supp. 1996) (enabling the “[a]cquired human immunodeficiency syndrome insurance program,” which is administered by the department of social and health services with state appropriated funds). This department is responsible for creating eligibility requirements beyond those mentioned in the statute, which include an HIV infection diagnosis and qualification for continuation benefits under COBRA. *Id.*

165. See Widiss, *supra* note 123, at 1620 n.8 (reporting that current estimates of health care costs for an HIV-infected person range from \$50,000 to \$125,000).

166. See Scherzer, *supra* note 120, at 420 (asserting that advocates provided a “model for disease group advocacy”).

167. See Widiss, *supra* note 123, at 1735 (arguing that revision of the underwriting process is not enough to cure the health care system’s difficulties).

168. See Scherzer, *supra* note 120, at 428 (contending that employers as well as employees are dissatisfied with the current system).

169. See *id.* (predicting that, as the groups realize their common pursuit, they will unite to encourage comprehensive health care reform).

170. See CONGRESSIONAL RESEARCH SERVICE, HEALTH CARE REFORM: OVERVIEW 1 (Sept. 1994) (reporting that nearly all of the 37.4 million uninsured Americans were under 65, and a majority were children and young adults, according to 1992 statistics); Zavos, *supra* note 121, at 44 (observing that this change in the disease’s epidemiology will increase the need to provide equitable access to health care).

171. NATIONAL COMMISSION, *supra* note 1, at 10 (stressing the importance of coverage for services such as home and long-term care); see also *id.* at 12 (asserting that the federal

state governments provide affordable access to the proper continuum of health care, individuals living with HIV disease will not receive the peace of mind that they deserve in their time of desperate need.

II. BUILDING ON EXISTING LAWS TO PROVIDE FOR THE NEEDS OF PEOPLE LIVING WITH HIV DISEASE

A. *Planning for Incapacity and Death*

The traditional mechanisms used for personal and estate planning often are inappropriate for HIV-infected individuals because of the unpredictable progression of HIV disease.¹⁷² While some individuals steadily decline in health over a period of months or years, many others alternate between sickness and health before succumbing to the virus.¹⁷³

“Living with HIV” means tolerating a high level of anxiety, which takes a tremendous toll at every stage. For those who are well, it means the uncertainty of waiting for the other shoe to drop, sometimes for years. For those who are already sick, it means worrying about what the next complication will bring, how their bodies will betray them next, whether they will lose some crucial faculty such as sight, or how much pain they may be asked to tolerate.¹⁷⁴

This compelling account illustrates the importance of providing state laws to make things as easy as possible for HIV-infected individuals to plan for their uncertain futures.

1. Health Care Decisions

Historically, state statutes have allowed an individual to execute a financial power of attorney, in which he or she may designate someone to

government must search for ways to provide health care to all).

172. See Elizabeth B. Cooper, *HIV-Infected Parents and the Law: Issues of Custody, Visitation and Guardianship*, in AIDS AGENDA, *supra* note 2, at 70, 82 (discussing this problem in the context of family law issues).

173. Brett-Smith & Friedland, *supra* note 3, at 37-38 (commenting on the inconsistency of HIV disease in its effects on individuals). For example, some people may live for a long period of time with a low T4 cell count while other may have a moderate count for a number of years that suddenly drops. *Id.* at 38.

174. *Id.*

make decisions on his or her behalf.¹⁷⁵ Typical powers delegated to an attorney-in-fact include making gifts, disclaiming property interests, withdrawing and receiving trust income, carrying out banking and financial transactions, and engaging in real property transactions.¹⁷⁶ The difficulty with the traditional power of attorney is that it becomes ineffective upon the grantor's mental incapacity, which is exactly the point when many people need its powers.¹⁷⁷

Every state now provides for a durable financial power of attorney.¹⁷⁸ To alleviate additional anxiety about future decisions, individuals living with HIV disease need such an arrangement for health care decisions as well. To accommodate this necessity, a number of states now have durable health care power of attorney provisions, which allow a principal to appoint someone to make health care decisions on his or her behalf upon incapacity. California, for instance, has passed detailed legislation allowing such agreements.¹⁷⁹ So that individuals have as much control as possible over future health care decisions, state law must give the principal power to decide whether to grant broad or specific powers to the attorney-in-fact.¹⁸⁰ Because people living with HIV disease may alternate between sickness and health for a long period of time, and personal relationships can change during that period, a statute also must allow the principal to alter the document and to revoke the appointment, if he or she has the capacity to do so.¹⁸¹ Most statutes require that individuals execute very specific documents to give the arrangements legal effect, but state legislatures must recognize that such actions are not always possible. Virginia has taken

175. Arnold J. Rosoff & Gary L. Gottlieb, *Preserving Personal Autonomy for the Elderly*, 8 J. LEGAL MED. 1, 37-38 (1987).

176. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 5602 (listing a number of powers which a principal may delegate to an attorney-in-fact).

177. Rosoff & Gottlieb, *supra* note 175, at 38. Such provisions are based on agency law, which dictates that the power terminate upon incapacity because the agent can not have more power than the principal. *Id.*

178. Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1012 (1984) (noting that all 50 states have passed such legislation and asserting that it is a viable option in the health care setting as well).

179. CAL. HEALTH & SAFETY CODE §§ 2430-2510 (Deering 1992); *see also* D.C. CODE ANN. §§ 21-2201 to -2213 (Supp. 1995); VA. CODE ANN. §§ 54.1-2981, -2993 (Michie Supp. 1992).

180. *See* CAL. HEALTH & SAFETY CODE § 2430(b)-(c) (broadly defining "health care" as practically any action pertaining to the individual's physical or mental conditions and "health care decision" as consent, or refusal or withdrawal of consent, to health care).

181. *See id.* § 2437(a)-(c) (presuming that the principal has the capacity to revoke the appointment and placing the burden of proof on the other party).

action by allowing a terminally ill, but competent individual to orally appoint an agent to make health care decisions.¹⁸²

To accompany a durable health care power of attorney, a person living with HIV disease may want to execute a living will,¹⁸³ and states should pass legislation that empowers them to do so. Normally, an individual executes a living will to direct health care providers not to use artificial life support procedures if he or she becomes terminally ill.¹⁸⁴ Because these documents have a number of shortcomings in practice,¹⁸⁵ individuals should use them to complement, rather than to replace, a durable power of attorney. Additionally, states should pass or amend specific living will legislation, which takes these problems into account. By passing the recommended durable health care power of attorney and living will provisions, states will give individuals, especially the rising number of them with diverse family structures and relationships, an important degree of control over their future health care decisions.¹⁸⁶

2. Guardianships

Most current state laws regulating guardianships also do not address the needs of individuals living with HIV disease and other chronic conditions. Traditionally, a parent may use a guardianship arrangement¹⁸⁷ to transfer

182. See VA. CODE ANN. § 54.1-2983 (Michie 1994) (authorizing oral arrangements only if specific procedures are followed).

183. See Fowler, *supra* note 178, at 1000 (explaining that the living will allows patients some autonomy but that this instrument is not enough in and of itself).

184. See generally D.C. CODE ANN. §§ 6-2421 to -2430 (1995); MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -614 (1987 & Supp. 1995). Both laws require that two physicians attest to the patient's terminally ill condition before discontinuing life support upon request. D.C. CODE ANN. § 6-2421(5); MD. CODE ANN., HEALTH-GEN. § 5-606.

185. See Fowler, *supra* note 178, at 999-1000 (asserting that an individual cannot foresee all health care possibilities when the document is executed and that living wills do not always protect patient rights because of formalistic statutory requirements).

186. See Arlene Zarembka & Katherine M. Franke, *Women in the AIDS Epidemic*, 9 ST. LOUIS U. PUB. L. REV. 519, 536-37 (1990) (stressing the importance of such provisions to the increasing number of women living with HIV disease, who may have nontraditional family structures). In these situations, women may not necessarily want their legal spouse or immediate family members to make decisions for them. *Id.* Additionally, homosexual men commonly object to immediate family members making their health care decisions. Robert Steinbrook et al., *Preferences of Homosexual Men with AIDS for Life-Sustaining Treatment*, 314 NEW. ENG. J. MED. 457, 457 (1986).

187. MARK I. SOLER ET AL., REPRESENTING THE CHILD CLIENT ¶ 3.06[2][a] (1994) (explaining that a guardianship of a minor's person discontinues a parent's custody and shifts that responsibility to another adult).

parental powers while retaining the right to support and visit the child.¹⁸⁸ Guardianship proceedings normally are governed by the state probate court¹⁸⁹ because a parent often names a guardian in his or her will.¹⁹⁰ The proposed guardian or a parent may initiate a petition for guardianship in a family court.¹⁹¹ The court, however, may reject the parent's choice if it is not in the child's best interest.¹⁹² Traditional guardianships are permanent and terminate only when the child reaches the age of majority, marries, or dies, whichever comes first.¹⁹³

For two primary reasons, current guardianship laws do not work for the growing number of individuals living with HIV disease, most of whom draw strength from their children and need to know the courts will respect their child-rearing choices after they have passed away.¹⁹⁴ First, traditional mechanisms allow only long-term transfers of custody.¹⁹⁵ Considering the unpredictability of HIV disease, permanent transfer is not always necessary, and the parent may want to regain custody of his or her children after returning to good health.¹⁹⁶ Second, the growing number of women with

188. *Id.* (stating that powers and duties of guardians are defined by state statute). Powers usually include deciding where the child will live, making health care decisions for the child, overseeing the child's educational and religious development, and reasonably disciplining the child. *Id.*

189. *Id.* ¶ 3.06[5][a] (adding that this court may also hear the juvenile and family law cases).

190. *Id.* ¶ 3.06[5][c].

191. SOLER, *supra* note 187, ¶ 3.06[5][d][i] (observing that the guardian usually files the petition); *see, e.g.*, N.Y. SURR. CT. PROC. ACT §§ 1701, 1703 (McKinney 1967 & Supp. 1996) (allowing a parent as well as a child fourteen or over to petition for appointment of a guardian).

192. SOLER, *supra* note 187, ¶ 3.06[5][d][vii].

193. *Id.* ¶ 3.06[11].

194. *See* Ann Kurth, *Introduction: An Overview of Women and HIV Disease*, in UNTIL THE CURE 1, 16 (Ann Kurth ed., 1993) (emphasizing that many HIV-infected women, who are usually the primary caretakers of their children, consider planning for child care their main concern).

195. SOLER, *supra* note 187, ¶ 3.06[3][f] (warning that no state law expressly authorizes informal guardianships but that parents still may execute them in writing, at their own risk); *id.* ¶ 3.06[7] (describing a temporary guardianship, as defined by many state statutes, and its limitations); *see also* Michele A. Zavos, *Legal Considerations*, in UNTIL THE CURE, *supra* note 194, at 125, 140 (asserting that temporary and informal guardianships are often complicated and contestable).

196. Zavos, *supra* note 195, at 140 (asserting that women must have the opportunity to designate a guardian without relinquishing full custody). One woman explains this dilemma:

I have been trying to draw up custody papers for my daughter for quite some time now (her biological father died of AIDS two years ago). I would not give

HIV disease, especially those of a low socioeconomic status, makes the need for reform even more urgent.¹⁹⁷ States originally designed guardianship statutes to serve the middle-class, traditional family,¹⁹⁸ but, for individuals with HIV disease, this model often does not hold true. Many single parents, mostly women, cannot rely on the other parent to assume responsibility for the child because the noncustodial parent already may have succumbed to HIV disease.¹⁹⁹ Further, HIV disease often strikes those in areas pervaded by drug use and poverty, and, as a result, the non-infected parent may not be available or interested in raising the child.²⁰⁰

Commentators have long suggested that a “springing” guardianship mechanism would remedy these problems because it would “spring” into existence when illness leaves a parent unable to care for the child but “lapse” if and when the parent regains health.²⁰¹ Motivated by the impact of HIV disease on single parents, especially single mothers,²⁰² New York became the first state to pass such a statute in 1992,²⁰³ and Maryland followed suit by passing its own statute in 1994.²⁰⁴

For the reasons stated above, other states must enact similar legislation to protect HIV-infected parents, especially the growing number of single mothers who make up this group. Basically, the New York and Maryland

up custody while I am well, perhaps not even when I am sick. For now, this is not an alternative for me. I relate this to you because you need to know that often the children in our lives are our survival. I work at staying healthy so that I can raise my daughter. It is she who keeps me on track, centered in my will to survive. This is an essential to women, to mothers living with this disease.

Id. at 125-26 (quoting an anonymous source).

197. *See id.* at 140 (reporting that most HIV-infected women are “functionally single parents”).

198. Cooper, *supra* note 172, at 82 (arguing that existing statutes only apply to family situations that do not conform to “socioeconomic reality of most HIV-infected parents”).

199. *Id.* (explaining that existing laws assume that, if one parent dies, another parent is standing by to care for the child).

200. *Id.*; *see Zavos, supra* note 195, at 140 (relating that many HIV-infected women cannot afford a lawyer and, as a result, do not execute a will in which they could name guardian).

201. Zarembka & Franke, *supra* note 186, at 539-40 (asserting that flexible law of this type would ensure that parent could regain custody when his or her good health returned without fighting for it in costly, exhausting court battle).

202. N.Y. SURR. CT. PROC. ACT § 1726 Practice Commentaries (McKinney Supp. 1996).

203. *Id.* § 1726; *see Zavos, supra* note 195, at 140-41.

204. MD. CODE ANN., EST. & TRUSTS §§ 13-903 to 13-904 (Supp. 1994) (providing for a springing guardianship arrangement that is almost identical to that allowed in New York).

statutes allow a parent to appoint a guardian by judicial appointment²⁰⁵ or by signed and witnessed instrument.²⁰⁶ If “medically unable” to appear in court, neither method requires the parents’ presence, an important improvement over existing law.²⁰⁷ These laws respect both parents’ rights, a concern of some critics,²⁰⁸ by ordering that both parents join in the petition.²⁰⁹ At the same time, Maryland recognizes that a single parent cannot always locate the other parent and requires only “reasonable efforts” to find an absent parent.²¹⁰ Furthermore, the parent retains a certain amount of control in that he or she decides when the guardianship will take effect, or terminate, in the event that he or she returns to good health.²¹¹

205. See N.Y. SURR. CT. PROC. ACT § 1726(3) (establishing that only parent or legal guardian may file a petition for appointment of a standby guardian); MD. CODE ANN., EST. & TRUSTS § 13-903(b) (specifying that only parent may file petition for appointment of standby guardian). The petition must specify a triggering event (incapacity, death, or whichever occurs first). N.Y. SURR. CT. PROC. ACT § 1726(3)(b)(i); MD. CODE ANN., EST. & TRUSTS § 13-903(b)(3). The petitioner must describe his or her stage of illness. N.Y. SURR. CT. PROC. ACT § 1726(3)(b)(ii) (requiring “progressively chronic illness” or “irreversibly fatal disease”); MD. CODE ANN., EST. & TRUSTS § 13-903(b)(3) (requiring “significant risk” of death or incapacity within two years of filing).

206. N.Y. SURR. CT. PROC. ACT § 1726(4) (allowing such arrangement if signed by the parent, two witnesses who are at least 18 years old, and the standby guardian); MD. CODE ANN., EST. & TRUSTS § 13.904(a)(1)(i)-(ii) (imposing same requirements). Both statutes permit another individual to sign for the parent, upon the parent’s consent, if he or she is physically unable to do so. N.Y. SURR. CT. PROC. ACT § 1726(4)(a); MD. CODE ANN., EST. & TRUSTS § 13.904(a)(2)(i)-(ii). A parent also may appoint an alternate standby guardian in this document and in the same manner. N.Y. SURR. CT. PROC. ACT § 1726(4)(b)(ii); MD. CODE ANN., EST. & TRUSTS § 13.904(b)(2). The standby guardian’s authority begins upon receipt of a determination of capacity or a determination of physical debilitation and a copy of written consent from the parent. N.Y. SURR. CT. PROC. ACT § 1726(4)(c); MD. CODE ANN., EST. & TRUSTS § 13.904(c). An appointment by written instrument ends after 60 days in New York and after 180 days in Maryland, if the standby guardian does not file a petition for guardianship with the court. N.Y. SURR. CT. PROC. ACT § 1726(4)(c); MD. CODE ANN., EST. & TRUSTS § 13.904(e).

207. N.Y. SURR. CT. PROC. ACT § 1726(3)(c); MD. CODE ANN., EST. & TRUSTS § 13-903(c).

208. See Cooper, *supra* note 172, at 93 (listing some commentators’ concerns, including apprehensions about locating and displacing the rights of the other parent).

209. N.Y. SURR. CT. PROC. ACT § 1726(2) (providing that other guardianship provisions still apply to standby guardianship arrangements); MD. CODE ANN., EST. & TRUSTS § 13-903(a) (expressly requiring both parents to sign unless the other cannot be found).

210. MD. CODE ANN., EST. & TRUSTS § 13-903(a)(1)-(3) (requiring both parents to sign or to document efforts to locate an unavailable parent before filing for judicial appointment).

211. N.Y. SURR. CT. PROC. ACT § 1726(3)(f), (4)(f) (providing rules for revocation of judicial and written appointments); MD. CODE ANN., EST. & TRUSTS §§ 13-903(f), 13-904(h) (duplicating New York’s statute on this point). By explicitly giving the parent the power to

Although these statutes are relatively new and untested in court, state legislatures cannot “play it safe” by waiting to pass them. HIV disease is rapidly affecting single parents, especially women, and these individuals need laws to accommodate their special needs right away.

B. *Fighting Custody Battles*

In addition to the problems inherent in guardianship statutes in most states, many HIV-infected parents may face custody and visitation disputes in which the law may not protect their rights. Even though courts should treat HIV disease like any other disability in this context,²¹² broad statutes governing custody and visitation still may allow for discrimination against the HIV-infected parent. Courts often consider the probability of transmission to the child, even though transmission cannot occur in casual situations; courts determine the parent’s ability to care for the child, despite his or her condition; and courts weigh the chance that the child could suffer discrimination because of the parent’s condition.²¹³ Courts have rejected all of these arguments at some point,²¹⁴ but custody and visitation determinations still leave room for judges’ personal opinions.²¹⁵ States, therefore, must pass legislation to ensure that HIV-infected parents receive fair determinations in custody and visitation disputes.

1. Existing Statutes and Case Law Governing Custody and Visitation

Because federal law plays little, if any, part in custody and visitation decisions, this issue is an especially important one for states to consider.

“unspring” the guardianship, the two legislatures allayed yet another concern about springing guardianship statutes. See Cooper, *supra* note 172, at 93 (explaining that critics have contended that the guardian and relinquishing parent may differ as to whether and when the arrangement should “unspring”).

212. Cooper, *supra* note 172, at 71 (asserting that courts should evaluate HIV-infected parents based on their ability to fulfill their parenting responsibilities and to ensure the child’s social and psychological well-being).

213. Zavos, *supra* note 195, at 141 (explaining that disputes based on these considerations are unrelated to the child’s best interests); Cooper, *supra* note 172, at 70 (arguing that parent may advance these contentions to disguise concerns about HIV-infected parent who is homosexual or has history of drug use).

214. See *infra* notes 223-49 and accompanying text (examining each one of these unsupported arguments).

215. See *infra* notes 221-22 and accompanying text (stating the ways in which a judge may abuse his discretion in custody and visitation decisions).

Most state courts use the “best interests of the child” standard and make decisions on a case-by-case basis.²¹⁶ Different states articulate their standards for this determination in diverse ways, but many follow the Uniform Marriage and Divorce Act (“UMDA”),²¹⁷ which suggests factors that courts should take into account.²¹⁸ Most states follow the UMDA in providing standards for visitation determinations as well.²¹⁹ The UMDA directs courts to grant visitation unless “visitation would endanger seriously the child’s physical, mental, moral, or emotional health.”²²⁰

Even though statutory and case law outlines a framework for these decisions, custody determinations still allow judges a great deal of discretion.²²¹ The “best interests” standard is vague, and, therefore, manipulable, so judges often rely on their own and the community’s value preferences in reaching decisions.²²² In the absence of clearly defined judicial standards, state legislatures must take the necessary steps to protect

216. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in CHILD, PARENT & STATE 3, 4 (S. Randall Humm et al. eds., 1994) (noting that some states list factors to consider while others leave it to court’s discretion).

217. Cooper, *supra* note 172, at 71 (noting that most states have either adopted the UMDA or used it as foundation for statutes outlining factors for courts to consider).

218. UNIF. MARRIAGE & DIVORCE ACT § 402 (1979). The five factors mentioned in the uniform act are:

- 1) the wishes of the child’s parent or parents as to his custody;
- 2) the wishes of the child as to his custodian;
- 3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- 4) the child’s adjustment to his home, school, and community; and
- 5) the mental and physical health of all individuals involved.

Id.

219. See Cooper, *supra* note 172, at 72.

220. UNIF. MARRIAGE & DIVORCE ACT § 407(a) (1979).

221. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 255-68 (1975), reprinted in ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 636, 648 (1989) (asserting that the broad standards provided to judges encourage value-based decisions by particular judges in each case). Mnookin advocates a system that favors family autonomy, rather than state paternalism, as the underlying value of policies in this area. *Id.* at 646. He further contends that government involvement is justified only in cases where private dispute settlement or child protection is necessary. *Id.* at 648.

222. See Martin Guggenheim, *The Best Interests of the Child: Much Ado about Nothing?*, in CHILD, PARENT & STATE, *supra* note 216, at 27 (lamenting that these value choices lead to an ironic result in that the judge often overlooks the child’s best interests in reaching a decision).

HIV-infected parents from arbitrary custody and visitation judgments based on the parents' seropositivity.

2. Applicable Case Law

In a number of states, courts have rejected the idea that a parent's disability is reason enough to deny him or her custody. In *In re Marriage of Carney*,²²³ the Supreme Court of California began this trend by holding that a disability does not constitute prima facie evidence that a parent is unfit.²²⁴ Instead, the court should make an individualized inquiry²²⁵ to determine whether the parent's disability will have a "substantial and lasting adverse effect on the best interests of the child."²²⁶ Consequently, a number of other state courts have chosen to follow this approach.²²⁷

Courts have specifically applied *Carney's* principles in custody and visitation disputes involving HIV-infected parents. For example, a New York court, in *Doe v. Roe*,²²⁸ held that a disability alone cannot prevent an otherwise qualified parent from having custody of a child.²²⁹ In addition to refusing to order a father to submit to an HIV antibody test,²³⁰ the court rejected the maternal grandparents' efforts to convince the court

223. 598 P.2d 36 (Cal. 1979).

224. *Id.* at 42.

225. *Id.* The court should:

inquire into the person's actual and potential physical capabilities, learn how he or she has adapted to the disability and manages its problems, consider how the other members of the household have adjusted thereto, and . . . the special contributions the person may make to the family despite—or even because of—the [disability].

Id. In addition, the court should consider any other relevant factors in reaching its decision.
Id.

226. *Carney*, 598 P.2d at 42 (citations omitted). The lower court was admonished for stereotyping the physically disabled father as unable to participate meaningfully in his child's life and for failing to give children credit for their ability to adapt to such situations. *Id.* at 42-23.

227. *See, e.g.*, *Bednarski v. Bednarski*, 366 N.W.2d 69, 73-74 (Mich. Ct. App. 1985) (remanding case back to trial court because it placed undue emphasis on mother's deafness when it granted custody to child's grandparents); *Hatz v. Hatz*, 455 N.Y.S.2d 535, 536-37 (Fam. Ct. 1982), (adopting *Carney* standard and holding that mother's paralysis did not warrant revocation of custody), *aff'd*, 468 N.Y.S.2d 943 (App. Div. 1983).

228. 526 N.Y.S.2d 718 (Super. Ct. 1988).

229. *Id.* at 726.

230. *Id.* at 725 (stressing that mandatory testing is contrary to public policy of protecting confidentiality). Reasoning that the petitioner must show a "compelling need" for involuntary testing information, the court held that this standard was not met. *Id.* at 725-26.

that the father's limited life expectancy and his propensity to take his own life and that of others made him an unfit parent.²³¹ Instead, the court found that the pertinent consideration is the effect, if any, of the father's disability on the child.²³² Applying this test to the facts at issue, the court decided that, even assuming the father was an HIV carrier, a shortened life span could not justify taking a child from a parent with whom he or she has a good relationship.²³³ Further, expert testimony revealed that the father displayed no suicidal tendencies.²³⁴ Considered together, *Carney* and *Doe* offer persuasive authority for protecting HIV-infected parents from the unwarranted loss of custody or visitation rights because of their condition.

In addition to rejecting unfounded claims based on disability alone, a number of courts also have declined to recognize fear of transmission through casual contact as a basis for denying custody or visitation. Rather than concentrating on the father's AIDS diagnosis, a New York trial court, in *Jane W. v. John W.*,²³⁵ dismissed the condition as a significant issue and stressed the father's capability to care for the child.²³⁶ Noting that "exceptional circumstances" must exist for a court to limit visitation, the court refused to terminate the father's unsupervised visitation rights.²³⁷ Relying on the *Jane W.* decision, an Indiana appellate court overturned a lower court decision²³⁸ denying visitation rights to a homosexual, AIDS-infected father, because of his condition, in *Stewart v. Stewart*.²³⁹ The

231. *Id.* at 726.

232. *Id.*

233. *Doe*, 526 N.Y.S.2d at 726 (relying on testimony of court-appointed psychiatrist who interviewed all parties and children).

234. *Id.* (elaborating that expert did not consider father a danger to his children).

235. 519 N.Y.S.2d 603, 605 (N.Y. Sup. Ct. 1987) (finding that the father's AIDS diagnosis should carry little, if any, weight in adjudicating visitation disputes).

236. *Id.* (stressing that father is health care worker and knows proper precautions to take in protecting family and friends from infection).

237. *Id.*

238. See Nancy L. Mahon, Note, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092, 1121 (1988) (citing *Stewart v. Stewart*, No. S485-1128 (Sup. Ct. Marion City, Ind., Oct. 9, 1986). In *Stewart*, the court disregarded evidence of the mother's parental incompetence and awarded custody to her after learning of the father's condition. *Id.* The trial judge's approach not only defied the best interests standard but also misconstrued medical evidence and focused on the condition, rather than the child's needs. *Id.*

239. 521 N.E.2d 956, 959 (Ind. Ct. App. 1988) (recalling the lower court's decision to terminate completely the father's visitation rights, a remedy not requested by the mother, because of the slight chance of transmission through casual contact); see also Robert D. Zaslow, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interests Doctrine*

appellate court in *Stewart* followed the *Jane W.* court's lead by taking a more reasonable approach²⁴⁰ and choosing to base its decision on the weight of medical evidence.²⁴¹ Consequently, the *Stewart* court remanded the decision with instructions that the trial court may not deny visitation privileges solely on the basis of the father's AIDS diagnosis.²⁴² Many state courts have since relied on the principles announced in *Doe* and *Jane W.*²⁴³ At the very least, judges have an obligation to individually assess the facts of each case, rather than to deny parental rights based solely on a parent's disability or a societal fear of transmission through casual contact.

The effect of the social stigma²⁴⁴ on the child of an HIV-infected parent is yet another factor that courts should not consider in reaching their decisions on parental rights. In *Palmore v. Sidoti*,²⁴⁵ the Supreme Court recognized that even though the law cannot reach private prejudices, courts must not, directly or indirectly, condone them.²⁴⁶ Soon after that decision, state courts extended *Palmore* to other contexts. The Supreme Court of Alaska offered protection to gay and lesbian parents,²⁴⁷ while an Ohio

to *Ensure Impartial Parental Rights Determinations for HIV-Infected Parents*, 3 J. PHARMACY & L. 61, 76 (1994) (asserting that this lower court decision exemplifies how judges may exploit the best interests standard, based on their own fears and prejudices).

240. *Stewart*, 521 N.E.2d at 965 (characterizing the trial court's action as "extreme and unwarranted" and contrary to the medical evidence presented).

241. *Id.* at 966 (referring to *Jane W.* and noting the similarity of the medical evidence in the two cases). The court mentioned that *Jane W.* was the only reported case addressing the visitation issue in this context. *Id.* at 965. The decision included a lengthy excerpt of the case's medical testimony and then expressly relied on the case in finding the trial court in error. *Id.* at 965-66 (citing *Jane W.*, 519 N.Y.S.2d at 604-05).

242. *Id.* at 966. On remand, the trial court was also directed to hear current medical evidence from either party about AIDS and to tailor its decision to all evidence presented. *Stewart*, 521 N.E.2d at 966.

243. *See, e.g.*, *Steven L. v. Dawn J.*, 561 N.Y.S.2d 322, 326 (Fam. Ct. 1990) (denying father's petition for modification of custody order and refusing to consider mother's HIV infection as sole grounds for such alteration). The court observed that a change in custody could have a greater emotional effect on the child than the mother's condition and the possibility of her untimely death. *Id.*

244. *See generally* Brandt, *supra* note 13, at 425-32 (examining society's reasons for stigmatizing people with HIV disease, in the context of history, society, and culture).

245. 466 U.S. 429 (1984).

246. *Id.* at 433-34 (holding that effect of racial prejudice on child is not permissible factor for courts to consider in decisions concerning parental rights). The father sought custody after discovering that the child's mother, who had custody of their daughter, lived with, and later married, a black man. *Id.* at 430.

247. *See S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (holding that social stigma surrounding homosexual mother's sexual orientation is not pertinent consideration in custody

appellate court allowed a father overnight visitation rights over the mother's protests of his homosexuality and alleged HIV seropositivity.²⁴⁸ These cases provide courts the foundation for broadening *Palmore's* reach to cover the HIV-infected parent.²⁴⁹

3. Recommendations for State Legislation on Custody

In keeping with the spirit of recent federal measures, such as the ADA,²⁵⁰ states must follow suit and fill the gaps left by this measure. Specifically, states can accommodate HIV-infected parents by amending child custody statutes to prohibit judges from considering a parent's HIV-positive status as a per se bar to custody or visitation. Florida already has amended its custody and visitation statute in this manner,²⁵¹ and states should look to this law for guidance. The Florida statute expressly forbids a court to deny custody or visitation solely because a parent or grandparent is HIV positive.²⁵² The court may, however, condition its decision on the parent or grandparent's agreement to observe infection control measures for the protection of the child.²⁵³ To provide even more guidance to judges, lawmakers must go further than the Florida statute and instruct judges to consider each case individually.²⁵⁴ The judge must determine the effect, if any, of the parent's condition on the child and then consider the status only if "exigent circumstances" exist.²⁵⁵ The only two possible examples of such circumstances are deterioration of the parent's condition, leaving

determination, unless it has adverse effect on child). The court remanded the case for further fact finding on this issue and warned that the mother's conduct, rather than her sexual orientation, must be contrary to the child's best interests. *Id.*

248. *See Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (declaring that court's duty is to protect parent-child relationship and that court cannot discriminate against homosexuals in so doing). The court held that the trial court acted in the best interests of the child in allowing the father to visit with his children. *Id.*

249. *See, e.g., Doe v. Roe*, 526 N.Y.S.2d 718, 726 (Super. Ct. 1988) (calling upon court system to eradicate AIDS-related discrimination, stigmatization, and hysteria by repudiating personal attacks veiled as medical issues).

250. 42 U.S.C. §§ 12101-12213.

251. FLA. STAT. § 61.13(6) (1995).

252. *Id.*

253. *Id.*

254. Zaslów, *supra* note 239, at 81.

255. *Id.* (warning that "exigent circumstances" should be strictly limited to those two situations).

him or her unable to meet the child's everyday needs,²⁵⁶ and the rare situation where the parent becomes a threat to himself or herself, or to others.²⁵⁷

By reforming laws to serve the needs of HIV-infected parents, states will serve a dual purpose. First, lawmakers will exhibit respect for these parents and the obstacles they must face. In addition, reform in this area will benefit all citizens in that state by protecting the future of its children.

IV. A FINAL RECOMMENDATION: COMPREHENSIVE HIV EDUCATION PROGRAMS

To complement all of the aforementioned recommendations for legislation, states must take one more vital step toward ensuring that the rights of HIV-infected individuals receive the attention that they deserve. Federal efforts to educate the public have failed as a whole,²⁵⁸ so state governments must fill the gaps left by federal inaction and assume the leadership role in this area.²⁵⁹

Many state governments acted quickly in the earlier years of the epidemic to provide education to the public, and these efforts must continue, but with some reforms.²⁶⁰ States must begin by ensuring that all education programs provide a wide range of information.²⁶¹ While prevention and control measures obviously are important issues to cover, states also need to include much more.²⁶² Educating all citizens about the dangers of discrimination will encourage prevention as well as ease the burdens of

256. *Id.* at 81-82 (outlining these circumstances and adding that parent still must retain visitation rights to maximum extent practicable).

257. *Id.* at 82-83 (giving examples of situations where parent might lose custody, including: parent who openly threatens to infect others; HIV-infected mother who continues to breastfeed; one who knowingly fails to reduce risk of blood-to-blood contact; and one who engages in sexual contact with child).

258. See Scott Burris, *Education to Reduce the Spread of HIV*, in AIDS LAW TODAY, *supra* note 3, at 82 (characterizing federal education program as "halfhearted").

259. See NATIONAL COMMISSION, *supra* note 1, at 13 (calling on all levels of government to show leadership to combat AIDS crisis); Burris, *supra* note 258, at 89 (asserting that federal grants impose too many restrictions on content, which causes state and local programs to be ineffective). To avoid such results, states must not only pass their own legislation but also lobby the federal government to alleviate content restrictions placed on these grants.

260. See Burris, *supra* note 258, at 94 (reporting that about one-third of the states have required or encouraged education in the public school system).

261. See *id.* at 83 (discussing reducing the risk of contracting AIDS).

262. *Id.*

people already living with HIV disease.²⁶³ In addition, states must teach the principles of “universal precautions” to everyone in society, not just workers with occupational risks of exposure, to avoid global infection.²⁶⁴ All education programs, but especially those directed toward minority groups most affected by HIV disease, must work to empower these individuals if their safety is to be ensured.²⁶⁵ States may do so by requiring programs that advocate not only safer, but more communicative sex, so that women can protect themselves more effectively,²⁶⁶ and present pictures of people living with, rather than dying of, HIV disease.²⁶⁷

Because the rise in adolescent and young adult transmission presently endangers prevention efforts,²⁶⁸ states must pass comprehensive HIV education legislation that reaches as many citizens as possible. Education must begin in the public schools,²⁶⁹ but program administrators must realize that young people need more than condoms. Schools must reach these young people with realistic messages about responsible behaviors, and the programs must take their social and cultural context into account.²⁷⁰

As mentioned, HIV infection is also increasing in young adults, and states must do more than target high-risk groups if they intend to combat AIDS-related discrimination. Because so many people living with HIV disease are of working age, states must mandate workplace education programs.²⁷¹ State governments must set an example for private employ-

263. See NATIONAL COMMISSION, *supra* note 1, at 12 (characterizing reduction of discrimination one of cornerstones for all programs).

264. See Field, *supra* note 72, at 80 (arguing for “universal precautions” to avoid risk of global infection).

265. See Burris, *supra* note 258, at 87 (contending that “HIV is not spread simply by ignorance or carelessness or bad luck, but also by powerlessness, shame, racism and mistrust”).

266. See Kurth, *supra* note 194, at 18 (asserting that empowerment of women will lead to safer sex because they will communicate better with their partners).

267. Phyllis Arnold, *Betwixt and Between: Adolescents and HIV*, in AIDS AGENDA, *supra* note 2, at 41, 43 (stressing the importance of including this information in adolescent programs).

268. *Main Killer*, *supra* note 27, at A2 (providing statistics on the growing incidence of the virus among young adults).

269. See Arnold, *supra* note 267, at 43 (warning that education efforts will fail unless the needs of young adults are addressed).

270. Burris, *supra* note 258, at 86.

271. See, e.g., *id.* at 94-95 (noting Philadelphia ordinance which requires employees to educate individuals in workplace). This program requires employers with three or more employees to hold education programs, run by senior management officials. *Id.* Employers who do not comply are fined up to \$300 per employee. *Id.* States could follow the

ers by educating their own workers to encourage more compassionate responses to people living with HIV disease and to prevent further transmission. The federal government's limited commitment to HIV education includes an HIV education program for federal employees, and states must follow suit.²⁷²

States also must reach those who are not public school students or members of the private or public work forces. Campaigns to educate the general public must continue because many people still think they are not at risk.²⁷³ State governments must work even harder to dispel these unwarranted, incredibly dangerous assumptions through more publicity in a medium available to the public.²⁷⁴

While many governments and organizations concentrate on educating the public before they become infected, they often forget the importance of educating those already living with HIV disease. As more women, children, and people of color become infected, state governments will need to adopt new strategies of education. In addition to providing psychological counseling and information about prevention, states need to give HIV-infected individuals information about housing, estate planning, and public medical benefits during post-test counseling.²⁷⁵ Numerous community-based organizations provide a wealth of services to the HIV-positive, but the very people who can benefit from these services often are unaware that the programs exist.²⁷⁶

Providing effective HIV education programs will require state legislative efforts to empower individuals living with HIV disease. States must coordinate existing programs to provide education as well as adequate health care, housing, drug treatment programs, and a society free of unwarranted discrimination. In reality, such solutions are costly and require vast changes on the part of all citizens, but they are necessary to show individuals living with HIV disease the respect they deserve from the government and society as a whole.

Philadelphia plan in creating a model for workplace education programs.

272. See Hilts, *supra* note 6, at A1, A9.

273. See Berge, *supra* note 65, at 779-81 (examining attitudes of average, middle-class Americans about their chances of transmission).

274. See generally Burris, *supra* note 258, at 89-90 (discussing ways in which National Aids Information and Education Program informs public of HIV).

275. See Kurth, *supra* note 194, at 16-17 (imploing that HIV-infected women need more than just medical attention); Zavos, *supra* note 195, at 140 (explaining that women living with HIV disease often do not make wills because they cannot afford attorney).

276. See NATIONAL COMMISSION, *supra* note 1, at 11 (asking that these organizations receive acknowledgement and support).

V. CONCLUSION

HIV-infected individuals are living with, not dying of, the disease, and states must remember that important fact when making decisions that affect them. Even though HIV disease became a part of our culture over ten years ago,²⁷⁷ discrimination persists that haunts these individuals every day of their limited lives. Legislators, however, have the power to control such unwarranted reactions by passing laws that comport with federal disability discrimination measures and by mandating educational programs that reach as many citizens as possible. Because of HIV disease's novelty and unpredictability, many existing laws are inadequate to meet the needs of those living with HIV disease. States must consider creative measures, such as those discussed here, to accommodate their special situations. Mary Fisher, an outspoken AIDS advocate living with HIV disease, has called upon people worldwide to adopt a "language of hope which affirms life"²⁷⁸ and to recognize that HIV-infected people are indeed living with, rather than dying of, HIV disease. State legislatures must heed her firsthand advice before it is too late.

277. See *supra* notes 2-4 and accompanying text (discussing the genesis of HIV disease in the United States).

278. See NATIONAL COMMISSION, *supra* note 1, at 12 (quoting Mary Fisher).

Baseball's Antitrust Exemption: It's Going, Going . . . Gone!

Joseph A. Kohm, Jr.*

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It is designed to break your heart. The game begins in the spring, when everything else begins again, and it blossoms in the summer, filling the afternoons and evenings, and leaves you to face the fall alone. You count on it, rely on it to buffer the passage of time, to keep the memory of sunshine and high skies alive, and then just when the days are all twilight, when you need it most, it goes . . . and summer is gone.¹

I. INTRODUCTION

Perhaps no other sport invokes more emotion, memories, or love in the United States than baseball. It is almost as old as the United States itself, and is firmly rooted in the fabric of our society. It is one of the few subjects that a ten-year-old orphan can discuss with the same level of proficiency as a sixty-five-year-old brain surgeon. History and tradition have passed it down through generations, and in many respects the history of baseball mirrors the history of our country. Sociological issues such as

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1. A. Bartlett Giamatti, *The Green Fields of the Mind*, YALE ALUMNI MAG. & J., Nov. 1977, at 9.

immigration, segregation, racism, the struggle between labor and management, and self governance have played a part in both the American experience and the history of the game of baseball.

Almost incredibly, though, for the first time since 1904, the 1994 season did not have a World Series. On August 12, 1994, the baseball season was interrupted by its eighth work stoppage when the Major League Baseball Players Association, the union that represents the players and team owners, failed to negotiate a new collective bargaining agreement. There was anger, disgust, and finger pointing by both sides, and the prevalent sentiments of the fans were resentment and sadness.

Protracted negotiations continued through the spring of 1995 with no foreseeable collective bargaining agreement in sight. The owners were determined to play a 1995 season, and with the lone exception of the Baltimore Orioles, each franchise fielded teams of non-union players.² The 1995 season began with the actual players only because two days before opening day an injunction was issued by the United States District Court which forced the owners to begin the season under the rules of the expired collective bargaining agreement.³ Even though the season began with the real players, none of the issues which contributed to the latest work stoppage were resolved. There is still no existing collective bargaining agreement, which leaves open the possibility that the current season may still be interrupted.

During the seven-month strike, many suggested that baseball would somehow be better off, and these types of problems would not emerge, if professional baseball were to lose its judicially created exemption from federal antitrust laws. By subjecting the owners to the same regulations as other industries, many argue that the actions and behavior of the owners would be less conducive to the hostility which has had a history of creating strife with the players.

The purpose of this paper is to explore whether that is really true. Is a judicial or legislative repeal of this exemption the panacea that will restore Major League Baseball to its rightful place as one of our national treasures? The first part of this paper will examine the history and scope of baseball's judicially created exemption from antitrust laws, followed by an examination of the effect of a repeal on certain components of the game such as labor/management issues, franchise relocation, and the minor leagues.

2. Hal Bodley, *Players to Return*, U.S.A. TODAY, April 3, 1995, at 1C.

3. *Id.*

II. HISTORY OF THE JUDICIALLY CREATED EXEMPTION TO ANTITRUST LAW

There has been much recent speculation about the inception of baseball and who really invented it. Legend says the game of baseball was invented in the sleepy upstate New York village of Cooperstown by Abner Doubleday around 1840. Another theory is that the early form of baseball played in the United States was a version of the English game known as "Rounders."⁴ Still others have attributed the birth of baseball to a fraternal organization known as the New York Knickerbockers Club during the 1840s in New York City.⁵ Whatever its origins, baseball's popularity grew at a rapid pace, and it soon became one of the most fashionable forms of recreation in the country.

Towns and cities began to field their own teams, and with enthusiastic followings, traveled to other towns to play games. Larger cities began to form leagues.⁶ But due to the escalating competitiveness of the contests, corruption soon followed. During the 1860s baseball went through a transition period from amateurism to professionalism.⁷ In order to attract the best players, businesses that sponsored teams began to entice players with jobs and money.⁸ In 1869, the Cincinnati Red Stockings became the first professional baseball team, in that each player received a salary.⁹

Other professional teams soon formed, and the result was that on March 17, 1871, the National Association of Professional Baseball Players was formed.¹⁰ While this league contained many of the best teams in the country, it was controlled by the players.¹¹ Consequently, there was little discipline, little organization, gambling, drunkenness, and players who would jump from team to team in mid-season for more money.¹² These factors combined to lead to the league's demise after the 1875 season.¹³

In 1876, however, the National League of Professional Baseball Clubs was formed by Chicago businessman William Hulbert.¹⁴ Hulbert believed

4. HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* 5 (1960).

5. *TOTAL BASEBALL* 7 (John Thorn et al. eds., 1989).

6. SEYMOUR, *supra* note 4, at 35.

7. *Id.* at 47.

8. *Id.*

9. *TOTAL BASEBALL*, *supra* note 5, at 8.

10. *Id.* at 9.

11. *Id.*

12. *Id.*

13. *Id.* at 9.

14. SEYMOUR, *supra* note 4, at 80. This is the same national league that exists today.

it was possible to apply business principles to baseball and turn a profit by having team owners, not the players, control the league.¹⁵ League bylaws mandated strict control over the players. Players under contract with one national league team were prohibited from playing with another national league club until their original contract concluded.¹⁶ In addition, players who tried to jump to other clubs without the permission of their original team were blacklisted because the rules prohibited a league team from employing a player who had broken any league rules.¹⁷

But even with these restrictive terms governing the League, the owners still needed to reduce expenses, and the greatest League expense was the players' salaries. They discovered that the competition among themselves in trying to secure the services of the better players was responsible for inflating salaries. This problem resulted in the inception of what is commonly known as the "reserve clause." The owners secretly agreed to reserve a certain number of players on each roster, and it was agreed that none of the other owners would bid for or solicit the services of any other teams' reserved players.¹⁸

In 1887, the reserve clause was inserted into the uniform contract signed by all players.¹⁹ The impact of the reserve clause was that it made each player property of his respective team in perpetuity, one year at a time. Once a player signed with a team, he was the property of that team for the duration of his career. The player could be traded or released at the discretion of the team. If the player chose to hold out, other clubs were prohibited from employing him.

With the power of the reserve clause and the exploding popularity of the game, Major League Baseball established itself as a premier entertain-

15. *Id.* One of the original team owners, A.G. Spaulding, said: The idea was as old as the hills; but its application to Base Ball had not yet been made. It was, in fact, the irrepressible conflict between Labor and Capital asserting itself under a new guise. . . . Like every other form of business enterprise, Base Ball depends for results on two interdependent divisions, the one to have absolute control and direction of the system, and the other to engage—always under the executive branch—the actual work production.

Id. (alteration in original).

16. *Id.* at 82.

17. *Id.*

18. SEYMOUR, *supra* note 4, at 108.

19. LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW, § 2.1 (1977). The clause states: "It is further understood and agreed that the party of the first part [the team] shall have the right to 'reserve' the said party of the second part [the player] for the season next ensuing the term mentioned in paragraph 2, herein provided." *Id.*

ment industry by the early part of the twentieth century. In an effort to cash in on baseball's increasing popularity, the rival Federal League of Professional Baseball Clubs commenced its inaugural season with eight teams in March of 1913.²⁰ It tried to raid the rosters of the American²¹ and National League teams, but because of the threat of being blacklisted, few players defected to the new league.²² In addition, the Federal League was not as well financed as the American and National Leagues.²³ Recognizing its bleak outlook, the Federal League sued the National and American Leagues on January 5, 1915, claiming that the reserve clause was an unreasonable and illegal restraint on competition.²⁴ The case was tried before Judge Kenesaw Mountain Landis, who would later be named by the owners as baseball's first Commissioner.²⁵ After deliberating eleven months, Judge Landis had not rendered a verdict.²⁶ Faced with mounting financial pressures, the Federal League settled out of court.²⁷ Unhappy with the out-of-court settlement, the owner of the Baltimore franchise filed suit against Major League Baseball in what would be the first of a trilogy of cases to reach the Supreme Court regarding professional baseball's subjection to antitrust regulation.²⁸

Congress had passed the Sherman Antitrust Act in 1890 for the purpose of preventing business practices which create monopolies.²⁹ The provisions of the Sherman Act which have historically been used by those trying to eliminate baseball's exemption from antitrust laws are sections 1 and 2. Section 1 makes it illegal to contract or conspire to restrain commerce

20. *Id.* § 1.2.

21. The American League played its first season in 1901. The League resulted from the National League dropping four of its twelve teams in 1900. Those four teams combined with a strong minor league, named The Western League, for a total of eight original teams. TOTAL BASEBALL, *supra* note 5, at 17.

22. HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 206 (1971).

23. TOTAL BASEBALL, *supra* note 5, at 644.

24. SOBEL, *supra* note 19, at 3.

25. *Id.*

26. *Id.*

27. *Id.* at 4.

28. *Id.*

29. 15 U.S.C. §§ 1-2 (1994).

among the states.³⁰ Monopolies or attempts to monopolize trade or commerce among the states are prohibited by section 2.³¹

At issue in its suit against professional baseball,³² the Baltimore Club alleged three things. First, it was alleged that under section 1 of the Sherman Act the reserve clause in the uniform player contract was an illegal restraint on commerce.³³ The fear of being blacklisted by the American and National Leagues prevented players from joining the Federal League. Second, it was alleged that under section 2 of the Sherman Act, the reserve clause allowed the American and National Leagues to monopolize the trade and commerce of baseball.³⁴ Lastly, the Baltimore Club claimed that because of professional baseball's size, popularity, profits, and interdependence of one team on another for league play, the operations of the National and American Leagues constituted interstate trade and commerce.³⁵

The jury awarded the Baltimore Club \$240,000 in damages.³⁶ The District of Columbia Court of Appeals, however, reversed and remanded the case with instructions to enter judgment for the National League.³⁷ On appeal, the Supreme Court affirmed this decision.³⁸ In his opinion, Justice Holmes, writing for a unanimous court, wrote that although players were required to cross state lines in order to participate in the games, "the transport is a mere incident, not the essential thing."³⁹ Justice Holmes

30. 15 U.S.C. § 1 (1988). A selected portion of the statute provides:
[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Id.

31. *Id.* § 2. A selected portion of the statute provides, "[e]very person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony." *Id.*

32. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922), *reh'g granted*, 42 S.Ct. 587 (1922).

33. *Id.* at 687.

34. *Id.* at 686.

35. *Id.*

36. *Id.* at 682.

37. *National League of Professional Baseball Clubs*, 269 F. at 688.

38. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

39. *Id.* at 209.

reasoned that the games, even though they were played for money, “would not be called trade or commerce in the commonly accepted use of those words.”⁴⁰ Since baseball was not trade or commerce, it was not subject to antitrust laws. Justice Holmes, having held that the games were not trade or commerce, did not discuss the Baltimore Club’s arguments regarding the reserve clause in the uniform player contract or its belief that the reserve clause effected a monopoly of the best players by the National and American Leagues. The game and business of baseball, as played and conducted by the National and American Leagues, received a broad and sweeping exemption from antitrust law. This decision was not limited in scope to specifics such as the reserve clause or player restraints.

No serious challenge to baseball’s antitrust exemption materialized again until 1948 in *Gardella v. Chandler*.⁴¹ Danny Gardella played for the New York Giants minor league organization during the 1944 and 1945 seasons.⁴² In 1946, he and several other players left organized baseball in the United States and played in the Mexican professional league.⁴³ In an effort to discourage other players from doing the same, the owners agreed that any player who left to play in the Mexican league would be suspended from professional baseball in the United States for five years.⁴⁴ Gardella filed an antitrust suit against Albert “Happy” Chandler, the Commissioner of Baseball, and the American and National Leagues, alleging that because radio and television broadcasts transmitted games across state lines, the leagues were engaged in interstate commerce, and thus should be subject to antitrust regulations.⁴⁵ Major League Baseball moved to dismiss the action and the district court agreed, relying on the authority of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*. However, the Second Circuit Court of Appeals reversed and remanded.⁴⁶ Judge Frank wrote that baseball was engaged in interstate commerce, “because the defendants have lucratively contracted for the interstate communication by radio and television of the playing of games.”⁴⁷ Shortly

40. *Id.*

41. 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949).

42. *Id.* at 261.

43. *Id.* at 262.

44. TOTAL BASEBALL, *supra* note 5, at 645.

45. *Gardella*, 79 F. Supp. at 262.

46. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

47. *Id.* at 410.

after this decision, Gardella reportedly was paid \$60,000 by Major League Baseball to not pursue his case any further.⁴⁸

It was the enterprise of baseball as a whole that the court found to be subject to antitrust laws.⁴⁹ The court examined certain elements of the industry, such as the travel, league structure, reserve clause, and ultimately the broadcasting.⁵⁰ In analyzing the combination of these components, it was baseball in the aggregate which the court determined was subject to antitrust law. In discussing the reserve clause, Judge Frank wrote that it "results in something resembling peonage of the baseball player."⁵¹

Shortly thereafter, perhaps encouraged by the result in *Gardella*, another player mounted a challenge against baseball's antitrust exemption in *Toolson v. New York Yankees*.⁵² George Toolson was an outfielder in the New York Yankees minor league organization. Unable to make the Yankees, he was assigned to their Binghamton, New York, affiliate, but refused to report.⁵³ He was placed on the ineligible list by the Yankees, and the team refused to allow him to play with any other organization.⁵⁴ Toolson filed an antitrust suit against the Yankees alleging that professional baseball had monopolized the trade and commerce of baseball and that by broadcasting games by radio and television, Major League Baseball was engaged in interstate commerce.⁵⁵ The district court dismissed the suit for two reasons. First, the court felt bound by the Supreme Court's decision in *Federal Baseball*.⁵⁶ Second, the court believed it had a "clear duty to endeavor to be a judge and should not assume the function of a pseudo legislature."⁵⁷

The court of appeals affirmed the dismissal, "[o]n the grounds and for the reasons stated" in the district court's opinion.⁵⁸ Then on November 9,

48. SOBEL, *supra* note 19, at 19.

49. *Gardella*, 172 F.2d at 409.

50. *Id.*

51. *Id.*

52. 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952), *aff'd*, 346 U.S. 356 (1953).

53. *Id.* at 93. The New York Yankee outfield in 1951 consisted of Hank Bauer, Gene Woodling, and Joe DiMaggio. Also in the Yankee organization was a minor leaguer named Mickey Mantle.

54. *Id.*

55. *Id.* at 94.

56. *Id.*

57. *Toolson*, 101 F. Supp. at 95.

58. *Toolson v. New York Yankees*, 200 F.2d 198, 199 (9th Cir. 1952), *aff'd*, 346 U.S. 356 (1953).

1952, in a one-paragraph opinion, the Supreme Court affirmed, stating, “[w]e think that if there are evils in this field which now warrant application to it of the antitrust laws, it should be by legislation.”⁵⁹ The Court believed that if antitrust laws were to be applied to baseball, it was Congress’ and not the Court’s responsibility to do so. But for the purpose of examining the scope of this judicially enacted exemption from antitrust law, the most important part of the opinion is the last sentence. The Court wrote:

Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.⁶⁰

Thus, the industry of baseball, as a whole, had again, courtesy of the Supreme Court of the United States, received a broad exemption from antitrust laws.

The issue of baseball’s exemption from antitrust laws remained dormant until the St. Louis Cardinals traded outfielder Curt Flood to the Philadelphia Phillies at the conclusion of the 1969 season. Unhappy about the trade, Flood sent a letter to Commissioner Bowie Kuhn stating, “I am not a piece of property to be bought and sold irrespective of my wishes,” and asked the Commissioner to declare him a free agent for the upcoming season so he could negotiate with any other major league team.⁶¹ Kuhn refused, resulting in a lawsuit against himself, the teams, and the owners, in the United States District Court for the Southern District of New York.⁶² The issue in *Flood v. Kuhn* was similar to those in the previous cases, in that Flood contended that the reserve system constituted a conspiracy among the teams and owners which prevented him from playing with any other team.⁶³ The district court found that *Federal Baseball* and *Toolson* were controlling, and judgment was entered on behalf of Major League Baseball.⁶⁴ The court of appeals affirmed.⁶⁵

59. *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953).

60. *Id.* (citation omitted).

61. TOTAL BASEBALL, *supra* note 5, at 646.

62. *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff’d*, 443 F.2d 264 (2d Cir. 1971), *aff’d*, 407 U.S. 258 (1972).

63. *Id.* at 272.

64. *Id.* at 280.

65. *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff’d*, 407 U.S. 258 (1972).

The Supreme Court granted certiorari and affirmed the decision of the lower courts.⁶⁶ The opinion by Justice Blackmun constitutes one of the more entertaining opinions in Court history.⁶⁷ The rationale of the Court in affirming the decisions of the lower courts were three-fold. First, the Court noted that in relation to other sports, the exemption granted to baseball in *Federal Baseball* and *Toolson* was an “aberration confined to baseball.”⁶⁸ In addition, this aberration was “fully entitled to the benefit of *stare decisis*.”⁶⁹ The Court also recognized that the reserve clause was an important part of baseball’s structure, and any judicial attempt to eliminate or modify it may upset league balance.⁷⁰ Finally, the Court echoed the sentiments of *Toolson*, concluding that it was the responsibility of Congress, and not the courts, to include baseball within the scope of federal antitrust laws.⁷¹

But the importance of the decision is found in the first line of the opinion which reads, “[f]or the third time in 50 years the Court is asked specifically to rule that professional baseball’s reserve system is within the reach of federal antitrust laws.”⁷² The issue and discussions in the case

66. *Flood v. Kuhn*, 407 U.S. 258 (1972).

67. *Id.* at 261-64. Justice Blackmun’s opinion begins with a nostalgic look at the history of baseball, as well as references to and excerpts from classic baseball literature such as Ernest L. Thayer’s *Casey at the Bat* and Franklin Pierce Adams’ *Tinker to Evers to Chance*. In addition, Justice Blackmun wrote, “[t]hen there are many names, celebrated for one reason or another, that have sparked the diamond and its environs and have provided tinder for recaptured thrills for reminiscence and comparisons, and for conversation and anticipation in-season and off-season.” *Id.* at 262. He then proceeded to individually list 88 of baseball’s greatest players. *Id.* at 262-63.

68. *Id.* at 282.

69. *Flood*, 407 U.S. at 282.

70. *Id.* at 283.

71. *Id.* at 285.

72. *Id.* at 259. The reserve clause, as it read in the Uniform Player Contract at the time of *Flood*, provided:

On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be

centered on the legality of the reserve system. The tone of *Flood* appeared to narrow the issue from baseball as an industry, and in a broad sense being exempt from federal antitrust laws, to the reserve clause and its role in the industry of baseball. In support of the contention that baseball's exemption from antitrust laws should be limited to the reserve clause, Justice Blackmun specifically wrote: "Professional baseball is a business and it is engaged in interstate commerce. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."⁷³

In summary, the trilogy of Supreme Court cases has provided baseball with an exemption from federal antitrust laws. *Federal Baseball* and *Toolson* have held that this exemption applied to baseball as a whole. The Court in *Flood* also held that baseball has an exemption from antitrust laws, but the scope of this exemption appeared to have been narrowed to just the reserve clause of the Uniform Player Contract. Therefore, as will be discussed below, both in theory and in reality, a legislative repeal would have little effect on labor/management issues, franchise relocation, or the minor leagues.

III. THE IRRELEVANCY OF *FLOOD V. KUHN*

Advances in collective bargaining have given players mobility through free agency that were not available to them when *Flood* was decided. Major league players who now have more than six years experience are eligible for free agency which allows them to offer their services to the highest bidding team.⁷⁴ In addition, subsequent litigation regarding franchise relocation allows the judiciary to further erode whatever was left of baseball's antitrust exemption after *Flood*.⁷⁵

As discussed above, the reserve clause was the result of the owners' recognition that the stability of the game rested on a secure labor force and controlling costs. Its institution prohibited players from jumping teams based on which owner would offer the player the most money. Predictably, the players opposed the reserve clause, and on October 22, 1885, formed the

an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

Id. at 260-61 n.1.

73. *Flood*, 407 U.S. at 282.

74. TOTAL BASEBALL, *supra* note 5, at 631.

75. See *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993).

Brotherhood of Professional Baseball Players in an attempt to unionize.⁷⁶ At one point, the Brotherhood had a membership of ninety players, and its president was New York Giant John Montgomery Ward.⁷⁷ The Brotherhood's existence was short-lived as it disbanded in 1891 for financial reasons, without making any serious gains on behalf of the players.⁷⁸

Federal Baseball held that baseball was not subject to federal antitrust law. While this decision was disheartening to the players in terms of antitrust law, it was also detrimental in terms of labor law. The right of employees to unionize and to bargain collectively through representatives of their own choosing is found in section 7 of the National Labor Relations Act.⁷⁹ The Act applies to all employers that affect commerce, with the National Labor Relations Board ("NLRB") as the instrumentality to enforce the Act.⁸⁰ By application, since baseball was not considered interstate commerce, *Federal Baseball* prohibited the players from bringing labor disputes before the NLRB. Any advances on behalf of the players would have to be gained through negotiation or collective bargaining agreements.⁸¹

Following only marginal success in the areas of salaries, pensions and other issues, in December of 1953 the players formed the Major League Baseball Players Association, which still exists as the players' formal union.⁸² Minor concessions were made on behalf of the owners, but it was not until 1966 when the players hired former Chief Economic Advisor and Assistant to the President of the United Steelworkers of America, Marvin Miller, to be the Association's Executive Director, that the players gained any substantial concessions.⁸³ Miller was responsible for negotiating

76. SEYMOUR, *supra* note 4, at 221.

77. *Id.* at 223. John Montgomery Ward was elected to the Baseball Hall of Fame in 1964 as an outstanding shortstop and pitcher. During his playing career with the Giants, he went to night school at Columbia Law School, graduating with honors. TOTAL BASEBALL, *supra* note 6, at 642.

78. GEORGE W. SCHUBERT, SPORTS LAW § 6.1 (1986).

79. 29 U.S.C. § 157 (1994).

80. 29 U.S.C. §§ 153-156 (1994).

81. Pittsburgh Pirate and Hall of Famer Ralph Kiner approached General Manager Branch Rickey about a raise after Kiner had hit 47 home runs the preceding season even though the Pirates had finished in last place. Rickey's response was "[w]e could have finished last without you." TOTAL BASEBALL, *supra* note 5, at 632.

82. SCHUBERT, *supra* note 78, § 6.1.

83. WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW § 25.1 (1990). Long time Brooklyn Dodger announcer Red Barber once commented, "[w]hen you speak of Babe Ruth, he is one of the two men, in my opinion, who changed baseball the most. And the second most influential man in the history of baseball is Marvin Miller." MARVIN MILLER, A

baseball's first collective bargaining agreement in 1968 and for negotiating others in subsequent years.⁸⁴

Another important development on behalf of the players occurred in 1969 when the NLRB decided to assert jurisdiction over the baseball industry.⁸⁵ As noted above, the NLRB is the instrumentality that polices the enforcement of the National Labor Relations Act, which applies to all business affecting interstate commerce. Prior to 1969, the NLRB had refused to assert jurisdiction over labor matters in baseball because of the holdings in *Federal Baseball* and *Toolson*.⁸⁶ This decision by the NLRB was the result of a petition filed on behalf of the National League Umpires.⁸⁷ The impact of this holding upon the Major League Baseball Players Association was that they would now be protected by federal labor laws.

While the players made gains in labor law and collective bargaining, the exempted reserve clause was about to receive a damaging blow. The Collective Bargaining Agreement of 1973 contained a provision in which an independent arbitrator would make decisions in a formalized grievance procedure.⁸⁸ It would be the arbitration venue, not the courts, that would eliminate the reserve clause.

Pitcher Andy Messersmith signed a one-year contract to play for the Los Angeles Dodgers in 1974.⁸⁹ The reserve clause at that time read:

If prior to March 1, the Player and the Club have not agreed upon the terms of the Contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player to renew this contract for the period of one year.⁹⁰

The Dodgers renewed Messersmith's contract at the completion of the 1974 season and he played the 1975 season without signing a new contract.⁹¹ At the conclusion of the 1975 season, Messersmith asserted that he was a free agent, at liberty to negotiate with any team for the upcoming season.⁹²

WHOLE DIFFERENT BALLGAME (1989) (back cover).

84. TOTAL BASEBALL, *supra* note 5, at 372.

85. CHAMPION, *supra* note 83, § 25.1.

86. *Id.*

87. *Id.*

88. *Id.* § 25.3.

89. *Id.* § 25.4.

90. BILL JAMES, HISTORICAL BASEBALL ABSTRACT 263 (1988).

91. *Id.*

92. CHAMPION, *supra* note 83, § 25.4.

The crux of Messersmith's argument was that the Dodgers had renewed the contract for one year and now that one year had concluded. The owners believed, as they had since its inception, that the reserve clause meant one year, and then the next year, and on into perpetuity. The issue between the two sides, however, was not the clause's legality, for that had already been decided in the trilogy of Supreme Court cases. The issue, rather, was the construction of the clause.

The formalized grievance procedure outlined in the governing collective bargaining agreement provided for a three-person arbitration panel with one member chosen by the Major League Baseball Players Association, one member chosen by the owners, and one member chosen by both.⁹³ Not surprisingly, the partisan votes of Marvin J. Miller representing the players, and John J. Gaherin representing the owners, cancelled each other's vote, and the issue was essentially decided by an independent arbiter, Peter Seitz.⁹⁴ Seitz's interpretation of the clause was that teams were able to renew the contract for only one year.⁹⁵

The collective bargaining agreement negotiated just six months after the Messersmith case contained a memorable provision. As a result of the Messersmith decision, any player with six or more years of major league service would now be able to declare himself a free agent.⁹⁶ Through gains won in collective bargaining, most notably the right to arbitration, the players were able to accomplish what they could not do through the courts. As discussed earlier, it appears that the last of the Supreme Court cases, *Flood*, held that baseball's antitrust exemption was limited in its scope to the reserve clause. Under the recently expired collective bargaining agreement, players were eligible to become free agents after six years of major league service and were not the property of teams for the duration of their careers. This, coupled with the *Flood* holding and subsequent litigation to be discussed below, have rendered any remaining antitrust exemption practically irrelevant.

IV. THE LABOR EXEMPTION ISSUE

Any judicial or legislative repeal of baseball's antitrust exemption would also be of very limited value to the players regarding any judicial recourse against the owners because of certain labor exemptions in antitrust

93. *Id.*

94. *Id.*

95. *Id.*

96. TOTAL BASEBALL, *supra* note 5, at 631.

law. Under antitrust law, there exist certain statutory and non-statutory exemptions from antitrust sanctions for terms negotiated and agreed to in collective bargaining agreements.

As discussed above, Congress passed the Sherman Antitrust Act in 1890 for the purpose of preventing practices which create monopolies or illegally restrain interstate commerce. Shortly thereafter, in the *Danbury Hatters'* case, the Supreme Court held that a union's effort to organize a hat factory by means of strikes and boycotts violated antitrust law, in that they were illegal conspiracies on trade.⁹⁷ To remedy this, Congress passed the National Labor Relations Act,⁹⁸ which gave workers the right to organize and select representatives to negotiate the terms and conditions of their employment. Additional legislation by Congress has declared that the activities of labor unions are not subject to antitrust sanctions.⁹⁹ These are the statutory labor exemptions. The purpose of this legislation is to foster collective bargaining between labor and employers without one side claiming the other is engaging in activity violative of antitrust law.

In addition, through the development of case law, a nonstatutory labor exemption has been created which covers the terms of collective bargaining agreements between labor and management.¹⁰⁰ The nonstatutory labor exemption to federal antitrust law protects the terms and conditions of collective bargaining agreements from antitrust attack by either labor or management. Regarding professional sports, the landmark case outlining the concept of the nonstatutory labor exemption is *Mackey v. National Football League*.¹⁰¹ The issue in that case was the legality of the "Rozelle Rule."¹⁰² The Rozelle Rule, named after National Football League Commissioner, Pete Rozelle, provided that when a player's contract expired and the player signed with a new team, the new team had to provide the player's former team with compensation, either in the form of an additional player or players, money, or a draft pick.¹⁰³ If the teams could not agree on the form of compensation, Commissioner Rozelle then made the determination of what he thought would be fair and equitable, and that decision would be binding on both teams.¹⁰⁴

97. *Lawlor v. Leowe*, 235 U.S. 522, 534-35 (1915).

98. 29 U.S.C. §§ 151-169 (1994).

99. 15 U.S.C. § 17 (1994).

100. *CHAMPION*, *supra* note 83, § 26.2.

101. 543 F.2d 606 (8th Cir. 1976).

102. *Id.* at 609.

103. *Id.* at 610.

104. *Id.*

The complaint against the NFL, filed by thirty-six players, alleged that "the enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services."¹⁰⁵ The players could make this argument because in 1957, in *Radovich v. National Football League*,¹⁰⁶ the Supreme Court held that professional football was subject to federal antitrust laws.¹⁰⁷ The NFL argued that it could not be subject to an attack under antitrust laws because the Rozelle Rule was the product of the collective bargaining agreement between the team owners and the National Football League Players Association.¹⁰⁸

The value of *Mackey* to baseball, and to any potential repeal of an antitrust exemption, is not the outcome of the case; it is the court's analysis and three-part test to determine when a nonstatutory labor exemption to antitrust law applies. Initially, the court discussed the rationale of the nonstatutory labor exemption claiming that it is necessary to "accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act. . . ."¹⁰⁹ Then the court outlined a three-part test that must be met before a nonstatutory labor exemption will be granted. First, the alleged restraint on trade must primarily affect only the parties to the collective bargaining relationship.¹¹⁰ Second, the agreement seeking the exemption must concern a mandatory subject of collective bargaining.¹¹¹ Mandatory subjects of collective bargaining in professional sports include all issues which concern the terms and conditions of employment.¹¹² Finally, a nonstatutory labor exemption will be granted if the agreement is the product of bona fide arms length bargaining.¹¹³

In *Mackey*, the court held that the collective bargaining agreement in question was not the product of bona fide arm's length negotiations, and therefore the Rozelle Rule was not exempt from antitrust suit by the players.¹¹⁴ By application, if baseball's traditional exemption from antitrust law were repealed, legislatively or judicially, the holding in *Mackey*

105. *Id.*

106. 352 U.S. 445 (1957).

107. *Id.* at 452.

108. *Mackey*, 543 F.2d at 609.

109. *Id.* at 611.

110. *Id.* at 614.

111. *Id.*

112. CHAMPION, *supra* note 83, § 25.2.

113. *Mackey*, 543 F.2d at 614.

114. *Id.* at 616.

is unfavorable to the players. If the actions of baseball's owners were subject to antitrust law, they could conceivably seek protection from antitrust attack by the players in the nonstatutory labor exemption.

For the players to be successful in any lawsuit filed against the owners, the players would have to fail to meet any one of the three prongs of the *Mackey* test. This would be a very difficult task for the players because under the *Mackey* test, almost any issue the players would be litigating would primarily affect the parties to the last collective bargaining agreement, namely, the players and the owners. In addition, the legal issue the players would be pursuing almost assuredly would be a mandatory subject of collective bargaining, in that it would affect the terms and conditions of their employment. Finally, based on the long history of concessions earned by the Major League Baseball Players Association in labor negotiations, it would be difficult for the players to argue that the last collective bargaining agreement was not the product of bona fide arms length bargaining. Based on the above, the nonstatutory labor exemption would be a formidable hurdle for the players in their attempt at legal recourse.

One of the contentious issues surrounding the most recent strike was the owners' desire to control labor costs through the use of a "salary cap" which would prohibit the payrolls of teams from exceeding a certain dollar amount.¹¹⁵ Fortunately for the players, if the owners were to implement a salary cap before a new collective bargaining agreement is reached, by applying the *Mackey* test, it is unlikely that the owners would benefit from the nonstatutory exemption in an attempt by the players to enjoin this action by the owners. This is because the owners would not be able to meet the third prong of the *Mackey* test.

True, the implementation of a salary cap would primarily affect the owners and the players, and it would certainly concern the terms and conditions of employment of the players; however, the salary cap would not be the product of bona fide arms length negotiation. The recently expired collective bargaining agreement did not contain a salary cap, and the players are currently obstinate in their opposition to a cap being included in any new collective bargaining agreement. Therefore, the nonstatutory labor exemption would not protect the owners from antitrust attack if the owners implemented a salary cap.

Another consideration is whether the nonstatutory labor exemption is available to either side when the collective bargaining agreement has

115. Hal Bodley, *NLRB Official Could be Pivotal Player*, U.S.A. TODAY, Jan. 20, 1995, at 3C.

expired. This question was recently answered in *National Basketball Association v. Williams*.¹¹⁶ In that case, the collective bargaining agreement between the NBA's players and owners had expired June 23, 1994.¹¹⁷ The owners sued the players to continue to impose the league's salary cap and draft of college players, which were both agreed to and bargained for in the expired collective bargaining agreement.¹¹⁸ It was the owners' contention that they were able to continue the imposition of these terms and that they were exempt from antitrust liability under the nonstatutory labor exemption to the antitrust laws.¹¹⁹ The players claimed that by acting collectively to impose terms of employment after expiration date of the collective bargaining agreement, the NBA teams were "acting as a cartel and committing a *per se* violation of the Sherman Act."¹²⁰ The issue was what terms and conditions would govern the employment of the parties until a new collective bargaining agreement could be reached, and whether the imposition of the status quo was a violation of antitrust law.¹²¹

The court held that it was acceptable for the owners to implement the former terms and conditions of the expired collective bargaining agreement until a new agreement was reached.¹²² By application, this case is unfavorable to the baseball players. If the owners were to implement the terms and conditions of the recently expired collective bargaining agreement, *Williams* extends the nonstatutory labor exemption beyond the expiration of the old agreement. As long as the terms and conditions were the same and met the three-part test in *Mackey*, the owners would be shielded from antitrust attack by the players.

In summary, any repeal of baseball's exemption would have minimal impact in terms of what legal recourse would be available to the players against the owners due to both the statutory and nonstatutory labor law exemptions from antitrust law. The statutory exemptions found in 29 U.S.C. §§ 52, 104, 105, 113 provide that the activities of labor unions are protected from antitrust sanctions. Similarly, as a result of case law, primarily *Mackey*, certain nonstatutory exemptions exist if the discrepancy primarily affects the parties to the collective bargaining agreement, is a mandatory subject of collective bargaining, and the agreement is the product of bona

116. 45 F.3d 684 (2d Cir. 1995).

117. *Id.* at 686.

118. *Id.*

119. *Id.*

120. *Id.* at 687.

121. *Williams*, 45 F.3d at 688.

122. *Id.* at 693.

vide arms length bargaining.¹²³ Since these labor exemptions would supersede antitrust law, the exemptions would provide a safe harbor for owners from most activities that would normally be subject to antitrust charges.

V. ANTITRUST EXEMPTION AND FRANCHISE RELOCATION

Another area where baseball's antitrust exemption has come under scrutiny is in the area of franchise relocation. This issue recently manifested itself when the San Francisco Giants were the subject of a controversial sale. Two cases have emerged following the sale, and whatever was left of baseball's exemption after *Flood* continues to be rendered even more meaningless.

In 1988, Tampa, Florida financed the construction of a \$138 million domed stadium in the hopes of attracting a Major League Baseball franchise.¹²⁴ In conjunction with the building of this new stadium, a group of investors organized for the purpose of purchasing the San Francisco Giants from owner Robert Lurie and moving the team to Tampa.¹²⁵ On August 6, 1992, the investors sent Lurie a letter of intent offering to purchase the Giants for \$115 million. In return, Lurie agreed not to negotiate with other potential purchasers and to encourage Major League Baseball to approve the sale.¹²⁶ One month later, Ed Kuhlmann, Chairman of the Ownership Committee for Major League Baseball, instructed owner Lurie to consider other offers to purchase the Giants.¹²⁷

Similarly, National League President Bill White invited another individual to make an offer to buy the Giants, which was done, though the offer was only \$100 million.¹²⁸ Both of these acts violated the exclusive agreement between Lurie and the original investors. By a vote of nine to four, the National League owners voted to reject approval of the sale to the original investors, and litigation followed.¹²⁹

123. See, e.g., *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

124. Andrew Zimbalist, *Baseball Economics and Antitrust*, 4 SETON HALL J. SPORT L. 287, 315 (1994).

125. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 422 (E.D. Pa. 1993).

126. *Id.* at 422.

127. *Id.*

128. *Id.*

129. Latour R. Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 21 FLA. ST. U. L. REV. 1271 (1994).

In *Piazza v. Major League Baseball*,¹³⁰ the plaintiffs constituted the original investors tendering the offer for \$115 million. In the suit, investor Vincent Piazza claimed that Baseball had monopolized the market for teams, and that Baseball had placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams.¹³¹ Defendant Major League Baseball (“Baseball”) claimed they were exempt from liability under the Sherman Act, and that Piazza failed to allege that Baseball’s actions restrained competition in a relevant market.¹³² Piazza claimed he was “competing in the team franchise market with other potential investors located primarily *outside* of Major League Baseball for ownership of the Giants, and that Baseball interfered directly and substantially with competition in that market.”¹³³

The court held that the market in this case was ownership in professional baseball teams.¹³⁴ More importantly, the court concluded “that the antitrust exemption created by *Federal Baseball* is limited to baseball’s reserve system,” and therefore rejected Baseball’s claim that it was exempt from antitrust liability.¹³⁵ In its analysis, the court distinguished the market for the exhibition of baseball games from the market for the sale of ownership interests in baseball teams.¹³⁶ By creating this dichotomy, the trilogy of Supreme Court cases limits baseball’s exemption to the market for the exhibition of games. The holding by this court is consistent with the holding in *Flood* which narrowed the scope of baseball’s exemption from the whole industry to just the reserve clause.¹³⁷

Additional litigation resulted from the Giants’ sale, in *Butterworth v. National League of Professional Baseball Clubs*.¹³⁸ When it became evident that the San Francisco Giants would not be moving to Tampa, the attorney general of Florida issued antitrust civil investigative demands to the National League to investigate whether there was “[a] combination or ‘conspiracy in the restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise.’”¹³⁹ Baseball moved to set aside the investigative demands based on its assertion that the business of

130. 831 F. Supp. 420 (E.D. Pa. 1993).

131. *Id.* at 424.

132. *Id.* at 429.

133. *Id.* at 430.

134. *Id.* at 439.

135. *Piazza*, 831 F. Supp. at 438.

136. *Id.* at 440.

137. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

138. 644 So. 2d 1021 (Fla. 1994).

139. *Id.* at 1022.

baseball owns a broad exemption from federal antitrust laws, which includes decisions regarding the sale and location of franchises.¹⁴⁰ The attorney general claimed that the exemption only applied to the reserve system.¹⁴¹

Relying on *Piazza*, the Supreme Court of Florida held that baseball's antitrust exemption extended only to its reserve system and remanded the case for trial on its merits.¹⁴² Thus, all litigation concerning the sale of the Giants has affirmed the narrow and limited scope of any exemption from antitrust law owned by baseball. In theory, the owners could claim that the exemption is necessary to insure the stability of league franchises. In reality, based on *Piazza* and *Butterworth*, the courts have rendered any existing exemption meaningless by narrowing its scope to the reserve clause. As discussed earlier, collective bargaining has superseded the reserve system, so in effect, baseball has no relevant exemption from antitrust laws.

VI. THE EFFECT ON THE MINOR LEAGUES OF AN ANTITRUST EXEMPTION REPEAL

Still another consideration of any repeal of Major League Baseball's antitrust exemption is the effect it would have on the minor leagues. Currently, baseball's minor league teams are primarily affiliates of their respective major league teams.¹⁴³ Each major league team is allowed one team at the AAA level, the level closest in competition and skill to the major leagues, and one team at the AA level, the next closest league to the major leagues in terms of skill.¹⁴⁴ Many teams operate more than one team at the A and Rookie League level, the lowest rung on the minor league ladder.¹⁴⁵

The major leagues make a significant investment in their minor league affiliates. According to Stanley Brand, Vice President of the Minor League's governing body, Major League teams spend a total of \$130 million on their minor league operations.¹⁴⁶ The parent major league clubs are responsible for all spring training costs and almost all of the salaries of the

140. *Id.*

141. *Id.* at 1023.

142. *Id.* at 1025.

143. TOTAL BASEBALL, *supra* note 5, at 663. There are some minor league teams that operate independently of any major league affiliation.

144. Zimbalist, *supra* note 124, at 305.

145. *Id.*

146. Dave Anderson, *Baseball's Best Remedy: A Repeal*, PALM BEACH POST, Dec. 18, 1994, at 15C.

players and coaches of their minor league teams.¹⁴⁷ For its significant investment, the minor leagues provide several valuable services to the major leagues: they develop potential players, facilitate fan interest in future players, spread fan base geographically, serve as a reservoir to replace injured players, and, with antitrust implications, hoard all the available player talent which prevents rival leagues from forming.¹⁴⁸

It is in this context of restraint on minor league players in which antitrust consequences must be considered. As a result of the Messersmith decision by arbitrator Peter Seitz and subsequent collective bargaining agreements, major league players may become free agents after six years of major league service.¹⁴⁹ Minor league players remain the property of their major league organization until they have at least three years of minor league service and are not listed on the forty-man major league roster.¹⁵⁰ Any repeal of an exemption would most likely lead to litigation similar to the claims made by Curt Flood, who argued in his case that any restraint on a player's ability to sell his services to the highest bidder was a result of a conspiracy by owners to monopolize contracts.¹⁵¹

Similarly, minor league players would be interested in the opportunity to market their services to other organizations willing to pay more money. Or, as in *Toolson*, a player may make a determination based on personnel that he could reach the major leagues more quickly in a different organization. Additional antitrust claims could be brought alleging that the amateur draft, where teams are selected from the high school and college ranks to compile their minor league rosters, constitutes a conspiracy in restraint of trade by denying the drafted players the right to freely contract for their services to the highest bidder.

Conversely, the argument for an exemption by Major League Baseball is that the teams need some stability in their control over minor league players. In other words, if a repeal of baseball's exemption limited the time constraints on minor league players, the major league teams would have little incentive to invest in players who are in their control for a short period of time. Professional football and basketball draw all of their players from the collegiate ranks. In effect, this makes college football and basketball the

147. TOTAL BASEBALL, *supra* note 5, at 663.

148. Zimbalist, *supra* note 124, at 304.

149. TOTAL BASEBALL, *supra* note 5, at 634.

150. Ron Kroichick, *Oakland Athletics*, SPORTING NEWS, Dec. 12, 1994, at 41.

151. Flood v. Kuhn, 316 F. Supp. 271, 272 (S.D.N.Y. 1970).

minor leagues for their respective sports. Major League Baseball almost exclusively draws its talent from the minor leagues.¹⁵²

Based on the above, predicting the impact of a repeal on the minors is difficult to do with any certainty. One extreme is a complete free-for-all, where minor league players are able to play where and when they desire based on the major league organization willing to pay the most money. The other extreme is the status quo where the existing restraints on minor league players constitute anticompetitive behavior where the players remain the property of their organization until they become subject to the Rule 5 Draft, complete six years of major league service, are traded, or are released.¹⁵³ Reality would lie somewhere in the middle. Major league organizations would have less control over the time a minor league player would remain in the organization. As a result, major league teams would be less likely to subsidize their minor league affiliates at their current levels. Teams at the AAA and AA levels are a necessities for major league teams. Because of the skill level involved all players called up to major league rosters come directly from these teams. As a result of the reluctance to spend money on player development, however, few A level teams would remain.

VII. CONCLUSION

Much of the discussion regarding baseball's exemption from antitrust laws constitutes much ado about nothing. An analysis of the series of Supreme Court cases that created this exemption reveals that its scope has been significantly narrowed. *Federal Baseball* and *Toolson* granted the baseball industry a broad exemption from antitrust laws. *Flood*, on the other hand, appears to have tapered the exemption to one component of the industry, the reserve clause. Through *Flood* the Court upheld the legality of the reserve clause and its anticompetitive effect of indenturing players to a team for the duration of their career. However, advances in collective bargaining have made the reserve clause irrelevant, because the players have negotiated the right to free agency after six years of major league service. The right to salary arbitration after three years of major league service makes the six years of involuntary servitude before free agency more tolerable.

152. Two notable exceptions regarding players who have gone straight to the majors from college with no minor league experience are New York Yankee pitcher Jim Abbott, and Toronto Blue Jay first baseman John Olerud.

153. All players who have at least three years of minor league service and who are not listed on 40-man major league rosters are eligible to be drafted by any other organization.

In addition, the value of a repeal and the availability of legal recourse to enjoin anticompetitive activity by either side would be limited due to exemptions in antitrust law. Terms of collective bargaining that primarily affect the parties to the agreement, are mandatory subjects of collective bargaining, and are the product of bona fide arms length bargaining, are shielded from antitrust attack by either labor or management.

Regarding the issue of franchise relocation, the recent litigation concerning baseball's antitrust exemption has confirmed *Flood*, in that the exemption is limited to the reserve clause, and, thus, does not necessarily apply to matters of franchise relocation. The implication of the results of the litigation following the sale of the San Francisco Giants, is that the judiciary, perhaps for policy reasons, is likely to be more hostile to any anticompetitive behavior on the part of Major League Baseball when making franchise decisions.

Lastly, the effect of a repeal on the minor leagues would be difficult to predict. Restraints on minor league players certainly would not be as stringent as they are now which would result in a reluctance by major league affiliates to subsidize their minor league counterparts. No drastic changes, however, would materialize as the AAA and AA farm systems would remain the same, as these levels would continue to be the reservoir from where major league teams draw their players. Is the repeal of the remaining antitrust exemption the answer for baseball? Obviously not. Any repeal will be irrelevant and meaningless from this point onward. Quoting a great philosopher: "It's deja vu all over again."¹⁵⁴

154. While not trying to trivialize Yogi Berra's unforgettable statement, nothing could be truer.

Florida Capital Cases:
July 1, 1994 - June 30, 1995

Gary Caldwell*

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I. DISCOVERY

A. *Rules of Discovery*

After many years of silence on the issue, the Supreme Court of Florida has in recent years begun to develop a body of law respecting penalty phase discovery. In May of 1995, the court proposed the following rule:¹

**RULE 3.202 EXPERT TESTIMONY OF MENTAL MITIGATION
DURING PENALTY PHASE OF CAPITAL TRIAL: NOTICE AND
EXAMINATION BY STATE EXPERT**

(a) **Notice of Intent to Present Expert Testimony of Mental Mitigation.** When in any capital case it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

(b) **Time for Filing Notice; Contents.** The defendant shall give notice of intent to present expert testimony of mental mitigation no later than 45 days before the guilt phase of the capital trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental

1. The impetus for the rule arose from *Burns v. State*, 609 So. 2d 600, 606 n.8 (Fla. 1992), in which the court asked the Criminal Rules Committee to develop a procedure for the state's mental evaluation of a defendant for capital sentencing purposes.

health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

(c) **Appointment of State Expert; Time of Examination.** After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

(d) **Defendant's Refusal to Cooperate.** If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:

(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or

(2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.²

In issuing this proposed rule,³ the court rejected a proposal by the Criminal Rules Committee to clarify that rule 3.220, which ostensibly governs all discovery in criminal cases, applies to death penalty proceedings.⁴ Do provisions of rule 3.220 concerning depositions, reports of experts, and the like nevertheless apply to capital sentencing? The court did not say, except

2. Amendments to Florida Rule of Criminal Procedure 3.220-Discovery (3.202-Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 654 So. 2d 915, 916-17 (Fla. 1995) [hereinafter *Amendments*].

3. The court directed the Criminal Procedure Rules Committee and other interested parties to file comments by July 1, 1995. It also directed the Committee to consider the need for 1) a rule requiring the defendant and the State to file a statement of the issues to be tried in the penalty phase of a capital trial and 2) a pretrial procedure, similar to summary judgment, that would allow the trial court to determine whether the death penalty is an option based on the aggravating and mitigating factors alleged to exist in a capital case.

Amendments, 654 So. 2d at 916. As to the first matter, the court has ruled in the past that the state has no duty to disclose the aggravating circumstances it seeks to employ. *E.g.*, *Menendez v. State*, 368 So. 2d 1278, 1282 n.21 (Fla. 1979). As to the second, the court has ruled that it would violate the separation of powers doctrine of the state constitution for a trial court to determine, before a trial, whether the state could seek the death penalty in the event of a conviction. *State v. Bloom*, 497 So. 2d 2 (Fla. 1986).

4. Among other things, the Committee had proposed to amend rule 3.220 (a) to "make the discovery rules applicable to the penalty phase of a capital trial." *Amendments*, 654 So. 2d at 915.

to write in a footnote: “The proposed rule will not relieve the parties of the continuing duty to disclose witnesses under Florida Rule of Criminal Procedure 3.220(j).”⁵

Respecting discovery in postconviction proceedings, the court addressed the question of whether a judge may be subjected to discovery depositions in *State v. Lewis*.⁶ The court held that where a rule 3.850 motion for postconviction relief alleges improper actions by the trial judge, there may be limited discovery depositions of the judge where “absolutely necessary.”⁷ The court added that a judge has the power to limit his own deposition in stating: “The judge may refuse to answer any question which the judge deems intrusive.”⁸ In *Asay v. Florida Parole Commission*,⁹ the court held that *Brady v. Maryland*,¹⁰ does not apply to clemency proceedings so that clemency records need not be disclosed to death row inmates.¹¹

B. Grand Jury

Discovery of grand jury testimony has also been a matter of controversy over the years. In *Keen v. State*,¹² the court seemed to have resolved the matter, ruling that the trial court erred by refusing to grant at least in camera review of grand jury testimony of a witness who had initially said the death of Michael Keen’s wife was an accident, but later said that he and Mr. Keen had murdered her. Relying on *Dennis v. United States*,¹³ and *Miller v. Wainwright*,¹⁴ the court wrote that, upon a showing of particular-

5. *Id.* at 916 n.1. The Committee’s proposal would have amended rule 3.220 to provide for separate witness lists for the guilt and penalty phases. *Id.*

6. 656 So. 2d 1248 (Fla. 1994).

7. *Id.* at 1250.

8. *Id.*

9. 649 So. 2d 859 (Fla. 1994), *cert. denied*, 116 S. Ct. 591 (1995).

10. 373 U.S. 83 (1963). Under *Brady*, the prosecution must disclose exculpatory evidence to the defense. *Id.* at 86.

11. In a related matter, the court amended Florida Bar Rule 4-1.6 (Confidentiality of Information) by adding section (5)(e), which states: “**Limitation of Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.**” The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 644 So. 2d 282, 311 (Fla. 1994). Presumably, this new rule was to govern disclosure of attorney-client communications in litigation of ineffective assistance of counsel claims in capital cases.

12. 639 So. 2d 597 (Fla. 1994).

13. 384 U.S. 855 (1966).

14. 798 F.2d 426 (11th Cir. 1986), *cert. denied and judgment vacated by*, 480 U.S. 901 (1987). The court also cited to *Jent v. State*, 408 So. 2d 1024 (Fla. 1986), *cert. denied*, 457

ized need for access to grand jury testimony,¹⁵ the trial court must turn such testimony over to the defense.¹⁶

During the survey period, the court rejected a claim under *Keen* in *Armstrong v. State*,¹⁷ ruling that the trial court did not err in denying in camera review of grand jury testimony where the defense failed to show its materiality and failed to advise the court as to its possible usefulness.

II. THE PENALTY TRIAL

A. *The Jury Sentencing Trial*

In *State v. Hernandez*,¹⁸ the court resolved a nagging question regarding the procedure for waiving the right to a jury sentencing proceeding. In *State v. Ferguson*,¹⁹ the district court had held that under rule 3.260 of the *Florida Rules of Criminal Procedure*, the defendant could not waive the sentencing jury without the state's consent.²⁰ *Hernandez* overruled *Ferguson*, and held that the trial court has discretion to proceed to sentencing without a jury upon a knowing and intelligent waiver by the defendant.²¹ It noted, however, that under *Sireci v. State*,²² the "trial judge may require a jury recommendation notwithstanding the defendant's waiver."²³

B. *Evidence and Argument*

1. Hearsay

Section 921.141(1) of the *Florida Statutes* provides the following regarding evidence at death penalty sentencing proceedings:

U.S. 1111 (1982), without noting that *Miller* effectively overruled *Jent*. For the history of this issue, see Gary Caldwell, *Recent Florida Capital Decisions*, 16 NOVA L. REV. 1357, 1362-64 (1992).

15. Under *Miller*, the defense shows a particularized need by demonstrating inconsistencies between the deposition and trial testimony of a material witness. *Miller*, 798 F.2d at 429.

16. *Keen*, 639 So. 2d at 600 & n.4.

17. 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

18. 645 So. 2d 432 (Fla. 1994).

19. 556 So. 2d 462 (Fla. 2d Dist. Ct. App.), *review denied*, 564 So. 2d 1085 (Fla. 1990).

20. *Id.* at 464.

21. *Hernandez*, 645 So. 2d at 435.

22. 587 So. 2d 450 (Fla. 1991), *cert. denied*, 503 U.S. 946 (1992).

23. *Hernandez*, 645 So. 2d at 435.

In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.²⁴

Somewhat surprisingly, the supreme court's decisions have interpreted the statute to authorize the state's use of hearsay and to prevent the defense's use of it.

As to the state's use of hearsay, the main case is *Rhodes v. State*,²⁵ in which the State presented the capital sentencing jury with evidence about an offense committed by the defendant in Nevada. A police captain played a taped interview of the Nevada victim, and gave hearsay testimony about the statement. The supreme court ruled that the Confrontation Clause barred the State's use of the taped statement,²⁶ but then ruled that the State could use the captain's hearsay testimony regarding the victim's statement, concluding

24. FLA. STAT. § 921.141(1) (1995).

25. 547 So. 2d 1201 (Fla. 1989).

26. *Id.* at 1204.

While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom. In *Engle v. State*, we stated:

The [S]ixth [A]mendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the [Due Process Clause] of the [F]ourteenth [A]mendment to the United States Constitution. The primary interest secured by, and the major reason underlying the [C]onfrontation [C]lause, is the right of cross-examination. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process.

Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Id. (citations omitted).

that because the defendant could cross-examine the captain, his hearsay testimony was admissible.²⁷

At to the defense's use of hearsay, the court wrote in *Hitchcock v. State*:²⁸

Hitchcock argues that, although the state's introducing hearsay in a penalty proceeding is limited to that hearsay which a defendant is given the opportunity to rebut, a defendant's ability to introduce hearsay is unlimited. While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded. We find no merit to Hitchcock's claim that the state must abide by the rules but that defendants need not do so. Additionally, even if admissible, the hearsay statements would have been merely cumulative to other testimony about Hitchcock's past.²⁹

During the survey period, the court expressed some antipathy for defense hearsay evidence in *Griffin v. State*³⁰ and *Wuornos v. State*.³¹ In *Griffin*, relying on *Hitchcock*, the court approved the trial court's refusal to let the defense present evidence of the defendant's remorse and character.³² In *Wuornos*, without totally disapproving the defense's use of hearsay, the court ruled that the trial court did not err in failing to find in mitigation facts presented via hearsay: "The vast bulk of the case for mitigation was hearsay. While hearsay can be admissible in the penalty phase, we cannot conceive that there is any absolute duty for the trial court to accept it in mitigation where, as here, the State's rebuttal established strong indicia of unreliability."³³

In *Henry v. State*,³⁴ the court found no error in the State's presentation of hearsay in the form of a transcript of the testimony of a witness at the trial leading to Henry's conviction of a prior violent felony.

27. *Id.*

28. 578 So. 2d 685 (Fla. 1990), *judgment vacated*, 505 U.S. 1215 (1992).

29. *Id.* at 690 (footnote omitted).

30. 639 So. 2d 966 (Fla. 1994), *cert. denied*, 115 S. Ct. 1317 (1995).

31. 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).

32. *Griffin*, 639 So. 2d at 970.

33. *Wuornos*, 644 So. 2d at 1020.

34. 649 So. 2d 1366 (Fla. 1994), *cert. denied*, 115 S. Ct. 2591 (1995).

2. Treatment of Mitigation

In three cases, the court seemed to express three different views about opinion evidence presented in mitigation. In *Walls v. State*,³⁵ Justice Kogan wrote for the court:³⁶

Eighth, Walls contends that the trial court improperly rejected expert opinion testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired. In Florida as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. This rule applies equally to the penalty phase of a capital trial.

Opinion testimony, on the other hand, is not subject to the same rule. Certain kinds of opinion testimony clearly are admissible—and especially qualified expert opinion testimony—but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve. We cannot conclude that the evidence here was anything more than debatable. Accordingly, this Court may not revisit the judge and jury's determination on appeal.³⁷

In a footnote to the opinion the court stated:

Reasonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators. Moreover, all the experts hedged their statements, gave equivocal responses, or responded to questions that themselves were equivocal. The psychiatrist said he could not testify as to Walls' state of mind at the time of the murder. One psychologist responded yes to a question that essentially only asked whether Walls was suffering *any* impairment at the time of the murder. The facts may be consistent with some degree of emotional impairment, which the trial court surely recognized in finding emotional

35. 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995).

36. Chief Justice Grimes, and Justices Overton, Shaw, and Harding concurred in the court's opinion. *Id.* at 391. Justice McDonald wrote a special concurrence joined by Justice Overton. *Id.*

37. *Id.* at 390-91 (citations omitted) (footnote omitted).

handicap and brain dysfunction as nonstatutory mitigators. Nevertheless, the expert testimony does not address the true problem here: the relative weight of mitigating versus aggravating circumstances. On the whole, the facts are consistent with the conclusion that any impairment Walls suffered was nonstatutory in nature and, in any event, was of far slighter weight than the aggravating factors found to exist.³⁸

Thus, *Walls* indicates that the sentencer is free to disregard un rebutted expert evidence offered in mitigation. In *Spencer v. State*,³⁹ however, the court took an opposite view:

We also find merit in *Spencer's* claim that the trial court improperly rejected the statutory mitigating circumstances. During the penalty phase, the two experts testified that *Spencer* suffered from chronic alcohol and substance abuse, a paranoid personality disorder, and biochemical intoxication. Based upon their testing, interviews, and evaluations, both experts concluded that *Spencer* was under the influence of extreme mental or emotional disturbance at the time the murder was committed and that his capacity to conform his conduct to the requirements of law was impaired. The sentencing order finds that neither of these mitigating factors is present.

Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved if the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstance. In this case, the evidence of these mitigating circumstances that was submitted by *Spencer* was uncontroverted. The trial judge rejected the experts' opinions as speculative and conclusory. However, the experts based their opinions on a battery of psychological and personality tests administered to *Spencer*, clinical interviews with *Spencer*, examination of evidence in this case, and a review of *Spencer's* life history, school records, and military records. Thus, the trial court erred in not finding and weighing these statutory mental mitigating circumstances.⁴⁰

38. *Id.* at 391 n.8.

39. 645 So. 2d 377 (Fla. 1994).

40. *Id.* at 384-85 (citations omitted).

The voting pattern in *Spencer* is worth noting. Justices Shaw, Harding, and McDonald joined the *per curiam* opinion for the court,⁴¹ and Justice Kogan concurred in part and dissented in part, writing:

In light of the strong case for mental mitigation here and the lack of cold calculated premeditation, I would reduce the penalty to life imprisonment without possibility of parole for twenty-five years. A remand here would be a useless act because the death penalty cannot be imposed based on the facts. I note that this case is directly on point with *Santos v. State*, in which we remanded based on similar facts only to reverse the trial court's imposition of the death penalty in the appeal after remand. Moreover, based on our second *Santos* opinion, I believe death clearly cannot be proportional in this instance. I therefore dissent as to the remand, but otherwise concur with the majority.⁴²

Justice Kogan made no mention of the apparent contradiction between these views and his opinion for the court in *Walls*.

In *Jones v. State*,⁴³ the court approved the trial judge's refusal to find in mitigation apparently uncontroverted evidence that the defendant's alcoholic mother had abandoned him as a child:

As a separate nonstatutory mitigating circumstance the trial judge considered the fact that Jones was "an abandoned child who was raised by relatives." The court rejected this "childhood scenario" as a mitigating factor, reasoning that Jones' mother delivered him into an "infinitely superior environment" where he was cared for by "decent, law abiding and God fearing" relatives who "cared for him as if he was one of their own" and where he did well in school and was a good child.

Jones challenges the trial judge's failure to find his abandonment by an alcoholic mother in mitigation and maintains that a new sentencing proceeding is required because the mental health experts who testified did not bring to the court's attention the fact that Jones likely suffers from fetal alcohol syndrome. First, on this record, the court did not abuse its discretion by refusing to find in mitigation that Jones was abandoned by an alcoholic mother.⁴⁴

41. *Id.* at 385.

42. *Id.* at 386 (citations omitted).

43. 652 So. 2d 346 (Fla.), *cert. denied*, 116 S. Ct. 202 (1995).

44. *Id.* at 351 (citations omitted).

3. "Victim Impact" Evidence

In *Windom v. State*,⁴⁵ the court addressed a number of issues pertaining to the State's use of "victim impact" evidence:

Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

Defendant asserts, first, that this evidence was in essence nonstatutory aggravation, relying upon *Grossman v. State*. Defendant does concede that subsequent to *Payne v. Tennessee* this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the *Payne* decision. Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences. We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in *State v. Dixon*, or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case.

Rather, we believe that section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The

45. 656 So. 2d 432 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995).

testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.

However, defendant did not object to this testimony specifically, and thus his objection on appeal is procedurally barred

Defendant's second attack on the victim impact evidence concerns the application of 921.141(7) to defendant's crime. He claims that such application was a violation of the ex post facto clauses of the United States and Florida Constitutions since the murders were on February 7, 1992, and subsection seven of section 921.141 did not go into effect until July 1, 1992. We do not agree. To the contrary, we approve the Fourth District Court of Appeal's decision on this point in *State v. Maxwell*, in which the district court found our decision in *Glendenning v. State* to be instructive. Section 921.141(7) only relates to the admission of evidence and is thus procedural. Therefore, application of section 921.141(7) in the present case does not violate the prohibition against ex post facto laws.⁴⁶

4. Final Argument

In *Wike v. State*,⁴⁷ the court found per se reversible error in the trial court's failure to allow the defense to make its final argument to the sentencing jury under rule 3.780 of the *Florida Rules of Criminal Procedure*.

III. AGGRAVATING CIRCUMSTANCES

A. Sentence of Imprisonment⁴⁸

Although the application of this circumstance is usually straightforward, *Thompson v. State*,⁴⁹ involved a rare misapplication. At the time that the defendant murdered a sandwich shop employee, he was ostensibly serving community control sentences for various thefts and forgeries. Accordingly, the trial court employed the "sentence of imprisonment" circumstance in

46. *Id.* at 438-39 (citations omitted).

47. 648 So. 2d 683, 687 (Fla. 1994).

48. An aggravating circumstance exists where "[t]he capital felony was committed by a person under sentence of imprisonment or placed on community control." FLA. STAT. § 921.141(5)(a).

49. 647 So. 2d 824 (Fla. 1994).

sentencing him to death for the murder. After imposition of the death sentence, the court presiding over the community control cases ruled that the community control sentences had been illegally imposed. Accordingly, the defendant argued on appeal that it was error to use the "sentence of imprisonment" circumstance against him. The supreme court agreed:

"We have expressly held that a conviction used as an aggravating circumstance, which is valid at the time of the sentence but later reversed and vacated by an appellate court, results in an error in the penalty phase proceeding. The reversal eliminates the proper use of the conviction as an aggravating factor." We conclude that the same reasoning applies to an aggravating circumstance based on an illegal sentence. We strike this aggravating circumstance.⁵⁰

B. *Previous Violent Felony Conviction*⁵¹

Again, there is usually little trouble with the application of this circumstance.⁵² There were no significant developments regarding this circumstance during the survey period.

50. *Id.* at 827 (citations omitted).

51. An aggravating circumstance exists where "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." FLA. STAT. § 921.141(5)(b).

52. A defendant has been "previously convicted" even if the violent felony is contemporaneous with the murder. *See Lucas v. State*, 376 So. 2d 1149 (Fla. 1979) (attempted murders of two victims could constitute prior violent felonies in sentencing defendant for murder of third victim). On the other hand, contemporaneous violent felonies committed on the murder victim do not satisfy the circumstance. *See Holton v. State*, 573 So. 2d 284 (Fla.), *cert. denied*, 500 U.S. 960 (1991). The court has written directly contrary opinions as to whether the circumstance applies only to felonies which contain a violent element or whether the court can look to the facts to determine whether the previous felony involved violence. *Compare Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994) (holding it error to use conviction for solicitation to commit murder to establish the circumstance since violence is not an inherent element of this offense) *with Sweet v. State*, 624 So. 2d 1138 (Fla. 1993) (approving the trial court's use of conviction for possession of firearm by convicted felon, notwithstanding that violence is not an inherent element of that offense; sentencer not bound by the elements of the offense, and can look to facts underlying prior offense), *cert. denied*, 114 S. Ct. 1206 (1994).

C. *Great Risk*⁵³

In *Coney v. State*,⁵⁴ the court disapproved use of this circumstance in an arson-murder at a jail, in which “Jimmie Coney set his putative jailhouse lover ablaze.”⁵⁵ Striking the circumstance, the court wrote: “the fire was relatively small, was contained within a single cell, was set in an area under constant surveillance, and was easily extinguished with several puffs from a fire extinguisher.”⁵⁶

D. *Felony Murder*⁵⁷

There were no significant developments respecting this circumstance.

E. *The Law Enforcement Circumstances: Avoiding Arrest, Hindering Law Enforcement, and Murder of Law Enforcement Officers*⁵⁸

Where the defendant has murdered a police officer, the application of these aggravating circumstances is nearly automatic, although they usually merge into one.⁵⁹

Problems arise, however, when the victim is not a law enforcement officer. *Robertson v. State*⁶⁰ sets out the standards applying to such cases:

53. An aggravating circumstance also exists where “[t]he defendant knowingly created a great risk of death to many persons.” FLA. STAT. § 921.141(5)(c).

54. 653 So. 2d 1009 (Fla.), *cert. denied*, 116 S. Ct. 315 (1995).

55. *Id.* at 1010.

56. *Id.* at 1015.

57. “The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.” FLA. STAT. § 921.141(5)(d).

58. In addition, an aggravating circumstance exists when “[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody,” *id.* § 921.141(5)(e); “[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws,” *id.* § 921.141(5)(g); “[t]he victim of the capital felony was a law enforcement officer engaged in the performance of his official duties,” *id.* § 921.141(5)(j).

59. *E.g.*, *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588 (1995); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

60. 611 So. 2d 1228 (Fla. 1993) (striking circumstance where defendant murdered a woman who had witnessed her companion’s murder).

The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Moreover, even the trial court may not draw “logical inferences” to support a finding of a particular aggravating circumstance when the State has not met its burden. In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant’s dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. “Proof of the requisite intent to avoid arrest and detection must be very strong” to support this aggravating circumstance when the victim is not a law enforcement officer.⁶¹

Thus, in the past, the court has struck the circumstance where defendants committing burglaries have murdered victims who knew and could identify them.⁶² On the other hand, it has applied the circumstance where the defendant has moved a victim to a remote location.⁶³

The court followed the first line of cases in disapproving the circumstance in *Thompson v. State*.⁶⁴ The evidence there was that the defendant robbed and shot the attendant of a Subway sandwich shop. The court struck the circumstance because “we do not know what happened” at the time of the shooting.⁶⁵

It followed the second line in approving the circumstance in other cases. In *Thompson v. State*,⁶⁶ a retarded former grave digger, thinking that the cemetery owed him money, forced the bookkeeper to write him a check, then took the bookkeeper and his assistant to a wooded area and murdered them. Finding that the record supported the circumstance, the court wrote: “Once Thompson had obtained the \$1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the

61. *Id.* at 1232 (citations omitted).

62. *E.g.*, *Davis v. State*, 604 So. 2d 794 (Fla. 1992) (burglar killed elderly woman who knew and could identify him; supreme court held that the fact that witness elimination may have been a motive in the murder was insufficient to support circumstance); *Geralds v. State*, 601 So. 2d 1157, 1164 (Fla. 1992) (striking circumstance and speculating that where burglar tied victim up and then killed her, perhaps defendant killed her while she was trying to escape).

63. *E.g.*, *Hall v. State*, 614 So. 2d 473, 477 (Fla.) (holding circumstance applied where defendants abducted and raped woman, killing her to cover up their crime), *cert. denied*, 114 S. Ct. 109 (1993).

64. 647 So. 2d 824 (Fla. 1994).

65. *Id.* at 827. See the discussion of the court’s striking of the coldness circumstance below. See *infra* part III.H.

66. 648 So. 2d 692 (Fla. 1994), *cert. denied*, 115 S. Ct. 2283 (1995).

sole witnesses to his actions."⁶⁷ The court apparently did not consider the defendant's slim intellectual resources in reaching this determination.

The court affirmed the circumstance without discussion in *Suggs v. State* where Ernest Suggs took a barmaid to a remote area and stabbed her,⁶⁸ and in *Fennie v. State* where Alfred L. Fennie flagged down a woman motorist, forced her into the trunk of her car, eventually shooting her after driving around telling others he was going to kill her.⁶⁹

F. *Pecuniary Gain*⁷⁰

This circumstance usually applies in robbery and burglary cases where it merges with the felony murder circumstance.⁷¹ Problems may arise when the state's theory is that the defendant has committed a murder to obtain insurance proceeds. In *Chaky v. State*,⁷² pointing to the fact that Kenneth Chaky had increased life insurance coverage of his wife less than seven months before he murdered her, the trial court concluded that he had committed the murder for pecuniary gain.⁷³ The supreme court disagreed:

In his third issue, Chaky contends that the evidence is insufficient to support, beyond a reasonable doubt, the aggravating circumstance of "committed the murder for pecuniary gain." This aggravating circumstance applies "only where the murder is an integral step in obtaining some sought-after specific gain." Moreover, proof of this aggravating circumstance cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. The only evidence presented to support this aggravating circumstance was that Chaky, as a matter of course through his employment with the University of Florida, maintained two life insurance policies on his wife, totalling

67. *Id.* at 695. The court employed somewhat similar reasoning in *Hannon v. State*, 638 So. 2d 39 (Fla. 1994), *cert. denied*, 115 S. Ct. 1118 (1995). There, the defendant and two friends murdered a man who had mistreated the sister of one of the friends. The defendant then chased the first victim's roommate upstairs and murdered him. The court upheld the avoid arrest circumstance because the roommate's murder was "ancillary" to the purpose of killing the first man. *Id.* at 44.

68. 644 So. 2d 64, 70 (Fla. 1994), *cert. denied*, 115 S. Ct. 1794 (1995).

69. 648 So. 2d 95, 98 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).

70. An aggravating circumstance exists if "[t]he capital felony was committed for pecuniary gain." FLA. STAT. § 921.141(5)(f).

71. *E.g.*, *Robertson v. State*, 611 So. 2d 1228 (Fla. 1993).

72. 651 So. 2d 1169 (Fla. 1995).

73. *Id.* at 1171.

\$185,000, and that he had increased this life insurance on a regular basis since his initial employment date with the university in 1985. Additional testimony indicated that fifty-percent of all employees with the university maintained similar policies and that the amount of insurance Chaky maintained on his wife was only half of the amount of life insurance he maintained on himself. Further, the last increase in his life insurance was initiated more than six months before he killed his wife. Although Chaky did tell Thompson and Feinberg that he would pay them for their assistance, Thompson assumed that he was to be paid from automobile insurance money obtained for burning Chaky's car and Feinberg was never told where the funds for payment would come from and was not told that he would be paid until after the murder occurred. Although one could surmise under these circumstances that Chaky killed his wife to obtain the insurance proceeds, we must conclude that the evidence in this record is insufficient to support that hypothesis beyond a reasonable doubt. Consequently, we find that the trial judge erroneously concluded that Chaky committed the murder for pecuniary gain.⁷⁴

G. *Heinousness*⁷⁵

During the survey period, the court did little to firm up this often shapeless circumstance.⁷⁶ In 1995, after many years of litigation, the court adopted the following jury instruction defining the circumstance:

8. The crime for which the defendant is to be sentenced was especially ~~wicked~~, ~~evil~~, *heinous*, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime

74. *Id.* at 1172-73 (citations omitted).

75. An aggravating circumstance exists if "[t]he capital felony was especially heinous, atrocious, or cruel." FLA. STAT. § 921.141(5)(h).

76. For the background of this circumstance, see Craig S. Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 908 (1989); Eric Cumfer, *Instructing a Capital Sentencing Jury on Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance*, 14 FLA. B. CRIM. L. SEC. NEWSL., Oct. 1991, at 18; Michael Mello, *Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases-The Standardless Standard*, 64 N.C. L. REV. 941 (1986).

was conscienceless or pitiless and was unnecessarily torturous to the victim.⁷⁷

This instruction is an amalgam of definitions of “heinous,” “atrocious,” and “cruel” found unconstitutional in *Shell v. Mississippi*,⁷⁸ and a narrowing construction (“accompanied by additional acts . . . unnecessarily torturous to the victim”) found constitutional in *Proffitt v. Florida*.⁷⁹

Notwithstanding this attempt at regularizing the circumstance’s application, the court still seems to reach contrary results in similar cases. In *Green v. State*,⁸⁰ the court disapproved the circumstance where, robbing Charles Flynn and Kim Hallock at gun point in the woods, Crosley Green tied Flynn’s hands behind his back, and kidnapped the pair.⁸¹ Attempting to escape, Flynn shot at Green⁸² who shot him back as Hallock escaped. The court wrote: “The additional acts accompanying Flynn’s death—Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove—do not turn this shooting death into the “‘especially’ heinous” type of crime for which this aggravator is reserved.⁸³

The court took a different tack in *Wuornos v. State*⁸⁴ writing:

Next, Wuornos contends that this murder was not heinous, atrocious, or cruel beyond a reasonable doubt. Wuornos’ initial confession to law officers detailed a sequence in which she first struggled with Mallory for no reason other than his refusal to remove his clothes. After winning the struggle, she pointed the gun at him and announced that she “knew” he was going to rape her. Despite Mallory’s protestation that he had no intent to rape her, she shot him anyway. Mallory still was conscious and able to walk from the car. In spite of seeing this, Wuornos then ran around to where Mallory was standing, and shot him several more times.

We believe the protracted nature of this killing together with the mental suffering it necessarily would entail created a question for the finder of fact to resolve, especially in light of the similar crimes

77. In Re Standard Jury Instructions Criminal Cases - No. 90-1, 579 So. 2d 75, 75 (Fla. 1990).

78. 498 U.S. 1 (1990).

79. 428 U.S. 242 (1976).

80. 641 So. 2d 391 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).

81. *Id.* at 395-96.

82. Apparently Flynn’s hands were still tied behind his back. *Id.* at 393.

83. *Id.* at 396; *see* *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

84. 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995).

evidence. That question has been resolved against Wuornos, and the resolution is sufficiently supported by the record.⁸⁵

Similarly, the court wrote in the case of Charlie Thompson:

We also find that there was sufficient evidence to support the trial court's finding that each murder was heinous, atrocious, or cruel. Swack was stabbed numerous times before he was shot. Also, both victims undoubtedly suffered great fear and terror for some time prior to their murders. In the sentencing order, the trial judge stated:

After obtaining a check to which he was not entitled, the Defendant forced the victims to go in one of the victim's cars to a park and then walk to a secluded wooded area. The Defendant was armed with a knife and a gun. The victims were forced to disrobe. The female victim was then allowed to redress. While clothed only in his underwear and shoes and socks, the male victim struggled with the Defendant and was stabbed nine times in various parts of his body. While the victim was still alive, the Defendant shot him in the head. The female victim was lying face down on the ground with her head on her arm. The autopsy revealed a bite mark to her arm that was inflicted while she was alive and aware of her impending death which came from a gunshot to her head. It is unclear which victim was killed first, but it is clear that both were aware for some period of time that the Defendant intended to kill them.

We have previously found that these type of facts support a finding of the heinous, atrocious, or cruel aggravating factor.⁸⁶

*Wyatt v. State*⁸⁷ is consistent with *Thompson*. Robbing a pizza restaurant, Thomas Wyatt raped an employee, and then shot her and two co-

85. *Id.* at 1011 (citation omitted). The court also upheld use of the circumstance for another murder committed by Aileen Wuornos in a separate case where the victim "suffered bruises and abrasions and was shot while in the act of twisting or writhing in a vain effort to avoid his attacker." *Wuornos v. State*, 644 So. 2d 1012, 1019 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).

86. *Thompson v. State*, 648 So. 2d 692, 695-96 (Fla.), *cert. denied*, 115 S. Ct. 2283 (1995) (citations omitted).

87. 641 So. 2d 1336 (Fla. 1994), *cert. denied*, 115 S. Ct. 1983 (1995).

workers (one of them her husband). The court upheld the circumstance because the victims “were acutely aware of their impending deaths.”⁸⁸

The court also upheld the circumstance in *Whitton v. State*,⁸⁹ where the defendant beat and stabbed a drunken friend stealing his money. The court rejected an argument that since the decedent had a blood alcohol level of .34, it was unlikely that he experienced the degree of pain or suffering associated with the heinousness circumstance.⁹⁰

*State v. Breedlove*⁹¹ involved an unusual interpretation of the circumstance. The trial court had granted a motion to vacate McArthur Breedlove’s death sentence for a 1979 murder⁹² because the sentencing jury had received an unconstitutional jury instruction on the heinousness circumstance.⁹³ The supreme court reversed, writing that the use of the unconstitutional instruction was harmless.⁹⁴ Without purporting to employ the narrowing construction contained in the 1991 jury instruction, the court employed an amorphous standard that the murder was “far different from the norm of capital felonies[:.]”

However, we believe that the failure to give the requested instruction on heinous, atrocious, or cruel was harmless error. The evidence presented at the trial clearly established that Breedlove committed the murder in a heinous, atrocious, or cruel manner. The fatal stabbing was administered with such force that it broke the victim’s collar bone and drove the knife all the way through to the shoulder blade. The puncture of the victim’s lung was associated with great pain and the victim literally drowned in his own blood. The victim had defensive stab wounds on his hands and did not die immediately. Moreover, the attack occurred while the victim lay asleep

88. *Id.* at 1341. In another case, Wyatt took a woman from a bar across the state and then shot her and stole her car. *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994), *cert. denied*, 115 S. Ct. 1372 (1995). The trial court instructed the jury on the heinousness circumstance, but did not find it in the sentencing order. The supreme court ruled that it did not need to decide whether the evidence supported the circumstance “because the jury was properly instructed and the trial judge did not find the existence of this aggravating circumstance.” *Id.* at 360.

89. 649 So. 2d 861 (Fla. 1994), *cert. denied*, 116 S. Ct. 106 (1995).

90. *Id.* at 866-67.

91. 655 So. 2d 74 (Fla.), *cert. denied*, 116 S. Ct. 678 (1995).

92. The supreme court had affirmed the conviction and death sentence in *Breedlove v. State*, 413 So. 2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982).

93. *See Espinosa v. Florida*, 505 U.S. 1245 (1992) (holding that heinousness jury instruction violated eighth amendment requirement of narrow definition of aggravating circumstances), *cert. denied*, 114 S. Ct. 2184 (1994).

94. *Breedlove*, 655 So. 2d at 76.

in his bed as contrasted to a murder committed in a public place. In fact, in discussing this aggravator in Breedlove's direct appeal, we stated that this killing was "far different from the norm of capital felonies" and set apart from other murders. Under the facts presented, this aggravator clearly existed and would have been found even if the requested instruction had been given. Further, there were two other valid aggravating circumstances, including the previous conviction of a violent felony. While Breedlove presented some testimony concerning possible psychological problems, two state experts expressly stated that they found no evidence of organic brain damage or psychosis and one of them said Breedlove was malingering. Any error in the instruction was harmless beyond a reasonable doubt and did not affect Breedlove's sentence.⁹⁵

Apparently in response to a dissent by Justice Anstead (joined by Justices Shaw and Kogan) based on *James v. State*,⁹⁶ the court wrote: "Breedlove's

95. *Id.* at 76-77 (citations omitted).

96. 615 So. 2d 668 (Fla. 1993). *James* has an interesting history. In 1981, Davidson and Larry Clark robbed a sign shop owned by Felix and Dorothy Satey. Clark shot Mr. Satey twice, and the men then went into an adjoining residence where one of them shot the seventy-four-year-old Mrs. Satey who was confined by a physical disability to a castored typist's chair. Mr. Satey pleaded that his wife not be harmed, then heard a gunshot followed by his wife's moaning. When found, Mrs. Satey had a gunshot wound over the right eye, from which she subsequently died.

Clark v. State, 443 So. 2d 973, 975 (Fla. 1983), *cert. denied*, 467 U.S. 1210 (1984). On Clark's appeal, the court struck the heinousness circumstance, writing:

Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

Id. at 977 (citations omitted). Relying on *Clark*, the court then struck the circumstance in James's appeal. See *James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 469 U.S. 1098 (1984). In both cases, however, the court found harmless the trial court's use of the heinousness circumstance.

In 1993, the court accepted James' argument that the unconstitutional instruction on the circumstance required resentencing:

In closing argument the state attorney argued forcefully that the murder was heinous, atrocious, or cruel. On appeal, on the other hand, we held that the

reliance on *James v. State*, is misplaced because in that case it was determined that the facts did not support a finding of heinous, atrocious, or cruel."⁹⁷

H. *Coldness*⁹⁸

As in the past,⁹⁹ the coldness circumstance was the most frequently misapplied during the survey period.¹⁰⁰

facts did not support finding that aggravator. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given. Therefore, we reverse the trial court's order as to the last issue regarding the constitutionality of the instruction on the heinous, atrocious, or cruel aggravator. The trial court is directed to empanel a new jury, to hold a new sentencing proceeding, and to resentence James.

James, 615 So. 2d at 669 (citation omitted).

97. *Breedlove*, 655 So. 2d at 77 n.4.

98. An aggravating circumstance exists where "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. § 921.141(5)(i). For the early history of this circumstance, see Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STETSON L. REV. 47 (1987).

99. See Gary Caldwell, *Capital Crimes (1993 Survey of Florida Law)*, 18 NOVA L. REV. 117, 128 (1993).

100. The court approved use of the circumstance in twelve direct appeals. See *Hunter v. State*, 660 So. 2d 244 (Fla. 1995), *cert. denied*, 116 S. Ct. 946 (1996); *Gamble v. State*, 659 So. 2d 242 (Fla. 1995), *cert. denied*, 116 S. Ct. 933 (1996); *Windom v. State*, 656 So. 2d 432 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995); *Lockhart v. State*, 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995); *Foster v. State*, 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995); *Thompson v. State*, 648 So. 2d 692 (Fla. 1994); *Fennie v. State*, 648 So. 2d 95 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995); *Wuornos v. State*, 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995); *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995); *Suggs v. State*, 644 So. 2d 64 (Fla. 1994), *cert. denied*, 115 S. Ct. 1794 (1995); *Walls v. State*, 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995); *Griffin v. State*, 639 So. 2d 966 (Fla. 1994), *cert. denied*, 115 S. Ct. 1317 (1995). The court disapproved use of the circumstance in six appeals. See *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995); *Thompson v. State*, 647 So. 2d 824 (Fla. 1994); *Spencer v. State*, 645 So. 2d 377 (Fla. 1994); *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588 (1995); *Castro v. State*, 644 So. 2d 987 (Fla. 1994); *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994), *cert. denied*, 115 S. Ct. 1983 (1995). In several other cases, the court reversed convictions or sentences without approving or disapproving the trial court's use of the circumstance.

In *Jackson v. State*,¹⁰¹ the court summarized the requirements of the circumstance: 1) the killing was the product of cool and calm reflection rather than of emotional frenzy, panic, or a fit of rage; 2) there was a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant had a "heightened" level of premeditation over and above what is required for unaggravated first-degree murder; and 4) there must be no "pretense of moral or legal justification," meaning a colorable claim of some excuse, justification, or incomplete defense to the murder.¹⁰²

It is easiest to apply the circumstance where the defendant has previously announced his intention to commit murder. Thus, there could be no dispute about its use in *Fennie* where the defendant, after forcing a woman into the trunk of a car, drove around telling others he was going to kill the woman.¹⁰³

At the other extreme, as noted in *Jackson*, are cases where the defendant acts out a state of profound mental agitation which belies any claim of cold-bloodedness.¹⁰⁴ Thus, the court disapproved the circumstance in *Spencer v. State*,¹⁰⁵ where, although there was "evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator."¹⁰⁶ As may be recalled, the trial

101. 648 So. 2d 85 (Fla. 1994).

102. *Id.* at 89. The most acceptable "pretense of moral or legal justification" is that the defendant, while committing a violent felony, killed the victim in order to defend himself. *Banda v. State*, 536 So. 2d 221, 224-25 (Fla. 1988), *cert. denied*, 489 U.S. 1087 (1989). Some pretenses of justification rejected by the court are: defendant poisoned neighbor to get her family to move, *Trepal v. State*, 621 So. 2d 1361 (Fla. 1993), *cert. denied*, 114 S. Ct. 892 (1994); defendant was retarded, *Hall v. State*, 614 So. 2d 473 (Fla.), *cert. denied*, 114 S. Ct. 109 (1993); defendant murdered daughter as way of getting back at wife, *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991); considering himself protector of the black community, defendant murdered Iranian shopkeeper's brother, *Gunsby v. State*, 574 So. 2d 1085 (Fla.) (indicating through dicta that attempting to rid neighborhood of drug dealers might be reasonable pretense), *cert. denied*, 502 U.S. 843 (1991).

103. *See also* *Griffin v. State*, 639 So. 2d 966 (1994), *cert. denied*, 115 S. Ct. 1317 (1995) (before shootout with police, defendant said he was not going back to jail).

104. *Jackson*, 648 So. 2d at 89.

105. 645 So. 2d 377 (Fla. 1994).

106. *Id.* at 384. In fact, there was substantial evidence of premeditation—Spencer repeatedly said that he was going to kill his wife in the weeks leading up to the murder. *Id.* at 379; *see also* *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995). A half hour after being evicted from a bus, Joseph Besaraba confronted the driver at a bus terminal, shooting him and a passenger dead and then shooting a man while stealing a getaway car. The court struck the circumstance because "the random nature of Besaraba's acts during the crimes belies a careful plan" and the trial court found "strong mental health mitigating circumstances

court had rejected un rebutted expert opinion testimony respecting statutory mental mitigating circumstances.¹⁰⁷

In between, there are many cases in which the exact events of the fatal episode and the defendant's state of mind are in dispute. In some cases, the court defers to the trial court's resolution of uncertainties in the evidence, but in others it applies a rule that the state must conclusively rebut hypotheses contrary to the circumstance's application.

The court took the first approach in one of Aileen Wuornos' cases.¹⁰⁸ In a thorough discussion of each of the four elements of the circumstance, the court noted that the defense evidence, if believed, would rebut each element.¹⁰⁹ Nevertheless, the court approved the finding of the circumstance, writing that the jury and trial judge could accept the State's theory of the case and reject the defendant's "testimony as self-serving, unbelievable in light of Wuornos' constantly changing confessions, contrary to the facts that could be inferred from the similar crimes evidence, or contrary to other facts adduced at trial."¹¹⁰

The court took the opposite approach in the case of Derek Todd Thompson.¹¹¹ The trial court had determined that Thompson's murder of a store clerk during a robbery was cold, calculated, and premeditated.¹¹² The supreme court reversed, noting that while a witness saw Thompson enter the shop and talk with the clerk, she was looking away when she heard the gun fire:

No one saw the actual shooting A number of scenarios inconsistent with heightened premeditation are possible: The victim may have struggled with Thompson; the victim may have tried to duck and hide from Thompson; or the victim may have tried to escape. The record simply does not show what happened in the brief time span when the witness looked away.¹¹³

that weigh against the formulating of a careful plan to kill" the bus driver. *Id.* at 445. "Although the record may reflect a suspicion that [a careful plan to kill] existed," the court determined that "it is plausible that Besaraba acted impulsively." *Id.* at 446. *But see* Thompson v. State, 648 So.2d 692 (Fla. 1994) (upholding circumstance notwithstanding that trial court found in mitigation that retarded defendant had chronic mental illness and acted under "moderate" disturbance at time of murder), *cert. denied*, 115 S. Ct. 2283 (1995).

107. *Spencer*, 645 So. 2d at 380.

108. *Wuornos v. State*, 644 So. 2d 1000 (Fla.), *cert. denied*, 115 S. Ct. 1705 (1995).

109. *Id.* at 1008.

110. *Id.*

111. *Thompson v. State*, 647 So. 2d 824 (Fla. 1994).

112. *Id.* at 826.

113. *Id.*

As already noted, the court took a similar approach in *Besaraba* (“it is plausible that Besaraba acted impulsively”).¹¹⁴

Sometimes there does not seem to be any principled reason for the court’s ruling on the circumstance. One would be hard pressed to explain why one of the two following horrible sets of facts is more “cold-blooded” than the other:

The evidence shows that the victims were subjected to at least twenty minutes of abuse prior to their deaths. Wyatt pistol-whipped William Edwards when the safe did not contain enough money for his satisfaction. Wyatt also undressed Frances Edwards completely and raped her a short distance from where the other two employees were being held. Wyatt then killed his victims in front of each other. William Edwards begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh’s ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.¹¹⁵

Walls indicated that he deliberately woke up the two victims by knocking over a fan after entering the house to commit a burglary. Then he forced Alger to lie on the floor and made Peterson tie him up so that his hands were “behind the back, ankles shackled.” He next forced Peterson to lie on the floor so he could tie her up in the same manner.

Walls stated that Alger later got loose from his bindings and attacked Walls. During the fight, Walls tackled Alger, forced him to the floor, and “caught [Alger] across the throat with the knife.” Alger continued struggling with Walls and succeeded in biting him on the leg. At this point, Walls apparently dropped his knife. Walls then pulled out his gun and shot Alger several times in the head.

Walls returned to Peterson. He found her “laying in there crying and everything, asked—asked me some questions.” Walls said he could not understand what she was saying, so he removed her gag. She asked if Alger was all right. Walls said:

114. *Besaraba*, 656 So. 2d at 446.

115. *Wyatt v. State*, 641 So. 2d 1336, 1340-41 (1994), *cert. denied*, 115 S. Ct. 1983 (1995).

I told her no. I told her what was going on, and I said, "I came in here, and I didn't want to hurt none of y'all. I didn't want to hurt you, but he attacked my ass, and things just happened."

Walls then untied Peterson, and "started wrestling around with her." During this second struggle, he ripped off Peterson's clothing. Walls' confession stated:

[Peterson] was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses.

. . . .
I—all I know is just—all I know I just went out, and I just pulled the trigger a couple of times right there behind her head.

. . . .
I mean close range, I mean shit, it's got powder burns (unintelligible) and everything.

Walls stated that after the first shot, Peterson was "doing all kinds of screaming." He then forced her face into a pillow and shot her a second time in the head.¹¹⁶

The court struck the circumstance in *Wyatt*¹¹⁷ but approved it in *Walls*.¹¹⁸

IV. MITIGATION

A. *Right to Present Mitigation*

In *Guzman v. State*,¹¹⁹ the court went out of its way to emphasize in dicta the right of the defense to present evidence of mitigation: "trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life."¹²⁰

116. *Walls v. State*, 641 So. 2d at 381, 384-85 (1994), cert. denied, 115 S. Ct. 943 (1995).

117. *Wyatt*, 641 So. 2d at 1341.

118. *Walls*, 641 So. 2d at 389.

119. 644 So. 2d 996 (Fla. 1994).

120. *Id.* at 1000.

B. *Disparate Treatment of Others*

The court ruled in several cases on arguments that a co-defendant's life sentence constitutes a mitigating circumstance. In *Barrett v. State*,¹²¹ a quadruple homicide case, the court held that the jury could have rationally based its life verdicts on the life sentences received by one of John C. Barrett's co-defendants.¹²² The court also wrote that:

[t]he jury could have reasonably concluded that Barrett was not the person who actually committed the murders, and that Burnside had committed the murders with the help of someone other than Barrett. Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment.¹²³

In *Heath v. State*,¹²⁴ on the other hand, the supreme court affirmed the trial court's conclusion that the co-defendant's life sentence did not outweigh the aggravating circumstances¹²⁵ since, according to the co-defendant's testimony, the defendant was the dominating force in the murder.¹²⁶

In *Gamble v. State*,¹²⁷ the court was presented with a procedural twist on this issue. Guy R. Gamble and Michael Love carefully planned and carried out the murder of their landlord. After a jury convicted Gamble and recommended that he be sentenced to death, Love entered a guilty plea and was sentenced to life imprisonment. Rejecting Gamble's argument that Love's sentence could have provided a basis for a life recommendation from the jury, the supreme court wrote:

The trial court found two aggravating factors (cold, calculated, and premeditated and pecuniary gain), one statutory mitigating factor (age), and several non-statutory mitigating factors, most of which were given little weight. One of the non-statutory mitigating factors given "some" weight was Love's sentence of life. Gamble asserts that his jury would have also recommended a life sentence if it had been informed of Love's sentence. Gamble proffers that this factor singlehandedly

121. 649 So. 2d 219 (Fla. 1994).

122. *Id.* at 223.

123. *Id.* (citing *Cooper v. State*, 581 So. 2d 49, 51 (Fla. 1991)).

124. 648 So. 2d 660 (Fla. 1994), *cert. denied*, 115 S. Ct. 2618 (1995).

125. Prior conviction of a violent felony (second-degree murder) and commission of murder during course of violent felony. *Id.* at 663.

126. *Id.* at 665-66.

127. 659 So. 2d 242 (Fla. 1995), *cert. denied*, 116 S. Ct. 933 (1996).

requires a sentence reduction. We disagree. Love's sentence was based on a guilty plea entered after Gamble's penalty phase proceedings. Clearly the *Gamble* trial judge was not required to postpone Gamble's sentencing and await Love's plea and sentence. We refuse to speculate as to what may have occurred had the *Gamble* jury been made aware of the posture of Love's case. We find no error relative to the issue.¹²⁸

C. Consecutive Life Sentences

The supreme court seems to have two rules respecting the mitigating effect of consecutive life sentences.¹²⁹ In *Nixon v. State*,¹³⁰ Joe Elton Nixon was convicted of first-degree murder and several noncapital offenses for which he could receive life sentences. The trial court refused his request for a penalty phase jury instruction on the penalties for the noncapital offenses.¹³¹ On appeal, the supreme court rejected his argument that the refusal prevented the jury from considering in mitigation, the fact that life sentences on the other offenses would prevent his ever being released from prison.¹³² "The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime."¹³³

In *Jones v. State*,¹³⁴ on the other hand, the court ruled that the trial court erred in refusing to let Randall Scott Jones argue in mitigation that, since he was convicted of two first-degree murders, consecutive life sentences would prevent him from ever being released from prison.¹³⁵ The court stated,

[c]ounsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consider-

128. *Id.* at 245. Compare *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992) (co-defendant's subsequent life sentence could form basis for reduction of sentence to life imprisonment in postconviction proceedings).

129. The theory of mitigation is that consecutive sentences will ensure that the defendant will not be released into society.

130. 572 So. 2d 1336 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991).

131. *Id.* at 1344-45.

132. *Id.* at 1345.

133. *Id.*

134. 569 So. 2d 1234 (Fla. 1990).

135. *Id.* at 1239-40.

ation of “the circumstances of the offense” which the jury may not be prevented from considering.¹³⁶

During the survey period the court ruled, consistently with *Jones*, that a jury can reasonably base a life sentence on the fact that consecutive life sentences will assure that the defendant will never be released in prison. In the double homicide case of *Turner v. State*,¹³⁷ the court found that the trial court had failed to consider the mitigating effect of consecutive life sentences for the two murders in overriding a jury life recommendation.¹³⁸ The court specifically wrote that among the “ample mitigation” supporting the life verdict was the fact that “the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole.”¹³⁹

D. *Statutory Versus “Nonstatutory” Mitigation*

Under *Hitchcock v. Dugger*,¹⁴⁰ mitigation may not be limited to the “statutory circumstances” listed in section 921.141 of the *Florida Statutes*.¹⁴¹ Nevertheless, the supreme court sometimes considers statutory circumstances somehow more important than nonstatutory circumstances. For instance, in *Foster v. State*,¹⁴² a case in which the trial court found fourteen nonstatutory mitigating circumstances, the supreme court found the use of an unconstitutional jury instruction on the coldness circumstance harmless, and wrote:

In view of the fact that the trial court found no statutory mitigators and three strong aggravators, we also find, beyond a reasonable doubt, that the invalid CCP instruction did not affect the jury’s consideration and

136. *Id.* at 1239-40. In *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), the Supreme Court held that, where the state had put in issue the future dangerousness of the defendant, the trial court violated due process in preventing the defense from informing the jury that the defendant would not be eligible for parole. *Id.* at 2193. The Court declined to decide whether a defendant’s ineligibility for parole is a mitigating circumstance for purposes of the eighth amendment requirement that the sentencer consider all mitigating evidence. *Id.* at 2196-97.

137. 645 So. 2d 444 (Fla. 1994).

138. *Id.* at 448.

139. *Id.*

140. 481 U.S. 393 (1987).

141. *Id.* at 398-99.

142. 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995).

that its recommendation would have been the same if the requested expanded instruction had been given.¹⁴³

E. *Waiver of Mitigation*

A growing number of cases have involved defendants who prevent presentation of mitigation or even demand to be executed. *Koon v. Dugger*¹⁴⁴ established the circumstances in which the trial court should allow defense counsel to waive presentation of mitigation:

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.¹⁴⁵

As may be expected, such cases may involve murders arising from tormented domestic relationships and those committed by mentally disturbed persons. Typical is *Layman v. State*.¹⁴⁶ The evidence showed that Gregory Scott Layman ambushed his estranged girlfriend, Sharon DePaula, shooting her twice with a sawed-off shotgun. He confessed to the crime and said he wanted to die for it. At the penalty proceeding, when the State announced that it was not seeking death, Mr. Layman objected, insisting that he be sentenced to death. After the State presented no evidence in aggravation, "Layman, representing himself, then addressed the jury and said that he wanted to die for several reasons: He had a history of committing violence against Sharon; the murder was cold, calculated and premeditated; and he still loved Sharon deeply and wanted to be with her in the after-life."¹⁴⁷ The jury rendered a death verdict, which the trial court fol-

143. *Id.* at 115 (emphasis added).

144. 619 So. 2d 246 (Fla. 1993).

145. *Id.* at 250.

146. 652 So. 2d 373 (Fla. 1995).

147. *Id.* at 374.

lowed.¹⁴⁸ However, the supreme court reversed the sentence because of defects in the rendition of the sentencing order.¹⁴⁹

The court affirmed death sentences in the following cases which involved various waivers of mitigation. *Farr v. State*,¹⁵⁰ discussed at length the issue of waiver of mitigation. The case was before the court after a remand for resentencing.¹⁵¹ At resentencing, "Farr forbade his attorney to present a case for mitigation on remand and . . . himself took the witness stand and systematically refuted, belied, or disclaimed virtually the entire case for mitigation that existed in the earlier appeal."¹⁵² The court determined that under these circumstances, the trial court did not err in rejecting the case for mitigation.¹⁵³

After some discussion, the court wrote:

It deserves emphasis, however, that the ability of a capital defendant to restrict counsel's argument is not without limit. It is true that the right to counsel embodies a right of self-determination in the face of specific criminal charges. At the trial level, this certainly means that "defendants have a right to control their own destinies" when facing the death penalty. Nevertheless, there are countervailing interests that must be honored.

In *Klokoc*, for example, we addressed the problem that can arise when a death-sentenced defendant attempts to restrict the argument of appellate counsel in this Court. The Florida Constitution imposes upon the Court an absolute obligation of determining whether death is a

148. *Id.*

149. *Id.* at 375-76.

150. 656 So. 2d 448 (Fla. 1995).

151. *See Farr*, 621 So. 2d 1368 (Fla. 1993). The 1993 opinion shows: after injuring two women by gunshot during a kidnap attempt outside a bar, Victor Marcus Farr commandeered a car with a man and woman inside. The man escaped, and the defendant drove the car into a tree in an attempt to kill himself and the woman. He lived, she died. He plead guilty, waived the sentencing jury, and asked for a death sentence. The supreme court found the defendant's waiver of mitigation valid, but nevertheless ordered resentencing because the trial court had erred by failing to consider mitigation contained in psychiatric and presentence investigation (PSI) reports, writing:

We repeatedly have stated that mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Id. at 1369 (citations omitted).

152. *Farr*, 656 So. 2d at 449.

153. *Id.* at 450.

proportionate penalty. For that reason, appeals from death penalties are both automatic and mandatory, and cannot be rendered illusory for any reason. Thus, the *Klokoc* Court held that appellate counsel must proceed with a proper adversarial argument notwithstanding the defendant's instruction to dismiss the appeal or to acquiesce to the death penalty.

We acknowledge that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionately. While there are no simple solutions, we do strongly believe that trial courts would be wise to order presentence investigations in at least those cases in which the defendant essentially is not challenging imposition of the death penalty. Nevertheless, the failure to order one cannot be considered error in light of a defendant's refusal to seriously challenge death as a penalty.¹⁵⁴

In a special concurrence joined by Justices Shaw and Kogan, Justice Anstead wrote that he would "adopt a uniform rule that requires a presentence investigation and report in all capital cases. Our failure to adopt such a requirement is tantamount to inviting arbitrary decision-making at both the trial and appellate levels in a significant number of cases."¹⁵⁵ Justice Kogan (joined by Justice Anstead) dissented in part, writing:

Our analysis of these cases is at best criticizable. There could be a variety of solutions, but all are problematic. One would be to recede from *Klokoc*, which would result in appeals such as Mr. Farr's becoming perfunctory affirmances. This clearly would increase the proportionality problem but would more fully honor rule 9.140(b)(3). Another would be to adopt Justice Barkett's approach in *Hamblen*, which would increase the restriction on the defendant's right of self-determination yet would more fully satisfy the proportionality doctrine. Yet the latter approach would not fully honor rule 9.140(b)(3). Part of the problem could be eliminated simply by requiring a presentence investigation in every case in which death is imposed, including those in which a defendant does not seriously challenge imposition of the death penalty. I would so order. On this point, I dissent from the majority.

A time is coming when this Court must comprehensively address the problem of defendants who seek the death penalty, whose numbers

154. *Id.* (citations omitted).

155. *Id.* at 450-51.

are growing. We have reached the stage at which our holdings are not entirely consistent with each other or with our own rules of court. Case-by-case adjudication of a larger problem certainly has its place, but not when the result is a confounding of the overall law: a point we are rapidly reaching.

I personally would favor referring the entire matter to one of The Florida Bar's standing rules committees or to a committee or Court commission created especially to investigate this problem. This Court has inherent authority to promulgate rules of procedure, which could include a new procedural framework for dealing with defendants who favor their own executions. Our piecemeal approach to cases like Farr's has not adequately addressed all the problems at hand, and I believe the time is approaching for a comprehensive study and the development of one or more proposals for reform, with adequate input from all segments of the public and the Bar. I therefore would refer this issue to the Criminal Procedure Rules Committee of The Florida Bar for more intensive study and formulation of a recommendation to the Court.¹⁵⁶

Like *Layman, Windom v. State*,¹⁵⁷ involved a seriously disturbed defendant. Curtis Windom shot a man on a street corner, ran to his (Windom's) girlfriend's house, shot her, and later shot the girlfriend's mother while she was driving down the street. All three died. He also shot another man in the street who survived. According to the sentencing order, the survivor "said the Defendant did not look normal—his eyes were 'bugged out like he had clicked.'"¹⁵⁸ Windom waived presentation of mitigation under odd circumstances:

In this triple murder, the defendant made a knowing waiver of presenting any mitigating evidence to the advisory jury. The defendant did this in order to avoid any evidence being presented to the jury concerning the murders being related to the defendant trafficking in cocaine. The trial judge elicited a direct confirmation from the defendant that he understood that he was waiving his right to present mitigating evidence and that the reason was so that the "drug thing" would not be heard by the jury.¹⁵⁹

156. *Id.* at 452-53.

157. 656 So. 2d 432 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995).

158. *Id.* at 435.

159. *Id.* at 438-39.

*Lockhart v. State*¹⁶⁰ presented an entirely different picture. Michael Lee Lockhart, “inflicted a number of wounds described as pricking, prodding, or teasing wounds” on a fourteen-year-old girl, and then bound, stabbed, strangled, and raped her.¹⁶¹ After the judge denied defense counsel’s motion to withdraw,¹⁶² the defendant sought to discharge counsel, plead guilty, and refused to present mitigation.

The defendant in *Pittman v. State*,¹⁶³ according to the trial court’s findings in mitigation, had a hyperactive personality, may have suffered physical and sexual abuse as a child, and was an impulsive person with memory problems and impaired social judgment.¹⁶⁴ A jury convicted him of three counts of first-degree murder on evidence that he repeatedly stabbed his estranged wife’s parents and sister and burned their house. After the jury recommended death sentences for all three murders, the defense inexplicably failed to produce evidence (or argument apparently) to support override life sentences.¹⁶⁵

V. JURY INSTRUCTIONS

In *Guzman v. State*,¹⁶⁶ the court wrote in dicta:

By this opinion, we direct that trial judges fully instruct death penalty juries on all applicable jury instructions set forth in the Florida Standard Jury Instructions unless a legal justification exists to modify an instruction. If a legal need to modify an instruction exists, that need should be fully reflected in the record in accordance with Florida Rule of Criminal Procedure 3.985.¹⁶⁷

The court also followed this doctrine of adherence to the standard jury instructions in *Gamble*, rejecting arguments that

160. 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995).

161. *Id.* at 71.

162. On the motion, counsel argued “that he could not be ready when trial started because of his workload, the complexity of the case, and the travel required due to Lockhart’s out-of-state convictions.” *Id.* The out-of-state convictions included convictions for murder in Texas and Indiana. *Id.* at 71 n.2.

163. 646 So. 2d 167 (Fla. 1994), *cert. denied*, 115 S. Ct. 1982 (1995).

164. *Id.* at 170 n.2. There was also evidence that he had been a difficult child, with severe attention deficit disorder and hyperactivity, that his mother disciplined him severely, and that he was a paranoid schizophrenic and had organic personality disorder. *Id.* at 169.

165. *Pittman*, 646 So. 2d at 172.

166. 644 So. 2d 996 (Fla. 1994).

167. *Id.* at 1000.

the standard jury instructions fail to: (1) inform the jury that even if an aggravating circumstance is proven beyond a reasonable doubt, they may still recommend life imprisonment; (2) adequately define mitigating circumstances; and (3) inform the jury that it could find mental impairment even if it failed to conclude that such impairment was extreme.¹⁶⁸

In *Chaky v. State*,¹⁶⁹ there was an unusual failure by the trial court to reduce its instructions to the jury to writing and send them into the jury room for use during deliberations.¹⁷⁰ While determining that Chaky's lawyer had failed to preserve the matter for appeal, the court noted that the trial court had violated the requirement of rule 3.390(b) of the *Florida Rules of Criminal Procedure*, that jury instructions "in capital cases shall . . . be in writing."¹⁷¹ The court also noted that rule 3.400(c) gave the trial court the discretion to send a copy of the instructions into the jury room.¹⁷² With its decision in *Chaky*, the court then issued a comment seeking to promulgate a proposed rule amending rule 3.400(c), which would make the rule mandatory for instructions in all capital cases.¹⁷³

VI. THE SENTENCING ORDER

A. Campbell v. State

During the survey period, the court continued to be troubled by fallout from its decision in *Campbell v. State*.¹⁷⁴ In *Campbell* the court wrote:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the

168. *Gamble v. State*, 659 So. 2d 242, 246 (Fla. 1995).

169. 651 So. 2d 1169 (Fla. 1995).

170. *Id.* at 1169.

171. *Id.* at 1172 (quoting FLA. R. CRIM. P. 3.390(b)).

172. *Id.*

173. *Id.* The court did go on to adopt this mandatory rule. *In re Florida Rules of Criminal Procedure - Rule 3.400*, 657 So. 2d 1134 (Fla. 1995).

174. 571 So. 2d 415 (Fla. 1990).

defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.” The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.¹⁷⁵

In *Ferrell v. State*,¹⁷⁶ the court took a strong stand on strict adherence to *Campbell*:

We now find it necessary to further emphasize the requirements established in *Campbell*. The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge’s discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.¹⁷⁷

In *Green v. State*,¹⁷⁸ however, the court was less concerned about its ability to conduct a meaningful review of the death sentence: “Although the sentencing order might not comply strictly with the requirements of *Campbell*, the trial judge clearly gave careful consideration to the mitigating factors.”¹⁷⁹ Similarly, in *Lowe v. State*,¹⁸⁰ the court wrote that while it “might take issue” with the trial court’s rejection of un rebutted mitigation,

175. *Id.* at 419-20 (citations omitted) (footnotes omitted).

176. 653 So. 2d 367 (Fla. 1995).

177. *Id.* at 371; *see also* Larkins v. State, 655 So. 2d 95 (Fla. 1995); Layman v. State, 652 So. 2d 373 (Fla. 1995).

178. 641 So. 2d 391 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).

179. *Id.* at 396.

180. 650 So. 2d 969 (Fla. 1994), *cert. denied*, 116 S. Ct. 230 (1995).

it nevertheless affirmed the death sentence because “the trial judge also stated that, even if these factors were of a mitigating nature, they ‘would not outweigh the aggravating circumstances of committing a prior robbery and committing a murder during the commission of another attempted robbery.’”¹⁸¹

Justice Wells, in a dissent in *Crump v. State*,¹⁸² joined by Chief Justice Grimes, registered a vigorous disapproval of *Campbell*, writing that the court’s decision remanding for resentencing pursuant to *Campbell* was “just one more procedural impediment to finality.”¹⁸³

B. Timing

Section 921.141 of the *Florida Statutes* does not state when the trial court is to render its sentencing order, although the context makes clear that it is to do so after the penalty verdict.¹⁸⁴ The supreme court has developed two rules respecting the timing of the rendition of the sentencing order. In *Grossman v. State*,¹⁸⁵ the court ruled that the court must render the written sentencing order at the time that it pronounces the sentence.¹⁸⁶ In *Spencer v. State*,¹⁸⁷ the court decided that the court is not to render its decision until after a post penalty verdict hearing (sometimes called an “allocution hearing” or, now, a “*Spencer* hearing”) at which it has heard such additional argument and evidence as the parties may present.¹⁸⁸ While a violation of *Grossman* requires reduction of the sentence to one of life imprisonment,¹⁸⁹ a violation of *Spencer* apparently requires only resentencing.

In *Perez v. State*¹⁹⁰ and *Layman v. State*,¹⁹¹ the court followed *Grossman* and ordered that death sentences be reduced to life imprisonment.

181. *Id.* at 976; *see also* *Coney v. State*, 653 So. 2d 1009 (Fla. 1995).

182. 654 So. 2d 545 (Fla. 1995).

183. *Id.* at 549. *But see* *Bryant v. State*, 656 So.2d 426 (Fla. 1995). Justice Wells again joined by the Chief Justice, agreed in an opinion concurring in part and dissenting in part that the sentence be reversed under *Campbell*. *Id.* at 429-30. *Bryant* was decided two weeks before *Crump*.

184. FLA. STAT. § 921.141.

185. 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989).

186. *Id.* at 841.

187. 615 So. 2d 688 (Fla. 1993).

188. *Id.* at 690-91. However, *Spencer* merely formalized what had already been the practice in most if not all circuits.

189. *E.g.*, *Christopher v. State*, 583 So. 2d 642 (Fla. 1991).

190. 648 So. 2d 715, 720 (Fla. 1995).

191. 652 So. 2d 373, 376 (Fla. 1995).

In *Layman*, Justice Wells again issued a strongly worded dissent, contending, “[s]anctions such as the one imposed by these cases have too heavy a price in the public’s loss of confidence in the judicial system. I would recede from this sanction.”¹⁹²

In *Armstrong v. State*,¹⁹³ the court declined to apply *Spencer* to a sentencing which occurred before *Spencer* was decided.

VII. APPELLATE REVIEW

A. Tedder v. State

Although section 921.141 of the *Florida Statutes* lets the trial court impose a death sentence notwithstanding a life verdict,¹⁹⁴ the supreme court has ruled that it will affirm such an “override” sentence only where virtually no reasonable person could disagree with the death sentence.¹⁹⁵ In keeping with this rule, the supreme court reversed most override death sentences that came before it during the survey period.¹⁹⁶

The court’s method of appellate review in override cases differs substantially from its review in death verdict cases. In the latter, the court usually defers to the trial court’s decisions of minimizing or disregarding mitigation.¹⁹⁷ But in override cases, it usually acts on the assumption that the jury has accepted all mitigation presented to it and has given it sufficient weight to outweigh the state’s case for death.¹⁹⁸ As shown in the preceding footnote, the court will reverse override sentences even in horrendous

192. *Id.* at 377 (Wells, J., concurring in part and dissenting in part).

193. 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

194. FLA. STAT. § 921.141.

195. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

196. The court reduced override sentences in five cases pursuant to *Tedder*. See *Barrett v. State*, 649 So. 2d 219 (Fla. 1994) (quadruple homicide); *Caruso v. State*, 645 So. 2d 389 (Fla. 1994) (double homicide); *Turner v. State*, 645 So. 2d 444 (Fla. 1994) (double homicide); *Parker v. State*, 643 So. 2d 1032 (Fla. 1994) (triple homicide); *Esty v. State*, 642 So. 2d 1074 (Fla. 1994), *cert. denied*, 115 S. Ct. 1380 (1995). In *Perez*, also an override case, the court reduced the sentence under *Grossman* without reaching the *Tedder* issue. *Perez*, 648 So. 2d at 720. The court has also affirmed override sentences in two cases: *Washington v. State*, 653 So. 2d 362 (Fla. 1994), *cert. denied*, 116 S. Ct. 387 (1995); *Garcia v. State*, 644 So. 2d 59 (Fla. 1994) (affirming one override death sentence and one death sentence following death recommendation), *cert. denied*, 115 S. Ct. 1799 (1995).

197. *E.g.*, *Lowe v. State*, 650 So. 2d 969, 976-77 (Fla. 1994); *Green v. State*, 641 So. 2d 391, 395-96 (Fla. 1994).

198. *E.g.*, *Barrett*, 649 So. 2d at 223.

cases involving multiple homicides.¹⁹⁹ Thus, the penalty verdict continues to be of paramount importance to the ultimate disposition of the case.

B. Clemons v. Mississippi and Espinosa v. Florida

Where the sentencer has employed an improper aggravating circumstance, the state appellate court must reverse a resulting death sentence unless it either determines that the circumstance did not contribute to the sentence, or it independently reweighs the remaining circumstances against the mitigating circumstances and finds that the death sentence is still appropriate.²⁰⁰ Since Florida shares sentencing responsibility between the jury and judge, the state supreme court must look to the effect of a sentencing error on both actors.²⁰¹ *Espinosa* disapproved the Florida court's practice of considering only the effect of an error on the judge's sentencing decision.²⁰² Although the court has in the past repeatedly asserted that it will not reweigh sentencing circumstances,²⁰³ it seems to have done so during the survey period.

In *Hill v. State*,²⁰⁴ a federal district court partially granted the writ of habeas corpus after finding that, in affirming Clarence Edward Hill's death sentence after striking an aggravating circumstance, the state supreme court

199. See cases cited *supra* note 196.

200. *Stringer v. Black*, 503 U.S. 222 (1992); *Parker v. Dugger*, 498 U.S. 308 (1991); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

201. *Espinosa v. Florida*, 505 U.S. 1079 (1992).

202. *Id.* at 1082.

203. "[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." *Parker*, 498 U.S. at 319. The state court has held that it complies with *Clemons* by the second alternative, harmless error analysis. *White v. Dugger*, 565 So. 2d 700, 702 (Fla. 1990); *Preston v. State*, 564 So. 2d 120, 123 (Fla. 1990). The court sees itself as "a reviewing court, not a fact-finding court," so that it defers to the findings of the trial court. *Lucas v. State*, 568 So. 2d 18, 23 (Fla. 1990).

The court's strong stance against reweighing arises from the extraordinary case of *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000 (1981) which involved the "alleged impropriety" of the supreme court's practice in capital cases of reviewing secret Department of Corrections documents not available to counsel and not contained in the appellate record. *Id.* at 1328. Some 122 death row inmates joined Joseph Green Brown in protesting this practice. Without denying that it had such an ongoing practice, the court ruled that, since it is a reviewing rather than a sentencing court, it could not engage in "weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." *Id.* at 1331. Hence, it wrote that its review of matters *dehors* the record could not affect its appellate review of the death sentence. *Id.* at 1332.

204. 643 So. 2d 1071 (Fla. 1994), *cert. denied*, 116 S. Ct. 196 (1995).

had violated *Parker v. Dugger*²⁰⁵ and may have also violated *Clemons* in failing to consider uncontroverted mitigating evidence.²⁰⁶ Permitting Hill to reopen his appeal for the limited purpose of addressing the issues raised in the federal court decision, the supreme court again affirmed the death sentence, writing:

four of the five aggravating circumstances found by the trial judge remain valid. Even when we consider the statutory mitigating circumstance of Hill's age of twenty-three at the time the murder was committed and the uncontroverted evidence of non-statutory mitigating circumstances presented by Hill at sentencing regarding his background, we must conclude that the trial judge's error in finding that the murder was cold, calculated, and premeditated, was harmless beyond a reasonable doubt. In aggravation, the evidence reflects that Hill, during the course of a robbery, killed a police officer so that he and his accomplice could escape prosecution. Moreover, Hill had previously been convicted of robbery with a firearm, and, in this case, he knowingly created a great risk of death to many persons by firing a number of shots in a populated area. We again hold that death is the appropriate sentence in this case because no reasonable possibility exists that the evidence presented in mitigation, such as Hill's age, his good work history, and his helpful and nonviolent nature, is sufficient to outweigh the four valid aggravating circumstances.²⁰⁷

Similarly, in *Castro v. State*,²⁰⁸ after striking the coldness circumstance, the court affirmed the death sentence writing that there remained three valid aggravating circumstances and only a "weak case for mitigation."²⁰⁹

The court also seemed to engage in reweighing in *Wuornos v. State*,²¹⁰ writing that the trial court's failure to find and weigh nonstatutory circumstances was harmless "because their weight is slight when compared with the case for aggravation."²¹¹

205. *See supra* note 200.

206. *Hill*, 643 So. 2d at 1072-73.

207. *Id.* at 1074 (footnotes omitted).

208. 644 So. 2d 987 (Fla. 1994).

209. *Id.* at 991.

210. 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995).

211. *Id.* at 1011.

C. Retroactivity

The riddle of retroactivity continued to bedevil the court during the survey period. In *Smith v. State*,²¹² the court seemed to settle the matter by writing that all of its decisions would apply retroactively to cases pending on direct appeal. Thereafter, however, the court refused to follow *Smith* and apply to pending cases its ruling²¹³ that trial courts may not instruct juries on flight as being indicative of the defendant's guilt.²¹⁴ In *Wuornos v. State*,²¹⁵ the court refused to follow its decision in *Castro v. State*,²¹⁶ in which it had held that the court must instruct the jury not to give double consideration to aggravating circumstances based on the same aspect of the offense,²¹⁷ and wrote: "We read *Smith* to mean that new points of law established by this Court shall be deemed retrospective with respect to all nonfinal cases unless this Court says otherwise."²¹⁸

But in *Kearse v. State*,²¹⁹ the court retroactively applied *Castro*. The court wrote that the trial court committed several errors in instructing the penalty jury, including the refusal to give an anti-doubling instruction.²²⁰ The court also retroactively applied its holding in *Jackson*, that the then-standard instruction on the coldness circumstance was unconstitutional.²²¹ It wrote that, in a case involving a pre-*Jackson* penalty phase, it "cannot fault" the trial court for giving the standard instruction, but then held that use of the standard instruction was harmful error.²²²

In *Foster v. State*,²²³ the court retroactively applied *Jackson* to a sentencing hearing that had occurred prior to an earlier remand for entry of a new sentencing order, writing that the death sentence was not yet final.²²⁴

212. 598 So. 2d 1063 (Fla. 1992).

213. *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992).

214. *E.g.*, *Taylor v. State*, 630 So. 2d 1038 (Fla. 1993) (refusing to apply *Fenelon* to case pending on appeal), *cert. denied*, 115 S. Ct. 107 (1994).

215. 644 So. 2d 1000, 1007 (Fla. 1994), *cert. denied*, 115 S. Ct. 107 (1994).

216. 597 So. 2d 259 (Fla. 1992).

217. *Id.* at 261.

218. *Wuornos*, 644 So. 2d at 1007-08 n.4

219. 662 So. 2d 677 (Fla. 1995).

220. *Id.* at 685.

221. *Id.* at 686 (citing *Jackson*, 648 So. 2d at 901).

222. *Id.*

223. 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995).

224. *Id.* at 115.

D. *The Appellate Record*

Lockhart v. State,²²⁵ and one of Aileen Wuornos' cases²²⁶ addressed questions regarding a court's power to look beyond the record before it. After Michael Lee Lockhart, as noted below, waived mitigation in the trial court, the judge sought to find mitigation by reading newspaper articles based on interviews of the defendant. The supreme court disapproved of this approach.²²⁷

In *Wuornos*, after entering a plea of *nolo contendere* to three murder charges, Wuornos presented at sentencing some limited hearsay evidence in mitigation.²²⁸ On appeal, the supreme court rejected her request that the court take judicial notice of the case in mitigation in her other case:

The entire reason for having a trial in a court of record is so that the appellate courts of Florida may review questions of law based on a true transcript of what occurred. While judicial notice of other proceedings certainly is permissible in some instances, it is not proper when the party in effect is asking that we use a wholly separate proceeding to establish a mitigating factor that was not asserted at any time in the proceedings below.²²⁹

E. *Proportionality*

Under *Songer*,²³⁰ the court will reduce a death sentence to one of life imprisonment where there is only one aggravating circumstance to weigh against substantial mitigation.²³¹ During the survey period, the court followed *Songer* in reducing death sentences in the following three cases.

In the case of Derek Todd Thompson,²³² the court struck three of the four aggravating circumstances supporting a death sentence for the murder

225. 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995).

226. *Wuornos v. State*, 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).

227. *Lockhart*, 655 So. 2d at 74.

228. *Wuornos*, 644 So. 2d at 1015.

229. *Id.* at 1019. The court has in the past looked outside the record in cases in which, like, *Gamble*, a co-defendant has received a life sentence after the appellant's sentencing. *Gamble*, 659 So. 2d at 245. In *Witt v. State* the court wrote that it could not "judicially ignore" the subsequent life sentence of a co-defendant. 342 So. 2d 497, 500 (Fla.), *cert. denied*, 434 U.S. 935 (1977); *see also* *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992).

230. *Songer v. State*, 544 So. 2d 1010 (Fla. 1989).

231. *Id.* at 1011-12.

232. *Thompson v. State*, 647 So. 2d 824 (Fla. 1994).

of a restaurant employee during a robbery.²³³ This left only the felony murder circumstance to weigh against the mitigating factors that the defendant was a good parent and provider, had no violent propensities before the murder, had been honorably discharged from the Navy, had been regularly employed, was raised in the church, possessed rudimentary artistic skills, and was a good prisoner.²³⁴

In *Chaky v. State*,²³⁵ the court found the prior violent felony circumstance²³⁶ insufficient to outweigh mitigating evidence respecting Kenneth Chaky's exemplary work, military,²³⁷ family record, remorse, and potential for rehabilitation and good prison record.²³⁸ Although the case involved a murder arising from a troubled family relationship, the court did not discuss its line of cases stating death is a disproportionate penalty for such murders.²³⁹

*Besaraba v. State*²⁴⁰ applied *Songer* to a double homicide. As already noted, the court struck the coldness circumstance, leaving only the prior violent felony circumstance.²⁴¹ The court found this insufficient to outweigh mitigation that Joseph Besaraba had no significant prior criminal history, committed the murder under the influence of a great disturbance, had a history of substance abuse and physical and emotional problems, was of good character and had a record of reliable employment, conducted himself well while incarcerated, and had suffered an unstable and deprived childhood.²⁴²

233. *Id.* at 827.

234. *Id.* at 826 n.2. The jury voted nine to three for a death sentence. *Id.* at 825-26.

235. 651 So. 2d 1169 (Fla. 1995).

236. The defendant had been convicted for attempted murder while serving in the military in Vietnam. *Id.* at 1171.

237. Notwithstanding the attempted murder conviction, Chaky "was restored to active duty and eventually was honorably discharged." *Id.*

238. *Id.* at 1173.

239. See *Blakely v. State*, 561 So. 2d 560 (1990), *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988), *Ross v. State*, 474 So. 2d 1170 (Fla. 1985).

240. 656 So. 2d 441 (Fla. 1995).

241. As to each murder, the other contemporaneous murder constituted a "prior" felony conviction for sentencing purposes. *Id.* at 443 n.4.

242. *Id.* at 446-47. Much of his childhood was spent in Nazi concentration camps and post-war refugee camps. *Id.* at 446.

F. *Revisiting Issues*

*Foster v. State*²⁴³ presents an unusual case of the court revisiting an issue on an appeal after remand. On a previous appeal, the court rejected a constitutional challenge to the standard jury instruction on the coldness circumstance,²⁴⁴ but remanded for the trial court to enter a new sentencing order²⁴⁵ expressly evaluating mitigation under *Campbell v. State*²⁴⁶ and *Rogers v. State*.²⁴⁷ On the appeal after the remand, the court let the appellant re-litigate the jury instruction issue because the sentence was “not yet final.”²⁴⁸

VIII. CONCLUSION

The supreme court’s decisions broke little new ground during the survey period. Nevertheless, the adoption of rule 3.202 (as discussed in the first section of this article) governing state mental examination of capital defendants²⁴⁹ promises substantial litigation in years ahead.

243. 654 So. 2d 112 (Fla. 1995).

244. *Foster v. State*, 614 So. 2d 455, 462 (Fla. 1992).

245. *Id.* at 465.

246. 571 So. 2d 415 (1990) (holding abusive and deprived childhood should be considered in mitigation).

247. 511 So. 2d 526 (Fla. 1987) (ruling that evidence presented by the State during the penalty phase should be limited to those matters provided by statute), *cert. denied*, 484 U.S. 1020 (1988).

248. *Foster*, 654 So.2d at 115 n.6.

249. Rehearing was still pending as of April 10, 1996.

Limited Liability in Registered Limited Liability Partnerships: How Does the Florida RLLP Measure Up?

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I. GENERAL, LIMITED, AND LIMITED LIABILITY PARTNERSHIPS

A “registered limited liability partnership (“RLLP”),” also known as a “limited liability partnership”¹ or LLP, represents the most recent item on the roster of possible partnership structures in Florida.² Before passage of the Florida Registered Limited Liability Partnership Act in June 1995, persons desiring to do business in the state as a partnership had only two choices: the general partnership and the limited partnership.³

In a general partnership all partners have joint and several, unlimited personal liability for their own acts, for those of the other partners and of the employees acting within the scope of their employment, and for the debts of the partnership. In a limited partnership, which consists of two classes of partners, limited and general, only the limited partners enjoy some protection from liability. The general partners in a limited partnership are personally liable for all the debts of the partnership, of the partners, and of the employees. In contrast, the limited partners are only liable for the amount contributed to the business, unless they participate in the management, or take control, of the business.⁴ In short, a general partnership provides no protection for the partners’ assets. A limited partnership leaves the general partner fully exposed and provides limited liability for the limited partner at the cost of lack of control of the business.

Mirroring the limited liability provisions of other states that have enacted similar legislation, the Florida RLLP Act allows general and limited partnerships to limit the exposure of their partners to liability for their own negligent acts and those of the persons whom they supervise and shields them from liability for the acts of their partners.⁵ The Florida RLLP fits

1. The two terms are generally considered interchangeable. Martin I. Lubaroff, *Registered Limited Liability Partnerships—the Next Wave*, INSIGHTS, May 1994, at 23, 23 n.1.

2. FLA. STAT. §§ 620.78-.789 (1995) (creating a “registered limited liability partnership”).

3. FLA. STAT. ch. 620 (1993).

4. Florida’s partnership laws provide “safe harbors” for limited partners, allowing them to control the business to the extent specified in the statute without forfeiting their limited liability. FLA. STAT. § 620.129(2) (1995).

5. *See* discussion *infra* part II.B.2.

into the parameters of the LLP structure as defined in prior legislation and contains many of the same advantages and disadvantages.

II. DEFINING AN LLP

As a new twist on partnership law, the LLP structure has sparked the interest of legislators and gained recognition in a majority of states since 1991, the year that Texas passed the first LLP legislation.⁶ Its popularity stems from the statutory protection it provides to partners. In an LLP, partners are shielded from vicarious liability for the negligence and malpractice of other partners.

A. Hybrid Liability

By definition, an LLP is a general partnership for all purposes except as modified by statute.⁷ Because it falls within the framework of a partnership, and is not a distinct legal entity,⁸ an LLP is subject to all the laws governing general partnerships in each state, except for the liability provisions which in most cases have replaced the joint or joint and several liability provisions of the partnership statutes.⁹ Of the thirty-nine legisla-

6. See, e.g., Lubaroff, *supra* note 1, at 23 & n.2; see also TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(a) (West Supp. 1995); *infra* note 10 (listing the 39 states that enacted LLP statutes by Jan. 1996).

7. Lubaroff, *supra* note 1, at 23; see also Robert R. Keatinge et al., *Limited Liability Companies and Limited Liability Partnerships: Operations and Drafting After Rev. Proc. 95-10*, Q236 A.L.I.-A.B.A. 1, 9 (Mar. 16, 1995) (defining an LLP).

A registered limited liability partnership (LLP) is a general partnership which has been registered with the secretary of state. [sic] [by] filing an appropriate document. . . . The statutes vary on the filing requirements, and some statutes require that the partnership maintain insurance. The statutes go to some length to confirm that an LLP is not only a general partnership, but is also the same general partnership that existed prior to the filing of the registration with the secretary of state. The benefit of being a general partnership rather than a separate and distinct entity is that the LLP . . . is able to take advantage of the rules developed for general partnerships.

Id.

8. Robert R. Keatinge et al., *Limited Liability Partnerships and Other Entities Authorized in Colorado*, 24 COLO. LAW. 1525, 1525 (1995) (defining an LLP).

9. Most states have adopted amendments to their version of the Uniform Partnership Act ("UPA") to include the LLP as an option under the partnership umbrella. See, e.g., Uniform Partnership Act (1994), P.A. 95-341, § 18, 1995 Conn. Legis. Serv. 1252, 1257 (West) (replacing CONN. GEN. STAT. ANN. §§ 34-53) (effective July 1, 1997).

tures that have passed LLP statutes to date,¹⁰ most have altered their preexisting partnership laws and some, including Florida, have created separate sections within the partnership statute to govern LLPs.

In those states which have altered existing partnership statutes, the resulting hybrid of an unlimited and a limited liability partnership exhibits the duality to be expected in an entity that is both a creature of statute and a creature of the common law. First, LLP statutes restrict the rights of injured third parties to collect from all the partners of the partnership and thus affect indemnity and contribution among the partners.¹¹

Second, although the statutes limit liability among general partners under some circumstances, they do not eliminate the liability of one partner to another for which the partnership agreement expressly provides.¹² Because it remains a partnership, the partnership agreement governs the new LLP just as it did the general partnership. Consequently, before registering as an LLP, the partners should review and amend their agreement to avoid inadvertent contradiction of the statutory limited liability through prevailing contractual provisions.¹³

Third, the statutory alterations to the partnership format do not act as a panacea to cure all the ills of unlimited liability exposure. The partnership itself remains jointly and severally liable to injured third parties along with

10. The 39 legislatures that have enacted LLP legislation as of January 1996 are Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

Unlike other states, the Ohio Legislature has recognized the legal existence of a "registered partnership having limited liability," rather than the usual LLP or RLLP. See OHIO REV. CODE ANN. §§ 1775.14, .61-.63 (Anderson Supp. 1995).

Texas was the first state to pass LLP legislation in 1991. Lubaroff, *supra* note 1 (discussing the original five LLP statutes enacted in Texas, followed by Louisiana in 1992, and Delaware, D.C., and North Carolina in 1993); see also Act effective August 26, 1991, ch. 901, § 84, 1991 Tex. Sess. Law Serv. (Vernon).

Connecticut first passed LLP legislation in 1994 effective January 1, 1996. See CONN. GEN. STAT. ANN. § 34-53 historical notes (West Supp. 1995). Before the new law could take effect, the legislature reworked the statute to include it in its revised Uniform Partnership Act (1994). See P.A. 95-341, §18, 1995 Conn. Legis. Serv. at 1257.

11. John R. Marquis, *Creating a Michigan Limited Liability Partnership*, 74 MICH. B.J. 698, 699 (1995).

12. *Id.*

13. *Id.*

the negligent partner.¹⁴ Under the majority of LLP statutes, the partners are still accountable for business debts of the partnership.¹⁵ In addition, the partners continue to be individually responsible for their own wrongdoing.¹⁶ As a result, while the new entity provides a measure of relief from some types of liability exposure, the partnership's assets, and to the extent of its contractual debts and the partners' own negligence, the partners' individual assets are still at risk.

B. *Limited Liability*

1. Lateral Liability

All the LLP statutes purport to protect innocent partners from liability for the wrongdoing of other partners by reducing exposure to "lateral" or "horizontal" vicarious liability.¹⁷ For example, the Delaware statute, the third LLP statute to be enacted by a state legislature, uses the words, "negligence, wrongful acts or misconduct" to describe the excused conduct.¹⁸ The term "negligence" in section 1515 was intended to include acts generally considered negligent and the addition of the terms "wrongful acts" and "misconduct" was meant to encompass tortious conduct generally beyond the scope of "negligence" as a legal term.¹⁹

The legislative history of Delaware's LLP law indicates that it was intended to be "broadly protective" but only for specific conduct.²⁰ By confining the resulting liability shield to tortious conduct, the drafters hoped to prevent the creation of "a magic, ever expanding list of excused conduct" under the aegis of an LLP.²¹ In attempting to provide broad protection

14. David B. Rae, *Limited Liability Partnership: The Time to Become One Is Now*, HOUS. LAW., Jan.-Feb. 1993, at 47, 47.

15. See *infra* part VI.B (discussing LLP statutory provisions which shield a partner from personal liability for the partnership's contractual debts, as well as from claims arising from negligence or malpractice).

16. See generally Thomas W. Van Dyke & Paul G. Porter, *Limited Liability Partnerships: The Next Generation*, J. KAN. B. ASS'N, Nov. 1994, at 16 (providing an overview of the LLP structure). "The LLP is not an entirely new business entity; rather, it is a general partnership that statutorily limits the liability of general partners without changing the partnership mode of operation." *Id.* at 20.

17. See Keatinge et al., *supra* note 8, at 1525.

18. DEL CODE ANN. tit. 6, § 1515(b) (Supp. 1994); see Lubaroff, *supra* note 1, at 23.

19. Lubaroff, *supra* note 1, at 24.

20. *Id.*

21. *Id.*

while narrowly defining the type of conduct protected, the Delaware statute served as the model for most of the subsequently enacted LLP legislation.²²

2. Vertical Liability

Most LLP statutes expressly sanction "vertical" vicarious liability by making each partner responsible for the tortious acts of the persons whom the partner supervises.²³ Again using the Delaware statute as an example, a partner in a Delaware LLP is liable for the "negligence, wrongful acts, or misconduct . . . of any person under his direct supervision and control."²⁴ The statute apparently requires active supervision and control but does not state that they are prerequisites to liability. The inference may be drawn that a partner is not responsible for another partner's wrongdoing when the supervision is casual or cursory.²⁵ Because the degree and quality of supervisory involvement necessary for liability is unclear, vertical liability will undoubtedly be the subject of litigation. Despite this definitional ambiguity, the verbatim borrowing of the quoted language by many states proves that Delaware's interpretation of vertical liability has set the standard in subsequently enacted LLP statutes across the nation.

This paper will first discuss the advantages and disadvantages of the LLP as a business structure. It will then examine in detail both the newly enacted Florida version of the LLP statute and the individual liability provisions of the LLP statutes of other states. Because the nature of a partner's liability is "at the heart of what it means to be an [LLP],"²⁶ such an examination will serve to illuminate its essential elements.

III. ADVANTAGES OF LLPS

Although professional partnerships of accountants and lawyers were the first entities to take advantage of the limited liability offered by LLPs, the statutes in most states do not restrict the type of partnership that may

22. See *infra* part VI.A (discussing the statutes, including the Florida RLLP Act, that list excused tortious conduct).

23. See, e.g., IOWA CODE ANN. § 486.15(2) (West Supp. 1995); KAN. STAT. ANN. § 56.315(c) (1994); Act of May 11, 1995, ch. 337, § 7, 1995 Wash. Legis. Serv. (West).

24. DEL. CODE ANN., tit. 6, § 1515(c) (1993).

25. Lubaroff, *supra* note 1, at 25. "An intimate involvement in supervision and control in connection with what is going on with respect to a matter appears to be required as a precursor to the imposition of liability." *Id.*

26. 15 PA. CONS. STAT. ANN. § 8204 committee cmt. (Supp. 1995).

register as an LLP.²⁷ Any partnership, whether of architects, engineers, or plumbers, whether professional or service organization, may become an LLP.²⁸ An LLP provides an attractive modification of the unlimited liability of a general partnership because it is easy to form, it benefits from partnership pass-through taxation, and it enjoys an uncomplicated structure.²⁹ The question of suitability of the structure for a particular business, however, should be considered on the basis of the specific needs of the business and its participants.

A. *Ease of Formation*

Formation of an LLP requires the filing with the designated state authority of cursory information concerning the partnership.³⁰ The registration must include the partnership's name and address, the number of partners, and a brief description of the business, and be accompanied by a filing fee (usually \$100 per partner). The registration is effective for one year and therefore must be renewed annually, which requires an annual filing fee. The partnership must comply with the statutory insurance requirements.³¹ Compliance with these simple steps erects a statutory shield of limited liability while the partnership is registered as an LLP. The shield, however, has not been tested by the courts.

27. See, e.g., Rae, *supra* note 14, at 47 (noting that the Texas LLP statute permits any general partnership to convert to an LLP). Rae commented that restricting LLPs to professional partnerships was thought to be discriminatory. *Id.* at 47 n.1.

28. Lubaroff, *supra* note 1, at 29. "There is no reason why any partnership, particularly partnerships involved in service-related businesses should not consider electing LLP status." *Id.*

29. Van Dyke & Porter, *supra* note 16, at 16.

30. For example, in Florida, registration requires payment of a filing fee and proof of insurance. See discussion *infra* parts V.A, F.

31. See, e.g., FLA. STAT. § 620.7851 (1995).

B. *Benefits of Partnership Taxation*

An LLP retains the advantages of pass-through partnership taxation,³² so long as the LLP does not take on corporate characteristics.³³ Because an LLP is a variation on a general partnership, its tax status as a partnership is probably more certain than the tax status of the limited liability company ("LLC")³⁴ the current frontrunner in the legislative race to enact the perfect limited liability entity. The uncertainty with respect to the taxation of an LLC has caused businesses to approach it with caution. The relative certainty of the tax status of an LLP as a partnership,³⁵ on the other hand, will probably promote its use.

C. *Simplicity of Structure*

An entity created by agreement among its founders imposes fewer restrictions, is inexpensive to set up and maintain, and provides a simpler governing format than one that must comply with statutory mandates. For

32. In a partnership, the business is required to file returns with the Internal Revenue Service which allocates the profits and losses among the partners, but the business itself is not subject to tax. This type of tax treatment is known as pass-through or flow-through taxation. In contrast, corporate profits are subject to "double taxation," once as corporate income and once as shareholder income. Double taxation can lead to possible combined taxation of more than 60% for a corporation and its shareholders.

33. The Internal Revenue Service examines four indicia of corporate characteristics to determine whether an entity is essentially a corporation and should be taxed as one: limited liability; free transferability of interests; centralization of management; and continuity of life or perpetuity. Rae, *supra* note 14, at 47 n.4. Because partners of an LLP already enjoy limited liability, to maintain its tax status as a partnership, the LLP must take care not to acquire more of the cited indicia. *Id.*

34. An LLC provides every participant (known as a "member") with limited liability akin to that of a shareholder in a corporation and to date has been given partnership tax treatment under the Internal Revenue Code, so long as it lacks the majority of the corporate characteristics. See MERTENS LAW OF FEDERAL INCOME TAXATION § 35.360 (Martin M. Weinstein et al. eds., Supp. Jan. 1996) (summarizing recent Revenue Rulings classifying LLCs as partnerships for federal income tax purposes). For Florida state taxation purposes, Florida LLCs are taxed as corporations. FLA. STAT. § 608.471 (1995).

35. See Barbara C. Spudis, *LLCs: Recent Developments and the Developing Uses of Hybrid LLCs*, in TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCING, REORGANIZATIONS AND RESTRUCTURING 1995, at 1003, 1003 (PLI Tax Law & Estate Planning Course Handbook Series No. 373, 1995). "Because LLPs are partnerships for state law purposes, classification issues have not arisen for them and no private letter rulings have been published in the taxpayer requested a ruling with respect to classification of an LLP." *Id.*

these reasons, a partnership is popular as a business entity based on agreement among the partners.

To smooth the transition to an LLP from a general partnership, the original partnership agreement stays in force in an LLP and continues to govern the structure of the entity.³⁶ Unlike a professional service corporation ("PSC") or an LLC, two other limited liability entities, the limited liability registration of a partnership permits partners to carry on their business as usual. Although enjoying similar limitations on vicarious liability among its shareholders, a PSC is subject to a surfeit of state regulation and is open only to the types of professionals listed in the PSC statutes.³⁷ Similarly, an LLC must also comply with burdensome state regulations, and has been compared to those that govern a corporation.³⁸ Because the LLP is subject to minimal state interference, it constitutes an alternative format worthy of consideration.

IV. DISADVANTAGES OF LLPs

The disadvantages of LLPs as a choice of business structure center around the liability for which they do not provide a shield. Other areas of uncertainty include governing law and cultural³⁹ questions.

A. *Chinks in the LLP Liability Shield*

The following list of "horribles" is not fantastic (nor exhaustive). A business considering formation or conversion to an LLP should carefully consider the pitfalls of doing so, even as it basks in the benefits conferred by the LLP structure.

(1) A partnership which registers as an LLP has not escaped its liability for any claim, whether in tort or in contract, and each partner is still liable for his or her own wrongdoing and that of the persons the partner supervises.⁴⁰

36. See *supra* note 9 and accompanying text.

37. See, e.g., FLA. STAT. ch. 621 (1995); see also *id.* § 621.07 (using language identical to that of § 620.782 to limit the liability of the professionals in a PSC).

38. LLC statutes also restrict who may form one. See Thom Weidlich, *Limiting Lawyers' Liability; LLPs Can Protect Assets of Innocent Partners*, NAT'L L.J., Feb. 7, 1994, at 1, 1 (noting that certain states do not allow lawyers to form LLCs).

39. See *infra* part IV.C (citing examples of "cultural" issues that may arise in LLPs).

40. Marquis, *supra* note 11, at 703.

(2) Under most LLP statutes, partners in an LLP are not protected against the contract claims of third parties. This liability loophole may lead to the proliferation of suits against LLPs for breach of contract.⁴¹

(3) The assets of partners in an LLP are exposed to claims that arose before the partnership registered as an LLP.⁴²

(4) Should an LLP inadvertently forget to renew its registration on time, the partnership loses its limited liability until it refiles, pays the annual fee, and otherwise complies with the appropriate statutory provisions.⁴³ This gap period may expose the partners to vicarious liability, even if the partnership later re-registers.

(5) Because an LLP only shields non-negligent partners from the effects of catastrophic events and does not safeguard partnership assets, the partnership may have been decimated before statutory protections for individual partners take effect.⁴⁴

Such problems may still be legislatively remedied, but the LLP statutes enacted to date do not address them.

B. *Governing Law*

Many states have taken care in enacting LLP statutes to include provisions allowing LLPs formed in other states to do business within the state.⁴⁵ Florida's LLP statute takes a quantum leap ahead by expressly providing that (a) a domestic LLP be recognized in other jurisdictions and that (b) the liability of the partners in a Florida LLP doing business out of state be governed by the Florida LLP statute.⁴⁶ The issue, however, remains unresolved in the states which have not yet addressed either foreign or domestic LLPs legislatively. As a result, interstate problems may exist for an LLP that does business across state lines.⁴⁷

41. See *infra* part IV.C.

42. Marquis, *supra* note 11, at 703.

43. See, e.g., FLA. STAT. § 620.78 (mandating yearly renewal of registration for a Florida LLP).

44. Marquis, *supra* note 11, at 703.

45. Lubaroff, *supra* note 1, at 23 (citing the New Jersey and Minnesota LLP legislation as examples of jurisdictions qualifying a foreign LLP); see also FLA. STAT. § 620.7885 (1995) (citing requirements for a foreign LLP wanting to do business in Florida).

46. FLA. STAT. §§ 620.783, .789; see *infra* part V.D, G (discussing the choice of law and interstate commerce provisions of the Fla. RLLP Act).

47. An even stickier issue may be the tax implications for out-of-state partnerships who decide to register in a state as a foreign LLP. Would these business entities be liable for local taxation?

Because most LLP statutes were recently enacted, only a few courts have had the opportunity to address questions of whose law governs. Of these, in *Liberty Mutual Insurance Co. v. Gardere & Wynne, L.L.P.*,⁴⁸ the United States District Court for Massachusetts stated that the law of the state of organization governs an LLP.⁴⁹ The case was decided in December 1994, a year before the enactment of the Massachusetts LLP statute.⁵⁰ Liberty Mutual, a long-standing client of the defendant Dallas law firm, Gardere & Wynne ("G & W"), had its principal place of business in Boston and therefore chose to bring suit in a Massachusetts court. It alleged that two new members of G & W, also named as defendants, breached their fiduciary duty by continuing to represent a company against whom the insurance company had been litigating for a number of years.

The federal district court considered two defense motions to dismiss the case based on lack of personal jurisdiction and other legal theories, or alternatively, to transfer venue to Texas. Repeatedly noting that it was being called upon to decide "difficult and unsettled issues of Texas law"⁵¹ because the defendant G & W was organized as a Texas LLP, the court ruled in favor of transfer to the Northern District of Texas mainly as a result of jurisdictional concerns in Massachusetts which would become moot in Texas.⁵² In deciding to transfer, the court clarified that Texas law would apply regardless of whether the case was heard in Massachusetts or in Texas because of the Texas LLP's right to be judged under Texas law in a foreign court.⁵³

Interestingly, the court also alluded in dicta to the "difficult issues of Texas law that will have to be addressed by whichever court decides the case on the merits," such as the extent to which non-involved partners are liable for breaches of fiduciary duty.⁵⁴ The court explained that the list of excused conduct in the Texas LLP statute does not specifically shield a partner from liability for such contractual wrongdoing.⁵⁵ This comment

48. No. CIV.A.94-10609-MLW, 1994 WL 707133 (D. Mass. Dec. 6 1994).

49. *Id.* at *6 n.7.

50. Act of Nov. 28, 1995, ch. 281, § 7, 1995 Mass. Legis. Serv. 822, 823 (West) (amending MASS. GEN. L. ch. 108A § 15).

51. *Liberty Mut. Ins. Co.*, 1994 WL 707133, at *4; *see also id.* at *6, *7, *9 (also referring to Texas LLP law as "unsettled").

52. *Id.* at *11.

53. *Id.* at *6 n.7.

54. *Id.* at *9.

55. *See infra* notes 105-107 and accompanying text.

echoes the concern that the limited liability shield may not protect partners from contractual liability to third parties.⁵⁶

Two other recent cases have touched on jurisdictional issues with respect to LLPs, *Lowsley-Williams v. North River Insurance Co.*⁵⁷ and *UOP v. Andersen Consulting*.⁵⁸ In the latter case, a Connecticut court ruled that the state long-arm statute governing foreign partnerships covered an Illinois LLP because it was a foreign partnership, although the foreign LLP had offices in Connecticut and several of its partners lived in-state.⁵⁹ The holding may provide guidance to other courts in determining the status of a foreign LLP.

In *Lowsley-Williams*, on the other hand, the federal district court in New Jersey could do no more than note the need for congressional action to help the judiciary define diversity jurisdiction when addressing “the wide array of non-traditional legal entities which currently exist and which are continuously being created.”⁶⁰ Faced with deciding the citizenship of a Lloyd’s London syndicate with which the plaintiff was associated, the court concluded that the syndicate most closely resembled an LLP.⁶¹ Because of the lack of legislative guidelines on diversity jurisdiction relating to partnerships, however, the categorization proved inconclusive. Both cases illustrate the struggle that courts will continue to confront in addressing jurisdictional issues surrounding LLPs.

C. Cultural Questions

Perhaps more difficult to resolve than jurisdictional issues are the cultural questions that may arise within an LLP because these cannot be resolved through legislation. For example, partners may be reluctant to take on supervisory burdens because of potential liability if the supervised person missteps and is considered to have acted while under the partner’s “direct supervision and control.”⁶² The new entity may also alter relationships among the partners because limited lateral liability erects a legal barrier

56. See *supra* part IV.A (discussing the chinks in the liability shield).

57. 884 F. Supp. 166 (D.N.J. 1995).

58. No. CV 95014753S, 1995 WL 784971 (Conn. Super. Dec. 21, 1995).

59. *Id.* at *2.

60. 884 F. Supp. at 170.

61. *Id.*

62. See *supra* part I.B.2.

between negligent and non-negligent partners.⁶³ The statute might thus have an inhibiting effect on the way the partners perform.⁶⁴

Whether or not these disadvantages will eventually discourage the widespread use of LLPs, state legislatures are rallying to the LLP banner. The Florida Legislature is a recent convert.

V. THE FLORIDA RLLP ACT

The Florida Registered Limited Liability Partnership Act supplements Florida's partnership laws by creating sections 620.78 through 620.789 of the *Florida Statutes*. The Act permits a Florida partnership to register as an RLLP; specifies registration and name requirements; outlines the limitation on individual partner liability for the acts of others; and mandates that an RLLP must be insured for a minimum amount.⁶⁵ The following section-by-section analysis examines these details of the Act in full, as well as other significant provisions.

A. Registered Limited Liability Partnerships

Section 620.78 of the *Florida Statutes* outlines the requirements that a partnership must satisfy to become an RLLP. The partnership must file a statement of registration or a statement of registration renewal with the Department of State ("DOS"), containing, among other items, its name and address, the number of partners, and a brief description of the partnership business.⁶⁶ The statement of registration must either be executed or authorized by a "majority in voting interest of the partners."⁶⁷ Registration must be accompanied by a fee of \$100 for each resident partner, up to a limit of \$10,000 for each LLP, and is effective for one year after the date the registration statement is filed or renewed.⁶⁸

The statute mandates that the DOS shall register or renew the registration of any partnership that has complied with the registration or renewal requirements. The DOS thus may not reject a properly filed registration statement. It also provides that an RLLP can amend its

63. Marquis, *supra* note 11, at 703.

64. *Id.* But see Weidlich, *supra* note 38, at 1 (quoting a commentator that an LLP structure will increase the level of comfort for lawyers practicing together).

65. See also FLA. H.R. Comm. on Com., FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT CS for HB 717, part I *Summary* (May 9, 1995) (preliminary draft).

66. FLA. STAT. § 620.78(1).

67. *Id.* § 620.78(2).

68. *Id.* § 620.78(3), (6).

statement of registration by filing a “certificate of amendment” with the DOS.⁶⁹

B. *Cancellation of Registration*

Section 620.781 of the *Florida Statutes* provides that an RLLP may cancel its registration by filing a statement of cancellation of registration with the DOS.⁷⁰ The section specifies that the statement of cancellation must be executed or authorized by a “majority in voting interest of the partners.”⁷¹ The statement of cancellation must also contain the name of the RLLP, the initial date of registration, and the effective date of cancellation if it is not effective when filed.⁷² The filing of the statement only cancels the partnership’s registration as an LLP and does not dissolve the partnership itself.⁷³ Thus, an RLLP may decide to terminate its status as a limited liability entity without dissolving the partnership.

C. *Partner’s Liability*

Section 620.782 of the *Florida Statutes* sanctions limited lateral liability for partners in an RLLP. In a validly registered LLP, a partner is “not individually liable for obligations, or liabilities of the partnership, whether in tort, contract, or otherwise, arising from errors, omissions, negligence, malpractice, or wrongful acts committed by another partner or by an employee, agent, or representative of partnership.”⁷⁴

A partner, however, remains individually liable for (a) debts “arising from any cause other than those specified”; for (b) the wrongful acts “committed by the partner or any person under the partner’s direct supervision and control in the specific activity in which errors, omissions, negligence, malpractice, or wrongful acts occurred”; or for (c) obligations “for which the partner has agreed in writing to be liable.”⁷⁵ The section primarily protects a partner in an RLLP from liability for the wrongdoing of other partners “or any person” over whose acts he had no actual supervision or control, but it does not protect the partnership itself from any obligations or liabilities for the wrongful acts.

69. *Id.* § 620.78(5), (8).

70. *Id.* § 620.781(1).

71. FLA. STAT. § 620.781(1).

72. *Id.* § 620.781(2).

73. *Id.* § 620.781(3).

74. *Id.* § 620.782(1).

75. *Id.* § 620.782(2).

The section contains three additional noteworthy provisos. First, a partner forfeits his liability protection if the RLLP does not carry the specified minimum amount of insurance coverage. The insurance requirement provides some recourse for victims of a protected partner's wrongdoing.⁷⁶ Second, the cancellation of registration, dissolution, or withdrawal of a partner does not affect the limitation of an individual partner's liability while the registration of the RLLP was in effect.⁷⁷ Third, the RLLP may sue or be sued without the necessity of joining its partners in the suit, and a partner who is not liable for a wrongful act is "not a proper party" in a suit against the RLLP arising out of the wrongful acts described in section 620.782(1).⁷⁸ This provision emphasizes both the non-negligent partner's protected status and the exposure of the RLLP itself.

D. *Liability—Governing Law*

Section 620.783 of the *Florida Statutes*, the choice of law provision, provides that the liability of a partner in an RLLP registered in Florida is governed solely by Florida law.⁷⁹

E. *Name of a RLLP*

Section 620.784 of the *Florida Statutes* deals with the requirements for the name of an RLLP. Among other requirements, the name must contain the words "Registered Limited Liability Partnership," or the designation "L.L.P." or "LLP" as the last words of its name.⁸⁰ This provision gives notice to third parties who have dealings with the RLLP of the limitations on liability of its partners.

F. *Insurance of RLLPs*

Section 620.7851 of the *Florida Statutes* allows an RLLP to meet the mandatory insurance requirement in one of two ways, by purchasing liability insurance or by setting aside funds to satisfy judgments.⁸¹ In either case, the "minimum coverage amount" is defined as \$100,000 multiplied by the number of general partners in excess of one, and must be at least \$200,000

76. FLA. STAT. § 620.782(3); *see also id.* § 620.7851 (1995).

77. *Id.* § 620.782(4).

78. *Id.* § 620.782(6), (7).

79. *Id.* § 620.783 (1995).

80. FLA. STAT. § 620.784(1).

81. *Id.* § 620.7851(1).

up to a limit of \$3,000,000.⁸² The insurance requirement ensures that a victim of the wrongful acts listed in section 620.782 will have recourse to a minimum amount of insurance funds for recovery of damages without limiting the amount of damages recoverable from the partnership or from an unprotected partner.⁸³

G. Professional Services

Section 620.787 addresses ethical considerations pertaining to those professionals who provide services already regulated by a state regulatory agency and who wish to register as an LLP. The section states that the appropriate regulatory agency will continue to supervise the registered partnership. Further, the partners in an LLP are “subject to disciplinary proceedings and penalties in the same manner and to the same extent as individuals”⁸⁴ in that profession. To ensure on-going oversight, the LLP must provide a certified copy of its registration to the regulatory agency.⁸⁵

Among other types of professional service providers attracted to the LLP blueprint, law firms organized as LLPs would remain within the traditional partnership framework while enjoying the advantages of limited liability. Florida law firms considering section 620.78 registration rely on compliance with section 620.787 to avoid violating the two Rules of Professional Conduct that prohibit lawyers from limiting their liability.⁸⁶ Section 620.787 directs a law firm organized as an LLP to remain under the supervision of the Florida Bar, the state agency responsible for the ethical conduct of lawyers. Section 620.782, the liability provision of Florida’s LLP Act, echoes Bar Rule 4-5.1(c)(2)⁸⁷ by not relieving a partner in an

82. *Id.* § 620.7851(2).

83. *Id.* § 620.7851(4).

84. *Id.* § 620.787(1).

85. FLA. STAT. § 620.787(2).

86. See Steel, Hector & Davis Memorandum to John A. Boggs, Director Law. Reg., Fla. Bar, from Victoria L. Weber & Cathy M. Sellers, *Necessity for Florida Bar Rule Addressing Registered Limited Liability Partnerships* 5 (June 20, 1995) (reviewing the Fla. RLLP Act, Fla. Bar rules and case law, and the practice in other LLP jurisdictions to conclude that a Bar rule authorizing legal LLPs is unnecessary) (on file with authors).

87. R. REGULATING FLA. BAR 4-5.1(c)(2) (1995).

Responsibility for Rules Violations. A lawyer shall be responsible for another lawyer’s violation of the Rules of Profession Conduct if:

.....

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails

LLP from supervisory responsibility and is subordinated to the ethical guidelines of the Bar rules as a result of section 620.787. More importantly, the Bar rules are confined to questions of ethical conduct; matters of civil or criminal liability fall outside the scope of the Rules of Professional Conduct.⁸⁸ Legal professionals wishing to register as LLPs see no conflict between the LLP statute and the Florida Bar Rules of Professional Conduct because they contend that the two are mutually exclusive.⁸⁹

Legal practitioners also argue that Bar Rule 4-1.8(h),⁹⁰ which bars lawyers from making agreements to limit their prospective malpractice liability to a client, is consistent with section 620.782. Because the limiting of a lawyer's liability under the LLP Act is self-executing and, therefore, requires no additional agreement between the lawyer and the client, the Act does not violate the prohibition on entering into liability-restricting agreements in the Bar rule.⁹¹ Moreover, by using the singular noun, "lawyer's liability," to identify whose liability may not be limited, the language of rule 1.8(h) suggests that its prohibition does not apply to vicarious liability among lawyers.⁹² The rule apparently was intended to assist a client in obtaining representation in a matter where the risk of legal malpractice was high because of the nature of the problem.⁹³ Rule 1.8(h) thus provides an exception to the general rule that lawyers are liable for their own malpractice. Because this general rule is incorporated into section 620.782(2)(b), which holds lawyers liable for their own malpractice, legal

to take reasonable remedial action.

Id.; see also Michael J. Lawrence, Note, *The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation*, 9 GEO. J. LEGAL ETHICS 207, 214-15 (1995) (discussing MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1995)).

88. FLA. STAT. Bar Rule 4-5.1 cmt. ("Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.").

89. Weber & Sellers, *supra* note 86, at 6. *But see* Keatinge et al., *supra* note 7, at 149-50 (noting that "[a]t the least, violation of ethical rules is probative of violation of the standard of care" (footnote omitted)).

90. "Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. . . ." R. REGULATING FLA. BAR 4-1.8(h).

91. *Id.*

92. Lawrence, *supra* note 87, at 216.

93. *Id.* (citing GEOFFREY C. HAZARD, JR. & WILLIAM HODES, 2 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.8:901 (Supp. 1992)).

professionals maintain that the Florida LLP Act is consistent with Florida Bar Rule 4-1.8(h).

Beyond compliance with codified ethical regulation, however, is the troubling question of a lawyer's responsibility to the client. Lawyers are generally held to a higher standard both by the public and by the judiciary.⁹⁴ Even if the state Bar is convinced that registration as an LLP will not conflict with existing Bar rules, legal practitioners must consider the impression that an attempt to create a liability shield will make on the public. The potential for negative repercussions from limited liability among law firm partners should not be ignored. Despite the long-standing acceptance of limited vicarious liability for attorneys in Florida PSCs,⁹⁵ the public may incorrectly perceive lawyers' use of the new LLP format as unseemly.

H. *Miscellaneous Provisions*

Sections 620.786, 620.788, 620.7885, and 620.7887 of the *Florida Statutes* address the effect of registration on dissolution of an RLLP,⁹⁶ the conversion of a limited partnership into an RLLP; and the requirements for registration and cancellation of registration of a foreign (that is, out-of-state) RLLP that wants to do business in Florida.⁹⁷

I. *Applicability to Foreign and Interstate Commerce*

Section 620.789 of the *Florida Statutes* constitutes the comity provision of the Act, in which the Florida Legislature asks that other states defer to its jurisdiction over LLPs organized in Florida. The section codifies the legislative intent that the "legal existence" of Florida RLLPs doing business outside the state be recognized under the Full Faith and Credit Clause of the U.S. Constitution.⁹⁸ It also enables a domestic LLP to do business

94. See *First Bank & Trust Co. v. Zagoria*, 302 S.E.2d 674, 676 (Ga. 1983) (holding a lawyer in a PSC liable for his partner's misconduct, despite state legislation permitting lawyers organized as a PSC to limit their vicarious liability).

95. See *In re Florida Bar*, 133 So. 2d 554, 557 (Fla. 1961) (holding that Florida Bar members may practice law as PSCs).

96. FLA. STAT. § 620.786 (1995).

97. The organizational and internal affairs of a foreign LLP are to be governed by the laws of the jurisdiction under which it is organized, "including the liability of partners, solely by reason of being partners, for the debts, obligations, and liabilities of or chargeable to the partnership." *Id.* § 620.7885(4).

98. *Id.* § 620.789(2).

nationwide and internationally.⁹⁹ In enacting section 620.789, the legislature intended that the limitation on liability that non-negligent partners enjoy in a Florida RLLP will protect them wherever the entity does business.

J. *Effective Date*

The Florida RLLP Act took effect October 1, 1995, the thirtieth LLP statute to become effective.¹⁰⁰

K. *How Does the Florida RLLP Measure Up?*

Section 620.782 on the nature of a partner's liability constitutes the functional provision of the Act. A comparison of its operative language to the words that other states have chosen to limit liability in an LLP sheds light on the potential efficacy of the liability shield. Although Florida's LLP Act was recently enacted, the legislature chose to follow Delaware's 1993 narrow formulation of the liability provision. Like Delaware, Florida used a particularized list of excused conduct, rather than emulating Minnesota's choice of a broader, more protective, corporate-like liability shield. Florida's choice of a conservative approach suggests that the legislature was concerned with the potential difficulty that Florida RLLPs might encounter in doing business outside the state.¹⁰¹ Its solution was to minimize the difficulty by not placing Florida LLPs in the forefront of the movement toward enhanced liability protection. The variety of legislative approaches to creating LLPs also highlights the interstate diversity in the nature of the protection provided to a partner in a limited liability partnership.

99. *Id.* § 620.789(1).

100. Act of June 18, 1995, ch. 409, § 13, 1995 Fla. Laws 1386, 1391 (effective October 1, 1995) (codified at FLA. STAT. § 620.78 et seq.).

101. See Michael J. Bohnen, *Limited Liability Partnerships for Law Firms Proposed Massachusetts Legislation*, BOSTON B.J., Nov.-Dec. 1995, at 7, 13 (discussing comity issues for Massachusetts LLPs).

It is not clear whether the limitation on liability will be recognized in states that do not have LLP legislation. Arguably, courts of other states should recognize the liability shield of an LLP under the 'internal affairs doctrine,' which treats the laws of the state of organization as governing the liability of members of other forms of business organizations. . . . However, because . . . [some] states do not have LLP laws, the issue remains a consideration in those jurisdictions.

Id.

VI. THE NATURE OF A PARTNER'S LIMITED LIABILITY

By January 1996, thirty-nine legislatures had enacted provisions limiting a partner's liability in LLPs.¹⁰² In defining the nature of a partner's liability in the new entity, these statutes fall into two broad categories: those that contain a particularized list of excused conduct, the "list" jurisdictions, and those that do not, the "no list" jurisdictions.¹⁰³ The former category contains the majority of states and provides a narrower

102. ARIZ. REV. STAT. ANN. § 29-215 (Supp. 1995); CAL. CORP. CODE § 15015 (Deering Supp. 1996); COLO. REV. STAT. ANN. § 7-60-115 (West Supp. 1995); Uniform Partnership Act (1994), P.A. 95-341, 1995 Conn. Legis. Serv. § 18 (West) (amending CONN. GEN. STAT. ANN. § 34-53) (effective July 1, 1997); DEL. CODE ANN. tit. 6, § 1515 (1993 & Supp. 1994); D.C. CODE ANN. § 41-146 (Supp. 1995); FLA. STAT. §§ 620.78-.789 (1995); GA. CODE ANN. § 14-8-15 (Supp. 1995); IDAHO CODE § 53-315 (Supp. 1995); ILL. ANN. STAT. ch. 805, para. 205/15 (Smith-Hurd Supp. 1995); IND. CODE § 23-4-1-15 (Supp. 1995); IOWA CODE ANN. § 486.15 (West Supp. 1995); KAN. STAT. ANN. § 56-315 (1994); KY. REV. STAT. ANN. § 362.220 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 9:3431 (West Supp. 1996); MD. CODE ANN., CORPS. & ASS'NS § 9-307 (Supp. 1995); Act of Nov. 28, 1995, ch. 281, 1995 Mass. Legis. Serv. § 7 (West) (amending MASS. GEN. L. ch. 108A, § 15); MICH. COMP. LAWS ANN. § 449.46 (Supp. 1995); MINN. STAT. ANN. § 323.14 (West 1995 & Supp. 1995); Act of Mar. 14, 1995, ch. 353, 1995 Miss. Laws § 3 (amending MISS. CODE ANN. § 79-12-29); MO. REV. STAT. § 358.150 (Supp. 1996); MONT. CODE ANN. § 35-10-307 (1995); Act of July 1, 1995, ch. 465, 1995 Nev. Stat. § 12 (amending NEV. REV. STAT. § 87.150); Ch. 96, § 3 1995 N.J. Sess. Law Serv. 302, 302-03 (West) (amending N.J. STAT. ANN. § 42:1-15); Ch. 185, § 13 1995 Adv. Leg. Serv. 1534, 1552-53 (Michie) (to be codified at N.M. STAT. ANN. § 54-1-48); N.Y. PARTNERSHIP LAW § 26 (McKinney Supp. 1995); N.C. GEN. STAT. § 59-45 (Supp. 1994); N.D. CENT. CODE § 45-22-08 (Supp. 1995); OHIO REV. CODE ANN. § 1775.14 (Anderson Supp. 1994); Act of July 19, 1995, ch. 689, 1995 Or. Laws § 3 (amending OR. REV. STAT. § 68.270); 15 PA. CONS. STAT. ANN. § 8204 (Supp. 1995); S.C. CODE ANN. § 33-41-370 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. § 48-2-15 (Supp. 1995); TENN. CODE ANN. § 61-1-114 (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(a) (West Supp. 1996); UTAH CODE ANN. § 48-1-12 (Supp. 1995); VA. CODE ANN. § 50-15 (Michie 1994); WASH. REV. CODE § 25.04.730 (Supp. 1995); Act of Dec. 1, 1995, 1995 Wis. Legis. Serv. Act 97, § 9 (West) (to be codified at WIS. STAT. § 178.12(2)-(4)); see also *supra* note 10 and accompanying text (listing states that have enacted LLP statutes).

103. Cf. Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 107-09 (1995) (categorizing LLP statutes into three groups immunizing partners from vicarious liability for "tort only," "tort or contract," and "tort, contract, or otherwise" types of wrongdoing); Robert R. Keatinge et al., *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 BUS. LAW. 147, 175-80 (1995) (dividing LLP acts chronologically into first, second, and third generation statutes, with the original group providing protection for negligence claims, the next group addressing negligence and other misconduct, whether in tort, contract, or otherwise, and the most recent enactments providing full vicarious liability protection).

type of protection for partners choosing to do business as an LLP. The latter category protects partners who register from the tortious conduct of fellow partners, in some states even for supervisory liability,¹⁰⁴ and has extended statutory protection to liability for debts chargeable to the partnership.

A. *The "List" Jurisdictions*

Twenty-three legislatures have passed LLP statutes that attempt to restrict the type of conduct for which an innocent partner can be liable by listing specific acts of others from which the partner is shielded.

The District of Columbia, Louisiana, North Carolina, and Texas passed one-of-a-kind statutes between 1991 and 1993. In Texas, for instance, a partner is not liable for another partner's "errors, omissions, negligence, incompetence, or malfeasance," a fairly typical list of excused conduct.¹⁰⁵ The shield is not qualified, however, by the usual provision providing for vertical liability for the conduct of a person under the partner's "direct supervision and control."¹⁰⁶ Instead, a partner in a Texas LLP is exposed to risk if the partner is "directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner," or the partner "had notice or knowledge" of the culpable conduct and according to the 1993 amendment of the earlier liability provision, "failed to take reasonable steps to prevent or cure" the wrongdoing.¹⁰⁷ Although North Carolina's statute similarly provides that to incur liability the partner must have been "directly involved in the specific activity,"¹⁰⁸ the notice or knowledge provision does not appear in its liability provisions or that of any other state's LLP laws.

104. *See, e.g.*, COLO. REV. STAT. ANN. § 7-60-115(2)(a) (stating that partner in an LLP is liable for own misconduct but omitting mention of liability for misconduct of person under partner's supervision or control); GA. CODE ANN. § 14-8-15(c).

105. TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(a). The Texas LLP statute was amended in 1993, but the list of excused conduct remained unchanged. *See id.* 1993 bar committee's cmt. (noting that "[s]ubsection (a)(1) follows TUPA § 15(2) in providing that a partner in a [RLLP] is not individually liable for the errors or omissions of another partner").

106. *See* discussion of vertical liability *supra* part II.B.2; *see also* LA. REV. STAT. ANN. § 9:3431 (West Supp. 1995) (omitting provisions for vertical liability).

107. TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(a)(1). The 1991 statute did not qualify the notice requirement with a "reasonable steps" provision. *See id.* 1993 bar committee's cmt. (saying that the amendment merely "clarifies" the former version).

108. N.C. GEN. STAT. § 59-45(b).

Delaware's 1993 LLP legislation spawned numerous progeny that are very similar and sometimes identical. The statutes of Illinois, Iowa, Kansas, Michigan, Mississippi, Nevada, New Jersey, New Mexico, Pennsylvania, South Carolina, Tennessee, and Washington all include negligence, wrongful acts, or misconduct in their lists of excused conduct, mirroring Delaware's provision;¹⁰⁹ eight of them add "omissions" and "malpractice" to the list.¹¹⁰ These two additions make the LLP structure more attractive to professionals, such as lawyers and accountants, by limiting a partner's malpractice exposure to his own wrongdoing, and not that of fellow practitioners.¹¹¹

The LLP statutes in Arizona, Connecticut, Florida, and Virginia loosely resemble that of Delaware. Arizona's and Connecticut's statutes, for example, omit the phrase "whether in tort, contract, or otherwise," although both use the identical list of excused conduct as Delaware, namely "negligence, wrongful acts, or misconduct."¹¹² The omission may result in an innocent partner being liable for a contractual breach of another partner, even if the breach can be interpreted broadly as negligent behavior.

Finally, the LLP statutes in Kentucky and Utah, similar to those of Texas and Louisiana,¹¹³ contain lists of excused conduct but no provision for vertical liability, although both states expressly provide that the partner is liable for his own negligence, wrongful acts, or misconduct.¹¹⁴ These provisions further limit the type of conduct for which an innocent partner can be held liable.

B. *The "No List" Jurisdictions*

The "no list" states, those which contain no particularized list of excused conduct, can be further subdivided by the differences in the

109. See, e.g., IOWA CODE § 486.15(2); see also *supra* part II.B.1.

110. See, e.g., ILL. ANN. STAT. ch. 805, para. 205/15.

111. But see 15 PA. CONS. STAT. ANN. § 8204 committee cmt.

Although the Committee chose to use the phrase "negligent or wrongful acts or misconduct" because of its use in other contexts in Pennsylvania law, the Committee believes that it should include the actions covered by the Texas provision cited in the Official Source Note, which refers to "errors, omission, negligence, incompetence, or malfeasance."

Id.

112. ARIZ. REV. STAT. ANN. § 29-215(B); Uniform Partnership Act (1994), P.A. 95-341, § 18, 1995 Conn. Legis. Serv. 1257 (West).

113. See *supra* note 102 and accompanying text.

114. KY. REV. STAT. ANN. § 362.220(2); UTAH CODE ANN. § 48-1-12(2)(a).

operative language of their legislation. They fall into two categories. In early 1994 the Minnesota Legislature created a limited liability entity which provides the most comprehensive protection to partners in a registered firm of any state.¹¹⁵ By the end of 1995, fifteen additional states had chosen this broadly exculpatory approach to the limitation of a partner's liability in an LLP. California, Georgia, Indiana, Maryland, New York, Oregon, South Dakota, and Wisconsin passed legislation that provides that a partner is "not liable . . . for any debts, obligations, or liabilities of . . . the partnership or any other partner . . . solely by reason of being a partner."¹¹⁶ Colorado, Idaho, Massachusetts, Missouri, Montana, North Dakota, and Ohio have statutes that resemble Minnesota's version: "A partner of a limited liability partnership is not, merely on account of this status, personally liable for anything chargeable to the partnership . . ."¹¹⁷

In minimizing a partner's liability in an LLP, the Minnesota Legislature created a "corporate-like liability shield that severs the connection between partner status and personal liability for partnership debts."¹¹⁸ A partner in an LLP is protected exactly as are shareholders in a Minnesota corporation and members in a Minnesota LLC, although partners in an LLP, do not enjoy perpetual protection.¹¹⁹ Limitation on liability lasts for one year only while the current registration is in effect. If the registration is not renewed, the liability buffer expires. The statute also expressly provides that the corporate doctrine of piercing the corporate veil applies to LLPs.¹²⁰

115. See Keatinge et al., *supra* note 7, at 120-21 (discussing the liability of partners in an LLP in the state of organization).

116. OR. REV. STAT. § 68.270 (1995). The liability provision in California's LLP Act resembles this group of statutes, but it omits the word "solely," and like Maryland, New York, Oregon, and South Dakota, does not qualify the liability with either "individually," as Georgia does, or "personally," as in the LLP laws of Indiana and Wisconsin. CAL. CORP. CODE § 15015; GA. CODE ANN. § 14-8-15; IND. CODE § 23-4-1-15. The omissions in California's statute leave more room for manipulation when applying the statute to specific instances of partner liability. California, Massachusetts, and Wisconsin were the most recent states to jump on the LLP bandwagon and chose to join the no-list jurisdictions. In contrast, the first states to enact LLP legislation took the more conservative approach by including lists of excused conduct in their bills.

117. MINN. STAT. ANN. § 323.14(2) (West 1995).

118. *Id.* § 323.14 reporters' notes (naming Professors Daniel S. Kleinberger & Carter G. Bishop as co-reporters); see also *id.* § 323.14(2) (entitled "Limited Liability Partnership Shield").

119. *Id.* § 323.14 reporters' notes (indicating that "the LLP shield is more ephemeral" than the shield for corporate shareholders).

120. *Id.* § 323.14(3) (providing that "the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under

It does not, however, absolve a partner from personal liability for his own misconduct.¹²¹ The Minnesota LLP was created in the corporate image.

In Colorado, a partner also enjoys blanket protection. The LLP shield shelters partners from liability "directly or indirectly . . . for a debt, obligation, or liability of . . . the partnership while it is a registered limited liability partnership, except that . . . the liability of a partner . . . for such partner's own negligence, wrongful acts, or misconduct" is not affected by the section.¹²² Under the Colorado LLP Act, LLPs duplicate the liability protection of LLCs, which shield members from liability to the same degree as corporate shareholders are protected.¹²³ In passing an LLP statute that departs from the tradition begun by Texas in 1991, the Colorado Legislature sought to reduce conflicts in two areas. First, it sought to avoid questions and potential litigation regarding claim exclusion. Second, it hoped to minimize conflicts arising from payment priority for personal negligence claims as opposed to partnership contractual claims.¹²⁴

The "no list" states have enacted statutes that apparently shield partners in an LLP from all liability that does not arise from personal negligence. These limited liability entities may thus protect partners from contractual claims as well as negligence and malpractice claims whether based on common law or statute, whether the statute is state or federal.¹²⁵

VII. CONCLUSION

LLP legislation is varied and becoming more so each day, as states continue to embrace the innovative concept of limited liability within a partnership framework. While legislatures are picking and choosing among various possibilities for limited liability entities, the final format of the LLP is still undecided. Questions remain regarding the extent of limitation on a partner's liability and other issues such as taxation of foreign LLPs. Ideally, once all the states have enacted their own legislation, a movement toward uniformity will arise that will solve the problems attributable to the lack of uniformity among state LLP statutes.

Minnesota law also applies to [LLPs]).

121. MINN. STAT. ANN. § 323.14 reporters' notes.

122. COLO. REV. STAT. ANN. § 7-60-115(2)(a).

123. Keatinge et al., *supra* note 8, at 1525 & n.7.

124. *Id.* at 1525 & n.10.

125. See Lubaroff, *supra* note 1, at 26 (noting as example that under the LLP statutes enacted from 1991 to 1993 it was uncertain whether liability limitations would extend to statutory liability of a partner for employment discrimination).

Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled

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"There is nothing either good or bad, but thinking makes it so."

—WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

I. INTRODUCTION

Ahhhh! Life at nineteen . . . carefree youthfulness, Bacchanalian weekends, and unlimited free time. Life's biggest worries often amount to nothing more than performing well on an exam, getting a date for the weekend, or trying to adhere to this year's New Year's Resolution. STOP!!!!!!!!!!!!

Now, imagine that you are nineteen years old and require three medications every day, without which you may die.¹ Your only means of communication is a collection of noises that others have learned to interpret. You never have more than fifteen to thirty minutes to yourself because you are monitored on an hourly basis. You are prohibited from engaging in sexual relations with the opposite sex because the possibility of pregnancy could be fatal. An intercom has been installed in your bedroom to ensure that you have no male visitors (and to provide medical supervision). To most, this lifestyle seems like nothing short of a nightmare. To Catherine White,² this is reality.

Catherine is a nineteen-year-old mute woman who, since infancy, has suffered from a moderately severe mental disability, grand mal epilepsy, cerebral palsy, and scoliosis. Her mental and physical disabilities are irreversible. Her I.Q. test results range between thirty and fifty on the Weschler Adult Intelligence Scale revised. Experts who have evaluated Catherine agree that she has the mental age of a three to five-year-old child.³

Over the course of her life, Catherine has experienced over fifty seizures,⁴ some of which have lasted over sixty minutes.⁵ Any virus, infection, cold, or fluctuation in her body temperature may cause her to have a seizure.⁶ She is administered three drugs every day to control her epilepsy.⁷ Without medication, she could experience *status epilepticus*, causing her to seize repeatedly, and possibly die.⁸

1. The forthcoming facts approximate those in *Estate of C.W.*, 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), and *cert. denied*, 115 S. Ct. 1175 (1995).

2. The name used in this article is fictitious, to protect Catherine's right to privacy.

3. *Estate of C.W.*, 640 A.2d at 430.

4. *Id.*

5. *Id.*

6. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine's mother (Feb. 20, 1995). The author would like to express his thanks to Ms. Engdahl for her assistance in the preparation of this article.

7. *Estate of C.W.*, 640 A.2d at 430 ("Every day Catherine is administered three drugs, Phenobarbital, Dilantin, and Tegritol, sometimes in toxic doses, to control her epilepsy.").

8. *Id.* "At one point in 1989, [Catherine's] behavior became more aggressive and self-abusive. It was thought that her Dilantin level was too high and was possibly contributing to her behavior problem." *Id.* Her neurologist consequently reduced her dosage of Dilantin. As a result, she began to experience a "severe seizure, and her dosage of medication had to be increased to a toxic level in order to stabilize her." *Id.* Catherine had a seizure again. Her physician noted this episode as a reminder of how difficult it is to control Catherine's epilepsy. *Id.*

Catherine could also suffer severe, life threatening trauma in the event that she became pregnant.⁹ Her epilepsy could cause a spontaneous abortion or premature birth.¹⁰ Testimony indicated that a pregnancy could also be psychologically traumatic for Catherine in the unlikely event that she could carry the pregnancy to term, and then have to be separated from the child due to her inability to care for it.¹¹

Because of the life-threatening dangers associated with pregnancy, Catherine's mother chose to request permission from the Orphan's Court to have a tubal ligation performed on her daughter.¹² As required by

9. *Estate of C.W.*, 640 A.2d at 432. Catherine could experience a combination of psychological and physiological trauma if she were to become pregnant. This instability could aggravate her already tenuously controlled condition. See generally ERNST NIEDERMEYER, *EPILEPSY GUIDE: DIAGNOSIS AND TREATMENT OF EPILEPTIC SEIZURE DISORDERS* 212 (1983) (explaining how pregnancy may aggravate seizure disorder); S. Koch et al., *Obstetric Complications in Pregnancies of Epileptic Mothers and Their Obstetric Histories*, in *EPILEPSY, PREGNANCY, AND THE CHILD* 91 (1982) (providing results of various studies indicating complications suffered by epileptics during pregnancy); C.M. Lander & M.J. Eadie, *Plasma Antiepileptic Drug Concentrations During Pregnancy*, 32 *EPILEPSIA* 257 (1991) (providing results of study confirming lower plasma antiepileptic drug ("AED") concentrations in epileptics during pregnancy which may, as direct consequence, expose patients with active epileptic disorders to heightened risk of increased seizure activity). Catherine suffers from grand mal epileptic seizures which have lasted in excess of 60 minutes. *Estate of C.W.*, 640 A.2d at 430. In some years of her life, Catherine has experienced over 50 seizures. *Id.* Such seizures are also termed "*status epilepticus*" because they are very prolonged. NIEDERMEYER, *supra*, at 78. For individuals who suffer status epilepticus grand mal seizures during pregnancy, mortality of the fetus is high and maternal mortality is considerable. *Id.* at 212. In one study of 29 patients with status epilepticus during pregnancy, 9 of the 29 patients died, and at least 14 of the 29 fetuses died in utero or shortly after birth. K. Teramo and V.K. Hiilesmaa, *Pregnancy and Fetal Complications in Epileptic Pregnancies: Review of the Literature*, in *EPILEPSY, PREGNANCY, AND THE CHILD*, *supra*, at 54. The life-threatening risks posed to Catherine in the event that she became pregnant were not in dispute. Telephone Interview with Marta Engdahl, *supra* note 6.

10. *Estate of C.W.*, 640 A.2d at 430.

11. *Id.* In addition to the anxiety she would suffer as a result of being separated from her child, research indicates that there may be psychological problems associated with the pregnancy itself for a woman in Catherine's position. Dieter Schmidt, *The Effect of Pregnancy on the Natural History of Epilepsy: Review of the Literature*, in *EPILEPSY, PREGNANCY, AND THE CHILD*, *supra* note 9, at 8 ("The fear of the potential risk of giving birth to a child with epilepsy, malformations, or functional defects may be overwhelming," "[t]he psychosomatics of pregnancy may contribute to the outcome of epilepsy during pregnancy," and the "[l]oss of sleep or pregnancy-induced changes in sleep physiology, anxiety-induced hyperventilation, or fatigue, may increase the seizure frequency.").

12. Brief for Appellee/Respondent at 3, *Estate of C.W.*, 640 A.2d 427 (Pa. Super. 1994) (No. 91-2970). Catherine's mother was quoted as saying, "[I] just wanted to see her

Pennsylvania law, Catherine's mother sought appointment as her guardian with specific authority to consent to the sterilization procedure.¹³ The court of Common Pleas granted her such authority.¹⁴ This decision was subsequently affirmed by the Superior Court of Pennsylvania.¹⁵

This note analyzes the constitutional implications of involuntary sterilization as applied to the mentally disabled, when sought strictly out of medical necessity. Part I discusses the case of *Estate of C.W.* Specifically, it touches upon the common law sources which laid the groundwork for Pennsylvania's best interests requirement for involuntary sterilization. Part I argues that the sterilization of Catherine was lawfully granted. Part II will, on a global level, trace the historical evolution of the eugenics movement from which the court's current skepticism towards involuntary sterilization lies. Part III explains the current status of sterilization. Part IV outlines the evolution of the modern right to privacy, argues that the fundamental right to sexuality is implicit in both the right to privacy and in the First Amendment right to self-expression, and explains the right to habilitation. Part V argues that the court's granting of authorization to perform the sterilization procedure served to justly uphold Catherine's constitutional rights to privacy, sexuality, and habilitation. Finally, part VI concludes with a balancing test, which balances the state's interest in protecting Catherine's rights to privacy¹⁶ and procreational freedom against her mother's interest in protecting Catherine's rights to privacy, sexuality, habilitation, and life itself.

[Catherine] have a life. . . . I want to do the best I can to protect her from any problems happening in her life." *Id.*

13. 20 PA. CONS. STAT. ANN. § 5511 (1995). The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate. *Id.*

14. *Estate of C.W.*, No. 87-3107, slip. op. at 56 (Pa. Ct. Common Pleas, Phila. County Feb. 28, 1990), *aff'd*, 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), *and cert. denied*, 115 S. Ct. 1175 (1995).

15. *Estate of C.W.*, 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), *and cert. denied*, 115 S. Ct. 1175 (1995).

16. The right to privacy which the state asserts on Catherine's behalf relates to her freedom from bodily intrusion. Alternatively, the right to privacy asserted by her mother is the right for Catherine to be let alone, free from invasive state interests controlling her well-being.

II. GENERAL OVERVIEW: *ESTATE OF C.W.*

A. *Catherine's Background*

Since the age of twelve, Catherine has lived in a community living arrangement ("CLA")¹⁷ because she had become increasingly difficult to care for at home.¹⁸ In view of her potential proximity to other males living in the CLA,¹⁹ her overly affectionate nature,²⁰ and her heightened sexual awareness,²¹ there exists a strong likelihood that Catherine could become sexually involved and become pregnant.²² In the event that she did become pregnant, her epileptic condition could very well put her and her fetus into a life-endangering situation.

17. Community living arrangements such as the one where Catherine lives are intended to provide a cooperative or structured small group living arrangement that is part of the community, as opposed to an institutional system closed off from the community. See generally HANDBOOK OF MENTAL RETARDATION (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991) [hereinafter HANDBOOK].

18. *Estate of C.W.*, 640 A.2d at 431 (stating that while at home, Catherine sometimes refused to eat or take medications and she often disrupted rest of family).

19. Brief for Appellee/Respondent at 6, *Estate of C.W.* (No. 91-2970). At one time, there were three male residents living in the CLA whose ages ranged from 17 to 22. *Id.*

20. *Id.* at 5-6. Testimony indicated that Catherine is particularly affectionate, even with strangers. Because she has been so sheltered through her developmental years, she has learned to trust everyone with whom she comes into contact. She believes that everyone is as caring as her parents and family, so consequently assumes that they are her true friends. *Id.* After conducting an interview of Catherine, the trial judge said that Catherine "willingly hugged everyone in the room including people whom she had never met." *Estate of C.W.*, 640 A.2d at 431. She was described by the judge to be "extremely suggestible, compliant, and anxious to please." *Id.*

21. Brief for Appellee/Respondent at 4, 5, *Estate of C.W.* (No. 91-2970). Catherine is "sexually interested" and "aggressive physically and sexually with other people." *Id.* at 5. More than one witness testified that Catherine appears "to crave physical contact with others." *Estate of C.W.*, 640 A.2d at 434. A psychologist who examined Catherine indicated that she was "keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate." *Id.* The record also indicated that "there had been increased kissing involvement" between Catherine and her boyfriend. *Id.* A doctor who performed a physical examination of Catherine revealed that "she did not have an intact hymen." *Id.*

22. *Estate of C.W.*, 640 A.2d at 434 ("The record supports the trial court's finding that [Catherine] might be willing to engage in voluntary sexual intercourse."); see also discussion *supra* notes 20-21 and accompanying text.

Therefore, out of medical necessity,²³ Catherine's mother wished to undertake whatever means necessary to protect her daughter from becoming pregnant. While many different contraceptives were initially considered—barrier methods such as an IUD or diaphragm, hormonal treatments such as Depo-Provera, or the birth control pill, and a tubal ligation²⁴—medical testimony indicated that, in light of her tenuously controlled epilepsy, the safest available option²⁵ for Catherine was to undergo a laparoscopic tubal sterilization.²⁶

B. *Procedural Requirements and Holding*

Pennsylvania courts follow the precedent set by a 1982 case, *In re Terwilliger*,²⁷ which established Pennsylvania's standards governing the process through which a guardian is granted specific authority to consent to the involuntary sterilization of a mentally disabled person.²⁸ After *Terwilliger*, courts require that the burden of proof rests on the party seeking the approval of the authorized procedure.²⁹ Courts additionally require that the party prove, through clear and convincing evidence, that such an operation is in the "best interests" of the mentally disabled person.³⁰ Once the petition for authorization is filed with the court, the judge appoints a guardian ad litem who is responsible for asserting and defending the rights of the individual at trial.³¹ After the guardian has been appointed, the court must find the following: first, that the individual lacks the capacity to make a decision about the sterilization and that the incapacity is unlikely

23. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine's mother (Feb. 1, 1995).

24. *Estate of C.W.*, 640 A.2d at 437.

25. See Brief for Appellee/Respondent at 11, *Estate of C.W.* (No. 91-2970). The court-appointed medical expert, Catherine's treating physician, petitioner's medical expert, and a psychiatrist all testified that the appropriate medical procedure for Catherine is a tubal ligation (laparoscopy). *Id.*

26. See SARAH F. HAAVIK & KARL A. MENNINGER, II, *SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON* 109 (1981). A relatively simple operation, the "tubal sterilization" or "tubal ligation" procedure can be done on an outpatient basis. The patient is given general anesthesia, and a small incision is made near the navel. A laparoscope is inserted to enable the physician to view the Fallopian tubes. The tubes are then cut and cauterized. "The entire procedure can be completed in fifteen minutes." *Id.*

27. 450 A.2d 1376 (Pa. Super. 1982).

28. *Id.* at 1382-84.

29. See *id.* at 1382.

30. *Id.*

31. *Id.* at 1383.

to change in the near future,³² and second, that the person is capable of reproduction.³³ Once these findings have been made, the court proceeds to its ultimate determination which is whether the sterilization is in the woman's best interests.³⁴ The Orphan's Court appointed the mother as guardian,³⁵ and the case was appealed to the Pennsylvania Superior Court, which held that the best interests of Catherine required that her mother be appointed guardian with authority to consent to the tubal ligation procedure.³⁶

C. Best Interests Determination

Pennsylvania, like many other states,³⁷ has never had a statute governing the process through which one may receive authorization for the involuntary sterilization procedure.³⁸ Instead, the decision rests entirely with the judiciary.³⁹ The court's power to render such a decision stems from the common law doctrine of *parens patriae*,⁴⁰ which enables it to

32. *Terwilliger*, 450 A.2d at 1383.

33. *Id.*

34. *See id.*

[I]t must be established that sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual.

Id. (citations omitted).

35. *Estate of C.W.*, No. 87-3107, slip. op. at 56 (Pa. Ct. Common Pleas, Phila. County Feb. 28, 1990), *aff'd*, 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), *and cert. denied*, 115 S. Ct. 1175 (1995). Catherine's mother was appointed as a guardian for the purpose of approving the sterilization. *Id.*

36. *Estate of C.W.*, 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), *and cert. denied*, 115 S. Ct. 1175 (1995).

37. Florida, Illinois, Maryland, Massachusetts, New Mexico, and Wyoming have never had a compulsory sterilization statute. Richard A. Estacio, *Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance are Enough*, 92 DICK. L. REV. 411 (1988). As of 1988, most states do not have sterilization statutes, including: Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming. *Id.* at 423.

38. *Id.*

39. *Id.*

40. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1991). The phrase refers to the role of the state as a sovereign and guardian

protect those individuals within the state who, because of a legal disability, are incapable of protecting themselves.⁴¹ In making the decision whether to authorize an involuntary sterilization procedure, the court may only consider the best interests of the incompetent, and not that of the parents, guardian, or society.⁴²

Perhaps the most influential case to utilize the "best interests" test was *In re Grady*.⁴³ In *Grady*, it was emphasized that in spite of the disabled person's lack of input during the decision-making process, the court's decision was "designed to further the same interests she might pursue had she the ability to decide for herself."⁴⁴ The court further provided that its role was not that of an interpreter, but rather a surrogate.⁴⁵ To help facilitate the best interests determination, the court provided the following guidelines to be considered:

- 1) The possibility that the disabled person can become pregnant.
...
- 2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.
- 3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.
- 4) The inability of the disabled person to understand reproduction or contraception and the likely permanence of that inability.
- 5) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances.
- 6) The advisability of sterilization at the time of the application rather than in the future. . . .

to individuals who are under some type of legal disability, such as juveniles, or the insane.
Id.

41. *In re Grady*, 426 A.2d 467, 479 (N.J. 1981).

42. *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. 1982); *see, e.g., In re Grady*, 426 A.2d at 467. *Terwilliger* relied heavily on many of requirements laid out by Supreme Court of New Jersey in *Grady*, including requirement that court consider only best interest of the incompetent.

43. 426 A.2d 467, 479 (N.J. 1981).

44. *Id.* at 467.

45. *Id.*

7) The ability of the incompetent person to care for a child, or the possibility that the person may at some future date be able to marry and, with a spouse, care for a child.

8) Evidence that scientific advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.

9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interest of the incompetent person rather than their own or the public's convenience.⁴⁶

This non-exhaustive list of factors to be considered was adopted by the Pennsylvania Superior Court in *Terwilliger* to comprise part of its "best interests" test, and was subsequently relied upon in the *Estate of C.W.*⁴⁷ The most heavily debated point in the case was whether the sterilization of Catherine was the "only practicable means of contraception."⁴⁸ As provided in *Terwilliger*, this determination is reached through the use of a "least restrictive means" test, which requires that "all other contraceptive alternatives be found unworkable."⁴⁹

D. *Sterilization as the Least Restrictive Means of Contraception*

The "least restrictive means" test requires an evaluation and comparison of the net benefits associated with each available alternative to determine which is the most practicable. The contraceptive options under initial consideration included barrier methods such as the intra-uterine device ("IUD") or diaphragm, and hormonal methods such as Depo-Provera or oral contraceptives. Evidence indicates that the health risks associated with these contraceptives are non-existent with a tubal ligation procedure.

An IUD poses such potential risks as the perforation of the uterine wall, pelvic inflammatory disease, cramping pain, spontaneous expulsion, heavy bleeding between periods, and pregnancy failures.⁵⁰ The IUD must also

46. *Id.* at 483.

47. 640 A.2d 427 (Pa. Super.), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), *and cert. denied*, 115 S. Ct. 1175 (1995).

48. *Id.* at 433.

49. *In re Terwilliger*, 450 A.2d at 1383.

50. JEFFREY S. VICTOR, *HUMAN SEXUALITY: A SOCIO PSYCHOLOGICAL APPROACH* 49 (1980).

be replaced every year.⁵¹ The necessity of an annual medical procedure is more intrusive than the single procedure which would be necessary if Catherine underwent a tubal ligation.⁵² A diaphragm was not seriously considered because it would require a high level of motivation and cognitive understanding on the part of Catherine.⁵³ Hormonal treatments such as Depo-Provera have been linked with cervical cancer after prolonged use.⁵⁴ Other reported problems with the use of this product include irregular bleeding and a higher risk of breast cancer.⁵⁵ Furthermore, while the physical variations caused by the product may pose little, if any, danger to healthy people, Catherine, as a severe epileptic, would be subjected to a considerably higher risk of destabilization, grand mal seizures, and potential status epilepticus.⁵⁶ Finally, oral contraceptives such as the birth control pill increase the risk of liver cancer and may increase the risk of breast and cervical cancer.⁵⁷ The hormonal changes normally induced by the pill may also pose additional dangers to Catherine's already barely manageable epileptic condition.⁵⁸

51. *Estate of C.W.*, 640 A.2d at 438.

52. *Id.*

53. WILLIAM S. ROWE & SANDRA SAVAGE, *SEXUALITY AND THE DEVELOPMENTALLY HANDICAPPED* 51 (1987). Catherine's intellectual level was that of a three to five-year-old. See *supra* note 6 and accompanying text.

54. Patricia Bailey & Joseph Sanfillipo, *Contraception in the Adolescent*, in *CONTRACEPTION* 105 (1993). In a case controlled study conducted in Latin America, cervical cancer risks appeared to be associated with prolonged use. Short-term use of this product appears to be associated with a lower incidence of cervical cancer. *Id.*

55. *Id.*

56. Brief for Appellee/Respondent at 38, *Estate of C.W.* (No. 91-2970). Catherine's epilepsy is tenuously controlled. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine's mother (February 27, 1995). Her medical condition is so fragile, that the slightest cold, or change in body temperature could cause her to have seizures. The severity of Catherine's epileptic condition was not a matter of dispute. *Id.*

57. Malcolm C. Pike & Darcy V. Spicer, *Oral Contraceptives and Cancer*, in *CONTRACEPTION* 67 (Donna Shoupe, et al. eds., 1993). While there are many types of oral contraceptives, the side-effects associated with the one referred to in the accompanying text have been linked with the use of "combination-type" oral contraceptives which are the most commonly used. Each pill contains both an estrogen and a progestin. *Id.* The alternative pill, the "minipill," contains progestin only. *Id.* at 95.

58. Catherine's mother was primarily concerned with potential drug interactions with her other medication and how they could detrimentally affect Catherine's health. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine's mother (Aug. 11, 1995). See Martha J. Morrel, *Hormones and Epilepsy Through the Lifetime*, *EPILEPSIA* 33 (Supp. S49-61 1992).

By comparison, the tubal ligation procedure carries with it minimal, if any, danger to Catherine's health.⁵⁹ "Physicians as a group are generally in favor of sterilizing developmentally disabled individuals and often encourage the operation."⁶⁰ A recent study found that women who have had tubal sterilizations were two-thirds less likely to develop ovarian cancer than other women.⁶¹ Ovarian cancer kills 12,000 women in the United States every year.⁶² Only thirty-nine percent of women who become afflicted with ovarian cancer will survive more than five years.⁶³ This provides a compelling argument for women who are sure that they do not want to have children.⁶⁴ Even before this study was conducted, however, another study which was designed to gauge women's satisfaction after having undergone the tubal ligation procedure revealed that ninety percent

Hormones influence brain function from gestation throughout life and may affect the seizure threshold by altering neuronal excitability. Estrogen enhances and progesterone diminishes neuronal excitability experimentally. . . . Hormonal effects in the CSN [Central Nervous System] also depend on the region of the brain in which the hormone acts. Sites of action for most steroid hormones include the hypothalamus and limbic cortex, providing a mechanism for modulating behavior and endocrine function. Seizure patterns may change at certain life stages, perhaps as a result of alterations in hormones. . . . In some women, fluctuations in hormones over the menstrual cycle appear to increase seizure vulnerability, probably reflecting changes in relative amounts of estrogen and progesterone.

Id. at S49.

59. See ROWE & SAVAGE, *supra* note 53, at 47. The side effects for tubal ligation are reportedly negligible. There may be minor post-surgery discomfort. *Id.*; see also HAAVIK & MENNINGER, II, *supra* note 26, at 109 ("Complications of the operation are rare but include hemorrhage, complications of general anesthesia, electrocoagulation burns, and perforation of the uterus, bowel, and occasionally other organs."). One study of 2000 tubal sterilizations reported a complication incidence of 3.9%, with hemorrhage being the most frequent complication. *Id.* at 110.

60. HAAVIK & MENNINGER, II, *supra* note 26, at 113. A survey of 652 professionals and parents of retarded children revealed that 85.8% either favored or strongly favored voluntary sterilization for mentally disabled persons. *Id.* at 114.

61. Linda Carrol, *Beyond Birth Control: Women Who Never Considered Tubal Sterilization Might Be Thinking Twice After a Study Shows It Offers Some Protection Against Ovarian Cancer*, NEWSDAY, Dec. 20, 1993, at 61.

62. *Id.*

63. *Id.*

64. See *id.* ("Several doctors said [] that the new study presents a powerful argument for the operation if a woman is sure she will not want to have children in the future."). Dr. Robert C. Wallach, director of gynecologic oncology at the New York University School of Medicine, reportedly said, "I'm very happy that we have this potential preventative measure for one of the worst diseases we treat." *Id.*

were satisfied with their operation and would elect to repeat it if they had to do it over again.⁶⁵ In the unlikely event that Catherine's mental or physical condition changes, and she can experience childbirth in the absence of the aforesaid risks, the sterilization may be reversed.⁶⁶

E. *The Dissenting Opinion*

Justice Johnson, writing for the dissent, focused his attack on the majority's conclusion that Catherine's sterilization was the least restrictive means of contraception available to her.⁶⁷ Citing our country's history of the eugenic sterilization of mentally disabled persons,⁶⁸ the dissent emphasized the need to impose the least restrictive alternative test.⁶⁹ Adhering to the "clear and convincing" standard, Justice Johnson stated that the evidence failed to show that the tubal ligation procedure was in Catherine's best interests.⁷⁰ In stating that the court "may only consider the best interests of the incompetent . . . [and] not the interests or convenience of that individual's parents, guardian, or of society,"⁷¹ Justice Johnson unveiled his skepticism towards the majority's interpretation of the best interests test. He reminded the court that its best interests determination was not to be based on a balancing test of the pros and cons associated with the various contraceptives.⁷² Instead the court must find that other

65. HAAVIK & MENNINGER, II, *supra* note 26, at 113. The sample was taken from 147 women who received counseling two to three months before sterilization. Five percent of the women indicated that they would not repeat the operation, and five percent were uncertain. *Id.*

66. See Victor Gomel, *Tubal Reconstruction: Reversal of Female Sterilization By Microsurgery*, in FEMALE STERILIZATION 85, 85 (1980) ("Microsurgery offers the best chance for a successful reversal of sterilization and a normal intrauterine pregnancy resulting in a live birth."). Studies have shown that the procedure is reversible 80.8% of the time. *Id.*

67. Estate of C.W., 640 A.2d 427, 440 (Pa. Super.) (Johnson, J., dissenting), *stay granted*, 640 A.2d 445 (Pa. Super. 1994), and *cert. denied*, 115 S. Ct. 1175 (1995).

68. See *infra* part III.

69. Estate of C.W., 640 A.2d at 441 (Johnson, J., dissenting).

70. *Id.* at 442 (Johnson, J., dissenting). He based his opinion, in part, on the possibility that new or safer methods of contraception may be available in the future. He also rejected the argument that the mere chance of side affects associated with other alternative contraceptives was a sufficient basis for rejecting a less intrusive method in favor of sterilization. *Id.* at 444 (Johnson, J. dissenting). While medical testimony indicated that other contraceptives had potential side affects, or potentially negative interactions with Catherine's anti-epileptic medication, this was not proven with certainty. *Id.* (Johnson, J., dissenting).

71. *Id.* at 440 (Johnson, J., dissenting).

72. Estate of C.W., 640 A.2d at 445 (Johnson, J., dissenting).

contraceptives have been proven unworkable, and that the sterilization procedure is the least significant intrusion necessary to protect Catherine's best interests.⁷³ Finally, he accused the majority of neglecting to address Catherine's constitutional rights, specifically, her right to bodily integrity and reproductive autonomy.⁷⁴

III. THE ORIGIN OF INVOLUNTARY STERILIZATION AS A PRODUCT OF THE EARLY EUGENICS MOVEMENT

The term eugenics was coined by Sir Francis Galton who, in 1883, defined it as the "study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally."⁷⁵ Eugenics encompassed two different classifications—positive and negative—with essentially the same objective.⁷⁶ Positive eugenics encouraged procreation between mates who shared the most desirable genetic traits.⁷⁷ This was assumed to ensure that future offspring would be blessed with the optimal genetic makeup. Negative eugenics was concerned with "curbing the fertility" of those who were predicted to bear undesirable offspring.⁷⁸ Included in this group were the mentally ill, the mentally and physically handicapped, degenerates, and the diseased.⁷⁹ One of the tools of negative eugenics was compulsory sterilization.⁸⁰

Predicated on Social Darwinist Herbert Spencer's "survival of the fittest" doctrine, the eugenics philosophy was designed to engineer a better, more capable society.⁸¹ The objective was to spread the message that undesirable human traits were, in fact, "hereditary, and that good citizens had a duty to promote the reproduction of fit stock and to discourage or prevent reproduction of the unfit."⁸² Further, "[t]he eugenists believed that

73. *Id.* (Johnson, J., dissenting).

74. *Id.* at 441.

75. ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 356-57* (1937).

76. STEPHEN TROMBLEY, *THE RIGHT TO REPRODUCE: A HISTORY OF COERCIVE STERILIZATION 2* (1988).

77. *Id.*

78. *Id.*

79. J.H. LANDMAN, *HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT 129* (1932).

80. TROMBLEY, *supra* note 76, at 2.

81. *Id.* at 5.

82. *Id.* at 11.

slow evolutionary progress was in the natural order of things,” and such progress was halted by society’s efforts to protect “the socially inadequate from extinction.”⁸³

The controversy started with Charles Darwin’s *On the Origin of Species*,⁸⁴ which theorized that the idea of natural selection⁸⁵ was not always “natural,” and was sometimes the result of man’s interference with nature.⁸⁶ Though Darwin’s viewpoints expressed in his book were not based on any scientific evidence, they were influential nevertheless, because of his sound reputation.⁸⁷ In 1900, the laws of heredity developed by Austrian monk Gregor Mendel helped further lay the groundwork for the Eugenics movement.⁸⁸ Mendel’s research on the crossbreeding of peas resulted in the discovery that inherited traits were actually inherited in the form of a pair of determiners (later called genes), one from each parent.⁸⁹ What scientists today characterize as dominant and recessive genes originated from Mendel’s research.⁹⁰ Mendel hypothesized that it may be possible to predict one’s genetic composition based on the dominant and recessive gene pools of one’s parents.⁹¹ These discoveries were thought to have provided society with a justification for considering the use of compulsory sterilization as a means of cleansing the gene pool.

One of the earliest proponents of compulsory sterilization was Dr. Robert Rentoul.⁹² His theory of sterilization was legitimized on a medical and social basis. Because it was assumed that diseases, idiocy, and socially deviant characteristics were inheritable, sterilization was argued to be an efficient means to eliminate the possibility of the affliction of such traits on future offspring.⁹³ During the period from 1912 to 1916, several books

83. Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1426 (1981).

84. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (1859).

85. TROMBLEY, *supra* note 76, at 5. Darwin’s concept of “natural selection” served as the genesis for Spencer’s subsequent “survival of the fittest” doctrine. *Id.*

86. *Id.*

87. *Id.* Few eugenists were actually trained geneticists. *Id.*

88. DEUTSCH, *supra* note 75, at 356.

89. *Id.*

90. *Id.*

91. *See generally id.* (providing a detailed explanation of Mendelian genetics).

92. *See generally* ROBERT RENTOUL, *PROPOSED STERILIZATION OF CERTAIN MENTAL AND PHYSICAL DEGENERATES—AN APPEAL TO ASYLUM MANAGERS AND OTHERS* (1903); ROBERT RENTOUL, *RACE CULTURE, OR RACE SUICIDE? A PLEA FOR THE UNBORN* (1906) (both advocating compulsory sterilization of the mentally disabled).

93. TROMBLEY, *supra* note 76, at 11.

theorized that mental retardation was largely hereditary, and was the root of social evils.⁹⁴ Estimates of the number of cases of retardation which were attributable to heredity ranged to ninety percent and greater.⁹⁵ While no conclusive modern research has been performed in this area, several studies have attempted to identify the likelihood that mental retardation may be passed down to one's offspring.⁹⁶ Three studies in particular⁹⁷ indicated that, in the event that one or both parents are mentally disabled, the likelihood that the offspring will inherit the condition is roughly eleven percent.⁹⁸

In the earlier part of the twentieth century, however, society was ultimately convinced that mental disabilities were inheritable and the "mother of crime, pauperism and degeneracy."⁹⁹ It was said that:

The feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. They cause unutterable sorrow at home and are a menace and danger to the community. Feeble-minded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves. . . . Every feeble-minded person, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of his criminal tendencies.¹⁰⁰

"Involuntary" or compulsory sterilization found its beginning as a punishment for convicted criminals, rather than as strictly a eugenic

94. See DEUTSCH, *supra* note 75, at 358, 359 (naming some of most celebrated publications, including: CHARLES B. DAVENPORT & FLORENCE H. DANIELSON, *THE HILL FOLK* (1912); ARTHUR H. ESTABROOK, *THE JUKES IN 1915* (1915); ARTHUR H. ESTABROOK & CHARLES B. DAVENPORT, *THE NAM FAMILY* (1912); ELIZABETH S. KITE, *THE PINEYS* (1913); and MARY S. KOSTIR, *THE FAMILY OF SAM SIXTY* (1916)).

95. *Id.* at 357.

96. HANDBOOK, *supra* note 17, at 286.

97. *Id.* The following studies established a likelihood of 11% that a child will inherit a mental disability from his parent if one or both are mentally disabled: Brandon, 1957; Scally, 1968; Shaw & Wright, 1960. *Id.* When one parent is mentally disabled and there is already one mentally disabled child in the family, the recurrence risk rises to nearly 20%. *Id.*

98. *Id.*

99. DEUTSCH, *supra* note 75, at 359.

100. *Id.* at 359-60 (citations omitted).

measure.¹⁰¹ In 1855, the Kansas Territorial Legislature legalized the castration of any black or “mulatto” convicted of rape, attempted rape or kidnapping of a white woman.¹⁰² Towards the end of the nineteenth century, the European theory of “degeneration” or “eugenics” found its way to the United States.¹⁰³

Prior to 1900, however, support for sterilization was quite limited.¹⁰⁴ Surgical procedures like castration resulted in asexualization, disturbing the hormonal balance, and various other psychological and physiological effects.¹⁰⁵ These undesirable side effects forced those who supported such measures to justify them on the basis of their punitive or therapeutic value in addition to their eugenic benefits.¹⁰⁶ Along with the discovery of less intrusive surgical procedures¹⁰⁷ came a more powerful justification for sterilization to be used for solely eugenic reasons. Dr. Harry Sharp’s discovery of the vasectomy as a safe, inexpensive and quick medical procedure revolutionized eugenic thinking.¹⁰⁸ The procedure did not affect the libido, despite its ultimate aim of preventing fertilization.¹⁰⁹ Between 1899 and 1907, Sharpe performed 465 compulsory sterilization operations

101. See TROMBLEY, *supra* note 76, at 49-50; see also LANDMAN, *supra* note 79, at 51 (explaining that history includes various cultures who used compulsory sterilization for one reason or another).

Apostate Jews, who dared revert to Judaism, were in the Middle Ages castrated; negroes in the pre-Civil War days were castrated at times as a punishment or as a method of developing more sturdy workers; Mohammedans frequently castrated young boys for purposes of maintaining their harems; and the choir boys in the Roman Catholic Church during the Middle Ages, until forbidden by Pope Leo XIII, were made eunuchs before puberty so that they might retain their soprano voices as they grew to adulthood. The ancient peoples—such as the people of the Bible, the Egyptians, the Assyrians, the Chinese, the Hindus, the Greeks, the Persians, and the Romans—castrated their captives, criminals, and slaves for penal purposes.

Id.

102. See TROMBLEY, *supra* note 76, at 49.

103. *Id.*

104. Cynkar, *supra* note 83, at 1429.

105. *Id.*

106. *Id.*

107. *Id.* (explaining various types of sterilization including the salpingectomy—cutting and tying the Fallopian tubes—and the vasectomy—cutting and tying the vas deferens). These procedures require comparatively minor surgery and have none of the side effects of castration. *Id.*

108. See TROMBLEY, *supra* note 76, at 50.

109. *Id.* (explaining Sharp’s view that “each man ‘is in no way impaired for his pursuit of life, liberty and happiness, but is effectively sterilized’”).

on male inmates at the Indiana State Reformatory.¹¹⁰ Sharpe's perceived success in eugenics served as a prelude for its ultimate legislation.

"Probably the first explicitly eugenic legislation in the [United States] was Connecticut's 1896 law preventing marriage to, or sexual relations with, the eugenically unfit."¹¹¹ The first American eugenic sterilization bill, introduced in 1897 by the Michigan legislature, was never enacted.¹¹² On April 9, 1907, Indiana became the first state to enact legislation which allowed compulsory sterilization of the feeble-minded.¹¹³ Other states were quick to follow.¹¹⁴ One of the best examples of how determined some states were to carry out such laws is reflected by the sterilization laws of Kansas, first passed in 1913.¹¹⁵ Kansas' first sterilization law made it a crime for any managing officer of a state institution to fail to recommend the sterilization of any inmate unfit to procreate.¹¹⁶ Any officer failing to do so was fined up to \$100, or imprisoned up to thirty days, or both.¹¹⁷

The 1924 passing of Virginia's sterilization statute is of particular significance because it was the first statute of its kind to ultimately be deemed constitutional by the Supreme Court of the United States.¹¹⁸ The Virginia law was written in such a way so as to avoid any constitutional infractions.¹¹⁹ "The [Virginia] legislature did not intend sterilization to be a punitive measure, but rather [as] a measure in 'the best interests of the

110. *Id.*

111. *Id.*

112. *Id.*

113. TROMBLEY, *supra* note 76, at 51. The statute allowed for the procedure to be performed if it was determined that there was no probability of the victim's mental improvement. *Id.*

114. *Id.* Washington enacted a compulsory sterilization law for convicted criminals in 1909. *Id.*; see also HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES (1922). California was the third state to enact legislation for compulsory sterilization in April of 1909. TROMBLEY, *supra* note 76, at 51. Its motive was primarily eugenic, and partly punitive. Connecticut followed with its compulsory sterilization statute passed in August, 1909. It, too, was primarily eugenic. Nevada approved a sterilization statute in March, 1911. Iowa passed legislation in March, 1911; New Jersey in April, 1911, North Dakota in March, 1913. *Id.* at 65. Several other states followed suit. *Id.*; see also HARRY H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 7 (1930) [hereinafter LAUGHLIN, LEGAL STATUS] (stating that by January 1, 1930, 23 different states had enacted eugenic sterilization statutes of one type or another).

115. TROMBLEY, *supra* note 76, at 65.

116. *Id.*

117. *Id.*

118. LAUGHLIN, LEGAL STATUS, *supra* note 114, at 7.

119. Cynkar, *supra* note 83, at 1436.

patients and of society.”¹²⁰ In April of 1927, the landmark case of *Buck v. Bell*¹²¹ was argued before the Supreme Court of the United States. In that case, the superintendent of the State Colony for Epileptics and Feeble-minded for the state of Virginia, had requested and performed a sterilization procedure on Carrie Buck.¹²² Buck was believed¹²³ to be a mentally disabled daughter of a mentally disabled woman, both of whom lived in the same institution.¹²⁴ The proponents of eugenics and compulsory sterilization used the Bucks as a confirmation of their theories of heredity. Carrie’s mother had registered a mental age of less than eight on the Stanford revision of the Binet-Simon test, while Carrie had a mental age of nine.¹²⁵

120. *Id.* (quoting, in part, 1924 VA. ACTS ch. 394).

121. 274 U.S. 200 (1927).

122. See LANDMAN, *supra* note 79, at 97.

123. Subsequent literature revealed that Carrie Buck was not mentally ill or retarded. See Stephen J. Gould, *Carrie Buck’s Daughter*, 2 CONST. COMMENTARY 331, 336 (1985) (quoting a letter received from Paul A. Lombardo of the School of Law at the University of Virginia).

As for Carrie, when I met her she was reading newspapers daily and joining a more literate friend to assist at regular bouts with the crossword puzzles. She was not a sophisticated woman, and lacked social graces, but mental health professionals who examined her in later life confirmed my impressions that she was neither mentally ill nor retarded.

Id.; see also Telephone Interview with Paul A. Lombardo, Associate Professor & Director of The Center For Mental Health Law at the Institute of Law, Psychiatry & Public Policy at the University of Virginia, and a leading scholar of *Buck v. Bell* (August 23, 1995) (stating that: “Carrie exhibited no difficulty in speaking with me. The clinicians who had interviewed and evaluated her found no evidence of mental retardation.”).

124. LANDMAN, *supra* note 79, at 97.

125. *Id.* at 98; see also HANDBOOK, *supra* note 17, at 286 (discussing the statistical probability of mentally disabled parents birthing mentally disabled offspring). The Stanford-Binet is one of the most commonly used instruments for evaluating intellectual functioning in the mentally disabled. It seeks to identify patterns of intellectual functioning which it then compares to other individuals’ of the same age. See THE PRESIDENT’S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 229 (Michael Kindred et al. eds., 1976) [hereinafter Kindred].

[Intelligence] [t]est performance might indicate differences in mental capacity among [people] who “have had an equal opportunity to learn certain types of cognitive, linguistic and mathematical skills and to acquire certain types of information; if they were equally motivated to learn these skills and to acquire this information; if they are equally motivated to exert themselves in a test situation and equally familiar with the demands of the test situation; if they were equally free of emotional . . . and biological . . . difficulties which might interfere with their performance.”

Id. (citations omitted).

Their relationship as parent/child served to show that mental disabilities were transmitted genetically, and could be prevented through sterilization.

At trial, Buck's attorney argued that Virginia's sterilization statute was a violation of Carrie Buck's constitutional right of "bodily integrity," and consequently a deprivation of "life" without due process of law.¹²⁶ He also attacked the statute on the ground that it violated the equal protection component of the Due Process Clause of the Fifth Amendment.¹²⁷ In an eight-to-one decision, the Court supported the sterilization statute.¹²⁸

The lone dissenter, Justice Butler, neglected to provide a written opinion.¹²⁹ Speaking for the majority, Justice Holmes held that the procedural aspects of the statute satisfied the due process arguments and that the uniform application of the statute to all members of the class of mentally disabled people in state institutions complied with equal protection.¹³⁰ Justice Holmes said of Carrie Buck:

"[H]er welfare and that of society will be promoted by her sterilization."
 . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.¹³¹

Currently, the holding in *Buck v. Bell* has not been overturned. Nonetheless, most scholars suggest that the case would be overruled, if presented to the Supreme Court of the United States today.¹³² Having established the historical context of compulsory sterilization, this casenote will proceed to analyze the *C.W.* case on a factual and constitutional basis, arguing that the operation was required out of medical necessity and ultimately served to uphold Catherine's constitutional rights. As shall be seen, the aforementioned eugenic or punitive justifications for the procedure are nonexistent in this case.

126. Cynkar, *supra* note 83, at 1447 (citations omitted).

127. *Id.* (citations omitted).

128. *Buck v. Bell*, 274 U.S. 200 (1927).

129. *See* Cynkar, *supra* note 83, at 1450.

130. *Id.*

131. *Buck*, 274 U.S. at 207 (citations omitted).

132. *See* Cynkar, *supra* note 83, at 1456.

IV. THE MODERN STATUS OF STERILIZATION

Currently, there are ten states which still have compulsory sterilization statutes.¹³³ Just twenty years ago, there were over twice as many such statutes.¹³⁴ Some jurisdictions have banned the sterilization of the mentally disabled altogether.¹³⁵ There are three factors which have helped shape society's current sterilization laws:¹³⁶ "the discrediting of the eugenic theory, the development of the constitutional doctrine of reproductive privacy, and the changing conception of mental retardation."¹³⁷

With the erosion of the scientific community's support for eugenics came society's rejection as well. Elizabeth Scott notes: "[r]eports of widespread sterilization in Nazi Germany led to increased criticism of eugenic sterilization laws."¹³⁸ By the 1960s, involuntary sterilization was often deemed an unjustified intrusion by the state on an individual's liberty and privacy.¹³⁹ Moreover, the evolution of the constitutional right of reproductive privacy has spawned a greater interest among lawmakers to

133. See ARK. STAT. ANN. § 20-49-205 to -304 (Michie 1991); DEL. CODE ANN. tit. 16, §§ 5701-5716 (1985); GA. CODE ANN. § 31-20-3 (1982); IDAHO CODE §§ 39-3901 to -3909 (1971); MISS. CODE ANN. §§ 41-45-1 to -19 (1972); N.C. GEN. STAT. §§ 35-39 to -43 (1994); OR. REV. STAT. §§ 436.225 to .295 (1993); UTAH CODE ANN. §§ 62A-6-101 to -6-116 (1988); VT. STAT. ANN. tit. 18, §§ 8705-8712 (1987); VA. CODE ANN. §§ 54.1-2975 to -2977 (Michie 1994).

134. Estacio, *supra* note 37, at 417.

135. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 817 n.31 (1986). "No person with developmental disabilities who has not given consent shall be sterilized." *Id.* (quoting COLO. REV. STAT. § 27-10.5-128(2) (Supp. 1985)). In 1981, the Colorado Supreme Court carved out an exception to allow sterilization of mentally disabled minors. *Id.* (citing *In re A.W.*, 637 P.2d 366, 375 (Colo. 1981)). "A California law prohibiting sterilization of all persons under conservatorship, CAL. PROB. CODE § 2356 (1981) was struck down in 1985 in *Conservatorship of Valerie N.*, 707 P.2d 760 (Cal. 1985). Several courts have effectively banned sterilization by refusing to allow sterilization in the absence of statutory authority." *Id.* Federal law prohibits governmental funding of the sterilization of minors or mentally incompetent persons who are incompetent to consent to the operation. See *infra* text accompanying note 163.

136. See Scott, *supra* note 135, at 809.

137. *Id.*

138. *Id.* at 811.

139. *Id.* The right to reproductive privacy in the 1960s and 1970s has affected the constitutional analysis of sterilization laws. *Id.* n.17. Because the eugenic sterilization laws infringed a fundamental right to privacy and procreation, the laws are subjected to strict scrutiny and must be narrowly tailored to the means they seek to achieve. This contrasts to the rationality review previously used by the court in *Buck v. Bell*, 274 U.S. 200 (1927). Scott, *supra* note 135, at 811.

address the reproductive rights of the mentally disabled.¹⁴⁰ It is well established that normal adults and mature minors are entitled to avoid unwanted pregnancies via contraception or sterilization.¹⁴¹ There is a consensus within the legal community that mentally disabled persons are entitled to the same right of reproductive privacy as normal people.¹⁴² This relatively newfound sense of legislative acceptance for the mentally disabled reflects changes in society's attitudes as well.¹⁴³ As a result, today's programs for the mentally disabled strive to encourage the person to live as independently and self-sufficiently as possible.¹⁴⁴ This is formally recognized as "normalization."¹⁴⁵

"Normalization," or "habilitation" refers to the "mainstreaming" of mentally disabled individuals.¹⁴⁶ The constitutional right to habilitation for the mentally retarded was first articulated in the landmark case of *Wyatt v. Stickney*,¹⁴⁷ in 1972.¹⁴⁸ The court held that a mentally retarded person had an "inviolable constitutional right to habilitation."¹⁴⁹ The term was originally intended to describe the bundle of constitutional rights which belonged to mentally disabled persons who were confined to institutions.¹⁵⁰ Though the Supreme Court of the United States has not yet recognized habilitation as a constitutional right,¹⁵¹ the right is grounded in the legal doctrines of substantive due process, equal protection guarantees, and the constitutional prohibition of cruel and unusual punishment.¹⁵²

Today's laws concerning involuntary sterilization are designed to protect the interests of the mentally disabled rather than those of society.¹⁵³ There are primarily two types of tests used when a state considers permitting an involuntary sterilization procedure, the substituted judgment

140. *Id.* at 812.

141. *Id.* at 813.

142. *Id.*

143. *Id.* at 814.

144. See Scott, *supra* note 135, at 815.

145. *Id.*

146. See Brief for Appellee/Respondent at 8, *Estate of C.W.*, 640 A.2d 427 (Pa. Super. 1994) (No. 91-2970).

147. 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

148. Kindred, *supra* note 125, at 385.

149. *Id.* at 400 (quoting *Wyatt*, 344 F. Supp. at 390).

150. *Id.* at 386-87.

151. *Id.*; cf. *Youngberg v. Romeo*, 457 U.S. 307, 331 (1982) (holding that mentally disabled persons have a fundamental right to minimally adequate training).

152. Kindred, *supra* note 125, at 390.

153. See Scott, *supra* note 135, at 807.

test, and the best interests test.¹⁵⁴ Both tests proclaim to preserve the rights of self-determination of the mentally disabled.¹⁵⁵ The substituted judgment test is frequently used in cases where the individual was, at one time, competent to make decisions.¹⁵⁶ It allows a court to render a decision consistent with that of the patient, were she competent to do so.¹⁵⁷ In its consideration, the court will examine any evidence which tends to indicate the individual's intent.¹⁵⁸ The difficulty with the substituted judgment test is that the court cannot always infer the patient's intent. Consequently, most courts have relied on the best interests test.

Courts which use the best interests standard are motivated by the interests of the person who is mentally disabled and perhaps not competent to make a well-informed decision.¹⁵⁹ Of the two tests, the best interests standard accommodates itself to the particular needs of the individual, as opposed to the substituted judgment test which arbitrarily attempts to guess whatever the individual's preference may be. For the foregoing reasons, most states use the best interests test in determining whether or not to grant authority to perform the involuntary sterilization procedure.¹⁶⁰

Due to the problems of consent, lack of implementation of the laws, and a growing movement supported by civil libertarians, the incidence of reported sterilization has fallen in the last several years.¹⁶¹ In addition, the 1974 decision of *Relf v. Weinberger*,¹⁶² prohibiting the use of all federal funds for the sterilization of minors or incompetent persons, further stagnated the number of sterilization procedures.¹⁶³ The cumulative result

154. William A. Kraiss, *The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J.L. & MED. 333, 334 (1989).

155. *Id.*

156. *Id.* at 343.

157. *Id.*

158. *Id.* at 344.

159. Kraiss, *supra* note 154, at 345.

160. *Id.* at 353.

161. See HAAVIK & MENNINGER, II, *supra* note 26, at 108.

162. 372 F. Supp. 1196 (D.C. 1974), *vacated by* 565 F.2d 722 (D.C. Cir. 1977).

163. See HAAVIK & MENNINGER, II, *supra* note 26, at 108. The *Relf* court held that the family planning sections of the Social Security Act and Public Health Service Act did not authorize the federal funding for any person who, under state law, was incompetent to consent. *Relf*, 372 F. Supp. at 1196. The court further held that federally assisted family planning sterilizations are only permissible with the voluntary, knowing and uncoerced consent of persons competent to give such consent. *Id.* at 1202.

of this has been the limited accessibility of sterilizations for many women who want them.¹⁶⁴

V. ANALYSIS

A. *The Right to Privacy Cases*

The genesis of the Supreme Court's recognition of the constitutional right to privacy dates back to 1891 in the case of *Union Pacific R. Co. v. Botsford*,¹⁶⁵ where Justice Gray stated: "No right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . ."¹⁶⁶ He continued, "The right to one's person may be said to be a right of complete immunity: to be let alone."¹⁶⁷

In 1927, Justice Brandeis alluded to the right to privacy in his famous dissent in *Olmstead v. United States*.¹⁶⁸ In the dissenting opinion, Justice Brandeis argued that the makers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."¹⁶⁹ He continued to say that the makers of the constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹⁷⁰

In a succession of modern cases beginning with the landmark case of *Griswold v. Connecticut*,¹⁷¹ the Supreme Court explicitly recognized the fundamental right to privacy. In *Griswold*, the Court struck down a Connecticut statute which prohibited the use, distribution, and exchange of knowledge concerning contraceptives.¹⁷² Justice Douglas, delivering the opinion of the Court, stated that the statute exerted a "destructive impact" on the right to marital privacy.¹⁷³ The Court's recognition of the fundamental right to marital privacy was legitimized as the derivative of several

164. See HAAVIK & MENNINGER, II, *supra* note 26, at 108.

165. 141 U.S. 250, 251 (1891).

166. *Id.* at 251.

167. *Id.*

168. 277 U.S. 438 (1928) (Brandeis, J., dissenting).

169. *Id.* at 478 (Brandeis, J., dissenting).

170. *Id.* (Brandeis, J., dissenting).

171. 381 U.S. 479 (1965).

172. *Id.* at 486.

173. *Id.* at 485.

other fundamental constitutional guarantees.¹⁷⁴ The Court explained that these various guarantees have “penumbras formed by emanations from those guarantees that help give them life and substance.”¹⁷⁵ The penumbras which collectively generate the marital right to privacy include: the right of association in the First Amendment; the prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner, in the Third Amendment; the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, in the Fourth Amendment; the self-incrimination clause of the Fifth Amendment; and a part of the Ninth Amendment which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁷⁶

Seven years later, the Supreme Court of the United States extended *Griswold* to apply to unmarried individuals in *Eisenstadt v. Baird*.¹⁷⁷ The Court held that a statute prohibiting the use and distribution of contraceptives to unmarried individuals was violative of the Equal Protection Clause because the same type of prohibition was deemed unconstitutional as applied to married persons.¹⁷⁸ The Court stated that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁷⁹

In 1973, in perhaps one of the most controversial cases of the century, *Roe v. Wade*,¹⁸⁰ the Court held that the right of privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁸¹ The Court held that a woman has a fundamental right to get an

174. *Id.*

175. *Id.* at 484.

176. *Griswold*, 381 U.S. at 484 (quoting U.S. CONST. amend. IX).

177. 405 U.S. 438 (1972).

178. *Id.* at 453.

179. *Id.*

180. 410 U.S. 113 (1973).

181. *Id.* at 153. The Court’s support for *Roe* appears to be waning. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), the Court rejected *Roe*’s trimester framework which placed the fetus’ viability at or near the last trimester. Due in part to advances in medicine, and to a more conservative court, the new “pregnancy timeline” is solely a function of the pre and post viability of the fetus. Viability, defined as the point at which the fetus is presumed to be capable of a meaningful life outside of the mother’s womb, is also the time at which its interest becomes sufficiently compelling so as to warrant protection under the Constitution. *Roe*, 410 U.S. at 160. The state may prohibit an abortion after the fetus becomes viable, provided that it does not endanger the health of the mother. *Id.* at 163. Due to scientific advancements, viability occurs earlier than

abortion prior to viability of the fetus, and subject to restrictions after viability.¹⁸²

Again in 1973, the Court in *Doe v. Bolton*¹⁸³ held that the “right [to privacy] includes the privilege of an individual to plan his own affairs, for, ‘outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.’”¹⁸⁴

Having established the constitutional backdrop against which Catherine’s right to privacy lies, this note will proceed to argue that there exists an unenumerated fundamental right to sexuality, implicit in the Constitution.

B. *The Fundamental Right to Sexuality*

1. Right to Privacy Theory

Sexuality itself has been defined to encompass many concepts: maleness/femaleness, sensuality, sense of self, ego, perception of self in relationship to the world and to others, and expressing or receiving an expression of sexual interest.¹⁸⁵ The activity of sex is perhaps the world’s oldest recreational activity.¹⁸⁶ The average American adult has sex fifty-seven times a year, and over ninety-seven percent of adults have had intercourse at least once.¹⁸⁷ Nevertheless, the Supreme Court of the United States has never explicitly recognized the constitutional right to sexuality, or sexual expression.¹⁸⁸ However, the Ninth Amendment has been interpreted to establish that United States citizens have certain

previously. The time during which the woman may undergo an abortion unrestricted by the state has lessened accordingly.

182. *Id.* at 164.

183. 410 U.S. 179 (1973).

184. *Id.* at 213 (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

185. ROSALYN K. MONAT-HALLER, UNDERSTANDING AND EXPRESSING SEXUALITY, RESPONSIBLE CHOICES FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES 1 (1992).

186. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre-and Extramarital Sex*, 104 HARV. L. REV. 1660, 1660 (1991) [hereinafter *Constitutional Barriers*].

187. *Constitutional Barriers*, *supra* note 186, at 1660-61.

188. The Court has noted that it “‘has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.’” *Briggs v. North Muskegon Police Dep’t*, 563 F. Supp. 585, 589 (1983) (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 n.17 (1977)), *aff’d*, 746 F.2d 1475 (6th Cir. 1984), and *cert. denied*, 473 U.S. 909 (1985).

fundamental rights, even though unenumerated in the Constitution.¹⁸⁹ The right to sexuality should be recognized as a fundamental constitutional right because it is both implicit in the rights to privacy and First Amendment self-expression, and inherent within the meaning of "life, liberty, and the pursuit of happiness." Thus, Catherine's constitutional right to sexuality will continue to be violated, even though permission to perform the tubal ligation procedure may be denied.

The Supreme Court of the United States' decision in *Griswold v. Connecticut*¹⁹⁰ was the beginning of the process by which the Court, over a period of twenty years, would carve out an expansive body of sexual privacy law.¹⁹¹ The Court held that a state cannot prohibit married couples from receiving information about contraceptive devices because it would violate the couple's right to marital privacy.¹⁹² The Court's ruling logically implies that non-procreative sexual intercourse is inherent within the institution of marriage, and therefore protected under the doctrine of marital privacy. This carries with it the inevitable presumption that each married individual is entitled to freely engage in sexual relations with his or her spouse free from state interference. The Court, reflecting the unexpressed wishes, needs, and desires of the populace, has expressed the right to sexuality in a seemingly camouflaged asexual manner. The specific language in the opinion does everything but come out and say that the state may not interfere with a couple's right to sexual expression. For example, Justice Douglas stated that the law, "operates directly on an intimate relation of husband and wife. . . ."¹⁹³ One's imagination need only go so far in considering the implications of the phrase "intimate relation." While Justice Douglas does not literally state that the law interfered with the couple's right to have sexual intercourse, it is illogical to exclude this interpretation from among the limited possibilities. Even if the phrase refers to something exclusively cerebral or spiritual, this does not negate the fact that sexual expression is another mode of intimate relation between husband and wife. It is frightening to think of the day when the Court may decide for us what distinguishes permissible intimate relations between husband and wife from that which is impermissible.

In his concurring opinion, Justice Goldberg stated that the law prohibiting contraceptives dealt with "a particularly important and sensitive

189. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

190. 381 U.S. 479 (1965).

191. ARTHUR S. LEONARD, *SEXUALITY AND THE LAW* 19 (1993).

192. *Griswold*, 381 U.S. at 485-86.

193. *Id.* at 482.

area of privacy—that of the marital relation and the marital home.”¹⁹⁴ Though vague, the nature of his language indicates the Court’s persistent tendency to circuitously express this constitutional right to sexuality. Justice Goldberg then quoted Justice Harlan’s dissenting opinion in *Poe v. Ullman*,¹⁹⁵ stating:

Adultery, homosexuality and the like are sexual intimacies which the [law] forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.¹⁹⁶

This language reflects the Court’s endorsement for non-procreative sexual expression between husband and wife, but a rejection of sexuality in other contexts. It also underscores the extent to which the Court serves as a “moral mouthpiece” for society—manifesting attitudes and behavior which society deems appropriate through its rulings.¹⁹⁷ Ironically, eight years later, *Griswold* was cited in the case of *California v. LaRue*¹⁹⁸ where Justice Marshall, in his dissent, stated: “I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults.”¹⁹⁹

Griswold was subsequently extended to apply to unmarried persons as well as married persons, in *Eisenstadt v. Baird*.²⁰⁰ Justice Brennan’s opinion in *Eisenstadt* probably generated more confusion about sexual

194. *Id.* at 495 (Goldberg, J., concurring).

195. 367 U.S. 497, 553 (1960).

196. *Griswold*, 381 U.S. at 499 (quoting *Poe*, 367 U.S. at 553 (Harlan, J., dissenting)).

197. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the issue concerned the constitutionality of a sodomy statute as applied to homosexuals. In upholding the statute, Justice White explained that fundamental rights deserving constitutional protection must be “implicit in the concept of ordered liberty,” *id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), or “deeply rooted in our Nation’s history and tradition,” *id.* at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 503 (1977)). While the Court upheld the statute five to four, Justice Blackmun, in his dissenting opinion, states his contention that the statute was unconstitutional by touting the mental health community’s newfound acceptance for homosexuality within the area of mental health: “[d]espite historical views of homosexuality, it is no longer viewed by mental health professionals as a ‘disease’ or disorder.” *Id.* at 203 n.2.

198. 409 U.S. 109 (1972).

199. *Id.* at 132 n.10 (Marshall, J., dissenting).

200. 405 U.S. 438 (1972).

privacy for the unmarried than any other Supreme Court opinion.²⁰¹ Such is the case because Justice Brennan never clarified whether the Court's ruling was based on the notion of associational intimacy as implied in *Griswold*,²⁰² or solely on the right of one's accessibility to contraceptives.

In *Eisenstadt*, the Court struck down a statute which prohibited the use of contraceptives among unmarried persons, on the basis of the Equal Protection Clause of the Fourteenth Amendment.²⁰³ The Court held that the need to distribute contraceptives is just as great among unmarried persons as it is for married ones.²⁰⁴ One can reasonably infer that the corollary to the right of accessibility to contraceptives necessarily translates into the right to engage in non-procreative intercourse, both for married and unmarried persons.²⁰⁵ Through the incorporation of *Stanley v. Georgia*,²⁰⁶ and *Skinner v. Oklahoma*,²⁰⁷ the Court constructed an individual right to privacy strong enough to be applied against other regulations which prohibited abortion, fornication, and homosexual conduct.²⁰⁸

201. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 528 (1983).

202. *See Griswold*, 381 U.S. at 479.

203. *Eisenstadt*, 405 U.S. at 443.

204. *Id.* at 450.

205. *See Doe v. Duling*, 603 F. Supp. 960, 966 (E.D. Va. 1985) ("Necessarily implicit in the right to make decisions regarding childbearing is the right to engage in sexual intercourse."); *see also Constitutional Barriers*, *supra* note 186, at 1664 ("The privacy right recognized in *Griswold* and *Baird* was not merely the right to use contraceptives; without the corresponding right to engage in sexual intercourse such a right would be meaningless," and "[t]he interest protected in these cases is the right to have sex free of governmental control and to do so with or without contraceptives."); *Bowers v. Hardwick*, 478 U.S. 186, 216-18 (1986) (Blackmun, J., dissenting) (stating, "prior cases make [it] . . . abundantly clear . . . [that] individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," and "The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others consider offensive or immoral.").

206. 394 U.S. 557 (1969). While based on the First Amendment, the Court held that the mere private possession of obscene material by an adult may not be made criminal by the state. *Id.* at 568.

207. 316 U.S. 535 (1942). On the basis of equal protection, the Court struck down a statute which allowed for the sterilization of persons convicted three times for felonies showing "moral turpitude," but which did not apply to other "white-collar" crimes like embezzlement. *Id.*

208. *See LEONARD*, *supra* note 191, at 25.

In 1986 the Court, in *Bowers v. Hardwick*,²⁰⁹ upheld an anti-sodomy²¹⁰ statute as applied to homosexuals.²¹¹ In so ruling, the Court held that prior privacy cases could not be construed to confer a right to homosexual behavior.²¹² The Court fell one vote shy of deciding that the Constitution provided an unenumerated fundamental right to homosexual conduct.²¹³

Writing for the dissent, Justice Blackmun emphasized that the case was not about homosexual conduct, per se, but rather, the “right to be let alone.”²¹⁴ His particular characterization of the matter at issue enabled him to persuasively argue that the right to sexuality is implicit in the right to privacy.²¹⁵ Justice Blackmun reminded the Court “that a certain private sphere of individual liberty [should] be kept largely beyond the reach of government.”²¹⁶ He stated that “sexual intimacy is a ‘sensitive, key relationship of human existence, central to family life, community welfare, and the development of [the] human personality.’”²¹⁷ Further, “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to . . . be the heart of the Constitution’s protection of privacy.”²¹⁸

Justice Powell, who voted with the majority in *Bowers*, later conceded that he may have made a mistake.²¹⁹ He stated, “[w]hen I had the opportunity to reread the opinions a few months later, I thought the dissent

209. 478 U.S. 186 (1986).

210. The statute provided that “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” *Bowers*, 478 U.S. at 188 n.1 (citing GA. CODE ANN. § 16-6-2(a) (1984)).

211. *Id.* at 189.

212. *Id.* at 194. *But see* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1993) (holding that criminal statute prohibiting consensual homosexual activity violates fundamental right of privacy).

213. *Bowers*, 478 U.S. at 187.

214. *Id.* at 199 (Blackmun, J., dissenting).

215. *Id.* (Blackmun, J., dissenting) (“I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy.”).

216. *Id.* at 203 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

217. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

218. *Bowers*, 478 U.S. at 208 (Blackmun, J., dissenting).

219. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT’L L.J., Nov. 5, 1990, at 3.

had the better of the arguments.”²²⁰ The ramifications of his admission are too far-reaching for the purposes of this discussion. Of paramount relevance, however, is that the decision would have entitled sexual activity between consenting adults to protection under the Constitution. As Justice Blackmun stated in the dissenting opinion, “[w]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”²²¹ Arguably, it also would have laid to rest the confusion underlying the Court’s holding in *Eisenstadt*.²²² In holding that the Constitution confers protection upon sexual activity between consenting adults, it discounts the theory that *Eisenstadt* merely stood for the right to accessibility to contraceptives; instead, it lends credence to the view that *Eisenstadt* stood for the right to associational intimacy.

The notion of sexuality as a constitutional right has been addressed on a state level as well. The Supreme Court of Pennsylvania, in *Commonwealth v. Bonadio*,²²³ held that a statute prohibiting “deviate sexual intercourse”²²⁴ was unconstitutional.²²⁵ The court rejected the argument that the state was empowered to enact the statute vis-à-vis its Tenth Amendment police power.²²⁶ Instead, it ruled that the statute’s only purpose, which was to regulate the private conduct of consenting adults, exceeded the valid bounds of the state’s police power, and infringed upon the individual’s constitutional rights to equal protection.²²⁷ In limiting the state’s ability to unduly interfere with the constitutional rights of its citizens, the court cited the philosopher John Stuart Mill, who once said:

[T]he sole end for which mankind are warranted, individually, or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purposes for which power can be rightfully exercised over any member of a civilised community, against

220. *Id.* (quoting Mr. Justice Powell in telephone interview as he elaborated on his regretted ruling).

221. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

222. *See supra* notes 201-02 and accompanying text.

223. 415 A.2d 47 (Pa. 1980).

224. *Id.* at 49. The statute defines deviate sexual intercourse as, “sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.” *Id.* at 49 n.1 (citing 18 PA. CONS. STAT. ANN. § 3101 (1973)).

225. *Id.* at 50.

226. *Id.* at 49-50.

227. *Bonadio*, 415 A.2d at 50.

his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant.²²⁸

Perhaps one of the most telling of all sexuality cases that fall within the framework of the privacy doctrine is the Supreme Court of New Jersey case of *State v. Saunders*.²²⁹ In *Saunders*, the court struck down an anti-fornication²³⁰ statute, holding that it was unconstitutional.²³¹ The court held that sexual activities between consenting adults are protected within the right to privacy.²³² The premise for the court's ruling was that a decision to engage in consensual sexual activity was at least as intimate and personal as those involving decisions on whether to use contraceptives.²³³ Of particular significance in *Saunders*, was the introduction of behavioral and social science data to establish the psycho-sexual significance of non-marital intercourse, and the frequency and acceptance of such behavior.²³⁴ An expert witness²³⁵ had testified that:

the sex drive is instinctive, and is, a biologic force that is a central factor, not only in personality development, but also at the practical office level of treating problems. . . . When this drive is involuntarily proscribed, guilt and anxiety problems can arise and frequently create residual problems many years later.²³⁶

228. *Id.*

229. 381 A.2d 333 (N.J. 1977).

230. Fornication is defined as: "sexual intercourse other than between married persons." BLACK'S LAW DICTIONARY 653 (6th ed. 1990).

231. *Saunders*, 381 A.2d at 339.

232. *Id.*

233. *Id.* at 340. *Saunders* was not the first state court to hold that fornication was protected by the right to privacy. See also *State v. Pilcher*, 242 N.W.2d 348, 359 (1976). In *Pilcher*, the Supreme Court of Iowa held that a statute barring acts of sodomy between consenting adults of the opposite sex was unconstitutional because it invaded their fundamental right to privacy. *Id.* Similarly, in *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (1979), the court held that private sexual activity between consenting adults is within the zone of privacy protected from unwarranted government intrusion. *Id.*

234. See Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AMER. L. REV. 226, 229 (1988).

235. Richard Green, the expert witness who testified in *Saunders*, authored the law review article from which the accompanying text was taken. See also RICHARD GREEN, *SCIENCE AND THE LAW* (1992) (discussing many issues involving the relationship between sexuality and the Constitution from legal, as well as psycho-sexual and medical perspectives).

236. Green, *supra* note 234, at 229-30.

Justice Bedford, the trial judge in *Saunders*, later commented that while the impact of this testimony was minimal in his ruling, the nature of the evidence could be useful in these types of cases.²³⁷ Justice Schreiber, a New Jersey Supreme Court Justice who wrote the concurring opinion in *Saunders*, stated in an interview after the case that his decision was primarily based on the notion of privacy.²³⁸ He said, "if [sexual] conduct is such that it doesn't affect anybody else, no third person is affected, or the state isn't affected, then we're getting into the zone of privacy."²³⁹

The advancement and consideration of this type of evidence in other lower level court decisions could profoundly affect the future of the modern privacy doctrine. To the extent that such evidence leads to analogous rulings in other courts, the Supreme Court of the United States may have incentive and support to re-evaluate its position concerning privacy law as it relates to the notion of sexual expression between consenting adults.

2. First Amendment Right to Self-Expression Theory

The concept of sexual expression has found its way to the Supreme Court in other contexts as well, notably that of the First Amendment. Over the past twenty years, the Supreme Court of the United States has ruled on the constitutionality of various regulations on nude dancing.²⁴⁰ In *California v. LaRue*,²⁴¹ the Court held that live nude dancing may be entitled to constitutional protection under the First and Fourteenth Amendments under certain circumstances.²⁴² Justice Brennan, in his dissent, stated that "nothing in the language or history of the Twenty-First Amendment authorizes the states to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."²⁴³ Justice Marshall, in his dissent, said that "once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically."²⁴⁴ Marshall's statement implies that sexual expression, which would be protected under the First Amendment within the context of

237. *Id.* at 231.

238. *Id.* at 232.

239. *Id.*

240. *Leading Cases*, 105 HARV. L. REV. 177, 287 (1991).

241. 409 U.S. 109 (1972).

242. *Id.* at 118.

243. *Id.* at 123 (Brennan, J., dissenting).

244. *Id.* at 130 (Marshall, J., dissenting).

artistic expression in a play or painting, for instance, may be entitled to similar constitutional protection in other contexts.

Eight years later, in *Schad v. Mount Ephraim*,²⁴⁵ the Court struck down a zoning ordinance which prohibited the existence of all nude dance clubs.²⁴⁶ The Court held that nude dancing is not without its First Amendment protections from official regulation.²⁴⁷ Because the zoning ordinance was held violative of the First Amendment right to self-expression, it was reviewed under higher scrutiny which required the zoning ordinance to be narrowly tailored to advance a sufficiently substantial government interest.²⁴⁸ The Court held that the ordinance was overbroad,²⁴⁹ and not based in furtherance of a substantial government interest.²⁵⁰ Justice White, delivering the opinion of the court, stated that "Nudity alone" does not place otherwise protected material outside the mantle of the First Amendment."²⁵¹

Ten years later, the Court was again confronted with the constitutionality of nude dancing in *Barnes v. Glen Theater*.²⁵² Until *Barnes*, however, the Court had not explicitly clarified whether nude dancing was protected expression.²⁵³ In *Barnes*, the Court held, in a five to four decision, that a statute proscribing totally nude dancing was not violative of the First Amendment.²⁵⁴ Specifically, the Court held that nude dancing, though expressive conduct, "falls within the outer perimeters of the First Amendment."²⁵⁵ In arriving at its decision, the Court relied on the test estab-

245. 452 U.S. 61 (1981).

246. *Id.*

247. *Id.* at 66.

248. *Id.* at 68.

249. The statute was held overbroad because it excluded all types of live entertainment, including non-obscene nude dancing that is otherwise protected by the first amendment. *Id.* at 76.

250. The court rejected Mount Ephraim's claim that permitting the live entertainment would have conflicted with its plan to create a commercial area that caters only to the immediate needs of its residents. *Schad*, 452 U.S. at 72. It also concluded that Mount Ephraim lacked any evidence in support of its claim that live entertainment posed problems otherwise avoidable by other permitted uses. *Id.* at 73. Finally, the court held that there was no evidence for the borough's contention that live entertainment was incompatible with the uses which were already permitted by the borough. *Id.* at 75.

251. *Id.* at 66.

252. 501 U.S. 560 (1991).

253. See *Leading Cases*, *supra* note 240, at 287.

254. *Barnes*, 501 U.S. at 563.

255. *Id.* at 566.

lished in *United States v. O'Brien*,²⁵⁶ which has been applied to regulations imposed upon symbolic speech. The Court stated that a regulation will be upheld under *O'Brien* "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."²⁵⁷ Chief Justice Rehnquist concluded that the purpose of the statute was to "protect societal order and morality,"²⁵⁸ and that was within the state's Tenth Amendment police power to regulate for the public health, safety, and morals of the state.²⁵⁹ Chief Justice Rehnquist concluded by holding that the statute indeed furthered a substantial government interest, and that this interest was unrelated to the suppression of free expression²⁶⁰ because the dancers were still permitted to express erotic messages provided that they wore pasties, and G-strings.²⁶¹

Writing for the dissent, Justice White argued that the statute was content based, and only served to prohibit nudity that fell within the specific context of nude dancing.²⁶² As a content based statute, it warranted strict scrutiny. Justice White proceeded to argue that the majority had fallen prey to its subjective biases in rejecting nudity when it occurs in strip bars, but protecting it if within a ballet:

While the entertainment afforded by nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some "entertainment. . . ."²⁶³

Justice White stated the element of total nudity in this type of dancing served to elicit "emotions and feelings of eroticism and sensuality among the

256. 391 U.S. 367 (1968).

257. *Id.* at 377.

258. *Barnes*, 501 U.S. at 568.

259. *Id.* at 569.

260. *Id.*

261. *Id.* at 571.

262. *Id.* at 589 (White, J., dissenting).

263. *Barnes*, 501 U.S. at 594 (White, J., dissenting) (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)).

spectators.”²⁶⁴ Finally, Justice White stated that “generating thoughts, ideas, and emotions, is the essence of communication.”²⁶⁵

The dissenting opinion in *Barnes*, falling one vote shy of the majority, lends support to the view that sexuality, as a form of self-expression, should be entitled to constitutional protection under the First Amendment. If four Justices of the Supreme Court of the United States agree that nude dancing in strip bars is worthy of constitutional protection, it is hard to reconcile how the act of intimacy as a means of expressing love, togetherness, and one’s sexual identity, between two consenting adults, is not worthy of as much protection. To be sure, the potentially negative secondary effects stemming from nude dancing bars are non-existent with private sexual relations between consenting adults.²⁶⁶ With the exception of sex crimes such as rape, sexual assault, child sexual abuse, or public acts of nudity, the government has no legitimate interest to advance. To the extent that any given sexual act does not infringe on the participants’ or other persons’ rights, it should not be subject to the state’s Tenth Amendment police power.

Sigmund Freud once said that “sex is not something we do, it’s something we are.”²⁶⁷ Sexuality has been defined to be everything that has to do with being a man or woman.²⁶⁸ Said to be inextricably woven with one’s personality,²⁶⁹ the concept of one’s sexual identity encompasses three components.²⁷⁰ “The first is the core awareness of belonging to one of two categories of persons—male or female.”²⁷¹ This component

264. *Id.* at 592 (White, J., dissenting).

265. *Id.* (White, J., dissenting).

266. *See Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1988) (holding that zoning ordinance designed to reduce concentration of nude dancing bars was rational means for state to reduce crime and protect property values).

267. BENJAMIN A. KOGAN, *HUMAN SEXUAL EXPRESSION* 2 (1973).

268. *Id.*

269. *Id.* at 3.

270. *See GREEN*, *supra* note 235, at 51.

271. *Id.*; *see also* RONALD A. LATORRE, *SEXUAL IDENTITY* 15 (1979). This belief is largely dependent on both the person’s perception of his or her body image and on the messages received from significant others. *Id.* This is arguably the most important sub category because it is mainly subconscious and can affect the development of other areas. *Id.* One’s physical gender does not necessarily translate into a congruent sense of self. Some individuals are so discontent with having been born male or female, that they eventually undergo a sex change. *See GREEN*, *supra* note 235, at 52. They are known as “transsexuals.” The notion of transsexuality serves to emphasize the degree to which one’s sense of maleness or femaleness can be independent of and override one’s physical make-up. To the extent that it is a function of one’s mind as opposed to the body, it lends support to

“permeat[es] nearly all behavior.”²⁷² Studies have indicated that the emergence of this characteristic occurs as early as thirteen months of age.²⁷³ The second component relates to the core of one’s gender—masculinity and femininity.²⁷⁴ One’s sense of masculinity or femininity is also manifested early.²⁷⁵ Masculine and feminine behavior generally develop together with the self-concept of maleness or femaleness.²⁷⁶ The third component concerns sexual orientation.²⁷⁷ One’s sexual identity—the selection of male or female sexual partners, or sexual orientation—is so profound that it is commonly used to actually define the person.²⁷⁸

the argument that one’s sexual identity or sense of sexuality is inherently cognitive, and not just merely a physical response. As such, it should be protected to the same extent as other forms of self-expression. No psychological or physiological explanation has been offered to conclusively resolve why some males and females are transsexual. *Id.* at 102.

272. GREEN, *supra* note 235, at 51.

273. *Id.* The age at which this feature becomes psychologically integrated is not known with 100% certainty, but some evidence suggest that the recognition of two classes of humans based on gender, occurs as early as thirteen months. *Id.*

274. *See id.* at 52; *see also* JANET T. SPENCE & ROBERT L. HELMREICH, *MASCULINITY & FEMININITY, THEIR PSYCHOLOGICAL DIMENSIONS, CORRELATES, & ANTECEDENTS* 4 (1978) (“Men and women are typically assumed to possess different temperamental characteristics and abilities—distinctive sets of attributes whose existence is used to justify the perpetuation of the society’s role structure or whose inculcation is believed to be necessary if members of each sex are to fulfill their assigned functions.”). Evidence suggests that sex-role differentiations are highly shapeable. *Id.* at 5. Various environmental factors including political, sociological, and economic forces have been determined to play a part in the shaping of one’s sense of masculinity or femininity. *Id.* To the extent that this is mental and not physical, and to the extent that it is manifested through one’s sexuality, it lends additional support to the argument that sexual expression is a form of cognitive expression, and should, consequently, be entitled to First Amendment protection. *See also* Susan R. Walen & David Roth, *A Cognitive Approach*, in *THEORIES OF HUMAN SEXUALITY*, *supra* note 186, at 335. In one longitudinal study, a pair of identical twins was observed for research concerning gender development. One infant, due to an accident at circumcision, lost his penis. He was reared as a girl, and his brother was reared as a boy, each successfully developed a different gender role. *See* GREEN, *supra* note 235, at 51.

275. GREEN, *supra* note 235, at 51.

276. *Id.* at 52; *see also* LATORRE, *supra* note 271, at 26 (“By the age of four or five years, almost every child says that when he grows up he will be a parent of the appropriate sex [i.e. daddy if he is a boy and mommy if she is a girl].”). Children as young as three have been found to make fairly accurate distinctions between male and female types of activities. GREEN, *supra* note 235, at 52.

277. GREEN, *supra* note 235, at 53.

278. *Id.* at 53. *Cf.* *Bowers v. Hardwick*, 478 U.S. 186, 205 (1985) (Blackmun, J., dissenting) (“The court recognized in *Roberts*, 468 U.S., at 619, that the ‘ability independently to define one’s identity that is central to any concept of liberty’ cannot truly be exercised in a vacuum; we all depend on the ‘emotional enrichment from close ties with others.’”).

The foregoing psychological construct lends support to the argument that sexuality is a physical product of sophisticated cognitive processes. The various components or stages of psycho-sexual development all underscore the extent to which one's sexuality is a function of the mind²⁷⁹ as opposed to the body. In essence, it is a manifestation of one's inner self, identity, and emotions. Nonetheless, one must be careful not to dismiss it as an exclusively cerebral function. A number of noted psychologists have incorporated sexuality into hierarchical models of development, where it is classified as a human need, in the absence of which psychological problems may ensue.²⁸⁰

As a manifestation of one's emotions, feelings, identity, self, gender, and sense of eroticism, sexuality is the embodiment of human self-expression at the most fundamental level. Similar to art, speech, and other forms of expression, sexuality is worthy of First Amendment protection. To the extent that it involves consenting adults and does not infringe on another person's rights, it is no less a form of communication than any other, and should be treated as such.

C. *Right to Habilitation*

In *Wyatt v. Stickney*,²⁸¹ the court held that mentally disabled persons who are confined to institutions have a constitutional right to "adequate and effective treatment."²⁸² The court mandated a list of minimum constitu-

279. See, e.g., Walen & Roth, *supra* note 275, at 335 (exploring various cognitive theories for sexuality and sexual development); see also, Igor S. Kon, *A Sociocultural Approach*, in THEORIES OF HUMAN SEXUALITY, *supra* note 186, at 280 ("Human sexuality is not a simple biological given and cannot be explained solely in terms of reproductive biology or in terms of instinctive behavior.").

280. See RICHARD M. LERNER, CONCEPTS AND THEORIES OF HUMAN DEVELOPMENT 310-18 (1986) (describing Erikson's eight stages of personality development, a psychological life cycle model, within which sexuality plays integral part); see also Lisa A. Serbin & Carol H. Sprafkin, *A Developmental Approach, Sexuality from Infancy Through Adolescence*, in THEORIES OF HUMAN SEXUALITY, *supra* note 186, at 163 (explaining how various cognitive, social, and affective phenomena involved in sexuality are interrelated throughout the developmental process).

281. 344 F. Supp. 387 (M.D. Ala. 1972).

282. *Id.* at 390. In support of its holding, the court cited a resolution entitled: "Declaration on the Rights of the Mentally Retarded." *Id.* Adopted by the General Assembly of the United Nations on December 27, 1971, the resolution read in, pertinent part: "[t]he mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation, and guidance as will enable him to develop his ability and maximum potential." *Id.* at 391.

tional standards for adequate habilitation²⁸³ of the mentally retarded.²⁸⁴ Of notable relevance was the right to a "humane psychological and physical environment."²⁸⁵ Specifically, the standards require that "residents shall have a right to dignity, privacy and humane care,"²⁸⁶ and that "the institution shall provide, under appropriate supervision, suitable opportunities for the resident's interaction with members of the opposite sex."²⁸⁷

In *Youngberg v. Romeo*,²⁸⁸ the Supreme Court of the United States held that mentally disabled persons have constitutionally protected liberty interests to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and "such [minimally adequate] training as may be required by these interests."²⁸⁹ In *Youngberg*, a mentally disabled man who had been committed to a state institution, was involuntarily restrained for extended periods of time as a result of his violent behavior.²⁹⁰ The Court remanded the case to the district court to balance the patient's liberty interest with the state's interest, so that they might determine whether the physical restraints imposed on the patient were excessive, and whether they fell short of the minimally adequate standards of habilitation to which the patient was constitutionally entitled.

VI. APPLICATION

A. Catherine's Right to Privacy

While in the community living arrangement, Catherine is under constant supervision.²⁹¹ Some testimony indicated that she is checked every ten minutes.²⁹² While it is necessary to monitor Catherine's precarious medical condition, this degree of oversight was also explained to be "primarily to prevent sexual activity."²⁹³ This implies that the overriding

283. The court defined "habilitation" as: "[t]he process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency." *Id.* at 395.

284. *Wyatt*, 344 F. Supp. at 395 app. A.

285. *Id.* at 399.

286. *Id.*

287. *Id.*

288. 457 U.S. 307 (1982).

289. *Id.* at 324.

290. *Id.* at 310.

291. Brief for Appellee/Respondent at 9, *Estate of C.W.* (No. 91-2970).

292. *Id.*

293. *Id.* at 10.

concern is that Catherine may become pregnant.²⁹⁴ However, a number of sexually related incidents were cited in the record to have occurred despite this unrelenting supervision.²⁹⁵ On one occasion, while visiting Catherine at her group home, her mother noticed a young man standing outside Catherine's door while she was undressing.²⁹⁶ Another time, a male resident who lived in the group home was seen leaving Catherine's bedroom, and she was found in bed crying, with her nightgown raised.²⁹⁷ These incidents underscore the inadequacy of her supervision, and raise the concern of how many incidents may have gone undetected.

Finally, medical testimony indicates that Catherine's hymen is not intact and she does not have a virginal tract.²⁹⁸ This fact, together with Catherine's overly affectionate nature,²⁹⁹ clearly indicates that, short of a live-in guardian, no amount of supervision could adequately guarantee her complete sexual abstinence.

This type of unceasing supervision imposed on Catherine constitutes an ongoing infraction on her fundamental constitutional right to privacy. Common to all of the aforesaid right to privacy cases is the inherent right to be let alone.³⁰⁰ Yet, because of the fear that Catherine may become pregnant, she never has more than ten minutes free from intrusion.³⁰¹ The sterilization procedure would eliminate the possibility that Catherine could ever become pregnant, and there would be no need for the constant interference with her right to privacy. Her right to privacy would be restored to the extent that her supervision was not medically necessary.³⁰² No contraceptive could provide this guarantee without causing harmful side effects.³⁰³

294. See *supra* part II.A.

295. See *supra* part II.A.

296. Brief for Appellee/Respondent at 10, *Estate of C.W.* (No. 91-2970).

297. *Id.* Catherine indicated that the male resident had touched her breasts and hips.
Id.

298. *Id.* at 4.

299. See *supra* notes 20-21 and accompanying text.

300. See *supra* part V.A. The precise parameters for the right to privacy have never been defined. Consequently, the Supreme Court is afforded greater flexibility in its interpretation and application of the concept. Though *Griswold*, *Eisenstadt*, *Roe* and *Bolton* do not explicitly recognize the right to be let alone, it is implicit in the right to privacy.

301. Brief for Appellee/Respondent at 9, *Estate of C.W.* (No. 91-2970).

302. *Id.* at 9-11.

303. See *supra* part II.D.

B. Catherine's Right to Sexuality

It has been said that "sexual activity for the mentally handicapped—whether heterosexual, homosexual or masturbation—is abhorrent to people, even though there is enlightened clamor for understanding the handicapped at home and in the community."³⁰⁴ Historically, the prevalent view has been that mentally disabled persons "should not be allowed to engage in any sexual activity whatsoever."³⁰⁵ The time has come for society to recognize that, as human beings, mentally disabled persons are entitled to develop, express, and enjoy their sexuality to the same extent as anyone else.³⁰⁶ Catherine is no exception. Up to this point in her life,³⁰⁷ she has been deprived of her fundamental right to sexuality. She has had neither the opportunity to decide whether to engage in sexual relations, nor the ability to express herself sexually if she so wished.³⁰⁸

It is known that developmentally disabled persons "need more opportunities to learn how to relate appropriately in social and sexual situations."³⁰⁹ Under the appropriate level of guidance and direction, Catherine should, to the extent that she is able, be permitted to enjoy a sexual relationship with a male whose level of intellectual functioning approximates her own. This would preserve her fundamental right to

304. George W. Lee, *The Sexual Rights of The Retarded—An International Point of View*, in *SEXUAL RIGHTS AND RESPONSIBILITIES OF THE MENTALLY RETARDED* 58 (Medora S. Bass et al. eds., 1973) (quoting Dr. J.M. Kahn from the August 1972 issue of the *British Medical Journal*).

305. HAAVIK & MENNINGER, II, *supra* note 26, at 8.

306. *Id.*

307. That is, up until the time of Catherine's sterilization.

308. Due to Catherine's cognitive limitations, no exploration was made into whether she could in fact consent to sexual activity. See Telephone Interview with Marta Engdahl, *supra* note 58. Catherine's sexual partners could potentially face criminal charges pursuant to 18 PA. CONS. STAT. ANN. 3121(4) (Supp. 1995) ("A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse . . . who is so mentally deranged or deficient that such person is incapable of consent."); see also 18 PA. CONS. STAT. ANN. 311(c)(2) (Supp. 1995), which provides:

Ineffective consent—Unless otherwise provided by this title or by the law defining the offense, assent does not constitute consent if: . . . it is given by a person who by reason of . . . mental disease or defect . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]

Id. This note will not address the ramifications of Catherine's ability or inability to consent. Though it is certainly worthy of further consideration, it exceeds the scope of this discussion.

309. HAAVIK & MENNINGER, II, *supra* note 26, at 26.

sexuality, and minimize the possibility of her being infected by a sexually transmitted disease, and/or being sexually exploited.³¹⁰

C. Catherine's Right to Habilitation

As a result of the deprivation of Catherine's right to privacy and sexuality, her right to habilitation is undermined as well. As held in *Wyatt*, Catherine has a constitutional right to a humane psychological environment.³¹¹ One may inevitably conclude that, without the tubal ligation, Catherine is not living in a humane psychological environment. With the exception of the evening, when Catherine goes to sleep, she never has more than ten or fifteen minutes to herself. While this is necessary to prevent Catherine from becoming pregnant, it could nevertheless be avoided if she were permitted to be sterilized. Even if one does conclude that such treatment is not inhumane, it still invariably frustrates her right to privacy, as provided within the context of habilitation.

Catherine's lack of opportunity to engage in sexual relations further undermines her right to habilitation.³¹² The essence of habilitation is "making available to mentally retarded patterns and conditions of everyday life which are [as] close as possible to the norms and patterns of the mainstream of society."³¹³ Implicit in the concept of habilitation or normalization is the recognition that the mentally disabled are sexual beings.³¹⁴ Without the tubal ligation, Catherine is not free to engage in a healthy intimate relationship. As provided in *Wyatt*, Catherine should have the opportunity to interact with members of the opposite sex.³¹⁵

310. If Catherine was not given the appropriate level of guidance and supervision, there would exist the danger of sexual abuse by males who were functioning at higher intellectual levels. There would also exist potential health problems with respect to the transmission of sexual diseases. By requiring Catherine, and her mate, to be subject to some degree of supervision or guidance in the beginning of their relationship, the potential onset of health related problems would be minimized.

311. *Wyatt*, 344 F. Supp. 387, 399 (M.D. Ala. 1972).

312. See discussion *supra* note 282 (describing the creation of the "Declaration on the Rights of the Mentally Retarded"); see also *Wyatt v. Stickney*, 344 F. Supp. 373, 381 (M.D. Ala. 1972) (holding that mentally ill persons who are confined to institutions have a constitutional right to "adequate treatment," including "suitable opportunities for the patient's interaction with members of the opposite sex"). Subsequently, in *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), the Court extended its prior holding to apply to the mentally disabled as well as the mentally ill. *Id.*

313. ROWE & SAVAGE, *supra* note 53, at 10.

314. See HAAVIK & MENNINGER, II, *supra* note 26, at 8.

315. *Wyatt*, 344 F. Supp. at 399.

Finally, the Court in *Youngberg* held that a court must show deference to the judgment exercised by qualified professionals with respect to the particular issues of habilitation.³¹⁶ Sufficient psychological evidence exists to lend support to the contention that the deprivation of Catherine's privacy and sexuality interests restricts her healthy psychological development, thereby undermining the chief objective of habilitation.³¹⁷

VII. CONCLUSION: BALANCING TEST OF CATHERINE'S CONSTITUTIONAL RIGHTS

The world's historic fascination with eugenics³¹⁸ demands an inquiry into any potential infractions on Catherine's constitutional rights which may result from the sterilization procedure. In *Youngberg*, the Supreme Court applied a balancing test consisting of the mentally disabled person's various liberty interests weighed against the legitimate interests of the state.³¹⁹ The Court stated that "[b]ecause the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before the court."³²⁰ This type of pragmatic approach ensures that the Court's decision is narrowly tailored to the particular needs of the mentally disabled person. The court must be careful not to lose its objectivity as a result of the temptation to compensate for its historical prejudices against the mentally disabled.³²¹ In a case such as this, it is particularly important for the court to use the "totality of the circumstances" approach because the sterilization procedure was sought strictly out of medical necessity. Catherine's mental disability was only one factor to be considered among many.

With that in mind, we may proceed by first identifying the various interests involved. The state's interests include the following: first, the protection of Catherine's right to privacy with respect to the decision of whether to undergo the sterilization; and second, the preservation of her right to procreate. Pitted against the state's foregoing interests is Catherine's mother's interest in protecting her daughter's following constitutional rights: first, her right to privacy with respect to her right to be let alone; second,

316. *Youngberg*, 457 U.S. 307, 322 (1982).

317. See *supra* notes 283-87 and accompanying text.

318. See *supra* part III.

319. *Youngberg*, 457 U.S. at 324.

320. *Id.* at 319 n.25.

321. See *supra* part III.

her right to sexuality; third, her right to adequate habilitation; and fourth, her right to continuation of life.³²²

We may begin by examining the state's interest in protecting Catherine's right to privacy. Her privacy interests have been invaded to the extent that the permission to perform the operation may be issued absent her consent. In analyzing Catherine's rights to privacy, it is vital to do so in light of her mental disability. Because of Catherine's level of cognitive functioning, it is necessary for her mother and others who care for her to aggressively assert her best interests for her. To the extent that she is unable to care for herself or make well-informed decisions, they have a duty to compensate by acting as surrogate decision makers.³²³ As a result of Catherine's disability, her life is necessarily regulated and protected by those around her.

322. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that during the second trimester of pregnancy, the state may protect its interest in the mother's life and health, by regulating an abortion procedure in ways that are reasonably related to same. *Id.* at 163-64. The Court further held that during the third trimester, the state must allow the mother to abort her viable fetus if it is for the purpose of preserving her life or health. *Id.* at 165-66. Four years later, in *Carey v. Population Servs. Int'l*, 431 U.S. 677 (1977), the Court upheld its ruling in *Roe*, which held that, even after viability, the state may not regulate or proscribe abortion if it interferes with the mother's right to life or health. *Id.* at 686. In providing that the mother's right to life supersedes that of her viable fetus, the Court has revealed its primary interest in taking whatever means necessary to protect a woman's right to continued life and health. *Id.* While *Roe* and *Carey* involved different scenarios than this case, they are analogous because of the overriding interest in protecting a pregnant mother's maternal life and health. However, Catherine's mother is not afforded the liberty to wait until her daughter becomes pregnant, because of Catherine's fragile epileptic condition. Rather, her mother must ensure that her daughter avoids the potentially irreversible, life-endangering situation which could arise, were she to become pregnant. To the extent that a potential pregnancy could put Catherine into a life-endangering situation, her mother has an interest in protecting her daughter's right to continued life by way of the tubal ligation procedure. The right to life itself is arguably the most fundamental of all constitutional rights. A decision to deny Catherine's mother the authorization to permit Catherine's sterilization would trivialize Catherine's right to life, and consequently, leave her and those who cared for her in constant peril.

323. See Scott, *supra* note 135, at 841.

Some mentally disabled persons are not competent to make reproductive decisions for themselves. A decision about sterilization made on behalf of an individual in this category violates no interest in reproductive autonomy; when a person is incapable of making her own decision, others must determine whether sterilization is in her best interest. . . . The desirability of the procedure may depend on nonreproductive considerations such as medical risks and benefits, human dignity, privacy, and family continuity. . . .

Id.

In *Cruzan v. Missouri Department of Health*,³²⁴ the Supreme Court of the United States held, in a five to four decision, that the parents of a woman who had fallen into a persistent vegetative state as a result of a car accident, had the right to exercise their daughter's constitutional right to refuse continued artificial nutrition and hydration procedures if there was clear and convincing evidence to indicate that their daughter would have chosen to, were she so able.³²⁵ The Court's decision indicates that a showing of clear and convincing evidence regarding an incompetent person's intent may permit a guardian to assert her rights for her. While this may be characterized as a substituted judgment, it is predicated exclusively on the best interests of the disabled person who is incapable of asserting his or her own rights.

In this case, while the facts may be different, the ultimate objective is the same—to protect the best interests of Catherine who is incapable of making such a determination on her own. *Cruzan* implicitly stands for the proposition that a guardian may assert the best interests of his or her child in the event that the child is incapable of doing so.³²⁶ Consequently, Catherine's mother should be permitted to make certain types of decisions for her despite her theoretical lack of consent, because it is in her best interest.³²⁷ The overriding concern for Catherine's life dwarfs the *de minimis* privacy intrusion which she would suffer as a result of the tubal ligation procedure.³²⁸

Catherine's right to procreate must be precisely defined in view of her medical predicament. It cannot be emphasized enough that the tubal ligation procedure was strictly being sought as a means through which Catherine's mother could protect her daughter's right to continuation of life. The laparoscopy should therefore be considered in the same light as any other medically necessary procedure. As stated earlier, one must resist the temptation to analyze the issue within the central context of Catherine's mental disability. Her mental disability was not the motivation for the procedure. Her medical condition was. Catherine's mental disability only becomes relevant to the extent of its limitation on her autonomy, her

324. 497 U.S. 261 (1990).

325. *Id.* at 284-85.

326. *See id.*

327. *See supra* part II.C.

328. *See* A. JEFFERSON PENFIELD, FEMALE STERILIZATION BY MINILAPAROTOMY OR OPEN LAPAROSCOPY 7-9 (1980). The tubal ligation procedure is relatively simple. It consists of a belly-button size incision through which the Fallopian tubes are burned or cut to prevent the ova from entering the uterus. *Id.*

heightened dependability on those around her, and the distorted context of the fundamental rights which have been consequently implicated.

The potential life-endangering risks facing both Catherine and her fetus, were she to become pregnant, necessarily place her right to procreate in a different light than that of a healthy woman who has no such risks. In *Cruzan*, Justice Brennan, writing for the dissent, argued that the state's proclaimed interest in protecting the incompetent person's right to life, which was being artificially sustained, was abstract.³²⁹ He stated that because of the person's irreversible vegetative state and the fact that such a person is incapable of thought, emotion or sensation, the state's interest in protecting that life is quite different from protecting that of a healthy person.³³⁰ Catherine's right to procreate is also abstractly defined because of the virtual impossibility that she could ever carry her pregnancy to term. As a result, the state's interest in protecting her right to procreate becomes lessened accordingly, especially when considered against Catherine's other fundamental rights which would be upheld as a result of the tubal ligation, such as her rights to privacy, sexuality, habilitation, and life.

While it is highly improbable that Catherine's mental or physical condition will change, the theoretical ramifications of her sterilization and their relationship to her fundamental right to procreate should nevertheless be addressed. In the event that Catherine was empowered to rear a child, she would have a number of options available to her. First, she could adopt. This would enable her to avoid the physical complications associated with pregnancy. Second, she could have the effect of the operation surgically reversed.³³¹ Alternatively, she could give birth through the use of in vitro fertilization.³³²

To the extent that Catherine is entirely dependent on those around her, the need to salvage any degree of freedom which she may otherwise have, should prevail over any accompanying de minimis infractions which she may incidentally suffer. The tubal ligation procedure would remove the

329. 497 U.S. at 272 (Brennan, J. dissenting).

330. *Id.* at 313-14, 317 (Brennan, J., dissenting).

331. *See* PENFIELD, *supra* note 328, at 98. Catherine's fallopian tubes could be reconstructed to give her the capability to become pregnant again, by either minilaparotomy or open laparoscopy. The success rate for the reversal of the tubal ligation procedure is approximately 82%. *Id.*

332. A procedure in which ova are removed from the woman's ovaries and fertilized in a petri dish using a donor's sperm. The fertilized egg is then transferred into the woman's uterus. *Id.*

threat of pregnancy, and consequently eliminate the need for the relentless privacy infractions which Catherine continuously endures. To the extent that her supervision is not medically necessary, Catherine could finally have the opportunity to be let alone in peace to think, to muse. She would also gain the opportunity to enjoy a sexual relationship with someone of the opposite sex. While these rights are oftentimes taken for granted by most, they are long-awaited, and far overdue freedoms for Catherine. With them, she would no longer be left to simply "exist" with the constant threat of death looming over her.

After twenty-six years, Catherine could finally begin to live life as a human being.

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The Polygraph Paradox: Florida's Conflicting Approaches Toward the Admissibility and Use of Polygraph Results

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I. INTRODUCTION

Lie detection is not a new concept. In fact, it has been said that more than 4000 years ago the Chinese would try the accused in the presence of a physician who, listening or feeling for a change in the heartbeat, would announce whether the accused was testifying truthfully.¹ Still others believed that dunking, a hot-iron-on-the-tongue, and other truth revealing

1. W. Thomas Halbleib, Note, *United States v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 KY. L.J. 225, 229 (1992).

techniques would uncover suspected liars.² Today, we rely on polygraph machines to serve this function. Although great strides have been made in the area of lie detection since the days of dunking and hot-iron-on-the-tongue tests, many argue that the polygraph is nothing more than a nervousness calculator which operates under assumptions and theories which are no more accurate than the tests of ancient times.³ As a result, the theory of lie detection has remained a controversial and much debated topic. To further complicate matters, courts are faced with the responsibility of having to decide whether polygraph results are worthy of admissibility when used in nontrial contexts such as suppression hearings, prison disciplinary hearings, and probation revocation hearings.⁴ In Florida, the concern over the admissibility of polygraph⁵ results is not a new issue. However, it remains a controversial and unsettled area of law in all courts. Florida precedent holds that polygraph results are inadmissible for purposes of determining guilt at trial.⁶ Nevertheless, many Florida courts have allowed polygraph results to be admitted upon the agreement of the parties⁷ and as a condition of probation.⁸ In addition, many Florida courts allow the polygraph to be used in civil trials for investigative purposes.⁹ As a result,

2. *Id.* at 229-30. In addition to dunking and hot iron tests, Halbleib notes that native Americans are said to have required a suspected liar to chew rice and then spit it out. *Id.* at 230. If the rice stuck to the accused gums, he was pronounced a liar. *Id.*

3. See *Hart v. State*, 633 So. 2d 1189, 1189 (Fla. 5th Dist. Ct. App. 1994), *abrogated* by *Cassamassima v. State*, 657 So. 2d 906 (Fla. 5th Dist. Ct. App. 1995).

4. *Cassamassima*, 657 So. 2d at 908.

5. As defined in *Barron's Law Dictionary* "polygraph" is:

[A]n electromechanical instrument that simultaneously measures and records certain physiological changes in the human body which it is believed are involuntarily caused by the subject's conscious attempts to deceive the questioner. Once the machine has recorded the subject's responses to the questions propounded by the operator, the operator interprets the results and determines whether the subject is lying.

BARRON'S LAW DICTIONARY 358 (3d ed. 1991).

6. See *Kaminski v. State*, 63 So. 2d 339 (Fla. 1952).

7. See, e.g., *Davis v. State*, 520 So. 2d 572, 574 (Fla. 1988); *Jones v. State*, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984).

8. See *Nichols v. State*, 528 So. 2d 1282, 1284 (Fla. 1st Dist. Ct. App. 1988).

9. When the polygraph is used for investigative purposes, it is usually done in the context of an employment setting. Thus, since no criminal conviction is involved, the decision whether to require submission to polygraph testing is a matter left to the discretion of the employer. See generally *Swope v. Florida Indus. Comm'n*, 159 So. 2d 653 (Fla. 3d Dist. Ct. App. 1964) (addressing the distinction between public and private employees in terms of discharge for failure to take a polygraph). *But see* *Farmer v. City of Ft. Lauderdale*, 427 So. 2d 187, 190 (Fla.) (holding that the unreliability of polygraph results precludes the

court decisions in Florida concerning the admissibility and use of polygraph results are diverse, inconsistent, and apparently irreconcilable.

This article will address these inconsistencies and their impact on the future of polygraph admissibility in Florida courts. Beginning with Part II, this Note provides a brief overview of the development of the law concerning the admissibility of scientific evidence, specifically the polygraph, along with the current approach used by Florida courts in addressing this issue. Part III presents a discussion on the use of polygraph testing as a condition of probation and its effect on the probationer's constitutional rights, specifically, his right against self-incrimination. In Part IV, the basic principles underlying the polygraph's operation are examined along with the many factors involved in obtaining an accurate polygraph reading. Recommendations for achieving consistent and reliable results are discussed in Part V, and Part VI concludes with a discussion concerning the issues that arise when polygraph results are admitted in Florida courts.

II. A LOOK AT THE LAW

A. Background

As early as 1923, beginning with the seminal polygraph case, *Frye v. United States*,¹⁰ and continuing through the present day, the issue of polygraph admissibility has remained an issue fraught with controversy, uncertainty, and peril. At the forefront of this quandary is the divergence of opinion regarding the reliability of polygraph results along with the fact that such results have yet to enjoy general acceptance within the scientific community.¹¹ In 1989, the Eleventh Circuit countered the trend of per se

dismissal of a police officer for failure to take the test), *cert. denied*, 464 U.S. 816 (1983).

10. 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, in order for evidence to be admissible, it must be based on principles which are sufficiently established to have gained general acceptance in the scientific community. *Id.* at 1014.

11. *Id.* at 1013-14. This landmark case is known for the promulgation of the "Frye Rule of per se inadmissibility," more commonly known as the "Frye test" or "general acceptance approach." In *Frye*, the results of a systolic blood pressure test were held inadmissible based on a lack of recognition and general acceptance within the scientific community. *Id.* at 1014. Although the results of polygraph testing were not at issue in *Frye*, Florida courts apply this approach when considering the admissibility of scientific evidence and have required, in terms of the polygraph, that the party seeking to introduce the evidence make a preliminary showing that the underlying methodology of such evidence is generally accepted within the relevant scientific community. *Accord* *Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983), *cert. denied*, 467 U.S. 1264 (1984); *Kaminski v. State*, 63 So. 2d 339 (Fla. 1952). *See generally* Mark R. Kapusta, *Daubert Versus Flanagan Comparing Standards for the*

inadmissibility of polygraph results with its decision in *United States v. Piccinonna*.¹² As a result of *Piccinonna*, the Eleventh Circuit became the first in the federal system to follow an approach to polygraph evidence that had been adopted more than a decade earlier by the Massachusetts Supreme Judicial Court.¹³ Under the *Piccinonna* approach, the results of polygraph testimony are admissible to impeach or corroborate the testimony of a witness at trial.¹⁴

More recently, in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁵ the Supreme Court of the United States expressly rejected *Frye's* stringent general acceptance test and adopted a more flexible approach based on the *Federal Rules of Evidence*.¹⁶ The Court reasoned that the *Frye* test had

Admissibility of Scientific Evidence in Florida State and Federal Courts, FLA. B.J., Dec. 1994, at 39; *see also* FED. R. EVID. 702 (to be admissible, scientific knowledge must have sufficient reliability or trustworthiness and there should be proof that the principle supports what it purports to show, i.e., that it is valid).

12. 885 F.2d 1529 (11th Cir. 1989).

13. The approach adopted by the *Piccinonna* court first appeared in *Commonwealth v. Vitello*, 381 N.E.2d 582 (Mass. 1978), *abrogated by* *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989). Interestingly enough, the Massachusetts Supreme Judicial Court overruled *Vitello* in *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989), which was decided less than three months after the Eleventh Circuit decided *Piccinonna*. It should be noted that under *Vitello*, the use of the polygraph for purposes of impeachment or corroboration was limited to the testimony of the defendant, whereas in *Piccinonna*, the use of the polygraph was broadened to include impeachment or corroboration of the testimony of any witness at trial. For additional discussion on the *Vitello* and *Piccinonna* opinions, see Halbleib, *supra* note 1, at 259.

14. *Piccinonna*, 885 F.2d at 1536-37.

15. 113 S. Ct. 2786 (1993).

16. *Id.* at 2794. In *Daubert*, an action was brought by parents and their minor children who were born with serious birth defects, alleging that the birth defects had been caused by the mother's ingestion of Bendectin, a prescription anti-nausea drug distributed by Dow. *Id.* at 2791. The plaintiffs sought to introduce the testimony of a scientific expert who had compiled data which indicated that Bendectin could cause birth defects. *Id.* This testimony was excluded by the district court because it was based upon principles which were not sufficiently established to have gained general acceptance in the relevant scientific field. *Id.* at 2792. These principles were based upon conclusions drawn from animal cell studies, live animal studies, and chemical structure analyses. *Daubert*, 113 S. Ct. at 2791. The Ninth Circuit affirmed, citing the *Frye* decision. *Id.* at 2792. The United States Supreme Court vacated the Ninth Circuit's decision and expressly rejected *Frye's* general acceptance test. *Id.* at 2799. In issuing the opinion of the Court, Justice Blackmun characterized the general acceptance test as a rigid requirement which was "at odds with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion testimony.'" *Id.* at 2794. For further discussion on the *Daubert* and *Frye* opinions, see Kapusta, *supra* note 11, at 38-40.

been superseded by rule 702 of the *Federal Rules of Evidence*, which had become effective some fifty years after the *Frye* decision.¹⁷ It would seem likely that Florida courts would follow in the footsteps of the *Daubert* decision since *Florida Statutes* section 90.702 is virtually identical to Federal Rule 702.¹⁸ Nonetheless, in *Flanagan v. State*,¹⁹ the Supreme Court of Florida rejected the approaches advocated by both the *Piccinonna* and *Daubert* courts and reaffirmed its commitment to the *Frye* "general acceptance" test for the admissibility of scientific evidence.²⁰

In Florida, polygraph results have been held inadmissible to prove the guilt or innocence of a defendant since 1952.²¹ However, Florida courts have allowed polygraph results to be admitted upon the stipulation of both parties.²² In addition, many Florida courts have advocated the use of periodic polygraph examinations as part of a probationer's sentence.²³ In

17. *Daubert*, 113 S. Ct. at 2794. Under the *Daubert* approach, federal judges ruling on the admissibility of expert scientific testimony must engage in a two-part analysis. First, the judge must determine whether an expert's testimony reflects scientific knowledge based on whether their findings are derived by the scientific method and whether their work product amounts to good science. *Id.* Second, the judge must determine whether the proposed testimony is relevant and that it logically supports a material aspect of the party's case. *Id.* at 2796. See generally FED. R. EVID. 702 (providing that scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence may be admitted in the form of an opinion from a qualified expert).

18. See Kapusta, *supra* note 11, at 39.

19. 625 So. 2d 827 (Fla. 1993).

20. *Id.* at 828. Regardless of the United States Supreme Court decision in *Daubert*, the Florida Supreme Court in *Flanagan* stood firm on its position that the *Frye* test should be strictly adhered to when the admissibility of scientific evidence is at issue. As the court noted: "We are mindful that the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the *Frye* test. However, Florida continues to adhere to the *Frye* test for the admissibility of scientific opinions." *Id.* at 829 n.2 (citations omitted). This is a particularly important point since Florida's own rule regarding expert testimony was patterned after Federal Rule 702. See FLA. STAT. § 90.702 (1994) (providing that scientific knowledge is admissible in the form of expert testimony if it will assist the trier of fact).

21. See *Kaminski v. State*, 63 So. 2d 339 (Fla. 1952).

22. See *Davis v. State*, 520 So. 2d 572, 574 (Fla. 1988); *Jones v. State*, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984) (holding that results of polygraph, absent consent by both parties, are inadmissible).

23. The courts of other jurisdictions have approved the use of the polygraph as a condition of probation despite the fact that the results of such a test are inadmissible at trial. See, e.g., *People v. Miller*, 256 Cal. Rptr. 587 (Ct. App. 1989); *Mann v. State*, 269 S.E.2d 863 (Ga. Ct. App. 1980); *State v. Sejnoha*, 512 N.W.2d 597 (Minn. Ct. App. 1994). See generally *State v. Victoroff*, 770 P.2d 922 (Or. Ct. App. 1989) (holding that polygraph examinations are a valid condition of probation and results are admissible in any future court

fact, many Florida courts have required that a probation candidate agree to submit to these tests before probation will be granted.²⁴ Thus, a direct conflict exists between Florida's refusal to recognize the validity of polygraph results and its willingness to accept the results of such tests in certain situations.

B. *Admissibility by Stipulation: A Whole New Evidentiary Question*

The Supreme Court of Florida first rejected the admissibility of the polygraph over forty years ago in *Kaminski v. State*.²⁵ In this case, the prosecution sought to introduce the results of a polygraph examination for purposes of rehabilitating a witness whose credibility had been shaken and upon whose testimony the State's whole case depended.²⁶ The court held, in response to the use of the polygraph for purposes of bolstering witness credibility, that such a mechanical device could not substitute "for the time-tested, time-tried, and time-honored discretion of the judgment of a jury as to matters of credibility."²⁷ The *Kaminski* decision, however, has not served to keep all polygraph evidence out of court. In *Codie v. State*,²⁸ the Supreme Court of Florida changed its position and held that the results of a polygraph examination could be admitted upon the agreement of both parties.²⁹ In *Codie*, the defendant agreed to submit to a polygraph examination after he was charged with two counts of robbery.³⁰ Prior to administering the test, the State Attorney advised Codie that the results of these tests would be admitted into court regardless of whether he passed or

proceedings); Anne M. Payne, Annotation, *Propriety of Conditioning Probation on Defendant's Submission to Polygraph or Other Lie Detector Testing*, 86 A.L.R. 4th 709 (1991) (discussing the use of the polygraph as a condition of probation and the defendant's right against self-incrimination). *But see, e.g.*, *State v. Travis*, 867 P.2d 234, 236 (Idaho 1994) (holding that the results of a polygraph examination are admissible in probation revocation hearing despite the fact that the results indicate that the defendant was deceptive in answering questions concerning whether he had been involved in sexual activity with minors).

24. *See Nichols v. State*, 528 So. 2d 1282 (Fla. 1st Dist. Ct. App. 1988); *Hockman v. State*, 465 So. 2d 619 (Fla. 2d Dist. Ct. App. 1985).

25. *Kaminski*, 63 So. 2d at 339.

26. *Id.* at 341.

27. *Id.*

28. 313 So. 2d 754 (Fla. 1975).

29. *Id.* at 756.

30. *Id.*

failed.³¹ Since Codie failed the test, the results were admitted.³² In upholding both the trial and appellate court decisions, the supreme court concluded that the evidence was admissible against Codie since he had freely and voluntarily agreed to waive any objection to admissibility prior to the administration of the test.³³ Thus, based on *Codie*, trial courts are given broad discretion to admit the evidence if the parties stipulate to the admissibility, scope, and use of the results prior to the administration of the examination.³⁴

Although the stipulation approach ensures that evidentiary objections will be avoided, it does not ensure that the results obtained from such an examination will be reliable and trustworthy. Furthermore, once the parties stipulate to the admissibility of polygraph evidence, they are bound by the results regardless of their effect. For example, in *Butler v. State*,³⁵ the defendant was offered the opportunity to submit to a lie detector test as a means of proving his innocence in a series of rapes.³⁶ A pretrial agreement was entered into whereby the State agreed not to prosecute if the results of the polygraph examination indicated that the defendant was telling the truth.³⁷ On the other hand, if the results of the test were unfavorable, the results would be admissible at trial.³⁸ The defendant passed the test and the State initially dismissed the charges.³⁹ However, the defendant was

31. *Id.*

32. *Id.*

33. *Codie*, 313 So. 2d at 757.

34. For detailed discussion on Florida law concerning the admissibility of polygraph results through prior stipulation, see for example, *Davis v. State*, 520 So. 2d 572 (Fla. 1988); *Carron v. State*, 427 So. 2d 192 (Fla. 1983); *Farmer v. City of Ft. Lauderdale*, 427 So. 2d 187 (Fla. 1983); *Codie*, 313 So. 2d at 754. These cases support the admission of polygraph results by agreement; however, the proposition that the polygraph is too unreliable to warrant its use in judicial proceedings in the absence of such agreement is maintained. See *Delap*, 440 So. 2d at 1242, wherein the court stated:

The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial. However, the court does recognize that the parties may waive their evidentiary objection.

Id. at 1247.

35. 228 So. 2d 421 (Fla. 4th Dist. Ct. App. 1969).

36. *Id.* at 422.

37. *Id.*

38. *Id.*

39. *Id.* at 423-24.

later indicted on the same charge, and was found guilty despite his prior agreement with the State.⁴⁰ On appeal, the Fourth District reversed the lower court's ruling and held that the State was bound to abide by the agreement that it had made with the defendant.⁴¹ The court reasoned that such an agreement constituted a pledge of public faith and as such it should not have been repudiated.⁴² However, in issuing its opinion, the court noted that although the State is free to choose its procedures and weapons of prosecution, it is a questionable situation when the State enters into contracts where the decision to prosecute is removed "from the hands of the traditional authority and delegate[d] to the conscience of a scientific device—a device which may not be infallible."⁴³ Thus, although the court remained convinced that polygraph results were unreliable for purposes of determining guilt, it allowed the results to be admitted based on the prior stipulation of the parties.⁴⁴

Similarly, in *State v. Davis*,⁴⁵ the court was required to dismiss the charges against a defendant after he passed a polygraph examination.⁴⁶ Here, as in *Butler*, the defendant was offered the opportunity to submit to a polygraph test in order to prove his innocence.⁴⁷ In this case, however,

40. *Butler*, 228 So. 2d at 424. In order to avoid its agreement with the defendant, the State claimed that its approval of the agreement was not obtained by the court. *Id.* Although the court held that the polygraph results were inconclusive, it dismissed the State's claim on the ground that the State had been aware of the agreement and of the questions that would be asked of the defendant. *Id.* at 425. In addition, the State made no objection to the administration of the test until after it was given. *Id.*

41. *Id.* at 424.

42. *Butler*, 228 So. 2d at 424 (citing *State v. Davis*, 188 So. 2d 24, 27 (Fla. 2d Dist. Ct. App. 1966)).

43. *Id.* at 425.

44. *Id.*; see also *Mullin v. State*, 571 So. 2d 1382 (Fla. 3d Dist. Ct. App. 1990). In this case, the defendant entered into a plea agreement whereby she agreed to submit to a polygraph examination in exchange for a waiver of the mandatory sentence and fine associated with cocaine trafficking. *Id.* at 1383. Based on hearsay testimony alone, the State was able to show that the defendant had failed the polygraph examination. *Id.* On appeal, the decision of the trial court was reversed on the grounds that the hearsay testimony was insufficient to sustain the trial court's finding. *Id.* at 1384. The court noted, however, that had the State been able to legitimately prove that appellant had failed the polygraph, that the minimum mandatory sentence would be appropriate. *Id.* Thus, in this case, as in *Davis* and *Butler*, the admissibility of the polygraph is not at issue. Rather, the focal point of these cases centers on the existence of a plea agreement and the fact that polygraph results obtained through a plea agreement are binding regardless of the outcome.

45. 188 So. 2d 24 (Fla. 2d Dist. Ct. App. 1966).

46. *Id.* at 27.

47. *Id.* at 25.

the defendant was willing to risk a plea of guilty to a lesser charge if the test indicated that he was untruthful.⁴⁸ In return, the State agreed to dismiss the case if the result indicated that the defendant was telling the truth.⁴⁹ Furthermore, both parties agreed that neither party would be bound if the results were inconclusive.⁵⁰ After the administration of the test, the State sought to repudiate its agreement based on conflicting opinions between the first and second polygraph examiners.⁵¹ The first examiner opined that the defendant was telling the truth and the second examiner opined that the results were inconclusive.⁵² However, in accordance with the parties' original agreement, the trial court quashed the indictment against the defendant based on the opinion of the first examiner.⁵³ On appeal, the Second District held that the agreement by the State to dismiss the case against the defendant was a pledge of public faith, and was therefore binding and enforceable.⁵⁴ Thus, the decision to dismiss the case against the defendant was affirmed.

Conversely, in *Madrigal v. State*,⁵⁵ the State did not waive the defendant's sentence despite its prior agreement.⁵⁶ In this case, the defendant agreed to undergo several polygraph examinations in order to assist the State in a homicide investigation.⁵⁷ After the examinations were administered, the State sought to repudiate its agreement based on the defendant's failure to reveal to the polygraph examiner all that he knew

48. *Id.* A plea agreement was entered into whereby the State would reduce the defendant's charge from first degree murder to manslaughter if the result of the polygraph was not in the defendant's favor. *Id.*

49. *Davis*, 188 So. 2d at 25.

50. *Id.*

51. *Id.* at 25-26.

52. *Id.* at 26.

53. *Id.* The court decided to follow the opinion of the first examiner based upon the agreement entered into by the State and the defendant whereby both parties agreed to select the person that would administer the test, who in this case, was Deputy Gill. *Davis*, 188 So. 2d at 26. Although Deputy Gill opined that the defendant was telling the truth, he later admitted that the results might not be accurate and that the opinion of the second examiner, Powell, might be correct. *Id.* However, Powell testified that his findings were not based upon any reexamination of the defendant, but upon his disapproval of one of the techniques used by Gill. *Id.* Nevertheless, the court held the agreement to be binding based upon the parties' original choice of polygraph examiners. *Id.*

54. *Id.* at 27.

55. 545 So. 2d 392 (Fla. 3d Dist. Ct. App. 1989).

56. *Id.* at 393.

57. *Id.*

about the perpetrators of the homicide.⁵⁸ In support of its position, the State claimed that the contract with Madrigal had been breached although it presented no evidence other than the opinion of the polygraph examiner to substantiate its conclusion.⁵⁹ On appeal, the Third District Court of Appeal held that the State Attorney and the trial court were justified in concluding that the defendant had violated their agreement.⁶⁰ Thus, the defendant's sentence was upheld.⁶¹ Here, as in the Fourth and Second Districts, the Third District was not only willing to admit these results for purposes of determining the guilt or innocence of the defendant, but it relied on the validity of them in upholding the defendant's sentence. More importantly, all of these courts were willing to admit and abide by the results of these examinations despite their failure to be recognized within the scientific community as being accurate, trustworthy, and reliable. Thus, based on the validity of the agreements entered into, these courts were willing to admit the results of the polygraph tests regardless of the negative impact that such results could potentially have on the lives of the defendants and irrespective of the standards for admissibility as set forth in *Frye*.

Likewise, many Florida courts have disregarded the *Frye* standard of admissibility in imposing polygraph testing as a condition of probation. This abandonment of the *Frye* standard is of particular importance in the context of the probationer since his very freedom is dependent on a favorable polygraph reading.

III. AIN'T MISBEHAVIN': THE POLYGRAPH AS A CONDITION OF PROBATION

The most recent Florida case to address the use of the polygraph as a condition of probation is *Cassamassima v. State*.⁶² In *Cassamassima*, the defendant was convicted of lewd assault on a child and was required to submit to a polygraph at six-month intervals as a condition of his probation.⁶³ In a five-four en banc opinion affirming the lower court's ruling, the Fifth District Court of Appeal held that a defendant may be required to

58. *Id.*

59. *Id.* In this opinion, neither the *Madrigal* court nor the State addressed the reasons why the polygraph examiner had concluded that the defendant was less than truthful in his responses. As such, it can only be inferred that the opinion of the examiner was enough to justify the court's decision.

60. *Madrigal*, 545 So. 2d at 394-95.

61. *Id.* at 395.

62. 657 So. 2d 906 (5th Dist. Ct. App. 1995).

63. *Id.* at 907.

take a polygraph at reasonable intervals and to respond to questions that concern noncriminal conduct so long as the results of the polygraph are not offered in evidence.⁶⁴ The court reasoned that the polygraph condition was justified by the circumstances of the particular offense and on the information available to the court which suggested that polygraphs offer a “deterrent to reoffense.”⁶⁵ In holding that the polygraph is a valid condition of probation, the court vacated its earlier decision in *Hart v. State*⁶⁶ where it struck the condition of mandatory polygraph testing from the probationer’s sentence. In *Hart*, the defendant pled nolo contendere in a lewd act case and was sentenced to six years in prison and five years probation with submission to periodic lie detector tests as a condition of probation.⁶⁷ On appeal, the court reasoned that such tests were unreliable for forensic⁶⁸ use, and that it was an improper delegation of the trial court’s fact finding

64. *Id.* at 911.

65. *Id.* The trial judge’s opinion reads as follows:

The Court imposes the special condition based on research which shows that this is a valid and effective deterrent to reoffend and is both valid and effective in dealing with denial that are critical in dealing with evaluation of rehabilitation of sex offenders and in large part because sex crimes, particularly with children, are secret crimes as to which it is very difficult to make an effective . . . detection or an effective way to monitor whether we are having a violation of either the Community Control or the probation.

A yes answer to either of those questions or a no answer which indicates deception would form the basis for a violation of community control or probation in this case.

Id. at 909.

66. 633 So. 2d 1189 (Fla. 5th Dist. Ct. App. 1994). *See generally* FLA. STAT. § 948.03 (1994) (providing that a probationer may be subject to a variety of requirements, such as mandatory drug or alcohol testing, so long as the condition is reasonably related to the offense, to the rehabilitation of the defendant, or to the protection of the public); *see also* Nichols v. State, 528 So. 2d 1282, 1284 (Fla. 1st Dist. Ct. App. 1988) (discussing permissible conditions of probation); Grubbs v. State, 373 So. 2d 905 (Fla. 1979). *But see* Gomez-Rodriquez v. State, 632 So. 2d 709, 710 (Fla. 5th Dist. Ct. App. 1994) (holding that special condition that defendant refrain from consuming alcoholic beverages be struck as being unrelated to cocaine offense); Grate v. State, 623 So. 2d 591, 592 (Fla. 5th Dist. Ct. App. 1993) (striking condition that appellant not enter any bar or consume alcohol); Peterson v. State, 623 So. 2d 637, 638 (Fla. 5th Dist. Ct. App. 1993) (holding that no nexus exists between prohibiting appellant’s consumption of dangerous substances and the appellant’s offense of aggravated assault with a deadly weapon).

67. *Hart*, 633 So. 2d at 1189.

68. “Forensic” is defined as belonging to the courts of justice and indicating the application of a particular subject to the law. For example, FORENSIC MEDICINE is a branch of science that employs medical technology to assist in solving legal problems. BARRON’S LAW DICTIONARY 195 (3d ed. 1991).

authority to rely on the results of these tests to establish whether a crime had been committed.⁶⁹ By reversing its decision in *Hart*, the Fifth District Court of Appeal joined other Florida courts in assuming the validity of polygraph examinations despite general adherence to per se inadmissibility under *Frye*.

In *Hockman v. State*,⁷⁰ the Second District Court of Appeal also approved of the use of polygraph testing as a probationary condition.⁷¹ In this case, as in *Cassamassima*, the defendant agreed to submit to regularly scheduled polygraph examinations as a condition of probation.⁷² However, as a result of three missed examinations, due to the defendant's inability to pay for the tests, the trial court held that the terms of probation had been violated.⁷³ The Second District Court of Appeal reversed this decision, concluding that the State had never proved that the defendant had the ability to pay for the polygraph tests.⁷⁴ Thus, the issue in this case was not

69. In *Hart*, Justice Griffin urged that:

[i]t is improper delegation of a court's fact-finding authority to rely upon some nervousness-calculator to establish whether a crime has been committed. That determination should be made after an accusation, proof through actual witnesses (not graph-readers) and an opportunity to cross-examine as to truth, present counter-witnesses, and otherwise defend.

Hart, 633 So. 2d at 1189 (Griffin, J., concurring in part and dissenting in part). In determining the validity of polygraph results, the *Hart* court relied on *Davis v. State*, 520 So. 2d 572, 574 (Fla. 1988), and *Jones v. State*, 453 So. 2d 226, 227 (Fla. 5th Dist. Ct. App. 1984) (holding that lie detector tests are unreliable for forensic purposes). However, later in the same opinion, Justice Griffin stated:

In concluding that the use of the polygraph has been effective in deterring sex offenders who victimize children, the trial court evidently has information and a frame of reference that we do not have I do know that such criminals pose peculiar detection and recidivism problems for the criminal justice system. I also know that the sheer volume of perpetrators of such offenses seems to have overwhelmed our system's ability to effectively monitor and supervise these criminals during their probationary term.

Since offenders on probation for such sex crimes are already expected to report to their probation officer and answer questions such as the two framed by the court, the requirement of answering those questions in connection with a polygraph does not seem an impermissible burden if it serves any useful purpose.

Hart, 633 So. 2d at 1190; *see id.* at 1189 (listing the questions that may be asked of a sex offender during a polygraph examination).

70. 465 So. 2d 619 (Fla. 2d Dist. Ct. App. 1985).

71. *Id.* at 621.

72. *Id.* at 620.

73. *Id.*

74. *Id.*

whether submission to polygraph testing was a valid condition of probation, but whether the defendant had the money to pay for them. Although the appellate court reversed the lower court's ruling, it did note that the use of the polygraph as a condition of probation was valid in the absence of any objection by the defendant.⁷⁵ The court reasoned that since the defendant never contested the validity or imposition of the polygraph as a probationary condition, he effectively waived any error by the lower court in imposing the condition.⁷⁶

In *Cassamassima*, however, no waiver occurred since a timely objection had been made.⁷⁷ Nevertheless, the court held that such a condition was proper and justified by the circumstances of that case and by the fact that Cassamassima did not intend to reject probation if the court insisted on the use of polygraph testing as a requirement of his probation.⁷⁸ As a result, Cassamassima was faced with a situation in which he would have to choose between no probation at all or probation with the attached condition that he submit to periodic polygraph examinations. In this type of situation, it is not clear whether the defendant is able to make a clear and rational choice concerning his alternatives, primarily since his options are limited to either accepting the conditions as set forth by the court or incarceration. This take it or leave it situation renders the defendant's decision making process one riddled with constitutional crisis. On the one hand, the defendant gains his freedom, but on the other hand he loses his rights with regard to any behavior that may be deemed as violating the terms of his probation. Thus, it appears that the probationer has little, if any, real choice in the matter.⁷⁹

75. *Cassamassima*, 657 So. 2d at 915 (referring to *Hockman*, 465 So. 2d at 619).

76. *Id.* On appeal, the court recognized that the appellant may have stipulated to the polygraph as a condition of probation as part of a plea negotiation or she may have simply failed to object to the condition at the time of its imposition. *Id.* Regardless, the appellant never objected to the condition in any subsequent proceeding. *Id.* See generally Payne, *supra* note 23 (discussing the use of the polygraph as a condition of probation).

77. *Cassamassima*, 657 So. 2d at 916 (Thompson, J., dissenting).

78. *Id.* at 913 (Harris, J., concurring specially with the opinion of Griffin, J.).

79. In addressing the issue of whether a probationer has a choice in accepting the terms of his probation, the Fifth District Court of Appeal held in *Bentley v. State*, 411 So. 2d 1361 (Fla. 5th Dist. Ct. App.), *review denied*, 419 So. 2d 1195 (Fla. 1982), in a unanimous, per curiam opinion:

When, at sentencing, the trial court proposes the conditions under which it will offer probation, the defendant should at that time seriously consider the matter and if he feels the conditions lade him with burdens too grievous to be borne, the defendant should forthrightly object to them at that time and place. . . . If he feels the proffered probation with conditions is more onerous than the maximum confinement permitted by law, he should reject the tendered offer of

IV. THE POLYGRAPH AS A SPECIAL CONDITION OF PROBATION: IS THERE REALLY A CHOICE?

A. *The Effect of the Probationer's Waiver*

In *State v. Heath*,⁸⁰ the Supreme Court of Florida held that a probationer's agreement to accept probation effectively waives his Fifth Amendment privilege with regard to noncriminal conduct regardless of whether an express agreement to do so is made with the court.⁸¹ In *Heath*, the defendant challenged a requirement that he periodically answer questions from his probation supervisor regarding his whereabouts and conduct as violating his Fifth Amendment privilege against self-incrimination.⁸² In quashing this order, the supreme court recognized that probation itself would be impractical if the probationer was not required to respond to certain questions from his probation supervisor.⁸³ However, the court also recognized that an implied waiver based on the acceptance of probation does not waive a probationer's Fifth Amendment rights relating to "specific conduct and circumstances concerning a separate criminal offense."⁸⁴ In this instance, a probationer is free to assert a Fifth Amendment privilege, if appropriate.⁸⁵ The problem with this approach, however, is that if a probationer asserts a Fifth Amendment privilege, it is likely that he will be drawing attention to the fact that he may be concealing prohibited conduct. Under this type of situation, the probation supervisor is free to increase the level of supervision of the probationer.⁸⁶ Furthermore, an answer which

probation. This is not unfair because the predicament leading to his dilemma is a matter of his own making and the trial judge is acting for organized society. . . . If the trial court is adamant that the conditions are necessary, the defendant should either refuse probation or accept it as offered.

Id. at 1364.

80. 343 So. 2d 13 (Fla.), *cert. denied*, 434 U.S. 893 (1977).

81. *Id.* at 16.

82. *Id.* at 14-15.

83. *Id.* at 16.

84. *Id.*

85. *Cassamassima*, 657 So. 2d at 910 (citing *Owens v. Kelley*, 681 F.2d 1362, 1369 (11th Cir. 1982)).

86. *See Hart*, 633 So. 2d at 1190 (Griffin, J., concurring in part and dissenting in part).

As Justice Griffin explained:

A 'false' answer may not be a basis to violate the offender's probation, but it certainly would offer a reasonable basis for the probation officer to enhance his supervision of the probationer and prevent further crimes. Or, perhaps, through investigation or more careful scrutiny, admissible evidence that the probationer

indicates deception may form the basis for a probation violation. As the trial judge in *Hart* noted, “[a] yes answer to either of [the] questions [asked] or a no answer which indicates deception would form the basis for a violation of community control or probation in this case.”⁸⁷ Thus, by utilizing his constitutional right against self-incrimination, the probationer is subjecting himself to further scrutiny and possible further punishment in the form of increased supervision.

B. *The Right Against Self-Incrimination: A Contradiction in Terms*

It is not surprising that the use of the polygraph as a condition of probation has raised Fifth Amendment objections. However, as noted by the *Cassamassima* court, these objections have usually been rejected by the courts on the ground that intrusion into the area of self-incrimination when undergoing a polygraph examination is no greater than the requirement that a probationer answer truthfully at all other times during a probation inquiry.⁸⁸ However, the use of a polygraph for these purposes cannot be analogized with a questioning process in which the probationer is confronted face to face with his supervisor. This is especially true since the polygraph works by measuring physiological responses which may reveal dishonesty

has, in fact, violated the terms of his probation by perpetrating further sex crimes could be uncovered. In other words, failing the polygraph would simply alert the probation officer that the probationer needs attention. As a means of husbanding the system’s badly overtaxed resources, this might help monitor the probationer.

Id.

87. *Cassamassima*, 657 So. 2d at 909. The probationer was required to undergo polygraph testing at least once every six months for the first two years and then once every year thereafter. *Id.* During these examinations, the probationer was required to answer whether he had been alone with a child since his last polygraph or since sentencing and whether he had any manner of sexual contact with a child. *Id.*; accord *Hart*, 633 So. 2d at 1190 (Griffin, J., concurring in part and dissenting in part) (noting a false answer may not be a basis to violate offender’s probation, but it would offer a basis for the probation officer to enhance supervision).

88. *Cassamassima*, 657 So. 2d at 910 (citing *Owens v. Kelley*, 681 F.2d 1362, 1370 (11th Cir. 1982)). In further support of this proposition, the *Cassamassima* court referred to the United States Supreme Court’s holding in *Minnesota v. Murphy*, 465 U.S. 420 (1984), wherein the Court explained that a “probationer may not refuse to answer a question just because his answer would disclose a probation violation; he may only refuse to answer if a truthful answer would expose him to prosecution for a crime different from the one of which he was already convicted.” *Id.* at 911 (citing *Murphy*, 465 U.S. at 442-43).

based on the nervousness of the subject rather than on an actual reading of untruthfulness.⁸⁹

V. TRUTH OFTEN REVEALS ITSELF, BUT NOT ALWAYS

In order to obtain accurate polygraph results, it is crucial that several conditions be met. Of these conditions, the subject's testimony constitutes only one of the factors. The qualifications and prior experience of the polygraph examiner are crucial factors in the process since a large part of making an accurate reading relies on the subjective impressions of the examiner.⁹⁰ As the supreme court noted in *Davis*, factors which contribute to the results of a polygraph test are the skill of the operator, the emotional state of the person tested, and the fallibility of the machine.⁹¹ In fact, it has been argued that the polygraph does nothing more than register physiological correlates of anxiety, which is not the same thing as consciousness of guilt or lying.⁹² Thus, a fundamental problem with polygraph testing is its inability to make correct and consistent determinations of a subject's truthfulness.⁹³ This predicament is of particular importance to the probationer since his continued freedom rests upon the accuracy and reliability of the polygraph in determining whether he has been truthful. In order to more thoroughly understand the many variables involved in a polygraph reading, it is necessary to discuss the basic principles of polygraph operation and how any one of the factors that contribute to this process may individually cause the reading to yield a different result.

A. Basic Principles of Operation

A polygraph operates based on certain assumptions, mainly that an individual will undergo physiological changes in blood pressure, respiratory

89. See *infra* text accompanying note 101.

90. See generally KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5169 (1978) (discussing the role of the examiner in the polygraph process); see also *State v. Davis*, 188 So. 2d 24, 26 (Fla. 2d. Dist. Ct. App.) (noting that testimony given by one polygraph examiner revealed that much of the outcome of a polygraph test depends upon the examiner), *cert. denied*, 194 So. 2d 24 (Fla. 1966).

91. *Davis*, 520 So. 2d at 573.

92. For an overview of how polygraph results may be unreliable for purposes of determining guilt or innocence, see 1 MCCORMICK ON EVIDENCE § 206 (John W. Strong ed. 1992). See also Halbleib, *supra* note 1, at 230-32 (discussing the mechanics of the polygraph technique and the role of the examiner in ensuring an accurate result).

93. See generally Note, *Lie Detectors in the Workplace: The Need for Civil Actions Against Employees*, 101 HARV. L. REV. 806 (1988).

rate, and galvanic skin responses.⁹⁴ It is believed that these responses are triggered when an examinee knowingly makes a false statement.⁹⁵ The arguments in favor of the machine's reliability and validity are based on tests which allegedly prove its correctness in a percentage of cases.⁹⁶ Unfortunately, the results of the studies vary greatly.⁹⁷ Moreover, there is no readily available clear-cut proof to substantiate the accuracy of these results.⁹⁸

It has been suggested that factors other than conscious deception can cause deviant responses from an examinee.⁹⁹ For example, frustration, surprise, pain, shame, and embarrassment, as well as other responses incapable of analysis, can cause the examinee to respond in a manner which would trigger a negative response.¹⁰⁰ In fact, studies have shown that examinees can successfully use countermeasures to create false negatives and thus clear themselves of suspicion.¹⁰¹ Alternatively, an examinee

94. *Farmer v. City of Ft. Lauderdale*, 427 So. 2d 187, 190 (Fla. 1983).

95. *Id.* The *Farmer* court notes that there are four theories operating behind the alleged validity of the polygraph: 1) the conditioned response theory where questions elicit emotional responses related to the subject's past experience (the more traumatic the experience the greater the response); 2) the conflict theory which operates on the assumption that incompatible reactions, (to lie or tell the truth), create physiological disturbances; 3) the punishment theory which is premised on the belief that the subject's fear of detection and punishment will create a physiological response; and 4) the arousal theory which ignores any emotional basis and operates under the theory that various stimuli will cause detection. *Id.* See generally BARLAND & RASKIN, DETECTION OF DECEPTION, ELECTRODERMAL ACTIVITY IN PSYCHOLOGICAL RESEARCH 445 (W. Prokasy & D. Raskin eds., 1973).

96. *Farmer*, 427 So. 2d at 190.

97. *Id.*; see Paul C. Gianelli, *Forensic Science: Polygraph Evidence*, 30 CRIM. L. BULL. 262, 270-73 (1994). Gianelli notes that some researchers claim a polygraph accuracy rate of 95% or higher, while others report results as low as 64%. See also *McKenzie v. State*, 653 So. 2d 395, 397 (1995), *review denied*, 661 So. 2d 824 (Fla. 1995) (noting that a study done for the United States Department of Justice concluded that the accuracy rate of polygraph testing is only 90%). But see CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., 22 FEDERAL PRACTICE AND PROCEDURE § 5169 (Supp. 1994) (noting that the estimated chances that a polygraph will yield accurate results, when introduced in court, are no better than 50-50).

98. *Farmer*, 427 So. 2d at 190.

99. *Id.* at 191.

100. *Id.*

101. See *United States v. Piccinonna*, 885 F.2d 1529, 1538 (11th Cir. 1989), *aff'd*, 925 F.2d 1474 (1991) (Johnson, J., concurring in part and dissenting in part). See generally *supra* note 93, at 806 (noting that a truthful subject may become very nervous and fearful when asked certain questions and thus may be erroneously labeled as deceptive whereas a subject who is lying may be adept at controlling his emotions and/or his physiological responses and thus may be erroneously labeled as truthful). But see Hableib, *supra* note 1,

could tell the truth while thinking of something painful which could cause the truthful response to appear on a polygraph as a lie.¹⁰² In addition to these concerns, perhaps the most crucial component in the polygraph mix is the skill of the polygraph examiner. The examiner must subjectively interpret the graphs that are produced by the machine in order to determine whether the examinee has offered deceptive responses.¹⁰³ In addition to graph interpretation, the examiner will also evaluate the examinee's demeanor, attitude, and responses to comments and questions.¹⁰⁴ It is based on these subjective evaluations that the examiner is able to make preliminary judgments regarding the truthfulness of the examinee.¹⁰⁵ Even if the scientific theory behind the polygraph is proven valid, the evidence obtained therefrom is of dubious value if the expert who interprets the results lacks the requisite skills.¹⁰⁶ Thus, the use of the polygraph technique is dependent upon the ability, experience, education, and integrity of the examiner himself.¹⁰⁷ Indeed as one author notes, "[a] properly tuned piano is an instrument upon which it is theoretically possible to play the 'Moonlight Sonata,' but whether we get that or 'Chopsticks' depends upon who is seated at the keyboard."¹⁰⁸

Based on these findings, it would seem that Florida courts would avoid using the polygraph for any purpose, particularly in the context of determining guilt. However, the courts that impose the polygraph as a probationary condition rationalize its imposition on the assumption that it will instill within the mind of the probationer a fear of detection, thus causing the

at 233. Halbleib analogizes an examinee's ability to fool the polygraph with the poker player's ability to fool his opponents:

Any poker player knows that if his mouth goes dry, his voice trembles, his face blushes, and he begins to sweat every time he tries to bluff his way into a big pot, he probably will lose. Good players learn to control and manipulate these physiological signs to their benefit.

Halbleib, *supra* note 1, at 233.

102. *Piccinonna*, 885 F.2d at 1539 (Johnson, J., concurring in part and dissenting in part).

103. *See* Halbleib, *supra* note 1, at 232.

104. *Id.*

105. *Id.*

106. *See, e.g.,* KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5169 (1978).

107. Halbleib, *supra* note 1, at 232.

108. *See Cassamassima v. State*, 657 So. 2d 906, 914 n.1 (Fla. 5th Dist. Ct. App. 1994) (quoting GRAHAM, JR., *supra* note 106, § 5169).

probationer to refrain from further criminal conduct.¹⁰⁹ However, the possibility still exists that the probationer will not fear detection or that even if he does fear detection that he will be able to control his emotions and/or responses so that he can escape suspicion. Moreover, even if the probationer is detected as being untruthful, this finding will be inadmissible against him in terms of criminal prosecution.¹¹⁰ Thus, it is questionable what real benefit, if any, is realized from such an exercise.

B. *Psychological Deterrent or Waste of Time*

In determining conditions of probation, it is the duty of the court to fashion such conditions so that they will serve the purpose of rehabilitating the defendant.¹¹¹ Section 948.03 of the *Florida Statutes* establishes that probationers may be subject to a variety of requirements that would significantly interfere with their rights or liberties in other contexts “[s]o long as the condition is reasonably related to the offense, to the rehabilitation of the defendant or to the protection of the public”¹¹²

109. See *Owens v. Kelley*, 681 F.2d 1362, 1369 (11th Cir. 1982) (citing *Mann v. State*, 269 S.E.2d 863, 866 (1980)). As one commentator notes:

To deter certain types of behavior, any factor which would cause that behavior is not an absolute, but merely another factor for consideration. In the final analysis, it depends not on whether the polygraph machine works, but on whether the subject ‘believes’ that it works. It is society’s belief that a person will fear being found out if a wrong is committed. This is a theory that is instilled early in life based on notions of morality and the norms of society. Thus, if the subject operates under these beliefs, the polygraph is much more likely to yield an accurate result.

Interview with Randolph Bracchialarghe, Professor of Law, Shepard Broad Law Center, Nova Southeastern Univ., in Fort Lauderdale, Fla. (Aug. 23, 1995).

110. See, e.g., *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Owens*, 681 F.2d at 1362; *State v. Heath*, 343 So. 2d 13 (Fla.), cert. denied, 434 U.S. 893 (1977).

111. *Cassamassima*, 657 So. 2d at 912-13 (citing *Bentley*, 411 So. 2d at 1364).

112. *Cassamassima*, 657 So. 2d at 909 (citing *Grubbs v. State*, 373 So. 2d 905, 909 (Fla. 1979)). See generally FLA. STAT. § 948.03 (1994). In *Larson v. State*, 572 So. 2d 1368 (Fla. 1991), the court stated:

As a general rule, a condition of probation that burdens the exercise of a legal or constitutional right should be given special scrutiny. However, a defendant cannot successfully challenge every aspect of a prior order of probation simply because it infringes on some such rights. Most sentences and orders of probation have that effect, if only because they restrict liberty to some extent.

Id. at 1371; accord *Owens*, 681 F.2d at 1366 (holding that conditions of probation are not necessarily invalid simply because they affect a probationer’s ability to exercise constitutionally protected rights). See *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979), in which the Supreme Court adopted a test to determine whether a condition of probation

The Supreme Court of Florida applied this rationale in *Biller v. State*,¹¹³ where it struck a condition of probation from the defendant's sentence on the ground that it was unrelated to the rehabilitation of the defendant.¹¹⁴ In that case, the defendant was prohibited from using or possessing alcoholic beverages as a result of his conviction for carrying a concealed firearm and a concealed weapon.¹¹⁵ The trial judge reasoned that the condition was rehabilitative in the sense that it would prevent the defendant from being in a position in which his judgment would be impaired.¹¹⁶ The Fourth District Court of Appeal acknowledged that there was nothing in the record suggesting any relationship between the defendant's behavior and the use of alcohol.¹¹⁷ Nevertheless, the district court upheld the challenged condition by concluding that it was within the trial judge's discretion to require the defendant to abstain from the use or possession of alcohol as a tool in the defendant's rehabilitation.¹¹⁸ In quashing this order, the Supreme Court of Florida stated that a special condition of probation will be upheld only if it has a relationship to the crime of which the offender is convicted, is related to conduct that is in itself criminal, or when it forbids conduct which is reasonably related to future criminality.¹¹⁹ The court concluded that a special condition of probation will only be upheld if the record supports at least one of the

imposed pursuant to Federal Probation Act, 18 U.S.C. § 3651 (1987), is unduly intrusive on constitutionally protected freedoms: "Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement." *Tonry*, 605 F.2d at 150 (quoting *United States v. Pierce*, 561 F.2d 735 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978)).

113. 618 So. 2d 734 (Fla. 1993).

114. *Id.* at 735.

115. *Id.* at 734.

116. *Id.*

117. *Id.*

118. *Biller*, 618 So. 2d at 734.

119. *Id.* at 734-35. The *Biller* court based its opinion on the decision of the Second District Court of Appeal in *Rodriguez v. State*, 378 So. 2d 7 (Fla. 2d Dist. Ct. App. 1979), which held that constitutional rights of probationers are limited by conditions of probation which are desirable for purposes of rehabilitation. *Id.* at 734 (citing *Rodriguez*, 378 So. 2d at 9); *see, e.g.*, *Stonebraker v. State*, 594 So. 2d 351 (Fla. 2d Dist. Ct. App. 1992); *Wilkinson v. State*, 388 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1980) (supporting the proposition that in order to be valid, special conditions of probation must be related to the crime for which the probationer was charged).

circumstances as stated above.¹²⁰ In *Biller*'s case, there was no connection between the use of alcohol and the crimes with which he stood convicted.¹²¹ Moreover, the use of alcohol by adults is legal.¹²² Therefore, since no nexus existed between the offense for which *Biller* had been convicted and the use of alcohol, the condition was stricken from his sentence.¹²³ In *Cassamassima*, however, the court concluded that a direct relationship did exist between the administration of the polygraph and the future rehabilitation of the appellant.¹²⁴ However, as Justice Thompson's dissent points out, no scientific evidence exists that would substantiate the polygraph as a deterrent against repeat offenders.¹²⁵ In fact, as Justice Thompson noted, such a theory was speculative at best.¹²⁶

VI. RECOMMENDATIONS

Based on the questionable character of the polygraph in terms of reliability and accuracy, it is essential that at minimum, certain safeguards be implemented.¹²⁷ These safeguards include standardizing the methods

120. *Biller*, 618 So. 2d at 735.

121. *Id.* at 734.

122. *Id.*

123. *Id.*

124. *Cassamassima*, 657 So. 2d at 910. Although the *Cassamassima* court held that the polygraph is a valid condition of probation, it did not offer any specific facts which would support the polygraph as being a successful deterrent against repeat offenders. The court did, however, rely on the Eleventh Circuit's decision in *Owens*, 681 F.2d at 1370, wherein the court held that such a condition "clearly is reasonably related to [the offender's] probation in that it deters him from violating the terms of his probation by instilling in him a fear of detection." *Cassamassima*, 657 So. 2d at 910.

125. *Id.* at 917.

126. *Id.* In a considerable dissent, Justice Thompson, writing on behalf of himself and Justice Sharp, reiterated the criteria set out in *Rodriguez*, 378 So. 2d at 7, which was adopted in *Biller*, 618 So. 2d at 734, in concluding that the polygraph examination is invalid as a special condition of probation because no nexus exists between the offense of lewd assault on a child and the condition of having to submit to polygraph testing. *Cassamassima*, 657 So. 2d at 916. As Justice Thompson observed:

It is incongruous to allow one probationer to consume alcohol (a drug) while on probation when the probationer was convicted of selling cocaine or PCP (drugs) based on the conclusion that there is no nexus between the crime and the condition of probation, and yet to compel another probationer to pay for a polygraph examination which is not related to the crime committed and which cannot be used as a basis for a violation of probation

Id.; see *supra* text accompanying note 119; see also cases cited *supra* note 66.

127. See generally Brian C. Jayne, *Applying Polygraph Methodology to Monitor Probated Offenders*, Criminal Law & Urban Problems, Apr. 19-20, 1991, at *1-8, available

used by polygraph examiners as well as implementing quality control measures to assure that equanimity is achieved.¹²⁸ Quality control measures may provide a source of feedback for examiners who may have become lax in their procedures and who may need updating on current techniques. This helps to ensure that the highest possible accuracy rates are achieved.¹²⁹ However, even if quality control standards are met there is still a need for uniformity in the many variables that comprise the polygraph technique. This is a particularly problematic area since there has been little controlled research concerning these different variables.¹³⁰ In the absence of any statistical data to support the individual controls, it is difficult, if not impossible, to reach a truly accurate result. To further complicate matters, even if a study did show that one variable produced a higher accuracy rate than a second variable, there is no way of knowing what it is about the first variable which caused this result.¹³¹ Thus, the process is imperfect and it can only be concluded that any result obtained therefrom is equally imperfect.

VII. CONCLUSION: TO BE OR NOT TO BE; THAT IS THE QUESTION

Although the polygraph has made progress in its journey toward judicial legitimacy, the journey is far from being over.¹³² Based on the imperfections of the process, the polygraph is really no more accurate than an elaborate guessing game. By allowing its use, for any purpose, within a judicial setting, courts are condoning an almost russian roulette situation in which the consequences for the player could be grave. Moreover, by allowing the results of polygraph examinations to be admitted by stipulation, Florida courts are intensifying the confusion that already surrounds the issue of polygraph admissibility. The thrust of this argument lies in the fact that

in PLI, 159 PLI/Crim 625.

128. *See supra* text accompanying note 95.

129. Jayne, *supra* note 127, at *6.

130. *Id.*

131. *Id.* Jayne lists a few of the many variables involved in the polygraph technique: 1) instrumentation; 2) required documents; 3) pretest interview; 4) question formulation; 5) chart recordings; 6) chart interpretation; 7) report writing; and 8) policy guidelines. The author notes that many of these categories involve a subjective evaluation. *Id.* at *7. Ideally, quality control should be based on objective assessments and it is in this area that most disagreements concerning different techniques arise. *Id.* at *8.

132. *See generally* Halbleib, *supra* note 1 (discussing the polygraph's odyssey toward judicial legitimacy).

the results of such an examination become no more scientifically valid or reliable by virtue of the parties stipulation than they did prior to such agreement.

Moreover, by allowing these results to be admitted, the door is left open to a virtual "Pandora's Box"¹³³ of potential issues that will need to be addressed by the courts.¹³⁴ Thus, rather than adhering to a uniform system of admissibility, or inadmissibility as the case may be, the courts have allowed an accepted standard of per se "inadmissibility" to be reshaped into one that suits the needs of the parties in each individual case. Thus, the inevitable question becomes one of reconciliation. Specifically, how can the use of the polygraph as a condition of probation be reconciled with the broader view that the results of such a test are unreliable, unscientific, and inadmissible for purposes of determining guilt? This query has no answer, at least not yet. As a result, this area is left wide open to mixed interpretation and broad misapplication. As Justice W. Sharp pointed out in *Cassamassima*, "[t]he guilty can fool them and the innocent can flunk them."¹³⁵ Thus, the potential exists for the guilty to be freed and the innocent to be punished. Although sentencing advocates recommend use of the polygraph when doing so fits the needs of their clients, there must be some assurance that offenders will be controlled in the community and that some rehabilitative benefit will be realized. At present, no such evidence exists. Based on this lack of clear and convincing evidence, it is apparent that a court of law should be the last place in which to rely on the results of such a questionable process.¹³⁶ In the final analysis, if anything is

133. According to Greek mythology, Pandora was the first mortal woman, who in curiosity opened a box, letting out all human ills into the world.

WEBSTER'S NEW WORLD DICTIONARY 1025 (2d ed. 1986).

134. See Halbleib, *supra* note 1, at 236-48 (discussing the issues of relevancy, unfair prejudice, confusion of the issues, probative value, due process, and compulsory process with regard to polygraph admissibility). It is also of value to note that the United States Supreme Court held in *Rock v. Arkansas*, 483 U.S. 44, 62 (1987), that the Arkansas evidentiary rule categorically prohibiting the admission of hypnotically refreshed testimony did not pass constitutional scrutiny. Halbleib, *supra* note 1, at 247-48. As a result, it is not a far fetched possibility that Florida courts may be faced with this issue to resolve at some future time. This is especially true in the context of prior stipulation. If Florida courts are willing to admit polygraph results based on the parties' stipulation, what is there to prevent these courts from ruling that hypnotically refreshed testimony may be admitted under the same circumstances?

135. *Cassamassima*, 657 So. 2d at 914 (Sharp, J., dissenting).

136. On behalf of the court, Justice Grimes stated in *Flanagan*, 625 So. 2d at 828, that: "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its

certain, it is that the search for truth is best left to the wisdom of judges and to the sensibilities of jurors.

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own purposes, then the procedure must be considered less reliable for courtroom use.” *Id.* (citing *Stokes v. State*, 548 So. 2d 188, 193-94 (Fla. 1989)).

City of North Miami v. Kurtz—Is It Curtains for Privacy in Florida?

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I. INTRODUCTION

The City of North Miami ("City") has a new policy, Regulation 1-46.¹ This regulation informs anyone who smoked within the past year not to waste her time applying for a job with the City because regardless of her existing abilities, she will not be considered a qualified applicant.² This policy contains inconsistencies because it does not prohibit the applicant, once hired, from smoking on the job. It also does not prohibit current employees from smoking. In *City of North Miami v. Kurtz*,³ the Supreme Court of Florida addressed the issue of whether the City may have a regulation that prohibits smoking prior to, and as a prerequisite for employment.⁴ This comment focuses on the court's decision in that case and resulting ramifications in the State of Florida.

The City claims this regulation was established to reduce costs to taxpayers and to increase the productivity of its workers.⁵ The goal of this regulation was to "gradually reduce the number of smokers in the City's work force by means of natural attrition."⁶ The City attempted to demonstrate how costs to taxpayers will be reduced. It submitted evidence indicating that employees who smoke cost the City more than those who do not.⁷ Accordingly, the City claims these interests justify the intrusion into Kurtz's privacy.⁸

In contrast, Arlene Kurtz claims the City is invading her right to privacy by enforcing this regulation; therefore, this regulation is unconstitutional under the federal and state constitutions.⁹ She believes that since she has a legitimate expectation of privacy in her own home and her private life, the City's interests are insufficient to outweigh those expectations.¹⁰ She claims that whether she smokes off-duty is irrelevant to the kind of job

1. Regulation 1-46 provides: "All applicants must be a non-user [sic] of tobacco or tobacco products for at least one year immediately preceding application, as evidence [sic] by the sworn affidavit of the application [sic]." Answer Brief of Respondent at 4, *City of N. Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995) (No. 92-2038).

2. *Id.*

3. 653 So. 2d 1025 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

4. *Id.* at 1026.

5. *Id.*

6. *Id.*

7. *Id.* at 1027.

8. *Kurtz*, 653 So. 2d at 1027.

9. *Kurtz v. City of N. Miami*, 625 So. 2d 899, 901 (Fla. 3d Dist. Ct. App. 1993) (holding that Regulation 1-46 violated Kurtz's right of privacy), *rev'd*, 653 So. 2d 1025 (Fla. 1995), *cert. denied*, 1995 WL 588370 (1996).

10. *Id.*

sought.¹¹ She further claims that this regulation is intrusive because it permits City employers to enter her private life to determine if she is a suitable employee based upon their own subjective standards.¹²

In an examination of the court's opinion, this comment first discusses the specific facts of this case and the trial history which eventually brought the case to the Supreme Court of Florida. Second, it discusses an individual's right to privacy, which grants freedom from governmental intrusions arising from both the federal and state constitutions. Third, the comment reviews the stringent test that must be proven by the state to allow an intrusion into a person's privacy. This section examines how the elements of the test were applied by the court. Fourth, this comment takes a brief look at how two other states deal with the privacy issue and why Florida ought to follow their lead in practice.

II. FACTS AND PROCEDURAL POSTURE

A. *The Facts of City of North Miami v. Kurtz*

In 1989, the City was accepting applications for a clerk-typist position.¹³ Arlene Kurtz desired a clerical job with the City, so she submitted an application.¹⁴ In December, 1989, she passed the examination for all prospective applicants¹⁵ and was deemed a qualified applicant.¹⁶ Three months later, the City passed Regulation 1-46,¹⁷ which requires each applicant to sign an affidavit verifying that she has not smoked for at least one year prior to being hired by the City.¹⁸

Two months after this regulation was passed, the City notified Kurtz of an opening for a clerk-typist.¹⁹ However, she was told at her interview that the City no longer considered hiring applicants who had used tobacco or tobacco products within the past year.²⁰ Kurtz informed the interviewer

11. Answer Brief of Respondent at 20.

12. *Id.* at 22.

13. *Kurtz*, 625 So. 2d at 900.

14. *Id.*

15. *Id.*

16. Answer Brief of Respondent at 5. The fact that Kurtz was qualified for the position of clerk-typist was not disputed by the City. *Id.*

17. *See supra* note 1 and accompanying text.

18. *See supra* note 1 and accompanying text.

19. *Kurtz*, 625 So. 2d at 900.

20. The reason that the City would not hire applicants who have used tobacco or tobacco products within the past year was that the regulation passed just two months earlier

that “she was a smoker and could not truthfully sign an affidavit to comply with the regulation.”²¹ The interviewer proceeded to tell Kurtz that she, as well as all other applicants, would not be considered for a city job unless she remained “smoke free” for one year.²²

B. *Procedural Posture*

Kurtz sought a judgment declaring the regulation unconstitutional and injunctive relief enjoining the City’s enforcement of the regulation.²³ After cross-motions for summary judgment, the trial court found for the City and held that the regulation did not violate the United States or the *Florida Constitution*.²⁴

The Third District Court of Appeal reversed the trial court’s judgment and determined that an individual’s privacy rights are invaded when the City requires a person to refrain from smoking for one year as a prerequisite to being considered for employment.²⁵ The court found that the City’s claimed interests were insufficient to outweigh Kurtz’s right to privacy.²⁶ The court stated, “Regulation 1-46 violates article I, section 23, of the Florida Constitution as the regulation constitutes an impermissible intrusion into Kurtz’ private conduct and has no relevance to the performance of the duties involved with a clerk-typist.”²⁷

After the district court issued its decision, it certified the following question to the Supreme Court of Florida as one of great public importance:

DOES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PROHIBIT A MUNICIPALITY FROM REQUIRING JOB APPLICANTS TO REFRAIN FROM USING TOBACCO OR TOBACCO PRODUCTS FOR ONE YEAR BEFORE APPLYING FOR, AND AS A CONDITION FOR BEING CONSIDERED FOR EMPLOYMENT, EVEN WHERE THE USE OF TOBACCO IS NOT RELATED TO JOB FUNCTION IN THE POSITION SOUGHT BY THE APPLICANT?²⁸

prohibited such hiring.

21. *Kurtz*, 625 So. 2d at 900.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 902-03.

26. *Kurtz*, 625 So. 2d at 901.

27. *Id.*

28. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1026 (Fla. 1995), *cert. denied.*, 1995 WL 588370 (U.S. 1996).

The court answered the preceding question in the negative and found that Kurtz was not afforded protection by the United States Constitution nor by Florida's explicit constitutional privacy provision.²⁹

III. FUNDAMENTAL RIGHT OF PRIVACY

A. *Right of Privacy Implicit in the United States Constitution*

There is no explicit right to privacy in the United States Constitution.³⁰ Rather, "the First Amendment has a penumbra where privacy is protected from governmental intrusion."³¹ Since the right to privacy is not explicit, the Supreme Court struggled with the idea of how far privacy should be extended, as illustrated through a line of cases dealing with the issue.

The first case to recognize this fundamental right to privacy was *Griswold v. Connecticut*.³² In *Griswold*, the Supreme Court established a right of privacy for married couples to be free from governmental intrusion in deciding whether to use contraceptives.³³ The Court cleverly framed the issue as follows: "[W]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"³⁴ The obvious answer of "no" allowed the Court to establish a right of privacy in the marriage relationship and demonstrate the absurdity of an absence of such a right.³⁵

The Court expanded the right of privacy in *Eisenstadt v. Baird*.³⁶ It stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁷ This case is significant because it

29. *Id.*

30. *See* *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

31. *Id.* In *Griswold*, the Court held a Connecticut statute that forbade the use of contraceptives violates the right of marital privacy. *Id.* at 485-86. *Griswold* was the first case to recognize a fundamental right of privacy; however, this particular case limited that right to marital relationships. *Id.* at 486.

32. 381 U.S. 479 (1965).

33. *Id.* at 486.

34. *Id.* at 485.

35. *Id.* at 486.

36. 405 U.S. 438 (1972) (overturning conviction for distributing contraceptives to unmarried persons and allowing individual right to privacy).

37. *Id.* at 453 (alteration in original).

extended the right of privacy to individuals and no longer limited it to married couples.

Shortly after the *Eisenstadt* decision, the Court further broadened the right of privacy in *Roe v. Wade*.³⁸ In *Roe*, the Court first reaffirmed the implicit right of privacy in the United States Constitution.³⁹ The Court then found that the right of privacy includes a woman's right, although not absolute, to determine whether or not she will terminate her pregnancy.⁴⁰

Finally and most importantly, in 1969, the Court decided *Stanley v. Georgia*.⁴¹ In *Stanley*, a man was arrested for possessing obscene materials in his own home.⁴² The Court found that a statute which punished mere private possession of obscene material was unconstitutional.⁴³ Although *Stanley* deals with obscenity, the case stands for the proposition that a man's home is his castle. To illustrate, the court stated that "a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."⁴⁴ A person's right to privacy—to be let alone from governmental intrusion—is "the most comprehensive of rights and the right most valued by civilized man."⁴⁵ While not explicit in the United States Constitution, other cases decided by the Court following *Stanley* also recognized the basic right to be free from governmental intrusion in the privacy of one's own home.⁴⁶

While the right to be free from governmental intrusion in one's home is merely implicit in the United States Constitution, several states have attempted to provide that right greater strength by adding explicit privacy provisions in their own state constitutions.⁴⁷ Florida is one of the states providing such a right.

38. 410 U.S. 113, 153 (1973) (including woman's qualified right to terminate her pregnancy in realm of right to privacy).

39. *Id.* at 152.

40. *Id.* at 153.

41. 394 U.S. 557, 559 (1969) (holding statute criminalizing possession of obscene material in privacy of one's home is unconstitutional).

42. *Id.* at 558. The Georgia statute under which he was charged was "knowingly hav[ing] possession of . . . obscene matter." *Id.*

43. *Id.* at 559.

44. *Id.* at 565.

45. *Stanley*, 394 U.S. at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

46. See *United States v. Orito*, 413 U.S. 139, 142 (1973) (recognizing that zone of privacy protected by *Stanley* does not extend beyond the home).

47. See, e.g., John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775, 799 (1994).

B. Florida's Explicit "Right to Privacy" Provision

Florida has an explicit privacy provision in its constitution.⁴⁸ Florida's privacy provision, Article I, section 23,⁴⁹ however, has not been given the power that was intended when it was adopted in 1980.⁵⁰ It has been observed that "all too often privacy plays second banana to competing interests,"⁵¹ even though the purpose of this provision was to provide more protection. The drafters' intent is illustrated by their rejection of "the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible."⁵² By deleting those words, the drafters avoided the application of the weaker levels of judicial scrutiny and provided for a strict scrutiny analysis when determining violations of an individual's privacy rights.⁵³ When drafting the amendment, the Florida legislators' intended to maintain the ideal that "an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable

48. FLA. CONST. art. I, § 23. Florida's explicit privacy provision, article I, section 23, provides the following: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id.* For a listing of other states that also have explicit privacy provisions, see Sanchez, *supra* note 47, at 799.

49. FLA. CONST. art. I, § 23. See *supra* note 48 and accompanying text.

50. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (holding that subpoena of bank records without notice to account holders did not violate their privacy interests); *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462, 463 (Fla. 1st Dist. Ct. App. 1987) (finding that section 23 does not foreclose press from obtaining and releasing court records concerning state senator's divorce); *Goldberg v. Johnson*, 485 So. 2d 1386, 1388 (Fla. 4th Dist. Ct. App. 1986) (holding that terms of settlement agreement and guardianship documents detailing estate of Shepard Broad Law Center benefactor, Leo Goodwin, Sr., were available to public, overriding his right of privacy).

51. Sanchez, *supra* note 47, at 800.

52. *Winfield*, 477 So. 2d at 548. See also *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlick, C.J., concurring) (holding that even though privacy interests were indicated when State gathered telephone numbers through use of pen register, State proved compelling interests and accomplished its goal through least intrusive means available); *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (holding that woman's constitutional right to terminate her pregnancy extends to minors).

53. *In re T.W.*, 551 So. 2d at 1191.

governmental interference.”⁵⁴ The State of Florida, therefore, must satisfy a hefty burden in order to override an individual’s right of privacy.

IV. TEST FOR STATE INTRUSION INTO PRIVACY

A. *What Triggers a Violation of Privacy? A Threshold Question*

The proper standard of review for a claim of an unconstitutional intrusion into one’s zone of privacy under the *Florida Constitution* was first enunciated in *Winfield v. Division of Pari-Mutuel Wagering*.⁵⁵ That standard is now a well-established test used in each privacy claim arising in Florida.⁵⁶ First, since the right of privacy is fundamental, the state must have a compelling interest.⁵⁷ This shifts the burden of proof to the government to justify its intrusion upon a person’s privacy interest.⁵⁸ This burden is only met by first “demonstrating that the challenged regulation serves a compelling state interest and [second, that it] accomplishes its goal through the least intrusive means.”⁵⁹ For a justified invasion, no governmental alternatives must have been available.

B. *The Intrusion*

The *Florida Constitution*’s privacy provision provides that citizens will be free from governmental intrusion.⁶⁰ By this provision, Floridians supposedly have their privacy interests protected. The people could reasonably believe that the government cannot intrude upon their personal lives.

In *City of North Miami v. Kurtz*, however, Regulation 1-46 prevents applicants from smoking on their own time, even in their own homes, for a minimum of one year before they may be considered for a governmental

54. *Stall v. State*, 570 So. 2d 257, 267 (Fla. 1990) (Kogan, J., dissenting) (holding that Florida constitutional privacy amendment does not apply to vendors of obscene material) (quoting *Public Health Trust v. Wons*, 541 So. 2d 96, 98 (Fla. 1989)), *cert. denied*, 501 U.S. 1250 (1991)).

55. 477 So. 2d 544 (Fla. 1985).

56. *See Stall*, 570 So. 2d at 260; *Shaktman*, 553 So. 2d at 157; *In re T.W.*, 551 So. 2d at 1191; *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 76 (Fla. 1983) (holding that Florida Bar requirement that applicants must disclose medical treatment records does not violate their right of privacy).

57. *Winfield*, 477 So. 2d at 547.

58. *Id.*

59. *Id.*

60. FLA. CONST. art. I, § 23.

job.⁶¹ This regulation allows governmental employers to take a peek inside the home and life of Kurtz, as well as other possible candidates for governmental employment. Since the regulation permits governmental intrusion, whereas Article I, section 23 of the *Florida Constitution* forbids such intrusion, they directly conflict. However, the Supreme Court of Florida held that this regulation is perfectly valid and does not violate the privacy provision.⁶² The court's message to Floridians is that it is permissible for the City to demand to know if its applicants participated in legal, off-duty conduct on their own time.

On the other hand, some believe, and courts have held in prior cases, that the government should be limited to only that information it genuinely needs to know.⁶³ To illustrate, in *Grusendorf v. Oklahoma City*,⁶⁴ the court allowed a regulation prohibiting smoking before and during the particular employment.⁶⁵ There is a significant difference between the facts in *Kurtz* and the facts in *Grusendorf*. Kurtz merely applied for a job as a clerk-typist. Contrarily, in *Grusendorf*, the plaintiff was a firefighter.⁶⁶ For a job with duties of a firefighter, where people's lives depend upon a person's ability to perform, it is necessary for the employee to be in top health. Therefore, a requirement that the individual not engage in unhealthy behavior like smoking is a justified intrusion.⁶⁷ In contrast, Kurtz's applied-for position of clerk-typist lacks those stringent health and conditioning requirements, and people's lives do not depend on it. Thus, the regulation appears to be an unjustified intrusion into Kurtz's private life.

If the government is permitted to intrude into an applicant's private life to determine if she smokes where the prohibition is not related to the job sought, one cannot help but wonder where the line will be drawn. There are no set limits or guidelines for what an employer may demand to know by claiming that it is in the City's interest. There is, however, an extraordinary

61. See *supra* note 1. Regulation 1-46 does not directly state, "no smoking in your home or on your own time." However, those are the obvious implications since it prohibits all smoking for one year at any location in order to be eligible for a city job.

62. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

63. Gerald B. Cope, Jr., *A Quick Look at Florida's New Right of Privacy*, FLA. B.J., Jan. 1981, at 12, 13.

64. 816 F.2d 539 (10th Cir. 1987) (holding that no-smoking off-the-job rule did not violate rights of employee).

65. *Id.* at 543.

66. *Id.*

67. *Id.*

amount of activities which are hazardous to one's health and may be the target of employer regulation.⁶⁸

For instance, because drinking beer could lead to alcoholism and liver problems, and eating eggs could lead to high cholesterol and heart disease, these activities could be banned by employers concerned about health insurance costs.⁶⁹ However, although these interests could legitimately relate to insurance claims, these types of bans by employers would probably fail because these activities are socially acceptable.⁷⁰ In many cases, people drink beer and eat eggs as a part of their daily regimen.⁷¹ In addition,

under the City's analysis, it could regulate when its employees or prospective employees go to bed at night, what they eat for breakfast, what kind of cars they drive, where they take their vacations and what hobbies they engage in, all in the interest of making sure that those employees meet some ideal of health and fitness and thus cost the City less money to insure.⁷²

Other prohibitions that employers might claim would help reduce insurance costs for the taxpayers are activities that pose great health risks but lack significant utility, such as consuming foods containing caffeine or alcohol, participating in activities such as skiing, scuba diving, and

68. Some of the many acts that are hazardous to our health that could be possible targets of employer regulation include the following activities:

Skiing, football, boxing, skydiving, and swimming are activities where a person puts safety at risk. . . . Medical experts agree there is no dietary reason for adding salt to foods. Yet many people do and subsequently increase their risk of hypertension and other circulatory diseases. Sunbathing often leads to skin cancer. A higher risk of coronary disease is associated with high cholesterol consumption. Automobile driving, mining, and bridge construction often result in injuries and fatalities.

Walter E. Williams, *Cigarettes and Property Rights*, in *CLEARING THE AIR* 39, 40 (Robert D. Tollison ed., 1988).

69. Elizabeth B. Thompson, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?*, 43 *VAND. L. REV.* 491, 520 (1990).

70. Compare possible interests claimed by the City due to harm from drinking beer and eating eggs with the harm from smoking. Smoking is looked down upon more and more in society. While few people give much concern to those who drink beer and eat eggs, there are employers who do not allow smoking on the job, and there are restaurants that either ban smoking or maintain a separate section for smokers. This results in a stigmatization of smokers, and it illustrates the discriminatory focus of Regulation 1-46.

71. Drinking beer and eating eggs are just as much a part of many people's daily lifestyles as smoking. However, the City chose to focus its prohibition only on smoking.

72. Answer Brief of Respondent at 21.

motorcycle riding, or engaging in sexual activity with numerous partners.⁷³ The idea of governmental control over its employees' off-duty lives⁷⁴ belittles the fact that an employer purchases only an employee's labor, not the employee (or in this case, a prospective employee).⁷⁵ Allowing this intrusion puts Florida's constitutional privacy provision to shame because that which is expressly prohibited is actually being permitted.

Practical problems may arise from enforcing this regulation and allowing the intrusion. One possible problem is verification of compliance with the regulation. Verification of an off-duty ban may result in a deeper intrusion into one's privacy.⁷⁶ For instance, one possible verification procedure that would result in more intrusion is a demand that an individual take a polygraph test to determine if she lied about not smoking.⁷⁷ Another intrusive way to verify compliance is by looking into the employee's medical records to determine if she has any symptoms associated with that type of prohibited conduct.⁷⁸ These two examples demonstrate the fact that verification is one problem which may result from allowing this intrusion.

Another possible problem resulting from this intrusion is concern over whether the government will be able to compel conduct of its employees and prospective employees in addition to banning it.⁷⁹ For instance, it is a frightening concept to imagine that the government could compel a person to exercise, to eat certain foods, or to go to bed at specific times, all in the name of reducing insurance costs and increasing productivity. While the idea may seem a bit of a stretch to some, at one time the idea of the Supreme Court of Florida granting the government permission to enter into a person's home to determine if she is engaging in lawful, off-duty conduct was also considered a stretch.

These potential problems illustrate that the *Kurtz* decision could easily lead to an increase in governmental power and a corresponding decrease in

73. Bernard J. Dushman & Lewis L. Maltby, *Whose Life is It Anyway—Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 646 (1994) [hereinafter Dushman & Maltby].

74. The idea of governmental control over its employees' lives includes sole intrusion into a person's private life to determine if she is smoking, as well as any of the other possible prohibitions mentioned.

75. Dushman & Maltby, *supra* note 73, at 658.

76. See Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 961-62 (1987) (providing analysis of problems with verifying compliance with such regulation).

77. *Id.* at 962.

78. *Id.*

79. Thompson, *supra* note 69, at 520-21.

citizens' rights.⁸⁰ This intrusion is simply too much to bear, especially when the prohibited conduct fails to relate to the job sought. Citizens of North Miami who desire city jobs lost their right to participate in a specific form of lawful, off-duty conduct. The Supreme Court of Florida held this intrusion was justified because the state had compelling interests.

C. *The City's Lack of a Compelling State Interest*

1. Introduction

In *City of North Miami v. Kurtz*,⁸¹ the Supreme Court of Florida found the City's stated interests compelling, thereby justifying its intrusive behavior.⁸² A state's interest only becomes compelling when "definite harm to specific individuals that either has occurred," or will occur, is recognizable.⁸³ The City claims two compelling interests in this case: a reduction of costs and an increase in productivity.⁸⁴ The City has the burden of justifying its intrusion into the private lives of its applicants.⁸⁵

2. Reduction of Costs

The City claims it has a "compelling interest in saving money for taxpayers by employing only healthy applicants."⁸⁶ In *Kurtz*, the City cites to evidence which states that "a high percentage of smokers who have adhered to the one year cessation requirement are unlikely to resume smoking."⁸⁷ Thus, the City concludes that the interest is compelling because employees will be healthier, thereby costing the taxpayers less money.⁸⁸

80. This gives employers more economic power to control more than what is rightfully theirs to control. Dushman & Maltby, *supra* note 73, at 658.

81. 653 So. 2d 1025 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

82. *Id.* at 1028.

83. Stall v. State, 570 So. 2d 257, 270 (Fla. 1990), *cert. denied sub nom.* Long v. Florida, 501 U.S. 1250 (1991).

84. *Kurtz*, 653 So. 2d at 1026.

85. *Id.* at 1027. This intrusion has been thrust upon Kurtz even though it does not relate to the job, and she (and all other applicants who are being intruded upon) has no guarantee of ever getting the job, even after she is forced to quit smoking for a year. *Id.*

86. *Kurtz v. City of N. Miami*, 625 So. 2d 899, 900 (Fla. 3d Dist. Ct. App. 1993), *rev'd*, 653 So. 2d 1025 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

87. *Kurtz*, 653 So. 2d at 1027.

88. *Id.*

Usually, one would probably consider reductions of costs to the taxpayers from health insurance a compelling interest. In fact, the Supreme Court of Florida did just that in this case when it allowed a privacy intrusion due to the City's claimed compelling interest in saving the taxpayers' money.⁸⁹ However, under the circumstances in this case, this interest cannot be deemed compelling because it does not relate to Kurtz's ability to perform her job. The interests will not be deemed compelling "[u]nless an employee's off-work activity has a direct bearing on his or her ability to perform job-related tasks or significantly interferes with business operation."⁹⁰

The City claims that a compelling interest will be served by monitoring the health of its prospective employees.⁹¹ However, this argument is flawed because the City is not concerned with the actual health of its employees. Since the compelling interest here is saving the taxpayers' money by hiring healthy employees, the subject of Kurtz's health must be examined.⁹² The City admits, however, that it did not even bother to inquire into Kurtz's health.⁹³ In fact, once Kurtz stated that she could not truthfully sign the affidavit,⁹⁴ the City immediately turned her down without even questioning her health.⁹⁵ In truth, the City does not even begin to examine any prospective applicants (even if they are the most qualified) if they have used tobacco in the past year.⁹⁶ The process of waiting until after hiring to determine the health of employees, thereby supposedly satisfying this interest, divests the City of qualified applicants and forbids all applicants who smoke from demonstrating just exactly how healthy they are.

Even though the City claims to be concerned with reducing health insurance costs by refusing to hire smokers, current employees and prospective employees who have not smoked for a year are permitted to "light up" on the job.⁹⁷ If the regulation's goal is to reduce costs by hiring only non-smokers because they are healthier, the City's compelling interest is defeated by the fact that once employees begin to work, they may smoke

89. *Id.* at 1028.

90. Rothstein, *supra* note 76, at 963.

91. *Kurtz*, 653 So. 2d at 1027.

92. Her health should be examined to determine if she would be a healthy employee. It was already determined that she was qualified. See *supra* note 16 and accompanying text.

93. Answer Brief of Respondent at 5.

94. *Id.* at 3.

95. *Id.*

96. *Id.* at 5.

97. *Kurtz*, 653 So. 2d at 1027.

on the job as often as they please. Ironically, the place where workers may smoke, in the workplace, is precisely where the regulation should be enforced. The workplace is the one arena where employers may control conduct, because that is where the regulation will have an effect on other employees. The workplace is the one place with which employers must be concerned. The current regulation deprives smokers of the opportunity to demonstrate whether they are inflicted with any preexisting conditions that may cost the City more money for health insurance.⁹⁸ Therefore, the City's interest in saving money for taxpayers cannot be deemed compelling.

3. Increase Productivity

The City's second claimed compelling interest is that the regulation will increase productivity.⁹⁹ Before this case reached the Supreme Court of Florida, the Third District Court of Appeal held such an interest insufficient to outweigh Kurtz's privacy interests.¹⁰⁰ The court reasoned that "the regulation constitutes an impermissible intrusion into Kurtz's private conduct and has no relevance to the performance of the duties involved with a clerk-typist."¹⁰¹ In other words, her lawful, off-duty conduct has no relevance to her performance on the job, nor her productivity once she begins to work.

When considering this particular interest, it is important to examine how the City claims productivity will be increased. The City suggests that since they employ healthier employees, productivity will increase due to lack of illness and absenteeism.¹⁰² On its face, this appears to be valid reasoning. However, when this regulation as applied is closely examined, it clearly does not support the City's stated interest because it permits on-the-job smoking.¹⁰³ There is no rational correlation between a regulation designed to increase productivity by refusing to hire smokers, and then subsequently allowing them to smoke on the job. These two concepts clash and surely do not support the City's interest.

Another important aspect of this second interest is the type of employees the City will hire so that it may "increase productivity." As already established, the City's regulation forbids hiring smokers. However, "[t]he effect of the regulation is . . . that a less-qualified-non-smoker may be hired by the

98. Answer Brief of Respondent at 5.

99. *Kurtz*, 653 So. 2d at 1027.

100. *Kurtz v. City of N. Miami*, 625 So. 2d 899, 903 (Fla. 3d Dist. Ct. App. 1993), *rev'd*, 653 So. 2d 1025 (Fla. 1995), *cert. denied*, 1995 WL 588370 (1996).

101. *Id.* at 901.

102. Answer Brief for Respondent at 11.

103. *Kurtz*, 653 So. 2d at 1027.

City, while a more-qualified smoker would not even be allowed to apply.”¹⁰⁴ It is extremely unlikely that the City can increase productivity when there is a great possibility that it will hire less-qualified workers. There is no clear correlation between increasing productivity and refusing to hire qualified smokers. Furthermore, excluding all qualified smokers forces the City to choose from a limited number of applicants—only those who do not smoke.¹⁰⁵ Once the non-smokers are hired, however, they may at any time decide to become a smoker and smoke on the job. This anomaly illustrates the City’s claimed interest of increasing productivity through this regulation is not supported by the evidence, and is therefore not compelling.

D. Other Less Intrusive Means Available

1. Introduction

The only time a state interest can override personal privacy interests is when it is impossible to fulfill it by any less intrusive means.¹⁰⁶ If the state actor does not use the least intrusive means, the privacy interests are not overcome and will, therefore, prevail over the state interest.¹⁰⁷

In *Kurtz*, the Supreme Court of Florida found that the City used the least intrusive means.¹⁰⁸ It held that the regulation was the least intrusive for three reasons. First, it does not prohibit smoking on the job. Second, it does not affect current health care benefits of employees. Third, it gradually reduces the number of employee smokers through attrition.¹⁰⁹ Each of these reasons, however, fail as the least intrusive means available.

104. Answer Brief of Respondent at 6.

105. The City does not refute that Kurtz is qualified. *Id.* at 5.

106. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985); see also *Byron, Harless, Schaffer, Reid, & Assoc., Inc. v. State*, 360 So. 2d 83, 96 (Fla. 1st Dist. Ct. App. 1978), *quashed sub. nom* by *Shevin v. Byron*, 379 So. 2d 633 (Fla. 1980).

107. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 77 (Fla. 1983) (Adkins, J., dissenting).

108. *Kurtz*, 653 So. 2d at 1029.

109. *Id.*

2. Allowing Smoking on the Job

First, the court claims that one reason Regulation 1-46 is the least intrusive to privacy interests is because it allows smoking on the job.¹¹⁰ In fact, "the regulation only applies to job applicants and does not affect current employees. Once an applicant has been hired, the applicant is free to start or resume smoking at any time."¹¹¹ This, however, lacks the status as the least intrusive means.

In contrast, the regulation actually seems very intrusive because instead of regulating conduct at work, it only intrudes into the applicants' conduct at home and in private. While in some cases this type of regulation may be reasonable, and even least intrusive, in Kurtz's situation, it fails to be both reasonable and least intrusive.

For instance, when the off-duty regulation in *Grusendorf v. Oklahoma*¹¹² is compared with the regulation in *Kurtz*, the meaning of the term "least intrusive" manifests. In *Grusendorf*, a regulation was held to be the least intrusive because the regulated job was a firefighter, an occupation which has mandatory health requirements upon which citizens' lives depend.¹¹³ However, in *Kurtz*, the job was merely secretarial and had no mandatory health requirements.¹¹⁴ Since the job for which Kurtz applied does not have an obvious mandatory health requirement upon which lives depend, the respective regulation does not appear to be the least intrusive. In addition, it is understandable to the reasonable person that

[b]etween the hours of nine and five, the average person's life is not her own. Her employer can tell her what to do, and when and how to do it. . . . [However, f]ew would want to live in a society in which they were subjected to employer control twenty-four hours a day.¹¹⁵

It is logical, and even practical, for one to assume that the employer may prohibit on-the-job smoking as part of the rules. That way the City could choose from the most qualified applicants and then enforce the no-smoking policy during working hours. The City, however, chose to travel a different route in this case, and in doing so, gave itself permission to control any prospective employee's life twenty-four hours a day. Certainly, allowing

110. *Id.*

111. *Id.* at 1026-27.

112. 816 F.2d 539 (10th Cir. 1987).

113. *Id.* at 542.

114. *Kurtz*, 653 So. 2d at 1026.

115. Dushman & Maltby, *supra* note 73, at 646.

smoking while on-the-job and prohibiting it while off-the-job is an under-inclusive policy that does not employ the least intrusive means.

3. Health Care Benefits

The second reason the court accepted for the regulation being the least intrusive means was that it does not affect current health care benefits of employees.¹¹⁶ Even though the City claims to be concerned with health care benefits, Regulation 1-46 limits itself to the prohibition of smoking, which is just one aspect of life that may cause a person harm. The City fails to address why hiring bans on people with other health conditions that will affect the health care costs¹¹⁷ is any different than smoking, or more importantly, why they too are not prohibited. Hiring others that may either have a serious health condition, or may participate in dangerous activities¹¹⁸ which could result in high costs to the taxpayers, is not prohibited by this regulation. The City claims to be concerned about health care benefits of employees, yet it only focuses on a single possible cause of harm while failing to address numerous other risk factors. This appears to be discrimination directed at smokers, and it certainly does not appear to be the least intrusive means available.

Also, this reasoning fails as the least intrusive means when dealing with health care benefits because other alternatives are available for health care which the City did not consider. For instance, the employer could allow insurance options.¹¹⁹ The City could give all applicants, smokers and non-smokers alike, the option of waiving insurance coverage.¹²⁰ In the present case, Kurtz already had her own health insurance; therefore, she would not have been a burden on the taxpayers because they would not be providing her with health care.¹²¹

Next, the City could implement a premium increase for insurance of employees who smoke.¹²² This type of alternative would also eliminate any excess cost to the taxpayers. Any insurance cost increase would be paid for by the smoker herself, which results in a less burdensome alternative.

116. *Kurtz*, 653 So. 2d at 1029.

117. Other conditions that may affect health care costs include, but are not limited to: obesity, diabetes, hypertension, and cancer. See Answer Brief of Respondent at 5.

118. These dangerous activities include, but are not limited to: unsafe sex, alligator wrestling, skydiving, and excessive television watching. *Id.* at 6.

119. *Id.* at 5.

120. *Id.*

121. *Id.*

122. Answer Brief of Respondent at 5.

Another alternative, one which the City already initiated, is a smoking cessation program.¹²³ The City's own expert witness testified that these programs, "[if] properly implemented, can have up to a 40 percent effectiveness rate."¹²⁴ However, the City failed to discover if this program was a success before implementing Regulation 1-46.¹²⁵ Had the City given the program some time to demonstrate its efficiency, or even attempted to establish if it was at all successful, it may not have had to resort to this regulation. The City had no idea whether this program was cost-effective nor whether the program could save money.¹²⁶ Clearly, this would have been another less intrusive alternative available.

Finally, the City's own evidence demonstrates that "most of the costs associated with employee smoking (lost productivity, secondhand smoke, ventilation and maintenance costs for segregation of smokers) can only be eliminated by a prohibition on on-the-job smoking."¹²⁷ The simplest and least intrusive means to deal with this issue would have been to ban on-the-job smoking. A ban of on-the-job smoking would help reduce smoking-associated costs and provide equal opportunities between the smokers and the non-smokers alike. In contrast, the effect of this regulation is the prevention of smokers from having a chance of obtaining any city job.

4. Reduction of Smokers Through Attrition

The final reasoning the court found to support its finding that the regulation is the least intrusive means is that it reduces the number of smokers through attrition.¹²⁸ The number of smokers in society today is staggering. According to the National Center for Health Statistics, thirty-three percent of men and twenty-eight percent of women in the United States are smokers.¹²⁹ The City hopes for a gradual reduction in the number of smokers by imposing a flat ban on hiring them for governmental jobs.

123. *Id.* at 9.

124. *Id.* at 10.

125. *Id.*

126. *Id.*

127. Answer Brief of Respondent at 10.

128. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1029 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

129. BUREAU OF NAT'L AFF., INC., WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 8 (1986).

There is, however, a serious flaw with the reasoning that this regulation will reduce the number of smokers through attrition. This defect is illustrated by the following situation. Suppose an applicant, Avis, desperately needs the job so she struggles and succeeds in quitting smoking for one year. The City then hires Avis. Since the City permits on-the-job smoking, and because smoking is known to be a highly addictive behavior, the chances are very likely that the same person who quit for one year will resume the habit once in the presence of other smokers during the average work day. Thus, Avis starts smoking again, thereby not reducing the number of smokers on the work-force, but rather, increasing it. This probable scenario fails to support the City's claim of least intrusive means.

These alternatives prove that the City did not use the least intrusive means available when it implemented this regulation. In contrast, it invaded Kurtz's right of privacy under the *Florida Constitution* by allowing the government to prohibit legal, off-duty conduct to determine if an applicant will be considered for a city job.¹³⁰ Florida should begin to look at the purpose of its own privacy amendment¹³¹ and also examine how other states deal with similar amendments for suggestions on how to handle these types of regulations.

V. SUGGESTIONS FROM OTHER STATES FOR DEALING WITH PRIVACY

A. Introduction

As illustrated by *Kurtz*, Florida courts are reluctant to take Article I, section 23 at face value.¹³² For an idea as to how privacy issues should be handled, two other states' privacy amendments shall be reviewed. This review will demonstrate how courts in those respective states deal with privacy issues arising from state regulations.

B. Alaska's Explicit Privacy Provision

Alaska, like Florida, has an explicit privacy provision in its constitution.¹³³ The *Alaska Constitution*, Article I, section 22, provides that "[t]he

130. The applicant only receives consideration for the job. Remember, there is no guarantee that she will even be hired. This illustrates the severity of the intrusion into an applicant's privacy.

131. FLA. CONST. art. I, § 23.

132. See Sanchez, *supra* note 47.

133. See Sanchez, *supra* note 47, at 799.

right of the people to privacy is recognized and shall not be infringed.”¹³⁴ This amendment is very similar to Florida’s privacy amendment because they both recognize the same basic ideal.¹³⁵ However, privacy amendments, solely on their face, do not demonstrate what effect they have on society. It is their interpretation and power given by the courts that allow these amendments to have an effect on society at large.

A significant case allowing an examination of what the *Alaska constitution’s* privacy amendment means to Alaskans is *Ravin v. State*.¹³⁶ In this case, a man was initially convicted for possessing marijuana in his own home.¹³⁷ In *Ravin*, the Supreme Court of Alaska held that no adequate justification exists for the State’s intrusion into a citizen’s right of privacy by its prohibition of possession of marijuana by an adult for personal consumption in home; thus, possession of marijuana by adults at home for personal use is constitutionally protected.¹³⁸ The court relied on Alaska’s privacy amendment and previous United States Supreme Court cases¹³⁹ to determine that an individual has a right of privacy to do as he pleases in his own home.¹⁴⁰

This case is similar to *Kurtz* because they both involve the prohibition of smoking. However, the substance smoked in *Ravin* was illegal.¹⁴¹ Even though it was unlawful, the Supreme Court of Alaska still found that as long as it was done in the privacy of one’s own home, the State lacked the ability to intrude.¹⁴²

The State of Florida should expand its constitutional horizons and look upon Alaska as an ideal example to follow. Alaska drew the line of state intrusion into the home at the threshold of the front door. In *Kurtz*, however, the Supreme Court of Florida has allowed government employers to open that door and barge in, thereby giving them permission to forbid all applicants for a city job from lawfully smoking in their own homes.¹⁴³

134. ALASKA CONST. art. I, § 22.

135. The ideal recognized in both the Florida and Alaska constitutions is being free from governmental intrusion.

136. 537 P.2d 494 (Alaska 1975).

137. *Id.* at 496.

138. *Id.*

139. *Id.* at 498-99 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Stanley v. Georgia*, 394 U.S. 557 (1969)).

140. *Ravin*, 537 P.2d at 504.

141. The illegal substance smoked in *Ravin* was marijuana. *Id.* at 496.

142. *Id.* at 504.

143. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1029 (Fla. 1995), *cert. denied*, 1995 WL 588370 (U.S. 1996).

The Supreme Court of Florida should follow Alaska's precedence and enforce Florida's privacy amendment to protect lawful, off-duty conduct that takes place at home, outside of the working arena. Florida must not permit the government to intrude upon a person's private life, as did the *Kurtz* court.¹⁴⁴ Instead, Florida should follow the court's rationale in *Ravin* and protect lawful, off-duty conduct that is irrelevant to the performance of one's job and takes place in one's own home. To further exemplify Florida's lack of protection of privacy, Rhode Island's privacy provision will be considered.

C. Rhode Island's Explicit Privacy Provision

The State of Rhode Island also has an explicit privacy provision. This provision, however, is more direct in its protection.¹⁴⁵ It "prohibits employers from refusing to hire or otherwise discriminate against employees for the lawful off-duty use of tobacco products."¹⁴⁶ Thus, Regulation 1-46 would not have been upheld in Rhode Island. In addition, Louisiana, Oklahoma, and Virginia also bar employers from discriminating against employees based on lawful, off-duty behavior such as smoking.¹⁴⁷

Florida should follow these states and provide stronger protection for its citizens. For instance, Rhode Island's amendment¹⁴⁸ clearly provides protection to smokers from discrimination. In contrast, Florida's privacy amendment has not received much support or enforcement, as illustrated by the decision in *Kurtz*. Floridians need more privacy protection before the State may intrude into more serious and personal aspects of private lives. For instance, more protection is necessary before intrusions into lawful sexual behavior, a woman's plans for procreation to eliminate family leave, as well as what religions are practiced by applicants are permitted.¹⁴⁹ *Kurtz* may have opened the door for such intrusions. Thus, Florida ought to protect its citizens by following the lead of other states. It should implement a stricter privacy provision, or at least as a bare minimum, apply the

144. *Id.* at 1029.

145. See Deborah S. Crumbley & Gregory A. Hearing, *Where They Smoke, They May Get Fired: An Overview of Significant Workplace Smoking Issues*, FLA. B.J., Oct. 1994, at 108.

146. *Id.*

147. Lisa Frye, "You've Come a Long Way Smokers": *North Carolina Preserves the Employee's Right to Smoke off the Job in General Statutes Section 95-28.2*, 71 N.C. L. REV. 1963, 1978 n.102 (1993).

148. See Crumbley & Hearing, *supra* note 145 and accompanying text.

149. *Kurtz*, 653 So. 2d at 1029 (Kogan, J., dissenting).

strict scrutiny standard the way it was intended. This will give the *Florida Constitution's* privacy provision its maximum potential of protection of privacy for Floridians.

VI. CONCLUSION

Kurtz was denied an employment opportunity because of what she lawfully did in the privacy of her own home. Even though she smokes at home, she is willing to abide by any on-the-job smoking prohibition.¹⁵⁰ Nevertheless, the City only forbids off-duty smoking, leaving the right to smoke on-the-job intact. This regulation is extreme and should fail to satisfy the strict scrutiny test that would justify such an intrusion, as it is merely a pretext for the main "problem" that the City wants to address. The City's main flaw in designing this regulation is that it fails to address this real problem: the City does not want smokers on its payroll. Instead of limiting the conduct of every possible applicant, the City's regulation should have taken the form of an on-the-job smoking ban. This type of prohibition is more acceptable because it would not control what the citizens of Florida may do on their own time, in their own home, as well as any other time they are not on the clock.

This is an apparent case of the government attempting to control private lives of citizens. In *Kurtz*, the Supreme Court of Florida invites such intrusions. Such precedent by the court opens the door to greater intrusions than just allowing the City to implement this regulation. Florida's privacy provision must receive the protection that was originally intended before the right to privacy is just a memory of what could have been.

Deborah Lynn Stewart

150. Answer Brief of Respondent at 4.