

Nova Law Review

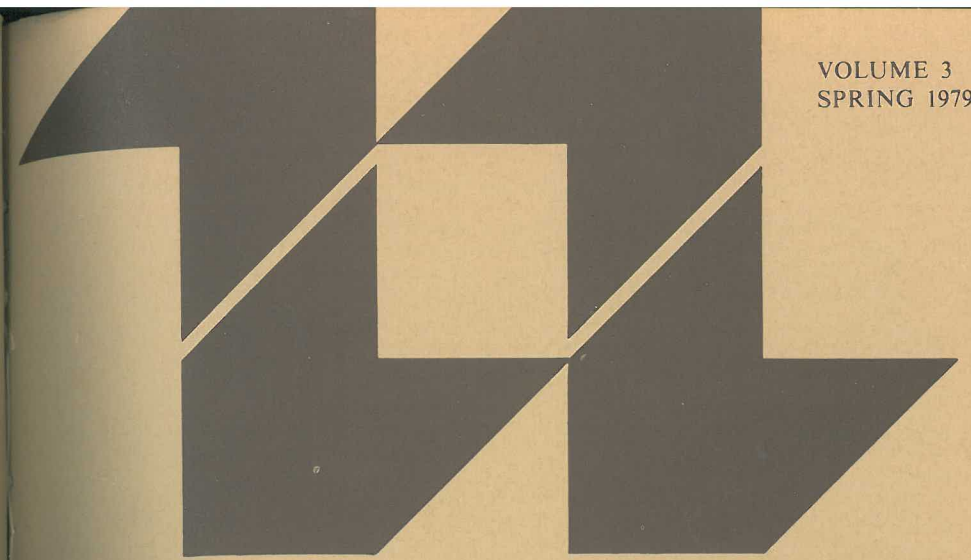
Volume 3, Issue 1

1979

Article 1

Nova Law Review Full Issue

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The Honorable Warren E. Burger

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Dilemma Continues
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Employee Drunk?

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Volume 3, Spring 1979
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How Long Can We Cope?*

THE HONORABLE WARREN E. BURGER

Chief Justice

The Supreme Court of the United States

It may seem premature to be thinking about the next significant bicentennial celebration in our national life, but our experience with the bicentennial of 1976 demonstrates the desirability for long advance planning. It is not too soon to turn our minds to the 200th anniversary of the document signed in Philadelphia almost exactly 191 years ago. We take considerable pride, and I think appropriately, in the fact that we have functioned as a nation under this one written Constitution for nearly two centuries. No other nation can match that.

The events of the past 40 years have brought home to us very forcefully that freedom is fragile. This is particularly true of the freedom of our open society where we not only permit, but at times almost seem to invite attacks, because of our commitment to flexibility and change and our dedication to the values protected by the First Amendment. Eric Hoffer, with his uncomplicated logic and simplicity of style, has expressed his deep concern that our system of government and our free society may be more fragile in many respects than other societies, and he has suggested that "the social body" is perhaps more vulnerable and fragile than the human body.¹

It has been an article of faith with us that the artificial and manipulated systems of authoritarian regimes, no matter how strong they seem for a time, do not possess the powers of restoration or recuperation possessed by our kind of government. It is within the memory of all of us that a great many people in the 1930's, and even later, accepted Hitler's boast that he was creating a "1,000 Year Reich." They remembered, too, that even before Hitler, as well as in more recent times, other people saw Soviet communism as "the wave of the future." It was Lincoln Steffens who said after a visit to Russia that he had "been over

* Remarks to the Seminar on Legal History, The National Archives, Washington, D.C., Thursday, September 21, 1978.

1. Letter from Eric Hoffer to Warren E. Burger dated March 21, 1969.

into the future and it works.”²

Surely the events of the last 40 or more years in world history underscore the importance of both the philosophy of freedom and the mechanisms and practices we have set up to insure a continuance of freedom.

We are surely committed to a significant celebration of the creation of our constitutional system under the Constitution, which in 200 years took us from three million struggling pioneers into a great world power, and individual initiative was the secret of this success. It is, therefore, not too early to begin thinking and planning to be sure that what we do will be an appropriate recognition of the importance of the event and to serve as a guide to correct whatever flaws we see and to plan for the years ahead.

I submit that an appropriate way to do this will be to reexamine each of the three major articles of our organic law and compare the functions as they have been performed in recent times with the functions contemplated in 1787 by the men at Philadelphia. The Constitution was, of course, intended to be a mechanism to allow for the evolution of governmental institutions and constitutional concepts. But we should examine the changes which have occurred over two centuries and ask ourselves whether they are faithful to the spirit and the letter of the Constitution, or whether, with some, we have gone off on the wrong track.

This undertaking is too serious, too broad in scope and too important to be accomplished within one year. I suggest for your consideration, and to those with similar interests, that we set aside, not one year or even two years, but three years for this enterprise. Although the sequence need not be rigid, I would suggest that in 1985 we devote ourselves to an examination of Article I; in 1986, we should address the powers delegated by Article II; in 1987, we should address Article III. Let me briefly suggest a few of the differences between the expectations of the framers and present-day practices, bearing in mind Marshall's statement that the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises in human affairs.”

2. LINCOLN STEFFENS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFENS* (New York: Harcourt, Brace & Co., 1931), p. 799.

Article I

Under Article I, all legislative powers were vested in the Congress of the United States, or as Jefferson said, "The great council of the nation." It does not require the skills of historians or political scientists to observe that Congress in 1978 is a very different institution from what was contemplated in 1787. But we must do more than study how the Congress of today is different; we should proceed to assess whether the Congress is functioning according to the spirit of the Founding Fathers, even as we recognize that changes were inevitable with changing times and new problems.

What are the kind of changes that ought to be looked at? Surely, the growth factor is one. The House of Representatives has grown from 45 to 435; the Senate from 26 to 100. In the original contemplation, membership in the Congress was not to be a full-time occupation. The framers anticipated part-time public service of the leading citizens of each state. They were to come to Philadelphia (and later to Washington) for only a few months out of the year and spend the remaining seven or eight months back home on a farm or at a law practice or lumber mill. Now, it is a full-time profession—and necessarily so—given what we ask of them.

Obviously members of the Congress cannot be expected to function today as they did in the time of Clay, Calhoun and Webster when there were no typewriters, no computers, and when both communication and travel were very different from the present day. But some of the changes which we now observe in the functioning of the Congress are so fundamental that they can profitably be reexamined in light of original expectations about the functioning of the legislative branch. For at least the first 100 years, each member of Congress could do all his own homework very largely as members of the British House of Commons still do. Each diligent member of Congress could readily read every bill proposed and understand what was being presented. Members of Congress are now torn between their mounting obligations to assist individual constituents in their dealings with the bureaucracy—to respond to mail—and the demands of the numerous subcommittees and committees upon which they serve. The mail is increased—perhaps—by new word processing equipment available to interest groups, with one set of word processing machines communicating with another machine. Added to all this is the constant need to mend political fences—which, of course, is democracy at work.

These cross-pressures, the immense increase in the volume of legis-

lative business and the need to match the size and specialized capabilities of the Executive Branch experts accounts in large measure for the enormous expansion of congressional staffs. Indeed, some say that Congress is now not 535 persons but rather 535 plus thousands of staff members in the House and Senate. *The Congressional Quarterly Weekly Report* tells us that currently the congressional staffs aggregate about 16,500.³ The increase in the size of staffs seems to have induced some proliferation of the number of lobbyists—or perhaps it was the other way around. The number of corporations maintaining offices in Washington has grown in 15 years from about 50 to 300. More than 16,000 trade associations and labor unions have offices in this capital.

But the central focus in reexamination of the operations under Article I are the new problems which have added to the burdens of the Congress. Observers say that floor debate no longer occupies the role it did in times past. Members of Congress tend to become specialists—concentrating on the work of their own committees—rather than the generalists of an earlier day. A large part of the work of congressional staffs is devoted to “servicing” constituents entirely apart from the legislative process itself. This may be an appropriate part of the democratic ethos, but it is surely some distance from what the authors of the Constitution intended. This is not said critically but rather as the reality of present day life. Indeed my reflections on this subject rest on what members of Congress have said—publicly and privately.

A well-informed and highly sophisticated journalist, Elizabeth Drew, recently described the dilemma of members of Congress attempting to cope with the flood of bills submitted and the lesser but still overwhelming flood of proposals emerging from committees.⁴ Many members of Congress have stated that it is almost impossible for any member to read all the proposed legislation. Some critics suggest that the increase in staffs has led directly to this increase in the number and length of proposed bills and committee reports. I do not know. But it is possible that a senator with a staff of 50 to 60 or 70 persons may have more burdens than benefits given the inexorable workings of Parkinson's Law. I do observe that rather than having their workload lessened, Congressmen seem to find themselves overwhelmed and many are retiring prematurely. We also see what perhaps is another result of current operations, and that is a legislative product where, all too often, the

3. *The Congressional Quarterly Weekly Report*, February 11, 1978.

4. Elizabeth Drew, “A Tendency to Legislate,” *The New Yorker*, June 26, 1978, pp. 80-86.

meaning and intent of Congress are blurred and the entire policy issue winds up in the courts for resolution.⁵ And often the courts have great difficulty discerning the true intent of Congress.

The purpose of these observations is neither to challenge nor to criticize the process. It is simply to point out the world of difference between functions contemplated in 1787 and the reality of 1978. A full year is needed to make a concentrated analysis by political scientists, historians, and other specialists—and members of Congress—to stimulate a serious national discussion. Such an analysis can be made in a more orderly and rational way if the discussion of one branch is conducted entirely independent of discussion of the other two branches. It is, therefore, desirable to set aside the year 1985 for comprehensive reexamination of the Article I functions.

Article II

The operations of the Executive Branch, like those of the Congress, have also undergone dramatic evolution and change. In 1789 there was only a handful of “executives” in the Executive Branch along with customs collectors and postmasters.⁶ The total budget of the federal government in dollars was smaller by far at the beginning than that of a modest sized city—Colorado Springs—for example.⁷ Communication between the first Executive and the Legislative Branch was casual and informal.⁸

Although the members of the first Supreme Court wisely resisted President Washington’s request for advisory opinions and declined to perform other functions which they deemed to be executive in nature, there is little doubt that Chief Justice Jay gave advice to Washington over the dinner table and even in writing. The President had no professional staff for himself. His close advisors also included the cabinet secretaries and the Vice President.

Although the Executive Branch grew greatly from 1789 to the First World War, our wartime president, Woodrow Wilson, pecked away at

5. See Carl McGowan, *Congress and the Courts*, 62 AMERICAN BAR ASSOCIATION JOURNAL at 1588-90 (Dec. 1970); and see *TVA v. Hill*, 98 S. Ct. 2279 (1978); *SEC v. Sloan*, 98 S. Ct. 1702 (1978).

6. See LEONARD WHITE, *THE FEDERALISTS* (Toronto: Collier, MacMillan, 1948).

7. The expenditures of the federal government were 5.1 million dollars in 1792. The expenditures of Colorado Springs in 1977 were 53.7 million dollars.

8. JAMES S. YOUNG, *THE WASHINGTON COMMUNITY* (New York: Columbia University Press, 1966).

his Hammond typewriter, turning out speeches and messages to Congress—and an outline of the League of Nations.

President Hoover had three or four staff aides, then called “secretaries,” who assisted him with his problems, including one former Congressman who presumably handled legislative relations. Franklin Roosevelt, as a candidate, attacked Hoover for his excessively large staff. Yet, as we know, the great expansion of the White House staff began under President Franklin Roosevelt as the whole Executive Branch burgeoned to meet the emergencies created by the world-wide depression. Thus one matter to be reflected upon in 1986 is the implications of the size of the Executive Branch. Another question deserving analysis is what we now understand from the provision of Article II stating that the executive power shall be vested in the President. Today executive power is actually in the hands of a few thousand of nearly three million civilian employees of the Executive Branch. There are 150,000 employees in the Department of Health, Education and Welfare alone—more than the standing army of the country in early parts of this century.

There are other changes. For nearly a half century the Executive Branch initiated much of the significant legislation. It is interesting to note that the Civil Service Commission is holding a workshop this December—and I use the Commission’s language—to “help train agency personnel who will be assuming assignments in the formulation of legislation.” This is entirely appropriate but it perhaps in part explains why Congress needed specialist staffs to cope with the Executive. The growth in the rule-making activity of the federal agencies has given rise to concern and indeed to challenges by recent presidents who thought their policies were being frustrated.

One example of changes brought on in the electronic age is the relationship of President with the media. Perhaps we should ask whether any President should be expected to have at his fingertips, and on the top of his head, a comprehensive and totally accurate response to every question submitted from an audience consisting of several hundred politically sophisticated media reporters? At times we read a superficial comparison to the British system where the Prime Minister and his cabinet ministers appear in the Commons for the question period. But the comparison is flawed because in Britain there is a fixed agenda for the question period. The Prime Minister or any member of his cabinet need be well-informed only on the specific and limited subjects covered by that agreed agenda.

Is it possible that the media, the Presidency, and the nation would

be better served if presidential press conferences were—at least—confined to agreed subjects? For example, the problems of the Middle East, or inflation or energy—rather than having every press conference open to the entire range of problems confronting the country. The evening news and the morning papers would be able to focus with greater clarity and in greater depth on particular policy issues and the media might thus be better able to inform the public in the long run.

These are just a sample of some of the issues and problems which might be discussed during the year 1986 by political scientists, historians, journalists, and those who have actual first-hand experience in government. Others having broader experience in government will see many areas for inquiry.

Article III

Questions about the present functioning of the judiciary compared with original expectations could be dealt with in 1987. Since I cannot qualify either as a total expert witness on the subject or as totally unbiased, I will leave it to others to flesh out the full scope of the inquiry for there is a long list of questions deserving serious study.

I suspect that, by the time the delegates reached Article III, they were getting weary in the hot and humid Philadelphia summer. The entire judicial Article contains only 369 words. The first Judiciary Act of 1789 authorized 13 U.S. District Judges and six members of the Supreme Court. Perhaps the feeling of those weary delegates at the Constitutional Convention was that a branch of government which would consist initially of only 19 judges did not call for much rhetoric—or much attention. The Constitution provided that the federal courts would have a limited and special function—in that day largely deciding admiralty cases.

The number of judges has grown from those first 19 to 397 authorized District Judges, 97 judges of Courts of Appeals, and another 21 judges of three specialized tribunals—a total of 515. Another 130 senior judges continue to serve—fortunately for us. This number will soon increase by approximately 150 when Congress passes the Omnibus Judgeship Bill.

The Supreme Court has increased from six justices to nine, remaining at that figure for over a century. I do not know of anyone advocating increasing the membership of the Supreme Court—least of all the present justices. One wag commented that nine members of the Supreme

Court have produced sufficient mischief in this country and any increase would be intolerable.

With 19 federal judges in 1789—and for at least 100 years—there were no significant “management” problems. Even with the 100 or more judges during the time Taft was Chief Justice, the management problem was not enormous. But Taft saw into the future and fought for the creation of the Conference of Senior Circuit Judges (now the Judicial Conference of the United States) to assist in “managing” the business of the courts, as he called it. The Administrative Office of the United States Courts was created in 1939 with essentially housekeeping functions. The Federal Judicial Center began operations in 1968 as the research, development and educational arm of the Judiciary. In 1971 the position of Circuit Executive—a management assistant for the Chief Circuit Judges—was created for each circuit. We must also count supporting personnel—court clerks, bailiffs, court reporters and so forth, or a total of 9,377 persons.⁹ We see, therefore, that the Judicial Branch, while small, has increased greatly since 1789.

For nearly nine years Congress has failed to create a single new judgeship and the courts have had to cope with the enormous increase in workload with additional law clerks and staff lawyers. The pressure of caseloads has led to an increase in the proportion of cases decided without oral argument and often without a formal, written opinion. Lawyers oppose this.

Some responsible and well-informed lawyers and scholars have criticized the increasing complexity of judicial procedure arguing that overuse of pre-trial processes complicate and delay trials. Others have echoed the criticism, made first by Roscoe Pound in 1906, that the excesses of the adversary system hinder rather than promote the ends of justice. The processes of administrative law are being challenged and questions are raised as to the soundness of trying complex anti-trust cases before 12 lay jurors picked at random from the population.

These developments inspire a series of questions, questions about the efficiency of courts functioning under such demands, questions about the growth of a judicial “bureaucracy,” and even questions about the duties placed on the Chief Justice are emerging. Should it be expected that the Chief Justice, with all the duties of other justices of the Court, be called upon to be the “Chief Executive” of the Judicial Branch. Congress made the Chief Justice Chairman of the Judicial

9. Excluding 2,902 probation officers.

Conference of the United States with duties that absorb hundreds of hours each year. It made him Chairman of the Federal Judicial Center, with similar demands. These two organizations are expected to develop innovative programs and mechanisms to improve and speed up justice. Because Chief Justices have somehow been able to manage up to now does not mean this can continue to be true in the third century under the Constitution. Seven years ago a committee of distinguished lawyers and scholars, chaired by Professor Paul Freund of Harvard, recommended that another court be created to take part of the work now resting on the Supreme Court. No action has been taken on that proposal.

There are serious questions as to how long justices can work a sixty hour week and maintain appropriate standards.

At least as important as the need to examine the increase in the size of the Judicial Branch is the need to examine the powers exercised by the Judiciary. The authors of the Constitution did not contemplate that the Judiciary would be an overseer of the other two branches. At most, they expected that the judicial function would be confined to interpreting laws and deciding whether particular acts of the Congress or of the Executive were in conflict with the Constitution, but even that was not explicit. Surely, that is all Marshall's opinion in *Marbury v. Madison* means.

Paradoxically, in recent years, the Supreme Court has been subjected to criticism from both ends of the spectrum. On the one hand, there are critics who suggest that the Supreme Court, like the other two branches, has become "imperial" in the sense of exercising powers not assigned to it by the Constitution. On the other hand, there are those who say that the Supreme Court has been too passive and has not undertaken to engage in wide ranging social and political activism thought by some to be called for by contemporary problems. It will be for others to evaluate these contentions. All this is rich fodder for symposia in 1987.

We make a large point of the independence and separateness of the three branches, but the authors of the Constitution also contemplated that there would be coordination between the branches deriving from a common purpose. That they should consult on some matters is beyond doubt. How far that should go is a subject for careful study.

The uniqueness and true genius of the document is that it has precluded any one of the branches from dominating any other. This will continue so long as we are faithful to the spirit and letter of the Constitution.

Project '87 is already underway and the Judicial Conference of the United States last year authorized the appointment of a special committee to prepare for an observance of this significant historic event. If we—collectively—use the “lead time” now available to us, we can develop a program worthy of the importance of the occasion.

Although none of us can alone determine the totality of what the Bicentennial of 1787 should be, you—today—are uniquely qualified to evaluate the merits of this proposal and to help with its implementation if you find merit in it.

If we concentrate along these lines for one year on each of the three branches and their functions, perhaps with the latter part of the third year devoted to an overview of all that has been discussed, debated and analyzed in the preceding years, conceivably we may produce a series of papers comparable in utility, if not in quality, with the Federalist Papers of 200 years ago.

Whatever the program is to be, the time to begin planning is now.

Fair Trial—Free Press: The Camera in the Courtroom Dilemma Continues

MARIANNA SMITH*

Marcia R. Powell†

The Conference of Chief Justices' meeting in Burlington, Vermont, August 2, 1978 adopted Resolution 1 allowing the presence of television, radio and photographic coverage of judicial proceedings.¹ In spite of this

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1. TELEVISION, RADIO, PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

"WHEREAS, the Conference of Chief Justices appointed a sixteen member committee in February, 1978, to study the possible amendment of Canon 3-A (7) of the Code of Judicial Conduct to permit electronic and photographic coverage of the courts of our nation under guidelines that would preserve the decorum and fairness of our judicial proceedings; and

"WHEREAS, the Conference has discussed, debated and considered the judicial canon which bans broadcasting, televising, audio recording or taking photographs during trial and appellate proceedings for new purposes; and

"WHEREAS, the highest court in each state has the authority and responsibility to provide ethical standards, to upgrade the quality of justice administered and to improve the contact with the public in each state; and

"WHEREAS, the news media, both print and electronic, serve an important role in informing the public and it is in the best interest of the public to be fully and accurately informed of the operation of judicial systems;

"NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the Canon 3-A (7) of the Code of Judicial Conduct be amended by adding the following paragraph and the commentary:

Notwithstanding the provisions of this paragraph, the (name the supervising appellate court or body in the state of federal jurisdiction) may allow television, radio and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the parties to a fair trial and subject to express conditions, limitation, and guidelines which allow such coverage in a

Resolution, the American Bar Association House of Delegates refused consideration of a camera-in-court provision at the 1978 annual American Bar Association meeting, deferring the matter until the February, 1979 meeting.²

State courts in at least fourteen states³ are conducting experiments allowing the electronic media access to court proceedings. This paper is provided as a review of the history of the media's struggle for entry into the courts and the present state experiments.

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the

manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

Commentary:

If television, radio, and photographic coverage is permitted it should be supervised by the appropriate appellate body which supervises the courts within its jurisdiction. It is necessary that there be express conditions and guidelines adopted by the supervising court or body in order to provide a specific manner and means for this type of media coverage. These guidelines should include the type and location of equipment, the discretion left to the individual trial or appellate court, and the necessity, if any, to obtain the consent of the participants. Absent special circumstances for good cause shown, no consent appears necessary in appellate courts. Special circumstances may exist in all courts for the restriction of this type of coverage in cases such as rape, custody of children, trade secrets, or where such coverage would cause a substantial increase in the threat of harm to any participant in a case.

"BE IT FURTHER RESOLVED, that the Conference designate the National Center for State Courts as the Clearinghouse for all photographic and electronic-in-the-courthouse information for various states and federal jurisdictions. In order to provide the complete exchange of information, the Conference recommends that each jurisdiction forward to the National Center all rules, statistics, guidelines, opinion, reports and other information pertaining to the use of photographic and electronic devices in the courtrooms of their states, and that all information be made readily available to the courts upon request.

"Adopted at the Thirtieth Annual Meeting held in Burlington, Vermont, August 2, 1978."

2. 64 A.B.A. J. 1342 (Sept., 1978). At the February, 1979 ABA National Convention in Atlanta, the ABA's House of Delegates voted overwhelmingly against cameras-in-the-courtroom. Associated Press, February 12, 1979.

3. See Appendix *infra*.

police, prosecutors and judicial processes to extensive public scrutiny and criticism.⁴

The Constitution of the United States offers "a right to speedy and public trial by an impartial jury"⁵ This right was created to prevent a recurrence of the well known and oppressive English Star Chamber judicial proceedings. On the other hand, the Constitution's First Amendment states that: "Congress shall make no law . . . abridging the freedom of speech and the press" ⁶ The philosophies of the first and sixth amendments dictate an enforceable power that are often found to be in conflict. The clash between the interests represented by these two amendments may be heard in the background of the dramatic judicial confrontation between the press seeking admittance to court proceedings and the judiciary's concern that the presence of the media can deny a defendant his right to a fair trial and invade the privacy of all trial participants. Therefore, it is necessary that compromises be struck between these interests to safeguard the ultimate freedom provided by each amendment. The press and judiciary have struggled toward this goal for years.

This paper is designed to be a brief overview of the current struggle between the broadcast media and the courts. The scope of the paper is limited to use of electronic equipment in courtrooms as a news gathering process by the print and broadcast media. However, use of electronic devices, particularly video taping equipment for utilization as part of the judicial process is another area which warrants consideration by the bench and bar, but goes beyond the scope of this paper. The paper will be divided into three sections. The first section will give an overview of the history of press and media coverage in judicial proceedings. The

4. *Sheppard v. Maxwell*, 384 U.S. 333, 350, citing to *Craig v. Harney*, 331 U.S. 367, 374 (1947).

5. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

6. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

second section will look to both the pro and con arguments which have been presented on the issue of media in the courts. The last section is an appendix and will deal with contemporary court rulings and experiments currently being conducted throughout the United States in an attempt to resolve the dilemma of whether to allow cameras in the courtroom.

1. HISTORY

The first broadcast of a trial to gain national interest was WGN Chicago's coverage of the Scopes Monkey Trial in Dayton, Tennessee⁷ in 1925. Photography and broadcasting were allowed in the proceedings, with no reported complaints registered about the process.

The print media became notorious for sensational coverage of trials in 1926 during the *Halls-Mills* case, a sex-murder scandal in Somerville, New Jersey.⁸ At the trial, there were over 200 reporters, necessitating a giant telegraph switchboard with 120 positions set up in the basement of the courthouse to send out reports. In addition, eight telephone operators were hired to handle the load. After acquittal, the defendants brought a libel suit against the New York Daily Mirror seeking \$1,500,000 in damages, which was purportedly settled for \$850,000.⁹

Today's concern with the risks inherent in having reporters with cameras in the courtroom is the direct result of the case involving the kidnap-murder of the Lindberg baby.¹⁰ The kidnaping occurred on March 1, 1932, and the body of the baby was not found until March 12th of that year. The accused, Bruno Hauptmann, was arrested during September of 1934. The story had remained front page news since the time of the kidnaping. The trial, which commenced in January of 1935, is stated to have "probably received the most extensive media coverage of any American criminal case up to its time."¹¹ The trial has been described as a "Roman Holiday."¹² "Photographers clamored on counsels' tables and shoved flash bulbs into the faces of the witnesses. The judge lost control of his courtroom and the press photographers lost

7. Danna, *TV's Fight for Courtroom Access*, 200 F.O.I. RPT. 1 (May, 1968).

8. J. LOFTON, *JUSTICE AND THE PRESS*, at 98-100 (1966).

9. *Id.*

10. *State v. Hauptmann*, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935).

11. Roberts and Goodman, III, *The Televised Trial: A Perspective*, 7 CUMB. L. REV. 327 (Fall, 1976).

12. Danna, *supra* note 7.

control of their senses.”¹³ There were more than seven hundred reporters in attendance. “Some two hundred newspapers sent their own correspondents and each of the major press services maintained a full staff at the scene. More than eleven million words were sent over the wires during the trial, about a million of them the first day.”¹⁴ Although the judge ordered the doors locked the day the verdict was due, ingenious press people created ways to inform their employers of the verdict. One of the most creative schemes was that of Francis Toughill of the Philadelphia Record who scraped the insulation from the courtroom telephone wires and hooked in a telephone headset. Crouched in the balcony of the courtroom, he called his city desk and announced the verdict.¹⁵

Although the New Jersey Court of Errors and Appeals did not find the abuses in the *Hauptmann* trial sufficient to overturn a death sentence,¹⁶ a barrier was created between the courts and the press. The organized press fought with the bench and bar about who was responsible for the chaos of the *Hauptmann* trial. In a September 18, 1937 edition of the media periodical, “Editor and Publisher,” the editors agreed that a portion of the blame must be placed upon the press, but laid most of the responsibility upon the bench and bar. “So long as you have publicity-hungry lawyers and judges, you’ll have newspapers ready to sate their appetite and make money as well.”¹⁷ As one broadcaster put it, “so we had a witches brew of journalistic excesses, judicial laxness, legal hamming and political maneuvering.”¹⁸ Despite the reprimands and excuses, it was clearly the press, the defendants and the general public who were penalized for the unfitting activities which accompanied the *Hauptmann* trial.

The true punishment was felt when the House of Delegates of the American Bar Association adopted Canon 35 on September 30, 1937.¹⁹ Canon 35 stated:

13. *Id.* at 1.

14. Lofton, *supra* note 8, at 104.

15. Reed, *Canon 35: Flemington Revisited*, 177 F.O.I. RPT. 3 (March, 1967), citing to TIME, Feb. 25, 1935.

16. The Appellate Court said prejudicial publicity was inevitable and upheld the conviction. See A. FRIENDLY and R. GOLDFARB, CRIME AND PUBLICITY, at Ch. I (1967).

17. Reed, *supra* note 15, at 4.

18. *Canon 35 and the Broadcast Media*, 61 F.O.I. RPT. (1961). (Based on a speech by Frank Fogarty).

19. Murrill gives a complete report of Canon 35 as it evolves from inception to adoption. See Murrill, *Canon 35: A Summary*, 77 F.O.I. RPT. (1962).

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconception with respect thereto in the mind of the public and should not be permitted.²⁰

Although the Canon was not controlling upon the state courts, many states considered it an adequate basis for keeping the press from the courtroom.²¹ In 1952, the Canon was amended to prohibit "the taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting-televising of court proceedings. . . ." ²² By 1966, all states except Colorado, Texas and Oklahoma had adopted some form of Canon 35 either by statute or by court ruling.²³ The essence of the Canon is applied in Federal Courts as Federal Rule of Criminal Procedure No. 53.²⁴ The Judicial Conference of the United States also adopted Canon 35 as a suggestive but not binding resolution.²⁵ Numerous committees met and debates were held in the decade following the adoption of Canon 35 with one result, a group of guidelines which the broadcast media created for themselves entitled the National Association of Broadcasters Standards of Conduct for Broadcasting Public Proceedings.²⁶

The first reversal of a state court criminal conviction on the grounds of adverse pretrial press publicity was by the Warren court in 1961 in the case of Leslie "Maddog" Irvin.²⁷ Irvin was indicted for one

20. D. GILMORE, *FREE PRESS AND FAIR TRIAL*, at 23 (1966).

21. Neither Canon 35 nor Canon 3-A (7) of the ABA Codes of Judicial Conduct are binding law. They are created by the ABA as suggestions. States are free to adopt such suggestions by statute or by court rules or are free to create their own rules. The preface to the 1972 ABA Code of Judicial Conduct adopted August 16, 1972 states:

In the judgment of the association this code consisting of statements of norms denominated as Canons, the accompanying text setting forth the specific rules and the commentary, states the standards the judges should observe. The Canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedure for its enforcement.

22. Danna, *supra* note 7, at 1.

23. D. GILMORE and J. BARRON, *MASS COMMUNICATIONS LAW*, at 452 (1974).

24. *Id.*, citing FED. R. CRIM. P. 53.

25. *Id.*

26. J. BITTNER and D. BITTNER, *RADIO JOURNALISM*, at 199 (1977).

27. *Irvin v. Dowd*, 366 U.S. 717 (1961).

of six local murders in the Evansville, Indiana area. His attorney asked for and received a change of venue based upon forty-six newspaper accounts, some of which claimed Irvin's confession to the six murders.²⁸ Venue, however, was moved only to the next county, an area which the same press served,²⁹ and the trial began in November of 1955. Of four hundred and thirty prospective jurors examined by the prosecutor and defense attorney, three hundred and seventy had formed some opinion about Irvin's guilt.³⁰ After twelve jurors were chosen and the defense had used all peremptory challenges, the defendant's counsel argued that four of the jurors had stated Irvin was guilty.³¹ Consequently, Irvin was found guilty and sentenced to death in the electric chair.³² After being denied a new trial by the Indiana Supreme Court,³³ Irvin twice appealed to the United States Supreme Court.³⁴

This was the first opinion in which the United States Supreme Court had thoroughly discussed trial by newspaper. Justice Frankfurter, in a concurring opinion, stated:

This court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press properly conceived. The court has not yet decided that while convictions must be reversed and miscarriages of justice result because the minds of jurors were poisoned, the poisoner is constitutionally protected in plying his trade.³⁵

The problem of pretrial publicity and the prejudice thereby created still remains exactly as a juror in the *Irvin* trial stated, "you cannot forget what you hear and see."³⁶

Soon after this trial by newspaper, a trial by television occurred in

28. GILMORE, *supra* note 20, at 31.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Irvin v. State*, 236 Ind. 384, 139 N.E. 2d 898 (1957).

34. *Irvin v. Dowd*, 359 U.S. 394, 398 (1959), and *Irvin v. Dowd*, 366 U.S. 717 (1961). See also K. DEVOL, *MASS MEDIA AND THE SUPREME COURT*, at 272 (1976); NELSON and TEETER, *LAW OF MASS COMMUNICATIONS*, at 305 (1974); and GILMORE, *FREE PRESS AND FAIR TRIAL*, at 11 (1966).

35. 366 U.S. at 730 (1961), as cited in H. NELSON and D. TEETER, *LAW OF MASS COMMUNICATION*, at 304 (2d ed. 1973).

36. 366 U.S. at 730 (1961).

*Rideau v. Louisiana*³⁷ during 1963. Six days after his arrest, and without the presence of counsel, Wilbur Rideau admitted to kidnaping, bank robbery and murder. Interviewed in his cell by a sheriff and two policemen, moving pictures complete with sound track recorded the entire twenty minutes of interrogation. Leading questions were climaxed by Rideau's confession to the charges.³⁸ Later that day, television station KLPC in Lake Charles, Louisiana broadcast the interview three times to a viewing audience of approximately one hundred and fifty thousand.³⁹ The defendant's request for a change of venue was denied. Rideau was convicted and sentenced to death for murder, with the Louisiana Supreme Court affirming the conviction.⁴⁰ The United States Supreme Court granted certiorari.⁴¹ Seven of the Justices felt that pretrial broadcasts had prevented the defendant from a fair trial and reversed the decision, giving Rideau a new trial.⁴² Justice Potter, delivering the opinion of the Court, said:

We hold that it was a denial of due process of law to refuse the request for change of venue after people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes of which he was later to be charged. For any one who has ever watched television, the conclusion cannot be avoided that this spectacle to the tens of thousands of people who saw and heard it in a very real sense was Rideau's trial . . . subsequent court proceedings in a community so pervasively exposed to such a spectacle would be hollow formality.⁴³

The landmark case of *Estes v. Texas*⁴⁴ in 1963 virtually overshadowed the sensationalism of *Rideau*. This case resulted in an absolute ban of television in the courts. Texas financier Billy Sol Estes was tried in 1962 for fraud against the federal government.⁴⁵ Despite a five hundred mile change of venue to Reeves County, the trial was a celebrated occurrence with a packed courtroom. Over Estes' objection, the televising of the trial was allowed with rules established for the media.

37. 373 U.S. 723 (1963).

38. *Id.*

39. *Id.* at 724.

40. 242 La. 431, 137 So. 2d 283 (1962).

41. 373 U.S. 723 (1963).

42. *Id.*

43. 373 U.S. at 726 (1963).

44. 381 U.S. 532 (1965).

45. *Id.* at 535.

The only live coverage was the prosecutor's argument to the jury and the jury verdict,⁴⁶ although portions of the trial were filmed without sound and shown on nightly newscasts with commentaries.⁴⁷ The defense attorney objected to his person being filmed during his summation, so the camera was focused on the judge while the defense attorney concluded his case. Estes' conviction was affirmed by the Texas Court of Criminal Appeals.⁴⁸

Estes appealed to the United States Supreme Court; one of the grounds being that he had been deprived of due process of law by the television of his trial.⁴⁹ The Court, in a five to four decision, reversed Estes' conviction holding broadcasting of both the pretrial hearing and the trial deprived the defendant of due process as afforded by the fourteenth amendment of the United States Constitution.⁵⁰ The Court was curiously divided, with six separate opinions constituting eighty-five pages including numerous photographs of the courtroom. Consensus of four of the five majority opinions indicates that the act of televising a criminal trial is in itself a violation of due process and thus unconstitutional.⁵¹ It is worthy to note that four of the five Justices who held this restrictive view are no longer on the Court as of this date.⁵²

Speaking for the Court, Justice Clark began by describing the conditions of the court in the initial hearing:

The video tapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which the petitioner was entitled. . . .⁵³ Indeed, at least twelve cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel tables.⁵⁴

Based on his finding of the conditions of the trial court, Justice

46. *Id.* at 537.

47. *Id.*

48. 354 S.W. 2d 161 (Crim. App. 1961).

49. 381 U.S. at 533.

50. *Id.*

51. *Id.*

52. They were Chief Justice Earl Warren, Justice Tom Clark, Justice Arthur Goldberg, and Justice William O. Douglas.

53. It is noted that the Supreme Court used both still photographs and videotapes in making its determination in *Estes*.

54. 381 U.S. at 536.

Clark continued to discuss these effects on the press and trial participants. He found it was a misconception of the rights of the press⁵⁵ to say the broadcasters were discriminated against in favor of the print media simply because cameras, the tools of the broadcast trade, were not allowed in the courtroom. The majority of the Court supported the public's right to know what occurs in the courtroom but not to the extent it would deny the defendant a fair trial and due process. Reversing the Texas decision, the Court delineated the problems created by the presence of television equipment in the courts. A major concern of the Court was the potential impact of television on the jurors, including the distraction created by cameras and similar equipment. The fear that jurors will be unable to properly perform their function in a "carnival" atmosphere pervades the *Estes* opinion.

Moreover, the *Estes* Court recognized televising trials may create potential problems including impairment of criminal trial testimony, because witnesses could be influenced by what they saw or heard on television or radio and a resulting additional burden could be placed on the trial court. The Court conceded that some of the problems are inherent in allowing print media reporting of courtroom activities, but explained that the impact of the broadcast media could be more detrimental to courtroom decorum. The Court discussed the impact of television on the defendant as a form of mental harassment.⁵⁶

Despite the holding of the majority that the judgment be reversed because of the denial of the defendant's due process, the opinion acknowledges the limitations of media equipment and technology as of that date:

It is said that the ever-advancing techniques of public communications and the adjustments of the public to its presence may bring about a change in the effect of telecasting on the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypotheses of tomorrow but must take the facts as they are presented today.⁵⁷

Chief Justice Warren, speaking for Justices Douglas and Goldberg, concurred with the holding of Justice Clark, stating:

55. *Id.* at 539.

56. *Id.* at 545-52.

57. *Id.* at 551-52.

I believe that it violates the Sixth Amendment for Federal Courts to allow criminal trials to be televised to the public at large. I base this opinion on three grounds: 1) The televising of trials diverts the trial from its proper purpose in that it has inevitable impact on all the trial participants; 2) that it gives the public the wrong impression about the purpose of the trials, thereby detracting from the dignity of the court proceeding and lessening the reliability of trials, and 3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.⁵⁸

The Chief Justice warned that unethical directors may choose to air only the parts of films that depict their points of view leaving the defendant in a false light before the public.⁵⁹ Moreover, if a mistrial were the result of a broadcast trial, it would be difficult to find an impartial jury for a second trial. In summary, Chief Justice Warren's opinion is that, "the television camera . . . is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights."⁶⁰

In his dissent, Justice Stewart, speaking for Justices Black, Brennan and White, found the televising of judicial proceedings had not been shown unconstitutional on its face.⁶¹ He warned that because of progressing technology, the Court's firm decision on the subject in 1965 was premature.⁶²

There are three noteworthy limitations regarding the case of *Estes v. Texas*.⁶³ First, the decision applies only to criminal trials; second, there was no consent given by the parties;⁶⁴ third, Canon 28 of the Texas Canon of Judicial Ethics, which allowed broadcast coverage of court proceedings at the trial judge's discretion, contained a warning that close supervision by the judge would be necessary to protect the dignity of the proceedings.⁶⁵ At the conclusion of *Estes* in the United States

58. *Id.* at 565.

59. *Id.*

60. *Id.* at 585.

61. *Id.* at 601-602.

62. *Id.* at 615.

63. 381 U.S. 532.

64. Some commentators think the requirement of mandatory consent might have led to a different decision. *Electronic Media in the Courtroom*, 385 F.O.I. RPT. (February, 1978). (Based on speech by Hon. J.P. Morgan, Chief Justice of the Missouri Supreme Court).

65. B. McDonald, *TV and News Coverage of the Courtroom*, TEX. BAR J., at 170 (March, 1967). This article gives a good discussion of Texas' somewhat unique legal views toward cameras in the courts during the decade of the 1960's.

Supreme Court, Texas Canon 28 was so criticized that Texas prohibited photographic coverage of all future state judicial proceedings.⁶⁶

In the following year, 1966, the United States Supreme Court made a strong attempt to balance free press and free trial in the case of *Sheppard v. Maxwell*.⁶⁷ Following the trend already established, the Court reversed denial of the petition for writ of *habeas corpus* of Dr. Samuel Sheppard on the grounds that due process as guaranteed by the fourteenth amendment had been violated by press publicity resulting in an unfair trial.⁶⁸ This decision brought about a new trial for Sheppard and resulted in acquittal and freedom.⁶⁹

According to Dr. Sheppard's version of the events of July 4, 1954, he was awakened by the screams of his twenty-nine year old pregnant wife.⁷⁰ He ran upstairs to her room and wrestled with a shadowy form of a man who knocked him unconscious. After recovering, Sheppard checked his wife's pulse and found she was dead. He then checked his son's room and found that he was not injured. Hearing a noise downstairs, Sheppard chased the shadowy form out of the house to the beach of his lakefront property where he was again knocked unconscious. After awakening, he returned to the house and called a neighbor. The neighbor reportedly found Dr. Sheppard dazed and injured. Mrs. Sheppard was found dead in her bed having been beaten to death with a blunt instrument.⁷¹

Media attention was focused on Dr. Sheppard almost immediately and the press fell on the case like birds of prey. They began acquiring information from Sheppard's family and neighbors; from Dr. Gurber, the coroner, who told the press and his professional associates that it was evident Sheppard had committed the crime and they should get a confession from him; and from Captain Kerr of the Cleveland police who, among other officials, urged that Dr. Sheppard be arrested.⁷² The

66. *Id.*

67. 384 U.S. 333 (1966).

68. Dr. Sheppard's conviction was affirmed by the Ohio Court of Appeals, 100 Ohio App. 345, 128 N.E. 2d 471 (1955); the Ohio Supreme Court denied his writ of *habeas corpus*, 170 Ohio 551, 167 N.E. 2d 94 (1960); the United States District Court for the Southern District of Ohio granted a writ of *habeas corpus*, 231 F. Supp. 37 (1964); but the order was reversed by the appellate court, 346 F. 2d 707 (1964), *cert. granted*, 382 U.S. 916 (1965).

69. 384 U.S. 333.

70. *Id.* at 336-37.

71. *Id.* at 337-38.

72. FRIENDLY and GOLDFARB, *supra* note 16, at 14.

press repeated every allegation and suspicion.

Dr. Sheppard was arrested on July 30, 1954. All of the Cleveland newspapers praised the arrest and reported favorable official comments by the mayor and police chief. Extensive media coverage of the pretrial proceedings continued until September 23rd.⁷³ The United States Supreme Court took judicial notice of five volumes filled with newspaper clippings representing the press' reporting from the time of the murder until Sheppard's conviction in 1954.⁷⁴

The trial began in mid-October and lasted forty-seven days with almost ten thousand pages of transcript.⁷⁵ The courtroom during the trial was in bedlam. This scene is described during the selection of the jury: "courtroom overrun by cameras and cameramen . . . flashbulbs were popping and huge lighting devices backed by powerful reflectors were sprouting from chairs, tables and the floor. Defense counsel, Corrigan, rose to protest . . . 'They're standing on tables, sitting on railings and hanging from the chandeliers,' he asserted. 'They're even taking pictures of the jurors—that is, when they can get their lens past the assistant prosecuting attorney trying to get into the picture!'"⁷⁶

Although trial court Judge Blythin ruled that no pictures of any kind could be taken in the courtroom during the duration of the trial, this ruling was frequently and openly disregarded.⁷⁷ The facts presented on appeal clearly indicated the trial judge had lost control of his courtroom.⁷⁸ It was noted by the United States Supreme Court that the trial judge and chief prosecutor ran in elections which occurred during the Sheppard trial with both incumbents being re-elected.⁷⁹

Jurors had access to all publications throughout the trial and were sequestered only during their five days of deliberation.⁸⁰ During the time

73. During the 53 days between arrest and trial, the Cleveland Press gave the story a banner headline 23 times, lead position 28 times and front page story 31 times.

The Cleveland Press was the largest newspaper in Ohio at the time with a circulation of 310,000. It was distributed in the afternoons. The Cleveland Plaindealer served the area in the mornings. It is noted that the day the *Sheppard* verdict was announced by the Ohio Court, 30,000 extra issues of the Press were printed and sold. See FRIENDLY and GOLDFARB, *supra* note 16.

74. Justice Clark speaking for the Court, 384 U.S. at 341-42.

75. 384 U.S. at 346, 348.

76. FRIENDLY and GOLDFARB, *supra* note 16, at 18, made in reference to P. HOLMES, THE SHEPPARD MURDER CASE (1967).

77. *Id.*

78. 384 U.S. 333.

79. *Id.*

80. *Id.*

the jury was sequestered, the jurors were allowed to make phone calls to friends and family without any restrictions.⁸¹ As the result of the trial in 1954, Dr. Sheppard was convicted of second-degree murder.⁸² Upon petition for *certiorari*, Sheppard was granted a new trial on the ground due process had been violated by the trial court's failure to protect the doctor from prejudicial publicity.⁸³

Justice Clark, writing the opinion of the court, described the prejudicial nature of the events:

There can be no question about the nature of the publicity We agree, as did the court of appeals, with the finding of Judge Bell's opinion for the Ohio Supreme Court; "Murder and mystery, society, sex and suspense were combined in this case . . . to intrigue and captivate the public's fancy Throughout . . . the nine week trial, the circulation conscious editors catered to the insatiable interest of the American public in the bizarre In this atmosphere of a Roman Holiday for the news media, Sam Sheppard stood on trial for his life."⁸⁴

After describing and discussing these specified abuses by the press in the Sheppard trial, the Clark opinion supports the traditional American values placed on freedom of the press:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field The press does not simply publish information about the trials, but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism.⁸⁵

Justice Clark continued that, because of this function of the press as a watchdog of the judiciary, the courts have been unwilling to totally restrict the press from the courtrooms. Yet, as Justice Clark makes clear, the due process afforded to a defendant must be carefully preserved with a jury able to come to a verdict based only on the evidence submitted at trial rather than from distracting extraneous sources.⁸⁶

The United States Supreme Court found the fundamental error of

81. *Id.*

82. *Id.* at 335.

83. 382 U.S. 916 (1965).

84. 384 U.S. at 356, citing to *State v. Sheppard*, 165 Ohio St. 293, 294; 135 N.E. 2d 340, 342 (1956).

85. *Id.* at 350.

86. *Id.* at 361-62.

the court below was that the trial judge, believing he lacked the power, had not properly controlled the courtroom. He failed to restrain the press and curtail the excessive publicity. The Supreme Court, stating that the courtroom and courthouse premises are subject to the control of the trial judge, found the carnival atmosphere could have been avoided had appropriate measures been taken.⁸⁷ The following guidelines were suggested: 1) The number of reporters should be limited and assigned seating areas selected; 2) certain prohibitions should be clearly defined, such as keeping the press away from the exhibits; 3) the trial court should insulate the witnesses; 4) the court should proscribe extrajudicial statements by any witness, party, attorney or court official. The Court further suggested that the jury should be sequestered throughout the trial.⁸⁸

In reversing the denial of the Sheppard *habeas corpus* petition, the Court stated that, where prejudice prevents a fair trial, a new trial should always be granted. However, the Court suggests that justice will be better served by the prevention of abuses in lieu of granting a new trial: "[W]e must remember that reversals are but palatives, the cure lies in those remedial measures that will prevent the prejudice at its inception. The court must take some steps by rule and regulation that will protect their processes from prejudicial, outside interference."⁸⁹

The warnings of the Supreme Court in Sheppard have been heeded by both the press and the bench. The impact resulted in rulings in which the courtroom doors were virtually locked to the press throughout the country. Zealous, overly protective judges fought with equally zealous reporters during the several years following *Sheppard* with perhaps the American judicial system and the American public suffering the greatest loss in most of the battles.

Finally, in 1972, the restrictive ban of the press from the courts was lifted.⁹⁰

87. The state experiments re cameras in the court set out in the Appendix reveal that the recommended guidelines have been established in response to Justice Clark's warning.

88. 384 U.S. at 361-63.

89. *Id.* at 363.

90. The Code of Judicial Conduct including Canon 3-A(7) was adopted by the House of Delegates of the American Bar Association on August 16, 1972.

2. CONTEMPORARY HISTORY

In 1972, a new Code of Judicial Conduct was unanimously approved by the American Bar Association House of Delegates. Canon 3-A(7)⁹¹ of this new Code replaced former Canon 35. The new Canon allowed a judge, at his discretion, to permit electronic or photographic equipment in the courtroom for purposes of preserving evidence, making the trial record and other specified judicial purposes. These purposes included the following: 1) closed circuit television to another room to accommodate a larger courtroom audience when necessary; 2) closed circuit television to a press room so the press could move about without distracting the trial participants; 3) closed circuit television to the cell of a defendant who had proven unruly in the courtroom, and 4) filming trials for editorial purposes as long as the trial participants would not be distracted or the dignity of the proceedings impaired. Film procured under these guidelines could not be shown to the public until all appeals have come to final judgment. In addition, all parties and witnesses must consent to the recording and reproduction. The commentary following 3-A(7) states: "temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or drama-

91. ABA CODE OF JUDICIAL CONDUCT, CANON 3-A(7):

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

- (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
- (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
- (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) the means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

tize the proceedings." Although 3-A(7) was apparently more liberal than Canon 35, it did not substantially affect the status quo because the judicial type of proceedings which were allowed to be televised under 3-A(7) had little, if any, newsworthiness. The Code was in keeping with the United States Supreme Court's ruling in *Sheppard* which gave the trial judge the responsibility of maintaining courtroom decorum, but 3-A(7) provided little additional opportunity for the press to serve its function as "handmaiden of effective judicial administration," as the United States Supreme Court aptly described in the *Sheppard* decision.⁹²

Prior to the adoption of 3-A(7) by the American Bar Association in 1972, only three states had experimented with modification of the prohibitions of Canon 35.⁹³ Texas had formerly allowed electronic media into courts at the trial judge's discretion under its Canon 28 of the Integrated State Bar of Texas.⁹⁴ After the United States Supreme Court's reversal of *Estes v. Texas*,⁹⁵ the State of Texas adopted the American Bar Association's Canon 35.⁹⁶ Continuing to adhere to the American Bar Association guidelines, Texas adopted Canon 3-A(7) to replace Canon 35⁹⁷ in 1972.

Oklahoma, in an attempt to experiment with media in the courtroom, began its first live coverage of a trial in Oklahoma City in December, 1953.⁹⁸ The state supreme court ruled in 1958 that the decision to televise the trial was a matter of judicial discretion.⁹⁹ A conflict was created in 1959 when Oklahoma adopted a modification of Canon 35 which prohibited televising of actual proceedings.¹⁰⁰ The question of cameras in Oklahoma courts became more enigmatic in 1961 when the Oklahoma Supreme Court again held that the matter lay at the discretion of the trial judge.¹⁰¹ These conflicts were apparently resolved in 1976 when Oklahoma adopted 3-A(7) of the American Bar Association

92. 384 U.S. at 350.

93. Danna, *supra* note 7 at 3, and OKLAHOMA CANONS OF JUDICIAL ETHICS No. 35. OKLA. STAT. ANN. tit. 5, §1, App. 4 (West 1966).

94. See 27 TEX. BAR J. 102 (1964).

95. 381 U.S. 532.

96. *Id.*

97. TEXAS CANONS OF JUDICIAL ETHICS No. 3-A(7), TEX. REV. CIV. STAT. ANN. (Vernon Cumm. Supp. 1972).

98. GILMORE, *supra* note 20, at 31.

99. Lyles v. State, 330 P. 2d 734 (Okla. Crim. App. 1958).

100. OKLAHOMA CANONS OF JUDICIAL ETHICS No. 35, OKLA. STAT. ANN. tit. 5, § 1, App. 4 (West 1966).

101. Cody v. State, 361 P. 2d 307 (Okla. Crim. App. 1961).

Judicial Code.¹⁰²

The third state to experiment with modification of the prohibition of Canon 35 before 1972 was Colorado. In 1956, the Colorado Supreme Court adopted its own modified version of Canon 35.¹⁰³ From that time until the present, Colorado has allowed some form of electronic coverage of trials. Because of the lengthy and also current experiments by Colorado, the full story of its experience is included in the Appendix under current usage of experiments of cameras in the courtroom.¹⁰⁴

In recent years, numerous states have attempted to create specific and special codes by which their judiciary may experiment with cameras in the courts. A complete explanation of these experiments can be found in the Appendix.

3. ARGUMENTS FOR AND AGAINST CAMERAS IN THE COURTROOM

The discussion of these arguments pertains to the general issue of whether there should be audio and/or visual recording of court proceedings under established guidelines and limitations. The type of filming and recording within the limitations and purposes of allowing such activities may vary; therefore, the arguments for cameras in the courtroom are not aimed at expressed unlimited access. Rather, the argument for allowing broadcast media in the courtroom is defined as falling within a range of any position opposite a complete ban or prohibition of cameras in the courts.

PRO: The constitutional guarantee of freedom of the press demands that the broadcast media not be discriminated against in favor of the print media.

CON: The obtrusive nature of electronic media demands that it be prohibited from the courts.

The United States Supreme Court's decision in *Estes v. Texas*¹⁰⁵ is still the governing law on this issue. Justice Clark, speaking for

102. OKLAHOMA CANONS OF JUDICIAL ETHICS NO. 3-A(7), OKLA. STAT. ANN. tit. 5, § 1, App. 4 (West Cumm. Supp. 1976).

103. In Re Hearings concerning Canon 35 of the Canons of Judicial Ethics, 132 Col. 591, 296 P. 2d 465 (1956).

104. See Appendix.

105. 381 U.S. 532.

the Court, said, "so long as a television industry, like other communications media, is free to send representatives to trial and report on those trials to viewers, there is no abridgment of the freedom of the press."¹⁰⁶ Yet, the Justice continued, "when the advances in these arts (broadcast news reporting) permit reporting by printing press or by television without their present hazard to a free trial, we will have another case."¹⁰⁷

Controversy on this subject continues. In response to the challenge to advance the art and skills of televising, substantial improvements in equipment have been made by the industry. These advancements in quality of televising techniques have created contradictory results in the courts. This is dramatically illustrated by the directly opposite results regarding permission for broadcast media to cover state executions. The United States Court of Appeals for the Fifth Circuit has ruled it is constitutional to exclude television from executions while admitting the print media; but a United States District Court in Texas has ruled it is discriminatory to exclude television from an execution when print media is admitted. These and other judicial opinions¹⁰⁸ which are clearly in conflict are the result of courts taking notice of the advancements in broadcasting technology and the current judicial experiments allowing cameras in the courtroom. The uncertainty resulting from the conflicting opinions suggest that the time has arrived for the United States Supreme Court to hear the "other case" predicted by Justice Clark.

PRO: The public has a right to know.

CON: The Sixth Amendment guarantees the right to a public trial to the defendant; not to the public.

The *Estes* decision also spoke to this issue. Justice Clark stated the purpose of the constitutional requirement was "to guarantee that the accused would be fairly dealt with and not unjustly condemned."¹⁰⁹ An argument may then be made that, as long as a courtroom remains open to the public, there is no reason why electronic media should be automatically eliminated. The theory behind the people's right to know is well illustrated by the case of *Minnesota v. Laura Miller*, an unreported

106. *Id.* at 585.

107. *Id.*

108. See Morgan, *Electronic Media in the Courtroom*, 385 F.O.I. RPT. (Feb. 1978). This author cites other examples including a U.S. District Court in California ruling that it is discriminatory to admit the print media into prisons while excluding television.

109. 381 U.S. at 538-39.

criminal case, broadcast by radio.¹¹⁰ In that decision, Judge Moriarity stated:

This is the people's court and the people have the right to know what is going on and how it is conducted. It is true and fundamental that all the people cannot assemble in the courtroom and be present while cases are tried; yet, all the people have a right to do that. That is why we have, in every courtroom in the United States of America a place for the people to come into the courtroom and to sit down and observe what is transpiring. That rule is just as sacred and recognized in the Supreme Court of the United States as it is here in this town. So that for the benefit of those who are not present, when cases are tried, the very essence of democracy requires that the information which is produced in the course of a trial and the way and manner in which a trial is conducted, and the proceedings of the trial should be reported to the people.¹¹¹

The present trend to allow limited access to the courtroom is apparently in sympathy with this view expressed by Judge Moriarity.

Included within an accused's sixth amendment rights is that of a public trial. This guarantee has been recognized by the United States Supreme Court to be a benefit afforded the defendant as a safeguard against the use of our judicial system as an instrument of persecution.¹¹² Commentators have long endorsed the theory that the right of a public trial belongs to the defendant.¹¹³ Accordingly, the United States Supreme Court established in the case of *In Re Oliver*¹¹⁴ that:

The requirements of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their function. . . .¹¹⁵

It would constitute a misstatement of the sixth amendment to convert

110. Lerner, *Limitation Imposed on Television and Radio: A Problem That Needs Immediate Attention*, 39 A.B.A. J. 570 (July, 1953).

111. *Id.*

112. *In Re Oliver*, 333 U.S. 257, 270 (1948).

113. COOLEY, CONSTITUTIONAL LIMITATIONS, at 647 (8th ed. 1927), and Douglas, *The Public Trial and Free Press*, 33 ROCKY MTN. L. REV. 1, 5 (1960). Radin, *The Right to Public Trial*, 6 TEMPLE L. J., 381 (1932).

114. 333 U.S. 257.

115. *Id.* at 270.

what is essentially the right of a particular accused into a privilege of entry into every trial by the press. It is conceded, however, that criminal trials will be open to the public and the press. There is a general agreement that the respective interests of the public's right to know and the defendant's right to a fair and public trial will most often coincide; however, when these interests come into conflict, the rights of the defendant should be superior.

PRO: Electronic coverage of court proceedings guarantees dignity and decorum in the courtroom.

CON: Electronic coverage of court proceedings creates loss of dignity and decorum in the court.

In *Sheppard* and *Estes*, along with other sensational cases discussed in the historical section of this paper, the sanctity of the courtroom was obviously desecrated. A principle reason for this desecration was the broadcast media's obtrusive, noisy equipment employed at that time. The current experiments show that these types of annoyances have been eliminated or seriously curtailed. Also, reports of current court proceedings reveal that the press has matured and has therefore become more professionally responsible. It is an obvious fact that dignity and decorum cannot be disrupted by the presence of broadcasters unless the presiding judge loses control of the courtroom. In the areas where press and bench have established standards for allowing electronic coverage of court proceedings, the underlying premise is that the discretion of the presiding judge controls. The judge's orders govern the activities of everyone, including the press; inside the courtroom and often in areas adjacent to the courtroom as well.¹¹⁶

116. The effect of cameras on court decorum is best evaluated by participants of a filmed trial. The following questions were submitted to Florida trial participants reported in a sample survey of the attitudes of individuals associated with trials involving electronic media and still photography coverage in selected Florida courts between July 5, 1977 and June 30, 1978:

To what extent did the presence of television, photographic, or radio coverage in the courtroom disrupt the trial?

Juror		Witness	
1. Not at all	77.6%	1. Not at all	57.0%
2. Slightly	14.3%	2. Slightly	24.3%
3. Moderately	5.3%	3. Moderately	11.1%
4. Very	2.6%	4. Very	4.4%
5. Extremely	.2%	5. Extremely	3.3%

Testimony for the enhancement of courtroom decorum due to the presence of the broadcast media was given by an Alabama Circuit Judge. "I have never seen such decorum," Circuit Judge Robert Hodnette, Jr. said of his first televised trial during July, 1976 in Mobile,

Court Personnel		Attorney	
1. Not at all	49.1%	1. Not at all	41.6%
2. Slightly	34.9%	2. Slightly	28.9%
3. Moderately	10.4%	3. Moderately	16.8%
4. Very	2.8%	4. Very	8.7%
5. Extremely	2.8%	5. Extremely	4.0%

To what extent were you aware of the presence of television, photographic or radio coverage in the courtroom during the trial?

Juror		Witness	
1. Not at all	19.5%	1. Not at all	20.0%
2. Slightly	55.1%	2. Slightly	39.4%
3. Moderately	11.9%	3. Moderately	15.8%
4. Very	9.0%	4. Very	16.0%
5. Extremely	4.5%	5. Extremely	8.8%

Court Personnel		Attorney	
1. Not at all	3.8%	1. Not at all	12.7%
2. Slightly	44.3%	2. Slightly	39.3%
3. Moderately	20.8%	3. Moderately	15.3%
4. Very	18.9%	4. Very	21.3%
5. Extremely	12.3%	5. Extremely	11.3%

To what extent did the presence of television, photographic or radio coverage in the courtroom *distract you* during the trial?

Juror		Witness	
1. Not at all	77.0%	1. Not at all	60.6%
2. Slightly	18.7%	2. Slightly	23.3%
3. Moderately	2.2%	3. Moderately	5.7%
4. Very	1.0%	4. Very	5.5%
5. Extremely	1.2%	5. Extremely	3.9%

Court Personnel		Attorney	
1. Not at all	57.0%	1. Not at all	40.7%
2. Slightly	29.0%	2. Slightly	34.0%
3. Moderately	7.5%	3. Moderately	11.3%
4. Very	3.7%	4. Very	8.7%
5. Extremely	2.8%	5. Extremely	5.3%

Alabama, "the prosecutor was on his toes, the clerks remained seated for the first time in 30 years."¹¹⁷ Therefore, it can be reasonably concluded that the earlier fear that the broadcast media would necessarily constitute a threat to judicial dignity in the courtroom is no longer a valid reason for total exclusion of all electronic coverage in all court proceedings. It must be conceded, however, that this conclusion is based upon the expectation of the high level of maturity and dignity exhibited by members of the press in their continued attempt to convince the judiciary that they should be allowed into the courtroom. Nevertheless, at the first indication that this high level of conduct is in lapse, the judge has and should exercise the power to immediately remove the press from the courtroom.

PRO: Cameras in the courts will educate the public and gain its respect for the judicial system as well as serve as a crime deterrent.

CON: Cameras in the courts entertain the public, giving them the wrong idea about our judicial system by sensationalizing and commercializing; thus creating public resentment and disrespect for the judicial system.

In his opinion in *Estes*, Chief Justice Warren expressed a serious concern with the commerciality of television and its effect on the viewing public. He worried that there is no assurance the public would not inherently distrust the entire system of justice following an intimate association with such a commercial enterprise as television. He found that the sense of dignity and integrity, which should be associated with the courtroom, would become lost if the presentation of the trial was too commercialized.¹¹⁸ "Televised trials," the Chief Justice argued, "would not only affect those involved in the trial process, but those who

During the trial, to what extent did you want to see or hear yourself in the media?

Juror		Witness	
1. Not at all	72.3%	1. Not at all	62.5%
2. Slightly	18.6%	2. Slightly	18.5%
3. Moderately	5.7%	3. Moderately	12.5%
4. Very	2.9%	4. Very	4.2%
5. Extremely	5%	5. Extremely	2.2%

117. *Television Gaining in Courtroom Access*, 65 THE QUILL 7 (May, 1977).

118. 381 U.S. at 574.

observe the trial process.”¹¹⁹ “The purpose of a trial is not to entertain or even to educate the public, valuable as those goals may be,” Chief Justice Warren declared.¹²⁰ He implied that, whatever its educational potential, a trial could easily be changed into a propaganda vehicle.¹²¹

The problem of commercialization and sensationalism may continue to exist. It is necessary to seek workable solutions for these problems. On the other hand, it is equally difficult to formulate exacting regulations since each proceeding covered by the media has its own, unique problems. For example: in Florida the Public Broadcasting Service televised *State of Florida v. Ronney Zamora*,¹²² thus avoiding commercials in the broadcast of the proceedings. In addition, some state guidelines have specifically discouraged opinionated commentary on the part of the broadcasters.¹²³

Sensationalism may inadvertently be the result of inaccurate and superficial reporting by the news media. Although newspaper editors have dealt with this problem for years and some have abused it while others have not; it would seem that, due to the stronger impact of television on the general public, the burden of responsibility is heavier on the broadcasters. Because of this greater potential impact, the courts have been less likely to trust the broadcast media with the burden.

The broadcast industry has been given a public trust and is bound to act in the public interest, convenience and necessity.¹²⁴ As gatekeepers of the news, broadcasters have an ethical duty to fairly and accurately report legal proceedings. However, inherent in reporting is a risk of inaccuracy or misstatement due to portions of the trial being presented out of context. It quickly becomes apparent that the present state experiments do not resolve this difficulty because, although the discretion of the trial judge controls the actual courtroom filming procedure and technique, it remains completely within the discretion of the broadcaster to determine what is actually shown to the public on the air. One proposed remedy for resolving this potential problem of inaccurate reporting is to permit electronic coverage of trials in their entirety. While this remedy removes the potential harmful effects resulting from discretionary editing, it imposes the equally impossible burden of filming com-

119. *Id.* at 575.

120. *Id.*

121. *Id.*

122. Case No. 77-25123-A (11th Cir. Ct. 1977).

123. See Appendix for the state experiment.

124. Federal Communications Act 1934, 47 U.S.C.A. § 326 (1934).

plete court proceedings despite their length. The result of such a requirement would virtually prohibit electronic broadcasting of trials due to the expense and the airtime required for audience viewing.

Therefore, a delicate balance must be maintained between the broadcast industry's responsibility to report newsworthy events to the public and its equally important responsibility to fairly protect the respective interests of the trial participants. An ethical burden reflecting this balance is imposed upon the decision-making broadcast personnel who handle the reporting of courtroom activities.

This problem and its potential ramifications have not been adequately addressed by the American Bar Association or the courts. It is submitted that a joint study conducted by the American Bar Association and the National Association of Broadcasters is necessary to establish general guidelines upon which broadcasters may rely when making editorial decisions. Moreover, legal remedies should be established for breach of these standards.

It has been alleged that cameras in the courtroom, with full coverage of trials, would act as a deterrent to crime. In researching, the writers surprisingly found that there was virtually no information to support or defeat this theory, not because it is not a valid suggestion, but simply because not enough time has elapsed since the current usage of cameras in the courts has begun to substantiate a valid study on criminal deterrence. Until a substantial study has been completed, the effect cannot be determined. A prime consideration is whether or not the public will actually watch televised court proceedings enough to cause a deterrence. Viewers in Florida expressed a high degree of interest in the case of *Florida v. Ronney Zamora* characterized by higher Neilson Ratings than any other program in its time period.¹²⁵ Whether this is due to an intellectual curiosity or an appetite for the sensational is unanswerable. Again, only the passage of time will reveal if the public is watching televised trials because they are entertainment or because of a genuine educational motivation.

PRO: Impact of the presence of the broadcast media on trial participants causes the quality of the proceedings to be enhanced.

125. Report to the Supreme Court of Florida, re: Conduct of Audio-visual Trial Coverage of *State v. Zamora*, submitted by Circuit Judge H. Paul Baker of the Eleventh Judicial District of Florida, Criminal Division, pages 2 and 3. This report addresses itself to each paragraph of the Supreme Court's order originally allowing such electronic coverage in the courts.

CON: Impact of the presence of the broadcast media on trial participants causes the quality of the proceedings to be diminished.

Justice Clark, stating the majority opinion in *Estes*, gave the general rule of the Court on this issue. The potential impact of the televising on witnesses, jurors, trial judge and defendant was a major concern. The court expressed a fear that the television crew and equipment would distract the jury. In addition, awareness of the media's presence could potentially distract the trial participants and create fear and excitement, resulting in forgetfulness or over-statement. Moreover, the trial judge could exhibit undesirable psychological reactions to the presence of cameras.¹²⁶ Current experiments with cameras in the courtroom indicate the fears expressed by Justice Clark have proven to be overstated.¹²⁷

Jurors: There is inherent, in electronic coverage of court proceedings, a possibility that jurors will be distracted by media equipment and personnel. The current experiments being conducted attempt to eliminate these distractions through the use of unobtrusive film and recording devices and by requiring that personnel and their equipment remain stationary throughout the trial. Reports from Florida indicate jurors have not been particularly distracted from their jobs as fact finders.¹²⁸

126. 381 U.S. at 548.

127. See note 116 *supra*.

128. See note 116 *supra* for the source of these statistics.

To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors self-conscious?

Court Personnel		Attorney	
1. Not at all	29.0%	1. Not at all	32.6%
2. Slightly	36.0%	2. Slightly	26.4%
3. Moderately	18.0%	3. Moderately	17.8%
4. Very	11.0%	4. Very	12.4%
5. Extremely	6.0%	5. Extremely	10.9%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors more attentive?

Court Personnel		Attorney	
1. Not at all	55.1%	1. Not at all	55.4%
2. Slightly	21.4%	2. Slightly	26.9%
3. Moderately	11.2%	3. Moderately	14.6%
4. Very	8.2%	4. Very	2.3%
5. Extremely	4.1%	5. Extremely	.8%

A study done by Florida Technological University (now University of Central Florida), cited by Judge Paul Baker when addressing the Society of Professional Journalists in Mobile, Alabama, reported that the jurors in Florida have not been detrimentally affected by cameras and recorders in the courtroom.¹²⁹ Judge Baker, in a report to the Florida Supreme Court,¹³⁰ specifically responds to Justice Clark's prediction as to the impact of the cameras on the jurors, saying, "no such problems were apparent in the Ronney Zamora trial."¹³¹

The potential problems can be virtually eliminated if a trial judge makes use of his control over the participants. Sequestration and judicial admonishment of the jury should insure consistent quality of the court proceedings despite the broadcast media's presence.

Witnesses: Justice Clark's prediction of the effect of cameras on witnesses has the support of Florida's Judge Baker. He says:

This court must concur with Mr. Justice Clark's concern regarding the possible violation of the rule against witnesses. The rule, of course, is discretionary but when invoked should not be violated. It is felt, however, that the learned Justice misplaced his concern when he directed it toward television and radio broadcast. Trials of great public interest are not confined to greater detail on the printed page. The witness who would violate the rule by watching portions of a trial on television or listen to radio broadcasts is the same witness, who without hesitation, devours every word in a newspaper article which he had been instructed not to read. Compliance with the rule is a matter of integrity on the part of the witness, and if he violates the court's instructions, there are sufficient sanctions available to the trial judge to admonish him.¹³²

To what extent did the presence of television, photographic or radio coverage in the courtroom make the jurors nervous?

Court Personnel		Attorney	
1. Not at all	47.0%	1. Not at all	36.1%
2. Slightly	28.0%	2. Slightly	30.8%
3. Moderately	16.0%	3. Moderately	12.0%
4. Very	3.0%	4. Very	15.0%
5. Extremely	6.0%	5. Extremely	6.0%

129. Address by Judge Baker, Region III Convention of the Society of Professional Journalists, Sigma Delta Chi, in Mobile, Alabama (March 17, 1978).

130. See note 125 *supra*.

131. *Id.* at 15.

132. *Id.*

Other possible effects on witnesses which may diminish the quality of proceedings are that witnesses may be intimidated by the media, be given to understatement, or even be afraid to come forward as a witness.¹³³ One rebuttal to these objections is that a responsible citizen

133. See note 116 *supra* for the source of these statistics.

To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses self-conscious?

Court Personnel		Attorney	
1. Not at all	14.6%	1. Not at all	24.1%
2. Slightly	36.9%	2. Slightly	28.4%
3. Moderately	33.0%	3. Moderately	19.1%
4. Very	5.8%	4. Very	16.3%
5. Extremely	9.7%	5. Extremely	12.1%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses more cooperative?

Court Personnel		Attorney	
1. Not at all	79.2%	1. Not at all	83.2%
2. Slightly	10.9%	2. Slightly	9.8%
3. Moderately	4.0%	3. Moderately	4.2%
4. Very	5.0%	4. Very	2.1%
5. Extremely	1.0%	5. Extremely	.7%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the witness more nervous?

Court Personnel		Attorney	
1. Not at all	22.3%	1. Not at all	24.8%
2. Slightly	43.7%	2. Slightly	32.6%
3. Moderately	19.4%	3. Moderately	16.3%
4. Very	6.8%	4. Very	13.5%
5. Extremely	7.8%	5. Extremely	12.8%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses more attentive?

Court Personnel		Attorney	
1. Not at all	54.8%	1. Not at all	64.7%
2. Slightly	21.2%	2. Slightly	25.9%
3. Moderately	16.3%	3. Moderately	4.3%
4. Very	5.8%	4. Very	3.6%
5. Extremely	1.9%	5. Extremely	1.4%

who becomes a witness will fulfill what is considered to be a public responsibility no matter what type of press coverage is present. This, of course, does not resolve the objection of press intimidation raised by a witness who does not voluntarily testify but is subpoenaed to appear. While there is a possibility that the presence of the broadcast media may enhance the quality of a witness' testimony by causing witnesses to

To what extent did the presence of television, photographic or radio coverage in the courtroom make the witnesses act flamboyant?

Court Personnel		Attorney	
1. Not at all	65.4%	1. Not at all	68.1%
2. Slightly	19.2%	2. Slightly	17.0%
3. Moderately	10.6%	3. Moderately	9.9%
4. Very	2.9%	4. Very	3.5%
5. Extremely	1.9%	5. Extremely	1.4%

To what extent did the presence of television, photographic or radio coverage in the courtroom distract witnesses?

Court Personnel		Attorney	
1. Not at all	36.2%	1. Not at all	36.2%
2. Slightly	40.0%	2. Slightly	40.0%
3. Moderately	13.3%	3. Moderately	13.3%
4. Very	4.8%	4. Very	4.8%
5. Extremely	5.7%	5. Extremely	5.7%

To what extent did the presence of television, photographic or radio coverage in courtroom inhibit witnesses?

Court Personnel		Attorney	
1. Not at all	44.6%	1. Not at all	44.1%
2. Slightly	40.6%	2. Slightly	21.0%
3. Moderately	7.9%	3. Moderately	14.7%
4. Very	4.0%	4. Very	11.9%
5. Extremely	3.0%	5. Extremely	8.4%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge self-conscious?

Court Personnel		Attorney	
1. Not at all	60.4%	1. Not at all	42.3%
2. Slightly	25.5%	2. Slightly	21.2%
3. Moderately	3.8%	3. Moderately	18.2%
4. Very	7.5%	4. Very	8.8%
5. Extremely	2.8%	5. Extremely	9.5%

speak more precisely, accurately and with less tendency to wander and roam in their presentations of evidence; the true value of the media's presence lies in its effect of reducing the likelihood that witnesses will perjure themselves because of the knowledge that there are potential viewers who are aware of their veracity. On the other hand, the witness' knowledge of observation by the general public may intimidate and inhibit the witnesses or cause their failure to testify truthfully due to fear of reprisal.

While some of the potential problems that may be created for a witness by electronic media coverage of court proceedings can be alleviated by stressing the obligations of duty of a responsibly minded citizen, this does not eliminate all the potential problems.

Attorneys: It may be argued that attorneys will resort to theatrics to dramatize the televised trial. However, the Clarence Darrow trials of the past rarely occur and cases today are decided more on the basis of a presentation of relevant and logical evidence, than on a fiery, emotional oration to a jury. The final determination of this issue is placed on the integrity of the particular attorneys involved. A responsible attorney will be concerned only with what is best for his client, and will be oblivious to the type of reporters or equipment in the courtroom.¹³⁴

134. See note 116 *supra* for the source of these statistics.

a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *attorneys nervous*?

b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *opposing attorney nervous*?

c. To what extent did the presence of television, photographic or radio coverage in the courtroom make *you nervous*?

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	42.9%	1. Not at all	59.8%	1. Not at all	60.0%
2. Slightly	32.4%	2. Slightly	27.9%	2. Slightly	26.7%
3. Moderately	6.9%	3. Moderately	5.7%	3. Moderately	8.0%
4. Very	4.9%	4. Very	4.9%	4. Very	3.3%
5. Extremely	2.9%	5. Extremely	1.6%	5. Extremely	2.0%

a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *attorneys better prepared*?

b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *opposing attorney better prepared*?

c. To what extent did the presence of television, photographic or radio coverage in the courtroom make *you better prepared*?

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	63.7%	1. Not at all	78.1%	1. Not at all	73.3%
2. Slightly	14.7%	2. Slightly	15.6%	2. Slightly	13.3%
3. Moderately	8.8%	3. Moderately	3.9%	3. Moderately	7.3%
4. Very	5.9%	4. Very	1.6%	4. Very	3.3%
5. Extremely	6.9%	5. Extremely	.8%	5. Extremely	2.7%

a. To what extent did the presence of television, photographic or radio coverage in the courtroom *distract the attorneys?*

b. To what extent did the presence of television, photographic or radio coverage in the courtroom *distract the opposing attorney?*

c. To what extent did the presence of television, photographic or radio coverage in the courtroom *distract you?*

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	53.3%	1. Not at all	53.2%	1. Not at all	40.7%
2. Slightly	36.2%	2. Slightly	29.8%	2. Slightly	34.0%
3. Moderately	4.8%	3. Moderately	9.7%	3. Moderately	11.3%
4. Very	2.9%	4. Very	4.8%	4. Very	8.7%
5. Extremely	2.9%	5. Extremely	2.4%	5. Extremely	5.3%

a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *attorneys self-conscious?*

b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *opposing attorney self-conscious?*

c. To what extent did the presence of television, photographic or radio coverage in the courtroom make *you self-conscious?*

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	35.6%	1. Not at all	42.5%	1. Not at all	37.3%
2. Slightly	32.7%	2. Slightly	32.1%	2. Slightly	36.7%
3. Moderately	16.8%	3. Moderately	17.9%	3. Moderately	13.3%
4. Very	9.9%	4. Very	4.5%	4. Very	8.0%
5. Extremely	5.0%	5. Extremely	3.0%	5. Extremely	4.7%

a. To what extent did the presence of television, photographic coverage in the courtroom make the *attorneys more attentive?*

b. To what extent did the presence of television, photographic coverage in the courtroom make the *opposing attorney more attentive?*

c. To what extent did the presence of television, photographic, or radio coverage in the courtroom make *you more attentive?*

Judge Baker suggests that any attorney who solicits television publicity to enhance his case should be disbarred.¹³⁵ It is submitted that a sanction of this nature is a valid study which should be undertaken by the American Bar Association while considering new rules pertaining to cameras in the courtroom.

Judges: The situation-comedy-stereotype of a judge portrayed as sleeping-on-the-bench or preoccupied with members of his audience may be real or imagined. In either case, one potential benefit created by allowing cameras into the courtroom is a guarantee of judicial attentiveness and a decrease in the abuse of judicial discretion.¹³⁶ There is a

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	46.0%	1. Not at all	66.4%	1. Not at all	70.0%
2. Slightly	25.0%	2. Slightly	18.4%	2. Slightly	19.3%
3. Moderately	15.0%	3. Moderately	12.8%	3. Moderately	6.7%
4. Very	9.0%	4. Very	1.6%	4. Very	3.3%
5. Extremely	5.0%	5. Extremely	.8%	5. Extremely	.7%

a. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *attorneys' actions flamboyant*?

b. To what extent did the presence of television, photographic or radio coverage in the courtroom make the *opposing attorney's actions flamboyant*?

c. To what extent did the presence of television, photographic or radio coverage in the courtroom make *your actions flamboyant*?

a. Court Personnel		b. Attorney's view of opposing attorney		c. Attorney's view of him/herself	
1. Not at all	44.3%	1. Not at all	54.8%	1. Not at all	70.3%
2. Slightly	30.2%	2. Slightly	18.5%	2. Slightly	14.7%
3. Moderately	17.0%	3. Moderately	17.8%	3. Moderately	4.7%
4. Very	4.7%	4. Very	5.9%	4. Very	1.3%
5. Extremely	3.8%	5. Extremely	3.0%	5. Extremely	0%

135. Address by Judge H. Paul Baker, Circuit Judge of the Eleventh Judicial Circuit of Florida (Criminal Div.), *Ethics, Television and the Courtroom*, Nova University Law Center in Ft. Lauderdale, Florida (April 3, 1978).

136. See note 116 *supra* for the source of these statistics.

To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge more attentive?

Court Personnel		Attorneys	
1. Not at all	66.0%	1. Not at all	45.7%
2. Slightly	17.0%	2. Slightly	27.1%
3. Moderately	7.5%	3. Moderately	16.4%

chance, however, that the new attentiveness of the trial judge may be aimed toward the television camera rather than toward the best interest of justice. Some of the plans for media coverage have recommended remedies to prevent a judge from becoming preoccupied with camera locations or lighting arrangements. Florida's Judge Baker suggests that a judge should not have personal contact with the press during the trial because it leads to abuses by both the press and the judiciary.¹³⁷ Judge Baker, as a result of his personal experience with cameras in the Florida courts, has stated that:

Mr. Justice Clark (in his opinion in *Estes*) points out that television is particularly bad when the judge is elected and notes that such is the case in all but six states. He noted that it would be difficult for judges to remain oblivious to the pressures that the news media can bring, both directly and through the shaping of public opinion. This court, with the deepest respect to Mr. Justice Clark, disagrees. The judge's conduct in the course of a trial should not be screened from public scrutiny. This is especially true since the judicial branch of this government is the only bulwark that stands as a shield between the people and the executive sword. The public has the right to know whether a judge is decisive or indecisive; attentive or inattentive; courteous or rude; whether or not he can maintain control over trial proceedings, and if he appears learned or confused. To this extent, it makes little difference whether the judge is observed by spectators in the courtroom or by spectators during television.¹³⁸

Another problem which must be recognized is that the media may attempt to exert political pressure on a judge. Many of the judges in this

4. Very	5.7%	4. Very	6.4%
5. Extremely	3.8%	5. Extremely	4.3%

To what extent did the presence of television, photographic or radio coverage in the courtroom make the judge nervous?

Court Personnel		Attorneys	
1. Not at all	78.1%	1. Not at all	60.1%
2. Slightly	14.3%	2. Slightly	23.2%
3. Moderately	3.8%	3. Moderately	10.1%
4. Very	3.8%	4. Very	2.9%
5. Extremely	0%	5. Extremely	3.6%

137. See note 135 *supra*.

138. See note 125 *supra*.

country are elected and therefore in need of the press as an advocate; not as an adversary. Political pressure can be exerted by press criticism or even political blackouts from the media. Due to the First Amendment guarantee of freedom of the press, the media is able to exercise great discretion in determining which public officials or candidates for public office will be given editorial attention. Due to the subtle nature of this discretion, it can be used unscrupulously and does not lend itself to control. It must be remembered that the judge and prosecutor of the *Sheppard* case were political candidates and benefited from the notoriety of the press coverage. While these candidates appear to have gained public support from the press attention, a contrary result is equally likely. Although this type of situation may be remote, chances for such political pressure on judges continues to exist. The integrity of the judge and the press and the adequacy of the governing standards are key factors in preventing potential detriment to a judge due to the presence of cameras in the court. Again, it is submitted that the American Bar Association and the National Association of Broadcasters should join forces to create appropriate guidelines and sanctions to prevent such abuses by the press.

The Defendant: There are meritorious benefits to the criminal defendant when the electronic media is admitted into the courtroom. The presence of live cameras can substantially augment the court's efforts to provide a fair trial by giving an accurate presentation of the proceedings to the public. On the other hand, there are serious detriments which may be suffered by the defendant. The most significant of these are the invasion of privacy and the denial of a fair trial due to prejudicial publicity. These will be discussed in the next section of this paper.

Because of biases inherent in human nature, the viewing of a trial by mass television audiences can create a potential irreparable prejudice to the defendant regardless of whether he is found guilty or innocent. One may be acquitted by the jury, but convicted by the public, thus preventing the defendant from living a normal life. The emotional impact on home viewers of exposure to the realism of a criminal trial combined with the enormous size in both numbers-of-people and geographic-viewing area, forces the defendant to become a post-trial public figure whether he is convicted or acquitted. This status of public figure will pervade his entire personal and private life. The potentiality of this harm to a defendant is so expansive and of such enormous magnitude that a legal tort remedy for the benefit of the defendant must be created before our judicial system can sustain the burden of subjecting a party to such a risk.

An equally compelling theory of irreparable prejudice is presented to a co-defendant granted a severance and tried at a time after the first co-defendant's trial was conducted with cameras in the courtroom. The televising of the first trial destroys the value of the severance and the public exposure makes it potentially impossible for the second defendant to obtain a fair trial.

The potential tort liability of the broadcast media and court administrators and the threat to a co-defendant's rights to a speedy and fair trial are areas which need to be studied by a combined committee organized by the American Bar Association and the National Association of Broadcasters.

PRO: Electronic coverage can prevent prejudicial publicity.

CON: Electronic coverage of court proceedings invade the privacy of the defendant and create unfair publicity before, during and after the proceedings.

In an exploration of a defendant's constitutional guarantee to a fair trial, the matter of the invasion of a defendant's right to privacy must first be examined. Obviously, any rule established regarding press coverage of the defendant and his trial must strike a balance between the right of a free press and the defendant's right to privacy. The Brandeis treatise on "The Right to Privacy" establishes the standard, "the right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would not render it a privileged communication according to the law of slander and libel."¹³⁹ Applying this standard, the publication of any statement made in a court of justice does not constitute an invasion of privacy.

While the application of the Brandeis standard can resolve the invasion of privacy issue, the defendant's objection of prejudicial publicity is far more compelling and difficult to resolve. The *Sheppard* and *Estes* decisions clearly indicate a realization by the United States Supreme Court that trial publicity may be of such an inflammatory nature that it is inherently prejudicial to the defendant. As a result, a defendant may be granted a reversal of his conviction on the ground he has been denied due process as guaranteed by the fourteenth amendment, without showing any specific instances of prejudicial publicity.

139. Brandeis and Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

The basic approach of our criminal justice system has been to allow an occasional abuse on the ground that such an abuse is the price a free society must pay to protect the broader fundamental freedoms. In an attempt to provide the defendant a fair trial, without curtailing the activities of the press, corrective adjustments have been utilized. These include: 1) a change of venue to an area beyond the publicity zone; 2) *voir dire* examination to eliminate prospective jurors who have been influenced by pre-trial publicity; 3) the sequestration of juries; 4) the postponement of a trial; 5) mistrials; 6) new trials and 7) express instructions from judge to jury regarding publicity.¹⁴⁰ While these recommendations are helpful, they do not provide a complete and satisfactory resolution to the problem of prejudicial publicity.

Several state court systems are presently utilizing an additional precaution of requiring the broadcaster to obtain the defendant's affirmative consent to have his trial televised or filmed by the electronic media.¹⁴¹ The consent requirement goes to the heart of the constitutional dilemma since the failure of the defendant to grant consent would result in barring the press from the courtroom. Whether or not the provision for an affirmative consent by the defendant or other trial participants is a constitutional requirement can only be determined by the judiciary, but guidelines should be established on this issue.

Pre-trial prejudicial publicity can best be corrected by a change of venue and careful selection of jurors. The threat of prejudicial publicity from electronic reproduction of the trial may be highly exaggerated. The viewer is exposed to testimony carefully controlled by the rules of evidence which are designed to eliminate all irrelevant or highly prejudicial material. Moreover, the viewing audience can observe that, in a trial designed to ascertain the truth, the accused is innocent until proven guilty. It is submitted that publicity of this nature is less prejudicial than the current speculation by a poorly informed public whose source of information is the press conferences conducted by prosecutors and other attorneys.

The threat of prejudicial publicity due to the presence of cameras in the courtroom continues. Only a mature and responsible press and judiciary working together can minimize this threat.

140. L. Powell, *The Right to a Fair Trial*, 51 ABA J. 536 (June 1965).

141. These state requirements of consent are set out in the Appendix.

3. SUMMARY

Since the mid-1970's, there has been a renewed interest in whether the electronic media should be admitted to court proceedings. Generally, the broadcast media with its tools of trade—the cameras and recorders—has been barred from the American courtroom.

Meanwhile, television has become the number one news source in the country. Prior to the present experiments allowing limited media access to the courts, artist sketches of judicial proceedings had to satisfy the visual report of the news.

The principle issue which must be resolved is whether allowing electronic media access to the courtroom is compatible with the constitutional guarantee of a fair trial and the orderly administration of justice.

The interest of the press has been devoted to criminal trials but questions remain unanswered. The media should be allowed to electronically reproduce trials of a highly personal or domestic nature. Besides proving costly, no positive benefits to society can likely be obtained. Admittance or denial of the media into a courtroom should be based on the nature and purpose of the trial, rather than the traditional classification of criminal versus civil. The acknowledged public interest in the general newsworthiness of criminal trials and civil trials designed to redress or remedy a wrongful act may justify the courts' admission of the broadcast media into the courtroom. However, there are cases which fall even within these classifications which have limited newsworthiness and subject the parties to personal indignities and embarrassments. Justice and common decency demand that such parties have access to the courts without being subjected to electronic press coverage to merely satisfy public curiosity. This is well illustrated by the publicity and undesirable social impact that would be imposed upon a rape victim by the electronic coverage of a rape prosecution. Moreover, hearings for the dissolution of marriage or for determining the custody of children are trials of a personal nature having no legitimate public interest. The broadcasting of such trials would constitute sensationalism designed to fulfill public curiosity and can only have detrimental effects on the parties. It is conceded that a substantial number of civil trials may prove worthy of news coverage and that audio and video excerpts from the actual trial proceedings can bring the reality of our judicial system closer to the citizenry than our present system of artists' cardboard sketches and attorney press releases.

The press, bench and bar have made substantial progress in the maturation process since the time of the *Hauptmann* trial. The over-

reaction resulting from *Estes* and *Sheppard* has diminished as the bench and bar created committees to consider the feasibility of electronic media in the courts. Moreover, both decisions were five to four votes and a major change in Justices in the United States Supreme Court has occurred since those cases were heard. How the Court would resolve the issue of cameras in the courts today is a matter of conjecture. Only three facts are clear: 1) the electronic media can be compatible with the administration of justice if proper standards and guidelines are established; 2) a new United States Supreme Court decision on the subject of a constitutional guarantee is needed and 3) a cooperative study by the American Bar Association and the National Association of Broadcasters is indicated to establish reasonable and uniform standards.

There is clearly a current trend in favor of electronic coverage of court proceedings as indicated by the recent experiments initiated by various state bar associations.¹⁴² Public opinion polls, based on interviews with attorneys, judges and community leaders, indicate a general approval of electronic media coverage.¹⁴³ The organized bar revealed a change in attitude at the 1978 mid-year meeting of the American Bar Association,¹⁴⁴ but the American Bar Association, at its 1978 annual meeting, failed to adopt any change in Canon 3-A(7)¹⁴⁵ in spite of the

142. See Appendix for explanation.

143. See note 116 *supra* for the source of these statistics.

Overall, would you favor or oppose allowing television, photographic or radio coverage in the courtroom?

Juror		Witness	
1. Completely in Favor	49.1%	1. Completely in Favor	41.3%
2. Slightly in Favor	15.8%	2. Slightly in Favor	14.6%
3. No Opinion	8.8%	3. No Opinion	8.3%
4. Slightly Opposed	10.7%	4. Slightly Opposed	11.5%
5. Completely Opposed	15.6%	5. Completely Opposed	24.3%
Court Personnel		Attorney	
1. Completely in Favor	36.1%	1. Completely in Favor	38.9%
2. Slightly in Favor	11.1%	2. Slightly in Favor	17.4%
3. No Opinion	11.1%	3. No Opinion	2.0%
4. Slightly Opposed	16.7%	4. Slightly Opposed	12.8%
5. Completely Opposed	25.0%	5. Completely Opposed	28.9%

144. See note 2 *supra*.

145. *Id.*

fact the National Conference of Chief Justices had approved a camera in the courts provision at its July, 1978 meeting.¹⁴⁶

One conclusion is clear. "The press and judiciary are mutually interdependent—the press must have an uncoerced judiciary to maintain freedom of the press—the judiciary requires an uncensored press to maintain an uncoerced judiciary."¹⁴⁷ Because of this interdependence, the cooperation and experiments between the press, bench and bar should continue; but the path will be more swift and sure if lighted by carefully constructed standards and guidelines.

These guidelines and standards can best be created by a joint effort of the judiciary and the broadcasters. In response to the August, 1978 Resolution of the Conference of Chief Justices, the National Center for State Courts has established a clearinghouse to provide a repository for information and guidelines governing the use of cameras in the courts. The service provided by the National Center for State Court will give all state courts access to statistics, guidelines, opinions and reports pertaining to the use of electronic devices in the courtroom. This undertaking uniquely qualifies this organization to serve as the nucleus of an advisory committee for the benefit of the judiciary and broadcasters to conduct extensive studies of the various potential benefits and detriments produced by electronic media coverage of court proceedings.

146. See note 1 *supra*.

147. *TV-in-the-Courts Issue in Sharp Meeting Focus*, 64 A.B.A.J. 314 (March, 1978).

APPENDIX

Current Usage and Experiments With Cameras in the Courtroom

Colorado

This state's experimentation with cameras in its courtroom has enjoyed a much longer lifespan than the Oklahoma or Texas attempts discussed in this paper. Indeed, Colorado's liberal experimentations are still viable and successful and form a foundation for what may be called contemporary history of cameras in the courtroom. In 1956, hearings were conducted by the Colorado Supreme Court to consider the matter of televising trials.¹⁴⁸ The hearings included exhibits of the modern methods of photography, recording and televising.¹⁴⁹ As a result of these hearings, the Colorado Supreme Court, in February 1956, rejected the ABA version and adopted its own Canon 35 which left the issue of cameras in the courts to the discretion of the trial judge. The electronic media covered trials in Colorado with few problems, but elicited much comment and debate from jurists throughout the country. In 1969, Justice Douglas addressed the experiment using pessimistic terms in a speech at the University of Colorado Law School.¹⁵⁰ In part, Justice Douglas said:

With all respect to the Supreme Court of Colorado, I feel that a trial on radio or television is quite a different affair than a trial before the few people who could find seats in a conventional courtroom. The already great tensions of the witness are increased when they know that millions of people watch their every expression, follow each word . . . The presence and participation of a vast unseen audience creates a strain and tense atmosphere that will not be conducive to the quiet search for truth.¹⁵¹

In retrospect, Frank Hall, Associate Justice of the Supreme Court of Colorado, who was Chief Justice in 1961 when Justice Douglas made his speech, appraised the experiment of cameras in the Colorado court-

148. The contents of these hearings can be found at 132 Col. 591, 296 P. 2d 465 (1956).

149. *Id.*

150. Address by Justice Douglas, The Public Trial and Free Press to the University of Colorado Law School (May 10, 1960), *printed in* 46 A.B.A. J. 840 (December 1960) and 33 ROCKY MOUNTAIN L. REV. 1 (1960).

151. 46 ABA J. at 842; 33 ROCKY MOUNTAIN L. REV. at 5.

room in 1962. Justice Hall states, “[w]ith six years of experience behind us, I think it may be stated that none of the ominous possibilities that filled Mr. Justice Douglas with so grave apprehensions, have come to pass in Colorado.”¹⁵² Justice Hall, lauding the Colorado system, notes that, although thousands of photographs and film frames have been made of proceedings, no fiascos have occurred and no complaints have been registered.¹⁵³ The justice credited this success to a responsible Colorado press, bar and judiciary.¹⁵⁴ The cooperation of the three groups was embodied in guidelines promulgated by the broadcasters which provided for the pooling of equipment, information and work force among the stations, with each under the control of the trial judge. It was agreed that only one camera and recording device would be used in the courtroom at a given time. Justice Hall believes this method gives the public a better understanding of the entire judicial process.¹⁵⁵

The continuing success was placed as a burden on the trial judge: “The final test as to whether a court is degraded or lacks essential dignity as a result of operation of the rule rests with the presiding judge. Canon 35 will not serve as a substitute for judicial ability, integrity and dignity.”¹⁵⁶ Despite success, Colorado’s canon was modified in 1966 as a direct result of the *Estes* decision. The new rule required the defendant’s consent before any telecasting could occur. The version adopted in 1966 is virtually the same as the one presently in effect: Colorado’s Code of Judicial Conduct 3-A(7) now states,

1. A judge may authorize:
 - (a) the use of electronic photographic means for the perpetuation of the record, or for purposes of judicial administration;
 - (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.
2. There shall not be any photographing, or broadcasting by radio or television, of court proceedings unless permitted by order of the trial judge and then only under such conditions as he may prescribe.
3. A judge should prohibit the broadcasting by radio or television of court proceedings, or the taking of photographs in the courtroom, where he believes from the particular circumstance of a given case, or any

152. Justice Frank H. Hall (Colorado Supreme Court), *Colorado’s Six Years’ Experience Without Judicial Canon 35*, 48 A.B.A.J. 1121 (1962).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1122.

portion thereof, that the broadcasting or taking of photographs would:

- (a) detract from the dignity of court proceedings;
- (b) distract a witness in giving his testimony;
- (c) degrade the court; or
- (d) otherwise materially interfere with the achievement of a fair trial.

4. A judge shall prohibit:

(a) the photographing, or broadcasting by radio or television of testimony of any witness or juror in attendance under subpoena or order of court who has expressly objected to the photographing or broadcasting; and

(b) the photographing, or broadcasting by radio or television of any portion of any criminal trial, beginning with the selection of the jury and continuing until the issues have been submitted to the jury for determination, unless all accused persons who are then on trial shall have affirmatively given consent to the photographing or broadcasting.¹⁵⁷

As of 1976 and as far as can be presently determined, there have been no reversals of decisions in Colorado of broadcasted trials on the ground of unfairness. Thus, Colorado's long standing experience of having cameras and electronic media in the courts continues successfully to date.¹⁵⁸

*Alabama*¹⁵⁹

Alabama adopted its own version of Canon 3-A(7) in December of 1975.¹⁶⁰ It provides,

157. COLORADO CODE OF JUDICIAL CONDUCT CANON 3-A(7), Appendix C at 674. The Supreme Court of Colorado in a telephone interview in February 1978, stated that this particular publication of the Code went into effect January 1, 1973. Copies of these canons may be obtained from the National Center for State Courts, Williamsburg, Virginia.

158. M. Roberts and W. Goodman, *Televised Trials: a Perspective*, 7 CUMB. L. REV. 323-42 (Fall 1976).

159. Order of the Supreme Court of Alabama authorizing the use of electronic media equipment in the Alabama Supreme Court. Dated October 14, 1976. Petition For and Approval of, a Plan For News Media Coverage in the Circuit Court of the Thirteenth Judicial Circuit of Alabama (The Mobile Plan). Order dated June 28, 1976. Petition For and Approval of, a Plan for News Media coverage in the Circuit Court of the Fifteenth Judicial Circuit of Alabama (The Montgomery Plan). Order dated April 12, 1977. Copies of these petitions and orders and plans may be obtained from the Alabama Supreme Court. Copies are permanently filed at the Nova Law Journal Office, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. See also note 157 *supra*.

160. See "Forward" to *Alabama Canons of Judicial Ethics No. 3-A(7)*, 37 ALA.

the authorized plan to set forth the safeguards to insure that such photographing, recording or broadcasting by radio or television of such proceedings will not detract from the dignity of the court proceedings, distract any witness from giving testimony, degrade the court or otherwise interfere with the achievements of a fair trial

Alabama's Canons 3-A(7) and 3-A(7B) were created by an advisory committee of the State Bar with the aid of the attorneys throughout the state. Pertinent provisions of Canon 3-A(7B) allow broadcast coverage live or by tape or still photography of trials and hearings if written permission is sought by the press and granted by the trial judge before the commencement of the proceedings. Written consent of the accused and the prosecutor is required in both criminal and civil proceedings. A significant sanction is that the broadcasting or photography may be halted at any time during the trial proceeding if any juror, party, attorney or testifying witness objects. Canon 3-A(7B) accepted by the same Supreme Court order, places the same restrictions on the televising, recording, broadcasting or photographing of appellate proceedings.

In accordance with Canon 3-A(7) and 3-A(7A), several plans have been submitted to Alabama courts. The first was the Mobile Plan approved by the Alabama Supreme Court on July 28, 1976. This plan is more restrictive than required by the Alabama Canon. It requires the consent of witnesses and jurors in addition to the prosecutor and defendants. It further prohibits televising or broadcasting in such a way that any member of the jury might be identified. Another more stringent safeguard prohibits pre-verdict interviews of jurors, witnesses or parties. The media is restricted by the requirement that it refrain from making speculative comments in its newscoverage of the proceedings. In more detail, the Mobile Plan discusses the type of electronic equipment to be used, along with its positioning in the courtroom, and provides consent forms for the media to supply to the participants in the trial. Because of the stringent requirements, few cases have been broadcast under this plan.

The few cases which have met the test to be televised under the Mobile Plan have been successful. Speaking before the Northeast

LAW 10 (1976). See also Roberts and Goodwin, *supra* note 158, an excellent and thorough article on the status of Alabama's experience with cameras in the courts up through 1976.

Broadcast News Association, Circuit Court Judge Robert Hodnette, Jr. complimented the conduct of all trial participants in his courtroom stating that public reaction was extremely favorable and that he felt camera coverage made judges, prosecutor and defense lawyers more responsible.¹⁶¹

A second plan approved by the Alabama Supreme Court in 1976 provides for supreme court proceedings to be televised, broadcast or recorded as per the provisions of Canon 3-A(7B) which applies to appellate proceedings. This plan sets forth in detail guidelines as to how much and what type of equipment may be used, along with positioning of reporters and their equipment in the courtroom. It further requires written consent by the attorneys and the parties. Moreover, electronic coverage may be stopped at any time by the objection of a witness, a parent or guardian of a testifying witness, an attorney, judge, or party who express an objection to the photographing and recording. Consent request forms for the media are provided in the order. The court makes note of Disciplinary Rule 7-107 of the Code of Professional Responsibility of the Alabama State Bar which covers the conduct of attorneys as to pretrial publicity.

The third plan approved by the Alabama Supreme Court provides for media coverage of the Fifteenth Judicial Circuit in the Montgomery County area. This plan is similar to the other two Alabama plans and provides for pooling of media resources with written requests made to the trial judge and the attorneys and parties involved. The press coverage may be terminated by the objections of the judge or any testifying witness. No video coverage of the jurors is allowed. One major difference from the other Alabama plans is that the reports of a grand jury may be covered under this plan if the district attorney and members of the grand jury give their consent.

A comparison of the Alabama and Colorado plans reveals that the Colorado scheme provides only a general set of guidelines for the press to follow, while the detailed Alabama standards provide an exacting outline so the press knows precisely what is expected and allowed. The rigid consent requirements indicate that the Alabama Supreme Court may be giving with one hand and immediately taking away with the other. The final result is not far removed from the American Bar Association's Canon 3-A(7) which prohibits electronic coverage of court proceedings. It must be granted that the Alabama guidelines are a major

161. "Television Gains in Courtroom Access," *THE QUILL*, 7 (May 1977).

step toward broadcast media's access to the courts, but a more liberal ruling would more effectively serve the present need.

*Washington*¹⁶²

A bench, bar and press committee recommended an amendment to the Washington Judicial Canon 3-A(7) to allow electronic coverage of court proceedings. The change, adopted July 23, 1976 by the State Supreme Court and made effective September 20, 1976, requires the media to procure express permission from the trial judge. Further, the media must insure there will be no distractions of the participants nor impairments of the proceedings. One specific sanction is that no witness, juror or party should be photographed or subjected to telecasts if any prior objection is raised to the judge. Published along with the amendments are illustrative guidelines for both the broadcast and print media. These guidelines were not adopted by the court and are merely advisory in nature. They establish a procedure for the pooling of press equipment and the bailiff serving as liason between the judge and the press. The Washington Canon was designed to provide a workable method of electronic media coverage of court proceedings. The entire plan, as Washington Chief Justice Charles F. Stafford points out, will still "be a matter of discretion for the individual trial judge."¹⁶³

*Georgia*¹⁶⁴

Similar to Alabama's statute on cameras in the courts, Georgia's

162. Washington Canon of Judicial Conduct No. 3(A)(7) as amended July 23, 1976, effective September 20, 1976. Includes illustrative broadcast guidelines. The petitions, orders and proposed guidelines may be obtained from the Washington Supreme Court. A copy is kept on permanent file at the office of the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. See also note 157 *supra*.

163. *Washington Permits Cameras in Courtroom*, 62 ABA J. 1416 (November 1976).

164. Order of the Supreme Court of Georgia Authorizing the Use of Electronic Media Equipment in the Georgia Supreme Court. Order dated September 1, 1977. Petition for and Approval of, a Plan For News Media Coverage in the Superior Court Courtrooms of the Dougherty Judicial Circuit of Georgia. Order dated October 7, 1977. Petition For and Approval of, a Plan For News Media Coverage in the Superior Court Courtrooms of the Chattahoochee Judicial Circuit of Georgia, Order dated October 20, 1977. The petitions, order and plans can be obtained from the Georgia Supreme Court. Copies are kept on permanent file in the office of the Nova Law Journal, Nova Univer-

Supreme Court has approved three plans for electronic coverage of such proceedings. The three plans were made possible by an amendment to Judicial Canon 3-A which added 3-A(8) authorizing the supreme court to allow televising, broadcasting, recording, filming and the taking of photographs of judicial proceedings in Georgia's courtrooms if submitted plans were approved by the supreme court and the respective trial judge. On September 1, 1977, the Georgia Supreme Court approved a plan, its first, based on recommendations of an advisory committee on news media to allow electronic coverage of its own supreme court proceedings. Following the lead of the three prior states in taking such steps, Georgia requires a timely request to the court, a guarantee that the dignity of the court not be impaired, the pooling of media resources and written consent from the attorneys and parties.

The second plan approved by the Georgia Supreme Court permits news photography and television and radio broadcasts of proceedings in a Superior Court of the Dougherty Judicial Circuit in the Albany area. It was the most detailed plan of its type in the country when approved. This plan, known as the Albany Plan, is as restrictive as Alabama's procedure in that it requires consent of the parties, their attorneys, and the witnesses as well as the judge. One aspect is somewhat less restrictive than Alabama's Plan in that, once consent is given, only the judge can halt the proceedings. A unique conclusion in the Albany Plan is paragraph 16: "reporters and technicians must keep in mind the most important factor in covering a court event is not getting the story, but preserving the dignity and decorum of the court."¹⁶⁵ Georgia's third plan for media coverage of courtroom proceedings applies to the Superior Courts of the Chattahoochee Judicial Circuit in the Columbus area. In effect, this plan approved October 20, 1977 is the same as the one approved for the Dougherty Circuit. The Georgia rules allowing cameras in its appellate courts are precisely detailed. While the plans adopted in Georgia express a more commendable flexibility than is found in the Alabama plans, the rigidity of the consent requirement may prove to hinder and devalue the overall merits of Georgia's guidelines for electronic coverage of its court proceedings.

sity, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. See also note 157 *supra*.

165. Plan for News Media Coverage in Dougherty Superior Courtroom, Dougherty County, Georgia (approved October 7, 1977), paragraph 16.

*Wisconsin*¹⁶⁶

The Wisconsin Supreme Court has superseded Rule Fourteen of its Code of Judicial Ethics for a one-year experimental period of cameras in its courts which began April 1, 1978. Standards of conduct to be followed by the Wisconsin Supreme Court were approved during March of 1978. The experiment, which will be monitored by a court-appointed committee representing the press, bar and public, permits the use of audio and visual equipment in the courtroom at the discretion of the presiding judge. Similar to the plans in the four states previously discussed, the ruling requires pooling of media equipment and personnel, and restricts their number and positioning in the courtroom.

There are three distinctions in the Wisconsin Plan which the previous plans of its general type have not provided. First, there is a requirement that a media coordinator be chosen by the press in each administrative district to work with the judge in implementing the standards. Secondly, the guidelines expressly state that any audio or visual reproduction made of any proceedings are inadmissible as evidence. Thirdly, the standards state that "the presiding judge may for cause prohibit photographing of a participant with a film, video tape or still camera on the judge's own motion or the request of a participant in the court proceedings."¹⁶⁷ The third distinction appears more judicially provident than its counterpart in the Georgia and Alabama orders in that the latter allows any party to the proceedings to object and thus halt the electronic coverage at any time because of a change of mind as to the advisability of it. Letting the presiding judge make a for cause determination on the objections to specific media coverage seems the most fair and desirable way to handle such problems. The Wisconsin media coverage plan has recently gone into effect and its actual utility is not yet proven.

166. Order of the Supreme Court of Wisconsin in re the Code of Judicial Ethics. Order dated March 16, 1978. Includes Standards of Conduct Governing Use of Audio or Visual Equipment in Courtrooms for the period April 1, 1978 through March 31, 1979. The petitions and orders may be obtained from the Wisconsin Supreme Court. Copies are kept on permanent file at the office of the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314.

167. *Id.*

*Florida*¹⁶⁸

After two years of petitions, requests and hearings, the Supreme Court of Florida agreed to the televising of one criminal and one civil trial as a basis for making a decision in modifying Canon 3-A(7) of the Florida Judicial Code. This prospective test failed to occur because of a full consent requirement placed on all parties. No cases were found in which all witnesses would consent to electronic coverage prior to the April 1, 1977 deadline which had been set by the court.¹⁶⁹ Still determined to make a complete investigation on electronic coverage of court proceedings before modifying Canon 3-A(7), the Florida Supreme Court established a pilot program to last one year,

during which the electronic media including still photography may televise and photograph, at their discretion, judicial proceedings, civil, criminal and appellate in all courts in the State of Florida, subject only to the prior adoption of standards with respect to the types of equipment, lighting, noise levels, camera placement, audio pick up and to the reasonable orders and discretions of the presiding judge in any such proceedings.¹⁷⁰

After rejecting the plan for the experimentation in only two judicial circuits in the state, the Florida Supreme Court approved guidelines meeting the above criteria in an opinion filed July 14, 1977. This opinion set the experiment to run from June 5, 1977 until June 30, 1978. At the end of the pilot program, "all media participants in the program and all parties hereto and all participating judges are requested to furnish the court a report of their experiments under the program so that the court can determine to what extent Canon 3-A(7) should be modified."¹⁷¹ The plan provided that no more than one portable camera be

168. Petition For and Approval of, a Plan to Change the Code of Judicial Conduct to Allow News Media Coverage in Courts in the State of Florida. Opinion of the Florida Supreme Court filed June 14, 1977. Report To The Supreme Court of Florida re: Conduct of Audio-visual Trial Coverage by Judge Paul Baker of the Eleventh Judicial Circuit Court of Florida, Criminal Division. Filed November, 1977. Copies of the petitions, order and report may be obtained from the Supreme Court of Florida. Copies are kept on permanent file at the office of the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. See also note 157 *supra*.

169. See Supplemental Interlocutory Decision of the Florida Supreme Court, In Re: Petition of Post-Newsweek Stations, Florida, Inc. for change in Code of Judicial Conduct. (Opinion filed April 7, 1977).

170. Opinion of the Supreme Court of Florida filed June 14, 1977.

171. *Id.*

used or trial proceedings and not more than two for appellate proceedings; each camera with only one camera person to operate it. One audio visual system using audio visual facilities already existing in the courtroom would be available. Further, no artificial lighting was to be utilized. The trial judge had the discretion to modify existing courtroom facilities to better accommodate the media if necessary. The appendix to the order designated specific types of cameras and recorders approved for their quietness and unobtrusiveness. Broadcasters were prohibited from moving around the courtroom, changing film or making other technical adjustments in the course of proceedings, except during recesses. No audio or video close-up coverage of attorneys conferring with their clients or with the judge was allowed. No interviews with anyone participating in a current trial were to be conducted in the courtroom or any adjacent area, such as in the hallways. Because of the experimental nature of this project, films, video tapes, still photographs and audio reproductions from earlier trials were not admissible as evidence in subsequent trials or appeals. Further, broadcasters and photographers could not appeal the trial judge's decision as to media coverage. The most notable aspect of the plan was that no consent was required for parties to the action or their attorneys before media coverage could occur. The decision of the Florida Supreme Court was unanimous in approving the plan. Justice J. Carlton concurred separately because he felt that the Florida Plan was still restrictive and that the standards created went further than necessary.

The first case to come under the pilot program was somewhat less than successful. The murder case of *Johnson v. Florida* occurred in the Tampa area in August of 1977. The state's witnesses were two felons in the State Department of Corrections and one felon under indictment. These witnesses refused to testify if they were to be photographed and televised for fear of reprisal in prison. Trial Judge Andrews ordered that there be no video coverage of these particular witnesses. Two reporters tried to photograph them and the judge ordered them from his courtroom. Despite this ominous beginning, Florida's experiment had far fewer problems than anticipated.¹⁷² The most publicized case to date is that of the *State of Florida v. Ronney Zamora*.¹⁷³ The Zamora trial was the first criminal trial to be fully covered by electronic media. The fifteen year old was tried for first degree murder for the slaying of his eighty-two year old neighbor. The trial created an unusual amount of

172. See note 125 *supra*.

173. See note 122 *supra*.

publicity and notoriety because of the unique defense raised by Zamora's attorney who argued that his client was addicted to television and acted as though insane through the influence of prolonged, intense, involuntary, subliminal television intoxication.¹⁷⁴

At the close of the one-year experiment admitting electronic media into the courtrooms in Florida, a survey of the attitudes of all those associated with such trials was taken by the Judicial Planning Coordination Unit Office of the State Courts Administrator of Florida.¹⁷⁵ The survey included questions concerning thoughts and reactions of jurors, attorneys, witnesses and court personnel to the experiment.¹⁷⁶ Responses were sought only from those persons who had participated in or were associated with trials that had electronic or still photography coverage.¹⁷⁷ Because of the format and length of the survey, it is impractical to publish the entire results herein. However, some of the main thrusts of the responses were reflected in the discussion of arguments for and against (*supra*) the use of electronic media in the courts. Overall, the trial participants favorably reacted to the experiment. The margin between the favorable and opposed responses was narrow.

174. *Id.*

175. A Sample Survey of the Attitudes of Individuals Associated With Trial Involving Electronic Media and Still Photography Coverage in Selected Florida Courts between July 5, 1977 and June 30, 1978.

176. Judges were not included because a survey of trial judges had previously been conducted by the Circuit Judges Conference.

177.	Number of Questionnaires Initially Mailed Out	Number of Questionnaires Undeliverable by Date Deadline
1. Witness	1,566	87
2. Attorney	236	4
3. Court Personnel	154	4
4. Juror	704	29

Number of Questionnaires returned by Date Deadline	Percentage Response
1. 654	44%
2. 150	65%
3. 108	72%
4. 437	65%

In the survey, "media" refers to any television, radio, newspaper or still photography. The groups sampled were attorneys, witnesses, jurors, and court personnel (baliffs, court clerks and court reporters).

*Nevada*¹⁷⁸

Canon 3-A(7) of the Nevada Code of Judicial Conduct allows electronic coverage of court proceedings at the trial judge's discretion as long as all parties, through their counsel, expressly waive objection and consent to the coverage. The first case authorized for electronic coverage was held November 7, 1977 at the City Hall Chambers in Las Vegas. There have been no reported complaints from parties or witnesses involved in televised trials under this plan.

*Louisiana*¹⁷⁹

In the spring of 1978, Louisiana sponsored a seminar to consider electronic coverage of court proceedings in that state.¹⁸⁰ People from all over the country who had been involved in prior similar experiments were invited to attend. The result of the study is a one-year pilot project allowing electronic coverage of court proceedings in Division B of the Ninth Judicial District for Rapides Parish. An advisory committee made up of press personnel and judicial administrators will supervise the project. The guidelines call for pooling of media personnel and resources, allowing only two film and two still cameras to be used in the courtroom at any one time. Equipment and personnel are to remain stationary in appointed areas of the room. The most significant requirement is that written permission of the parties and their counsel is re-

178. Order of the Supreme Court of Nevada Authorizing News Media Coverage of (a particular trial *Mangeris v. Gordon*) pursuant to Canon 3-A(7) of the Nevada Code of Judicial Conduct. Order filed November 3, 1977. Canon 3-A(7) of the Nevada Supreme Court Rules. Rule of the Nevada Judicial Department No. 1.220. Provision No. 178.604 of the regulation of Criminal Court proceedings in Nevada. Rule 12 of the General Rules of the U.S. District Court for Nevada. Copies of the petitions, orders and guidelines may be obtained from the Supreme Court of Nevada. Copies are kept on permanent file in the office of the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. *See also* note 157 *supra*.

179. Order of the Supreme Court of Louisiana approving a pilot project on camera and electronic coverage of court proceedings in Division B of the Ninth Judicial District Court for Rapides Parish, Louisiana. Plan adopted February 23, 1978. Copies of the petition and order may be obtained from the Louisiana Supreme Court. Copies are kept on permanent file in the office of the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314. *See also* note 157 *supra*.

180. *See* note 129 *supra*.

quired before any electronic media coverage can occur. In criminal cases, the victim and the district attorney must also consent. Louisiana's one-year project began February 23, 1978.

*Montana*¹⁸¹

After numerous meetings and discussions, the Supreme Court of Montana suspended Canon 35 of its State Judicial Code of Ethics which did not allow cameras in the courtroom. A revised Canon 35 established April 1, 1978 supersedes the former Canon 35 until further orders from the court. The Montana Supreme Court order provides an experimental period for operation of the new Canon which will last for two years after its inception on April 1, 1978. This revised Canon permits broadcasting, recording or photographing in any court of the State. No consent is required but the trial judge may, for good cause shown, prohibit such media activities in the courtroom. The illustrative guidelines for the media aim at unobtrusiveness and preservation of courtroom decorum. As in other states, there is a suggestion for the pooling of media equipment and personnel. The success of Montana's two-year experiment is still to be seen.

SUMMARY OF THE STATES' EXPERIMENTS

As of February 1, 1979, twenty-one states allow some form of electronic coverage of court proceedings, although this coverage is not expansive.¹⁸² It is suggested that this may be due to (1) the rigid consent

181. Order of the Supreme Court of Montana in the matter of Canon 35 of the Montana Canons of Judicial Ethics. Order dated February 3, 1978. Includes illustrative broadcast and print media guidelines. Copies of the petition, order and guidelines can be obtained from the Montana Supreme Court. Copies are kept on permanent file at the Nova Law Journal, Nova University, Center for the Study of Law, College Avenue, Fort Lauderdale, Florida 33314.

182. STATE COURTS ALLOWING
ELECTRONIC MEDIA IN
THE COURTROOM

State	Authority	Duration of Experiment	Effective date
Alabama	Supreme Court has authorized trial and appellate coverage		Feb. 1, 1978

Alaska	Supreme Court has authorized trial court coverage	1 year	Sept. 18, 1978
California	Judicial Council has authorized filming in selected courts	1 year	Dec. 2, 1978
Colorado	Judicial Canons permit coverage		
Florida	Supreme Court authorized filming in all courts—experiment completed	1 year	Feb. 27, 1956
Georgia	Supreme Court has authorized trial and appellate filming		May 12, 1977
Idaho	Supreme Court authorized 7 month experiment of Supreme Court proceedings only	7 months	Dec. 4, 1978
Louisiana	Supreme Court plan for the 9th Judicial District Court	1 year	Feb. 23, 1978
Minnesota	Supreme Court authorized filming of Supreme Court proceedings		Jan. 22, 1978
Montana	Supreme Court authorized trial and appellate coverage	2 years	Feb. 3, 1978
New Hampshire	Presiding Judge and Supreme Court may allow		Jan. 1, 1978
New Jersey	One day coverage of Supreme Court	1 day	Dec. 12, 1978
N. Carolina	Instructional purposes only		Sept. 23, 1973
N. Dakota	Supreme Court proceedings only	1 year	Feb. 1, 1978

requirements in some states or (2) the nature of court proceedings as undeterminable in length and of little interest to the general public. Moreover, extensive media coverage of trials would tie up media personnel for an extended time, creating additional expense. There have been no recent reports of the press creating "carnival atmospheres" as those found in *Sheppard* and *Estes*. In Florida, where the one-year plan is over, the supreme court is reviewing a statistical survey of the results. In Montana, the experiment is to run for two complete years. This may indicate a trend to expand the state experiments for a longer period of time. All sources indicate that further study and consideration are required.

Oklahoma	Trial Coverage only	1 year	Jan. 1, 1979
Tennessee	Interim Coverage only		May 24, 1978
Texas	Appellate Court only		Nov. 9, 1976
Washington	Trial and Appellate Courts		Sept. 20, 1976
Wisconsin	Trial and Appellate Courts	1 year	April 1, 1978

The authors wish to thank the National Center for State Court for much of the information in this chart.

Government Regulation of In Vitro Fertilization, Recombinant DNA and Cloning Biotechnologies: Where Powers End and Rights Begin

ANITA C. PORTE*

In this age of bureaucratic proliferation it is hard to imagine any aspect of our lives that is not somehow affected by government regulation. In particular realms, the power of the government to regulate is regarded not as an option but as a duty. The American legal system has traditionally held that the protection of the public health is one of the first duties of government,¹ and that there is no public policy more important than

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1. U.S. CONST., preamble, states: "We the People of the United States, in Order to . . . promote the general Welfare . . . do ordain and establish this Constitution for the United States of America." For a discussion of the government's responsibility to protect the public health, see Tobey, *Public Health and the Police Power*, 4 N.Y.U. L.REV. 126 (1927). The United States Supreme Court affirmed this tenet in *Powell v. Pennsylvania*, 127 U.S. 678 (1888). Subsequently, a number of cases from various jurisdictions have based their decisions on the premise that the protection of the public health is one of the first duties of government. See, e.g., *People v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (quarantine imposed by legislature held constitutional as an exercise of government's duty to preserve the public health); *Patrick v. Riley*, 209 Cal. 350, 287 P. 455 (1930) (Bovine Tuberculosis law is designed to promote the public health and is thus a matter on which the government is necessarily authorized to take action); *Central States Life Ins. Co. v. State*, 80 S.W.2d 628 (Ark. 1935) (since one of the first duties of government is the protection of the public health, funds set aside by legislature to promote the public health is a necessary expense of any government, and thus constitutional); *United States v. Darby*, 312 U.S. 100 (1941) (it is the duty of Congress to exclude from commerce articles which may be injurious to the public health or welfare); *Lewis Food Co. v. State Dept. of Public Health*, 110 Cal. App.2d 759, 243 P.2d 802 (1st DCA 1952) (statute regulating the sale of horse meat is a reasonable exercise of the government's duty to conserve the health of its citizens); *Yaworski v. Town of Canterbury*, 21 Conn. Supp. 347, 154 A.2d 758 (1959) (ordinances relating to garbage disposal are reasonable exercises of government's duty to safeguard the health of its people); *Ellis v. City of Grand Rapids*, 257 F. Supp. 564 (D.D.C. 1966) (renewal

the protection of citizens from practices which may injure their health.²

Historically, the promotion or protection of public health and safety has been a matter particularly for the state government.³ Where the federal government has acted to regulate a particular field of health and safety, a state or local government cannot act⁴ unless the state or local regulation is consistent with and does not invalidate any section of the federal law.⁵ If the federal government has not acted, the state is free to legislate regulations, for a state has broad power to make and enforce standards to promote the health of those within its borders.⁶

In the not too distant future, the promotion of the public health will take on added meanings. Members of the human race will have wide-

and expansion of medical care centers through urban renewal projects is a public service in accordance with the government's responsibility to protect the public health and welfare).

2. See, e.g., *State ex rel. Anderson v. Fadely*, 180 Kan.652, 308 P.2d 537 (1957) (statute authorizing allocations for the protection of persons and property from "extraordinary conditions" should be liberally construed, since no obligation of government is more important than the preservation of the public health); *Friedlander v. Cimino*, M.D., 385 F. Supp. 1357 (D. D.C. 1974), *rev'd on other grounds and remanded*, 520 F.2d 318 (2nd Cir. 1975) (proficiency testing programs for laboratories operated by nonphysicians are essential to protect the public health, which is the most important of all public policies).

3. *Tobey*, *supra* note 1. For cases, see, e.g., *In re Seiferth*, 137 N.Y.S.2d 35 (1955), *rev'd on other grounds*, 127 N.E.2d 820 (Ct. App. 1955) (Act ordering surgical care of neglected children is valid, since the state has an enormous interest in the physical and mental health of its inhabitants); *Borough of West Caldwell v. Borough of Caldwell*, 138 A.2d 402 (N.J. 1958) (the power of the state government to regulate and control public health and sanitation is an essential governmental function, and cannot be surrendered or impaired by contract).

4. For preemption provision, see *Chemical Specialties Mfrs. Ass'n., Inc. v. Lowery*, 452 F.2d 431 (2nd Cir. 1971) (because in enacting the Federal Hazardous Substances Act, Congress used the phrase "precautionary labeling" in preemption provision to refer to all labeling of hazardous substances covered by the Act, city regulations in question are inconsistent with FHSA, and thus preempted).

5. See, e.g., *Cohen v. Bredehoeft*, 290 F. Supp. 1001 (1968), *aff'd*, 402 F.2d 61 (5th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969) (city ordinance ordering the destruction of any fireworks within the city's jurisdiction is valid and enforceable where state and federal statutes do not restrict the power of home rule city to enact such ordinances).

6. See, e.g., *Barsky v. Board of Regents of University of State of New York*, N.Y., 347 U.S. 442 (1954) (New York State Education Law is not unconstitutional, as the state has broad power to protect the public health); *Stephens v. Dennis*, 293 F. Supp. 589 (D.D.C. 1968) (a state has broad power to protect the health of its citizens; including the plenary power to fix terms of admission into the practice of any profession concerned with health).

spread access to new technologies which will critically affect the public health and safety: the biotechnologies of in vitro fertilization,⁷ recombinant DNA,⁸ and cloning.⁹ Since the potential effects of these techniques could significantly transform our world and even life as we know it, the public policy decisions made regarding their use are of great importance.

The effects of these biotechnologies are frequently fantasized in a science-fiction like manner by the media and, as a result, are rarely examined in a rational, systematic manner. The constitutional basis and need for regulation in this field have been all but ignored. It is crucial, however, that the constitutional ramifications of these technologies be fully explored. Accordingly, it is the intent of the author to help fill this void by formulating a solid constitutional framework for assessing the implications of these three biotechnologies.

Part 1 focuses on the ninth amendment's guarantee of individual rights in this area and Part 2 addresses the issue of the extent to which the commerce clause can be invoked as a basis for government regulation. In Part 3 a model for making constitutional public policy decisions of a regulatory nature is proposed. Parts 4, 5 and 6 apply this model to the biotechnologies of in vitro fertilization, recombinant DNA and cloning, ultimately suggesting the extent to which government regulatory policy is necessary and proper in each field.

1. THE ROLE OF THE NINTH AMENDMENT

In matters of government regulation, the courts have assumed that the power to regulate lies somewhere, whether it be with the federal, state or local governments. This assumption has been based at least in part on the tenth amendment: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*"¹⁰

The widespread preoccupation with the power of the government to regulate has resulted in a failure to give the last words of the tenth

7. See text accompanying notes 93 through 96 *infra* for an explanation of this technique.

8. See text accompanying notes 119 through 134 *infra* for an explanation of this process.

9. See text accompanying notes 224 through 230 *infra* for an explanation of this technique.

10. U.S. CONST. amend. X.

amendment the attention they merit. The fact that this amendment reserves powers to the people themselves, as well as the states, has been largely ignored.¹¹

Furthermore, rights which preclude grants of power are also reserved to the people¹² in the ninth amendment of the Constitution: "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*"¹³

A. Historical Interpretations

Upon a preliminary reading, one might conclude that the ninth amendment is a fountainhead of rights.¹⁴ Instead, this single sentence has emerged over the years as a fountainhead of consternation and controversy, and widely varying theories of interpretation have been proposed.

Perhaps the predominant method of construing the ninth amendment has been simply to avoid it. Feelings of uncertainty regarding how to approach this cryptic amendment are common even among experts, such as Mr. Justice Jackson: "[T]he ninth amendment rights which are not to be disturbed . . . are still a mystery to me."¹⁵ Thus, rather than wander into this uncharted territory, many constitutional scholars have refrained from entering the mainstream of ninth amendment controversy.

A second theory of interpretation was highlighted in *Griswold v. Connecticut*,¹⁶ one of the few recent Supreme Court cases to deal with the ninth amendment issue.¹⁷ In his concurring opinion, Mr. Justice

11. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 INDIANA L.J. 309 (1936).

12. *Id.* at 309.

13. U.S. CONST. amend. IX.

14. Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U.CHI. L. REV. 814 (1966).

15. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT*, 74-75 (1955).

16. 381 U.S. 479 (1965).

17. Previous Supreme Court cases interpreting the ninth amendment are *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (the ninth amendment's insuring of rights retained by the people does not negate the government's constitutional authority to dispose of electric energy generated at the Wilson Dam); *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (the ninth amendment gives power companies no standing to object to TVA power activities); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding constitutionality of Hatch Act limitations

Goldberg concluded that the ninth amendment is only a rule of construction to apply to the Constitution as a whole. The Justice saw it as a guidepost, the sole purpose of which was to call the courts' attention to other portions of the Constitution, such as the due process clauses of the fifth and fourteenth amendments. While these selected portions might then be used as a vehicle for unenumerated rights, the Justice did not see the ninth amendment as a source of and vehicle for protecting unenumerated rights in itself.¹⁸

B. *A Positive Declaration of Unenumerated Rights*

Even proponents of the above theories admit that they do not help solve the problem of "where one draws the dividing line between . . . the rightful exercise of . . . powers and unconstitutional infringement of individual rights."¹⁹ This problem lies at the very heart of the philosophy of limited government and individual rights, as expressed in the Constitution.²⁰ Indeed, the fundamental theory of American government is founded upon the concepts of reserved rights and delegated powers.²¹ The ninth amendment of the Constitution refers to reserved rights, and the tenth amendment refers to delegated powers.

The fact that both these provisions were included in the Constitution and the fact that they were placed side by side in the Bill of Rights makes it evident that there was some distinction in the minds of the framers between declaration of right and limitations on power.²² If this had not been the case, the limitations of power and reservations of rights contained in the body of the Constitution, taken along with the tenth

on federal employees' political activities against ninth amendment claims); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity is not protected through ninth amendment rights).

18. Since the *Griswold* decision, there has been a good deal of scholarly activity regarding ninth amendment theories and issues. See Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 172 (1966); Kitner, *Neglected Ninth Amendment: The Other Rights Retained by the People*, 51 MARQ. L. REV. 121 (1967); Comment, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP. L.Q. 46 (1968); Moore, *Ninth Amendment — Its Origins and Meaning*, 7 NEW ENGLAND L. REV. 215 (1972); Rhoades, *Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut*, 50 DENVER L.J. 153 (1973); Towe, *Natural Law and the Ninth Amendment*, 2 PEPPERDINE L. REV. 270 (1975).

19. Kelley, *supra* note 14, at 834.

20. Kelsey, *supra* note 11, at 309.

21. *Id.* at 310.

22. *Id.*

amendment reservation of power to the states and to the people would have sufficed, and the ninth amendment would have been unnecessary.²³

Thus, the ninth amendment cannot simply be ignored. It has been held that, when interpreting the Constitution, no section, sentence or even word is unnecessary.²⁴ No word was included needlessly, and subsequently nothing in the Constitution can be held to be superfluous.²⁵

It is inconsistent with such a holding that the ninth amendment could be viewed as a mere rule of construction, a guidepost pointing to other sections of the Constitution, as Mr. Justice Goldberg maintained in *Griswold v. Connecticut*.²⁶ Rather, “[i]t must be a positive declaration of existing through unnamed rights, which may be vindicated under the authority of the amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of ‘unenumerated rights.’”²⁷

The theory that the ninth amendment is indeed a positive declaration of rights is not a new one. Mr. Justice Story said of the ninth amendment:

This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others²⁸ . . . a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.²⁹

C. Finding the Unenumerated Rights

The rights enumerated in the Constitution³⁰ constitute an impos-

23. *Id.*

24. *Id.*

25. *Id.* at 323.

26. 381 U.S. 479 (1965).

27. Kelsey, *supra* note 11, at 323.

28. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. II, 623-27 (1833).

29. *Id.* at 626, §1867.

30. The enumerated rights include: freedom of speech, religion, the press, assemblage, petition (amend. I); to keep and bear arms (amend. II) on quartering troops (amend. III); from search and seizure (amend. IV); of presentment and indictment, against double jeopardy, against self-incrimination, against deprivation of life, liberty

ing catalogue of human rights.³¹ The positive declaration theory of interpreting the ninth amendment asserts that rights enumerated in the Constitution by means of guarantee, limitation or prohibition do not preclude the existence of other rights retained by the people. With this rule of construction in mind, it is necessary to operate under the assumption that, in the minds of the framers, other non-enumerated rights did exist. The next question is how to determine what these rights are.

(1) INTENT OF THE FRAMERS

One method of determining the unenumerated rights protected by the ninth amendment is to consult the several documentations of the basic human values and liberties that were most likely among those cherished by the framers of the Constitution.³² Perhaps these rights were best expressed and most familiar to the framers and colonists alike in Blackstone's Commentaries, nearly as many copies of which were sold in the colonies as in England.³³ Blackstone classified the natural rights of human beings under three categories: (I) Personal Security, (II) Personal Liberty and (III) Private Property.³⁴ To these, Blackstone's American counterpart Chancellor Kent added the American contribution of (IV) Religious Freedom.³⁵

Two rights cherished by the framers are crucial in formulating regulatory policy. One of the rights most important to the framers was the right of the people to have a government which functions in the public interest and for the common good.³⁶ Statements to this effect

or property, against taking of property, (amend. V); for fair and speedy criminal trials (amend. VI); for jury trials in civil suits at common law (amend. VII); against excessive bail, against cruel and unusual punishments (amend. VIII); against abridgement of privileges and immunities, deprivation of life, liberty or property without due process of law, for equal protection of the law (amend. XIV); against denial of suffrage (amends. XV, XIX, XXIV and XXVI); limitations on taxation (art. I, sec. 8, cl. 1 and art. I, sec. 9, cl. 4 and 5); limitations on suspension of the writ of habeas corpus (art. I, sec. 9, cl. 2); freedom from bills of attainder, ex post facto laws, laws impairing the obligation of contract (art. I, sec. 10, cl. 1); limitations on conviction of treason (art. III, sec. 3); prohibitions on corruption of blood or forfeiture (art. III, sec. 3, cl. 2); the guarantee of a republican form of government (art. IV, sec. 4).

31. Kelsey, *supra* note 11, at 312.

32. Paust, *Human Rights and the Ninth Amendment — A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975).

33. Kelsey, *supra* note 11, at 313.

34. W. BLACKSTONE, 1 COMMENTARIES OF THE LAW OF ENGLAND 129-45 (1884).

35. J. KENT, COMMENTARIES ON AMERICAN LAW (1858).

36. Call, *Federalism and the Ninth Amendment*, 64 DICKINSON L. REV. 122

were included in the constitutions of the various colonies.³⁷

In addition, the framers believed that each citizen had an equal political interest in all questions of public policy and that each had equal political rights, including access to the governmental process and the right to have a voice in its decision. This right has been expressed as the right of "access to a free and full shaping and sharing of power,"³⁸ and Thomas Paine regarded it as one of the foremost redeeming qualities of a representative democracy.³⁹ It follows that effective denial of the individual's right to political participation in governmental decision-making, resulting from deference to the minority views of special interest groups, is in itself a denial or disparagement by decisional bodies of the citizens' right to full participation in government—an "undue" process of law and government.⁴⁰

(2) JUDICIAL DETERMINATION

The second and perhaps best method of determining which enumerated rights are protected by the ninth amendment is the gradual process of judicial determination by inclusion and exclusion.⁴¹ Apart from *Griswold*, no case has decided the scope of the ninth amendment, even in part.⁴² Furthermore, no opinions have cited the ninth amendment as the basis for the assertion or vindication of a right.⁴³

However, certain rights have been confirmed or rejected on the basis of whether or not they are "natural rights." For example, the right to attend state educational institutions⁴⁴ and to serve as a juror⁴⁵ have

(1959). See also Declaration of Independence (1776); U.S. CONST. preamble.

37. E.g., The Constitution of Pennsylvania, as adopted on September 28, 1776 states: "All powers are inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. The community hath an indisputable, inalienable and indefensible right to reform, alter, or abolish governments, in such a manner as shall be, by that community, judged most productive to the common total. All officers of the government are their trustees and servants, and at all times accountable to them."

38. Paust, *supra* note 32, at 261.

39. See T. PAINE, 2 THE RIGHTS OF MAN 26 (1794).

40. Paust, *supra* note 32, at 261.

41. 16 AM. JUR.2D, *Constitutional Law*, §331 (1964). See also *In re Morgan*, 58 P. 1070 (Wash. 1899); *Blair v. Ridgely*, 41 Mo. 63 (1867).

42. See note 17 *supra*.

43. Kelsey, *supra* note 11, at 319.

44. *Board of Trustees of University of Mississippi v. Waugh*, 62 So. 827 (Miss. 1913), *aff'd*, 237 U.S. 589 (1915).

45. *People ex. rel. Murray v. Holmes*, 341 Ill. 23, 173 N.E. 145 (1930).

been found not to be natural rights, but rather gifts of our civilization and the legislature. Rights judged to be natural and inherent include the right of a natural affection between parents and offspring,⁴⁶ the right to travel from state to state,⁴⁷ and the right to certain governmental services.⁴⁸

Two such natural rights are directly affected by government regulation of biotechnology. In dictum in *Griswold v. Connecticut*,⁴⁹ the Supreme Court suggested that the right of "freedom of inquiry" is a fundamental right within the penumbra of rights entitled to constitutional protection. This freedom, which scientists have struggled to achieve since the time of Galileo,⁵⁰ has been an important factor in the formulation of scientific policy.⁵¹

Another right which the courts have determined to be natural and constitutional is the right to beget children.⁵² Although this right was upheld over fifty years ago in a lower court, the right has never been subsequently denied. If judicial determination was indeed to be employed as a means of designating protected ninth amendment rights, perhaps the United States Supreme Court should be viewed as the only court qualified to make such determinations. It must also be considered that predictions of an imminent population explosion might outweigh this right. Nonetheless, the right to beget children has at least been suggested to be a natural right protected by the ninth amendment. Accordingly, regulations burdening decisions to beget children may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.⁵³

46. *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922).

47. *Crandall v. Nevada*, 6 Wall 35 (1868).

48. *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See also* notes 77 through 85 and accompanying text *infra*.

49. 381 U.S. 479 (1965).

50. Lederberg, *The Freedoms and the Control of Science: Notes from the Ivory Tower*, 45 S.CAL. L. REV. 596-97 (1972).

51. 41 Fed. Reg. 27, 903 (1976). A central concern of the National Institutes of Health [NIH] was apparently whether or not the guidelines for recombinant DNA research "balanced scientific responsibility to the public with scientific freedom to pursue new knowledge."

52. *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925).

53. *Carey v. Population Services Intern.*, ____ U.S. ____, 97 S. Ct. 2010 (1977) (invalidating state ban on distribution of non-medical contraceptives except through licensed pharmacists).

2. THE REACH OF THE COMMERCE CLAUSE

Although widespread government regulation is an accepted reality, the constitutional basis for and limitations on the power of the government to regulate must be considered. The commerce clause⁵⁴ is the primary constitutional basis for regulation by the federal government in the areas of the environment and public health.⁵⁵ Congress could enact some regulations regarding the interstate shipment of materials pertaining to genetic activity, such as recombinant DNA materials, under the commerce clause.⁵⁶ The ultimate question is to what extent Congress can enact such regulations when they are held to conflict with constitutional rights of the people, especially when the activities in question are intrastate or privately sponsored.

A. The "Affecting Commerce" Standard

The interpretation of the commerce clause as originally articulated by Chief Justice Marshall in *Gibbons v. Ogden*⁵⁷ defined Congress' power as extending to "that commerce which concerns more states than one."⁵⁸ Supreme Court decisions of the late 1930's and early 1940's established that Congress had power under the commerce clause to regulate nearly all aspects of the interrelated American economy.⁵⁹ The courts have indicated that an activity "affects" interstate commerce, so as to be subject to federal regulation under the commerce clause,⁶⁰ as

54. The commerce clause states: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the Several States . . ." Art. I, sec. 8, cl. 3. See also Note, *Recombinant DNA and Technology Assessment*, 11 GEORGIA L.REV. 832 (1977).

55. See, e.g., Toxic Substance Control Act, 15 U.S.C. §2601 (Supp. Dec. 1976); Clean Air Act, 42 U.S.C. §1857 (1970); Federal Water Pollution Control Act, 33 U.S.C. §1251 (Supp. II 1972).

56. 41 Fed. Reg. 27, 914 (1976).

57. 22 U.S. (9 Wheat) 1, 194 (1829).

58. *Id.*; see also Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L.REV. 1335 (1934).

59. Stern, *The Commerce Clause Revisited — The Federalization of Intrastate Crime*, 15 ARIZ. L.REV. 271 (1973). For the story of how the Supreme Court arrived at this conclusion, see BENSON, *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970* (1970); TRIBE, *THE CONSTITUTIONAL STRUCTURE OF AMERICAN GOVERNMENT — SEPARATION AND DIVISION OF POWERS* (1978); Stern, *The Commerce Clause and the National Economy 1933-46*, 59 HARV. L. REV. 645, 883 (1946).

60. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

long as interstate commerce is a "practical" consequence of the activity.⁶¹

The "affecting commerce" rationale was construed so broadly as to subject seemingly all local activities to federal regulation. In *Wickard v. Filburn*⁶² the Supreme Court upheld Federal regulations of the production of wheat grown solely for home consumption on the grounds that such activity in the aggregate could affect the interstate market by depressing the farmer's demand for wheat or by ultimately being marketed itself.⁶³

The Court went even further in *Perez v. United States*,⁶⁴ where it upheld the application of a statute to a particular intrastate crime without requiring the government to demonstrate any interstate nexus. In this apparent extension of the *Wickard* principle, Mr. Justice Douglas stated, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise as trivial, individual instances of the class."⁶⁵

B. Regulations to Further Non-Economic Purposes

In recent cases, it has been shown that Congress may regulate interstate commerce for a variety of reasons, as long as the conditions themselves violate no other constitutional prohibition or grant of rights.⁶⁶ One permissible and especially potent form of federal regulation of commerce is the congressional imposition of "protective conditions" on the privilege of engaging in commerce. The intent of such regulations has been to combat activities disfavored by Congress for primarily non-commercial reasons. The Court has upheld the constitutionality of such legislation since it ruled that legislation banning the interstate transportation of lottery tickets was constitutional in the famous "Lottery Case" of *Champion v. Ames*.⁶⁷

61. 301 U.S. at 41-42.

62. 317 U.S. 111 (1942).

63. *Id.* at 127-29.

64. 402 U.S. 146 (1971).

65. *Id.* at 152, 154.

66. *TRIBE, supra* note 59, at 238.

67. 188 U.S. 321 (1903). In the single case of *Hammer v. Dagenhart*, 247 U.S. 251 (1903) the Supreme Court reversed itself in holding that Congress could not prohibit interstate commerce in the products of child labor, since it involved regulating production by standardizing the ages at which children could be lawfully employed, rather than regulating interstate transportation. Apart from this isolated instance, the Supreme

The significant challenges in recent years to the exercise of the federal commerce power have dealt with its application for non-economic purposes. The public accommodation act of the Civil Rights Act of 1964⁶⁸ prohibited racial discrimination by hotels, restaurants or other establishments receiving transients or interstate travelers.⁶⁹ Obviously, this Act was directed at practices especially prevalent in the Southern states, which substantially handicapped and inhibited the interstate movement of many persons, primarily blacks.⁷⁰

In *Heart of Atlanta Motel, Inc. v. United States*,⁷¹ the Supreme Court upheld Congress' power, exercised in Title II of the Civil Rights Act of 1964, to prohibit racial discrimination in places of public accommodation on the grounds that Congress had a rational basis for finding that racial discrimination by motels affected commerce, and that Congress had selected a reasonable and appropriate means to eliminate this evil.⁷² Similarly, in *Katzenbach v. McClung*,⁷³ the Court upheld the Civil Rights Act's extension of the prohibition to all restaurants serving food which had moved in interstate commerce, since the restaurant, due to its failure to serve blacks, was either subject to federal regulation of all of its practices, or would reduce the amount of food moving in commerce.⁷⁴

In these cases the Court reaffirmed current commerce clause doctrines. First, the slightest interstate connection can provide an adequate

Court has upheld such congressional regulations to impose "Protective conditions" on the activities of interstate commerce. See *Hypolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Hale v. United States*, 227 U.S. 308 (1913); *Brooks v. United States*, 267 U.S. 432 (1925) and *United States v. Darby*, 312 U.S. 100 (1941). Here the Court stated its philosophy regarding cases of this nature: "Congress . . . is free to exclude from [such] commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare. . . ." According to Charles Black, the constitutionality of Title II of the Civil Rights Act of 1964 could have been more straight-forwardly justified along the lines of this "protective principle" in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). See BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW*, 55-57 (1969).

68. 42 U.S.C. §2000(a) *et seq.* (1970).

69. *Id.* at §§ 2000(a), (b)(1), (c).

70. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 254-58.

71. *Id.*

72. *Id.*

73. 379 U.S. 294 (1964).

74. Stern, *The Commerce Clause Revisited — The Federalization of Intrastate Crime*, *supra* note 59, at 272.

basis even for federal commerce regulations which serve a non-economic purpose.⁷⁵ Second, Congress has the power to regulate acts which in isolation have no significant effect on interstate commerce but are part of a class which as a whole could be said to have such an effect.⁷⁶

C. *A Less Expansive Interpretation*

For the first time since *Wickard*, the Supreme Court has retreated from its expansive interpretation of Congress' power under the commerce clause in a case which is one of the Court's major federalism decisions of the post-1937 era.⁷⁷ In the 1976 case of *National League of Cities v. Usery*,⁷⁸ the Court invalidated the 1974 amendments to the Fair Labor Standards Act which had extended federal maximum hour and minimum wage provisions to all state and municipal employees,⁷⁹ thus holding a congressional regulation of commerce to be an unconstitutional intrusion upon the sovereignty of state and local governments for the first time in forty years.⁸⁰

While the Court's decision in *National League of Cities* that Congress had violated state sovereignty came as a surprise to some, the Court had recently handed down numerous decisions protecting rights of states in the federal system.⁸¹ Yet, this very familiarity of the federalism theme poses the danger that the decision will be read as a general

75. *Id.*

76. 379 U.S. at 300-301.

77. *TRIBE*, *supra* note 59, at 236.

78. 426 U.S. 833 (1976).

79. Pub. L. No. 93-259, §§6(a)(1), (5), (6); 88 Stat. 58 (1974), codified at 29 U.S.C. §§203(d), (s), (x).

80. The latest such holding was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

81. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (absent bad faith or extraordinary circumstances, federal court is precluded from enjoining pending state criminal prosecution by considerations of equity, comity, and federalism); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (holding there is no equitable relief against state criminal magistrate and judge for alleged practice of discriminatory bond setting and sentencing); *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment prevents liability for damages payable from state treasury); *Fry v. United States*, 421 U.S. 542 (1975) (holding that Congress may not exercise power in a way that impairs the states' integrity or their ability to function effectively in a federal system); *Rizzo v. Goode*, 423 U.S. 362 (1976) (federal court may not order structural changes in police departments which have invaded constitutional rights unless high-level official encouragement of such misconduct is shown); *Paul v. Davis*, 424 U.S. 693 (1976) (restricting range of property and liberty interests protected by the fourteenth amendment).

vindication of the autonomy of states and municipalities to the detriment of individual rights.⁸² If the case is regarded as such, problematic distinctions arise in the majority opinion of Justice Rehnquist. For example, it seems that the Court is anomalously asserting that Congress retains the power to strike down state regulation of private conduct, but does not possess the same power to control the regulation of state employees.⁸³ Furthermore, this decision and others⁸⁴ make a problematic distinction between federal legislation regulating commerce, and similar legislation enforcing rights under section 5 of the fourteenth amendment.⁸⁵

(1) THE THEORY

Professor Tribe has suggested an alternative interpretation of *National League of Cities* which resolves the conflicting priorities of the decision without doing violence to the Court's established notions both of federalism and of the judicial accommodation of conflicting values.⁸⁶ He sees the decision as one based on the protection of individual rights, in this instance, the right to basic government services.⁸⁷ Basically, the argument is that policy-based congressional legislation which threatens the provision of vital services is unlike similar legislation directed at private parties in that it presents the constitutional problem of endangering efforts by state and local governments to meet their citizens' legiti-

82. For an analysis of the decision as imposing limitation on the congressional power under the commerce clause by asserting the rights of the states under the tenth amendment, see Comment, *Constitutional Implications of a Federal Collective Bargaining Law for State and Local Government Employees*, 11 CREIGHTON L. REV. 863 (1978).

83. TRIBE, *supra* note 59, at 312.

84. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (application to state employees of a federal antidiscrimination statute sustained as an exercise of Congress' power under section 5 of the fourteenth amendment).

85. TRIBE, *supra* note 59, at 313.

86. *Id.* at 314. See also Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977).

87. TRIBE, *supra* note 59, at 313. Tribe's theory has not achieved widespread support, a fact which he anticipated: "That the account suggested here is unconventional seems clear enough . . . others will surely seek to defend *National League of Cities* in terms that focus on state autonomy as such, paying only secondary attention to the underlying concern for adequate provision of essential services . . . Doubling . . . such an explanation, I have relied upon my own quite speculative thesis."

mate expectations of basic government services. The language of Justice Rehnquist could well be read to assert such a theory:

Even if we accept [the Federal Government's] assessments concerning the impact of the [wage and hour regulations], their application will nonetheless significantly alter or displace the states' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments . . . Indeed, it is functions such as these which governments are created to provide, such services as these which the states have traditionally afforded their citizens.⁸⁸

If such individual rights against the government for basic services do exist, there must be a means to enforce these rights. *National League of Cities* could be seen as the precedent for enforcing individual rights against the government for certain basic services in areas where the federal government has left to the states and localities the responsibility of providing these services.⁸⁹

(2) RAMIFICATIONS OF THE THEORY

The recognition of rights of individuals to basic governmental services is a two-edged sword. In instances where, due to the national character or other aspects of the problem, congressional action results in a lesser degree of restriction on individual rights than state action, the congressional action would prevail.⁹⁰ Thus, this decision does not propose a wholesale reallocation of powers in our federal system in favor of state and local government. As long as congressional legislation reflects a compelling government interest and does not jeopardize individual rights, the courts should not be expected to object. The crucial point is that, barring overriding governmental concerns,⁹¹ the courts must

88. 426 U.S. at 851. For an analysis dealing with this aspect of the case, see Michelman, *States Rights and States' Roles: The Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

89. TRIBE, *supra* note 59, at 315.

90. *Id.* at 316-17.

91. In *National League of Cities*, Justice Rehnquist distinguished *Fry v. United States*, 421 U.S. 542 (1975), where the Court upheld the application of the national wage freeze to state and local employees. He noted the emergency character of the legislation and the national scope of the problem. Furthermore, the federal action resulted in reducing rather than increasing the burden upon state budgets, thus enhancing the ability of the state and local governments to provide basic governmental services.

insure a "necessarily over inclusive protection of individual rights."⁹²

In summary, the Court's decision in *National League of Cities* asserts two principles of particular relevance to determining the constitutionality of government regulation. The Court did not question the fact that the amendments to the Fair Labor Standards Act were "undoubtedly within the scope of the commerce clause,"⁹³ but rather objected to the legislation on the ground that it deprived the states of the sovereignty necessary to insure individual rights to basic governmental services. Thus, the first principle is that, if federal government regulation imposed via the commerce clause unduly risks infringement of affirmative individual rights, Congress must justify actions which would otherwise clearly be within its powers.⁹⁴ Second, the courts are obliged to insure a necessarily overinclusive protection of individual rights and, when conflicts arise, defer to either the federal or state and local actions by determining which of the two infringes least on the exercise of legitimate individual rights.⁹⁵

3. THE MODEL AND ITS RATIONALE

The following pages will discuss whether and the extent to which research and application of the technologies of in vitro fertilization, recombinant DNA, and cloning should be regulated by the government. In the past, it has been widely assumed that the government had the power and even the duty to regulate such areas. The power was seen as arising from the Court's interpretation of the commerce clause as allowing Congress to legislate to further its non-economic purposes via the imposition of protective conditions on the privilege of engaging in any activity seen to affect commerce. Furthermore, the promulgation of regulations to protect the public health has traditionally been seen as a foremost duty of both state and federal governments.

However, the Court's recent construction of the commerce clause in *National League of Cities*, viewed in conjunction with the positive declaration of unenumerated rights theory of the ninth amendment, provides grounds for the formulation of a new approach to government regulation in these areas. I have combined these two themes to derive the following model, which serves as the guidepost to the central theme

92. TRIBE, *supra* note 59, at 316-17.

93. 426 U.S. at 841.

94. TRIBE, *supra* note 59, at 316.

95. *Id.*

of the later sections of this article: *Although the government might technically have the power to regulate in a given area under the commerce clause, if such regulation threatens to infringe upon enumerated rights, or unenumerated rights protected by the ninth amendment, the government must insure a necessarily overinclusive protection of these rights, and must prove that there is a compelling need for the regulation which justifies the infringement of these rights.*

To determine whether the present extent of regulation imposed on the research and application of in vitro fertilization, recombinant DNA, and cloning is appropriate and, if not, to suggest an alternative, both the compelling need for government regulation under the commerce clause, and the individual ninth amendment rights which such regulation would threaten, will be assessed in each respective field.

Four basic regulatory options with respect to the use of these technologies will be considered:⁹⁶

(1) *No regulation/Marketplace* - Decisions made by individuals. Physicians inform persons what can or should be done in a particular case, and individuals make their decisions based on this information.

(2) *Decisions Made by the Medical Community* - Such as medical associations or quasi-public bodies like the National Institutes of Health. While such pronouncements are not legally binding, they have great moral force and can effectively resolve issues which would otherwise be settled in court or by formal regulation.

(3) *Judge-Made Law* - Legal standards relating to the use of genetic technology will eventually emerge as people seek legal remedy for the consequences of such activities. The first such cases will be decided by reference to precedents involving general medical procedures and other relevant precedents. Eventually, however, a body of judge-made laws pertaining specifically to genetic technology will evolve.

(4) *Direct Legislation* - Made either by legislative bodies or by regulatory agencies to which the legislature delegates the authority to regulate.

There are three assumptions implicit in the following analysis. The first is that the unenumerated rights mentioned in Part 1 as being implicit in and protected by the ninth amendment merit the same protec-

96. The following four options are taken from Green, *Law and Policy for the Brave New World*, 48 INDIANA L. J. 559, 572-74 (1973) and TRIBE, CHANNELLING TECHNOLOGY THROUGH LAW 52-60 (1973). Professor Tribe theorized that technologies which meet with public approval will be encouraged by increased public consumption, while those rejected will be limited or eliminated by lack of demand.

tion as rights expressly enumerated in the Constitution. The unenumerated rights considered in this article are: (1) The right of the people to have a government which functions in the public interest and for the common good; (2) The right to full participation in government and access to a free and full shaping and sharing of power through participation in the governmental decision-making process, unencumbered by undue deference to minority views or special interest groups; (3) The right to freedom of inquiry; and (4) the right to beget children.

Second, Professor Tribe's interpretation of the commerce clause as seen through the *National League of Cities* decision is regarded as the status quo. In other words, if federal regulations imposed via the commerce clause infringe upon the rights of individuals, the regulations can be justified only by demonstrating a compelling need for the regulations.

The third and perhaps most crucial premise from which the following conclusions are drawn is *that governs best which governs least*. Government is created to serve the people, rather than for the people to serve government. Regulations are not an end in themselves, and should be imposed only when necessary to protect the exercise of vital individual rights. Thus, regulations should never impose more restrictions on the exercise of rights than would be the case in their absence.

4. IN VITRO FERTILIZATION

With the birth of Louise Brown on July 25, 1978,⁹⁷ the prospect of successful in vitro fertilization has become a reality. The process involved in vitro fertilization is conceptually straightforward.⁹⁸ Ripe eggs are removed from the female's ovary through an incision in the abdominal wall and placed in a glass "petri" dish containing blood serum and nutrients. Sperm cells from the male, which have been prepared for fertilization, are added to the petri dish and, within a few hours, fertilization occurs. The fertilized egg divides for between two and six days until it is approximately a 100-celled embryo called a blastocyst. The blastocyst then is placed in the women's uterus where, if all goes well,

97. *Test-Tube Baby: It's a Girl*, TIME, August 7, 1978 at 68. Since the Brown baby, there have been other reported test-tube births. See, e.g., "Test-Tube Baby" Born in India, Facts on File, October 27, 1978 at 824.

98. For detailed descriptions comprehensible to the lay person, see *In Vitro Fertilization: Is it Safe and Repeatable?* 201 SCIENCE 698 (1978); *The First Test-Tube Baby*, TIME, July 31, 1978 at 58. See also Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?* 285 N.E.J. MED. 1174 (1971).

it attaches to the uterus wall and normal embryo development and birth result.⁹⁹

The potential benefits of this technique, if perfected, are significant, since it provides a means whereby women who are infertile due to fallopian tube disorders can have children.¹⁰⁰ In addition, Dr. Carl Pauerstein of the University of Texas states that in vitro research "has the potential for adding greatly to the knowledge of the reproductive biology of our species."¹⁰¹

A. Existing Government Regulation

The government has felt that the risks involved in the process outweigh its advantages, and has imposed an unofficial federal moratorium which has halted all United States research involving in vitro fertilization in humans as of 1975.¹⁰² In a 1975 federal order, the Department of Health, Education and Welfare was barred from funding any in vitro fertilization¹⁰³ experiments unless they were first approved by the National Ethics Advisory Board appointed by the Secretary of HEW.¹⁰⁴

Perhaps due to its controversial nature, this panel was not formed until January of 1978, and did not meet to begin deciding whether or not to recommend that the moratorium be lifted until the following September. Strong opposition to federal financing of in vitro research has surfaced at regional hearings of the Board, although a final determination has not yet been made.¹⁰⁵ In the face of such delays, scientists such as Joseph D. Schulman of the National Institute of Child Health and Human Development lament that, "for every year that we wait,

99. This scenario is taken from the sources *supra* note 98. Since the birth of Louise Brown, Dr. Patrick Steptoe claims to have improved the technique of test tube fertilization and implantation. See *Gain Claimed in Test Tube Baby Method*, *The New York Times*, Dec. 2, 1978, section C at 6.

100. Green, *Law and Policy for the Brave New World*, 48 *INDIANA L. J.* at 562 (1973).

101. *The First Test-Tube Baby*, *supra* note 98, at 59.

102. *Id.* at 62.

103. Private foundations have also hesitated to fund such experiments in the United States. Ironically, America's own Ford Foundation pays the salary through endowment of Robert Edwards, the physiologist responsible for the birth of Louise Brown. See *In Vitro Fertilization: Is it Safe and Repeatable?* *supra* note 98, at 699.

104. *The First Test-Tube Baby*, *supra* note 98, at 62.

105. *In Vitro Fertilization: Is it Safe and Repeatable?* *supra* note 98, at 699. For a report of testimony at one such regional hearing, see *Testimony Opposes Test-Tube Baby Funds*, *The Kansas City Times*, Dec. 5, 1978 at 1.

thousands of infertile American women will, because of their ages, lose forever their opportunity to have children.”¹⁰⁶

*B. The Compelling Need for Government Regulation
Under the Commerce Clause*

The government and others opposed to in vitro research see basically three potential dangers. First, there is the medical danger that the process would result in abnormal babies.¹⁰⁷ As Dr. John Marshall, head of obstetrics and gynecology at Los Angeles County’s Harbor General Hospital puts it, “the potential for misadventure is unlimited . . . What if we got an otherwise perfectly formed individual that was a cyclops?”¹⁰⁸

The vast preponderance of research and expert opinions suggest that these fears of biological disaster are totally unfounded. According to Schulman, “there are no data to support the hypothetical fears that in vitro fertilization will lead to abnormal babies.”¹⁰⁹ Schulman points out that, in the course of the substantial amount of work that has been done with animals ranging from mice to sheep, pigs, horses and cows, there has been no confirmed evidence that in vitro fertilization leads to genetic or morphological abnormalities in the offspring of any species.

Furthermore, these pre-implantation embryos are remarkably resistant to manipulation, and may even be fused or frozen and still result in normal offspring.¹¹⁰ Perhaps the ultimate evidence of the process’ safety was the birth of normal, healthy Louise Brown, the first “test-tube” baby.

Schulman also contends that, even if there is a risk of abnormality, the decision to have a child should be left to the prospective parents, as is the customary procedure in the medical profession when similar risks are involved.¹¹¹ For example, if one or both parents are thought to carry traits of various genetic diseases, such as hemophilia or sickle cell anemia, the couple is not told that they cannot have children. Rather, they are often encouraged to undergo genetic counseling and to assess the

106. *Id.* For federal legislation regarding this technology, see National Research Act, Pub. L. No. 93-348 (1974); Part 46 of 45 C.F.R. subtitle A and amendments in 43, No. 7 Fed. Reg. 1759 (1978).

107. *In Vitro Fertilization: Is It Safe and Repeatable?* *supra* note 98, at 699.

108. *The First Test-Tube Baby*, *supra* note 98, at 59.

109. *In Vitro Fertilization: Is It Safe and Repeatable?* *supra* note 98, at 699.

110. *Id.*

111. *Id.*

condition of the developing fetus through amniocentesis.¹¹² The ultimate decision is left to the parents. There is no reason why a similar procedure could and should not be used in cases of in vitro fertilization and embryo transplantation.

The second perceived need for government regulation stems from anticipated ethical problems feared to result from in vitro fertilization. In the words of Nobel Laureate James Watson, there is the potential for "all sorts of bad scenarios."¹¹³ Foremost is the question of the morality of this experiment, even with the informed consent of the parties involved, and the specter at the end of the road of maintaining a fetus in vitro to the point of birth.¹¹⁴ There is the possibility of surrogate motherhood, or "wombs for rent" in which a woman's egg would be fertilized and implanted in another woman for biological reasons, for the sake of convenience, or perhaps even without the consent or knowledge of the donors.¹¹⁵ Some fear that so-called "baby factories" could result in which people would be bred for specific desirable traits. Finally, if an embryo developing in vitro were to be terminated at the will of the donors, doctors or both, would this be regarded as murder if done beyond a certain stage of embryonic development?

Fears that such dangers would result from the application of in vitro technology, while commonly held, are largely unfounded. Use of the technology could be restricted to cases in which the donors are a married couple and the fetus is implanted in the uterus of the biological mother. Such situations would not be essentially different from ordinary biological parenthood.¹¹⁶ If in vitro fertilization and embryo transplantation involved using the sperm of a donor, the case would be similar to artificial insemination¹¹⁷ which has been used successfully and without significant controversy for a number of years.¹¹⁸

The chance that widespread human "breeding" would occur seems

112. The surgical procedure of inserting a hollow needle through the abdominal wall into the uterus of a pregnant woman and extracting amniotic fluid for analysis to determine the presence of disease, genetic defects, etc.

113. *The First Test-Tube Baby*, *supra* note 98, at 562-63.

114. Green, *supra* note 100, at 562-63.

115. *Id.*

116. Hudock, *Frankenstein is Still a Myth, But it Should be Read Periodically*, 48 INDIANA L. J. 553 (1973).

117. The impregnation of a female by artificial introduction of semen taken from a male.

118. Hudock, *supra* note 116, at 554; See also Sagall, *Artificial Insemination*, 9 TRIAL 59 (1973).

unlikely in view of the fact that, in the past, this has not been attempted by either artificial insemination or natural conception, except perhaps in isolated cases. Standards regarding the "killing" of embryos developing in vitro could be the same as those set for abortions.

Lest the possibility be overlooked, it should be mentioned that maintaining a fetus in vitro to the point of birth could prove to be highly beneficial, in terms of both convenience for the mother,¹¹⁹ and the provision of a controlled and risk-free artificial womb for the fetus.

The third feared danger of in vitro technology is that unmanageable legal complications would result. In the eyes of the law, would the child belong to the donor of the egg, or the surrogate who bears the child?¹²⁰ Who would be responsible for providing monetary support? In the case of death or deformity of the fetus, should responsibility lie with the biological parents, the surrogate mother, the doctor or perhaps even the government?¹²¹

The resolution of such legal questions should not be as difficult as it might first appear. In vitro fertilization and embryo transplantation would be performed only by qualified and licensed persons. Rights, responsibilities, and the potential liabilities of all involved could be contractually pre-determined before any action was taken.¹²² Thus, any legal controversy which arose could be resolved by customary means in the courts of law.

In conclusion, the case foreshowing a compelling need for government regulation of in vitro fertilization is negligible at best in terms of biological dangers, ethical controversies, and legal entanglements.

C. *Threatened Ninth Amendment Rights*

The constitutional rights of individuals which would potentially be infringed if in vitro fertilization was subjected to government regulation¹²³ are several. There is the right to freedom of scientific inquiry and research. Also affected is the right to beget children. The exercise of this right justifies the use of any means which does not subsequently infringe the rights of any other party. Such means might include the taking of fertility drugs, the use of artificial insemination, or application of the technology of in vitro fertilization.

Related is the right of the people to have a government which functions in the public interest and for the common good. It is in the

119. Hudock, *supra* note 116, at 555.

120. Green, *supra* note 100, at 562.

121. *The First Test Tube Baby*, *supra* note 98, at 59.

122. Hudock, *supra* note 116, at 553-55.

123. As has been the practical case since 1975.

common interest to have a government which does not infringe upon constitutional rights of individuals when compelling dangers are not at stake. Since the right to have children is a constitutional right, it is in the public interest to allow for the exercise of this right by artificial insemination, if necessary.

Finally, there is the right to full participation in and access to a free and full sharing of power and shaping of public policy unencumbered by undue deference to minority views of special interest groups. The option which would allow for the greatest public participation in in vitro decisions would be to impose no regulations, and allow decisions regarding this technology to be made in the marketplace or on an individual patient-doctor basis.

D. Policy Assessment

Available evidence suggests that application of in vitro technology poses no danger that would justify the need for government regulations. Scientists should be free to do research in the area, and persons should be free to decide whether, when and to what extent they wish to use these technologies on an individual basis. Any legal controversies arising out of such actions could be settled in the courts.

5. RECOMBINANT DNA

The distinctive traits which characterize each species on earth are determined by inheritance factors known as genes.¹²⁴ These genes have been identified as strings of matter called chromosomes, which consist of segments of deoxyribose nucleic acid [DNA]¹²⁵ and are found in the nucleus of every living cell. It is the myriad of potential sets of molecular combinations of DNA which is responsible for the particular gene pools which define each species. The species maintain their identities because they are unable to mix their gene pools with those of any other species through reproduction.¹²⁶

124. Note, *Recombinant DNA and Technology Assessment*, 11 GEORGIA L.REV. at 791 (1977).

125. Although Mendel first hypothesized the existence of genes in the nineteenth century, their location was not identified for another fifty years until the work of Watson and Crick. See Watson and Crick, *Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid*, 171 NATURE 737 (1953). See also WATSON, *THE DOUBLE HELIX* (1963).

126. Note, *supra* note 124, at 791. See also MERRELL, *AN INTRODUCTION TO GENETICS*, 555 (1975).

Molecular biologists have recently acquired the remarkable ability to break through these natural barriers by developing techniques to "recombine" or "splice" DNA segments from one species into the DNA chain of another species, where the combined segments will replicate as a part of the normal metabolism of the host cell.¹²⁷ This technique of "gene splicing" or recombinant DNA¹²⁸ was developed in 1972 and, for the first time, allowed researchers to manipulate DNA within cells of lower organisms.¹²⁹ The technique involves utilizing an enzyme¹³⁰ to cut a segment of DNA from the chromosome of one organism and place it in the chromosome of another organism, thus constructing a molecule containing portions of DNA from two organisms. When placed inside a host cell, the cell replicates normally, each subsequent cell containing identical sets of the newly constructed DNA strands.¹³¹

This process was first used to recombine DNA segments from the same bacterial species, *E. coli*.¹³² Subsequently, biologists have successfully combined segments from two unrelated species of bacteria, and DNA from a toad into *E. coli*.¹³³ All recombined molecules have demonstrated normal replication and metabolism, in addition to showing the appropriate cellular effect of the spliced gene. Theoretically, it is now possible to isolate a DNA segment from any species of plant or animal and recombine it into a new host cell, which would then exhibit certain specific characteristics of the foreign species.¹³⁴

The development of recombinant DNA technology represents a major breakthrough in the field of the biological sciences.¹³⁵ An obvious

127. For a detailed description of this technique, see Cohen, *The Manipulation of Genes*, 233 SCI. AMER. 24 (1975).

128. For scientific discussion of recombinant DNA research intelligible to the lay person see, e.g., Grobstein, *The Recombinant DNA Debate*, 237 SCIENTIFIC AM. 22 (1976); *Recombinant DNA: Impacts and Advances*, 109 SCIENCE NEWS 389 (1976); Miller, *Recombinant DNA Research*, 111 SCI. NEWS 216 (1977); Schneider, *Genetic Engineering: Threat and Promise*, TECH. REV. (1976).

129. Comment, *Law v. Science: Legal Control of Genetic Research*, 65 KENTUCKY L.J. 880 (1977).

130. A type of protein that promotes the chemical processes of life without itself being altered or destroyed.

131. Comment, *supra* note 129, at 881.

132. Cohen, *supra* note 127, at 31. *E. coli* stands for *Escherichia coli*. Strain K-12 is the most commonly used.

133. *Id.*

134. Note, *supra* note 124, at 792.

135. See *Recombinant DNA Research Guidelines, Draft Environmental Impact Statement*, 41 Fed. Reg. 38, 426, 431-32 (1976).

advantage of this work is the advancement of scientific knowledge,¹³⁶ specifically of the biological processes. The technique could be used for the cheap and efficient production of medically important substances such as insulin, for which a world-wide shortage appears imminent.¹³⁷ Certain genetic diseases such as sickle-cell anemia might be cured simply by replacing the responsible gene.¹³⁸ Pollutants could be neutralized by manufactured microbes.¹³⁹ The number of potentially beneficial applications of this technology is indeed staggering.

A. Existing Government Regulation

There are presently various existing and proposed regulations regarding research on and application of recombinant DNA technology. Shortly after the recombinant DNA technique was developed, scientists became concerned with the potential for danger and a worldwide moratorium was called until hazards could be evaluated and standards developed.¹⁴⁰ Eight months later, the first attempt at regulating the research came from the scientists themselves at the international Asilomar Conference which was held in California in 1975.¹⁴¹ The prominent researchers participating in the Conference agreed that subsequent recombinant DNA research should proceed under a set of guidelines adopted by the Conference.¹⁴² The adopted guidelines lifted the worldwide moratorium and imposed a voluntary ban on research judged to be too dangerous under any circumstances.¹⁴³ All other experiments were allowed to proceed, provided that set safety conditions were maintained to insure that the experimental organisms were adequately "contained."¹⁴⁴ Although not legally enforceable, these guidelines were generally followed.¹⁴⁵

136. Cohen, *Recombinant DNA: Fact and Fiction*, 195 Sci. 654-55 (1977).

137. Note, *supra* note 124, at 792-93.

138. *Id.*

139. General Electric reported the creation of a petroleum consuming microbe potentially useful in the eradication of oil spills. See NAT'L. GEOGRAPHIC, September 1976, at 374-75.

140. Committee on Recombinant DNA molecules, *Potential Biohazards of Recombinant DNA Molecules*, 185 Sci. 303 (1974).

141. Comment, *supra* note 129, at 884-85.

142. *Id.*

143. Wade, *Genetics: Conference Sets Strict Controls to Replace Moratorium*, 187 Sci. 931-33 (1975). See also *Summary Statement of the Asilomar Conference on Recombinant DNA Molecules*, 188 Sci. 991 (1975).

144. *Id.*

145. Comment, *The Potential for Genetic Engineering: A Proposal for Interna-*

The Asilomar guidelines served as a basis for the first controls imposed by the federal government, the National Institutes of Health¹⁴⁶ Guidelines which govern federally funded research.¹⁴⁷ Though both scientists and the general public were consulted in the development of the guidelines,¹⁴⁸ the result remained essentially scientific self-regulation. Compliance with the NIH Guideline is mandatory only for all NIH funded research, and compliance in research done by private industries such as pharmaceutical companies¹⁴⁹ is strictly voluntary.

Recently, HEW Secretary Califano announced that the NIH Guidelines will be relaxed, due to the fact that the likelihood of harm now appears more remote than was once believed. The revised guidelines, while continuing the ban on six categories of potentially dangerous research such as that involving deadly disease organisms, will exempt one-third of the genetic research covered by the present rules. In addition, the new guidelines will permit the National Institutes of Health director to grant case-by-case exemptions.

Although the new guidelines will still be mandatory only for federally financed research, Califano said that, for the first time, the government will seek to require the compliance of private industry through the Food and Drug Administration, which will propose regulations applying to all the industries it regulates.¹⁵⁰ Whether or not the FDA will in fact impose such regulations, and the impact that these regulations might have, remain to be seen.

A number of existing laws can be viewed as enabling the federal government to control some aspects of recombinant DNA research.¹⁵¹ One statute under which such regulation could be promulgated is the

tional Legal Control, 16 VA. J. INT'L. L. 403, 420 (1976).

146. Hereinafter referred to as NIH.

147. 41 Fed. Reg. 27, 902 (1976) and 41 Fed. Reg. 38, 427 (1976).

148. Roblin, *Reflections on Issues Posed by Recombinant DNA Molecule Technology*, 265 ANNALS N.Y. ACAD. SCI. 59 (1976) and Wade, *Recombinant DNA: Guidelines Debated at Public Hearing*, 191 SCI. 834 (1976).

149. Grobstein, *Recombinant DNA Research: Beyond the NIH Guidelines*, 194 SCI. 1133-34 (1976). At least several major pharmaceutical companies are actively involved in recombinant DNA research. Comment, *Considerations in the Regulation of Biological Research*, 126 UNIV. PENN. L. REV. 1420 (1978); Wade, *Gene-Splicing: At Grass-Roots Level a Hundred Flowers Bloom*, 195 SCI. 558 (1977).

150. *U.S. Set to Relax Guidelines for Gene-Splitting Research*, The Washington Post, Dec. 17, 1978, sec. C at 1. See also *The Public Interest in Gene Splitting*, The Washington Post, Jan. 13, 1979 at 18.

151. See generally Balmer, *Recombinant DNA: Legal Responses to a New Biohazard*, 7 INVT'L. L. 293, 308 (1977).

Public Health Services Act.¹⁵² Under the PHSA, the Surgeon General, with the approval of the Secretary of HEW, has the power to create and enforce regulations "as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases,"¹⁵³ such as might result from an organism with unknown properties created via gene-splicing.¹⁵⁴

The National Environmental Policy Act¹⁵⁵ gives the federal agencies certain procedural and substantive duties to promote a national policy of environmental protection. Since recombinant DNA biotechnology poses a risk of disrupting the environment through the creation of new and harmful species, NEPA offers an opportunity for public review of federally sponsored recombinant DNA research.¹⁵⁶

The Toxic Substances Control Act¹⁵⁷ requires users of potentially dangerous chemical substances to notify the Environmental Protection Agency,¹⁵⁸ which will test the substance's environmental or health risks. If results suggest imminent danger, the EPA may enact controls as it deems appropriate.¹⁵⁹

The Occupational Safety and Health Act,¹⁶⁰ administered by the Occupational Safety and Health Administration, protects employees from injury by employment-related toxic substances.¹⁶¹ Thus, it could be used to enforce appropriate safety regulations in laboratories engaged in work with recombinant DNA.¹⁶²

For two years, Congress has been struggling to enact legislation to control recombinant DNA research but, as of yet, no bill has been passed into law. In February of 1977, Senator Dale Bumpers introduced a bill entitled The DNA Research Act of 1977,¹⁶³ which would require the Secretary of HEW to promulgate guidelines for such research within

152. 42 U.S.C. § 201 (1970) [hereinafter referred to as PHSA].

153. 42 U.S.C. § 264 (1970).

154. Balmer, *supra* note 151, at 310-11.

155. 42 U.S.C. §4321 (1970 and Supp. IV 1974) [hereinafter referred to as NEPA].

156. Parenteau and Catz, *Public Assessment of Biological Technologies: Can NEPA Answer the Challenge?* 64 GEO. L. REV. 679 (1976).

157. 15 U.S.C. §§ 2601-29 (1976) [hereinafter referred to as TSCA].

158. Hereinafter referred to as EPA.

159. 15 U.S.C. §2603(4) (1976).

160. 29 U.S.C. §§651-78 (1970).

161. 29 U.S.C. §655(b)(5) (1970).

162. Balmer, *supra* note 151, at 312, n. 99.

163. S. 621, 95th Cong., 1st Sess., 123 Cong. Rec. 2272 (1977).

ninety days of the bill's enactment.¹⁶⁴ During and since that time, both houses have considered a number of similar bills,¹⁶⁵ the most recent of which include bills sponsored by Representative Rodgers,¹⁶⁶ Senator Nelson,¹⁶⁷ and Senator Kennedy.¹⁶⁸

When Congress may approve legislation in this area and the ultimate nature of the legislation are uncertain. Whether such legislation will ever be passed has itself become questionable. In a recent letter to HEW Secretary Califano,¹⁶⁹ Senator Kennedy threw the recombinant DNA initiative back into the lap of the administration, suggesting that Congress is no closer to passing legislation to control recombinant DNA research than it was two years ago.

B. *The Compelling Need for Government Regulation Under the Commerce Clause*

There are three areas of public concern regarding the biotechnology of recombinant DNA. The most common fear is that a dangerous new microorganism might escape from the laboratory, causing the death of millions as the result of a bubonic-like plague.¹⁷⁰ Since this technique creates essentially new species of organisms, these organisms could possibly produce some unnatural or unpredicted substances which might become serious pests.¹⁷¹

The spread of recombinant organisms might be irreversible, and thus the possibility that these molecules may escape from laboratories into the environment must be regarded with great concern.¹⁷² The likelihood of such danger is enhanced by the fact that the organism most commonly used in recombinant DNA research is *E. coli.*, a bacterium

164. *Id.* at §4.

165. *See, e.g.*, S.945, 95th Cong., 1st Sess., 123 Cong. Rec. 3699 (1977); S.1217, 95th Cong., 1st Sess., 123 Cong. Rec. 5335 (1977); H.R. 3191, 95th Cong., 1st Sess., 123 Cong. Rec. 917 (1977); H.R. 4232, 95th Cong., 1st Sess., 123 Cong. Rec. 1552 (1977); H.R. 4759, 95th Cong., 1st Sess., 123 Cong. Rec. 1929 (1977).

166. H.R. 11192, 95th Cong., 2d Sess. (1978).

167. S. 1217, amend. No. 754, 95th Cong., 1st Sess. (1977).

168. S. 1217, amend. No. 1713, 95th Cong., 2d Sess. (1978).

169. *Senate Passes Back Gene-Splice Cup*, 200 SCI. 1368 (1978).

170. Kilpatrick, *Regulation and the Search for Truth*, NATION'S BUSINESS, Jan. 1978 at 13-14.

171. Bennett and Gurin, *Science That Frightens Scientists*, 239 THE ATLANTIC, Feb. 1977 at 44.

172. *See Recombinant DNA Research Guidelines, Draft Environmental Impact Statement*, 41 Fed. Reg. 38, 429-31 (1976).

that inhabits the human gut.¹⁷³ Although *E. coli.* in its natural state is relatively harmless, the fear is that an escaped pathogenic strain of recombinant *E. coli.* would colonize in the intestines of humans.¹⁷⁴

Many experts have predicted that the risks involved in recombinant DNA biotechnology would lead to the above mentioned disasters.¹⁷⁵ However, such risks are entirely potential and speculative, and have never, in any way, been demonstrated.¹⁷⁶ Scientists have pointed out the extreme unlikelihood that such risks would be manifested, and have de-emphasized the dangers of this research.¹⁷⁷ Nobel Laureate Watson, the discoverer of DNA's structure, has commented, "the dangers involved [in recombinant DNA research] are probably no greater than working in a hospital."¹⁷⁸

The inescapable conclusion, however, is that the likelihood of danger resulting from recombinant DNA research is simply not known.¹⁷⁹ Therefore, according to Dr. Philip Handler, president of the National Academy of Sciences, some regulations of recombinant DNA biotechnology are necessary in the interest of the public health and safety.¹⁸⁰

At least three recent incidents have demonstrated potential risks and hazards.¹⁸¹ Yet, the scientific community is in general agreement that an outright ban is not warranted. The situation has been compared with the remote possibility of pathogenic organisms being returned to earth by the Apollo missions.¹⁸² In that instance, rather than forfeit the missions, reasonable safeguards were imposed. The potential risk involved in recombinant DNA research is sufficient to justify the imposition of similar safeguards.

Perhaps the most ominous justification for controlling recombinant DNA research is the possibility that the technology could be deliberately misused for such purposes as biological warfare.¹⁸³ These fears are

173. Comment, *supra* note 129, at 882.

174. 41 Fed. Reg. 38, 430 (1976).

175. Sinsheimer, *An Evolutionary Perspective for Genetic Engineering*, 73 NEW SCIENTIST 150 (1977).

176. Berg, *Potential Biohazards of Recombinant DNA Molecules*, 185 SCI. 303 (1974).

177. A British scientist illustrated this view via the use of mathematical probabilities. Holliday, *Should Genetic Engineers Be Contained?* 73 NEW SCIENTIST 399 (1977).

178. Wade, *supra* note 143, at 933.

179. Comment, *supra* note 129, at 883.

180. Kilpatrick, *supra* note 170, at 14.

181. Wade, *Dicing With Nature; Three Narrow Escapes*, 195 SCI. 378 (1977).

182. *A Scientist-Senator on Recombinant DNA Research*, 201 SCI. 15 (1978).

183. *Gene War? Reds Play Catch-Up in Genetic Research*, Atlanta Journal &

reminiscent of the waves of controversy that erupted when the techniques of atomic fission and fusion were understood to embrace the capacity for both social good and social catastrophe.¹⁸⁴ Some might argue that, in retrospect, the A-bomb should never have been put together.¹⁸⁵

The ideal solution would be to impose regulations which would allow society to reap all the benefits of the technology and risk none of the disasters. Unfortunately, such a solution might be possible only in a Utopia. Perhaps the next best remedy would be not to ban recombinant DNA research entirely, but to impose regulations tight enough to minimize opportunities for deliberate misuse of the technology.

A third appeal for the imposition of governmental regulations has been made on ethical grounds by those who do not wish to see a world in which babies are "custom made to order." The argument given in such cases is that it would be best to prevent the development of such capabilities by permanently halting all research on recombinant DNA on the grounds that there are some facts that members of the human race are better off not knowing.¹⁸⁸

Such appeals are reminiscent of the Promethean¹⁸⁷ myth and, carried a step further, echo of Pandora and her box of troubles. Application of this biotechnology has been regarded as crossing a barrier between the "will of God" and the acts of humanity by tinkering with the evolutionary process.¹⁸⁸ Other critics have suggested that the creation of new species through gene splicing would upset the precarious "balance of nature," and result in environmental chaos.¹⁸⁹

There is little likelihood that such arguments would be used as grounds for a case showing compelling need for government regulation. In the United States the traditional view has been that it is more dangerous to live in ignorance than to live with knowledge.¹⁹⁰ Unlike some totalitarian governments, it is not the policy of the United States to regulate ideas simply out of fear of the ideas themselves.¹⁹¹ Thus, the

Constitution, Feb. 20, 1977, sec. C at 16, col. 1.

184. Kilpatrick, *supra* note 170, at 14.

185. *Id.*

186. *Id.*

187. In Greek mythology, Prometheus created the human race by stealing knowledge that Zeus wanted to keep to himself. In his anger, Zeus punished Prometheus by nailing him to a mountain and dooming him to the eternal fate of having an eagle tear out his liver every day, only to have it grow back every night.

188. Kilpatrick, *supra* note 170, at 14.

189. Sinsheimer, *supra* note 175, at 150.

190. Kilpatrick, *supra* note 170, at 14.

191. *Id.*

prospects of using the power of government to regulate recombinant DNA research for the purpose of suppressing ideas that might otherwise flow from such research are slim.

C. *Threatened Ninth Amendment Rights*

The right most commonly debated in the field of recombinant DNA research is the right to freedom of inquiry, which has been held to be guaranteed by the first and ninth amendments.¹⁹² Since pure research has traditionally been unregulated,¹⁹³ scientists are generally fearful of the imposition of any legal control,¹⁹⁴ and warn of the "dangers facing modern society if it chooses to foreclose avenues of knowledge and discovery which might lead to the emancipation of mankind from the chains of ignorance and disease."¹⁹⁵ The prospect of any controls on research is often equated with the Vatican's inquisition of Galileo.¹⁹⁶

However, inquiry loses its constitutional protection when research constitutes a threat to the public health,¹⁹⁷ as is the case with recombinant DNA research. Thus, while scientists could claim constitutional protection in their desire to conduct research free from restrictions, the degree of their success would be limited by deference to official assessments of the degree to which the public health and environment would be endangered by the research activity.¹⁹⁸ Perhaps the most that scientists could reasonably expect is that regulations ultimately implemented would be drawn with utmost deference to imposing minimal infringements on the right to freedom of inquiry.¹⁹⁹

The constitutional right to beget children does not imply that this would include the right to "custom made" or even healthy offspring. Thus, regulation of recombinant DNA research would not seem to infringe upon the right to beget children.

Whether or not such regulation would violate the right to have a government which functions in the public interest and for the common

192. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also text accompanying notes 30 through 53 *supra*.

193. Comment, *supra* note 145, at 417.

194. Lederberg, *supra* note 50.

195. Comment, *supra* note 143, at 416.

196. Lederberg, *supra* note 50, at 596-97.

197. Note, *supra* note 124, at 836.

198. Comment, *supra* note 129, at 886-87.

199. *Id.* at 887.

good is not an easy issue to resolve. Scientists would undoubtedly contend that such regulations were not in their interest.²⁰⁰ Similarly, there might be those who would maintain that the creation of a race of blond-haired, blue-eyed giants would indeed be in the common good.²⁰¹

The interests of such special interest groups aside, there is no function of the government that is more in the public interest and for the common good than the protection of its citizens, especially from epidemic and widespread loss of life. It is certainly in the interest of persons to survive. Indeed, the survival instinct has been said to be the primary goal of all living organisms. Thus, government regulation of recombinant DNA would serve to enhance the right of the people to have a government which functions in the common interest and for the common good.

D. Policy Assessment

The above paragraphs suggest that there is indeed a compelling need for some form of institutionalized preventive control over the research and application of recombinant DNA techniques. Unlike in vitro technology, application of recombinant DNA techniques posts a potential threat to the public health and safety that could result from laboratory escape or deliberate misuse. While there is no apparent cause for a ban on such research altogether, the remote possibility of mass contamination is cause for comprehensive governmental regulation of the area. In the words of G. Raltray Taylor,

I am therefore forced to the conclusion that society will have to control the pace of research, if it can, and will certainly have to regulate the release of these new powers. There will have to be a biological "icebox" in which the new techniques can be placed until society is ready for them . . . the social consequences . . . could be so disastrous—nothing less than the breakup of civilization as we know it—that the attempt must be made.²⁰²

The questions which remain to be answered are whether the status quo satisfies this need and, if not, what course of action should be pursued.

Upon examination it becomes apparent that existing measures are

200. *Id.*

201. HITLER, *MEIN KAMPF* (1925).

202. TAYLOR, *THE BIOLOGICAL TIME BOMB* (1968).

not sufficient. The NIH Guidelines are not legally enforceable,²⁰³ and apply only to federally funded research.²⁰⁴ The PHSA is ill-equipped to act as a basis of regulation of biological research,²⁰⁵ since the purpose of the act is to "prevent the spread of disease."²⁰⁶ Because of this language and the Act's historical usage, an interpretation of the Public Health Services Act as allowing for control over the spread of a particular DNA molecule would be an extremely liberal if not implausible construction.²⁰⁷

The problem with environmental acts such as the National Environmental Policy Act is that they deal with preventing the discharge of hazardous substances in harmful quantities.²⁰⁸ Since there are no known safe exposure links of the new organisms which could potentially be created by gene splicing, such laws provide no useful basis for the formulation of regulations in the area.²⁰⁹

The Toxic Substances Control Act would not be an appropriate vehicle in this area for a variety of reasons. Directed to chemical substances, the Act would have to be amended to apply also to biological organisms.²¹⁰ The efficiency of this Act as a source of regulation is diminished by the fact that EPA uses the TSCA as a statute of last resort when no other statute will solve a pressing problem.²¹¹ Perhaps most importantly, the TSCA is used to test chemical substances before commercial production: with recombinant DNA, the issue is regulation of the research itself, regardless of possible future exploitation.²¹²

Finally the Occupational Safety and Health Act does not meet the need because the Act covers neither government employees nor workers employed by other federal government agencies,²¹³ two categories in which recombinant DNA researchers are concentrated.

Having determined that some new form of governmental control over recombinant DNA research is necessary, the next issue to be re-

203. *Supra* note 147.

204. Comment, *supra* note 129, at 885.

205. Comment, *supra* note 149, at 1437.

206. 42 U.S.C. §264 (1970).

207. Balmer, *supra* note 151, at 310-12.

208. Kraus, *Environmental Carcinogenesis: Regulation on the Frontiers of Science*, 7 ENV'T L. at 87-89 (1976).

209. Comment, *supra* note 149, at 1438.

210. *Id.* at 1436.

211. 15 U.S.C. §§ 2605(c), 2608(a) and (b) (1976).

212. Comment, *supra* note 149, at 1436.

213. 29 U.S.C. §§ 652 and 653 (1970).

solved is whether such legislation should emanate from the federal or the state and local level.²¹⁴ Upon examining the alternatives, there seem to be compelling reasons for the federal government to totally preempt regulations in this field.²¹⁵

Rather than giving sufficient deference to the scientific right of free inquiry, states and localities might politicize the decision-making process by responding to scare tactics and uninformed public hysteria.²¹⁶ Furthermore, it is questionable "whether a system of piecemeal regulation would be effective in protecting the public, for microbes fleeing from a low-safeguard locality are unlikely to recognize the political boundary of an adjacent high-safeguard jurisdiction."²¹⁷

A final reason for federal control is that local regulators could not reasonably be expected to have access to the same quality of information available to a national body.²¹⁸ The federal government is best equipped to keep in step with the most recent scientific developments.²¹⁹ If localities were allowed to regulate independently, it is likely that a time lag in the receipt of current scientific data would result in standards that would be either too restrictive for optimal research or not restrictive enough, thus either unnecessarily preventing valuable discoveries or creating an unreasonable risk to public health.²²⁰ For these reasons, it is not surprising that the scientific community strongly favors federal rather than state and local regulation.²²¹

The final key issue in implementing regulations on DNA research is whether Congress should assume responsibility for making the basic policy decisions, or delegate this responsibility to an administrative agency.²²² In the past, when Congress has legislated in areas of considerable controversy, factual uncertainty, and unknown policy impact, it has

214. Comment, *supra* note 149, at 1424.

215. *Id.* at 1425.

216. *Id.* Although the Cambridge Laboratory Experimentation Review Board and City Council passed useful and legitimate guidelines in this area in 1977, other localities might not be as "enlightened" as Cambridge. Furthermore, the board itself believed that federal controls should be implemented. See *Cambridge Experimental Review Board*, 33 BULL. ATOM. SCI. 23 (1977) and Culliton, *Recombinant DNA: Cambridge City Council Votes Moratorium*, 143 SCI. at 301.

217. Comment, *supra* note 149, at 161.

218. Guilbert, *The Relationship Between State and Federal Regulation of Air Polluting Energy Sources in Oregon*, 54 ORE. L. REV. 525 (1975).

219. Comment, *supra* note 149, at 1426.

220. *Id.*

221. *Gene Legislation: NAS Urges Caution*, 211 SCI. NEWS 293 (1977).

222. Comment, *supra* note 149, at 1438.

deferred to the judgment of administrative agencies, as was the case regarding the Nuclear Regulatory Commission.²²³ Recently proposed DNA regulation bills similarly delegate significant decision making to non-legislative bodies.²²⁴ While this pattern of delegation should not be automatically assumed, it is not practical to expect members of Congress to acquire expertise in all of the wide ranging and complex activities in which our government is involved today.²²⁵

No existing agency has a membership of scientists and laypersons suited to making the difficult value and policy choices necessary for adequate regulation of this area.²²⁶ A suitable guide for Congress to follow in establishing a commission to regulate the field of recombinant DNA is the composition of other bodies which make policy decisions of uncertain scientific or technological risks, such as the Nuclear Regulatory Commission.²²⁷

An especially apt membership example, on which the latest House bill is based,²²⁸ is the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, which is composed of eleven persons coming from the fields of "medicine, law, ethics, theology, the biological, physical, behavioral and social sciences, philosophy, humanities, health administration, government, and public affairs."²²⁹ A commission of similar composition would be capable not only of evaluating the technical data involved, but also of representing the public interest at large in the formulation of recombinant DNA regulations.²³⁰

6. CLONING

The technique of cloning²³¹ has received a great deal of recent attention from the media. Unlike in vitro fertilization, which lets nature

223. 42 U.S.C. §2201(b) (1970). This Commission was authorized to impose regulations on the use of nuclear materials as it deemed necessary to promote the common defense and protect the public health.

224. H.R. 11192, 95th Cong., 2d Sess., § 201 (1978); S. 1217, amend. No. 1713, 95th Cong., 2d Sess. § 201 (1978); S. 1217, amend. No. 754, 95th Cong., 1st Sess., § 481 (1977).

225. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 829 (1977).

226. Comment, *supra* note 149, at 1440.

227. *Id.*

228. H.R. 11192, 95th Cong., 2d Sess. (1978).

229. 42 U.S.C. § 218(f) (Supp. 1974).

230. Comment, *supra* note 149, at 1440.

231. From the Greek *klon*, meaning twig.

take its course in a test tube, cloning produces a genetic copy of its single parent through asexual reproduction.²³² This technique is facilitated by the biological fact that every cell in a living organism carries the same genetic material as every other cell in the organism. The cause of differentiated cell functions is that different genes are “turned on” in, for example, a blood cell than in a skin cell.²³³ In cloning, the nucleus of an egg or sperm cell, which contains only half the normal number of chromosomes, is replaced by the nucleus of a body cell containing the full number of the organism’s chromosomes. The cell, having been “fooled” into thinking it has been fertilized, begins to divide and develops as would a normal embryo.²³⁴ The end result is an organism biologically identical to that which donated the nucleus, thus enabling the production of multiple biological “carbon copies” of any given organism.²³⁵

This technique has tremendous implications for animal husbandry and laboratory research. For example, a particular strain of mouse needed for crucial experiments could be duplicated in mass; prize dairy cows, sheep and pigs could be mass produced, thus improving the quality of the world’s food supply.²³⁶ Theoretically, it would also be possible to make clones of great humans, ultimately creating a “superrace” or perhaps even a new species of human being entirely.²³⁷

A. Existing Government Regulation

There are presently no specific constraints on cloning research or the application of the biotechnology.

B. The Compelling Need for Government Regulation Under the Commerce Clause

Few people feel that the cloning of mice or of “grade-A” cattle is a danger creating a compelling need for government regulation. By contrast, the prospect of cloning humans evokes a sharply different response of fear, and even hysteria, provoked by thoughts of misuse

232. *A Test-Tube Baby is Not a Clone*, TIME, July 31, 1978 at 65.

233. *Id.*

234. Green, *supra* note 100, at 563.

235. *Id.*

236. *A Test-Tube Baby is Not a Clone*, *supra* note 232.

237. Green, *supra* note 100, at 563, 573.

such as tyrannical clones taking over the world. While such scenarios might not endanger the public health as such, they could cause sufficient emotional, political and social trauma to justify the imposition of government controls if it is determined that these fears are justified.

An examination of the most recent evidence suggests that these feared effects of human cloning are unjustified, as the chances for effective human cloning are minimal. According to Nobel Laureate James Watson, "there's no future in [cloning]."²³⁸ While researchers in the field can now effectively clone frogs, the cloning of mammals is much more complex and, by expert estimations, "a long way off."²³⁹ This is due in large part to the fact that mammalian eggs are one-tenth to one-twentieth the size of frog eggs and thus much harder to manipulate.²⁴⁰

Yet, even if scientists were some day able to clone humans,²⁴¹ there is reason to believe that the effectiveness of the human cloning process would be minimal. In the first place, unlike domesticated or laboratory animals, *Homo sapiens* is a mongrel breed, still containing a number of harmful or even lethal genes.²⁴² While such genes exist in the recessive state and are thus normally suppressed by dominant normal genes, certain cloning methods would allow these recessives to express themselves, thus causing deformities, genetic illness, or even the death of the clone.²⁴³

The second probable obstacle to effective human cloning stems from the difference between genotype²⁴⁴ and phenotype.²⁴⁵ Cloning would produce a person genetically identical to its nuclear donor.²⁴⁶ However, the genotype of an organism alone does not completely determine the phenotype, which is instead the result of the interaction between the genotype and the environment.²⁴⁷ The same genotype can produce very different phenotypes in the presence of variant physical and social influences.²⁴⁸ Thus, even if human clones were produced, the

238. *A Test-Tube Baby is Not a Clone*, *supra* note 232.

239. *Id.*

240. *Id.*

241. Hudock, *supra* note 116, at 555.

242. *Id.*

243. *A Test-Tube Baby is Not a Clone*, *supra* note 232.

244. Genetic make-up of an organism; All genes present in the nucleus of a cell, both dominant and expressed, recessive and unexpressed.

245. Manifest characteristics of an organism; dominant and expressed traits such as skin color and blood type that result from both heredity and environment.

246. Hudock, *supra* note 116, at 555.

247. *Id.* For example, phenotypic differences in identical twins.

248. *Id.*

clones would not necessarily exhibit the desired traits of the nuclear donor.²⁴⁹

Until conflicting and valid evidence or conditions are at hand, the difficulties and probable ineffectiveness of human cloning do not pose risks which would compel government regulation of technology. The effects of such efforts would apparently be benign. In the words of Watson,

What's to be gained? A carbon copy of yourself? Oh, if the Shah of Iran wanted to spend his oil millions on cloning himself, that's fine with me. But if either of my young sons wanted to become a scientist I would suggest he stay away from research in cloning humans. There's no future in it.²⁵⁰

C. *Threatened Ninth Amendment Rights*

Since there is not presently a compelling need for government regulation of cloning, individual rights in this area could be fully exercised without the threat of infringement. Researchers could exercise their right to freedom of inquiry. Results of such research, such as improvements in the world's food supply, would be in the public interest and for the common good. While it could be argued that cloning oneself is not protected by the right to beget children,²⁵¹ there is no reason for restricting this benign activity. As it is the right of individuals to have full access to the decision-making process, the decision whether or not to clone oneself should be left with the people.

D. *Policy Assessment*

The cloning biotechnology should be conducted without the imposition of government regulations. If future evidence suggests that effective human cloning is indeed possible, the need for government regulation should at that time be reassessed. Until such a time, the status quo should be maintained.

249. *Id.*

250. *A Test-Tube Baby is Not a Clone*, *supra* note 232.

251. Cloning is asexual reproduction. Sexual reproduction is implicit in the definition of beget.

7. CONCLUSION

Once a technology is developed, it is very difficult to "turn off."²⁵² It is unlikely that society could completely prevent the emergence of the applications of new genetic knowledge even if it so desired. The best that can be hoped for is that the consequences of these technologies be carefully considered, and that they be wisely used.²⁵³

While some government regulations will always be necessary, in the words of Commerce Secretary Jerry Jasinowski, "our regulatory system is out of control."²⁵⁴ The excessive regulation by our bulging bureaucracy is expensive and unnecessary, and our nation needs desperately to find a reasonable midpoint between too much regulation and too little. Recent legislation freeing the airline industry from federal regulation, the first instance of deregulating a major industry in decades, has resulted in better passenger service and lower prices.²⁵⁵

This experience should serve as a lesson that government regulation is not the best solution to all problems. It is true that movement toward the "brave new world" should be the result of conscious decision by society, taking into consideration the ultimate social consequences. However, there is a place in this scenario for both government regulation and individual, marketplace decision-making.

Finally, this article has demonstrated that these biotechnological issues can indeed be considered in a rational and systematic manner. By viewing their implications from a constitutional perspective, with a focus on the compelling need for government regulation under the commerce clause balanced against threatened ninth amendment rights, reasonable policy decisions can be made. This kind of logical assessment has unfortunately been markedly absent in the past. Hopefully, it will become the rule rather than the exception in the future.

However, the establishment of the much discussed "science court,"²⁵⁶ which would seek to resolve close technical issues in an adversary setting, is unnecessary. Scientific "facts" in many areas, such as DNA research, are conjectural and not amenable to resolution in an adversary process.²⁵⁷

252. Green, *supra* note 100, at 574.

253. *Id.* at 575.

254. Palmer, *The Rising Risks of Regulation*, TIME, Nov. 27, 1978 at 85-87.

255. *Flying the Crowded Skies*, TIME, Aug. 14, 1978 at 50-55. See also *Help for Full Fares*, TIME, Oct. 16, 1978 at 90-91.

256. Martin, *The Proposed "Science Court,"* 75 MICH. LAW REV. 1058 (1977).

257. Comment, *supra* note 149, at 1444-45.

Recombinant DNA research should be regulated by a newly created administrative agency. However, the biotechnologies of in vitro fertilization and cloning should be left unregulated. Controversies arising from individual applications of these techniques could be handled in the traditional courts of law,²⁵⁸ facilitated by the eventual evolution of a body of case law pertaining specifically to these biotechnological questions.

258. At least two such cases have already been resolved. *See Mack v. Califano*, 447 F. Supp. 668 (D.D.C. 1978) (holding that government scientists cannot be preliminarily enjoined from recombinant DNA research which is in accordance with National Institutes of Health Guidelines); *see also DelVio v. Presbyterian Hospital*, Facts on File October 13, 1978 at 770 (Federal court jury awarded Doris and Don DelVio \$37,000 for emotional stress suffered when their laboratory-conceived baby was halted the day after its test tube fertilization).

Sentencing: A Discretionary Judicial Function

GARY L. SWEET*

1. GENERAL CONSIDERATIONS

The Supreme Court has clearly stated the general rule that sentencing lies properly within the sound discretion of the trial judge and that, in exercising his discretion, a judge is not restricted by technical rules of evidence.¹ He can consider many sources and types of evidence "to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."² This principle has also been expressed by the Fifth Circuit Court of Appeals,³ and cases where an abuse of discretion by the sentencing court has been found by an appellate court are indeed rare.⁴

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This article was originally prepared at the request of Judge Norman C. Roettger, Jr. for use at the Sentencing Institute for judges in the Southern District of Florida.

1. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949).

2. *Id.* at 246.

3. *United States v. Frontero*, 452 F.2d 406 (5th Cir. 1971) ("in absence of other constitutional provision or of statute, this Court has no power to review the length of sentence within the limits permitted by statute") *Id.* at 409; *United States v. Menichino*, 497 F.2d 935 (5th Cir. 1974) (sentence within statutory limit "does not ascend to the orbit of a constitutional violation," *Id.* at 945, and sentence will be disturbed only for abuse of discretion); *United States v. White*, 524 F.2d 1249 (5th Cir. 1975) (length of sentence, if within statutory limits, is not a matter for consideration of appellate court); *United States v. Gamboa*, 543 F.2d 545 (5th Cir. 1976) (sentencing court exercises broad discretion, not subject to review except for arbitrary or capricious action amounting to a gross abuse of discretion).

4. *See, e.g., United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974) (sentence under the Federal Youth Corrections Act [FYCA] which was harsher than that allowed under the substantive statute was repugnant to the legislative intent of FYCA, and thus an abuse of discretion. Also, a rigid policy of always imposing the maximum for drug offenses is an exercise of no discretion and thus an abuse of discretion); *Dorszynski v. United States*, 418 U.S. 424, 94 S.Ct. 3042 (1974) (limited appellate review is available when no sentencing discretion is exercised at all).

However, as with all general rules, there are exceptions. Thus, a criminal defendant at sentencing does retain some due process protection. He is entitled, for example, to rudimentary notions of fairness,⁵ to have materially untrue matters in his record disregarded,⁶ to have constitutionally invalid convictions disregarded⁷ and to be sentenced no more than once for the same offense in compliance with the ban against double jeopardy.⁸

2. AREAS OF CONCERN

From a survey of appellate opinions which deal with challenged sentences, it appears that sentencing judges within the Fifth Circuit should be aware of several issues which concern appellate courts and which seem to recur with some frequency. Most frequently, the fact situations giving rise to those issues occur: (1) when the sentencing court may be considering another prior conviction which is constitutionally defective; (2) when the court may be considering materially untrue information or potentially unreliable hearsay; and (3) when the court has not allowed the defendant to examine and attempt to refute information in the presentence report.

A. Invalid Convictions

In *United States v. Tucker*,⁹ the Supreme Court held that sentences

5. See, e.g., *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975) (ex parte memo from prosecutor to judge deprived defendant of due process right to hear and rebut information it contained).

6. *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252 (1948). (Court erroneously considered charges for which defendant had been acquitted. Supreme Court considered these to be materially untrue assumptions).

7. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589 (1972) (two of three prior convictions explicitly relied on by sentencing judge had been obtained in violation of *Gideon v. Wainwright*).

8. *United States v. Durbin*, 542 F.2d 486 (8th Cir. 1976) (defendant sentenced originally to 12 years, then prior conviction that the sentencing court had considered was set aside. Relying on *Tucker*, the sentencing court vacated the 12-year sentence and, considering defendant's criminal activity while on parole, gave him a 15-year sentence. Held: not an abuse of discretion, but a violation of the ban against double jeopardy.) See also *United States v. Bell*, 457 F.2d 1231 (5th Cir. 1972).

9. 404 U.S. 443, 92 S.Ct. 589 (1972). The crucial issue upon remand, according to the *Tucker* Court, would be whether the sentence in the instant case would have been different if the judge had known that the prior convictions were constitutionally invalid

must be vacated and reconsidered when the sentencing court explicitly relies on constitutionally invalid prior convictions. This decision was reached after the Court discussed at length and expressed agreement with the general rule regarding a sentencing court's wide range of discretion.

This decision has led to circuit court opinions which offer refinements to its general holding. Thus, in *Russo v. United States*,¹⁰ the court held that, where a *Tucker* situation is asserted, the judge should "cause the record to factually reveal the processes through which the Judge has gone."¹¹ The procedure for this "factual outline" was stated in *Lipscomb v. Clark*.¹² There the court said,

First, the district court should review the records involved in this conviction and determine if, treating the state convictions alleged to have been unconstitutional as void and thus not to be considered in sentencing, the five-year maximum sentence would still be the appropriate sentence based on the records of the trial and petitioner's adjusted conviction record (which would still consist of a twenty-five year sentence on a federal counterfeiting charge). If the district court finds that the maximum sentence would still be appropriate, an order so setting forth would seem sufficient to comply with the requirements of *Tucker*. If, on the other hand, the district court finds that should these prior convictions be proven unconstitutional and void that the maximum sentence would not be appropriate, then it should grant petitioner an evidentiary hearing and allow him to present evidence on his claim that the prior convictions in question were unconstitutional due to *Gideon*. If the district court is convinced of the validity of petitioner's allegations after such a hearing, it may then properly resentence. Such a procedure seems best designed to fully protect petitioner's rights.¹³

However, the presence of constitutionally invalid convictions in a defendant's record does not mean that *Tucker* automatically applies and brings into play the *Lipscomb* procedure. In *Rogers v. United States*,¹⁴ the court held *Tucker* inapplicable because the sentencing judge had

and not whether the convictions would have been obtained even if the defendant had been represented by counsel. Looking at the facts of this case, the Court said yes. *Id.* at 448.

10. 470 F.2d 1357 (5th Cir. 1972).

11. *Id.* at 1359.

12. 468 F.2d 1321 (5th Cir. 1972).

13. *Id.* at 1323.

14. 466 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1046 (1972).

“specifically certified that the sentence was not enhanced by the existence of the earlier conviction.”¹⁵ *Tucker* was also held inapplicable in *Houle v. United States*,¹⁶ where the court relied on Canadian convictions which were allegedly obtained without the benefit of counsel. The court reasoned that *Tucker* was concerned with convictions invalid under the United States Constitution, and the United States judicial precedents “cannot be imposed on Canadian proceedings.”¹⁷ The court explicitly stated that the Canadian convictions were permissibly considered by the sentencing court, and that the defendant was free to submit any explanatory material concerning the circumstances of those convictions.¹⁸

B. Untrue Information and Presentence Reports Disclosure

Closely related to the right to have invalid convictions disregarded is the right to have materially untrue information also disregarded. This principle was established by *Townsend v. Burke*,¹⁹ and has been rigidly observed by the Fifth Circuit. In a recent case, *United States v. Woody*,²⁰ the court construed *Townsend* as establishing a constitutional right on behalf of a defendant “to know and to test the accuracy of any statement in the presentence report upon which the judge relies.”²¹ In that case, the court held that the judge’s summary of confidential information relied on was not sufficient to provide the defendant with any notice of the nature of the information being held against him, and thus

15. *Id.* at 513-14. See *Wheeler v. United States*, 468 F.2d 244 (9th Cir. 1972) for an example of where the appellate court remanded for a more particular description of the sentencing court’s reasoning. The statement by the lower court that he relied more on the seriousness of the crime than on the invalid convictions in the presentence report was not specific enough.

Another case which was remanded was *United States v. Bishop*, 457 F.2d 260 (7th Cir. 1972), where the sentencing court relied on convictions of a person who had the same name as the defendant. Although the appellate court relied on *Tucker*, it would seem that the same result would be compelled by *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252 (1948) which prohibited the sentencing judge from considering any facts in the criminal record that are materially untrue.

16. 493 F.2d 915 (5th Cir. 1974).

17. *Id.* at 916.

18. *Id.*

19. 334 U.S. 736, 68 S.Ct. 1252 (1948).

20. 567 F.2d 1353 (5th Cir. 1978).

21. *Id.* at 1361.

was not sufficient compliance with FED. R. CRIM. PRO. 32(c)(3)(B).²² “[T]o do otherwise [not remand] would mean that we would be doing no more than paying lip service to the right of the defendant to rebut possibly erroneous information without providing a viable opportunity for him to do so.”²³

The court in *Woody* discussed at length the history and purpose of FED. R. CRIM. PRO. 32(c), which deals with disclosure of contents of presentence investigation reports.²⁴ The rule has been interpreted to allow wide discretion by the trial judge in deciding how much of the report to disclose to the defendant.²⁵

Before the 1966 amendment to Rule 32,²⁶ there was no language

22. FED. R. CRIM. PRO. 32 (c) (3) provides in full:

(3) Disclosure

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Corrections Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c) (3) of this rule.

23. 567 F.2d at 1363.

24. *Id.* at 1358-61.

25. *Id.* at 1358.

26. That amendment added the following: “The court before imposing sentence

relating to disclosure by a court to a defendant of a report's contents. Consequently, disclosure was made or withheld solely as a discretionary choice of the individual judge.²⁷

The two-sentence amendment in 1966 to Rule 32(c) codified the existing practice of allowing judges to use their discretion in determining whether to disclose the contents of presentence investigative reports. Although the 1966 amendment contained an Advisory Committee's note that urged a policy of disclosure, the amendment failed to accomplish the goal intended by its draftsmen.²⁸

In 1975, the rule was amended again in an effort to encourage disclosure.²⁹ Now, the rule contains mandatory language, and it provides that the defendant and his lawyer are to be allowed to see the report's contents unless the material falls into the enumerated exceptions contained in FED. R. CRIM. PRO. 32 (c) (3) (A).³⁰ However, to

may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

27. See 567 F.2d at 1358-59, n. 10, which states: "For example, in *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960), *cert. denied*, 364 U.S. 854, 81 S.Ct. 83, 5 L.Ed. 2d 77 (1960), the court held that presentence investigation reports are strictly confidential and not to be disclosed to the defendant." See also *Hoover v. United States*, 268 F.2d 787, 790 (10th Cir. 1959); *Powers v. United States*, 325 F.2d 666, 667 (1st Cir. 1963). Other courts disclosed the contents of the presentence investigation report and permitted comment thereon. See *Shields v. United States*, 237 F.Supp. 660 (D.C. Minn. 1965); *Smith v. United States*, 223 F.2d 750, 754 (5th Cir. 1955), *rev'd on other grounds*, 360 U.S. 1, 79 S.Ct. 991, 3 L. Ed. 2d 1041 (1959).

A survey conducted in 1963 by the Junior Bar Section of the Bar Association of the District of Columbia revealed the diverse treatment of the contents of presentence investigation reports. Questionnaires were sent to 294 active district judges and 51 senior district judges. The questionnaire contained the following question: "Is it the practice of your Court to divulge any information contained in presentence reports to defense counsel?" Of the 157 responses received, 63 (43%) stated that the reports were exhibited to defense counsel and 83 (57%) stated that the disclosure was refused. The response also indicated that 11 judges exhibited the entire report to counsel, 19 judges provided excerpts of the reports to counsel, and 13 judges provided summaries. *Junior Bar Section of the District of Columbia, Discovery in Federal Criminal Cases*, 33 F.R.D. 101, 125 (1963).

28. See *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968), where the court noted the differing practices relating to disclosure by district judges.

29. For the text of the rule in its present language, see note 22 *supra*.

30. In a recent Fifth Circuit opinion, *United States v. Ruiz*, 580 F.2d 177 (5th Cir. 1978), the court held that the disclosure requirements of the present rule can only be activated by a request of the judge. The request may be made to the judge at the

promote disclosure and further the rule's intent, if a judge relies on information that was withheld under one of the rule's exceptions in imposing sentence, he must still provide an oral or written summary of that information to the defendant or to his lawyer.³¹ It was the adequacy of this summary that was at issue in *Woody*.

In *Woody*, the court also approved the Ninth Circuit's holding in *United States v. Weston*,³² which required the setting aside of a 20-year narcotics sentence that was based on uncorroborated hearsay testimony.³³ At sentencing, the defendant had staunchly denied the truth of the allegations, and had been given an opportunity by the judge to refute them. However, the appellate court felt the burden of "proving a negative"—that she was *not* a large scale heroin dealer as an anonymous informant had said she was—was too heavy.³⁴

A similar case which dealt with allegedly untrue material in the presentence report is *Shelton v. United States*.³⁵ There, a defendant convicted on income tax charges objected to the truthfulness of material in the presentence report linking him to drug traffic. Citing a line of precedent, the court held that Shelton should be afforded an opportunity to refute the information.³⁶ Upon remand, the court directed the sen-

sentencing, or by a prior written motion properly filed with the court. The court refused to accept the proposition that an informal request to a probation officer is equivalent to a formal request to a federal judge.

31. The policy behind the Rule's latest amendments is reflected in the Advisory Committee's notes which state:

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading.

32. 448 F.2d 626 (9th Cir. 1971).

33. 567 F.2d at 1364.

34. 448 F.2d at 634.

35. 497 F.2d 156 (5th Cir. 1974).

36. See also *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973) for an example of where the trial judge abused his discretion in refusing to allow the defendant to refute factually the reasons given orally by the judge for the sentence, when the defendant claimed that the reasons were factually erroneous.

By endowing the district court with discretion in sentencing, it is presupposed that such discretion will be exercised consistent with both the appearance and reality of due process. The action of the court below, in refusing to permit rebuttal of the stated factual basis for the sentence, is tantamount to an abuse of discretion and is inconsistent with the need for enlightened sentencing.

Id. at 558. *United States v. Battaglia*, 478 F.2d 854 (5th Cir. 1973) establishes a

tencing judge to weigh his authority to withhold the confidential contents of the report against the defendant's rights to be fairly advised of the information which formed the basis of that sentencing.³⁷

A case where inadequate disclosure was made to a defendant is *United States v. Hodges*.³⁸ The facts there indicate that the judge revealed only portions of the information contained in the presentence report and asked the defendant to refute it if possible. This was found to violate FED. R. CRIM. PRO. 32 (c)(3)(A) which, except for confidential material and other limited exceptions, "removes the judge's discretion to refuse requested disclosure of presentence reports."³⁹ After remand, the court sustained the new sentence⁴⁰ and strengthened its prior holdings that the burden is on the defendant to show that his sentence was based on a tainted record, and that the sentencing court actually relied on misinformation in handing down the sentence.⁴¹

3. SPECIFIC FACTORS

Despite these procedural safeguards afforded a defendant at

defendant's right to a hearing when he disputes factual matter so that he "may seek to remove any lingering doubt the court may have had about the true situation." *Id.* The *Shelton* court construed *Rogers v. United States*, 466 F.2d 513 (5th Cir. 1972) as imposing the burden of showing that the trial judge relied on inaccurate information concerning the defendant. 497 F.2d at 160.

37. *Id.* at 159.

38. 547 F.2d 951 (5th Cir. 1977).

39. *Id.* at 952.

40. 559 F.2d 1389 (5th Cir. 1977).

41. *Id.* at 1391. Cases distinguishing the *Espinoza* and *Shelton* line of decisions include *United States v. Ashley*, 555 F.2d 462 (5th Cir. 1977). Where a defendant has been given an opportunity to refute information considered in imposing sentence, the wide latitude allowed by *Williams v. New York*, 337 U.S. 241 (1949) comes into play. It is "essential that the [judge] '[possess] the fullest information possible concerning the defendant's life and characteristics.'" 555 F.2d at 466, citing *Williams*. See also *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976), where disputed material in presentence reports did not invalidate the court's use of those reports. The court assured one defendant it would not rely on a challenged allegation, and the other defendant declined to have a court-offered evidentiary hearing. *Id.* at 684.

In *United States v. Menichino*, 497 F.2d 935 (5th Cir. 1974), the court found no due process violation where defense counsel had been afforded an opportunity to examine and deny "anonymous accusations" of criminal activity against the defendant. "Counsel for the defendant made an able and effective argument for leniency, and his client received a sentence less than the statutory maximum. Since he did not ask that sentencing be delayed, he cannot now object to its result." *Id.* at 945-46.

sentencing, a judge is by no means confined to the strict evidentiary rules which govern during trial. The wide latitude given to judges by *Williams* has been, and continues to be, the law in the Fifth Circuit.⁴²

As an indication of some of the factors which have been permissibly and impermissibly considered by sentencing judges, the following cases have been summarized. The Fifth Circuit has held that a judge, in imposing sentence, may consider a person's arrest while on bail awaiting trial, even if it does not result in an indictment.⁴³ Foreign convictions may also be considered.⁴⁴ The court has also stated, in general language, that a judge may consider a defendant's activities, "including his relation to public and police authorities, his position in the community and other factors" which aid the judge in balancing among "(i) punishment, (ii) deterrence and (iii) rehabilitation."⁴⁵ In sentencing narcotics law violators, accurate information concerning a defendant's prior use of cocaine "is an integral part of those factors which the sentencing judge should consider in framing the appropriate sanction."⁴⁶ A judge, at sentencing, may also consider a defendant's prior state law violations which show a propensity to violate the law, or which show that he does not respond to certain types of punishment.⁴⁷

*United States v. Bowdach*⁴⁸ dealt with a sentence imposed pursuant to 18 U.S.C. §3575, the Dangerous Special Offender statute. It calls for enhanced punishment if the judge makes certain findings, one of which is that the defendant is dangerous, as defined in the statute. In that case, the Fifth Circuit approved the sentencing judge's consideration of facts underlying two firearms convictions that were overturned on appeal; those facts were deemed relevant to finding the defendant dangerous for purposes of the statute.⁴⁹ The court also said that a sentencing judge can consider "evidence of crimes for which the defendant has been indicted but not convicted, and evidence of other crimes."⁵⁰ A judge may not,

42. See *United States v. Ashley*, 555 F.2d 462, 466 (5th Cir. 1977), where the court cites *Williams* as controlling authority, and additionally cites *Houle v. United States*, 493 F.2d 915 (5th Cir. 1974) and *United States v. Marcello*, 423 F.2d 993 (5th Cir. 1970) *cert. denied* 398 U.S. 959, *reh. denied* 399 U.S. 938.

43. *Houle v. United States*, 493 F.2d 915 (5th Cir. 1974).

44. *Id.* at 916.

45. *United States v. Marcello*, 423 F.2d 993, 1012 (5th Cir. 1970) *cert. denied* 398 U.S. 959, *reh. denied* 399 U.S. 938.

46. *United States v. Hartford*, 489 F.2d 652, 656 (5th Cir. 1974).

47. *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976).

48. 561 F.2d 1160 (5th Cir. 1977).

49. *Id.* at 1175-76.

50. *Id.* at 1175. It is important to note, however, that a defendant, under this

however, in any situation, rely on hearsay computer statistics which seek to establish how many sales a narcotics dealer may have made before he was apprehended.⁵¹

A defendant's associates, or his alleged status in the Mafia, can be considered in arriving at a comprehensive judgment about a convicted defendant.⁵² In allowing this, however, the Seventh Circuit pointed out that it was in no way "advocating a policy of guilty by association."⁵³ In the circumstances of a sentencing, where the person's guilt has already been determined, that problem is not present.⁵⁴

Where a defendant wins a right to be resentenced, the judge may consider lawless behavior or criminal activity while on parole from the earlier sentence. However, the limits of the first sentence may impose double jeopardy restraints on the second sentence.⁵⁵ Likewise, in a revocation of probation hearing, the judge is not confined, in his consideration of sentencing to the original crime or the offenses of which proof was offered at the revocation hearing. He can permissibly consider the defendant's progressive criminal history.⁵⁶

A judge may also consider facts which are disclosed at trial, out of

statute, is entitled to an evidentiary hearing before sentencing. At this hearing, the defendant is entitled to assistance of counsel, compulsory process, and the right to cross examine witnesses. 18 U.S.C. § 3575(b). Thus, due process safeguards are provided. *See also* United States v. Sweig, 454 F.2d 181 (2d Cir. 1972), where the court said that a judge could permissibly consider a defendant's failure to cooperate with government officials in their investigation of influence peddling, and evidence adduced at trial relating to counts of which the defendant was acquitted. This, however, is not the law in this circuit. *See* text accompanying notes 66 and 67 *infra*. United States v. Martinez, ___ F.2d ___, No.78-5204 (Nov. 22, 1978) indicates that a judge can also consider the factual basis of counts in an indictment that are dismissed.

51. United States v. Cavazos, 530 F.2d 4 (5th Cir. 1976).

52. United States v. Cardi, 519 F.2d 309 (7th Cir. 1975).

53. *Id.* at 313.

54. *Id.*

55. *See, e.g.*, United States v. Durbin, 542 F.2d 486 (8th Cir. 1976).

56. United States *ex rel* Sluder v. Brantley, 454 F.2d 1266 (7th Cir. 1972). In this case, the defendant was sentenced to 20 to 40 years on revocation of probation which stemmed from a burglary conviction. The judge permissibly considered the progression of criminal activity by the defendant which culminated in a kidnapping and alleged aggravated statutory rape. *Compare* Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969), where the court said that "a kidnapper's conduct towards his victim is of great relevancy in determining sentence," *Id.* at 859, but nonetheless held that an *ex parte* communication from the prosecutor to the judge concerning the details of the conduct was a violation of due process.

the presence of the jury. For example, in *United States v. Hodges*,⁵⁷ the court held that the district judge had properly considered statements by witnesses, out of the jury's presence, that the defendant had successfully robbed other banks. Although on appeal the defendant claimed surprise at the judge's reliance on those statements, they appeared in the presentence report and the defendant declined to refute them at sentencing. The court specifically found that the sentencing did not lack fundamental fairness.⁵⁸

In the Fifth Circuit, it is permissible for a judge to consider his feelings that a defendant has perjured himself during trial.⁵⁹ However, in the context of a new trial, it is impermissible for a judge to consider the possibility that the defendant perjured himself, and then impose a

57. 556 F.2d 366 (5th Cir. 1977).

58. *Id.* at 369.

59. *United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976). In *Nunn*, the appellate court adopted the words of Judge Frankel's opinion in *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), which said that the argument contending that consideration of possible perjury amounts to a conviction without due process.

[It] ignores the nature of the sentencing process as it exists in our system and of the factors the trial judge may consider in exercising a frequently enormous range of discretion. If there is no clear consensus on these factors, it is certainly clear that they include, as aggravating circumstances, conduct that is not literally "criminal," or at least has not been duly adjudged criminal in the case in which sentence is being imposed.

* * *

The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentance" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. Compare, Bazelon, C.J., with Leventhal, J., in *Scott v. United States*, *supra*, 419 F.2d 269 and 282, respectively. Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.

525 F.2d at 960-61, quoting from 505 F.2d at 1235-36 (2d Cir. 1974).

For further Fifth Circuit authority which allows a judge to consider the possibility of perjury, see *United States v. Gamboa*, 543 F.2d 545 (5th Cir. 1976). This view is not accepted by all circuits; see 525 F.2d at 960, notes 4 & 5.

harsher sentence after the second trial than that imposed after the first.⁶⁰ This was described by the court as an adjudication of guilt, “of the crime of perjury without a presentment to a grand jury, without a trial by a jury of his peers, without the right to present evidence in his behalf, and without other procedural safeguards designed for the protection of an accused.”⁶¹ That conclusion, however, was reached on the basis of double jeopardy considerations; not as an abuse of discretion.

Courts have also not been receptive to the argument that different sentences for co-defendants convicted of essentially similar criminal conduct violate a defendant’s entitlement to equal protection.⁶² As long as sentences are within the statutory limits, courts generally will not disturb them.⁶³ One case of disparate sentence dealt with two defendants convicted of marijuana charges, wherein one received a six-month prison term and the other received probation.⁶⁴ However, the defendant who received probation had plead guilty and had cooperated with the government. Since the sentence was within the statutory limits, it was not reviewable on appeal as an abuse of discretion.⁶⁵

Fifth Amendment considerations, however, do prevent trial judges from relying on a defendant’s failure to cooperate with the government in imposing a harsher sentence than would have been imposed had he cooperated.⁶⁶ Likewise, a court may not penalize a defendant for not “coming clean” after conviction and before sentencing.⁶⁷ It is permissible, however, to consider as a factor among a range of others, that a

60. *United States v. Bell*, 457 F.2d 1231 (5th Cir. 1972).

61. *Id.* at 1236.

62. *United States v. Frontero*, 452 F.2d 406 (5th Cir. 1971); *United States v. DeLaFuente*, 550 F.2d 309 (5th Cir. 1977).

63. 550 F.2d 309.

64. *Government of Canal Zone v. O’Calagan*, 580 F.2d 161 (5th Cir. 1978).

65. *Id.* at 165.

66. *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), where the court stated: “When it has been made to appear that longer sentences have been imposed by the courts because the defendants refused to confess their guilt and persisted in their claims of innocence we have vacated the sentences.” *Id.* at 1085. The court termed the comparison of the issues of confessing guilty with cooperating with the government as a “distinction without a difference.” *Id.*

67. *United States v. Wright*, 533 F.2d 214, 215 (5th Cir. 1976). *See also* *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), where the rule was established that a court may not pressure a defendant to confess his guilt prior to imposition of sentence. In *Bertrand v. United States*, 467 F.2d 901 (5th Cir. 1972), the rule was extended to the situation where a trial court may pressure a defendant to admit his guilt in a crime other than that to which he had originally pleaded.

defendant exhibits no remorse for his crime.⁶⁸

One final situation which requires attention is sentencing in the context of plea bargains. In this setting, it is important that the judge know all of the terms of a plea agreement before imposing sentence. If the sentence is entirely within statutory limits, but the judge is not informed fully of the terms of the agreement, he will still be reversed for a sentence based on what the judge perceives to be the defendant's non-compliance with those terms.⁶⁹ In accepting a guilty plea, it is also imperative that the district judge personally advise the defendant of the maximum possible penalties. Permitting the United States Attorney to advise the defendant of the maximum possible sentence, instead of the judge doing it personally, constitutes reversible error.⁷⁰

4. CONCLUSION

Although the cases may seem to create unnecessary exceptions and overly complex issues, the time honored general rule that sentencing is a discretionary function stands basically intact. Judges should keep in mind the motive behind the latest amendment to Federal Rule 32(c),⁷¹ which is accuracy of information. All protections given to a convicted defendant serve that single function. The law allows a judge to consider a wide range of human qualities and instances of conduct on the part of the defendant, but the judge's sources of information must have some indicia of reliability. If that purpose is honored, and the various procedures supporting it are followed, sentences within the statutory maximum will probably not be vacated on appeal.

68. *United States v. Richardson*, 582 F.2d 968 (5th Cir. 1978).

69. *United States v. Shanahan*, 574 F.2d 1228 (5th Cir. 1978). In this case, the government mentioned no conditions of cooperation when the guilty plea was accepted by the district court. However, at sentencing, it argued to the court that the defendant had not fulfilled his part of the bargain because he had not cooperated. The sentence was vacated and remanded to another judge for resentencing.

70. *United States v. Clark*, 574 F.2d 1357 (5th Cir. 1978).

71. *See* note 22 *supra*.

Protecting Municipalities Against Unnecessary State Infringement: The Unrealized Wake of the Municipal Home Rule Powers Act and *Temple Terrace*

CHERYL RYON EISEN*

In 1976 the Florida Supreme Court affirmed the decision of the Second District Court of Appeal in *Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace*,¹ wherein the issue was the extent to which the state or its agencies may ignore local zoning regulations in carrying out their proper functions, be they governmental or proprietary in nature.² In adopting the district court's opinion as its own,³ the Florida Supreme Court established the "balancing of interests" test as the measure for determining on a case-by-case basis whether a state agency enjoys immunity from local zoning provisions.⁴ In embracing this test, the district court rejected the "superior sovereign"⁵ and "power

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1. 332 So. 2d 610 (Fla. 1976), *aff'g* 322 So. 2d 571 (Fla. 2d DCA 1975) [hereinafter referred to as *Temple Terrace*].

2. A distinction between governmental and proprietary functions is frequently used by courts to determine whether a political subdivision of the state attempting to locate an institutional facility is immune from local zoning regulation. Proponents of the distinction contend that when the institutional use is "governmental" the political unit performing such a function is immune from the conflicting zoning ordinance; when the use is "proprietary," however, the zoning ordinance prevails [A] political unit performs a governmental function if it is acting pursuant to and in furtherance of obligations imposed by legislative mandate. The unit performs a proprietary function if the act is permissive in nature The classification of specific functions as governmental or proprietary varies from jurisdiction to jurisdiction.

Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 869-70 (1971) (footnotes in the original are omitted). This governmental/proprietary function distinction was essentially rejected by the district court in *Temple Terrace*. 322 So. 2d at 577-78.

3. 332 So. 2d at 612.

4. See 322 So. 2d at 578-79.

5. 322 So. 2d at 576-77. Under this test, "where immunity from a local zoning ordinance is claimed by an agency occupying a superior position in the governmental

of eminent domain”⁶ tests as well as the “governmental/proprietary” theory.⁷ In addition, the court noted that the “statutory guidance” test was still valid but inoperative in *Temple Terrace* because there was no applicable legislation to consult.⁸ In addition to establishing the balancing of interests test for judicial use in settling inter-governmental zoning squabbles, the district court⁹ and the supreme court¹⁰ clearly placed on the state the burden of seeking compromise with local authorities.¹¹

hierarchy, it is presumed that immunity was intended in the absence of express statutory language to the contrary.” *Id.* at 574.

6. *Id.* at 578. “Where the power of eminent domain has been granted to the governmental unit seeking immunity from local zoning, some courts have concluded that this conclusively demonstrates the unit’s superiority where its proposed use conflicts with zoning regulation.” *Id.* at 574.

7. See note 2 *supra*.

8. *Id.* at 578. “While we acknowledge that a specific legislative statement on the subject would control, in the absence of such a statement we must look to other criteria in order to reach a decision.” *Id.*

9. [T]he governmental unit seeking to use land contrary to applicable zoning regulations should have the burden of proving that the public interests favoring the proposed use outweigh those mitigating against a use not sanctioned by the zoning regulations of the host government.

. . . [U]nder normal circumstances one would expect the agency to first approach the appropriate governing body with a view toward seeking a change in the applicable zoning or otherwise obtaining the proper approvals necessary to permit the proposed use.

Id. at 579.

10. We conceive that the effect of our decision will be that the state will always cooperate with local government when it has decided to achieve an objective by means of a non-conforming use . . . [L]ocal administrative proceedings will provide the forum in which the competing interests of governmental bodies are weighed.

332 So. 2d at 613.

Petitioner has raised here its concern that local governments will be able to thwart state policy by refusing to approve zoning for legislative projects. The courts are available, however, to review the balance struck in administrative proceedings. Beyond that, . . . the State of Florida possesses the power to exempt itself from local zoning ordinances.

Id. n.5.

11. For general discussion of *Temple Terrace*, see Note, *State Immunity From Zoning: A Question of Reasonableness*, 31 U. MIAMI L. REV. 191 (1976), and Commentary, *Immunity of State and State Related Activities from Local Municipal Zoning Regulations: Florida Focus*, 28 U. FLA. L. REV. 800 (1976).

The balancing of interests test was probably first fully proposed, though not so named, in a Note which appeared in the Harvard Law Review in 1971. Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869, 883

The purpose of this brief article is to explore the possibility of the extension of the holding of *Temple Terrace* beyond inter-governmental zoning disputes to state/local conflicts in other areas of municipal concern.

1. CASE IN POINT: THE BOCA BANYAN TREE

In 1978, the City of Boca Raton filed a complaint in Palm Beach County Circuit Court against a construction company and the State of Florida's Department of Transportation (F.D.O.T.).¹² The complaint sought to enjoin the defendants from destroying a banyan tree located within the right-of-way for improvements to a street without first applying for and obtaining from the city a tree removal permit pursuant to a city ordinance.¹³ Essentially, the ordinance provided that no tree could be removed by any person without first obtaining a city permit and also set forth certain conditions which must exist for a removal permit to issue.¹⁴ Public rights-of-way were specifically included within the pur-

(1971). Since that time, a number of jurisdictions have embraced this test to resolve inter-governmental zoning disputes involving various levels of government. *See, e.g.,* City of Newark v. University of Delaware, 304 A. 2d 347 (Del. Ct. Ch. 1973), Kunimoto v. Kawakami, 56 Haw. 582, 545 P. 2d 684 (1976), Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P. 2d 230 (Ct. App. 1978), Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W. 2d 426 (1972), Rutgers, State University v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972), Lincoln County v. Johnson, 257 N.W. 2d 453 (S.D. 1977). Additionally, Florida courts before *Temple Terrace*, were using a balancing test to resolve zoning conflicts between governments. *See, e.g.,* State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (1930), and Palm Beach County v. Town of Palm Beach, 310 So. 2d 384 (Fla. 4th DCA 1975).

Interestingly, in *Lincoln County v. Johnson, supra*, while the court applied the balancing of interests test in deciding when a city was required to seek county approval for locating a sanitary landfill in the county on property owned by the city outside the city limits, it also pointed out the possibility that:

State agencies such as public utility commissions or state highway authorities have a political jurisdiction and a concomitant planning responsibility statewide in scope transcending local boundaries. To be compelled to comply with local zoning regulations might well thwart the state agency's attempt to perform its public service function.

257 N.W. 2d 453, 457.

12. City of Boca Raton v. Crabtree Constr. Co., No. 78-1035 CA (Fla. 15th Cir. Ct., filed March 21, 1978).

13. *See generally*, BOCA RATON, FLA., CODE ch. 21A (1978).

14. *Id.* § 21A-12.

view of the ordinance.¹⁵ In this case, circumstances were such that the mandatory conditions were partially satisfied and the city was willing to issue the removal permit if the defendants were willing to comply with a permissive condition under the ordinance that the tree in question be relocated or that trees and landscaping of equal value be placed in the near vicinity.¹⁶ Defendants refused.

In its memorandum in support of its request for permanent injunction, the city argued by analogy to *Temple Terrace* that the balancing of interests test requires state agencies to apply for appropriate municipal permits and to cooperate with local governments in any instance where proposed state action would conflict with municipal ordinances.¹⁷ In granting defendant F.D.O.T.'s Motion to Dismiss,¹⁸ the circuit court found that *Temple Terrace* was "limited in impact of decision to zoning matters only"¹⁹ and in effect decided the case on the basis of a superior sovereign test, finding no statutory waiver of the sovereign immunity of the F.D.O.T. as an agency of the state.²⁰

If the City of Boca Raton had appealed the banyan tree case,²¹ it

15. *Id.* § 21A-25.

16. Memorandum in Support of Plaintiff's Request for Permanent Injunction at 6, *City of Boca Raton v. Crabtree Constr. Co.*, No. 78-1035 CA (Fla. 15th Cir. Ct. 1978).

17. *Id.* at 4-6. The city recognized that this contention assumes that the source of authority for the questioned municipal regulation probably must be Article VIII, Section 2(b) of the Florida Constitution, in light of the supreme court's decision in *Dickinson v. City of Tallahassee*, 325 So. 2d 1 (Fla. 1975), upholding state immunity from municipal taxation. See text accompanying notes 23-24 and 31-35 *infra*. It must also be noted that the city was not contending that it had the power to pass ordinances in conflict with state law. See *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 806 (Fla. 1972). Instead, the city was attacking state action contrary to municipal ordinance, which action was not specifically protected from municipal control by state statute, the state constitution, or the general concept of sovereign immunity. See text accompanying notes 31-35 *infra*.

18. F.D.O.T. responded to the city's complaint with a motion to dismiss on various grounds. The road contractor, Crabtree Construction Company, filed a cross-claim against F.D.O.T. and a counter-claim against the city. The dismissal was with prejudice as the city stated at the hearing that it had nothing further to plead. The dismissal operated in favor of Crabtree as it was acting as an agent of F.D.O.T.

19. *City of Boca Raton v. Crabtree Constr. Co.*, No. 78-1035 CA (Fla. 15th Cir. Ct., April 4, 1978).

20. *Id.*

21. The road project was delayed by other causes and, accordingly, the threat to the banyan tree was removed. The remaining pleadings were dismissed by the parties with stipulations that would permit the banyan tree to be removed when required and

might have participated in some important law-making. It is the thesis of this article that the position taken by the City of Boca Raton advocating the extension of the *Temple Terrace* rule beyond zoning matters was well-founded and supportable by significant state constitutional and legislative predicate.²²

2. CONSTITUTIONAL BASIS FOR THE EXTENSION OF THE *TEMPLE TERRACE* RULE: ARTICLE VIII, SECTION 2(b)

In its review of the district court's decision in *Temple Terrace*, the Florida Supreme Court was careful to distinguish that case from the case of *Dickinson v. City of Tallahassee*,²³ decided by the supreme court after the district court issued its opinion in *Temple Terrace*:

In *Dickinson* we held that the state was immune from a municipal utility tax, in part because Article VII, Section 9(a) of the Florida Constitution did not expressly waive the state's sovereign immunity from taxation and in part because the applicable statute did not expressly confer on municipalities the power to impose a utility tax on the state. Sovereign immunity is no guide here as we deal with a zoning power of municipalities which is derived from Article VIII, § 2(b) of the Florida Constitution . . .²⁴

From this language it is arguable that the supreme court should be willing to favorably consider the application of the balancing of interests test to state/local disputes regarding a municipality's exercise of any power having the same constitutional lineage as municipal zoning powers, assuming no applicable legislation preserving sovereign immunity (thus necessitating the use of the statutory guidance test rather than the balancing of interests test).²⁵ What is the basis for the special significance attached by the supreme court to Florida municipalities' Article VIII, Section 2(b) powers?

the city to demand and enforce relocation or replacement landscaping. Interview with Robert A. Eisen, Assistant City Attorney for the City of Boca Raton, Florida, in Boca Raton (November 1, 1978).

22. To date, there is no case law, in Florida or elsewhere, concerning the extension of the balancing of interests test to state/local conflicts outside the area of zoning.

23. 325 So. 2d 1 (Fla. 1975).

24. 332 So. 2d at 612.

25. See note 8 *supra*.

A. *The 1968 Revision of the Florida Constitution: Home Rule*

With respect to the existence and powers of municipalities, the 1885 Florida Constitution, as amended through 1967, provided in pertinent part:

The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.²⁶

With the 1968 revision of the Florida Constitution came the following replacement provisions in Article VIII, Section 2, regarding municipalities:

(a) ESTABLISHMENT. Municipalities may be established or abolished and their charters amended pursuant to general or special law

. . . .

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise *any* power for municipal purposes *except* as otherwise provided by law.²⁷

The new Article VIII provision was apparently proposed for the purpose of granting "home rule" powers to Florida municipalities.²⁸ In the past municipalities had been constitutionally reliant on the legislature to *grant* municipal powers by general or special law, but now it appeared cities could exercise *any* power assuming a municipal purpose for such exercises and no state legislation to the contrary.²⁹ The realiza-

26. Art. VIII, § 8, FLA. CONST. (1885). This section also provided that if a municipality were abolished, provision must be made for the protection of its creditors.

27. (Emphasis added.) This revised section also retained the "protection of creditors" provision of the former constitution and added the provision that municipal legislative bodies be elected.

28. It was not generally conceded that the new Article VIII would accomplish home rule for municipalities, however. See M. DAUER, C. DONOVAN, & G. KRAMMER, SHOULD FLORIDA ADOPT THE PROPOSED 1968 CONSTITUTION? 33-36 (1968) (Public Administration Clearing Service of the University of Florida: Studies in Public Administration No. 31, 1968). For a general discussion of the concept of municipal home rule, see Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

29. It should be noted, however, that prior to the 1968 constitutional revision the legislature had chosen to grant limited *legislative* home rule to Florida cities. ("Although difficult to define, legislative home rule may be said to exist when the state

tion of this change did not occur until 1973, however.³⁰

B. Sovereign Immunity

Analysis of the home rule provisions of the 1968 constitution notwithstanding, the question of state immunity to exercises of municipal power still remains. Accepting the elementary premise of the state's sovereign immunity, one seeking to deny such immunity must identify a waiver of the privilege.³¹ The supreme court in *Temple Terrace* took for granted the *need to find an express* constitutional or statutory waiver with respect to municipal exercise of powers under *Article VII*, and the *existence of an implied* waiver with respect to exercise of *Article VIII*

legislature, in the absence of constitutional provision, empowers municipalities to adopt and exercise home rule powers." Vanlandingham, *supra* note 27, at 273). This came about in 1915 when a general act on municipal charter amendment was passed. Chapter 6940, §§ 1-15, Laws of Florida (1915). The first section of the chapter limited the scope of municipal home rule to modification of local government structures, election procedures, and the mode of exercising existing powers:

Every city . . . may . . . determine the manner in which its corporate powers shall be exercised, by amending its charter, or adopting a new charter, consistent with the constitution and the general laws of this state; or . . . consistent with . . . [applicable] special laws; provided, however, that this article shall not be so construed as to authorize any city . . . to enlarge its corporate powers beyond the limitations prescribed by law

Section 166.01, FLA. STAT. (1971).

30. The legislation referred to in note 29, *supra*, remained on the books after the adoption of the 1968 constitution until 1973 when the Municipal Home Rule Powers Act was passed (*see* notes 37-39 *infra*, and accompanying text) although in 1969 a new section appeared in Chapter 167, Florida Statutes, the general chapter on municipal powers:

(1) In accordance with the provisions of § 2(b), Art. VIII of the state constitution, municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when prohibited by general or special law.

(2) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution.

Section 167.005, FLA. STAT. (1969). The result of including this provision at the beginning of a laundry list of enumerated municipal powers in Chapter 167 as well as leaving intact the very restrictive-sounding provision in § 166.01, recited *supra*, was understandable judicial confusion. *See* note 38 *infra*, especially, *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972).

31. *Buck v. McLean*, 115 So. 2d 764, 768 (Fla. 1st D.C.A. 1959).

powers.³² The court appeared to support this approach on the basis that a municipality's Article VIII general home rule powers flow directly from the constitution and are, therefore, self-executing,³³ whereas its Article VII taxing powers are mandatory or permissive, but not self-executing, therefore requiring legislative implementation.³⁴ "This constitutional delegation of municipal authority differentiates [the two]."³⁵ The necessary conclusion is that sovereign immunity is implicitly preserved by the constitution where there remains the opportunity, if desired, of legislative waiver, but is implicitly waived when not preserved in a constitutional provision granting self-executing powers.

3. LEGISLATIVE BASIS FOR EXTENSION OF THE *TEMPLE TERRACE* RULE: THE MUNICIPAL HOME RULE POWERS ACT OF 1973

In *Temple Terrace*, the supreme court pointed out that it was dealing with a power of municipalities (zoning) derived from the state constitution by way of the Municipal Home Rule Powers Act.³⁶ The court was referring to the 1973 revision of Florida Statutes³⁷ belatedly enacted by the legislature to reflect the reality of Article VIII, Section

32. 332 So. 2d at 612, as set forth in the text accompanying note 24 *supra*.

33. Home rule provisions are generally classified as self-executing, mandatory, and permissive. A self-executing provision . . . enables a city to adopt and exercise home rule powers immediately without the necessity of state implementing legislation. A mandatory provision . . . stipulates that the state legislature "shall" enact implementing legislation to provide for home rule adoption. A permissive provision . . . merely authorizes home rule and empowers the state legislatures to grant it at its discretion.

Vanlandingham, *supra* note 28, at 278 (footnotes in the original are omitted). That Article VIII, Section 2(b) is self-executing is by no means an incontestable conclusion. In fact, the supreme court did not expressly state in *Temple Terrace* that Article VIII, Section 2(b) is self-executing or that Article VII, Section 9(a) is mandatory or permissive only. However, that the court now accepts this principle is a logical inference to be drawn from its comparison of the two provisions. *But see* note 38 *infra*.

34. In pertinent part, Article VII, § 9(a) provides: "[M]unicipalities shall . . . be authorized by law to levy ad valorem taxes and may be authorized . . . to levy other taxes . . . except ad valorem taxes on intangible personal property and taxes prohibited by this constitution." (Emphasis added.) Compare Article VIII, § 2(b) as set forth in the text accompanying note 27 *supra*.

35. 332 So. 2d at 613.

36. *Id.* at 612-13.

37. Ch. 73-129, § 1, Laws of Fla.

2(b) of the 1968 Florida Constitution and to clear up judicial confusion over the meaning and intent of the constitutional revision.³⁸

38. Compare *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) with *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974).

This is not the initial appearance of a rent control ordinance before this Court. We dealt with a prior rent control ordinance of the city in [*Fleetwood*]; there we affirmed a trial court order invalidating that ordinance. In so doing we stated that a municipality has no power to enact a rent control ordinance "absent a legislative enactment authorizing the exercise of such a power by a municipality" . . .

[T]herefore, we must consider whether the municipality now has the power to enact such an ordinance; that is, whether the enactment of [the Municipal Home Rule Powers Act] after our decision in *Fleetwood Hotel* necessitates a change in the result there reached. I believe it does . . .

Id. at 764-65 (Dekle, J., concurring specially).

In pertinent part, the Municipal Home Rule Powers Act (§§ 166.011-.411, Fla. Stat., 1977) provides:

§ 166.021 Powers.—

(1) As provided in Section 2(b), Article VIII of the State Constitution, municipalities shall have the . . . powers to enable them to conduct municipal government, perform municipal function, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited from law.

(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

(3) The Legislature recognizes that pursuant to the grant of power set forth in § 2(b), Article VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

(a) The subjects . . . which require general or special law pursuant to . . . the State Constitution;

(b) Any subject expressly prohibited by the Constitution;

(c) Any subject expressly preempted to state or county government by the Constitution or by general law; and

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of . . . the state constitution;

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the Constitution . . . and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those . . . expressly prohibited.

§ 166.042 Legislative intent.—

(1) It is the legislative intent that the repeal [of certain statutes pertaining to municipal powers] shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes.

Prior to the passage of the 1973 act it was necessary to find legislative authorization to municipalities to legislate in the field of zoning, tree removal, and all other areas of municipal concern. This was true even during the period after the 1968 constitutional revision until passage of the Municipal Home Rule Powers Act, the broad language of Article VIII, Section 2(b) notwithstanding.³⁹ Under the act, however, a municipality may legislate with respect to almost any subject pursuant to Article VIII, Section 2(b).⁴⁰ This means that most powers exercisable by a municipality are Article VIII powers, as was the zoning power in *Temple Terrace*.⁴¹

Recalling the holding of the supreme court in *Temple Terrace* that sovereign immunity was no guide in a case dealing with the zoning power of municipalities "which is derived from Article VIII, § 2(b) of the Florida Constitution by way of the Municipal Home Rule Powers Act,"⁴² the logical conclusion is that sovereign immunity would be inoperative, in the absence of preservative legislation, as to most of the powers exercisable by municipalities today. By further analogy to *Temple Terrace*, the duty of the state to seek compromise with municipal authorities where city regulations pose an obstacle to state action is clear, as is the necessity of using the balancing of interests test in judicial solution of unresolved state/local conflicts.

4. CONCLUSION

The foregoing analysis demonstrates the existing opportunity for Florida courts to recognize in an appropriate case the pre-eminence of municipal authorities vis-à-vis the state and its agencies where neither the state constitution nor the legislature has expressly provided sovereign immunity from local rules and regulations. It is nonetheless possible that courts will be reluctant to extend the *Temple Terrace* rule to

It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities . . . but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

39. See text accompanying notes 26-30 *supra*.

40. For those subjects on which a municipality may not legislate, see § 166.021(3), Fla. Stat. (1977) as set forth in note 38 *supra*. The municipal taxing power is not an Article VIII power, being specifically spoken to in Article VII.

41. See 332 So. 2d at 612.

42. *Id.* at 612-13.

non-zoning cases. Accordingly, it is proposed that the Florida Legislature amend the Municipal Home Rule Powers Act as follows:*

An Act relating to the powers of municipalities; creating section 166.042(3), F.S., to provide a statement of legislative intent that the state, the counties, and their agencies must comply with, or obtain waivers of compliance with, municipal regulations in those municipalities in which they operate; providing the criterion to be judicially applied in deciding questions of wrongful denial of waiver.

Be It Enacted by the Legislature of the State of Florida:

166.042 Legislative Intent.—

(3)(a) It is the legislative intent that municipal ordinances and other regulations passed pursuant to s. 2(b), Art. VIII of the State Constitution and this Act shall be complied with by the state and counties and their agencies unless otherwise provided by general or special law, including county charters. This requirement may be fulfilled by applying for and receiving from the appropriate municipal authority a variance or other waiver of compliance.

(b) In the event a state or county or an agency thereof is denied a requested variance or other waiver of compliance with a municipal ordinance or regulation, the state or county or agency thereof may seek judicial review in a court of competent jurisdiction, which court shall determine which governmental authority, on balance, possesses the greater interest in maintaining its course of action. Sovereign immunity shall not be inferred from any legislative grant of power in the absence of a specific provision for sovereign immunity.

The effects of this proposal would be to translate to legislative mandate the judicial rule in *Temple Terrace* beyond the limited application inferred by the circuit court in the Boca banyan tree case and to lend added significance to local ordinances evidencing the will of a local citizenry on important local issues which are not transcended by state necessity.

* Editor's Note: The author's proposed legislation has been pre-filed for consideration in the 1979 session of the Florida Legislature as House Bill 531.

Municipal Regulation of "Adult Entertainment"— The Game Without Rules?

GEORGE F. KNOX, JR.*
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"Perhaps I could never succeed in
intelligibly [defining obscenity].
But I know it when I see it."

Mr. Justice Stewart,
concurring in *Jacobellis v.*
Ohio, 378 U.S. 184, 197 (1964).

Historically, local governments have been empowered to regulate the health, safety, welfare and, more significantly, the morals of their citizens. The exercise of these powers is subject to a standard of reasonableness, except where there exists some threat to the exercise of "fundamental rights" of those persons who are to be governed by the regulations.

The courts have decided that the sale or distribution of materials previously determined to be obscene is not a right protected by the first amendment to the Constitution of the United States.

While there have been varying opinions regarding the precise definition of obscenity, this article will address the ability of local governments to regulate the distribution of those materials that have been judicially determined to be obscene and the measures which may properly be applied to those individuals who have previously been convicted of some offense relating to obscenity.

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The authors gratefully acknowledge the assistance of Ms. Susan R. Horovitz, Nova University law student, whose extensive and diligent research made this article possible.

The technical assistance of Ms. Freda Lieberman in preparing the text of this article is gratefully acknowledged.

In addition to utilizing the power to revoke occupational licenses for infractions relating to obscenity, local authorities have sought to circumvent the legal difficulties associated with the infringements upon free speech by fashioning zoning regulations which are designed to confine "adult entertainment" activities to specified geographical areas, to disperse these activities throughout a wide geographical area, or to abate these activities as nuisances.

Local governments have often imposed rules and procedures which may be designed to frustrate the "adult entertainment" activities. These procedures include background investigations of operators, officers and employees of adult entertainment businesses; the taking of police photographs and fingerprints of employees; requiring that lists of names and addresses of customers be maintained; and the strict (and sometimes selective) enforcement of building and fire codes.

The judiciary has sought to balance the competing interests of governments, which seek to regulate and proscribe a mode of conduct and those citizens who seek to exercise their right of expression and their freedom to earn a living. The result of the courts' judicious scrutiny has been that cases involving the propriety of certain regulatory measures have been decided, each on its own facts. As a result, there are few precise guideposts for legislative bodies to follow.

In an effort to discover whether there exist consistent patterns of legislation which appear to be a permissible exercise of the police power in a manner designed to regulate the morals of the citizens, this article will explore some of the enactments by local governments and the review processes.

1. HISTORY

"Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages."¹ The interest in sexual matters was first "squarely presented" to the United States Supreme Court in 1957,² when it was called upon to determine the permissibility of having local governmental bodies proscribe the extent to which sexually-oriented materials may be sold, ad-

1. Roth v. United States, 354 U.S. 476, 487 (1957).

2. *Id.* The court did note that, in its previous opinions, it had always *assumed* that obscenity was not protected by the "freedoms of speech and press." 354 U.S. at 481. However, this was the first case actually *holding* that obscenity is not a constitutionally protected area. 354 U.S. at 485.

vertised or distributed to the public.

There have been early determinations that municipalities may adopt ordinances which regulate the exhibition of obscene motion pictures³ and the distribution of obscene literature as a valid exercise of the police power. However, in these earlier cases, the concepts of obscenity were limited to whether a theatre operator should lose his license for exhibiting a film relating to the repeal of a birth control law,⁴ a picture which portrayed in harrowing detail the capture and death of a spy,⁵ or a certain picture dealing with the American Civil War reconstruction period and having a tendency to stimulate class hatred.⁶ Current concern for regulation is motivated by a desire to limit the distribution of materials which explicitly depict sexual intercourse, fellatio, cunnilingus, brutality, sodomy and, more recently, the depiction of the foregoing activities by children, known as "kiddi-porn."

Inasmuch as the intensity of the sexual activity which is depicted has increased over the years, the need for heightened emphasis upon the regulation of morals by governments is apparent. Concurrently, however, the courts are reluctant to countenance a manner of regulation which would infringe upon an individual's "fundamental rights." All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the constitutional guaranties of free speech and press, unless excludable because they encroach upon the limited area of more important interests.⁷ The difficulty, from the view of local governments, is that the "more important interests" have not been precisely defined. The Supreme Court, in *United States v. O'Brien*,⁸ held that a government regulation is sufficiently justified if: (1) it is within the constitutional powers of the government; (2) it furthers an important or substantial governmental interest; (3) the govern-

3. See, e.g., *Brooks v. Birmingham*, 32 F.2d 274 (N.D. Ala. 1929).

4. *Universal Film Manufacturing Co. v. Bell*, 100 Misc. 281, 167 N.Y.S. 124 (1917), *aff'd*, 179 App. Div. 928, 166 N.Y.S. 344 (1917). The film in question portrayed, as a martyr, the confessed violator of a law forbidding the imparting of information pertaining to birth control. The intent of the film's maker was, unquestionably, to argue in favor of repealing the law. The court upheld the suspension of the theatre operator's license under a city ordinance allowing same where such a film or play is "immoral, indecent or against the public welfare." 167 N.Y.S. at 128.

5. *City of Chicago v. Fox Films*, 251 F. 883 (7th Cir. 1917).

6. *Thayer Amusement Corp. v. Moulton*, 21 R.I. 117, 7 A.2d 682 (1939).

7. 354 U.S. at 484.

8. 391 U.S. 367 (1968).

mental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.⁹ The Court referred to "an important governmental interest," but failed to define it. In the opinion, Mr. Justice Harlan noted that "[t]wo members of the Court steadfastly maintain that the first and fourteenth amendments render society powerless to protect itself against the dissemination of even the filthiest materials."¹⁰ However, there is also a reluctance to admit that the states are powerless to protect their citizens from exposure to patently offensive materials. "The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential."¹¹ The Court believes that the "task of restructuring the obscenity laws lies with those who pass, repeal and amend statutes and ordinances."¹²

While the courts have had little difficulty in permitting the regulation of those materials which are determined to be offensive to children and non-consenting adults,¹³ the question of whether states and municipalities may regulate distribution to "consenting adults" is not so well settled.

The United States Supreme Court, in *Paris Adult Theatre I v. Slaton*,¹⁴ announced that, even though it had often pointedly recognized the high importance of states' interest in regulating the exposure of obscene materials to juveniles and non-consenting adults, "this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material."¹⁵ The Court held, in particular, "that there are legitimate state interests at stake in stemming the tide

9. *Id.* at 377.

10. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 705 (1968). The "two members" to whom Harlan is referring are Justices Douglas and Black, both of whom set out this idea in their dissenting opinions in *Roth v. United States*, 354 U.S. 476, 508, and in *Ginzburg v. United States*, 383 U.S. 463, 476, 482 (1966).

11. *United States v. Reidel*, 402 U.S. 351, 357 (1971).

12. *Id.*

13. *Miller v. California*, 413 U.S. 15, 18 (1973). (Unsolicited offering of sexually explicit books sent through the mails).

Stanley v. Georgia, 394 U.S. 557 (1969). (Where the court found that the first and fourteenth amendments recognize a valid governmental interest in dealing with pornography which might fall into the hands of children or offend the general public.)

14. 413 U.S. 49 (1973).

15. *Id.* at 59.

of commercialized obscenity . . .”¹⁶ “These included the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city centers, and possibly the public safety itself . . . that there is at least an arguable correlation between obscene material and crime.”¹⁷

In distinguishing between an individual’s private right to “expose himself to indecency” and his demand for a right to obtain books and pictures in the marketplace, the Court noted that *to grant this right is to affect the world about the rest of us, and to impinge on other privacies*.¹⁸

By its holding in *Paris*, the Court opened the door for local governments to regulate, pursuant to a recognized state interest and subject to procedural safeguards, the distribution of obscene materials. Such a right does invite the innovative and imaginative exercise of the power. However, again the Court failed to provide standard to be applied. The result has been that state and local governments have adopted certain measures, the operators of “adult entertainment” establishments have attacked these measures and the courts have treated each of the cases separately, with no apparent emerging judicial policy regarding the parameters within which the governments may regulate.

The courts of the state of Florida have already ruled upon such issues as whether the seizure of certain motion pictures by municipal officers and a subsequent court injunction against their showing constitute a prohibited prior restraint¹⁹ and whether a charging information which tracks the language of the Florida obscenity statute²⁰ while specifically naming the publication involved in a prosecution is “sufficient to put the defendant on notice and prevent double jeopardy.”²¹ Thus far,

16. *Id.* at 57.

17. Report of the Commission on Obscenity and Pornography, (Hill-Link Minority Report) (1970).

18. Berns, *Pornography vs. Democracy, The Case for Censorship*, 22 THE PUB. INTEREST 3 (Winter 1971) (emphasis added).

19. State ex rel. Little Beaver Theatre v. Tobin, 258 So. 2d 30 (Fla. 3rd DCA 1972). The injunction was upheld as to certain seized films, although the court found such a restraint could not be imposed against any showing which would occur outside of Dade County, Florida, (the jurisdiction in which the court sat) as the circuit court had ordered. In addition, the court held invalid those portions of the injunction which prohibited the showing of “any motion picture which portrayed certain listed acts” without reference to any seized or specific film. 258 So. 2d at 32.

20. § 847.011 FLA. STAT. (1977).

21. Johnson v. State, 351 So. 2d 10, 12 (Fla. 1977).

the United States District Court for the Southern District of Florida has determined that vigorous enforcement of obscenity laws constitutes an invalid restraint on first amendment rights if its purpose is to force a sexually-oriented enterprise to cease doing business or to refrain from dealing in presumably protected sexually-oriented materials.²²

2. PRIOR RESTRAINT—AN OVERVIEW

In attempting to regulate the distribution of printed or recorded material based on its content, municipalities have found themselves inexorably enmeshed in the doctrine of prior restraint. That is, a restraint on a form of speech before any actual expression occurs, with an absence of judicial safeguards.²³

The historical genesis of this doctrine is traced in *Near v. Minnesota ex rel. Olson*.²⁴ In reversing a finding of public nuisance against an anti-semitic publication, the Court quoted Blackstone²⁵ in holding that liberty of the press consisted in laying "no previous restraints upon publication."²⁶

Prior restraints on free speech are not, however, *per se* unconstitutional. In *Time Film Corp. v. Chicago*,²⁷ the Supreme Court refused to strike down a section of a Chicago city ordinance requiring the submission of a film to a censor prior to its being exhibited.²⁸ Although the

22. *P.A.B., Inc. v. Stack*, 440 F. Supp. 937 (S.D. Fla. 1977).

23. *Southeastern Publications, Ltd. v. Conrad*, 420 U.S. 546 (1975). Here, municipal authorities denied a promoter of theatrical productions the use of a municipal theatre in which to present the rock musical "Hair," on the basis that the presentation of such a show "would not be 'in the best interest of the community.'" *Id.* at 547-48. The Supreme Court found such denial constituted a prior restraint because the municipal authorities had denied "use of a forum in advance of actual expression." *Id.* at 553. The Court further held that the municipal authorities violated the promoter's first amendment right of free expression when they effected the prior restraint without implementing "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Id.* at 559.

24. 283 U.S. 697, 713 (1931). In this landmark case, the United States Supreme Court held that a state statute which prohibited, as a public nuisance, the publication of a newspaper or periodical, imposed "an unconstitutional restraint upon publication." *Id.* at 723.

25. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 151, 152 (1765). The full quote reads: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication." *Id.*

26. 283 U.S. at 715.

27. 365 U.S. 43 (1961).

28. *Id.* at 46.

Court admitted that the ordinance imposed a prior restraint, it indicated that its ruling dealt solely with the issue of the censor's authority to impose a prior restraint for the protection of the public welfare and not with the validity of "any statutory standards employed by the censor or procedural requirements as to the submission of the film."²⁹ Relying upon the opinion of Chief Justice Hughes in *Near v. Minnesota*,³⁰ the Court found support for the legitimacy of imposing prior restraints on expression for the protection of the public welfare.³¹

The most significant crystallization of the prior restraint doctrine is found in the Supreme Court decisions of *Freedman v. Maryland*³² and *Shuttlesworth v. City of Birmingham*.³³ Although the former concerned obscenity and the latter was a product of the civil rights movement, each decision was used by Court to firmly establish strict guidelines to insure a minimum of interference with first amendment rights.

In *Freedman*, unlike *Time Film Corp.*,³⁴ the Court was presented with the issue of the validity of procedural standards used to implement a prior restraint on the exhibition of a film. The Court, per Justice Brennan, first warned that any system of prior restraints or expression comes to the United States Supreme Court "bearing a heavy presumption against its constitutional validity."³⁵ More particularly, the Court held that "while the state may require advance submission of all films . . . to bar all showings of unprotected films . . . only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint."³⁶ Thus, before any restraint on expression may properly occur, there must be a prompt adversary hearing initiated by the censoring authority and resulting in a final judicial determination.³⁷

29. *Id.* at 47.

30. 283 U.S. at 715-16. *See also* *Gitlow v. New York*, 268 U.S. 652, 667 (1925), where the court held that "a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare."

31. In *Near*, the Court listed public policy exceptions to the first amendment protection against prior restraints, including "the primary requirements of decency [that] may be enforced against obscene publications." 283 U.S. at 716.

32. 380 U.S. 51 (1965).

33. 394 U.S. 147 (1969).

34. Note 27 *supra* and accompanying text.

35. 380 U.S. at 57, quoting from *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1962).

36. 380 U.S. at 58.

37. *Id.* at 59.

*Shuttlesworth*³⁸ arose from the refusal of the city of Birmingham to grant a parade permit to civil rights marchers.³⁹ The city had adopted an ordinance which permitted the city commission to refuse a parade permit if, in its judgment, the "public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."⁴⁰ In a 6-3 decision, the Supreme Court struck down the ordinance as an unconstitutional prior restraint for its failure to have "narrow, objective and definite standards to guide the licensing authority."⁴¹ Justice Harlan, in his concurring opinion, applied the *Freedman* requirement of "speedy" judicial review,⁴² finding that the entire licensing process should "be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures."⁴³

Shuttlesworth is particularly significant in that it dealt with the issuance of a license. More precisely, the Court held:

Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.⁴⁴

Thus, it would appear that the United States Supreme Court has clearly expressed serious doubt as to the validity of a prior restraint on any recognized form of expression.

A municipality which desires to curb the proliferation of a class of expression, such as pornography, is faced with a difficult problem. Administrative licensing officials must be provided with some objective guidelines and any determination resulting in a restraint must be presented by officials for judicial review.

While the practical mechanics of licensing as a method of control will be discussed *infra*, one more philosophical question remains to be answered: What if the judicial determination of obscenity has already occurred before the licensing authority becomes involved?

38. 394 U.S. 147.

39. *Id.*

40. *Id.* at 149-50.

41. *Id.* at 150-51.

42. *Id.* at 163.

43. *Id.*

44. *Id.* at 153, quoting from *Kuntz v. New York*, 340 U.S. 290, 293-94 (1951).

It is established beyond peradventure that once a communication is determined to be obscene, it no longer retains the protection of the first amendment.⁴⁵ Moreover, the Supreme Court has held that "there are legitimate State interests in stemming the tide of commercialized obscenity . . . [and] [t]hese include the interest of the public in the quality of life and the total community environment."⁴⁶ Therefore, where a particular book or film has already been adjudged obscene, it may be entirely permissible to enjoin its further exhibition.⁴⁷

The Fifth Circuit Court of Appeals, following this line of reasoning, has held that a prior conviction for obscenity serves the same purpose as a pre-restraint judicial determination. In *106 Forsyth Corp. v. Bishop*,⁴⁸ challenge was made to the city of Athens, Georgia, ordinance which permitted the mayor and city council to revoke the business license of a movie theatre operator for violation of a Georgia state law prohibiting the exhibition of obscene films. Petitioner's challenge was based on the argument that the ordinance operated as a prior restraint. The District Court for the Middle District of Georgia⁴⁹ rejected the claim of prior restraint and, relying on *Near v. Minnesota*,⁵⁰ held that "a publisher cannot be restrained by a prior order from publishing what he desires to publish, but [protection against prior restraint] in no sense exonerates the publisher from liability for what he has published."⁵¹ The Fifth Circuit Court of Appeals⁵² affirmed the judgment of the district court and held that "the revocation of a movie house license upon a violation of a valid state law or city ordinance forbidding the exhibition of sexually explicit material does not violate the right of free speech vouchsafed under the first amendment."⁵³

Restraint, therefore, is not placed upon the publisher or theatre operator with respect to what he intends to express, but calls upon him to account for his past abuses.⁵⁴ Thus, the use of prior obscenity convictions by civil authorities could become a significant tool in the control of commercialized obscenity.⁵⁵

45. *Miller v. California*, 413 U.S. 15, 23 (1973).

46. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973).

47. *Id.*

48. 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975).

49. 362 F. Supp. 1389, 1396 (M.D. Ga. 1972).

50. 283 U.S. 697.

51. 362 F. Supp. at 1396.

52. 482 F.2d at 281.

53. *Id.*

54. 362 F. Supp. at 1396-97.

55. *But see Hamar Theatres, Inc. v. City of Newark*, 150 N.J. Super. 14, 374

3. THE LICENSING POWER

All businesses, however designated, are subject to the reasonable exercise of a state's police power through licensing.⁵⁶ That is, the right to engage in any commercial enterprise is subordinate to the public welfare, as determined by the legislature, and even uncompensated obedience to this authority is not a deprivation of property without due process of law.⁵⁷ It appears, therefore, that no vested right exists in a licensee which is superior to the police power of local governments.⁵⁸

In addition, the equal protection clauses of the United States and Florida constitutions do not forbid reasonable classifications. Under the United States Constitution, the fourteenth amendment is violated only if the classification rests upon grounds wholly irrelevant to the achievement of the government's objective. Florida law permits classification made on a "reasonable basis" and taking account of "real differences of practical conditions."⁵⁹ Thus, the legislative authority may give groups of persons certain rights or burdens not given to others so long as there is a reasonable basis for the dichotomy.⁶⁰

Implicit in the power to grant licenses is the power to deny an application or to revoke an existing license when the licensee has committed acts in direct conflict with matters regulated through exercise of the police power.⁶¹ While the revocation procedure must comply with the essentials of due process and equal protection, such a procedure has been recognized, by at least one Florida court, as an appropriate method of preserving the public order.⁶² The United States Supreme Court has held that where licensing and first amendment freedoms collide:

- 1) There must be definite, narrow, distinct guidelines for the licensing authority;

A.2d 502, 504 (Super. Ct. App. Div. 1977) (holding a "denial of a license because of prior obscenity convictions constitutes an impermissible prior restraint").

56. See *Atlantic Coast Line R.R. Co. v. City of Goldsboro*, 232 U.S. 548 (1914).

57. *Id.* at 559. The Florida Supreme Court has used this concept several times. See, e.g., *Golden v. McCarthy*, 337 So. 2d 388 (Fla. 1976) (regulation of tattooing licenses).

58. See E. McQUILLAN, *MUNICIPAL CORPORATIONS* § 26.81 (3d ed. 1978).

59. See *Chandler Services, Inc. v. Florida City*, 202 So. 2d 11 (Fla. 3rd DCA 1967).

60. See *Florida Sugar Distributors, Inc. v. Wood*, 135 Fla. 126, 184 So. 641 (Fla. 1938).

61. McQUILLAN, *supra* note 58, at § 26.80.

62. See *Vicbar v. City of Miami*, 330 So. 2d 46 (Fla. 3rd DCA 1976).

- 2) A prompt judicial determination must occur as to whether the subject speech falls within the protection of the Constitution; and
- 3) The burden of initiating such procedures must be borne by the licensing authority.⁶³

The federal courts have considered these principles as they apply to adult entertainment licensees on several occasions, with little agreement among the circuits. In fact, the Fifth Circuit Court of Appeals appears to stand alone among the federal courts in permitting revocation of a book store or movie license on the basis of prior convictions for obscenity.⁶⁴

Among the decisions most frequently cited by advocates of unrestricted adult entertainment is *Avon 42nd Street Corp. v. Meyerson*.⁶⁵ In this challenge to a New York City ordinance concerning a motion picture theatre license revocation procedure, the district court found that the law lacked sufficient precise guidelines to restrict the discretion of the administration in regulating licenses and, further, that revocation of a movie house license on the basis of a past conviction for obscenity constituted an invalid prior restraint.⁶⁶

The court expressed concern that revocation of a license on the basis of past speech which was unprotected will inevitably result in a restraint on protected speech. That is, protected speech and obscenity are often separated by "a dim and uncertain line"⁶⁷ and require "sensitive tools"⁶⁸ to be used in delineating this line. In addition, the court also relied in large part on *Near v. Minnesota ex rel. Olsen*⁶⁹ to support its disapproval of license revocation where it was held that suppression of a publication because of past offenses "is the essence of censorship."⁷⁰

63. *Freedman v. Maryland*, 380 U.S. 51 and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 and text accompanying notes 32 through 43 *supra*.

64. *106 Forsyth Corp. v. Bishop*, 482 F.2d 280 and text accompanying note 48 *supra*. For the proposition that such licenses cannot constitutionally be suspended for prior convictions on matters of obscenity, see *Hamar Theatres, Inc. v. City of Newark*, *supra* note 55.

65. 352 F. Supp. 994 (S.D.N.Y. 1972).

66. *Id.* at 999.

67. *Id.* at 997, citing the language of the Supreme Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1962).

68. *Id.*, citing the language of the Supreme Court in *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

69. 283 U.S. 697.

70. 352 F. Supp. at 998, discussing the holding of *Near v. Minnesota*, 283 U.S. 697.

This is not to say, however, that the court failed to recognize the power of municipalities to “validly regulate and license motion picture theatres on the basis of public health and safety by a narrowly drawn ordinance.”⁷¹ The court’s concern was that terms such as “character,” “decency” or “public morality,” failed to meet the definite standards required in *Freedman*⁷² and *Shuttlesworth*.⁷³

While the *Avon* decision clearly disapproved of all but the narrowest restraints on adult businesses involving print or film media, the fifth circuit has taken exactly the opposite position in *106 Forsyth Corp. v. Bishop*.⁷⁴ Here, the United States district court⁷⁵ and the Fifth Circuit Court of Appeals both found that revocation of a book store or movie house license on the basis of a past conviction is neither vague for failure to provide standards nor violative of first amendment as a prior restraint.⁷⁶

In *Forsyth*, an Athens, Georgia, adult theatre had been convicted of displaying obscene films. The Athens City Code provided:

Section 417. The Mayor and Council of the City of Athens shall have the right after notice and hearing to revoke any business license issued hereunder on the following grounds:

* * * * *

2(b) Violation of a law of the State of Georgia which affects the public health, safety, and welfare and which violation occurred as a part of the main business licensed.⁷⁷

Thus, the Athens ordinance provided a three-element formula to guide the licensing authority: (1) violation of a valid law; (2) said violation affects the public health, safety and welfare; and (3) the violation occurred as a main part of the business licensed; *e.g.*, sale of obscene materials by the operator of an adult book store or theatre.

In finding these standards sufficiently explicit, the district court determined that obscenity violations clearly affect the public health, safety and welfare. Further, the ordinance “sufficiently indicates to both

71. 352 F. Supp. at 999.

72. 380 U.S. 51.

73. 394 U.S. 147.

74. 482 F.2d 280.

75. 362 F. Supp. 1389.

76. 482 F.2d at 281.

77. ATHENS, GA., CODE § 417 (1971), set out in the district court’s opinion, 362 F. Supp. at 1393.

Mayor and any licensee what conduct may result in a revocation.⁷⁸ The court went on to note that the revocation procedure does not intend to restrain the licensee from future publication, but to call upon him to account for past abuses.⁷⁹

The dichotomy between the courts would appear to turn on the perspective given the revocation proceeding. In *Avon*, the court saw the revocation proceeding as a "sword" aimed at eliminating future expressions of unknown quality and, thus, effectively eliminating the public commercial forum for adult materials. In *Forsyth*, however, the court views the revocation proceeding as a "shield" designed to protect the public from proven abusers of the rights of free speech.

It is significant to note that, under the *Forsyth* doctrine, the problem of judicial determination of obscenity raised in *Freedman v. Maryland*⁸⁰ is absent. The criminal proceeding resulting in the conviction from which the revocation springs is the judicial determination of obscenity.

In *Jordan Chapel Freewill Baptist Church v. Dade County*,⁸¹ a Flor-

78. 362 F. Supp. at 1397.

79. *Id.* The district court's analysis of the concept of prior restraint is most significant in that this court and the court in *Avon*, 352 F. Supp. 994, came to opposite conclusions, each basing its decision on the Supreme Court's holding in *Near v. Minnesota*, 283 U.S. 697. The *Forsyth* court placed considerable emphasis on the penalty for publishing unprotected speech. That is, each person is free to publish without restraint, but "must take the consequence of (his) own temerity." 362 F. Supp. at 1397. The *Forsyth* court saw no prior restraint arising from revocation based on past abuses:

The non-exhibition of films obscene or non-obscene during said period would not be the result direct or indirect of previous restraint, but would result incidentally from past abuses of immunity from previous restraint just as a person convicted and imprisoned for criminal libel might incidentally and indirectly prevented and thus practically restrained from any and all publications during the period of incarceration.

362 F. Supp. at 1397.

On the other hand, the *Avon* court viewed *Near* as an absolute prohibition against revocation for past abuses. The court looked at revocation as a disabling of the public's right to view certain films. Further, the *Avon* decision ignored the reasoning cited in *Forsyth* and held that *Near* would tolerate only fines for abuses of the first amendment. 352 F. Supp. at 998. Such conflicting opinions defy explanation or reconciliation. Until some higher court addresses these philosophies together, the question will remain subject to debate.

80. 380 U.S. 51. The doctrine is more fully set forth in the text accompanying note 63 *supra*.

81. 334 So. 2d 661 (Fla. 3rd D.C.A. 1976), construing DADE COUNTY, FLA., ORDINANCE NO. 75-50 (1975).

ida case involving a challenge to the Dade County Bingo Ordinance which provided for revocation of a license if the licensee was convicted of violating the ordinance, the District Court of Appeal for the Third District of Florida held that "such a procedure provides the best possible due process available in our judicial system since the person must be proved guilty of violating the ordinance beyond a reasonable doubt instead of a mere preponderance of the evidence, as is the standard in civil cases."⁸²

Thus, license revocation appears, at least in a general sense, to be an efficacious tool in the attempts of municipal governments to stem the tide of commercialized obscenity.

It should be noted, however, that several state jurisdictions expressly reject *Forsyth*⁸³ and that Florida still requires a narrowly drawn ordinance in those instances where an *administrative* body is charged with the power to deny or revoke a license.⁸⁴

In *Perrine v. Municipal Court*,⁸⁵ the California Supreme Court declared unconstitutional a licensing statute which provided for license denial based on prior convictions for obscenity. Supporting that holding, the court concluded that the penalty for violating the obscenity laws "does not include a forfeiture of First Amendment rights."⁸⁶ Further, it was held that the fact that the obscenity penalties might be insufficient to deter future violations cannot justify a prospective forfeiture of those rights on the theory of prior convictions.⁸⁷

The subject ordinance⁸⁸ was found invalid for three reasons: (1) An absence of objective and definite standards for issuance of the license; (2) The ordinance conditioned issuance of a license upon qualifications

82. *Id.* at 668. This holding is consistent with *Forsyth*, 362 F. Supp. 1389, in that both courts recognize that revocation flowed directly from the conviction. *See also* *Berman v. City of Miami*, 17 Fla. Supp. 72 (C.C.D.C. 1960), *aff'd*, 127 So. 2d 683 (Fla. 3rd DCA 1960).

83. *Hamar Theatres, Inc. v. City of Newark*, 150 N.J. Super. 14, 374 A.2d 502 (Super. Ct. App. Div. 1977); *City of Seattle v. Bittner*, 81 Wash. 2d 747, 505 P.2d 126 (1973); *City of Delevan v. Thomas*, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (App. Ct. 1975); *Perrine v. Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

84. *Permenter v. Younan*, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

85. 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

86. 488 P.2d at 653.

87. *Id.*

88. LOS ANGELES, CAL., COUNTY ORDINANCE NO. 5860 (1969), more specifically § 329.4.

that allegedly bear no reasonable relationship to the occupation licensed; and (3) It is constitutionally impermissible to prohibit a person from selling books solely on the basis of a past criminal conviction.⁸⁹

As to the first reason, there seems to be little debate that definite guidelines are required to guide any licensing authority in the granting or denying of an occupational license. Thus, amorphous terms such as "good character" or "public welfare" are, without more, legally insufficient.⁹⁰ Florida seems to have adopted the same rule.⁹¹

As to the second and third grounds, in *Perrine*, the court was concerned with the applicability of the standards to the business of selling books. The court emphatically noted that, unlike doctors, lawyers and school teachers, sellers of books have no particular professional demands upon them such that moral character would be relevant.⁹²

The court went on to note that "sex crimes" are not ordinarily committed in book stores and, therefore, the standards were overbroad. Moreover, the court rejected even a nexus between convictions for obscenity and the operation of book stores where obscene materials were sold, finding revocation on such convictions to be violative of the first amendment.⁹³

89. 488 P.2d at 652.

90. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

91. *Vicbar v. City of Miami*, 330 So. 2d 46 (Fla. 3rd DCA 1976). The Third District Court of Appeal held that the power of refusal to renew nightclub licenses, when left in the hands of the city manager, is impermissible unless limited by guidelines bearing a reasonable relationship to the public health and welfare.

It should be noted, however, that the concept of revocation was not *per se* unlawful. Rather, the court expressed understanding for the desires of government officials to curtail the activities of businesses known to "engender trouble" for law enforcement authorities and suggested that, given appropriate guidelines, the court had no legal objection to the vesting of revocation power in the licensing authority.

92. 488 P.2d at 652.

93. *Id.* The California court's statements concerning crimes is not entirely correct. While no empirical data exists to show a nexus between pornographic literature and violent sex crimes, there is clearly a nexus between adult businesses and the crime of obscenity. The average commercial book store or theatre may occasionally utter some unprotected speech. An adult business engages in unprotected communication on a regular basis. Thus, adult businesses do foster frequent violations of the law governing their business.

The United States Supreme Court, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, reached another conclusion vis-a-vis the link between obscenity and crime. Rather than rejecting this possible connection, the court referred to the *Hill-Link Report, supra*

This nexus between the crime committed and the trade practiced has been litigated in a number of jurisdictions. Florida has recognized that suspension of a professional license may be made for misconduct which is "malum in se" and thus jeopardizes the interests of the profession and public it serves.⁹⁴ Similarly, Florida and other jurisdictions have upheld license denials and revocations on the basis of past convictions for non-professional trades when some definite standards to control the discretion of the licensing authority were provided.⁹⁵

In *City of Miami Beach v. Austin Burke, Inc.*,⁹⁶ the Third District Court of Appeal held that "merchandising is a lawful business" which one has an "inherent" right to pursue.⁹⁷ In contrast, where the business is not a "lawful business" (e.g., the sale of intoxicating beverages),⁹⁸ that "right" is reduced to a mere privilege for which such definite standards are not required.⁹⁹ The determinant as to whether a business is lawful or unlawful *per se* appears to be whether the license is regulatory or revenue producing.¹⁰⁰

Thus, of vital concern is the status which adult entertainment may be said to occupy. As obscenity is unprotected speech, a commercial purveyor of such materials may fairly be said to be engaging in an "unlawful" business or, at least, possesses no "inherent" right to do so. While permanent revocation of a non-professional license has been held invalid and arbitrary, a period of years required between conviction of

note 18, and its suggestion of a correlation between obscenity and anti-social behavior. 413 U.S. at 59.

Whatever socio-psychological conclusions may ultimately be drawn by medical science, there clearly exists some *judicial* approval of legislative efforts to link crime and pornography.

94. *Richardson v. Florida State Board of Dentistry*, 326 So. 2d 231 (Fla. 1st DCA 1976).

95. *See, e.g., State ex rel. Volusia Jai-Alai, Inc. v. Board of Business Regulation*, 304 So. 2d 473 (Fla. 1st D.C.A. 1974); *Anderson v. Comm'r. of Highways*, 126 N.W. 2d 778 (Minn. 1964); *Green v. Silver*, 207 F. Supp. 133 (D.D.C. 1962). *But see City of Mesquite v. Alladin's Castle, Inc.*, 559 S.W. 2d 92 (Ct. Civ. App. Tex. 1977), where a licensing ordinance permitting denial of a license to operate vending machines in an amusement park on the basis of an applicant's "connection with criminal elements" was struck as constitutionally vague.

96. 185 So. 2d 720 (Fla. 3rd DCA 1966).

97. *Id.* at 725.

98. In Florida the sale of intoxicating beverages has been held to be a privilege and not a right. *Id.*, citing *Permenter v. Younan*, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

99. 185 So. 2d at 725.

100. 31 So. 2d at 389.

a crime and issuance of a license has been held to be a valid regulation designed to eliminate undue prevalence.¹⁰¹

The California courts are not alone, however, in disapproving this theory. The *Perrine*¹⁰² decision was followed by the Supreme Court of Minnesota in a 1975 decision involving revocation of an adult theatre's occupational license.¹⁰³

This city of St. Paul's ordinance¹⁰⁴ provided that the city council could revoke or deny any motion picture theatre license on the ground that the "licensee, owner, manager, lessee, employee, or financially interested person" had been convicted of a crime pertaining to the sale, distribution or exhibition of obscene material relative to the operation of the movie theatre license.¹⁰⁵ The St. Paul city council revoked the plaintiff's license on the basis of a prior conviction.

In striking down the St. Paul ordinance, the Minnesota Supreme Court specifically found that motion picture theatres are engaged in activity protected by the first amendment and any licensing power is subordinate to those constitutional dictates.¹⁰⁶ The court specifically rejected an analogy between obscene books and businesses, such as massage parlors or liquor stores and the concept of "unlawful" versus "lawful and ordinary" business, on the ground that massage parlors enjoy no first amendment protection.¹⁰⁷ Referring to *Near v. Minnesota*,¹⁰⁸ the court held that the proper remedy is not in suppression but in criminal prosecutions. Further, the court stated: "The risk that criminal sanctions will be insufficient to deter future violations of the ordinance cannot justify the city's attempt to revoke plaintiff's license in the face of his right to the free speech guaranty of the first amendment."¹⁰⁹

This holding was also followed by the District Court of Appeals of Illinois.¹¹⁰ The ordinance in question permitted the mayor to revoke any

101. 185 So. 2d at 725.

102. Note 84 and accompanying text *supra*.

103. *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W. 2d 370 (1975).

104. ST. PAUL LEGISLATIVE CODE, § 372.04(G) (1974).

105. 227 N.W. 2d at 371.

106. *Id.* at 372-73.

107. *Id.*

108. 283 U.S. 697.

109. 227 N.W. 2d at 373.

110. *City of Delevan v. Thomas*, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (3rd DCA 1975).

occupational license "for good and sufficient cause."¹¹¹ Finding this definition to be unduly vague, the court held that permitting revocation on such terms creates a "danger of unduly suppressing protected expression."¹¹²

More recently, the Superior Court of New Jersey rejected a Newark city ordinance,¹¹³ which based license denial or revocation on past convictions, for reasons similar to *Avon*¹¹⁴ and its progeny. In this case, a license was refused for the applicant's failure to give full and correct answers on the license application and because the applicant had been previously convicted of showing obscene pictures.¹¹⁵

The court found that failure to disclose a 1972 conviction on a license application, in light of disclosure of more recent convictions, was an "inconsequential and insufficient" reason to refuse a license.¹¹⁶ The court was silent, however, as to what effect a total failure to reveal past convictions would have.

As to the free speech issue, the New Jersey court joined California,¹¹⁷ Illinois¹¹⁸ and Minnesota¹¹⁹ in rejecting the use of license revocations and called for use of criminal sanctions as the only appropriate remedy.¹²⁰

It would thus appear that the United States Fifth Circuit Court of Appeals stands alone in approving the use of past convictions for license revocations.¹²¹ Yet, the division between the jurisdictions is not so clear-

111. DELEVAN, ILL., ORDINANCE NO. 73-6 § 12 (1973). § 4 of the ordinance made it unlawful to "offer or present any motion picture or performance which is obscene." 334 N.E. 2d at 191. A finding of obscenity, by the mayor, permitted him to exercise his revocation powers.

112. 334 N.E. 2d at 192, citing from the Supreme Court decision of *Freedman v. Maryland*, 380 U.S. 51 (1965).

113. *Hamar Theatres, Inc. v. City of Newark*, 150 N.J. Super. 14, 374 A.2d 502 (Super. Ct. App. Div. 1977), discussing NEWARK, N.J., CITY ORDINANCE NO. 5: 8-13(a).

114. 352 F. Supp. 994.

115. 374 A.2d at 503.

116. *Id.*

117. *Perrine v. Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972).

118. *City of Delevan v. Thomas*, 31 Ill. App. 3d 630, 334 N.E. 2d 190 (3rd DCA 1975).

119. *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W. 2d 370 (1975).

120. 374 A.2d at 504, citing *Alexander*, 227 N.W. 2d 370.

121. *106 Forsyth Corp. v. Bishop*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975).

cut. In each of the jurisdictions in which licensing-revocation ordinances were struck down, the courts expressed universal concern over the lack of definite standards. In the fifth circuit, where this procedure was approved, the court particularly noted the clarity of the revocation ordinance.¹²²

In the St. Paul ordinance, no legislative effort was made to connect the conviction with the public health, safety and welfare.¹²³ The Delevan, Illinois, ordinance allowed revocation for "good and sufficient cause," but failed to define that term.¹²⁴ Newark's revocation ordinance permitted a license to be suspended "for the furtherance of decency and good order," but, again, no definition of decency or good order was provided by the legislative authority.¹²⁵ Lastly, the Los Angeles ordinance failed to connect the enumerated offenses with the public welfare.¹²⁶

In *106 Forsyth*,¹²⁷ however, the Athens, Georgia, ordinance suffered from none of these deficiencies. It required a single standard conviction; that the conviction be deleterious to the public welfare; and a showing that the conviction arose from the operation of the licensed business.¹²⁸

It may reasonably be said that a revocation ordinance is not *per se* unconstitutional; rather, that in light of first amendment rights, there exists a heavy presumption against its constitutionality *which can be overcome* if sufficient objective standards exist to guide the licensing authority. As the Florida Supreme Court noted in 1947:

It has been indicated that a mere lodging of discretion in public officers or bodies to judge the fitness and character of applicants for licenses, permits, etc., does not vest arbitrary power in such officials, but rather calls for the exercise of a discretion of a judicial nature for which no definite rule of action is necessary.¹²⁹

122. *Id.* at 283.

123. 227 N.W. 2d at 373.

124. 334 N.E. 2d at 191.

125. 374 A.2d at 503.

126. 488 P.2d at 650.

127. 362 F. Supp. 1389.

128. *Id.* at 1393.

129. *Permenter v. Younan*, 159 Fla. 226, 31 So. 2d 387, 389 (1947).

4. DOUBLE JEOPARDY

A collateral issue in the revocation of occupational licenses as a result of criminal convictions is the problem of double jeopardy.¹³⁰ That is, in addition to whatever criminal penalty attached to the conviction, it has been argued that the license revocation is unlawful as a second punishment for the same offense.

Perhaps the strongest expression of this double jeopardy argument is found in the Washington Supreme Court decision of *City of Seattle v. Bittner*.¹³¹ The court presumed that persons convicted of obscenity violations had paid the prescribed penalty provided by law for that offense. In mixing this presumption with the doctrine of prior restraint, the court held:

The Appellant (City of Seattle) has apparently proceeded upon the assumption that a person who has been convicted of the offense of exhibiting an obscene movie . . . is more likely than not to commit the offense again. This must mean in its opinion, the imposition of penalties under the criminal law has neither a deterrent nor a rehabilitative effect, and further that the penalties prescribed are not adequate punishment for the offense. Whether or not this assumption has any validity, we are convinced that the constitution does not permit a licensing agency to deny to any citizen the right to exercise one of his fundamental freedoms on the ground that he has abused that freedom in the past.¹³²

Florida, however, has taken the opposite view. Injunctive relief to prevent future showing of films found to be obscene is not a punitive measure but a remedial one.¹³³ Even an acquittal in a criminal proceeding is not a bar to maintenance of the injunctive proceedings.¹³⁴ Further, because judgments in criminal actions are inadmissible in Florida to prove facts in a civil action,¹³⁵ the identity of issues and claims is absent and thus *res judicata* will not apply.

In essence, the civil penalty which flows from an obscenity conviction is not aimed primarily at the offender. Rather, it is merely a mea-

130. U.S. CONST. amend. V: "nor shall any person be subject for the same offense to be twice put in jeopardy for life and limb."

131. 81 Wash. 2d 747, 505 P.2d 126 (1973).

132. 505 P.2d at 131.

133. *State ex rel. Gerstein v. Walvick Theatre Corp.*, 298 So. 2d 406, 408 (Fla. 1974).

134. *Id.*

135. *Boshnack v. World Wide Rent-A-Car, Inc.*, 195 So. 2d 216 (Fla. 1967).

sure of protection for the public. The Florida Supreme Court, in approving revocation of a dental license for drug abuse violations, held that acts done in "persistent disregard" of the law: "offend generally accepted standards of conduct within the profession thereby jeopardizing the interests of the profession and the public it serves."¹³⁶

5. ZONING

In 1926, the United States Supreme Court recognized that local zoning ordinances represent a valid exercise of a state's police power.¹³⁷ There it was argued that, where such ordinances are designed to promote public health, safety, welfare and morals, the individual's right must give way to the particular concern of the community.¹³⁸

More recently, the Supreme Court applied these general zoning principles to adult entertainment. In *Young v. American Mini Theatres*,¹³⁹ the Court approved a Detroit city ordinance¹⁴⁰ which required a specified distance between buildings housing adult theatres.

The decision is significant for several reasons. First, the Detroit ordinance was approved despite the fact that it singled out a particular type of activity as a "regulated use."¹⁴¹ Secondly, the ordinance was found not to have an impermissible deterrent effect on first amendment freedoms.¹⁴² Thirdly, and perhaps most importantly, the Court recognized a legitimate governmental interest, through its licensing and zoning power, sufficient to regulate the use of commercial property for the benefit of urban preservation.¹⁴³

In setting apart adult theatres as "regulated uses," the Detroit ordinance defined such theatres as ones in which the material presented was "characterized by an emphasis" on matter depicting or relating to "specified sexual activities" or "specified anatomical areas."¹⁴⁴

The Court held such classifications were not void for vagueness. As to the "characterized by an emphasis" language, the Court held that a

136. *Richardson v. State Board of Dentistry*, 326 So. 2d 231, 233 (Fla. 1st DCA 1976).

137. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

138. *Id.* at 373.

139. 427 U.S. 50 (1976).

140. DETROIT, MICH., CITY ZONING ORDINANCE § 66.000 (1972).

141. 427 U.S. at 62.

142. *Id.* at 60.

143. *Id.* at 71.

144. *Id.* at 53.

theatre owner whose "regular fare" involved sexually oriented materials was clearly on notice as to what was expected.¹⁴⁵ Further, the 1000 foot distance requirement between regulated uses was not unconstitutional, in that it was found not to be a regulation of speech on the basis of its content, but: "Rather, it is a regulation of the right to locate a business based on the side effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship."¹⁴⁶

What seemed of greatest importance to the Court was the fact that this zoning law did not constitute a prior restraint on the first amendment rights of the licensees. There was no claim made by the theatre owners that they were "denied access to the market" nor that the market denied access to them. The mere fact that the commercial exploitation of material was subject to zoning and the licensing requirement was held not to be a sufficient reason for invalidating these ordinances.¹⁴⁷

The Court also recognized the city's interest in planning and regulating the use of property for commercial purposes even to the extent that different classifications existed for adult theatres.¹⁴⁸ To support this holding, the Court referred to those prior instances where the content of the speech determined its level of constitutional protection.

For example, it has been held that a public rapid transit system may accept some advertisements and reject others;¹⁴⁹ that a state may properly limit highway billboards to neighborhood businesses;¹⁵⁰ that a regulatory commission may prohibit businesses from making statements which, though literally true, are potentially deceptive.¹⁵¹ Thus, the measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication.

In recognizing a distinction between adult expression and philosophical or political oratory, the Court noted:

145. *Id.* at 58-59.

146. *Id.* at 57, n. 15, citing the dissenting opinion in *American Mini Theatres v. Gribbs*, 518 F. 2d 1041 (6th Cir. 1975), the lower appellate decision to the present case. The Supreme Court did, in fact, embrace this thought in its decision by stating that the ordinance was justified "by the city's interest in preserving the character of its neighborhoods." 427 U.S. at 71.

147. 427 U.S. at 62.

148. *Id.* at 62-63.

149. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

150. *Markham Advertising Co. v. State*, 73 Wash. 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1968).

151. *Jacob Siegel Co. v. Fed. Trade Comm'n.*, 327 U.S. 608 (1946).

It is manifest that society's interest in protecting this type (adult material) of expression is of a wholly different and lesser magnitude than the interest in untrammelled political debate . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.¹⁵²

Lastly, the Court ruled that its function did not include an appraisal of the wisdom of the Detroit city government's desire to enact separate treatment for adult theatres. Rather, the city's interest in attempting to preserve the quality of urban life is one deserving of high respect and the city must therefore be allowed a reasonable opportunity to "experiment with solutions to admittedly serious problems."¹⁵³

The *Mini-Theatres* decision can be contrasted with the Supreme Court's rejection of a Jacksonville, Florida, ordinance¹⁵⁴ which prohibited nudity on outdoor theatre screens. That enactment was struck down because it failed to explain how flashes of nudity, without regard to their erotic purpose, could be any more distracting to traffic than non-obscene material. In so holding, the Court noted that the presumption of validity generally accorded statutes has less force when a classification turns on the subject matter of expression.¹⁵⁵

In the fifth circuit, a zoning ordinance was recently struck down for going beyond the limitations set forth in the *Mini-Theatres* decision.¹⁵⁶ Here, the city of Baton Rouge adopted a resolution withholding the certificate of occupancy from an adult book store, based on the content of its product. The city attempted to defend this resolution on the same basis set forth by the appellant in *Mini-Theatres*; that is, that a city may provide that certain establishments shall operate only in specified neighborhoods.¹⁵⁷ However, the court rejected this argument because the "zoning" resolution was retroactive and piecemeal, thus making it a "highly suspect" act.¹⁵⁸ The court held that "zoning . . . connotes a non-particularized legislative process in which rules are pro-

152. 427 U.S. at 70.

153. *Id.* at 71.

154. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

155. *Id.* at 215.

156. *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172 (5th Cir. 1977).

157. *Id.* at 1175.

158. 563 F.2d at 1175, citing *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So. 2d 659, 672 (La. 1975).

mulgated and land areas are designated on a general, prospective basis."¹⁵⁹ In essence, the court found that resolutions aimed at individual businesses, even if delineated as zoning enactments, fail to meet constitutional standards in that restrictions must be "'no greater than necessary or essential to the protection of the governmental interests.'"¹⁶⁰

A somewhat different approach to zoning regulations was adopted by the city of Boston in 1974.¹⁶¹ Rather than attempt to regulate adult entertainment locations by dispersing them throughout particular zoning classifications, the city set aside a specific geographical area, dubbed the "combat zone," for "adult entertainment," in an effort to concentrate such businesses and enhance enforcement activities.¹⁶² This area became the exclusive location within the city where adult entertainment would be permitted. Upon the passage of the enabling legislation, all Adult Entertainment Uses, formerly classified as "Conditional," became "Prohibited" outside the zone.

The zone concept, however, has proven unsatisfactory. In practical effect, the vices contained within the zone continue to spill over to the surrounding community. Of particular concern to law enforcement officials has been the significant increase in violent crimes, including murder.¹⁶³ By 1977, the Boston model was being shunned in favor of the Detroit spacing model.¹⁶⁴ In fact, Boston city planners are considering the tearing down of the combat zone and its re-classification as a more conventional commercial district.

159. 563 F.2d at 1175.

160. *Id.* at 1175-76, citing *Baldwin v. Redwood City*, 540 F.2d 1360, 1365 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). The *Watts* court also relied here in part on *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 91 (1977).

Recently, in *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978), a Jacksonville, Florida, zoning ordinance was struck down because it was found to have violated the parameters set down in *Young*. See note 139 and accompanying text *supra*. More particularly, the ordinance impermissibly resulted in the total exclusion of adult businesses. In so doing, the Jacksonville zoning law failed to survive the close scrutiny ascribed to enactments which affect free expression. 450 F. Supp. at 702-03.

161. BOSTON, MASS., CODE § 3-1 (1974).

162. STAFF DRAFT, PLANNING FOR DOWNTOWN ENTERTAINMENT DISTRICT, STUDY DESIGN OF THE BOSTON REDEVELOPMENT AGENCY (November 26, 1973).

163. Gumpert, *Problems in the Combat Zone*, Wall St. J., June 30, 1977.

164. See note 140 and accompanying text *supra*, which deal with the Detroit model.

6. NUISANCE

"The nuisance doctrine operates as a restriction upon the right of [an] owner of property to make such use of it as he pleases;"¹⁶⁵ the doctrine will not be invoked so long as this use does not interfere with the rights of his neighbors to use their property.¹⁶⁶ More specifically, the term applies to a "class of wrongs which arises from . . . unlawful use by a person of his property which produces . . . material damage:" generally, the diminution of the value or usefulness of the property surrounding the nuisance.¹⁶⁷

Of particular concern is this inquiry: Does the maintenance of a "common" or "public nuisance" constitute an act which injuriously affects the safety, health, welfare or morals of the public? A public nuisance must arise from an unlawful act and, therefore, its existence is generally considered a question of law.¹⁶⁸

As related to obscenity, the nuisance theory has been successful with regard to specific films or books, but is generally rejected as a blanket restraint on a class of activities.

In 1957, the Supreme Court of New Mexico prohibited the state from relying on a nuisance abatement statute in its criminal prosecution of a motion picture theatre owner.¹⁶⁹ First, the court held that applying the statute to enjoin the theatre owner would result in a violation of his due process rights. The state's case rested solely on the term "lewdness" found in the statutory language and the court determined that that term was impermissibly "too vague and indefinite" to support the state's action.¹⁷⁰ Then, in response to the state's assertion that injunctive relief could be sought by invoking the trial court's "general equity powers for

165. 58 AM. JUR. 2d *Nuisances* § 1 (1971); see *Reaver v. Martin Theatres of Florida, Inc.*, 52 So. 2d 682 (Fla. 1951).

166. See *Palm Corp. v. Walters*, 148 Fla. 527, 4 So. 2d 696 (1941).

167. 58 AM. JUR. 2d *Nuisances* § 1 (1971).

168. See generally 58 AM. JUR. 2d *Nuisances* § 8 (1971).

169. *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957).

170. 317 P.2d at 320. The court offered additional support for its belief that the term "lewdness" in the New Mexico statute could not be relied upon to enjoin the owner from showing obscene films. The statutory construction rule of *ejusdem generis* was applied when the court noted that the term "lewdness" was followed in the statute by the words "assignation or prostitution." "Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms." Thus, the court's view was that the legislature intended that the proscribed "lewdness" refer only to acts of "assignation or prostitution" and *not* to the showing of obscene films in theatre establishments as well. 317 P.2d at 319, citing to 50 AM. JUR. *Statutes* § 249 (1944).

protection of public morals," the New Mexico court stated that it would be prejudicial to the owner to permit a "civil action" such as that to be introduced into a criminal proceeding brought under a criminal statute and complaint.¹⁷¹

In 1968, the Michigan Supreme Court sustained the use of a municipal licensing ordinance to avert the "nuisance" caused by a drive-in movie screen visible to children in residential areas.¹⁷² Township officials had denied the theatre owner's application for license renewal and he filed suit. In rejecting the owner's first and fourteenth amendment argument, the court held that the right of free speech did not include the right to force material "not fit to be seen by children" on the "children of parents who are unwilling to have [that] done"¹⁷³

That same year, the Pennsylvania Supreme Court took a substantially more restrictive view of nuisance proceedings.¹⁷⁴ The court rejected injunctions issued after ex-parte hearings on complaints of the district attorney. Instead, the court held that no such injunctions may issue without a prompt, adversarial hearing resulting in a judicial determination of obscenity, as required by *Freedman v. Maryland*.¹⁷⁵

In 1971, a Louisiana Court of Appeals raised a unique due process argument vis-a-vis the closure of a business premises for maintenance of the nuisance of obscenity.¹⁷⁶ The court found unconstitutional that portion of an injunction which prohibited any use of the building in which the nuisance occurred. It was reasoned that an "unknowing and unparticipating" property owner could be deprived of the use of his property and that judicial policy against prior restraint forbade injunction of publications not contained in the nuisance category. Thus, the maximum injunction permissible was prohibition of "permitting the continued existence of the nuisance."¹⁷⁸

In 1971, an Ohio Court of Appeals rejected challenge to an Ohio

171. 317 P.2d at 321.

172. *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968).

173. *Id.* at 261, 263. The court noted that the theatre owner admitted on the stand and in his newspaper advertisements that the movies shown at his theatre were "not fit to be seen by children below 18 years of age." *Id.* at 261.

174. *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968).

175. *Id.* at 48. See text accompanying notes 35 through 37 and 63 *supra*.

176. *Society to Oppose Pornography, Inc. v. Thevis*, 255 So. 2d 876 (Ct. App. La. 1971), *cert. denied*, 257 So. 2d 158 (1972), *appeal dismissed*, 273 So. 2d 653 (1973).

177. 255 So. 2d at 881.

178. *Id.*

nuisance statute in *State ex rel. Ewing v. "Without a Stitch."*¹⁷⁹ The appellate court had examined a particular film and, having found it to be obscene upon applying the tests set forth in *Roth v. United States*¹⁸⁰ and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty General of Massachusetts*,¹⁸¹ also found it to be a nuisance.¹⁸² Thus judged as an obscene film, the appellate court held it to be outside the penumbra of the first amendment's protection. Therefore, held the court, the injunctive relief granted by the trial court under the Ohio nuisance abatement statute was not violative of the first amendment.¹⁸³

In 1974, the Ohio Supreme Court granted a motion to certify which "removed the issue of obscenity from [the] case," leaving the court to rule on the constitutionality of the Ohio nuisance abatement statute.¹⁸⁴ Although theatre owners who had been enjoined from showing the movie "Without a Stitch" made repeated attacks on the statute, it was upheld.¹⁸⁵ To their dismay, the court found that, despite the fact that the nuisance abatement statute was directed toward enjoining the exhibition of obscene "films" (in the plural), "the statute was broad enough to include the exhibition of a single obscene film, which is composed of a number of film positives," as are all motion pictures.¹⁸⁶ The court found valid the statute's procedural sections under which temporary and permanent injunctions had been issued. Those sections passed the *Freedman v. Maryland*¹⁸⁷ test in that they allowed the issuance of injunctions only after full judicial adversary hearings on the allegation of obscenity.¹⁸⁸ The court rejected the theatre owners' argument that the statute was "overbroad" because it provided that "any place which exhibits filmed obscenity" is a "nuisance."¹⁸⁹ The court also rejected the theatre owners' contention that the statutory scheme was

179. 28 Ohio App. 2d 107, 276 N.E. 2d 655 (Ct. App. 1971), *modified*, 307 N.E. 2d 911 (1974), *appeal dismissed*, 421 U.S. 923 (1975).

180. 354 U.S. 476 (1957).

181. 383 U.S. 413 (1966).

182. 276 N.E. 2d at 660.

183. *Id.* at 657.

184. *State ex rel. Ewing v. "Without a Stitch,"* 37 Ohio St. 2d 95, 307 N.E. 2d 911, 913 (1974), *appeal dismissed*, 421 U.S. 923 (1975).

185. 307 N.E. 2d at 917-18.

186. *Id.* at 913.

187. *See* text accompanying notes 35 through 37 and 63 *supra*.

188. 307 N.E. 2d at 914.

189. *Id.* at 915.

“unconstitutionally deficient” because it failed to require scienter, *i.e.*, knowledge on the part of the nuisance abatement defendants, as to the content of the film. Although the court agreed that such knowledge is constitutionally required, it noted the statute did, in fact, require scienter, but that the theatre owners failed to assert lack of knowledge in their first appeal.¹⁹⁰ The court further determined that, in accordance with the general rule, the burden of proof under the nuisance statute lay with the complainant, even when the statute itself fails to address the issue.¹⁹¹ Among the statutory remedies upheld was a one year closing of the theatre “in and upon which the nuisance was maintained . . .”¹⁹² That remedy received judicial approval because the statute provided that, through compliance with certain prescribed measures, the theatre owner could avoid a closure of the premises. Before giving its approval to the closure avoidance requirements, the court scrutinized each element to determine if any one posed “an unconstitutional prior restraint on an activity generally protected by the first amendment.”¹⁹³ Even the requirement that the theatre owner demonstrate “that he will prevent . . . the [future] exhibition of the particular film declared obscene” was held not to be a “prior restraint,”¹⁹⁴ although the court did observe that it would have struck a statute whose language required an owner to show that “no film to be exhibited during the one year period will be obscene.”¹⁹⁵

The United States Fifth Circuit Court of Appeals again revisited the issue of closing premises and the problems of prior restraint in 1977. In *Universal Amusement Co., Inc. v. Vance*¹⁹⁶ a split court reversed a district court decision which had invalidated a Texas nuisance abatement statute.¹⁹⁷ In upholding the provision, the court found that a proprietor enjoined under the statute was:

prohibited only from doing that which he could not lawfully do anyway, since Texas law prohibits him from commercially exhibiting, possessing for sale, or distributing obscene material, Tex. Penal Code Ann. 743.23(a)(1) (1974). A lawful injunction subjects him to no further gues-

190. *Id.* at 916.

191. *Id.*

192. *Id.* at 917-18.

193. *Id.*

194. *Id.*

195. *Id.*

196. 559 F.2d 1286 (5th Cir. 1977).

197. TEX. REV. CIV. STAT. ANN. art. 4667(a)(3) (Vernon 1976).

work, in determining what is and is not prohibited, than he must already engage in merely to comply with Texas law.¹⁹⁸ In short, as we read the Texas statutes, they authorize restraint of such expression only as is not constitutionally protected and is prohibited by State law. This is not the stuff of which First Amendment violations are made.¹⁹⁹

This holding was, however, expressly rejected in 1978 by a United States district court in North Carolina.²⁰⁰ In rejecting a state nuisance abatement statute, the court found that the fifth circuit had ignored the prior restraint issue. That is, the abatement injunction was held to have the effect of prohibiting future speech of an unknown quality because of a past abuse of the first amendment.²⁰¹ Although the fifth circuit decision relied on *Forsyth*²⁰² the North Carolina decision relied on *Nebraska Free Press Association v. Stuart*,²⁰³ for the proposition that:

A criminal penalty . . . is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.²⁰⁴

In essence, the North Carolina district court saw any injunction which went beyond specific named books or films to be an impermissible restraint.²⁰⁵ The fifth circuit, by contrast, felt that any purveyor of adult materials was always running the risk of violating the obscenity laws.²⁰⁶

198. 559 F.2d at 1292, n. 11, which states: "Under Texas law the injunctive order must 'be specific in terms' and 'describe in reasonable detail . . . the act or acts sought to be restrained . . . ' Tex. R. Civ. P. 683. An order which enjoins the exhibition of obscene material, as the term is defined in the Penal Code, and provides no further guidelines is invalid under Texas Rule 683"

199. 559 F.2d at 1292.

200. *Felhaber v. North Carolina*, 445 F. Supp. 130 (E.D. N.C. 1978).

201. *Id.* at 138.

202. 106 *Forsyth Corp. v. Bishop*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975). *See* text accompanying notes 35 through 37 *supra*.

203. 427 U.S. 539 (1976).

204. 445 F. Supp. at 139-40, citing 427 U.S. at 559.

205. 445 F. Supp. at 140.

206. 559 F.2d at 1292.

Therefore, an injunction to abate certain unlawful activity as a nuisance subjected the book store or theatre owner to "no further guesswork, in determining what is and is not prohibited, than he must already engage in merely to comply with [the] law."²⁰⁷

Florida's state courts have rejected blanket injunctions against obscene materials on a nuisance theory, approving such procedure only when specific films were considered.²⁰⁸ The California Supreme Court, in a lengthy 1976 decision, joined the ranks of those states disapproving blanket injunctions.²⁰⁹ In essence, the court adopted the theory that enjoining the distribution of unknown material in the future, without a prior determination of obscenity, is violative of the first amendment proscription on prior restraint.²¹⁰

In its most recent session, the Florida Legislature adopted a statute providing that any places where obscene materials are illegally kept are a public nuisance.²¹¹ Further, drive-in theatres are prohibited from displaying films depicting nudity in a manner harmful to minors, where the film is visible from the public streets.²¹²

As yet, this statute is untested, but its validity will in large part rely on the fifth circuit's disposition of *Vance*, which was ordered heard *en banc* in December, 1977.²¹³ If the fifth circuit follows the national trend,

207. *Id.*

208. *Mitchem v. State ex rel. Schaub*, 250 So. 2d 883, 886 (Fla. 1971); *Paris Follies, Inc. v. State ex rel. Gerstein*, 259 So. 2d 532, 533 (Fla. 3rd DCA 1972); *See Gayety Theatres, Inc. v. State ex rel. Gerstein*, 359 So. 2d 915 (Fla. 3rd DCA 1978).

209. *People ex rel. Busch v. Projection Room Theatre*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), in which the court held that any injunction must be "directed to particular books or films already adjudicated obscene." 130 Cal. Rptr. at 337.

210. 130 Cal. Rptr. at 337.

211. FLA. STAT. § 823.13(1) (1978).

212. *Id.*

213. The *en banc* decision was rendered on December 18, 1978. In an 8-6 decision (one judge not participating) the Court of Appeals overturned the three judge decision found at 559 F.2d 1286.

The court, per Judge Thornberry, found that the one year closure requirement of the Texas nuisance statute was unconstitutional as applied to obscenity. In reaching this conclusion, the court looked primarily to *Near v. Minnesota*, note 24 and accompanying text *supra*, for the proposition that the closure requirement would be an impermissible prior restraint on future and, thus, presumptively protected speech. The dissent sought to distinguish the case on its facts, but cited no new precedents.

This case is significant in that it represents a change in fifth circuit thinking. The *Vance* decision brings the fifth circuit more in line with its sister courts in taking a restrictive view of prior restraints.

then nuisance proceedings resulting in business closures will cease to be a viable alternative for control of adult materials.

7. SELECTIVE ENFORCEMENT

The simplest method of controlling obscenity is vigorous enforcement of the criminal laws prohibiting the distribution of such materials. Yet, such a control device also possesses the greatest potential for abuse.

It is axiomatic that protection of the public from illegal activity is a proper purpose for the exercise of the police power.²¹⁴ Furthermore, businesses which are susceptible to the opportunity for criminal activity are "fit subjects" for strict regulation.²¹⁵

A United States district court has held, however, that overly zealous enforcement of the law can reach the proportion of an impermissible prior restraint. In *Bee See Books v. Leary*,²¹⁶ the court was faced with considering the legality of a police program of stationing officers in adult book stores. The court found such activity to have effected a prior restraint in that it suggested the materials in the stores were unlawful and inhibited customers from exercising their right of free expression.²¹⁷

The United States Ninth Circuit Court of Appeals reached a similar conclusion in a case involving the repeated filing of obviously spurious criminal complaints.²¹⁸ The local police had initiated over one hundred prosecutions against a single corporation, despite the fact that each of the first eleven complaints had resulted in acquittals. Relying on the precedent set in *Yick Wo v. Hopkins*,²¹⁹ the court held: "In the vital area of First Amendment rights, it is just as easy to discourage exercise of them by abusing a valid statute as by using an invalid one."²²⁰

Most recently, a federal district court in South Florida considered

The unanswered question is the effect of this decision on *106 Forsyth Corp. v. Bishop*, notes 48 through 54 and accompanying text *supra*. *Forsyth* permitted the revocation of occupational licenses based on past obscenity convictions. Presumably, this question will be answered at some future time. Pending that resolution, however, the status of prior restraint in the *licensing* field will remain unsettled.

214. *Golden v. McCarty*, 337 So. 2d 388 (Fla. 1976).

215. *Tally v. City of Detroit*, 54 Mich. App. 328, 220 N.W. 2d 778 (Ct. App. 1974).

216. 291 F. Supp. 622 (S.D.N.Y. 1968).

217. *Id.* at 624.

218. *Kram v. Graham*, 461 F. 2d 703 (9th Cir. 1972).

219. 118 U.S. 356 (1896).

220. 461 F.2d at 707.

the problem of selective enforcement as it affects adult businesses. In *P.A.B., Inc. v. Stack*,²²¹ the court issued a restraining order against the Fort Lauderdale police and Broward County Sheriff's Office in response to their concentrated efforts against an adult book store. Here, as in *Bee See Books*,²²² the police stationed uniformed officers in front of the book store on a regular basis, frequently had undercover agents in the store, checked the identification of patrons seeking to enter and exit the premises and regularly checked employee identification.²²³ The court specifically found, based in part on admissions by the Sheriff in a television interview, that the enforcement drive was aimed at causing financial damage to the store. This pattern of conduct was found to "go beyond that necessary to enforce criminal obscenity laws" and to "chill" protected first amendment rights.²²⁴ The court stated:

In the area of sexually oriented literature and films, state prosecuting authorities may vigorously enforce obscenity laws where the purpose is to punish the promotion or sale of *obscene* material or to deter such promotion or sale. However, such law enforcement will run afoul of the Constitution if it is to force a sexually oriented enterprise to cease doing business or to refrain from dealing in presumably protected sexually oriented materials. In those circumstances, such activity constitutes an invalid restraint on First Amendment rights.²²⁵

Where first amendment rights are not directly jeopardized, the standard for selective enforcement becomes proportionately lighter. In 1976, the city of San Antonio, Texas, adopted an ordinance²²⁶ regulating massage parlors which, in part, required each operator to record the name, age and current address of each patron together with the date and the name of the masseur. The Fifth Circuit Court of Appeals expressly rejected an "associational freedom" challenge to that code provision,²²⁷ finding that massage is not protected by the first amendment.²²⁸ In making that finding, the court relied on *Paris Adult Theatre I v.*

221. 440 F. Supp. 937 (S.D. Fla. 1977).

222. 291 F. Supp. 662.

223. 440 F. Supp. at 940.

224. *Id.* at 944.

225. *Id.* at 945.

226. SAN ANTONIO, TEX., CITY CODE, Chapter 18, Art. IV (1976).

227. *Pollard v. Cockrell*, 578 F.2d 1002, 1015 (5th Cir. 1978). *See also* *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978), discussed more fully at note 160 *supra*.

228. 578 F. 2d at 1015.

Slaton,²²⁹ where the Supreme Court rejected the argument that the right of adults to view obscenity in the home extended to willing customers in commercial theatres:

Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theatre, open to the public for a fee, with the private home of *Stanley v. Georgia* and the marital bedroom of *Griswald v. Connecticut*. This Court has, on numerous occasions, refused to hold that commercial ventures such as a motion picture house are 'private' for the purpose of civil rights litigations and civil rights statutes.²³⁰

The level of interference tolerated from law enforcement officials is thus directly related to the quality of the expression. That is, the further an activity strays from "pure speech" toward conduct, the less stringent the test for regulation.

8. CONCLUSION

Because of the nature of the media in which "obscene materials" may appear (motion pictures and books), local governments encounter formidable constitutional obstacles in their attempts to regulate the distribution of these items. The United States Supreme Court appears reluctant to authorize procedures which would have a "chilling effect" upon the distribution of "legitimate" materials through the same media.

The Court's dilemma appears to rise out of a concern for the fundamental rights of individuals and an equally profound recognition of the compelling interests of the states in protecting the health, safety, welfare and morals of their citizens. The constitutional problems are further compounded by the existence of competing policy considerations in interpreting the constitution as it relates to obscenity.

Is the regulation of obscenity a sword to be used against the exercise of individuals' rights to distribute books and films or a shield to protect the public from being exposed to those materials which may be offensive to their sense of morality? The resolution of this question, it appears, would depend upon whether states are empowered to determine what is "good" for their citizens and, more importantly, whether the states and their subdivisions may eliminate what they determine to be "bad."

229. *Id.* at 1016, citing to *Paris*, 413 U.S. 49 (1973).

230. *Id.*

The courts are divided as to whether the states may be *parens patriae* to adults as well as to minors. Many courts appear to have decided that the states must protect their citizens from themselves, by ensuring that access to obscene materials is made difficult by strict regulations, while other courts have decided that unless there is a demonstrably compelling state interest in regulating the distribution of obscene materials—this interest to have been judicially legitimated as to each piece of questionable material—then the right must be unimpaired by regulatory processes.

Medical Mediation—A Judicially Supervised Social Hour

EDWARD N. WINITZ*

In 1975, the Florida Legislature recognized that the delivery of quality health care to the citizens of Florida was threatened. Faced with what was termed a "crisis," the Legislature passed the Medical Malpractice Reform Act of 1975.¹ The preamble² to this comprehensive legislation is evidence of the intent of the Legislature to address what were perceived to be the causes of the crisis and make it clear that the provisions of the medical mediation statute are not designed as a "toll-gate" approach to the problem, wherein the claimant is required to stop at the mediation panel and pay his toll before proceeding further. Rather, the provisions of the Act are, in the words of the preamble, fundamental reforms of tort law or liability insurance system.

Because a formal medical malpractice trial is a cumbersome, time consuming, expensive, painful and traumatic experience for both plain-

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The author acknowledges the research assistance of Gloria Jones, R.N., Nova Law Center.

1. Medical Malpractice Reform Act, Ch.75-9, 1975 Fla. Sess. Law Serv. 1 (West)(hereinafter referred to as the Act).

2. WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and WHEREAS it is not uncommon to find physicians in high-risk categories paying premiums in excess of \$20,000 annually; and WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance, and WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire or practice defensive medicine at increased cost to the citizens of Florida; and WHEREAS the problem has reached crisis proportion in Florida

tiff and defendant, alternatives have been sought for resolving medical malpractice disputes. One such alternative is the use of a medical liability mediation panel. The goal of mediation is to permit early settlement of meritorious claims and discourage frivolous litigation.³ The following advantages have been said to be present where medical mediation panels are used:

1. The unsophisticated jury is replaced by knowledgeable fact finders who, because of their expertise, are more capable of distinguishing a meritorious claim from a frivolous, nuisance claim.
2. Long delays between the initiation and final disposition of lawsuits may be avoided, thus providing the opportunity for rapid resolution of cases.
3. The enormous expense of actions-at-law is reduced because the technical, formal time-consuming procedure characteristic of a trial are replaced by an informal and simple process.
4. Unjustified, embarrassing lawsuits can be avoided if the panel is successful in identifying nuisance claims.⁴

By providing an impetus toward settlement and earlier resolution of disputes, the mediation procedure provides immediate benefits to the parties and to the judicial system. The claimant benefits when the case is settled rather than tried, because he receives compensation at a time when he may be out of work and in need of funds for medical expenses. The defendant benefits in that a rapid resolution of controversies subjects him to minimal embarrassment and potential damage to his reputation by an unwarranted claim.⁵ The judicial system benefits in that, if the number of malpractice suits that reach the trial stage is reduced, then the backlog is reduced and personnel and facility costs are avoided.

3. In Dade County, the clerk's statistics indicate that, in 1975 when the statute became effective, there were 74 requests for mediation filed and only 43 of those were subsequently filed in the circuit court. In 1976 there were 262 cases filed for mediation. One hundred sixteen cases subsequently were filed in the circuit court. Seventy-four of the cases were dismissed, either by settlement or by the statutory dismissal by the clerk. Of the 262 medical malpractice cases filed in 1976, 45 of the 100 cases tried were filed in the circuit court for litigation. The statistics affirmatively show a reduction in the filing of circuit court law suits, which reduced the need and expenses for the preparation of jury trials. Interview with Barbara Roberson, Medical Mediation Clerk, Dade County, Florida, May 18, 1977.

4. Hooks, *The Florida Medical Malpractice Act of 1975*, 4 FLA. ST. U. L. REV. 77, 78 (1976).

5. HEW, *Appendix, Report of the Secretary's Commission on Medical Malpractice* (DHEW Pub. No. (05) 73-89, 1973).

The 1975 Florida Legislature saw mediation of medical malpractice disputes as a partial resolution of the crisis it faced with the delivery of quality health care to the citizens of the state. As a provision of the Medical Malpractice Reform Act, the Legislature enacted Section 768.44, Florida Statutes (1977),⁶ which provided that, before a person

6. §768.44, FLA. STAT. (1977) (amending §768.133 (1975)) states:

768.44 Medical liability mediation panels; membership hearings

(1)(a) Any person or his representative claiming damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization against whom he believes there is a reasonable basis for a claim shall submit such claim to an appropriate medical liability mediation panel before that claim may be filed in any court of this state.

(b) Claims shall be made on forms provided by the circuit court and shall be filed initially with the clerk of that court, with copies mailed to the person against whom the claim is made and to the administrative board licensing such professional. Service of process shall be effected as provided by law. Constructive service of process may be effected as provided by law.

(c) All parties named as defendants in the claim shall file an answer to such claim within 20 days of the date of service. No other pleadings shall be allowed. If no answer is filed within such time limit, the jurisdiction of the mediation panel over the subject matter shall terminate, and the parties may proceed in accordance with law.

(2) The chief judge of each judicial circuit shall prepare a list of persons available to serve on medical liability mediation panels whose purpose shall be to hear, and facilitate the disposition of, all medical malpractice actions arising within the jurisdiction of the circuit. The number of persons on the list shall be determined by the chief judge, but they shall be in sufficient numbers to efficiently carry out the intent of this section. Each hearing, as hereinafter provided for, shall be before a three-member panel, hereinafter referred to as the "panel," "mediation panel," or "hearing panel," composed as follows: a judicial referee, who shall be the presiding member of the hearing panel; a licensed physician; and an attorney. The judicial referee shall be a circuit judge. Such appointments of judicial referees shall be made by a "blind" system. The other panel members shall be selected in accordance with the following procedures . . .

(3) The clerk shall, with the advice and cooperation of the parties and their counsel, fix a date, time, and place for a hearing on the claim before the hearing panel. The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with law.

(4) The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues

or his representative may file a damage suit for alleged malpractice against a health care provider, he must first submit his claim to a mediation panel. The panel, pursuant to the statute, shall decide the issue of liability, *i.e.*, whether the defendant was actionably negligent in his care and treatment of the patient.

Requiring a party to comply with certain jurisdictional prerequisites is not new in this jurisdiction and, therefore, the Florida Courts have already determined that it is not a denial of procedural due process for a statute to impose jurisdictional prerequisites to suit as well as prerequisites to the granting of relief.⁷ The appellate courts in this jurisdiction

its written decision or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.

(5) All parties shall be allowed to utilize any discovery procedure provided by the Florida Rules of Civil Procedure. Any motion for relief arising out of the use of such discovery procedure shall be decided by the judicial referee. The judicial referee may in his discretion make reasonable limitations on the extent of discovery.

(6) The claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court, however, strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. Witnesses may be called; all testimony shall be under oath; testimony may be taken either orally before the panel or by deposition; copies of records, x-rays, and other documents may be produced and considered by the panel; and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the circuit court. The right of cross-examination shall obtain as to all witnesses who testify in person. Both parties shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but any party may have the proceedings transcribed or recorded. The judge presiding at the hearing shall not preside at any trial arising out of the claim or hear any application in the case not connected with the hearing itself. No other hearing panel member shall participate in a trial arising out of the claim, either as counsel or witness.

(7) Within 30 days after the completion of any hearing, the hearing panel shall file a written decision with the clerk of the court who shall thereupon mail copies to all parties concerned and their counsel. The panel shall decide the issue of liability and shall state its conclusion in substantially the following language:

(a) "We find the defendant was actionably negligent in his care or treatment of the patient and we, therefore, find for the plaintiff"; or

(b) "We find the defendant was not actionably negligent in his care or treatment of the patient and we, therefore, find for the defendant." The decision shall be signed by all members of the hearing panel; however, any member of the panel may file a written concurring or dissenting opinion

7. See text accompanying notes 9 through 15 *infra*.

have consistently affirmed orders dismissing complaints for failure to comply with a condition precedent to obtaining relief.⁸

In one such case, *Millstream Corp. v. Dade County*,⁹ the corporation sought to have certain county tax assessments declared void and to enjoin the collection of ad valorem taxes on its property, pending a determination by the circuit court as to whether the corporation's property should have been classified as agricultural lands. The Third District Court of Appeal affirmed the trial court's order of dismissal of the corporation's (taxpayer) suit, for failure to comply with certain statutes¹⁰ requiring a taxpayer, as a prerequisite to suit, to pay those taxes which are admittedly owing. The court held that appellant (Millstream) was not denied due process since it had both the opportunity and the means to comply with the statute and there was no doubt that the state could properly and validly impose such requirements.¹¹

Similarly, compliance with Section 770.01, Florida Statutes,¹² is a condition precedent to the maintenance of a libel or slander action. Failure to comply with the provisions of the aforementioned statute was held, in *Ross v. Gore*,¹³ to justify entry of final judgment for defendant, since compliance was a condition precedent to plaintiff's ability to maintain his action. Similar results are found in *Gannett Florida Corp. v.*

8. *Id.*

9. 340 So. 2d 1276 (Fla. 3rd DCA 1977).

10. §§191.171(3) and (4) FLA. STAT. (1977).

11. The appellant in this action had such an opportunity, and it was only through its failure even to tender payment of those taxes which were admittedly owing that it was deprived of a hearing. There is little doubt that the state may validly impose such a requirement. Were it not so, it would be an easy matter to avoid paying legitimate taxes simply by challenging one facet of an otherwise valid assessment.

340 So. 2d at 1278.

12. §770.01 FLA. STAT. (1977) states: "Before any civil action is brought for publication or broadcast, in a newspaper, periodical or other medium, of a libel or slander, the plaintiff shall at least five days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast, and the statements therein, which he alleges to be false and defamatory."

13. In *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), Julian Ross (Appellant) filed a libel suit against Gore and others based on an allegedly defamatory editorial which appeared in a newspaper published by defendant. The Florida Supreme Court affirmed the final judgment for defendants holding, *inter alia*, that a statute which requires certain prerequisites does not violate the due process and equal protection clauses of the Constitution.

*Montesano*¹⁴ and in *Orlando Sport Stadium, Inc. v. Sentinel Star Company*.¹⁵

Indeed, the above libel statutory provisions are phrased in terms nearly identical to those of Section 768.44(1)(a), Florida Statutes, dealing with jurisdiction prerequisites to filing a circuit court action in a medical malpractice case.¹⁶

The fact that a medical malpractice plaintiff and defendant are treated differently is not the result of some invidious and unconstitutional discrimination. On the contrary, the State of Florida prescribed a reasonable and appropriate condition to the bringing of a lawsuit, of a specified kind or class, and this distinction is not only real but the condition imposed has a reasonable relation to a legitimate object.

Currently on appeal to the Florida Supreme Court is *Herrera v. Doctors' Hospital and Elbert L. Fisher, M.D.*¹⁷ This case had been certified by the Third District Court of Appeal as being a case passing upon a question of great public interest, to-wit:

whether a medical malpractice complaint filed in the Circuit Court may be dismissed, with prejudice, by a trial judge when the plaintiff has filed a medical mediation claim pursuant to Section 768.44, Florida Statutes then failed to submit evidence in support of the claim before the mediation panel but has accepted the statutory conclusion of the panel as to liability, to-wit: "We find the defendants were not actionably negligent in their care and/or treatment of the patient and we, therefore, find for the defendants."¹⁸

On December 29, 1975, the Herreras (claimants) filed a request for medical mediation within the scope of Section 768.44, Florida Statutes. They alleged the customary allegations against the defendants regarding negligence which resulted in injuries and damages to them on or about

14. 308 So.2d 599 (Fla. 1st DCA 1975), *cert. denied*, 317 So.2d 78 (Fla. 1975).

15. 316 So.2d 609 (Fla. 4th DCA 1975).

16. See *Rocky Riccobono v. Cordis Corp.*, 341 So.2d 805 (Fla. 3rd DCA 1977); *Mt. Sinai Hospital of Greater Miami, Inc. v. Wolfson*, 327 So.2d 883 (Fla. 3rd DCA 1976).

17. 360 So.2d 1092 (Fla. 3rd DCA 1978), *appeal docketed*, Nos. 53,646 and 53,699, ___ So.2d ___ (Fla.).

18. Certified question of the Third District Court of Appeal, February 28, 1978. The Florida Supreme Court accepted jurisdiction pursuant to FLA. R. APP. P. 9.030(a) (2) (A) (ii) which states that certiorari jurisdiction of the Supreme Court may be sought to review decisions of the district courts of appeal that pass upon a question certified to be of great public interest.

September 8, 1967.

Pursuant to the mediation statute, a mediation panel was chosen and the hearing was scheduled to last three days beginning September 27, 1976.

At that hearing, the claimants chose not to present any evidence, testimony, expert or otherwise, nor any documentary evidence to establish any basis for a medical malpractice claim. The record on appeal indicates claimants' deliberate circumvention and subversion of the Act:

[Claimants' Attorney]: It is a horrible, hideous trauma, and he says I am trying to subvert it. He is absolutely right . . . It's a law that should be subverted.¹⁹

The Judicial Referee, finding that no evidence had been presented, stated:

[B]ut in the eyes of the law, there has been no evidence presented . . . there can be no ruling on the merits.²⁰

The medical mediation hearing concluded with the entry of the following order:

We find the Defendants were not actionably negligent in their care and/or treatment of the patient and we, therefore, find for the Defendants, *because the claimants chose not to present any evidence before this Mediation Panel.*²¹

On October 1, 1976, the Herreras commenced a malpractice action in the circuit court of the Eleventh Judicial Circuit in and for Dade County, Florida. The defendants filed their respective motions to dismiss the complaint asserting, *inter alia*, that plaintiffs did not present any testimony or other documentary evidence to support their claim of malpractice at the medical mediation hearing and, therefore, they avoided and subverted the purposes and intention of the Medical Mediation Statute. As a result, the plaintiffs deprived the defendants of a

19. 360 So.2d 1092, Record at 37.

20. *Id.*, Record at 71.

21. *Id.*, Record at 7 (emphasis added). It should be noted that the additional language of the order itself was not a question presented on appeal when the Herreras appealed the trial court's order dismissing their complaint with prejudice.

valuable legal right, without due process of law which was extended to them pursuant to the statute.²² The hospital also moved to dismiss the complaint for failure to comply with the applicable Florida statute of limitations, however, this issue was not decided because of the court's order.

The trial court, after having heard argument from all parties, dismissed the Herrerras' complaint with prejudice and held that they failed to comply with the requirements of the statute; that such failure was

a deliberate attempt to circumvent and evade the provisions of the statute; that the procedure followed by the plaintiffs in this case attempted to make a mockery and a sham of the procedure enacted by the Legislature and upheld by the Supreme Court of Florida; [and that compliance with the mediation procedure is] a jurisdictional prerequisite to the bringing of a medical malpractice suit in the Court of Florida.²³

Based upon the foregoing facts, the Herreras filed an appeal with the Third District Court of Appeal arguing the following point of law; Whether the trial court properly dismissed with prejudice the subject cause of action for failure of appellants (Herreras) to comply with the Medical Mediation Act. On this point, the court reversed and remanded with instructions to permit the Herreras to reinstitute the suit on the condition that the conclusion of the mediation panel be admissible in evidence at trial and that counsel be prohibited from informing the jury about the stricken portion of the panel's decision. Judge Pearson, dissenting, held that where a trial judge found that there had not been a good faith compliance with the statute, he had the jurisdiction to dismiss the complaint. Further, Judge Pearson wrote that he would affirm the trial judge's order upon the holding of the mediation panel judge.²⁴

22. See note 6 *supra*.

23. See note 18 *supra*, Record at 83-85.

24. It appears abundantly clear to this Court from an examination of the Act itself, and its intent and purpose, that the Florida Legislature intended that the Medical Mediation panels provided for would conduct a hearing on the merits of the case before it. It appears to be eminently clear that the Legislature in its approach to the public health crisis in Florida, by this Act, seeks to remove from the Court system of this State those medical malpractice cases which are patently frivolous, or clearly meritorious, and those which are subject to settlement after the parties have been brought together with a disinterested mediator and to act as preliminary screening panels to determine the issues of liability and damages. A compliance with this mediation procedure is and should be a jurisdictional prerequisite to the bringing of a medical malpractice suit in the Courts of Florida. The procedure followed by the plaintiffs in this case attempt to make a mockery

The defendants argued that under the Medical Mediation Statute, a claimant must present evidence in support of his claim at the mediation hearing as a condition precedent to this right to sue. The Third District Court, placing great emphasis on the precatory language used in the statutory provision as it relates to the presentation of evidence before a panel, held that a claimant had satisfied the jurisdictional requirement when he submitted his claim for mediation whether or not he presented any evidence. To affirm this decision will occasion a repeat of the crisis which existed in 1975, thus subverting the very intent and purpose of the Act.²⁵

The issue presented by the *Herrerias*' case, therefore, was whether the *Herrerias* complied with the jurisdictional prerequisites of Section 768.44, Florida Statutes. Does the mere filing of a claim for medical mediation constitute a submission of the claim to a mediation or is it the presentation of evidence to the mediation panel which constitutes submission of the claim to mediation within the meaning of Section 768.44(1)(a)? In other words, does the mere filing of the claim form and payment of filing fee, concomitant with a voluntary intentional and informed decision to refuse to present any evidence at the hearing, comply with the requirement that the claimant "shall submit such claim" to a mediation panel. By the words of the statute itself, there is a distinction between submitting a claim and the mere filing of a claim form. Subsection (1)(b) of the Act provides that "claims shall be" made on forms provided by the circuit court and shall be "filed" with the clerk. Subsection (1) (c) provides that defendant shall "file" an answer. Subsection (4) indicates that the "filing" of the claim shall toll the applicable statute of limitation. Subsection (3) further provides that the clerk "shall" set a time and place for "a hearing on the claim before the hearing panel." "The hearing shall be held" within a specified time after the "date the claim is filed." Within 60 days of the date of the decision of the hearing panel, the claimant may "file" a complaint in

and a sham of the procedure enacted by the Legislature and upheld by the Supreme Court of Florida and appears to be a deliberate attempt to circumvent and evade the provisions of the Act. To permit and condone the procedure followed by the claimant before the medical mediation panel would make an absurdity of the Act.

316 So.2d 609.

25. The author agrees with the Third District Court of Appeal that the conclusion reached by the mediation panel went beyond the limits prescribed by the statute when the panel included a reason (beginning with the word "because") for its decision as a part of its conclusion, thus transgressing the limitations of §768.44(7) FLA. STAT. (1977).

court. Subsection (6) requires that “[t]he claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court.”²⁶

The plaintiffs and the Third District Court of Appeal took the position that, where the statute requires them to submit a claim, this only means that the claim has to be filed with the clerk. The majority of the Third District Court would hold that the terms “submit” and “file” have identical meanings. Such a determination is erroneous for two reasons. First and most important is that these terms are words of common usage and, when used in a statute, should be construed in their plain and ordinary sense.²⁷ To file a claim, as required by the statute, means to deliver and deposit the required document with the clerk of court. On the other hand, to submit the claim, once the claim was filed, as required by Section 768.44(1)(a) and 768.44(6), Florida Statutes, means to present evidence to the panel allowing it to take the claim under advisement for purposes of reaching an informed and intelligent decision required by subsection (7).²⁸ Second, since the legislature used two different terms (submit and file), case law holds that it must be presumed that different meanings are to be ascribed to them.²⁹ Thus, the legislative intent expressed by the choice of differing terms in various parts of this statute was that “submit” was to have a different meaning than the word “file.” That is to say, more is involved in submitting a claim to mediation than simply filing the claim. As stated in *Sharer v. Hotel Corp. of America*,³⁰ “[i]t should never be presumed that the Legislature intended to enact purposeless and therefore useless, legislation. [The court] must avoid statutory construction which would impair, nullify or defeat the object of the statute.”³¹

26. See note 6 *supra*.

27. *American Bankers Life Assurance Co. v. Williams*, 212 So.2d 777 (Fla. 1st DCA 1968).

28. BLACK'S LAW DICTIONARY, revised, 4th ed. at 1594 (1968) defines “submit” as follows:

To commit to the discretion of another . . . To propound; to present for determination; as an advocate *submits* a proposition for the approval of the court . . .

That is to say, a cause is not “submitted” by the mere filing of a form, but rather is “submitted” only when probative evidence in support of the moving party's case has been introduced.

29. See *Florida State Racing Commission v. Bourquardez*, 42 So.2d 87 (Fla. 1949).

30. 144 So.2d 813 (Fla. 1962).

31. *Id.* at 817. See also *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918); *City of Indian Harbour Beach v. City of Melbourne*, 265 So.2d 422 (Fla. 4th DCA 1972).

The Florida Supreme Court has enunciated its interpretation of the legislative intent embodied within the mediation panel provisions insofar as the main issue in *Herrera* is concerned, by stating in *Carter v. Sparkman*³² that: “[T]he statutes involved here deal with matters related directly to public health and obviously have for their purpose an effort to have the parties mediate claims for malpractice thereby reducing the cost of medical malpractice insurance and ultimately medical expenses.”³³

Similar language reaching to legislative intent and public policy is contained within Justice England’s concurring opinion where he writes “[i]t troubles me that persons who seek to bring malpractice lawsuits might be put to the expense of two full trials on their claim”³⁴

To require the claimant to come forward with probative evidence in support of his claim fosters the clear legislative intent, and such interpretation of the statutory phrase “submit such claim” prevents this Act from becoming meaningless. Since claimants in *Herrera* did not submit such claim, but simply filed the claim within the meaning of subsection (1) (b) of the statute, they failed to meet the jurisdictional prerequisite and, accordingly, the circuit court was unable to try the claim since jurisdiction to do so was lacking. Hence, it is this writer’s belief that the trial court was correct in dismissing the cause.

32. *Carter v. Sparkman*, 335 So.2d 802 (Fla. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 740 (1977) upheld the constitutionality of the medical mediation statute. In so doing, the court stated;

Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of certain administrative relief such as zoning matters or workmen’s compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.

Cases are legend which hold that the police power of the state is available in the area of public health and welfare, and we must, therefore, consider matters pursued under the law sub judice as being separate and distinct from those generally flowing from the marketplace. At the time of enactment of the legislation in question sub judice, there was an imminent danger that a drastic curtailment in the availability of health care services would occur in this state. The Legislature’s recognition of the crisis in the area of medical care and the need for legislation for the benefit of public health in this state is evidenced by the Preamble

Id. at 805.

33. *Id.* at 806.

34. *Id.* at 807.

The Third District Court of Appeal failed to consider, when rendering its opinion, that it was an uncontroverted fact and admission that the Herreras deliberately circumvented the Medical Mediation Act. Dismissal of their complaint was justified since it is clearly provided for by rule and case law. Such deliberate tactics fall within the spirit of Rule 1.420(6) Florida Rules of Civil Procedure, which provides, in part, that:

Any party may move for dismissal of an action or of any claim against him for failure of any adverse party to comply with these rules or any order of court. . . . unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, . . . operates as an adjudication on the merits.³⁵

Even apart from the aforementioned Rules, the courts have the inherent power to impose the sanction of dismissal with prejudice for failure to comply with their orders. In *Surrency v. Winn and Lovett Grocery Co.*,³⁶ The Florida Supreme Court stated:

When a plaintiff invokes the jurisdiction of a Court and seeks to avail himself of it he does so with the understanding that he must abide by all lawful statutes, rules and order applicable to him, and the Court has inherent power to impose the sanction of dismissal, for its coercive effect. (Citations omitted)³⁷

The question which then arises, and which was advanced by the Herreras on appeal, is what quantum of proof is required to be presented by a claimant at the mediation hearing. This argument had nothing to do with the order of dismissal in the trial court since the issue before that court was whether uncontroverted subversion of the law and total failure to mediate justified dismissal of the circuit court complaint. The claimants ignored the statute by refusing to present any evidence and by refusing to submit the merits of their claim to mediation. The claimants failed to present any evidence and the court felt that some was required—that a good faith effort had to be made to comply with the law.

What then is the burden of proof in any medical malpractice case, despite the forum where it is litigated? Section 768.45, Florida Statutes states:

35. FLA. R. CIV. P. 1.420(b).

36. 34 So.2d 564 (Fla. 1948).

37. *Id.* at 565.

[T]he claimant shall have the same burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.³⁸

This statutory enactment simply codified the Florida common law on this subject. The cases in Florida are legend in number which hold that the plaintiff may not recover against a defendant in a malpractice action in the absence of proof of the following elements: Standard of care, breach of standard of care or duty, proximate cause and damages or injuries. In *Hunt v. Gerber*,³⁹ the court stated that in the absence of a showing of what the standard of care is, and coupled with the absence of showing that the hospital's actions were a departure from the accepted standards of care, and that such departure was the proximate cause of the injury sustained by the plaintiff, it would not submit the case to a jury, for to do so would be granting a jury a license to speculate as to what caused the injury in the particular case.⁴⁰ Actions of medical malpractice cannot be grounded on speculation.⁴¹

Because case law requires that the standard of care and breaches of it, as well as proximate causation, be established by the plaintiff, Florida case law has also required that such must be proven by expert testimony. The leading Florida case on the subject is *O'Grady v. Wickman*.⁴² In *O'Grady*, the court held that expert testimony is required to ascertain the skills and means that are recognized as necessary and customarily followed in the particular community.⁴³ There is, of course, one exception to the rule requiring expert testimony, and that is where the duty and its breach are so obvious as to be apparent to persons of common experience.⁴⁴

38. §768.45 FLA. STAT. (1977).

39. 166 So.2d 720 (Fla. 3rd DCA 1964).

40. *Id.* at 722.

41. See *Blackwell v. Southern Florida Sanitarium and Hospital Corp.*, 174 So.2d 45 (Fla. 3rd DCA 1965); *Barber v. North Shore Hospital, Inc.*, 145 So.2d 760 (Fla. 3rd DCA 1962); *Memorial Hosp., South Broward Hosp. District v. Doring*, 106 So.2d 565 (Fla. 2nd DCA 1958), for similar statements of the law.

42. 213 So.2d 321 (Fla. 4th DCA 1968).

43. *Id.* at 324.

44. The discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia, commonly used in diagnosing and

There was a simple, direct method of dealing with the crisis in health care services existing not only in this state but throughout the United States, to-wit: express legislative and fundamental reforms. The trial court, in dismissing the Herreras' complaint, construed the statute in accordance with the legislative intent. More particularly, it examined the language of the statute, the subject sought to be regulated, the purpose to be accomplished, and the means adopted for accomplishing the purpose.⁴⁵ The district court failed to recognize the intended purpose of the legislation enacted to deal with the malpractice crisis. Adoption of its opinion and of the Herreras' "deliberate attempt to circumvent and evade the provisions of the Act" will reduce the medical mediation hearing to little more than a judicially supervised social hour and will destroy any useful purpose intended for mediation panels. If the claimant fails to present testimony then the intent and purpose of the Act, *i.e.*, to screen out nonmeritorious claims and encourage settlement of meritorious claims, will never be accomplished because a hearing on the merits will not be held. Hence, the method for evaluating the claim is rendered useless and the mediation process will only result in an enormous waste of extremely valuable judicial time and labor.⁴⁶

treating a patient, is prima facie evidence of negligence. Amputation of the wrong extremity or removal of the wrong tooth or organ are other cases falling within this exception.

45. See, *e.g.*, *Deltona Corp. v. Florida Pub. Serv. Comm.*, 220 So.2d 905 (Fla. 1969).

46. The Florida Supreme Court, in an opinion filed December 21, 1978, affirmed the decision of the Third District Court of Appeal and held that it is not a jurisdictional prerequisite to the bringing of a medical malpractice lawsuit that the plaintiff present evidence at the mediation hearing but only that the plaintiff submits the claim to mediation. 1 Fla. L. W. 17 (January 1, 1979).

Legislative Overview: Florida Automobile Reparaions Act, 1972-1978: A Review of the Modifications in the Tort Threshold

THE HONORABLE TERENCE T. O'MALLEY*

The "Automobile Reparaions Reform Act"¹ became law on January 1, 1972. Florida became the second state² to adopt a pure no-fault³ automobile insurance law. The adoption of no-fault in Florida was a response by the Legislature to rising public pressure and outcry reflecting frustration with Florida's existing automobile insurance rates. The 1970 campaign for Insurance Commissioner pitted a no-fault proponent, Thomas D. O'Malley, against the incumbent Insurance Commissioner, Broward Williams, a supporter of the existing system of auto insurance in Florida.⁴

The potential for insurance rate relief promised by no-fault advocates, including Commissioner-Elect O'Malley,⁵ resulted in the 1972 Act. To assure at least an initial rate reduction, the Legislature included

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1. FLA. STAT. §§627.730-.741 (1971).
2. Massachusetts adopted a no-fault law in 1970. A. WIDISS, J. LITTLE, R. CLARK, T. JONES, *NO-FAULT AUTOMOBILE INSURANCE IN ACTION* at 8 (1977).
3. A pure no-fault system contains these essential elements:
 - (1) no-fault coverage is compulsory by statute,
 - (2) or alteration and partial elimination of tort liability,
 - (3) a system of first party insurance was substituted for the eliminated portion of the tort liability.
4. Until the adoption of no-fault in Florida, insurance was not compulsory. Florida operated under a financial responsibility law which required insurance or other proof of financial responsibility *after* any accident.
5. See O'Malley, *Is No-Fault Insurance Best for Florida*, 45 FLA. B. J. 187 (1971).

in the 1972 Act a mandatory 15% reduction in liability rates, reflecting its expectation of a reduction in third-party lawsuits. This discussion will examine the original intent of the Legislature, the expectations of the Legislature in adopting no-fault and the modifications of the 1972 Act reflecting the legislative and public frustration with the failure of the original statute to provide all that was promised at the time it was first proposed. This article will not include any discussion of the attempt by the Legislature to apply the no-fault concept to the property damage insurance coverage. Although the 1972 Act included such a provision, the Legislature never attempted to correct the deficiencies cited by the Florida Supreme Court in its decision in *Kluger v. White*,⁶ in which the no-fault property section was stricken.

In *Lasky v. State Farm Mutual Insurance Company*,⁷ the court addressed for the first time the constitutionality of partially eliminating tort actions in Florida. The concept of no-fault is the limitation of the right to recover in tort for certain damages *offset* by the benefit of recovery for certain damages from one's own first party insurer without the requirement of establishing fault. In its decision, the court considered the threshold⁸ and found a portion of that threshold deficient.⁹

6. 281 So.2d 1 (Fla. 1973).

7. 296 So.2d 9 (Fla. 1974).

8. The threshold is the barrier as to the type of injury or amount of medical expenses before an action in tort is allowed.

In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required . . . or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury . . . or which would be payable but for any exclusion deductible . . . exceeded one thousand dollars or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a weight-bearing bone, a compound comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function, or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this section upon a showing that the medical treatment received has an equivalent value of at least one thousand dollars. Any person receiving ordinary and necessary services normally performed by a nurse from a relative or a member of his household shall be entitled to include the reasonable value of such services in meeting the requirements of this subsection.

FLA. STAT. ANN. §627.737(2) (1974).

9. In *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974), the Florida Supreme

Appellants had asserted that the tort threshold in the new no-fault law had violated appellants' right of access to the courts and to trial by jury, denying them due process and equal protection of the law. In considering this question, the court found:

[I]nsurance coverage as to the personal injury benefits provided by the no-fault insurance law is compulsory . . . [A]ll right of recovery is not denied, but only recovery for particular intangible elements of damage in a few situations; there is no immunity from tort liability for tangible damages resulting from injury except where the benefits provided in F.S. §627.736 are payable to the injured party by his insurer or would be so payable but for an authorized deduction or exclusion. Thus the injured party will receive such benefits as payment of his medical expenses and compensation for any loss of income and loss of earning capacity under the insurance policy he is required by law to maintain, up to applicable policy limits, and may bring suit to recover such of these damages as are in excess of his applicable policy limits.¹⁰

The court did, however, uphold the severability of the stricken portion and found the remainder of the statute complete in itself and capable of being executed in accordance with the original legislative intent.

Following *Lasky*, the Florida Automobile Repairs Reform Act remained intact until the 1976 Legislature. In the four years that had passed since its original adoption, automobile insurance rates had started to climb despite the initial reduction mandated by the 1972 law and a further 1973 reduction ordered by the Insurance Commissioner after a review of company experience under the law. During the first year of no-fault, because of the \$1,000 threshold, a substantial reduction in the number of third-party lawsuits filed had occurred.¹¹ Gradually, the number of lawsuits stabilized and then began to climb once again, reflecting both the inflation of medical costs causing the \$1,000 threshold to be pierced, and the practice of "building" of claims for the sole purpose of piercing the \$1,000 threshold so a tort action could be filed.

In 1976, in response to the apparent targeting of the \$1,000 amount,

Court invalidated all thresholds except \$1,000 medical expenses, death, and permanent injury, finding the other injury thresholds arbitrary and unreasonable, and thus denying equal protection.

10. *Id.* at 14.

11. For a detailed study of litigation trends after the adoption of no-fault in Florida, see Little, *No-Fault Auto Reparation in Florida*, 9 U. MICH. J. LAW REFORM 1 (1975) reprinted in A. WIDISS, J. LITTLE, R. CLARK, T. JONES, NO-FAULT AUTOMOBILE INSURANCE IN ACTION (1977).

the Legislature replaced the monetary threshold with a verbal threshold which allowed recovery in tort only if the injury or disease consisted in whole or in part in:

- (a) Loss of a body member.
- (b) Permanent loss of a bodily function.
- (c) Permanent injury within a reasonable degree of medical probability other than scarring or disfigurement.
- (d) Significant permanent scarring or disfigurement.
- (e) A serious non-permanent injury which has a material degree of bearing on the injured person's ability to resume his normal activity and life-style during all or substantially all of the ninety day period after the occurrence of the injury, and the effects of which are medically or scientifically demonstrated at the end of such period.
- (f) Death.¹²

Almost immediately the 1976 Act came under fire. The public was frustrated by the continuing escalation of auto insurance rates. Even though it might have been reasonable to assume that there would be a time lag between a legislative modification of the law and an actual reduction in rates, the public outcry was for immediate relief. As a result, the 1977 Legislative Session was inundated with a myriad of proposals for auto insurance reform. The most far-reaching proposal was that of Insurance Commissioner Bill Gunter.¹³ Commissioner Gunter's proposal was rejected by the 1977 Legislature, but it served as the catalyst for the changes made in the tort threshold in the 1978 Session. The Commissioner proposed the complete abolition of the right to recover in tort for "speculative"¹⁴ or non-economic damages. His proposal included a plan for insurance companies to offer an *optional* first party coverage to those who wished to have the ability to recover for non-economic losses.

The 1977 Legislative Session adjourned without acting on the Gunter Proposal. Hence, the Commissioner sought to pursue his plan via the initiative process and wrote a proposed constitutional amendment

12. FLA. STAT. §627.737(2) (1977).

13. FLORIDA DEP'T. OF INSURANCE, A SOLUTION TO THE AUTOMOBILE INSURANCE CRISIS (1977).

14. "Speculative" damages were defined by Gunter as those which have no dollar value. The damages to be eliminated were identical to those included as elements in personal injury and property damages in Florida Standard Jury Instructions 6.2: injury, pain, disability, disfigurement, and loss of capacity for the enjoyment of life.

to be placed upon the ballot in November of 1978. The Floridians for Auto Insurance Relief Amendment was to be an addition to Article X of the Florida Constitution and provided:

Limitation of damages—motor vehicle accidents—

(a) Damages recoverable by any person in a civil suit against the owner or operator of a motor vehicle for injuries resulting from a motor vehicle accident shall be limited to the following:

- (1) Medical expenses, past and future;
- (2) Lost earnings and lost earning capacity;
- (3) Funeral, burial or cremation expenses;
- (4) Property damage;
- (5) Out of pocket expenses; and
- (6) Punitive damages where the owner or operator of a motor vehicle is found to have caused injury to another by willful or wanton misconduct or a reckless indifference to the rights of others.

While the controversy raged over the proposed constitutional amendment, some 300,000 Floridians signed the petitions to place this item on the 1978 General Election Ballot. The Legislature, led by Senator Dempsey Barron, readdressed the tort threshold issue and attempted to provide a compromise reform bill that would be sufficiently acceptable to Commissioner Gunter to cause him to abandon his efforts to enact the Floridians for Auto Insurance Relief Amendment by the initiative process. The result, Senate Bill 1308, represented the latest modification of the tort threshold and became effective on January 1, 1979.

The newly revised tort exemption in Section 627.727(2) permits recovery in tort only in the event that the injury consists in whole or in part of:

- (a) ~~(b)~~ Significant and permanent loss of an important bodily function.
- (b) ~~(c)~~ Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
- (c) ~~(d)~~ Significant and permanent scarring or disfigurement.
- ~~(e)~~ (Struck in entirety)
- (d) ~~(f)~~ Death.

The revised law eliminates the right to recover for nonpermanent injuries by striking the language added in 1976, and offsets the elimination of that right with an increase from \$5,000 to \$10,000 in the required mandatory personal injury protection. The 1978 changes leave Florida with one of the strongest tort restrictions in the nation. Even before the effective date of the law, constitutional attacks loomed on the horizon.

CONCLUSION

From 1972 to 1978 the tort restrictions evolved from a dollar threshold with the ability to recover for nonpermanent injury upon exceeding that \$1,000 threshold to a total abolition of the right to recover in tort for any nonpermanent injury.

What may we expect from future Legislatures in relation to the tort threshold? If the constitutional challenges are withstood, it is unlikely that the tort threshold will be modified or altered at any time in the near future. The Legislature has modified that threshold three times in six years and evidences a reluctance to further restrict the right to a tort action. Further, it has been the position of a substantial number of Legislators, as well as the Insurance Commissioner, that Florida's automobile insurance climate is improving, that much of that improvement is a reflection of the changes that have occurred, and that further changes of a substantial nature should be postponed until there is clear statistical data from the insurance companies on which to base any additional changes.

A review of the legislative debate¹⁵ surrounding the initial adoption of the no-fault concept in Florida confirms that the intent¹⁶ in adopting no-fault revolved around a desire to:

- (1) Reduce insurance premiums;
- (2) Reduce litigation (and its attendant costs to the insurance system);
- (3) Reduce the delay in providing relief to injured parties;¹⁷
- (4) Elimination of overcompensation of minor injuries and undercompensation of serious injuries.¹⁸

15. See, e.g., Fla. H.R. Jour. 599-605 (May 19, 1971).

16. Little, *supra* note 11.

17. *Id.*

MEDIAN ELAPSED TIME IN DAYS BETWEEN THE DATE AN ACCIDENT CLAIM WAS FILED AND THE DATE FIRST PAYMENT WAS MADE—FLORIDA

Type of Claim	1971	1972	1973
First	37.3	25.3	29.1
Third Party	83.5	102.5	136.5

18. Reporting on a six year study conducted by the Department of Transportation, Brock Adams, Secretary of Transportation, stated:

The existing system unfairly overcompensated the small accident victim and inadequately compensated or did not compensate at all the major accident victim.

Where out-of-pocket victim losses were under \$500, victims recovered an average

These concerns continue to be foremost in the minds of Legislators. If, however, the Legislature is reluctant to further alter the tort threshold and the insurance rate climate does not stabilize or decline, it is my opinion that the legislative direction will next occur in the following areas:

(1) Changes in the classification system which would eliminate age, sex, and marital status as a basis for determining insurance premiums and replace them with some sort of merit-rating proposal based upon use of car, driving experience, and/or driving record.

(2) Elimination or modification of territorial ratings.

(3) Restructuring of surcharge system for accidents and moving violations.

(4) Statewide charge for company expenses replacing percentage of premium currently employed for such charges.

Many of these alternatives are currently being evaluated both in Legislative Committees and by the Department of Insurance. The allocation of company expenses referred to in (4) above has been mandated by a recent order of the Insurance Commissioner.¹⁹ All four alternatives have the potential of reducing rates for some drivers by shifting the premium burden to other drivers. The real dilemma and challenge facing future Legislatures will be to ascertain which premium burdens may be shifted from one sector or group to another without causing an inequitable result.

of four and a half times their economic losses. Where losses were \$25,000 or more, even successful tort claimants averaged a net recovery of only about one-third of their out-of-pocket loss.

Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings on S.1381 Before the Committee on Commerce, Science and Transportation, 95th Cong., 2d Sess. (July 15, 1977).

19. Florida Dep't of Insurance Rule No. 4-43.02, FLORIDA ADMINISTRATIVE CODE.

Copyright, Fair Use and Photocopying: A Stone Conundrum*

“Copyright admits of philosophic thinking more than most other parts of the law.”¹ While it is universally recognized that copyright is open to the objection that it burdens both competitors and the public, the monopoly is permitted and encouraged by the law for the public advantage it serves. By protecting the property rights of the author in his work, copyright attempts to assure that the public may enjoy the benefits of a continuing supply of creative works. Constant attention must be paid and adjustments made to the copyright law to assure that the burdens of such protection do not outweigh the benefits. The broad and as yet inadequately defined “fair use” doctrine² has increasingly been relied upon when considering the proper scope of the monopoly in any particular case. Due to the pervasiveness of philosophical uncertainties, the fair use doctrine has proven a difficult and ponderous area of copyright law. It has on occasion been confused with issues of initial infringement and damages.

I suggest that the fair use doctrine might better be understood after analysis of several related and more fundamental issues. Does the Constitution mandate a fair use doctrine, or, may fair use more helpfully be characterized as a defense which would arise after an initial determination of infringement? If a defense, some cases may turn on more palatable issues such as when a work is deemed “copied” or when works in question are “substantially similar.” This article shall also explore the impact of reprography³ on the quantity and quality of information

* This article, in somewhat different form, has been entered in the 24th annual Nathan Burkan Memorial Writing Competition.

1. Chafee, *Reflections on the Law of Copyright: I* (pt. 1), 45 COLUM. L. REV. 503 (1945).

2. The most widely accepted definition is that “fair use” is a “privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner” BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944). The fair use doctrine now appears at §107 of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976)(to be codified as 17 U.S.C. §§101-810) [hereinafter cited as New Act]. This Act became effective on January 1, 1978.

3. “The reproduction of graphic material especially by electronic means.”

available. Further, thoughts and perspectives are offered on the relationship of educational and library photocopying to fair use. Lastly, sections 107 and 108 of the new Copyright Act⁴ are examined in light of the legislative history⁵ as they relate to photocopying.

1. FAIR USE: QUESTIONS AND PERSPECTIVES

“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ It has been said that the constitutional statement of purpose was intended by the framers as a preamble to the grant of congressional power and not as a limitation of its exercise.⁷ This view is supported by the fact that the power of Congress to grant copyright has not been confined to those works which actually and undeniably promote the progress of science and the useful arts.⁸ This broad power of Congress to grant copyright does not, however, necessarily aid in defining the scope of power granted in any particular case. For, if the statement of purpose is construed as a limitation on the exclusivity of the rights granted by Congress, is this not a constitutional mandate for the fair use doctrine?

This issue encompasses any discussion of the two basic directives within the Copyright Clause: that the rights granted be for “limited times”⁹ and that the rights of the author be “exclusive.” The Constitu-

BARNHART DICTIONARY OF NEW ENGLISH SINCE 1963 at 402 (1st ed. 1973).

4. New Act, *supra* note 2.

5. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 [hereinafter cited as HOUSE REPORT] reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659; S. REP. NO. 473, 94th Cong. 1st Sess. 47 (1975) [hereinafter cited as SENATE REPORT], Conf. Rep. H.R. REP. NO. 1733, 94th Cong., 2d Sess. 65 [hereinafter cited as CONFERENCE REPORT], reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5810.

6. U.S. CONST. art. I, §8, cl. 8.

7. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03 [A], at 1-30 (1978).

8. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where the Court per Holmes, J. found a circus poster a suitable subject for copyright, and therefore within the constitutional statement of purpose. The arguable utility of this lithograph poster in the promotion of the useful arts is evidenced by the dissenting opinion per Harlan, J.: “A mere advertisement . . . would not be promotive of the useful arts, within the meaning of the constitutional provision . . .” *Id.* at 252.

9. The following discussion of “exclusivity” may be applied by analogy to this constitutional limitation on the duration of the copyright, a specific discussion of which is not within the scope of this writing. See New Act, *supra* note 2, at §§302-05.

tion, be it for better or worse, does not provide guidance as to the balancing which must inevitably and constantly be performed in determining that degree of "exclusivity" which will best promote the progress of science and useful arts. It may be this "balancing" which is both the initial and ultimate dilemma in copyright law, that which has caused copyright to be called the ultimate jurisprudential area of the law.¹⁰ Although it has been argued that there exists a constitutional mandate that any copyright provided by Congress be exclusive,¹¹ the survival of compulsory licensing, statutory recognition of fair use and limitations on the right found generally at 17 U.S.C. §§107-18 are evidence of the current reality that a copyright, at least in the final analysis, is something less than an exclusive right.¹²

Regardless of a court's final determination of the degree of exclusivity of the right in any particular case, it would seem helpful to a logical consideration of all of the issues to isolate as much as possible issues of constitutional limitations on the right. Such isolation of the issues could prove especially helpful where questions of "fair use" arise. The scope and limits of the doctrine have evaded definition for so long that the entire fair use issue is widely recognized as "the most troublesome in the whole law of copyright."¹³ Judicial considerations of the fairness of the complained of use should be confined to situations in which it is properly raised as a defense:¹⁴ that is, after plaintiff's state-

10. Complete vindication of the creator's economic interest would logically require that the statutory monopoly be absolute. Likewise, the logic of full vindication of the *immediate* public interest in free access would require that no statutory monopoly at all be permitted. The copyright statute reflects a reasoned compromise between these competing interests.

Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970) (emphasis added). See generally Chafee, *supra* note 1.

11. See testimony of Nathan Burkan, Esq. before a congressional committee, Hearings on S. 2328 and H.R. 10353, 69th Cong., 1st Sess. 31-32 (1926); WEIL, AMERICAN COPYRIGHT LAW 62-63 (1917): "[I]f it [Congress] determines to legislate, it may [not] give more, or less, than the only thing it is empowered to give, viz: an exclusive right."

12. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 529-30 (1972) wherein the Court upheld the rule enunciated in the leading case of *Radio Corp. of America v. Andrea*, 79 F.2d 626 (2d Cir. 1935) (restricting rights of patentees in combination patents) despite plaintiff's argument that the Constitutional mandate of Article I, section 8 was not properly reflected in the prevailing law.

13. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); 3 M. NIMMER, NIMMER ON COPYRIGHT §13.05, at 13-48 (1978).

14. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). In finding

ment of his prima facie case. This would seem an appropriate and prudent time for the courts to practice some judicial parsimony, thereby forcing, if at all possible, a reduction of the fair use issue to its most fundamental elements. Assuming the work in question is both copyrightable and properly copyrighted, the fair use issue may disentangle into less complex although similarly difficult issues. Opponents of such limited application of the fair use doctrine may be found eager to point out that first amendment considerations would take precedence over the statutory copyright privilege, and that an appeal of a constitutionally based fair use defense should prove successful as a first amendment non-infringing use. Supreme Court consideration and discussion of this ripe and thorny issue could only prove helpful.

Perhaps there may never be a final resolution of the seeming conflict between Article I, section 8 and the freedom of speech and press provided by the first amendment, but an airing of the countervailing considerations is becoming overdue.¹⁵ The advocates of greater public access and a constitutionally grounded fair use doctrine would be quick to remind the court that precedent exists for such a belated finding of constitutional mandate.¹⁶ Defenders of the exclusive monopoly of the copyright holder would no doubt argue that the policy of public access is best served in the long run not by narrowing the scope of copyright but by assuring a continued flow of creative information by maintaining

that the Southern District Court of New York had prematurely decided the case on the fair use issue to the prejudice of plaintiffs, the per curiam opinion of Circuit Court Judges L. Hand, Augustus N. Hand and Patterson counseled the district courts:

We doubt the convenience of dividing the trial in this way: the issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain. At least we should regret seeing the procedure become the custom, as it is apparently tending to become in the Southern District of New York.

But cf. Rosenfield, *The Constitutional Dimension of Fair Use in Copyright Law*, 50 NOTRE DAME LAWYER 790, 804 (1975), where Mr. Rosenfield maintains that first amendment constitutional considerations demand that fair use be something more than an affirmative defense.

15. Sobel, *Copyright and the First Amendment: A Gathering Storm?* 19 ASCAP COPYRIGHT L. SYMP. 43, 44 (1971).

16. In *Coleman v. Alabama*, 399 U.S. 1, 22 (1970), the majority found a constitutional mandate for a criminal suspect to have the opportunity to have counsel present at a preliminary hearing. In his dissenting opinion, Chief Justice Burger characterizes this discovery, made some two centuries after the writing of the Constitution, as "an odd business."

the incentives of publication and dissemination. This position is essentially Goldstein's "second accommodative principle"¹⁷ which differs from the "first accommodative principle" (identifying the accused infringer with the short range public interest) in that "it identifies the copyright owner with the long range public interest in the promotion of expression."¹⁸

Regardless of the final determination on the fair use issue in any particular case, such an orderly presentation of the issues may find the fair use issue narrowed to one less enigmatic than one of constitutional conflict. The question of what constitutes "a copy,"¹⁹ or "copies,"²⁰ is one which is inextricably intertwined in the initial question of infringement in all cases yet calls to question the fairness of the use in but a limited number of situations. That "copying" is an essential element of plaintiff's prima facie case is undisputed.²¹ Further, it is generally recognized that this burden is met by a showing that defendant had "access" to the copyrighted work and that the allegedly infringing work is "substantially similar" to the plaintiff's copyrighted work.²² In cases of reprographic infringement, proof of access poses little problem to plaintiff, if indeed the court is not willing to find the access conclusively shown by the photocopy itself. One might also conclude that reprography cases also render the element of substantial similarity moot, though this would be to ignore the helpful distinction drawn by Professor Nimmer between "comprehensive nonliteral similarity" and "fragmented literal similarity."²³

It is "fragmented literal similarity" which may form a defense

17. Goldstein, *supra* note 10, at 988.

18. *Id.* at 1015.

19. Copyright Act of 1909, 17 U.S.C. §1 (1976)(substantially revised by New Act, *supra* note 2).

20. New Act, *supra* note 2, at §106. The use of the plural "copies" in the New Act does not thereby sanction singular copying, but appears to be merely a grammatical difference from the 1909 Act. Both the House and Senate Committee Reports contain the same explanatory sentence: "The references to 'copies or phonorecords,' although in the plural, are intended here and throughout the bill to include the singular." HOUSE REPORT, *supra* note 5, at 61; SENATE REPORT, *supra* note 5, at 58.

21. 2 M. NIMMER, NIMMER ON COPYRIGHT §§8.01, 13.01, 13.03 (1978).

22. Sid & Marty Kroft Television Productions, Inc. v. McDonalds Corp., 562 F.2d 1157 (C.A. Cal. 1977); Musto v. Meyer, 434 F. Supp. 32 (D.C.N.Y. 1977); 3 M. NIMMER, NIMMER ON COPYRIGHT §13.01 [B], at 13-6 (1978).

23. 3 M. NIMMER, NIMMER ON COPYRIGHT §13.03 [A], at 13-16 (1978); *see also* L. Hand's discussion of these concepts in Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930).

prior to an initial finding of infringement in reprography cases.²⁴ How much literal borrowing of a copyrighted work is "substantial" within the "substantial similarity" element of plaintiff's prima facie case? Where reprography is the alleged infringement, an answer to this question may prove as difficult of determination as convincing a court to consider the question as part of the prima facie case. In *United States v. Taxe*,²⁵ a criminal prosecution under the Copyright Act of 1909, the testimony of defendant Taxe conclusively showed that the complained of infringement was the result of re-recording or pirating phonorecords some of which were copyrighted post-1972. Although acknowledging that substantial similarity must be found prior to a finding of infringement, the district court unreasonably deduced that any re-recording is of necessity substantially similar to the initial recording and therefore found that no substantial similarity need be shown where re-recording is evident.²⁶ Professor Nimmer points out that the question of substantial similarity necessarily involves a consideration of defendant's use of the copyrighted work (its importance to or the extent to which it forms the kernel of the defendant's work), but also emphasizes that this should not be confused with factors determinative of the separate issue of "fair use."²⁷ It is helpful to an understanding of this puzzle to remain aware that the substantial similarity issue goes to the initial question of infringement: that is, has a protectible portion of plaintiff's work been misappropriated? Has the protected work been "reproduced" within 17 U.S.C. §106(1) or should the defendant's appropriation come under the legal maxim of *de minimis non curat lex*? Any such finding must, of course, be made after examining the extent of the alleged infringement both quantitatively and qualitatively from the plaintiff's

24. *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Cal. 1974) *aff'd*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977), although a case involving infringement of phonorecords by re-recording, invites comparison to cases of alleged photocopy infringement due to potential likeness of "fragmented literal similarity" issues and facts.

25. *Id.*

26. This confusion of "access" with "substantial similarity" and thus of copying with infringement did not, however, result in prejudice to defendants. As eloquently expressed on appeal by Circuit Court Judge Goodwin:

We believe the instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider "substantial similarity" and cured any error in the earlier part of the instruction.

United States v. Taxe, 540 F.2d 961, 965 (9th Cir. 1976).

27. 3 M. NIMMER, NIMMER ON COPYRIGHT §13.03[A][2], at 13-28 (1978).

perspective. That is, the analysis must be the amount of the work taken and its significance not to defendant's work, but to the appropriated work as a whole.²⁸

The question of whether personal and private use of copyrighted works is within the scope of the Copyright Act and thus subject to its restrictions is one which has yet to be dealt with by the courts. However, as early as 1960, Mr. Latman foresaw that "the increasing use of photoduplication processes will undoubtedly require continuing attention to this area."²⁹ This question is of course linked to the seeming conflict between the first amendment and the Copyright Clause,³⁰ and may be avoided by application of the fair use doctrine. Given such an approach, it is likely that any private use by photocopying, short of "publication,"³¹ would be found "fair" by use of the now statutory factors test. It is perhaps this likelihood which has led at least one commentator to conclude that "anyone may copy copyrighted materials for the purposes of private study and review."³² If this is a safe conclusion, what then is the significance of the "single copying for teachers" guidelines within the House Report?³³

Does not the Conference Committee's acceptance of the House version of section 107 (1) (which includes consideration of the non-profit educational purpose of the use), when coupled with the restricted list of permissible single copying for teachers imply that even single copying by the lay public is at least an initial technical infringement? Further, what of the specific statement in both House and Senate Reports that references to "copies" are intended to include the singular?³⁴

In the past, fair use was said to be grounded, *inter alia*, in the implied consent of the copyright proprietor. This theory seems much

28. *Mathews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943). A comparison of the factors therein with those of the New Act, *supra* note 2, at §107, may indicate just how settled the understanding of this distinction is.

29. A. LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14 (1958) prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).

30. See text accompanying notes 6 through 14 *supra*.

31. " 'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending." New Act, *supra* note 2, at §101.

32. Cohen, *Fair Use in the Law of Copyright*, 6 ASCAP COPYRIGHT L. SYMP. 43, 58 (1955).

33. HOUSE REPORT, *supra* note 5, at 68.

34. See notes 19 through 20 and accompanying text *supra*.

less fictional when applied to the determination of what constitutes a copy, more specifically whether the copying is so substantial as to be "substantially similar." The implied consent fiction has largely been replaced by factors which are presently determinative of the fairness of the use. A further reason for abandonment of this basis for the doctrine is that its logical extension may have led to the situation where, by affixing copyright notice on every page, the proprietor could prevent any quotation at all.³⁵

On the other hand, there are publishers who are not adverse to scholarly and educational copying of their copyrighted works and who will consent to copying beyond that allowed by the 1976 Act and the fair use doctrine. A draft report released in March 1978 by the National Commission on New Technological Uses of Copyrighted Works (CONTU)³⁶ recommended several procedural steps and notice statements which might clearly communicate such nonpossessory attitudes, presumably without giving away what may effectively be the whole copyright.³⁷ There clearly should be no legal obstacle to such a practice as long as the express grant of authority is equal to or extends that already provided by the Copyright Act generally and the fair use doctrine specifically. Such a copyright holder should take care that the wording of such notice is neither too broad nor too narrow. As an example of a notice statement which is arguably too narrow, consider the following, which was presented in memorandum form by the Association of American Law Schools [hereinafter referred to as AALS]:

Except as otherwise expressly provided, the author of each article in this volume has granted permission for copies of that article to be made for classroom use in a nationally accredited law school, provided that 1) copies are distributed at or below cost, 2) author and journal are identified and 3) proper notice of copyright is affixed to each copy.³⁸

The legal effect of such a statement is, granted, merely an assurance that if the conditions are complied with the user has a license to copy and

35. If the basis for fair use is implied consent, a statement by the author explicitly removing any doubt as to his non-consent, such as ANY & ALL REPRODUCTION IS PROHIBITED, would effectively destroy fair use and would soon frustrate constitutional purposes behind the grant of a *limited* monopoly.

36. 371 PTCJ A-14 (March 23, 1978)(BNA).

37. *Id.* at A-19.

38. *AALS Memorandum 78-25*, Wayne McCormack, Associate Director, Association of American Law Schools, Washington D.C.

need not rely upon section 107 fair use. However, when such a statement is presented in conjunction with the legally mandated notice of copyright, does it not receive the imprimatur of legality thereby giving rise to an inference that this is the extent of the rights/privileges provided by law? Should such, albeit innocent, tampering with the public impression of legality be allowed when adherence to law is being frustrated by the encouragement of indiscriminate photocopying? The recipients of the same AALS memorandum were encouraged to include such a statement in each issue of their law journals by the suggestion that feedback as to the popularity of topics could be had for the asking merely by including the added precondition to consent that notice be provided prior to any copying.³⁹ This goes too far.⁴⁰ Regardless of one's position as to the constitutional basis for the fair use doctrine, it is and should remain a judicial rule of reason⁴¹ unaffected either at law or in the public's eye by unilateral statements of consent by the copyright holder.

It is perhaps illuminating that the "implied consent" fiction blossomed at a time when the state of the art was such that systematic mechanical copying was simply not feasible for any but the few with access to printing facilities. In later years, the mimeograph and other stencil duplicators provided similar convenience to a wider population.⁴²

[I]t is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use, and in the era

39. *Id.*

40. A more sensible, and again arguably more valid, notice statement appears in an earlier AALS memorandum:

Except as otherwise expressly provided the author of each article in this volume has granted permission for copies of that article to be made and used by non-profit educational institutions provided that author and journal are identified and that proper notice of copyright is affixed to each copy.

AALS Memorandum 78-13. For a similar statement already in use by the American Library Association, see material cited in note 37 *supra*. Compare the more concise notice appearing in Professor Treece's recent article:

A license is hereby granted to students, teachers, librarians and journal publishers to reproduce copies of this article by any means, and to distribute copies of this article to the public, provided that copies reproduced for distribution to the public include a notice of copyright in the following form: "Copyright © 1977 by James Treece."

Treece, *Library Photocopying*, 24 U.C.L.A. L. REV. 1025 (1977).

41. HOUSE REPORT, *supra* note 5, at 65-68.

42. See I N. HENRY, COPYRIGHT—INFORMATION TECHNOLOGY—PUBLIC POLICY, 28-31 (1975).

before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files.⁴³

This statement was used by the narrow majority of the Court of Claims in *Williams & Wilkins Co. v. United States*⁴⁴ to further the proposition that under the then governing 1909 Act, the word "copy" was not to be given its ordinary meaning. Despite a rather strained argument by defendant that the exclusive right to copy granted in section 1 of the 1909 Act should not apply to books and periodicals, the Court of Claims was sufficiently confused by the legislative history to abandon the basic tenet of judicial construction that words be given their plain and literal meaning.⁴⁵ Chief Judge Cowen in his well reasoned dissent to the *Williams & Wilkins* opinion found the meaning of "copy" apparent from the wording of the 1909 Act and found it "not necessary to debate the statutory history in light of the changes in the 1909 Act."⁴⁶

Although it is foreseeable that some photocopying cases may hinge on the relatively narrow issue of "substantial similarity," it is probable, at least in the foreseeable future, that the allegedly infringing photocopying will have been conducted on such a scale as to necessitate a weighing of the statutory factors determinative of fair use. Any analysis of the purpose and character of such wholesale photocopying would be something less than intellectually honest if it were to view machine copying as merely a substitute for hand copying and therefore fair use.⁴⁷ We live in a time when photocopies can be made in seconds and the demand is apparently sufficient to warrant the placing of photocopiers not only in most offices and libraries, but also in a growing number of convenience stores. One dare not hypothesize, therefore, that hand copies would have been laboriously produced in any but an infinitesimal proportion of the current photocopying explosion.

43. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

44. 487 F.2d 1345.

45. 2A SUTHERLAND, STATUTORY CONSTRUCTION §46.01. For a good discussion of policies behind what has become known as "the plain meaning rule," see ENDLICH, THE INTERPRETATION OF STATUTES, chapter 1 (1888).

46. 487 F.2d at 1365.

47. *Id.* at 1368.

2. THE REPROGRAPHY EXPLOSION

In reprography cases, when weighing the decisive factors in an effort to determine whether the use is fair, or whether "the value of the original is sensibly diminished,"⁴⁸ one must bear in mind the cumulative economic effect of the complained of photocopying. The temptation to consider the copying in and of itself without any thought as to the broader perspective and impact of such use upon the future market of the copyright proprietor is strong. This is especially true where the use itself is non-commercial and educational in nature. Such a myopic view brushes under the carpet the effect of the reprography explosion on the educational publishing industry.

That a reprography explosion exists is indisputable; only its size is unknown. In 1962, the Fry Report, conducted for the National Science Foundation, estimated that some 3.6 billion photocopies of both copyrighted and uncopyrighted works were made annually.⁴⁹ The president of the Xerox Corporation reported in 1965 that roughly 9.5 billion copies were produced in the United States in 1961.⁵⁰ By 1967, this figure had risen to 27.5 billion.⁵¹ The present annual total figure is unknown. Also unknown is the number of photocopies made of copyrighted works. It has, however, been estimated in a Dutch study that of the total volume of photocopying about 5% contain copyrighted works.⁵² This percentage increases to 25% of all photocopying within educational institutions and to 65% of all library photocopying.⁵³ An American study found that about 60% of library photocopying was of copyrighted work.⁵⁴ The same study found what is now generally recognized as true in discussions of copyright and reprography: copies are made of periodi-

48. *Folsom v. Marsh*, 9 Fed. Cas. 342, 348, No. 4901 (C.C. Mass. 1841).

49. George Fry and Associates (1962) *Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields*. Study prepared for the National Science Foundation, appearing in 11 BULL. COPYRIGHT SOC'Y. 69 (1963).

50. I N. HENRY, *supra* note 42, at 59.

51. Kolle, *Reprography and Copyright Law: A Comparative Law Study Concerning the Role of Copyright Law in the Age of Information*, 6 IIC 382, 385 (1975).

52. *Id.* But for exact figures, see Gerbrandy, *The Netherlands Solution to the Problem of Reprography*, 1975 COPYRIGHT 47, 50.

53. Kolle, *supra* note 51, at 385.

54. *Id.* See also G. Sophar and L. Heilprin, *The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as It Is Affected by Copyright — A Status Report*, Final Report: Project No. 7-0793, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc. (1967).

cals nine times as often as they are made from books, and of those periodicals the most likely to be photocopied are scholarly, scientific and technical journals.⁵⁵

What effect does such wholesale photocopying have on the potential market for or value of these copyrighted "sci-tech" journals?⁵⁶ And, does this inquiry differ from the one answered by the Court of Claims in *Williams & Wilkins*? It would seem that any attempted answer to the first question must conclude that the *potential* market for "sci-tech" journals is diminished by wholesale photocopying.⁵⁷ The risks in the "sci-tech" publishing industry are great,⁵⁸ and the market small. The business, when considered without subsidies, is therefore a marginal one more critically affected by drops in already low subscription levels.⁵⁹ There is, however, as yet no empirically shown causal relationship between falling subscription levels and photocopying.

The question resolved against plaintiffs in *Williams & Wilkins* called for a finding somewhat more certain than a mere tendency to diminish the market. As Professor Nimmer charges, "The Court [Court of Claims] fell into error by confusing the issues of damages and liability."⁶⁰ One of three factors listed as the core of their evaluation of the case was that "plaintiff has not . . . shown . . . that it is being or will be harmed substantially by these specific practices of NIH and NLM."⁶¹ Must publishers of monographs now affirmatively show what publisher Curtis Benjamin alleged in 1972, that because of photocopying "the scientific and technical monographs will disappear by 1980?"⁶²

That this disappearance has not occurred is not evidence of minimal impact of reprography on subscription levels, but perhaps is

55. *Id.* See also: I N. HENRY, *supra* note 42, at 62; *Soaring Prices and Sinking Sales of Science Monographs*, 183 *SCIENCE* 282 (1974).

56. New Act, *supra* note 2, at §107(4).

57. Fried, *Fair Use and the New Act*, 22 N.Y.L. SCH. REV. 497, 507 (1977).

58. The Library of Congress has commented that one periodical dies each day but three new ones are born. G. GIPE, *NEARER TO THE DUST — COPYRIGHT AND THE MACHINE* 94 (1967).

59. I N. HENRY, *supra* note 42, at 61; *PHYSICS TODAY* reports that "[I]n the past eight years the number of subscriptions to some physics journals has fallen by a factor of two." *PHYSICS TODAY*, October 1977, at 104.

60. 3 M. NIMMER, *NIMMER ON COPYRIGHT* §13.05[E][4][c], at 13-74 (1978).

61. *Williams & Wilkins Co. v. United States*, 487 F. 2d at 1354.

62. *PUBLISHER'S WEEKLY*, April 3, 1972, at 58. The necessity for such a showing would seem contrary to the function of §504(c) of the New Act which provides for statutory damages in the event such a showing is not feasible. See notes 143 through 145 and accompanying text *infra*.

informative as to the chief source of revenue of the monograph. The four monographs allegedly infringed in *Williams & Wilkins* are the exception in that they were commercial publications⁶³ and therefore presumably relied for the most part on advertising and subscriptions for revenue. Advertising revenues are not as significant a form of income for most non-profit journals due to limitations imposed by the Internal Revenue Code on the tax-exempt income of qualifying non-profit organizations.⁶⁴ Non-profit monographs rely in the most part, and to varying degrees, on subscription revenues and "page charges." The page charge is a fixed rate per page charged to the author of a published article which covers at least part of the cost of publication but is usually paid by the institution supporting his research.⁶⁵ When underwritten by the federal government, the page charge amounts to at least partial public subsidization of the journal. In 1961, the federal government, by far the largest source of research funds, endorsed the page charge principle under the rationale that research is not complete until its results are published.⁶⁶ That government page charge revenues are substantial is evidenced by the report that in 1970 the National Institute of Health paid out between 4 - 6 million dollars, or 1.5% of its total research awards, in page charges.⁶⁷ What portion of the publishing costs of non-profit monographs are met by page charges and to what extent they are reliant on subscription revenue is not known.⁶⁸ The question is nonetheless posed: should an organization largely supported by public monies be permitted

63. A 1962 survey of 262 representatives [*sic*] scientific journals conducted by the National Science Foundation revealed that 211 were published by non-profit scientific societies, 18 by university presses and 33 by commercial publishing firms." 1 N. HENRY, *supra* note 42, at 66.

64. I.R.C. §§501(b), 501(c)(3), 511(a), 512(b), 513(c). Most non-profit publishers would likely qualify for tax-exempt status under §501(c)(3). §513(c) specifically includes advertising as an unrelated business activity of any such tax-exempt organization. Advertising revenues are therefore taxable as unrelated business income. The tax is, however, computed with the modifications provided in §512(b), many of which are excluded as deductions "directly connected" with the income.

65. 3 SCHOLARLY PUBLISHING 62, 62-69 (October, 1971).

66. *Id.* at 64.

67. *Id.* at 67.

68. The Editor-in-Chief of the Americal Physical Society publications, THE PHYSICAL REVIEW and *Physical Review Letter*, is reported as having said in 1968 that about 70% of the cost of publishing comes from page charges and 30% from subscriptions. *Id.* at 63; *see also* Sophar and Heilprin, *supra* note 54, which indicates a somewhat smaller figure in that non-profit journals surveyed reported that 41% of their incomes were derived from subscriptions.

to limit public access to their publication by asserting copyright? Any question of the copyrightability of such publication should be dealt with legislatively. For judicial attempts to account for such an equitable argument would almost certainly skew consideration of the time tested and now statutorily imposed fair use factors and would serve to lessen their usefulness when applied in more classic fair use situations.⁶⁹ In short, the fair use doctrine must be applied as it appears at 17 U.S.C. §107 which specifies that the inquiry to be made should be: "the effect on the potential market" and *not* whether plaintiff has successfully shown substantial harm as in *Williams & Wilkins*.⁷⁰ This "probable effects test"⁷¹ based as it is on logic rather than on concrete evidence⁷² has been used successfully in the past⁷³ to assure the economic incentive of copyright and will hopefully survive *Williams & Wilkins*.

3. PHOTOCOPYING: THE STATUTE AND THE LEGISLATIVE HISTORY

If there was ever any but the most philosophical doubt that the fair use doctrine extended to photocopying, it could not stand in the face of the language in section 107.⁷⁴ The House Report makes this clear. "[T]he reference to fair use 'by reproduction in copies or phonorecords or by any other means' is mainly intended to make clear that the doctrine has as much application to photocopying and copying as to older forms of use."⁷⁵ This appears as one of the more bold statements of

69. See notes 13 and 14 and accompanying text *supra*.

70. 487 F. 2d at 1354; see also *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D. N.Y. 1970) where, after finding defendant's film on the life of Lenny Bruce infringing, the district court per Lasker, J. said, "[I]t seems as certain as it can be, *except after the fact*, that the distribution and public showing of *Dirtymouth* [defendant's film] will operate to reduce the demand for Worth's [plaintiff] film." (emphasis added).

71. Fried, *supra* note 57, at 505.

72. *Id.*

73. The probable effects test was applied in granting preliminary injunctions in: *Inge v. Twentieth Century-Fox Film Corp.*, 143 F. Supp. 294, 302 (S.D. N.Y. 1956); *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1276 (S.D. N.Y. 1970); *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938); *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D. N.Y. 1963).

74. "[F]air use . . . including such use by reproduction in copies . . ." New Act, *supra* note 2, at §107.

75. HOUSE REPORT, *supra* note 5, at 66.

congressional intent behind section 107. The desire not to “freeze” the fair use doctrine accounts both for the circumspect statement of intent as to section 107 and for the absence of a specific education section in the new Act.⁷⁶ Even though choosing to specifically include photocopying within the scope of fair use, Congress had provided guidance as to the permissible scope of photocopying only in the areas of teacher use, classroom and library reproduction. As the statistics would indicate,⁷⁷ these are the areas most ripe for confrontation between the holders and users and are most deserving of specific legislative consideration.

A. *Guidelines for Educational Photocopying*

It should initially be made clear that the specific guidelines for educational reproduction, appearing in the House Report as an agreement between negotiating representatives of authors, publishers and educational institutions⁷⁸ [hereinafter “guidelines”], are twice removed from actual law. The presentation of the guidelines in agreement form⁷⁹ rather than as a formally adopted statement of the intention of the House of Representatives casts a peculiar light on their legal significance. Both the House Judiciary Committee and the guidelines themselves caution that the negotiated agreement is not intended in any way to interfere with the judicial application of the fair use doctrine.⁸⁰ Since this warning could most certainly be found to apply to those situations specifically anticipated by the guidelines, an opening is thereby created for judicial modification, hopefully without destroying the certainty and protection they were intended to provide. Another perspective on the relationship and impact of the guidelines on fair use is offered by the

76. “[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.” Arguments on the subject of a specific educational section, presented in the 1967 House Judiciary Committee Report, are unofficially incorporated by reference in the HOUSE REPORT. After rejecting an education section, the Committee wrote, “The fullest possible use of the multitude of technical devices now available to education should be encouraged.” H.R. REP. NO. 83, 90th Cong., 1st Sess. 31 (1967). For an example of an educational section, see 46 F. L. REV. 91, 129 (1977).

77. See notes 49 through 55 and accompanying text *supra*.

78. HOUSE REPORT, *supra* note 5, at 67-70; parts of the following discussion apply equally to the similar agreement reached by representatives of music teachers, schools and publishers, appearing in the HOUSE REPORT, *supra* note 5, at 70-71.

79. *Id.* at 67.

80. *Id.* at 68, 70.

Conference Committee who "accept [the guidelines] as part of their understanding of fair use."⁸¹

The practical significance of the agreement is more clear. "Teachers kill [*sic*] know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers."⁸² Although teachers may fairly assume that any copying within the guidelines is allowed as fair use, at what point beyond the guidelines should a teacher feel that he or she may be infringing and choose to either surreptitiously proceed with or abandon the proposed photocopying? This undoubtedly is the question being asked by teachers. The authors and publishers are perhaps happy with a compromise agreement which raises the question so acutely⁸³ in the minds of educators who, as late as 1975, were somewhat less likely to consider the rights of the copyright proprietor before photocopying. Educators, on the other hand, may appreciate the fact that the agreement provides for the first time some "minimum standards" for educational fair use.⁸⁴

By distinguishing single copying for teachers from multiple copies for classroom use, the guidelines acknowledge important differences in the purpose and character of the respective uses. A single copy may be made by or for a teacher at his or her request for the purposes of scholarly research, use in teaching or preparation to teach a class.⁸⁵ Under the guidelines, these rights extend only to a specified list of materials.⁸⁶

Multiple copies may be made for classroom use provided that tests of brevity and spontaneity are met, the cumulative effect considerations are complied with and each copy includes a notice of copyright. The brevity test(s) are specific and vary with the nature of the copyrighted work be it prose, poetry, illustration or "special" work.⁸⁷ "Spontaneity"

81. CONFERENCE REPORT, *supra* note 5, at 70.

82. HOUSE REPORT, *supra* note 5, at 72.

83. *New Copyright Law: What's It To You?* 67 ENGLISH JOURNAL 16, 17 (February, 1978); Stedman, *New Copyright Law: Photocopying for Educational Use*, 63 AAUP BULL. 5 (February, 1977).

84. Although most references to the "minimum standard" language found by this researcher seem to assume benefit to educators, one definition of the word, "standard," *i.e.*, a requirement of moral conduct, suggests the possibility at least that the phrase is double-edged. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223 (1971).

85. HOUSE REPORT, *supra* note 5, at 68.

86. See notes 31 through 34 and accompanying text *supra*.

87. HOUSE REPORT, *supra* note 5, at 68-69.

requires both that the inspiration to copy be that of the individual teacher (as opposed to a directive from administration) and that the time between the inspiration to make copies and the moment of their use is such that it would be unreasonable to expect a timely reply to a request for permission.⁸⁸ This time element of the spontaneity test precludes photocopying the same material for classroom use term after term.⁸⁹ The cumulative effects test limits the number of works which may be copied from the same author, collective work or periodical volume during one class term. The instances of such multiple copying are limited to nine for the term of each course within the school where the copies are made.⁹⁰

The specific prohibitions within the agreement apply both to single copying for teachers and multiple copying for classroom use. "Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works."⁹¹ There should be no copying from "consumable" works such as tests, answer sheets, workbooks and like material. General prohibitions against copying which: (1) substitutes for purchase; (2) is directed by a higher authority; (3) is repeated from term to term; or (4) is charged to the student beyond cost,⁹² similarly apply to both single and multiple copying.

B. Section 108: Library Photocopying

By including section 108 in the 1976 Act, Congress provided libraries with limited statutory protection against infringement actions in addition to that provided by section 107 fair use.⁹³ A library having no privilege specifically granted by section 108 may find a defense within the scope of section 107 fair use. More specifically, although section 108 details the conditions under which libraries may reproduce and distribute copies, it should be remembered that where the library is copying

88. *Id.*

89. This practice is further specifically prohibited by the guidelines. *Id.* at 69.

90. *Id.*

91. *Id.*

92. *Id.* at 70.

93. New Act, *supra* note 2, at §108(f)(4). "Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes." HOUSE REPORT, *supra* note 5, at 78-79.

for a teacher, it, as agent, may depend on the teacher's fair use privilege.⁹⁴

The section 108 privileges "to reproduce and distribute . . . no more than one copy of a work,"⁹⁵ are initially subject to three general conditions. The first being that "[t]he reproduction or distribution is made without any purpose of direct or indirect commercial advantage."⁹⁶ Problems of defining "direct or indirect commercial advantage" are allayed by the House Report which reads: "[T]he advantage referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located."⁹⁷ This would allow "corporate libraries" in such places as clinics, law firms and research and development corporations to single copy and distribute to their employees, provided there is compliance with the other general and specific conditions of section 108.⁹⁸

The Congress evidently had such "corporate libraries" in mind when drafting the second general condition, that "the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field."⁹⁹ The *quid pro quo* for the privileges given these "subsection (a) libraries"¹⁰⁰ is the making of their collections "open" and "available," thereby furthering the policy of greater public access and broader dissemination of information. But what of libraries such as those of some private colleges and universities which are freely accessible to the university population, but are open to the general public only upon payment of a license fee? The plain meaning of the word "public" would indicate that such libraries should more likely be characterized as "private" and hence not granted section 108 privileges. However, the argument may be made that by the use of "open to the public," Congress intended section 108 privileges to extend to a broader category

94. Treece, *supra* note 40, at 1039.

95. These are more clearly words of limitation which, when applied to use by an entity capable of wide distribution (such as a library), do not seem to raise the same inference as to technical infringement of "single copying" as does single copying by teachers discussed in the text accompanying note 33 *supra*.

96. New Act, *supra* note 2, at §108(a)(1).

97. HOUSE REPORT, *supra* note 5, at 75.

98. CONFERENCE REPORT, *supra* note 5, at 74.

99. New Act, *supra* note 2, at §108(a)(2).

100. Treece, *supra* note 40, at 1033.

than would have been included by use of the more common phrase "public libraries."¹⁰¹ Assuming that such private libraries are not within subsection (a) some may find the protection provided by section 108(d) sufficient incentive to open their collections to the general public.

The third general condition or prerequisite to the privileges granted by section 108 is that "the reproduction or distribution of the work includes a notice of copyright."¹⁰² It is not specified whether this notice must be according to form required by the notice provision of the new Act¹⁰³ or whether a notice in the form of a warning would suffice. For example: **WARNING: THIS WORK MAY BE SUBJECT TO THE PROTECTION OF FEDERAL COPYRIGHT LAWS 17 U.S.C. §§ 101-810.** While not of paramount legal significance, this difference could have great impact on library photocopying of material which does not display section 401(b)¹⁰⁴ copyright notice on each page. For while it would be a simple matter to include the above warning/notice as a flap fixed to the copier which could appear along the margin of each photocopy, considerable employee time would be spent locating and properly affixing the individualized section 401(b) notice to all copies made from protected works.

In examining the conditions which accompany the various specific privileges within section 108, one must remember that the general conditions of section 108(a) discussed above are criteria which must be satisfied prior to qualification for any of the specific privileges provided by section 108.

Subsection (b) extends the rights of reproduction and distribution of one copy of an unpublished work for the purposes of preservation, security or deposit in another subsection (a) library if a copy of the unpublished work is currently in the collection of the copying library.¹⁰⁵ Subsection (c) allows reproduction of a published work solely for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen if, after a reasonable investigation, an unused replacement cannot be found at a fair price.¹⁰⁶ Both the Senate and House Reports

101. An otherwise private college library may, by involvement in interlibrary loan programs, make its collection "available" to the public and thus arguably qualify as a subsection (a) library. 46 F. L. REV. 91, 107 (1977).

102. New Act, *supra* note 2, at §108(a)(3).

103. *Id.* §401(b).

104. *Id.*

105. *Id.* §108(b).

106. *Id.* §108(c).

provide guidance as to what constitutes a reasonable investigation,¹⁰⁷ but acknowledge that the scope of a reasonable investigation will vary according to the circumstances of a particular situation.¹⁰⁸ Both subsections (b) and (c) limit reproduction to facsimile form. "Thus a library may reproduce from its own microform holdings a microform user copy" ¹⁰⁹ However, transfer from an original form (such as printed matter) to a microduplication or computerized system is not within the privileges granted by subsection (b) or (c).

Subsection (d) grants rights of reproduction and distribution of single copies of a small part of any copyrighted work¹¹⁰ to both individual libraries and those participating in interlibrary loan arrangements.¹¹¹ Conditions imposed are: (1) that the copy become the property of the user; (2) that the library have no notice that the copy is to be used for any purpose other than private study, scholarship, or research; and, (3) that the library display the warning of copyright issued by the Register of Copyrights.¹¹² That the second "no notice" condition does not require the library to affirmatively seek out information as to the status and identity of the user¹¹³ is significant in light of what appears to be a growing trend amongst other western countries to impose such a duty of inquiry even in situations of in-house copying performed by, instead of for, the user.¹¹⁴

Subsection (e) grants rights of reproduction and distribution of single copies of whole, or substantial parts of copyrighted works both

107. "It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service." HOUSE REPORT, *supra* note 5, at 76; SENATE REPORT, *supra* note 5, at 68.

108. HOUSE REPORT, *supra* note 5, at 75; SENATE REPORT, *supra* note 5, at 68.

109. Treece, *supra* note 40, at 1050.

110. "Any copyrighted work" specifically includes articles or other contributions to collective works or periodical issues, but does not extend to those works specifically excluded from §108 by §108(h). See generally New Act, *supra* note 2, at §108(d), (h).

111. New Act, *supra* note 2, at §108(d).

112. 42 Fed. Reg. 59,264 (1977) (to be codified in 37 C.F.R. 201.14).

113. Treece, *supra* note 40, at 1050.

114. *Société Masson v. CNRS*, [1974] D.S. JUR. 337 (Trib. gr. inst. 1974) where defendant, state-operated Centre National de la Recherche Scientifique, was held liable for infringement because of its failure to practice suitable supervisory measures, such as requiring proof of user's identity and purpose, prior to allowing copies to be made on its machines. Cf. *University of New South Wales v. Moorhouse et al.*, 6 AUSTL. L. R. 193 (High Ct. 1975).

to individual libraries and those participating in interlibrary loan arrangements.¹¹⁵ In addition to the conditions imposed by subsection (d),¹¹⁶ a reasonable investigation¹¹⁷ must be undertaken to find a copy at a fair price.

Subsection (f)(1) makes it clear that libraries are not liable under section 108 for any infringement resulting from unsupervised use of copiers located on library premises.¹¹⁸ The copier must, however, display a notice that the making of a copy may be subject to the copyright law.¹¹⁹ Subsection (f)(2) places the liability for any infringement in such a situation with the user.¹²⁰ Subsection (f)(4) asserts that a fair use defense is unaffected by section 108. It further provides that contractual obligations assumed at the time that the copy was obtained shall dominate the privileges granted by Section 108.

C. Section 108(g)

Congress has responded to the call for legislative guidance made by the Court of Claims in the *Williams & Wilkins* case by the enactment of subsection (g).¹²¹ Generally, subsection (g) attempts to establish limits on both in-house and interlibrary loan photocopying. Subsection (g)(1) warns that the rights of section 108 do not extend to cases where the library has actual or substantial reason to believe that it is involved in related or concerted reproduction or distribution of multiple copies of the same material, whether made at one time or over a period of time. Furthermore, it is irrelevant whether such copying is for aggregate use by one or more individuals or for individual use of members of a group.¹²²

Addressing itself to the specific question of interlibrary loan photocopying, subsection (g)(2)

prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements "that do not have, as their purpose or effect,

115. New Act, *supra* note 2, at §108(e).

116. See note 111 and accompanying text *supra*.

117. See note 107 and accompanying text *supra*.

118. New Act, *supra* note 2, at §108(f)(1). See note 114 *supra*.

119. New Act, *supra* note 2, at §108(f)(1).

120. *Id.* §108(f)(2).

121. *Id.* §108(g).

122. *Id.* §108(g)(1). For an example of such prohibited conduct, see SENATE REPORT, *supra* note 5, at 70 [Example 2].

that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."¹²³

To paraphrase: purposeful or effective systematic copying is prohibited, but only in such "aggregate quantities"¹²⁴ as to "substitute for a subscription . . . or purchase."¹²⁵

Some guidance as to the meaning of the key phrases "aggregate quantities" and "substitute for a subscription . . . or purchase" is provided by the CONTU guidelines¹²⁶ on which there has been substantial agreement by the principal library, publisher and author organizations.¹²⁷ With respect to periodicals, the guidelines apply only to issues, or articles therein, published within five years prior to the date of the request for the copy. Requests filled for six or more articles from any given periodical title¹²⁸ within a year shall be considered such an aggregate quantity as to substitute for a subscription or purchase and thus a use not protected by section 108.¹²⁹ Limited protection for the subscription levels of scientific and technical journals has thus been provided.¹³⁰ The absence of guidelines as to quantities which will substitute for subscription or purchase of periodicals or articles published more than five years prior to the date of request indicates that libraries shall be given somewhat greater latitude in copying these materials. This is perhaps because of the minimal effect of the use upon the market and value of the copyrighted work.¹³¹

Works other than periodical articles which are also within the purview of subsection (d)¹³² are similarly protected against copying which may substitute for purchase. The guidelines provide that filled requests of six or more copies of or from such a work within a year may be

123. CONTU *Guidelines for Inter-Library Arrangements, Circular R-21—Reproduction of Copyrighted Works by Educators and Librarians*, a Copyright Office Publication 7 (November 7, 1977).

124. New Act, *supra* note 2, at §108(g)(2).

125. *Id.*

126. CONFERENCE REPORT, *supra* note 5, at 72-74.

127. *Id.* at 72.

128. The actual language of the guideline reads "periodical (as opposed to any given issue of a periodical) . . ." *Id.*

129. *Id.*

130. See generally notes 48 through 73 and accompanying text *supra*.

131. See New Act, *supra* note 2, at §107(4).

132. Works such as fiction, poetry and collective works are contemplated by the CONFERENCE REPORT, *supra* note 5, at 73.

considered to substitute for purchase.¹³³ Further, these works are protected equally, and without prejudice as to the date of publication, throughout the copyright term.¹³⁴

Subscription and purchase are further encouraged in the guidelines. If the requesting entity has within its collection, or has ordered a copy of the copyrighted work, the copying shall be treated as if performed within its own library.¹³⁵ Similar protection is provided to requests for copies of periodicals a subscription to which has been ordered. This policy offers the dual reward of both increasing public access and encouraging subscription. After placing five interlibrary loan requests from the same periodical within a year, a library could recognize its need for an added subscription, subscribe, and provide an interlibrary loan copy of the requested article without delay to the user or prejudice to its quota.

In the interest of enforcement, the guidelines provide two further substantive recommendations: first, that each request for a copy should be accompanied by a representation that the request is being made in conformity with the guidelines, and second, that the requesting entity should keep a record of all requests for copies covered by the guidelines and that records be maintained until the end of the third calendar year after the end of the calendar year of any particular request.¹³⁶

The caution with which both Congress and CONTU approached section 108 is evidenced by subsections within both section 108¹³⁷ and the guidelines¹³⁸ calling for a re-examination of this section of the Act five years from the effective date. Reports to be solicited from authors, publishers and libraries will hopefully shed light on the extent to which section 108 has proven effective in balancing the rights of creators with the needs of users.¹³⁹

Although this recognition of the need for review of the library photocopying provisions may detract from the efficacy of section 108, placing the burden for final resolution of issues therein on the concerned parties may prove to facilitate agreement.¹⁴⁰ Barbara Ringer suggests

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. New Act, *supra* note 2, at §108(i).

138. CONFERENCE REPORT, *supra* note 5, at 73.

139. New Act, *supra* note 2, at §108(i).

140. Ringer, *The Unfinished Business of Copyright Revision*, 24 U.C.L.A. L. REV. 951, 967-68 (1977).

that this burden for final resolution of the "unfinished business" of section 108 may encourage libraries to make a good faith effort to comply with both section 108 and the CONTU guidelines, thereby promoting a greater "spirit of comity"¹⁴¹ in future negotiations. In light of prospective developments in information storage and retrieval systems,¹⁴² no legislation attempting to proscribe practices in this area is likely to be of long lasting significance. Section 108 shall then hopefully prove to meet its intended purpose of complementing, at least in the interim, the fair use doctrine.

A final mention should be made of the section 504¹⁴³ damages provision as it applies in cases of innocent photocopying of protected works by employees or agents of educational institutions and libraries. Section 504(c)(2) mandates that statutory damages *shall* be remitted so as to protect a specified class of defendant. This does not, of course, preclude a plaintiff from obtaining a judgment in the amount of damages actually suffered (which may or may not be found to include lost profits).

The class protected by the section 504 remission of statutory damages includes not only the employees or agents of non-profit schools and libraries, if acting within the scope of their employment, but also the institutions themselves.

Any member of the protected class must have "believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107."¹⁴⁴ This language seems to aim at situations in which an infringing use has been made of a work which has for some reason appeared without notice of copyright. However, section 405 of the new Act¹⁴⁵ (permitting as it does new latitude as to omission of notice and copyright validity) specifically removes liability for such innocent infringement not only for statutory damages but also for actual damages. Does then this language of section 504(c)(2) have an exclusive function or does this subsection generally attempt to insure that statutory damages shall be awarded in an equitable fashion?

Due to the lack of any mention in section 504(c)(2) of section 108, an analysis of this question may expose some painful questions as to the interrelationship of sections 107 and 108.

141. *Id.*

142. Treece, *supra* note 40, at 1058-66; I N. HENRY, *supra* note 42, at 33.

143. New Act, *supra* note 2, at §504.

144. *Id.* §504(c)(2).

145. *Id.* §405.

4. CONCLUSION

The problems arising from consideration of the fair use doctrine as applied to the photocopying of copyrighted works are intricate and difficult of solution. The changing state of technology, in both the areas of photoduplication and information storage and retrieval systems, contributes to the already complex problems by casting doubt on the durability of any potential solutions.

What will be the impact of already budding technological attempts to prevent photocopying?¹⁴⁶

Will the dissemination of reprography related technology force the courts to more thoroughly address the origins and basis for the fair use doctrine? For, as Justice Cardozo has said, "Rivulets in combination make up a stream of tendency that may attain engulfing power."¹⁴⁷ Present attempts at dealing with reprography's growing "stream of tendency" are modeled to varying degrees after performing rights societies such as the American Society of Composers, Authors and Publishers (ASCAP).¹⁴⁸ The future of this area of the law depends in no small measure on the success of these clearinghouse systems.

Brian Anderson

146. The Xerox Corporation at one time applied for a patent on a combination of fluorescent dyes which could render printed material uncopyable. The dyes could be sprayed on documents without affecting legibility, but would in effect "blind" photocopiers dependent on intense light. *TIME*, April 15, 1974, at 87. A recent telephone conversation with a representative of the Supplies Division of Xerox Corporation in Rochester, New York, revealed that research and development of this product has since been halted and the patent application withdrawn. The reason given was that the product proved ineffective inasmuch as some copier models were able to penetrate the fluorescence and produce legible copies. One wonders, however, if the potential impact of such a product on the photocopier industry did not weigh heavily in the decision to "drop" the patent application.

What perhaps is a more promising product has been patented by scientist Richard E. Reinagel. Copy-Trol is a paper coated with heat resistant material that does not reflect enough light to permit, again, *some* copiers to distinguish between the background and the lettering. *New York Times*, June 7, 1975, at 33.

147. *Holyoke Power Co. v. Paper Co.*, 300 U.S. 324, 340 (1937).

148. *Strong Start for Copyright Clearance Center*, *PUBLISHER'S WEEKLY*, February 27, 1978, at 78. An excellent discussion of alternate royalty collection schemes may be found along with an interesting proposal for compulsory licensing of educational and library photocopying in MacLean, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 20 *ASCAP COPYRIGHT L. SYMP.* 1 (1972).

Joint Tenancies and the Tax Reform Act of 1976

Tenancy by the entirety ownership of real and personal property is so widely accepted by married couples that to suggest holding the property in the name of one spouse alone may cause nuptial unrest. Married persons "know" that a good marriage means sharing the ownership of family assets. For many generations they have been counseled by bank and real estate personnel to perpetuate the traditional concept of sharing by taking title to such assets in joint names. Lawyers have given the same advice when it is clear that a client will never experience any estate tax problems.¹ But the better rule may be expressed in these terms: "The holding of property as joint tenants with the rights of survivorship should be the deliberate exception rather than the general rule. . . ."² It is the purpose of this article to re-examine the old estate planning considerations and discuss the new ones made necessary by the Tax Reform Act of 1976.³

The essay will outline the alternatives available in planning for jointly held property⁴ by first discussing the non-tax reasons for holding such property. Saving a dollar may not always be in the client's best interest, as the tax counselor must never forget that his client has human wants and needs. However, only a clear understanding of how many dollars are involved will give the client a proper basis for deciding whether to hold property jointly with his spouse. To facilitate, but in no way exhaust, the limits of this understanding, the discussion will be tailored to emphasize the 1976 changes⁵ in the estate and gift taxation of such property. It will be apparent that the reformers solved some old problems, created new ones and presented planners with several unex-

1. See T. SHAFFER, *The Planning and Drafting of Wills and Trusts* at 62 (1972). *Quaere*: Is it ever clear that a client will never have such problems?

2. Worthy, *Problems of Jointly Owned Property*, 22 *TAX LAW* 601 (1969) (hereinafter cited as Worthy).

3. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1855 (codified at 26 U.S.C. §§2040 and 2515 (1976)) (hereinafter cited as TRA 1976). Note that this page of the Statutes at Large contains both the §2515 and §2040 amendments.

4. When the terms "joint tenancy," "jointly held property," or "joint tenancy with right of survivorship" are used in this article, the reference will pertain to such holdings between spouses and as such constitute a tenancy by the entirety.

5. I.R.C. §2040(b), §2515(c).

pected and probably unintended tax benefits. It should be clear, however, that the "old advice" discouraging couples from holding joint property, except in very circumscribed instances, is still good advice.

1. NON-TAX CONSIDERATIONS

The most compelling reason for the creation of a tenancy by the entirety is that many spouses regard marriage as a partnership in which each should enjoy the fruits of success and the consequences of failure. Holding title in both names reinforces family security and harmony. These values often induce a couple to hold the majority of their assets in this manner. In Florida, it is possible for spouses to own literally all of their assets jointly,⁶ including purchase money mortgages,⁷ stocks, bonds and notes,⁸ and bank accounts.⁹ It is also possible to own joint property in fee, for life, for a term of years or as a chattel real (such as a five-year lease of realty).¹⁰

Each spouse's security is well-founded because each knows to whom the property will pass at the death of either — the entire estate will vest, by operation of law, in the survivor.¹¹ Moreover, this operation cannot be defeated by the decedent's attempt to encumber it or subject it to the payment of his obligations.¹² Nor may one of the parties alienate his share of the property without the consent of the other or act in any way to defeat the other's rights either during his life¹³ or by will.¹⁴ As a result of the property passing by operation of law, the necessity of probate is eliminated, along with its attendant disadvantages. The most frequently cited evils are delay, expense and publicity.

The delay in the distribution of the probate estate can be substantial. These assets are kept in a suspended state until a personal representative has been appointed to collect and manage them. When a personal representative is appointed he must bear in mind that, until the claims of creditors have been satisfied and death tax obligations met, he may be subject to personal liability should he fail to retain sufficient

6. *Winters v. Parks*, 91 So. 2d 649 (Fla. 1956).

7. FLA. STAT. §689.15 (1975); *Powel v. Metz*, 55 So. 2d 915 (Fla. 1952).

8. *Colclazier v. Colclazier*, 89 So. 2d 261 (Fla. 1956).

9. *In Re Estate of Lyons*, 90 So. 2d 39 (Fla. 1955).

10. *Mathews v. McCain*, 125 Fla. 840, 170 So. 323, 325 (1936).

11. See notes 6 and 10 *supra*.

12. *Id.*

13. *Leitner v. Willaford*, 306 So. 2d 555 (Fla. 3rd DCA 1975).

14. *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925).

funds to meet such claims and obligations.¹⁵ Naturally, this potential liability delays distribution until the extent of the decedent's obligations can be ascertained. Avoiding this delay is especially desirable with respect to funds needed by a surviving spouse for purposes of support and payment of death-related expenses.¹⁶ While the simple probate-avoiding device of a joint bank account can be used to provide the funds for such expenses, avoiding probate altogether serves to retain the estate's wealth. Probate expenses include executor and attorney's fees. These claims are the first to be paid and are computed as a percentage of the total probate estate.¹⁷ Thus, the percentage is reduced when certain gross-estate items come to rest in their post-death arrangement by a non-probate route. Subjecting an estate to probate has another disadvantage the client may wish to avoid. The value and destination of probate assets are a matter of public record. However, one can assure privacy concerning the disposition and value of personalty, at least, by taking advantage of the survivorship feature of joint ownership.

There is, of course, some appeal to a joint tenancy, but a revocable trust will accomplish the same result, as the property subject to its administration escapes the purview of probate¹⁸ without incurring the disadvantage of the inflexibility inherent in jointly held property. This lack of flexibility does not allow one to freely deal with unforeseen changes in his family situation. Should the surviving spouse become

15. 31 U.S.C. §192 (1970) provides:

Every executor, administrator or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Treas. Reg. §20.2002-1 (1958) points out that the possible personal liability of the executor under the above-quoted statute is present if he makes distributions to beneficiaries of the estate.

16. Florida ameliorates the harshness of delay by providing the spouse and lineal heirs with an allowance of up to \$6,000 for their maintenance during administration. § 732.403 FLA. STAT. (1977).

17. §733.707(1)(9) FLA. STAT. (1977).

18. Registration of an oral trust required identification of "terms of the trust, including subject matter, beneficiaries and time of performance" with a resulting loss in secrecy. § 737.102 FLA. STAT. (1977), repealed by 2, ch. 77-344, 1977 Fla. Sess. Law Serv., effective October 1, 1977. Note that, even before the repeal, there was no absolute duty to register the trust unless the grantor or a beneficiary specifically requested it. §737.101 FLA. STAT. (1977).

unreasonable, the property may not be available to satisfy the specific needs of minors, invalids, incompetents or other loved ones who may require extraordinary treatment and support. Automatic survivorship does not provide a method for dealing with a spendthrift and offers no general assurance that the property will be managed responsibly.

Another disadvantage of the survivorship feature is that it has led many couples to believe that a will is unnecessary when property is jointly held. In such a case, the property can pass to the "wrong" hands if common disaster strikes. For example, when spouses perish together, the Uniform Simultaneous Death Act provides that the property shall be distributed "one-half as if one had survived and one-half as if the other had survived" unless otherwise provided in the will.¹⁹ In failing to provide for such a contingency, a person loses the ability to choose the ultimate disposition of his property.

In sum, the advantages and assurances of owning joint property may be outweighed by the inflexibility of such a tenancy, especially where the majority of a deceased's estate is comprised of such holdings. If, after careful review of these non-tax considerations, a client remains uncertain as to how his property should be held, a discussion concerning the taxation of jointly held property may induce him to choose other methods.

2. FEDERAL TAXATION

The creation and termination of jointly held property have differing estate and gift tax consequences, depending on the type of joint ownership, the nature of the property held, the relative amount of consideration paid by the co-owners and the ownership rights in the property provided under local law.²⁰ The tax laws have undergone several changes in response to this confusion, but there remains a need for further legislation.

A. The Gift Taxation of Personal Property

The creation of a joint tenancy is generally a taxable gift.²¹ How-

19. H. R. REP. NO. 97-1380, 94th Cong. 2d Sess. 10-72 (1976). (Hereinafter cited as Cong. Rep. on T.R.A. 1976).

20. *Cuzy v. Commissioner*, 8 Tax Ct. Mem. (CCH) 681 (1949), where the taxpayers' joint purchase of securities (the creation) was deemed to be a taxable gift.

21. Treas. Reg. §25.2511-2(b), 1 T.D. 6334, amended T.D. 7238. It is interesting

ever, the creation may not always result in a "completed" transfer, which is a prerequisite to the imposition of the gift tax. A gift is considered complete when the donor has so parted with dominion and control as to leave him without the power to alter its disposition, whether for his or another's benefit.²² For example, a transfer of securities to a trust in which X is a beneficiary is not complete if the settlor has reserved the power to change the beneficiary. It should be obvious, however, that any distribution made to X will be a completed transfer, as the funds distributed will then be beyond the reach of the settlor. This same principle applies to joint bank accounts because the donor can regain the entire fund up until the time the donee actually makes a withdrawal.²³

The taxable value of a transfer will depend upon both the consideration supplied by each party and the type of tenancy created, as governed by local law. In an ordinary common law joint tenancy with right of survivorship, where either party can freely dispose of his or her interest in the property, the donee is deemed to have received a gift equal to the fair market value of the property divided by the number of tenants, less any consideration supplied by him.²⁴ If, for example, the transferee spouse contributed twenty percent of the purchase price, the transferor has made a gift equal to thirty percent of the value of the property. ((Fair Market Value ÷ 2) less twenty percent = value of the

to note that donative intent is not an essential element of a transfer under the Code. Treas. Reg. §25.2511-1(g)(1), T.D. 6334, amended T.D. 6542; T.D. 7150; T.D. 7238; T.D. 7296. (Hereinafter this section shall be cited without its history.) But a donor in Florida always retains the power to negate a transfer by proving a lack of such intent. *Pollack v. Pollack*, 282 So. 2d 30 (Fla. 3rd DCA 1973). In such a case, the Floridian donor may pay a federal gift tax on property he never intended to give away and, in fact, retained. This anomalous result can be avoided, however, if the transfer is also surrounded by objective facts and circumstances that suggest a transfer was not to occur. In *Bouchard v. Commissioner*, 285 F. 2d 556 (1st Cir. 1961), the decedent caused securities to be issued jointly to insure a transfer to his wife at his death. His wife was not informed of the transfer and never saw the certificates until after his death because, while the decedent was alive, he kept the stock in a company safe to which she had no access. The appellate court found that no transfer had occurred.

22. Treas. Reg. §25.2511-1(h)(4). See note 20 for history. Note this also applies to United States Bonds and securities on margin account. Rev. Rul. 69-148, 1969-1 C.B. 226; and Rev. Rul. 68-269, 1968-1 C.B. 399.

23. Treas. Reg. §25.2511-1(h)(5). See note 20 for history. See also Treas. Reg. §25.2515-2(b)(1), T.D. 6334; amended T.D. 7150; T.D. 7238. (Hereinafter cited without its history.)

24. *Harris v. Commissioner*, 340 U.S. 106 (1950).

gift.) While this process is simple enough, initially ascertaining the amount of consideration flowing from one spouse to another has, at a pace equal to the push for recognition of women's rights, become increasingly vexatious.

Often a spouse wished to perform certain domestic services or release various marital rights as her contribution to the joint acquisition. The Supreme Court has held the release of "property" rights in a divorce situation to be valuable consideration²⁵ but, while the Internal Revenue Service recognizes the release of "support" rights,²⁶ it holds the release of dower and curtesy rights is not valid consideration.²⁷ It distinguishes "support" rights from inheritance rights because the husband has a duty to support his wife during their joint lives or until she remarries and the satisfaction of this obligation does not have the effect of diminishing the husband's estate any more than his other legal obligations.²⁸ Domestic services are not recognized²⁹ unless it can be proven that they do not arise out of love and affection.³⁰

In the case of a tenancy by the entirety in Florida, where neither spouse can dispose of his or her interest without the consent of the other, the life expectancy of both donor and donee must also be considered.³¹ Thus, if the husband is younger and therefore more likely to survive his wife, he will be deemed to have received or retained an interest more valuable than hers. Factors representing their respective interests are determined through the use of actuarial tables prescribed by the Commissioner.³² For example, assume that, in 1965, X conveyed property worth \$100,000 to himself and Y as joint tenants. X is 62 years old and

25. Rev. Rul. 68-379, 1968-2 C.B. 414 and I.R.C. §2516.

26. I.R.C. §2043. See also *Merril v. Fahs*, 324 U.S. 308 (1945), where the court held that §2043 was to be read in *pari materia* with the estate tax sections of the Internal Revenue Code.

27. *Id.* at note 25 *supra*.

28. *Estate of Loveland*, 13 T.C. 5 (1949).

29. See *Estate of Trafton v. Commissioner*, 27 T.C. 610 (1956), where the surviving spouse actively participated in the couple's financial affairs and could trace her contributions from sources other than her husband.

30. Note 13 *supra* is used in conjunction with Treas. Reg. §25.2515-2 (b)(2) and (c). See note 22 for its history. See the discussion concerning the Technical Corrections Act of 1978, H.R. 6715 *infra*.

31. Treas. Reg. §25.2515-2(c). See note 22 for its history. Treas. Reg. §25.2512-5(e), T.D. 6334; amended T.D. 7327; T.D. 7432 (hereinafter cited without its history) for gifts made before January 1, 1971; or Treas. Reg. §25.2512-9(e) (1970), for gifts made after December 31, 1970.

32. Worthy, *supra* note 2, at 610.

Y is 55 years old at the time of the gift. Under the Commissioner's tables, Y is deemed to have received a sixty percent interest in the property and X is deemed to have retained a forty percent interest. The amount of the gift to Y is deemed to be \$60,000.³³

Even where a gift has been made and its value determined, the transaction may not be a taxable event. The first \$3,000 of gifts made to any one donee during a calendar year, except gifts of future interests,³⁴ are excluded in determining the donor's tax liability.³⁵ In addition, the donor may take a marital deduction that ranges from 100% of the value of the gift, if the aggregate value of one's lifetime intramarital transfers does not exceed \$100,000, to fifty percent of the lifetime gifts to a spouse totaling more than \$200,000.³⁶ These provisions apply to both real and personal property and are quite useful in helping the couple of moderate means avoid gift taxation.

B. The Gift Taxation of Real Property Prior to the 1976 Tax Reform Act

Prior to 1954, the principles used to determine whether a gift had been made were uniformly applied to both personalty and realty.³⁷ After 1954, the Code was amended so that, when one spouse created a joint interest in realty, the gift tax consequences would, unless the donor elected otherwise, be deferred until termination of the tenancy.³⁸ The election procedure was implemented because so many couples neglected

33. As defined in Treas. Reg. §25.2503-3, T.D. 6334; amended T.D. 7238 (hereinafter cited without its history) and Treas. Reg. §25.2503-4 (same history), concerning gifts to minors.

34. I.R.C. §2503(b).

35. I.R.C. §2523. Tenancies by the entirety qualify for both the estate and gift tax marital deductions as they are not considered terminable interests. I.R.C. §2523(d); Treas. Reg. §20.2056(b)-1(d) (1958), T.D. 6296. The Terminable Interest Rule furthers the purpose of the marital deduction, as it ensures that the value of the property qualifying for deferral will be taxed in the surviving spouse's estate, unless otherwise consumed.

36. Int. Rev. Code of 1954, ch. 12, §2515, 68A Stat. 409 (now I.R.C. §2515).

37. I.R.C. §§2515(a) and (c).

38. "Frequently, real property is held in Tenancy by the Entirety (or Joint Tenancy) to ensure the right of survivorship in the surviving spouse. Most couples who elect this method of buying a home have no intention of making a gift at the time of creation of the tenancy . . . or any knowledge that they are considered as having done so." S. REP. NO. 1622, 83d Cong., 2d Sess. 128 (1954).

to pay the gift tax due on the joint purchase of their residence.³⁹ *Quaere*: If this was Congress' concern, why is the election only available for a married couple's "real" jointly held property?⁴⁰

To illustrate the harshness of perpetuating this distinction, consider the divergent tax treatment of cooperatives and condominiums. The corporate form of co-op (the most common type) is based on a plan whereby a corporation is organized to hold title to the land and lease apartments to the tenant stockholders.⁴¹ Therefore, this type of ownership falls within the property law classification of personalty and, as such, constitutes a trap for the unwary, for it would be an automatic gift.

On the other hand, a condominium is organized on the basis of separate ownership of individual apartments, thus qualifying as real property. Although they may look the same, one's relationship with the Internal Revenue Service hinges on the difference.⁴²

While academicians may spend an inordinate amount of time and energy explaining or criticizing the above inquiry, the average taxpayer sees a deferral in any form as a blessing. "Whether because of ignorance of lack of tax planning at the time of purchase, or because of the understandable reluctance to elect deliberately to pay a tax now for an uncertain future gamble, such elections were rarely made."⁴³

When the taxable event is deferred by not making the election, there is, aside from the deferral itself, the additional advantage that no gift tax need ever be paid if termination occurs by reason of a spouse's death.⁴⁴ Even if the property is sold or exchanged during their joint lives,

39. I.R.C. §§2515(a) and (d).

40. R. E. Boyer, 3 *Florida Real Estate Transactions* §39.06 at 1516 (1977); Rev. Rul. 66-40, 1966-1 C.B. 227.

41. Rev. Rul. 77-423, 1977-2 C.B. 352. Note that the income tax sections of the Code do not recognize this "difference without distinction" at all. Under Treas. Reg. §1.1034-1(c)(3), T.D. 6500; amended, T.D. 6856; T.D. 6916; T.D. 7404 (hereinafter cited without its history); the term residence, for capital gains purposes treats a co-op interest as any other real property.

42. J. S. Bush, *Planning to Meet Problems of Non-business Residential Property; Co-ops; Condominiums; Non-exotic Realty; Exotic Types of Real Property, Time-shared Property; Domicile and Conflict of Laws*, 35TH ANNUAL NYU INST. ON FED. TAX, 1403, 1407 (1977). Bush claims never to have found a client willing to make this election during the entire period from 1954 to 1976.

43. I.R.C. §§2515(a) and (b). In this event, the transfer is taxed under §2040. See text accompanying notes 64 through 96 *infra*.

44. I.R.C. §2515(b). Its Regulation provides that where the proceeds are not actually divided between the spouses but are held in the name of one spouse who holds

there will be no gift if the proceeds are either divided in proportion to the couple's respective contributions⁴⁵ or reinvested in an identical tenancy.⁴⁶

Deferral often makes it difficult to trace the couple's proportionate contributions where there exists a series of improvements or mortgage payments. If the property appreciates in value between contributions it is necessary to allocate such increase in relation to the contributions previously made.⁴⁷ An example given in the Regulations illustrates this rule:

In 1955 real property was purchased by H and W and conveyed to them as tenants by the entirety. The purchase price of the property was \$15,000 of which H contributed \$10,000 and W, \$5,000. In 1960 when the fair market value of the property is \$21,000, W makes improvements thereto of \$5,000. The property then is sold for \$26,000. The appreciation in value of \$6,000 results in an additional contribution of \$4,000 ($10,000/15,000 \times \$6,000$) by H, and an additional contribution by W of \$2,000 ($5,000/15,000 \times \$6,000$). H's total contribution to the tenancy is \$14,000 ($10,000 + \$4,000$) and W's total contributions is \$12,500 ($\$5,000 + \$2,000 + \$5,000$).⁴⁸

Another advantage to making the election to immediately tax the property subject to appreciation is that it fixes the value of the gift.⁴⁹ Consider the situation in which one spouse contributes the entire purchase price of \$100,000 for such property and immediately conveys a one-half interest to the other. If the couple is lucky, the property will appreciate to \$250,000, at which time they will sell. When the proceeds are evenly divided, the donee spouse will have received a gift of \$125,000

for the benefit of both, each spouse is presumed to have received proceeds equal in value to the value of his or her interest. Florida law also provides that the spouse taking possession of such proceeds holds for the benefit of both. *Dodson v. National Title Ins. Co.*, 59 Fla. 371, 31 So. 2d 402 (1947).

45. Treas. Reg. §25.2515-2(d)(2) and (3), added T.D. 6334, amended T.D. 6542; T.D. 7150; T.D. 7238; T.D. 7296 (hereinafter cited without its history). The savings made possible as a result of the deferral should, however, be compared with the estate tax consequences stemming from the demise of a co-tenant either during the terms of the initial estate or while owning the property for which it was exchanged.

46. Treas. Reg. §25.2515-1(c)(2). See history *Id.*

47. *Id.* at (c)(2)(ii).

48. The estate taxation of these elected gifts may also provide the motivation to elect. See text accompanying notes 65 through 96 *infra*.

49. I.R.C. §2515(c); and Treas. Reg. §25.2515-2(b)(1). See note 22 for its history.

as a result of deferring the tax until termination. Had they made the election to treat the creation as the taxable event, the donor would have paid a gift tax on \$50,000. While this result occurs only in those jurisdictions giving a spouse the unilateral right to sever the tenancy,⁵⁰ the result in Florida before the 1976 Tax Reform Act required couples to consider their respective actuarial interests in calculating the gift tax.

3. POST-1976 CHANGES

The Tax Reform Act was an attempt by Congress to solve some of the administrative problems stemming from the ownership of joint property. However, it appears that they have solved one problem by replacing it with another.

Before the Tax Reform Act of 1976, a donor was required to make an election by filing a gift tax return both at the creation of the tenancy and after every subsequent investment.⁵¹ These tax returns were to be filed quarterly,⁵² which created a tremendous amount of paper work for the donor spouse. This burden has now been alleviated to some extent. While the present law still requires an election to be made at the creation of a joint tenancy, even when the value of the taxable property is less than \$3,000, the original election will automatically apply to all subsequent additions so that no additional returns are required unless the subsequent addition is greater than \$3,000.⁵³

The reformers also eliminated the divergent valuation principles which, in some jurisdictions, required the use of actuarial tables to determine a couple's respective interests.⁵⁴ These tables are no longer needed as the individual interests are deemed to be equal in value. In acquiring joint property, a gift results only to the extent that one spouse's contribution exceeds one-half of the value of the property.

These solutions have created both anomalous situations and interesting questions. One apparent conflict stems from the fact that section 2515(c)(1) requires filing the election-making gift tax return in the quarter in which the tenancy is created, while section 6075 does not require gift tax returns to be filed until the last quarter of the year for cumulative gifts under \$25,000.

50. See note 36 *supra*.

51. I.R.C. §2503(b).

52. I.R.C. §6075, as of Dec. 31, 1970.

53. I.R.C. §2515(c)(2).

54. I.R.C. §2515(c)(1).

Another problem results from Congress' efforts to alleviate the burden of filing a return every quarter in which an addition is made. A review of the Act shows that Congress simply assumed that any such additions will be made by the original donor. *Quaere*: When the original donee makes the addition, will the first election apply or must the donee make another election? If the original donee must make an election, there is a possibility that it will not be deemed a "creation" and thus fail to become a "qualified joint interest."⁵⁵

In rejecting the need for actuarial computations, a problem has arisen for spouses who make the election with the intent to create a qualified joint interest. If the tenancy is unilaterally severable, the couple must not contribute equally. If, in an effort to be fair to each other, they do make equal contributions, there will be no gift on the creation and there will be a failure to qualify.⁵⁶ In states like Florida, however, "the matter is less clear."⁵⁷ Section 2515(c) provides that an election can be made to the extent that the transfer was a "gift determined without regard to section 2515." If each spouse happened to make contributions equalling his or her respective actuarial interests, then the ordinary gift principles would indicate that no gift was made. "Presumably, however, section 2515(c)(3) was intended to eliminate resort to actuarial values in all respects."⁵⁸ This same section clearly states that the actuarial consideration need not be made on the creation of the estate. The question arises as to which method of valuation should be used when the tenancy is terminated by circumstances other than death. The presumption quoted above would seem to answer the question, but some regulations should be drafted to clear up any further confusion. Those who wish to qualify under section 2040(b) have a problem if they created their joint tenancy before 1977. However, the House Ways and Means Committee had purportedly solved this dilemma. It explains the consequences of severing and recreating tenancies as follows:

[I]f a severance or partition of an existing joint tenancy is made after December 31, 1976, and the joint tenancy between the spouses in that property is then recreated, the creation of the new joint tenancy would be eligible for the election so long as the other requirements are satisfied

55. See text accompanying notes 64 through 96 *infra*.

56. I.R.C. §2040(b).

57. S. SURREY, W. WARREN, P. MCDANIEL & H. GUTMAN, *Federal Wealth Transfer Taxation* (1977) at 504, note 4 (hereinafter cited as SURREY).

58. *Id.*

and the creation of the new joint tenancy is valid under local law. The tax consequences, if any, of the severance or partition of the existing joint interest would be determined in accordance with the provisions of present law, *e.g.*, no property interests or proceeds are distributed or reinvested in proportion to the consideration furnished by each. The amount of gift resulting from the recreation of the joint tenancy would also be determined under the principles of present law. The election provided under the bill would then be available with respect to the amount of the gift determined.⁶⁰

Although there are various ways to sever and recreate a joint tenancy,⁶⁰ the taxpayer must be careful to avoid certain pitfalls. He must make the termination properly and then make a gift on the recreation. For example, if no election had been made, then simply executing a new deed would not be sufficient to qualify, because it would merely result in a reinvestment.⁶¹ The taxpayer can terminate his previous estate in proportion to his contribution, but he must recreate his tenancy in different proportions. In addition, the House Report states that the gift will be determined under "present law", which would seem to dictate that the 50-50 interest rule contained in the amended section would not apply. This is an additional complication for persons owning joint tenancies before 1977.

Fortunately, the Technical Corrections Act of 1978 was proposed in order to smooth out several of these problems. The Act would allow a taxpayer to avoid possible adverse tax consequences involved in a severance and recreation by providing that one's estate can become qualified merely by filing a gift tax return making the election.⁶² The amount of the gift would depend on whether the creation of the pre-1977 joint tenancy was treated as a gift. If it was, the applicable tax would be computed on the basis of the appreciation accruing between the time of creation and the time of the post-1976 election. If the election was not made at the creation, the gift would then equal one-half of the fair market value of the property, less the donee's contributions.

The House Bill would also modify section 2515 to eliminate the need for actuarial computations in valuing gifts of personalty, except

59. Cong. Rep. on T.R.A. 1976, *supra* note 18.

60. D. Holdsworth, *How to Undo a Joint Tenancy, Thus Escape Numerous Tax and Non-tax Complications*, 2 ESTATE PLANNING 142 (1975). (Hereinafter cited as Holdsworth.)

61. Treas. Reg. §25.2515-1(d)(2)(ii).

62. Qualified for §2040(b).

when the fair market value of the interest or of the property (determined as if each spouse had a right to sever) cannot reasonably be ascertained except by reference to the life expectancy of one or both spouses.⁶³

Whether it is advisable for a taxpayer to make the election will depend upon the frequency and extent to which he makes life-time gifts in relation to the various deductions and credits available in both the gift and estate tax sections of the Code. A better understanding of the interrelationship between the two sections will manifest itself upon the reaching of a complementary understanding of the estate taxation of real and personal property.

4. ESTATE TAX

A. §2040(a) Joint Interests

The use of a §2515 election prior to 1977 was restricted to occasions where the spouses contemplated the sale of jointly held appreciable realty during the existence of the tenancy. The election would fix the value of the gift at the time of the transfer, thereby eliminating a gift tax on any appreciation once the property was sold and the proceeds divided. Unfortunately, if the donor spouse died prior to sale and division of proceeds, §2040 would cause the total market value of the property to be included in his taxable estate. Renumbered as §2040(a) by the Tax Reform Act of 1976,⁶⁴ this remains the general rule of §2040.

Under §2040(a) the decedent's gross estate includes the value of all property jointly owned at the time of death, except that portion which was acquired with the survivor's contributions, but only to the extent that it was obtained from the decedent for adequate consideration. In the case of gifts to both spouses from third parties, only half of the value of the property is included in the decedent's gross estate.

This contribution exception is best explained by Treasury Regulation §20.2040(1)(C) which gives the following rules of application:

1. The amount to be included in the decedent's gross estate is that part of the purchase price furnished by him over the total purchase price multiplied by the fair market value of the property at his death.⁶⁵

63. H. R. 6715, 95th Cong., 1st Sess. (1977) and recommending passage as the Technical Corrections Act of 1978, S. REP. NO. 95-745, 95th Cong. 2d Sess. (1978). (Hereinafter cited as Technical Corrections Act of 1978).

64. T.R.A. 1976, *supra* note 3.

65. The alternate valuation date may be substituted if chosen. See I.R.C. §2032.

2. Any money or property given by decedent to his spouse which in turn was used to pay for the joint property would be treated as if the decedent had made that contribution.

3. If the above property or money generated income in the hands of the surviving spouse and that income was contributed toward the joint property, then such income would be deemed her contribution.

4. If the survivor realized capital gains from the sale of property previously given by the decedent and contributed those gains, such gains would be treated as a contribution by the survivor.⁶⁶ Yet, this probably would not be true if the appreciated property had been contributed without prior realization of gain.⁶⁷

5. If the decedent and survivor acquired the property from a third party by gift, bequest, devise or inheritance in tenancy by the entirety, then only one-half will be in the decedent's gross estate.

Since the burden is on the surviving spouse to prove contribution to the purchase price of the property,⁶⁸ it is often easier to allege contribution than to prove it. Generally, it is the widow who must prove her contribution.⁶⁹ In meeting this burden of proof, she faces the difficulty

66. This rule is contra to the Regulations, example (4), but is supported by *Harvey v. United States*, 185 F. 2d 463 (7th Cir. 1950). In *Harvey*, the donee spouse contributed gains from the sale of gift property from her husband toward the purchase of the joint property. The court treated these gains as belonging to the donee spouse and therefore part of her contributions. However, if the appreciated property merely changed character without a corresponding change in ownership, then it will not fall within the contribution exception of §2040(a) (i.e., sale of joint appreciated property to joint proceeds to purchase of new joint property). See *Endicott Trust Co. v. United States*, 305 F. Supp. 943 (N.D. N.Y. 1969).

67. Treas. Reg. §20.2040-1(c), example (4) (1960).

68. *Tuck v. United States*, 282 F. 2d 405 (9th Cir. 1960).

69. Generally the Internal Revenue Service recognized contributions of the widow from:

1. Outside sources prior to marriage. I.R.C. §2040(a).
2. Income earned from work outside of marriage after marriage. I.R.C. §2040(a).
3. Gift or inheritance. I.R.C. §2040(a).
4. Income from property previously given by her husband. *Estate of Howard v. Comm.*, 9 T.C. 1192 (1947).
5. Realized gains from property previously given by her husband. *Harvey v. United States*. 185 F.2d 463 (7th Cir. 1950).
6. Income from the jointly owned property. *Estate of Giuliani v. Comm.*, 11 Tax Ct. Mem. (CCH) 673 (1952).
7. Support rights. Rev. Rule 68-374.
8. Assumption of mortgage. *Bremmer v. Luff*, 7 F. Supp. 148 (N.D. N.Y. 1933).

of convincing the Internal Revenue Service to recognize not only her contribution of income, but also the contribution of her services to the acquisition of the joint property.⁷⁰ The repeated refusal of the Internal Revenue Service and the courts to recognize these services as consideration was the impetus behind Congress' enactment of §2040(b).⁷¹ The problem of tracing contributions was also a factor in this 1976 "reform."⁷²

70. If the husband and wife purchase the jointly held property with funds acquired from a business enterprise carried on together, the court will recognize the wife's services as adequate consideration. See *Berkowitz v. Comm.*, 108 F. 2d 319 (3rd Cir. 1939) and *Singer v. Shaugnassy*, 198 F. 2d 178 (2nd Cir. 1952). This appears to be the rule even if the business is purchased in the name of one spouse for a low down-payment and, through the joint effort of the other spouse, the mortgage is paid off before the property is transformed to a tenancy by the entirety. See *Estate of Otte v. Comm.*, 31 Tax Ct. Mem. (CCH) 301 (1972). However, if a court feels these business services were rendered out of love and affection, it will refuse to recognize them as consideration. See *Bushman v. United States*, 8 F. Supp. 694 (Ct. Cl. 1934). Generally, all domestic services fall in this category and are not recognized by the court. See *Estate of Lyons v. Comm.*, 35 Tax Ct. Mem. (CCH) 605 (1976). In *Lyons*, the entire value of the jointly owned property was included in the decedent's gross estate even though his wife contributed her savings from the household allowance he gave her. The scope of domestic services has been expanded by the courts to include the nursing of one's spouse. In *Estate of Loveland v. Comm.*, 13 T.C. 5 (1949), the court ignored a written contract between the spouses regarding the dollar payment of such services and stated that, since the wife was under a legal duty to render them, they were not adequate consideration. For a more expanded discussion of the widow's problems, see Kruse, *Estate Tax Section 2040: Homemaker's Contributions to Jointly Owned Property*, 29 TAX LAW 623 (1976).

71. Cong. Rep. on T.R.A. 1976, *supra* note 19, at 19 and 20. The report explains that "it is often difficult, as between spouses, to determine the degree to which each spouse is responsible for the acquisition and improvement of the jointly owned property." In justifying the new act, the committee claims that "the effect of including only one-half the value of the property in the gross estate in these situations is to implicitly recognize the services furnished by a spouse toward the accumulation of the jointly owned property even though a monetary value of the services cannot be accurately determined."

72. *Id.* Most often joint property owners do not keep adequate records of respective contributions. In such cases the courts will step in and make an arbitrary determination. See *Estate of Ehret v. Comm.*, 35 Tax Ct. Mem. (CCH) 1432 (1976). An astute estate planner should foresee this and prepare a financial history of the property. For a more in depth analysis, see Cantwell, *House and Home—Some Estate Planning Architecture for the Family Dwelling and Its Contents*, 1972 U. OF M. INST. ON EST. PLAN. 72.1703.

B. §2040(b) Certain Joint Interests of Husband and Wife

Section 2040(b) was to be the panacea for the evils of §2040. If a taxpayer could qualify under this section he could avoid the "unnecessarily complex"⁷³ provisions of §2040(a) which often resulted in double taxation and difficulty in determining each spouse's respective contribution.⁷⁴

Admittedly, §2040(b) appears to be an easier solution. Utilizing a fractional formula, as opposed to §2040(a)'s contribution test, it includes fifty percent of the value of jointly held property in the decedent's gross estate if the statute's requirements can be met.

To qualify, the joint tenancy must:

1. Be created by either the husband, wife, or both;
2. Be created by a gift,⁷⁵
 - A. and, in the case of real property, one must elect to treat the creation of the joint tenancy as a gift at that time;⁷⁶
3. Have as its sole tenants the decedent and the decedent's spouse; and
4. Be created after December 31, 1976.

Despite the appearance of simplicity, this new amendment has actually created more complications than it was designed to avoid. One of the main goals of the House Ways and Means Committee in creating this section was to avoid subjecting the same piece of property to a gift tax on the creation of the joint tenancy and to an estate tax upon the death of the donor.⁷⁷ However, the double taxation problem was not as harsh as it appeared. Since one had a choice as to whether to pay a gift tax upon the creation of a joint tenancy in realty or to pay the tax after the subsequent sale of the property, most individuals opted to defer the tax until the time of the sale.⁷⁸ Moreover, even if a gift tax was paid upon the creation of the joint tenancy, the property was never actually subjected to a double tax. The old law, which remains the general rule of §2040, merely exposed the property to the highest transfer tax. This is

73. Cong. Rep. on T.R.A. 1976, *supra* note 19, at 19-21.

74. *Id.*

75. Technical Corrections Act of 1978, *supra* note 63, proposes to do away with actuarial computations in valuing joint interests in gifts of personalty.

76. One must make an election under §2515.

77. Cong. Rep. on T.R.A. 1976, *supra* note 19, at 19.

78. I.R.C. §2515.

true because §2012 allowed as a credit against the decedent's estate tax the amount of the gift tax previously paid on that property. Since the gift tax rate prior to 1976 was only three-quarters that of the estate tax rate,⁷⁹ there would always be an additional tax to the estate even if the fair market value of the property remained constant from the time of the creation of the joint tenancy. However, if the property had appreciated in value before the donor's death, an estate tax would also be levied against the appreciation. Thus, the payment of the gift tax was merely a partial prepayment of the higher estate tax on the property. The solution under §2040(b) is not as beneficial as the Committee claims.⁸⁰ An election under this section eliminates payment of an estate tax on one-half of the appreciation of jointly held property, but also requires the immediate payment of a gift tax when the election is made.⁸¹ This tax would be determined under the new single unified rate schedule for estate and gift taxes.⁸²

Therefore, §2040(b) does no more than eliminate estate taxation on half of the appreciation of the property. Moreover, to qualify, the taxpayer is required to make a §2515⁸³ election in the case of real property and in the case of personal property which falls under the proposed Technical Corrections Bill of 1978.⁸⁴ The effects of making such an

79. 1975 I.R.C. §§2001, 2501, 2502.

80. Cong. Rep. on T.R.A. 1976, *supra* note 19.

81. A prerequisite for qualification under §2040(b) is that the creation of the joint tenancy constitutes a gift. I.R.C. §2040(b)(2)(B).

82. I.R.C. §§2502, 2001.

83. Congress attempted to make the §2040(b)(1) exclusion of 50% conform to the amended §2515(c) gift of 50%. However, as SURREY, *supra* note 57, at 493 points out, this apparent internal consistency is not always achieved.

For example, assume A makes a cash gift of \$100 to her spouse B in 1977. Subsequently A and B purchase stock for \$200 to chase price the \$100 he was previously given by A. A predeceases B when the stock is worth \$300. The creation of the joint tenancy in these circumstances, assuming A and B have a 50 percent interest in the jointly held property, is not in whole or part a gift. Thus, on A's death section 2040(a) would apply and, due to the fact that no part of the consideration for the purchase of the property belonged originally to B or was acquired by him from A for full and adequate consideration, the entire \$300 value of the property will be included in A's gross estate. If, however, A had not given the \$100 outright to B but rather had invested the same \$200 in securities to which title was taken in joint names, the acquisition of the securities would be a complete gift of \$100 from A to B and at A's death only \$150 would be included in her estate.

84. Technical Corrections Act of 1978, *supra* note 63, would allow a taxpayer to make an election as to whether to treat the creation of a joint tenancy in personal

election to prepay the tax can be determined under a fairly complex mathematical formula.⁸⁵ This formula requires the user to make an assumption as to the growth rate of the property, the present value of the dollar and the time of disposition of the property.⁸⁶

The House Ways and Means Committee Report also claimed that §2040(b) implicitly recognizes the services of a spouse, even though the monetary value of those services cannot be determined.⁸⁷ The legislative intent behind §2040(b) was to arbitrarily set the value of such services as a fifty percent contribution to the value of the joint property for purposes of applying the estate tax contribution test.⁸⁸ However, this legislative purpose has not been accomplished. The Internal Revenue Service in no way recognizes the value of such services because, to qualify for §2040(b), the joint tenancy must be treated as a gift. If, in determining the amount of that gift, the donee spouse wished to consider her services as contribution, these services would be susceptible to the

property as a gift for §2040(b) purposes if he failed to file a gift tax return in the past.

85. Banks and Due, *Joint Realty and the Gift Tax Election*, 54 TAXES 250 (1976) presents a formula approach to the problem of whether to make a gift election. The authors use a number of assumptions; for instance, applying a reasonable growth rate to the property enables one to predict the market value at termination. They admit that it may not apply to all situations, but state that, at the very least, it is more systematic than a purely subjective approach. Basically, there are five steps in calculating the formula. One must:

1. Determine the present value of the dollar;
2. Apply a reasonable growth rate to estimate the fair market value of the property at termination;
3. Compute the gift tax on the donor's transfer;
4. Calculate the estimated tax on the property at termination of the joint tenancy if no gift tax had been paid at creation and reduce to present value; and
5. Compare tax on creation to tax on termination after reduced to present value.

To use the formula, let:

P= cost of realty at creation of tenancy;

M= marital deduction;

E= annual exclusion;

T= applicable gift tax rate;

V= appreciated fair market value of property at time of termination;

T¹= effective rate on taxable gift due to the cumulative nature of gift tax

computation;

RA= relative disadvantage/advantage; and

PV= present value.

$$\frac{P}{2} + \frac{V}{2} (M - E)T^1 (PV) - (V - M - E)T (PV) = RA$$

86. *Id.*

87. Cong. Rep. on T.R.A. 1976, *supra* note 19, at 19 and 20.

88. *Id.*

same tests of valuation used under pre-1977 §2040.⁸⁹ These tests would also apply in a post-1977 severance-recreation situation.⁹⁰ For instance, if no election is made to treat the formation of the joint tenancy as a taxable event, its severance will result in a taxable gift to the extent that either spouse received proceeds in excess of his or her proportional contribution to the total purchase price of the property.

The Report⁹¹ makes a helpful suggestion for those tenants with pre-1977 joint tenancies. If they wish to qualify under the amended rules of §2040(b), all that is required is a severance and recreation of the existing joint interest. Yet, this provision has created new complications for the taxpayer. Aside from the previously discussed problems of severance and recreation,⁹² there also remain unanswered questions as to what will occur where a third party is involved in this process. For example, in some jurisdictions a person cannot transfer property which he owns individually, to himself and his spouse in joint tenancy, without the use of a "straw man."⁹³ Technically, then, since the "straw man" recreated the joint tenancy, it would not meet the requirements of §2040(b)(2)(A)⁹⁴ and therefore would not qualify under §2040(b). This also raises the question as to what would occur if the joint property was acquired from the third party in a part-sale, part-gift transaction. *Quaere*: Does the third party's gift exclude the complete transaction from §2040(b) or is the property treated as if a portion qualified under §2040(b) with the remaining portion governed by §2040(a)?⁹⁵

Section 2035 adds another twist to the severance-recreation problem. A probable situation would be where the taxpayer, in contemplation of death, wishes to exclude from his taxable estate one-half of the value of joint property he purchased without contribution from his spouse. He could terminate the joint interest, collect all the proceeds, then recreate the joint tenancy and make a §2515 election. However, if he died within three years of making the election, his plans would be foiled. While it is true that only one-half of the joint interest would be brought into his gross estate under §2040(b), §2035 would bring the

89. See note 71 *supra*; See also I.R.C. §§2511, 2512 and 2043.

90. *Id.*

91. Cong. Rep. on T.R.A. 1976, *supra* note 19, at 20.

92. See text accompanying notes 59 through 62 *supra*.

93. SURREY, *supra* note 57, at 492, discusses this problem in more detail.

94. §2040(b)(2)(A), which is one of the requirements for qualifying under §2040(b), states that "such joint interest was created by the decedent, the decedent's spouse, or both."

95. Note 94 *supra*.

remaining one-half in as a gift made within three years of death. Ultimately, a tax would be paid on the entire value of the jointly held property.

The preceding discussion illustrates why the new amendment does not meet the Committee's expectations. Section 2040(b) does not specifically recognize a spouse's services as contribution to a joint tenancy and, while it has eliminated the burdensome treatment of appreciation on half of the property, it does no more than that which would be effectuated by a lifetime gift. That is, it removes certain property from a decedent's gross estate after a gift tax has been exacted. Yet, in doing so, it has originated many complexities.

5. THE COMPLEXITIES OF §2040(b) AND ESTATE PLANNING CONSIDERATIONS

Since qualification under §2040(b) has the same effect as a gift of one-half of the joint property to the spouse, it is important for the estate planner to know if and when he should use this qualified joint interest as opposed to another format. The traditional estate planning advice, as discussed in the introduction to this article, was to avoid the use of joint ownership as an estate planning device.⁹⁶ The following analysis should make it clear that the advent of §2040(b) has not affected the wisdom of that recommendation.⁹⁷ To understand the soundness of this counsel, one must re-examine joint interests in light of the changes made by the Tax Reform Act of 1976.⁹⁸

Proper use of the estate tax marital deduction⁹⁹ is the key to good estate planning. This deduction allows one spouse to pass the greater of \$250,000 or one-half of the decedent's adjusted gross estate to the surviving spouse without tax consequences,¹⁰⁰ with an adjustment for

96. This, of course, disregards any non-tax reasons for holding joint property.

97. Since an election under §2515 is necessary to qualify under §2040(b) for real property and perhaps personal property under H. R. 6715, the above analysis is equally applicable to §2515.

98. Prior to 1976 the gift tax rate was three-fourths that of the estate tax rate. This difference in schedules played a significant role in estate planning, since it is obvious that one would gain a tax advantage by transferring his property during his life as opposed to disposing of that same property at death. However, the Tax Reform Act of 1976 has brought the gift tax rate under a single unified tax schedle. See I.R.C. §§2001 and 2502. This unified tax rate has caused estate planners to take a second look at their advice to use lifetime gifts.

99. I.R.C. §2056.

100. *Id.*

inter vivos gifts between the spouses. The property thus passed must be of a type that will be included in the taxable gross estate of the surviving spouse, unless otherwise consumed.¹⁰¹ Thus, the effect of the marital deduction is to permit one-half of the wealthier spouse's property to escape immediate transfer taxation by simply deferring the tax until the death of the surviving spouse. In addition to this deferral benefit, the deduction also allows the wealthier spouse to effectively divide his property in such a manner so that each spouse will hold, for tax purposes, one-half of the total property. Since the sum of two taxes, one on each half of the assets, is less than one tax on the total possessions under the graduated tax system, this division should reduce the total transfer tax for the spouses.

The unified tax credit¹⁰² adds one more factor for the estate planner's consideration. After December 31, 1980, this credit will be \$47,000 and will allow one to transfer up to \$175,625 without payment of a tax.¹⁰³ If the spouses are considered as a unit, then \$351,250 of their property can escape transfer taxation.

Estate planners have derived marital deduction formulas to calculate exactly how much property should pass to the surviving spouse at the death of the testator.¹⁰⁴ These formulas take into consideration lifetime gifts between spouses, the unified credit and the maximum marital deduction allowance. If one does not take the maximum unified credit but instead passes the property to his spouse under the marital deduction, the property will be included in the surviving spouse's taxable estate.¹⁰⁵ Therefore, it is essential to take full advantage of the unified credit. The surviving spouse can be afforded lifetime use of property not qualifying under the marital deduction through the use of a non-marital trust. In the past, joint interests have created a problem in calculating the marital formula since such interests automatically pass to the survivor's estate. If the joint interest is large enough, it will cause the marital formula to be overfunded and consequently subject the property to needless tax in the survivor's estate. Unfortunately, §2040(b) has not changed this. A qualified joint interest operates in the same manner as

101. I.R.C. §2056(b).

102. I.R.C. §2010.

103. I.R.C. §§2010 and 2505.

104. Bush, *Transfers Between Husband and Wife: Inter Vivos and Testamentary, as Affected by the Marital Deduction and Property Previously Taxed*, 30 N.Y.U. TAX INST. 695 (1972).

105. I.R.C. §§2010, 2505, 2056 and 2523.

a non-qualified joint interest, with the exception that only half of the property is included in the decedent's gross estate.

The unification of transfer tax rates¹⁰⁶ and the introduction of a unified tax credit¹⁰⁷ make it necessary in estate planning to consider all lifetime, as well as testamentary, transfers. Prior to 1976, the main advantage of a lifetime gift between spouses was that the property transferred was subjected to a lower tax rate¹⁰⁸ and a separate gift tax exemption.¹⁰⁹ Although those benefits have been eliminated by the new unified federal tax system, there are now other reasons why inter vivos gifts between spouses might be advantageous. Before deciding whether a qualified joint interest should be implemented, the tax planner must understand these reasons. An examination of the marital deduction will reveal two such reasons. The gift tax marital deduction is 100% of the value of the first \$100,000 of gift property, without a deduction for the next \$100,000.¹¹⁰ For gifts in excess of \$200,000, the deduction is limited to fifty percent of the value of the transferred property.¹¹¹ Section 2056(a) permits a deduction of up to the greater of \$250,000 or one-half of the decedent's adjusted gross estate less the difference between the amount allowed for post-1976 transfers and fifty percent of the value of such transfers. This adjustment gives rise to the first advantage of lifetime gifts: by using such gifts, one can increase the total marital deductions allowed.¹¹²

The second advantage of lifetime gifts is clear from an analysis of the purpose of using the marital deduction. Its principal effect is that the total tax on the spouse's assets is reduced by the division of such assets into two estates. However, the savings that result from splitting the spouse's assets into two estates may not be achieved if the estate tax marital deduction is used alone since, to realize these tax savings, the wealthier spouse must predecease the other. However, spouses can insure against the tax consequences arising from an "unfavorable" order

106. I.R.C. §§2001 and 2502.

107. I.R.C. §§2010 and 2505.

108. 1975 I.R.C. §§2001, 2501 and 2502.

109. 1975 I.R.C. §2521.

110. I.R.C. §2523(a).

111. *Id.*

112. The following table is reprinted from SURREY, *supra* note 57, at 812. An analysis of this table will show the advantage of lifetime gifts between spouses with a total gross estate of \$485,000. The table could be modified to fit any estate planning situation. A simple substitution of the gross estate in question would allow the estate planner to opt for the maximum tax saving plan.

of death by making lifetime interspousal gifts, thereby equalizing their respective gross estates. The remainder of the estate not qualifying for the marital deduction must bypass the spouse's gross estate, since failure to do so will subject the property to an additional tax. Likewise, the donee spouse's assets must bypass the other's gross estate.

The unified credit presents another reason for lifetime gifts. To obtain the maximum benefit from this credit, two conditions must be

I. A predeceases B

A's Estate.

	(1)	(2)	(3)	(4)	(5)
Adjusted gross estate	\$475,000	\$475,000	\$475,000	\$475,000	\$475,000
less: gift to spouse	0	0	100,000	165,625	237,500
Resultant adjusted gross estate	475,000	475,000	375,000	309,375	237,500
Marital deduction	250,000	250,000	199,375	196,375	177,625
Taxable estate	225,000	225,000	175,625	113,000	59,875
plus: adjusted taxable gifts to spouse	0	0	0	62,625	115,750
Total transfers subject to tax	225,000	225,000	175,625	175,625	175,625
Tentative tax	62,800	62,800	47,000	47,000	47,000
less: unified credit	47,000	47,000	47,000	47,000	47,000
Tax payable	15,800	15,800	0	0	0

B's Estate.

Adjusted gross estate	\$ 10,000	\$ 10,000	\$110,000	\$175,625	\$247,500
plus: assets from A's estate	459,200	250,000	199,375	196,375	177,625
Taxable estate	469,200	260,000	309,375	372,000	425,125
Tentative tax	145,328	74,200	90,988	112,280	130,343
less: unified credit	47,000	47,000	47,000	47,000	47,000
Tax payable	98,328	27,200	43,988	65,280	83,343
Total transfer tax	<u>\$114,128</u>	<u>\$ 43,000</u>	<u>\$ 43,988</u>	<u>\$ 65,280</u>	<u>\$ 83,343</u>

II. B predeceases A

B's Estate.

Taxable estate	\$ 10,000	\$ 10,000	\$110,000	\$175,625	\$247,500
Tentative tax	1,800	1,800	26,800	47,000	70,000
less: unified credit	47,000	47,000	47,000	47,000	47,000
Tax payable	0	0	0	0	23,000

met. First, each spouse must have in his or her respective estate enough property to take full advantage of the credit. Second, the amount of property covered by the credit must bypass the surviving spouse's gross estate. Lifetime gifts from the wealthier spouse to the donee spouse can accomplish the first objective and protect against the consequences of an unexpected order of death.¹¹³

Lifetime gifts between spouses, therefore, are used to increase the marital deduction and to shelter each spouse's unified credit and marital deductions. Since election under §2515 and subsequent qualification under §2040(b) creates a lifetime gift, it is important to determine whether this form will accomplish the above purposes. While a § 2040(b) joint interest qualifies for the marital deduction for both gift and estate tax purposes¹¹⁴ and will thus accomplish the objective of increasing the marital deduction, it will not achieve the remaining two objectives.

The underlying requirement for effective use of lifetime gifts is that the property be permanently removed from the donor's gross estate. Consequently, the fact that the joint property automatically passes to the estate of the survivor makes this format of gift undesirable, for, if the donee dies first, the return of the property to the donor will place it back into his tax base a second time. This return will destroy the estate-splitting effect of the marital deduction that the lifetime gifts were used to preserve. This return will also squander that portion of the donee spouse's unified credit that would have been used had the joint property passed to a younger generation.

A qualified joint interest is distinguished from a nonqualified joint

A's Estate.

Adjusted gross estate	\$485,000	\$475,000	\$375,000	\$309,375	\$237,500
plus: taxable transfers to spouse	0	0	0	62,625	115,750
Total transfers subject to tax	485,000	475,000	375,000	372,000	353,250
Tentative tax	150,700	147,300	113,300	112,280	105,905
less: unified credit	47,000	47,000	47,000	47,000	47,000
Tax payable	103,700	100,300	66,300	65,280	58,905
Total transfer tax	<u>\$103,700</u>	<u>\$100,300</u>	<u>\$ 66,300</u>	<u>\$ 65,280</u>	<u>\$ 81,905</u>

113. The donor must live for three years after making the gift; otherwise §2035 will include it in his gross estate.

114. I.R.C. §§2523(d) and 2056.

interest in that it removes half of the property from the donor spouse's estate. However, since gifts are added back for the purpose of determining the ultimate estate transfer tax, §2040(b)'s effect is to remove one-half of the appreciation of the joint property from the donor's estate.¹¹⁵ Lifetime gifts will also achieve this result, but without as many complications.

On the other hand, if the donee spouse should die first, holding §2040(b) property, half of it will be included in her gross estate. However, if that property qualified under §2040(a), it would escape taxation in her estate. This treatment under §2040(b) might in some instances produce an unexpected tax benefit.

Prior to 1976, many surviving joint owners who had purchased joint property sought to include the total property in the predeceasing spouse's gross estate. This was accomplished by withholding any evidence of contribution, with the intent to achieve a stepped-up basis in the property. However, in *Madden v. Commissioner*,¹¹⁶ the court rejected this scheme. It held that §1014, which allows a stepped-up basis for property passing from a decedent, contains a qualification that such property must be included in the deceased spouse's estate.¹¹⁷ The court stated that inclusion was not required here, since available, though unproduced, evidence of the survivor's contribution was in existence.¹¹⁸

Since fifty percent of a joint interest under §2040(b) is required to be included in the donee spouse's gross estate, § 1014 should be satisfied. However, this half of the property should only receive a fresh-start basis as of its December 31, 1976 value¹¹⁹ under the new §1023, since carryover basis property is defined in §1023(b)(1) as property passing from the decedent within the meaning of §1014. It should be noted that one could obtain a fresh-start basis on all of the property by simply transferring it outright to the poorer spouse.

Since the creation of a joint tenancy does not remove property from a donor's gross estate and since any possible tax advantage of this format can be matched by lifetime gifts, it should be avoided as a tax planning tool. The tax planner may avoid the adverse tax consequences

115. I.R.C. §2001(b). For a further discussion on lifetime gifts and §2040(b), see generally, Horn, *Much Ado About Nothing: New Section 2040(b)*, 3 ESTATES, GIFTS AND TRUSTS JOURNAL 14 (1978).

116. 52 T.C. 845, *aff'd*, 440 F. 2d 784 (7th Cir. 1971).

117. *Id.* at 849.

118. *Id.*

119. I.R.C. §1023(h).

of joint interests by simply severing the tenancy.¹²⁰ Thus, only through a clear understanding of the negative implications involved in joint tenancies can the estate planner bring the most benefit to his client.

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120. There are nine methods of severing a joint tenancy:

1. Returning title to the donor;
2. Exchanging joint interests;
3. Converting to tenancy in common;
4. Vesting sole ownership in the donor;
5. Severance of interests;
6. Sale to a third party;
7. Gift to a third party;
8. Sale of one tenant's interest to another; and
9. Increase in mortgage indebtedness.

Each method has a different effect on estate, gift and income taxes, so care must be taken when selecting a method. For a more complete discussion of these considerations, see Worthy, *supra* note 2, and Holdsworth, *supra* note 60. Although these articles were written prior to 1976, the basic tax considerations have not changed. However, one should now consider I.R.C. §2035, gifts within three years of death, and §2513(a), gift splitting, when making a gift to a third party. Another factor to consider is the §2515(c) elimination of actuarial tables with regard to certain joint interests.

Workmen's Compensation: What if the Employer Gets the Employee Drunk?

Under Florida law, the defense of intoxication can be asserted by an employer when his employee makes a claim for workmen's compensation. Section 440.09(3) of the Florida Statutes deals in pertinent part with the defense of intoxication wherein: "No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee"¹ This statute, and the decisions interpreting it, stand for the general proposition that, if an injury was caused primarily by the claimant's intoxication and it can be shown that the intoxication was the proximate cause of the injury, then recovery will be denied.²

In construing Section 440.09(3), Florida courts have been concerned with the causal relationship of the claimant's conduct to the injury.³ It is surprising to note, however, that the courts do not mention the employer's possible culpability: "What if the employer gets the employee drunk?"⁴

To date, there have been no cases in Florida dealing with this problem. This paper will explore the resolution of this issue in other jurisdictions and apply existing Florida law to the analyses rendered.

1. SOLUTIONS IN OTHER JURISDICTIONS

In *Tate v. Industrial Accident Commission*,⁵ the California District Court of Appeals, when confronted with a case where the employer bought drinks for the claimant and then sent him home in a company car, held:

1. § 440.09(3) FLA. STAT. (1977).

2. See, e.g., *Zee v. Gary*, 189 So. 34 (Fla. 1939), where the Florida Supreme Court adopted the view that an injury caused by extreme intoxication of the employee does not arise out of the employment.

3. See, e.g., *Cone Brothers Contracting Co. v. Allbrook Co.*, 16 So. 2d 61 (Fla. 1943); *Duval Engineering and Contracting Co. v. Johnson*, 16 So. 2d 290 (Fla. 1944).

4. L. M. ALPERT, *FLORIDA WORKMEN'S COMPENSATION LAW*, § 19-12 at 493 (2nd ed. 1975).

5. 120 Cal. App. 2d 657, 261 P. 2d 759 (1st DCA 1953).

Such a state of facts, if found to exist, would support a finding of estoppel. Such participation by the employer amounts to an implied representation that the employer will not hold it against the employee if he drinks, and will not deprive him of his job or of compensation benefits if he does so.⁶

Thus, the employer was prohibited from raising the intoxication of the employee as a defense to the claim for benefits.

In the leading California case, *McCarty v. Workmen's Compensation Appeals Board*,⁷ the employee's estate claimed death benefits for a fatal injury which occurred when the worker was returning home from a company-sponsored activity where the employer had permitted and encouraged the consumption of alcoholic beverages. The California Supreme Court, in overruling the Workmen's Compensation Appeals Board, held that the employer was estopped from asserting the defense of employee intoxication since the facts demonstrated that the purchase of intoxicants with company funds and the employer's active involvement in the service of liquor at a company activity brought the employee's conduct within the scope of employment.⁸

The New Hampshire Supreme Court adopted an approach similar to *Tate* in *Henderson v. Sherwood Motor Hotel, Inc.*⁹ There, the employee, a cocktail waitress, became intoxicated while on duty. The employer, aware of her condition, allowed her to leave work alone. In upholding the employee's claim which arose out of an automobile accident on the way to her home, the court reasoned that, "[i]f the accident resulted from her intoxication, her death could clearly be found to have arisen 'out of' her employment."¹⁰ In reviewing the facts, the court concluded that the employer, in effect, had directed the deceased employee to the location of the accident and contributed to her intoxicated condition: "The fact that the accident was caused by the decedent's intoxication is no bar to the action, since it was stated that 'the employer knew that the employee was intoxicated.'"¹¹

6. 261 P. 2d at 764.

7. 12 Cal. 3d 677, 117 Cal. Rptr. 65, 527 P. 2d 617 (1974).

8. *Id.* at 684-85, 117 Cal. Rptr. at 69-70, 527 P. 2d at 622.

9. 201 A. 2d 891 (N.H. 1964).

10. *Id.* at 894. "The time bomb . . . is started ticking during working hours, but it happens to go off at a time and place remote from the employment. The hazards of the employment follow the claimant beyond the time and space limits of his work and there injure him." *Id.*, citing 1 LARSON, WORKMEN'S COMPENSATION LAW, § 29.22 at 450.

11. 201 A. 2d at 894.

In an important Indiana case, *United States Steel Corporation v. Mason*,¹² the employer allowed the claimant to operate a crane while he was intoxicated. The Appellate Court found that, under those circumstances, an affirmative duty was placed on the employer by common law:

By no means do we excuse drinking or intoxication on the part of employees on any job, nor do we mean to contravene the statute that bars recovery by employees who are intoxicated. What we are saying is that when a violation is as evident and plain as in this case, the employer must take some step to eliminate any semblance of approval or acquiescence.¹³

A review of existing case law shows that, in other jurisdictions, when an employer allows or encourages his employee to become intoxicated, such acquiescence bars him from raising intoxication as a defense to a claim by the employee. This holds true even if the injuries are sustained away from the employer's premises, once it can be shown that the main activity of the worker was within the scope of his employment, *i.e.*, a company function.¹⁴

By comparison, in other states, this issue is encompassed within the statutory framework. For example, Chapter 30, Section 61 of the Revised Statutes of Maine provides:

No compensation or other benefits shall be allowed for the injury or death of an employee where it is proved that . . . the same resulted from his intoxication while on duty. *This provision as to intoxication shall not apply, if the employer knew that the employee was intoxicated or that he was in the habit of becoming intoxicated while on duty.*¹⁵

Under this statute, if the claimant can show that the employer knew of either specific intoxication or habitual drunkenness, he can prevent the employer from raising the defense of intoxication. It is interesting to note that Maine has carried the doctrine of employer responsibility set forth in the common law one step further to cover the case of a worker who has exhibited alcoholic dependency on *previous* occasions.

12. 227 N.E. 2d 684 (Ind. App. Ct. 1967).

13. *Id.* at 696.

14. *See generally* 47 A.L.R. 3d 566 (1973).

15. ME. REV. STAT. ch. 39, § 61 (1964) (emphasis added).

2. DEVELOPING THE THEORY IN FLORIDA

Two of the basic postulates applied in other jurisdictions could also be argued in Florida cases. First, the doctrine of estoppel¹⁶ and second, the scope of employment theory.¹⁷

The application of the estoppel doctrine to workmen's compensation cases is stated generally in *Mercier v. American Refractories and Crucible Corporation*.¹⁸

[A]n employer may, by his conduct, estop himself from asserting what under other circumstances would constitute a good defense to a claim for consideration . . . Estoppel involves the two elements of misleading conduct by one party and prejudicial harm resulting to the other party.¹⁹

Unfortunately, use of the estoppel doctrine has been limited in Florida compensation law to questions involving entitlement to compensation. In *Butler v. Allied Dairy Products*,²⁰ the court held that an employer and its insurance carrier, which had for several years provided medical attention and treatment to an employee injured outside the state, were estopped from disclaiming further liability for benefits on the ground that the employment contract was not executed in Florida.²¹

Similarly, in *Blair v. Edward J. Gerrits, Inc.*,²² the employee was hired in Florida to do construction work in Puerto Rico and was injured and hospitalized in Puerto Rico. When he left the hospital, his supervisor purchased transportation for him to return to Florida, where he was provided with medical treatment by the employer. The court, in holding that the employer was estopped from insisting that the claimant return to Puerto Rico for medical treatment and compensation, said, "[t]he employer-carrier may not now be allowed to say there is no coverage in Florida when their prior conduct logically led the Petitioner to believe

16. See text accompanying notes 5 and 6 *supra*.

17. See text accompanying notes 7 through 11 *supra*.

18. 200 A. 2d 716 (Conn. 1964).

19. *Id.* at 720.

20. 151 So. 2d 279 (Fla. 1963).

21. *Id.* at 283. The Florida Workmen's Compensation statute provides that, if the employment contract is executed in Florida, an employee who is injured outside of the state is entitled to compensation. *Id.* at 281. The court pointed out that the gist of the statute is not whether the Industrial Relations Commission has jurisdiction over the subject matter, but whether the claimant is entitled to benefits. *Id.* at 283.

22. 193 So. 2d 172 (Fla. 1966).

that he could expect and receive coverage here."²³

Therefore, since the doctrine of estoppel is utilized in other areas of Florida compensation law, it might also be employed to bar the defense of employee intoxication. The two elements for estoppel enunciated in *Mercier*²⁴ would be satisfied by showing: 1) misleading conduct by one party — the employer's acquiescence in or encouragement of the employee's intoxication; and 2) prejudicial harm resulting to the other party — the employee's loss of compensation benefits.²⁵

The more fruitful approach to this issue may be found within the framework of "scope of employment."²⁶ If it can be shown that employee drinking is within that "scope," the employer may be held liable for claims arising out of injuries proximately caused by the intoxication.

The general test for connection to work is stated succinctly as follows:

A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to the employment if it carries out the employer's purposes or advances his interests directly or indirectly. Under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.²⁷

In Florida, this doctrine has been codified at Section 440.02(6) of the Florida Statutes, which defines "injury" as "personal injury or death by accident arising out of and in the course of employment"²⁸ Following the enactment of this statute, the Florida Supreme Court was

23. *Id.* at 175. The parties agreed that, since the contract was for employment exclusively out of state, the claimant would otherwise have been barred from recovery. *But see* *Wainright v. Wainright, Inc.*, 237 So. 2d 154 (Fla. 1970) (citing *Butler* and *Blair*, but holding that there was no waiver or estoppel in this particular case).

24. 200 A. 2d 716.

25. *See* text accompanying note 19 *supra*.

26. This doctrine, concerned with causal connection, holds that an employee's injuries would be compensable if he could show that the injuries would not have happened but for the conditions of the employment. *See generally* 1 LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, Ch. III (1978).

27. LARSON, *supra* note 26, § 20.00 at 5-1.

28. § 440.02(6) FLA. STAT. (1978).

confronted with an employee intoxication case in *Johnson v. Koffee Kettle Restaurant*,²⁹ where the employee was killed while walking across the highway from his place of employment, a restaurant, to obtain supplies from the grocery store across the street. His breath was found to contain an odor of alcoholic beverage. Nevertheless, the court allowed recovery.³⁰

In another Florida intoxication case, *Maroney v. Kelly and Sons, Inc.*,³¹ the claimant was entrusted with the employer's truck. After he completed a business mission, he drank beer with a fellow employee. He then realized that he had forgotten certain documents and decided to return to the place where he had left them. While en route, he was injured. The court denied compensation, applying the deviation from employment doctrine,³² without commenting on the intoxication issue or the employer's knowledge of the employee's drinking.³³

Florida courts have been confronted with various cases involving the liability of employers for injuries sustained by employees who followed their employers' directions. For example, in *Taylor v. Dixie Plywood Company*,³⁴ the court awarded compensation to an employee who was injured in an automobile accident on the way to his doctor's office, after being directed by his employer to seek medical attention for a job-related injury which occurred earlier that day. Similarly, in *Heller Brothers Packing Company v. Lewis*,³⁵ the Florida Supreme Court based its ruling for the claimant on the rationale that, when the employer "directed" the employee to take the company jeep and obtain

29. 125 So. 2d 297 (Fla. 1960).

30. In allowing recovery, the following test was applied:

[I]t is essential that claimant prove or show a state of facts from which it may be reasonably inferred that deceased was engaged in his master's business when the accident resulting in his injury took place. If the evidence to establish such a state of facts is competent and substantial and comports with reason or from which it may be reasonably inferred that deceased was engaged in his master's business when he was injured, it is sufficient.

Id. at 299. It is interesting to note that the defense of employee intoxication was not mentioned by the court.

31. 195 So. 2d 208 (Fla. 1967).

32. This doctrine holds that an employee who deviates from his employment duties in order to conduct personal business is not entitled to compensation for injuries sustained before he returns to those duties. See *Fidelity & Casualty Co. of New York v. Moore*, 196 So. 495 (Fla. 1940).

33. 195 So. 2d at 209-10.

34. 297 So. 2d 553 (Fla. 1974).

35. 20 So. 2d 385 (Fla. 1945).

lunch (at which time he was injured), the employer was advancing his own interests.³⁶

Similar holdings may be found in cases where the employer supplies transportation for the employee. In *Huddock v. Grant Motor Company*,³⁷ the Florida Supreme Court found that injuries sustained by an employee who is provided with transportation by the employer are compensable when that arrangement is:

the result of an express or implied agreement between the employer and his workman or when it has ripened into a custom to the extent that it is incidental to and part of the contract of employment, or when it is with the knowledge and acquiescence of the employer, or when it is the result of a continued practice in the course of the employer's business, and which practice is beneficial to both the employer and the employee.³⁸

This theory, by analogy, could be applied to the issue under discussion. If the employee could show that the employer provided him with the opportunity to become intoxicated, acquiesced in or encouraged his drinking, the employee could argue that his resulting behavior should be considered within the scope of employment. Therefore, any resulting injury would be compensable, despite an assertion by the employer that the defense of employee intoxication would defeat the claim.

A more restrictive approach has been taken in the area of recreation than in other employer-supplied activities. For example, in *Mathias v. City of South Daytona*,³⁹ the Florida Supreme Court denied a petition for writ of certiorari to review the order of the Industrial Relations Commission denying benefits to a police officer who was injured at a

36. *Id.* at 387. The court recognized the general principle that there is no liability when an injury occurs during lunchtime and away from the employer's premises, even though the employee may be riding in the employer's vehicle, "on the theory that the accident did not arise out of or in the course of the employment." *Id.* at 387. Nevertheless, it upheld the award for compensation, stating:

The foreman well knew that a hungry fruit picker could not render very efficient services and a lunch would enhance the interest of both the employer and employee in that food would create the strength and reserve of the employee to work, thereby resulting in more efficient services in gathering fruit in behalf of the employer. The interest of the employer was advanced by the foreman in directing the employee to take the [employer's] "jeep" and go to . . . obtain lunch.

Id.

37. 228 So. 2d 898 (Fla. 1969).

38. *Id.* at 900.

39. 350 So. 2d 458 (Fla. 1977).

softball game held at his employer's home. Although at the administrative hearing the Judge of Industrial Claims awarded compensation, having found that the function fell within the scope of employment and that pressure was brought on the employee to attend, the claim for compensation was rejected by the Commission.⁴⁰ Justice Sundberg, in a dissenting opinion, argued that, in light of the general rules enunciated in Larson,⁴¹ the view adopted in Florida is conservative and self-defeating.⁴² Recreational activities are defined as being within the course of employment when:

1. They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
2. The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.⁴³

While these criteria could be applied in intoxication cases by drawing an analogy to employer-sponsored recreational activities, the employer may claim that, since drinking is beneficial primarily to the employee, the claimant's attempt to prohibit the employer from raising the intoxication defense should be defeated. In response, the claimant could argue that an employee who becomes intoxicated while engaged in business-related activities is serving both a personal and a business purpose and should be compensated for resulting injuries under the "dual purpose doctrine."⁴⁴

40. *Id.* at 458.

41. *Supra* note 26.

42. 350 So. 2d at 459-60 (Sundberg, J. dissenting). For a more enlightening approach, see *Tedesco v. General Electric Co.*, 305 N.Y. 544, 114 N.E. 2d 33 (Ct. App. 1953) (holding that, under the facts of the case, injuries sustained during a softball game were compensable as arising out of the course of employment).

43. LARSON, *supra* note 26, § 22.21 at 5-71.

44. The "dual purpose doctrine" is stated in *Krause v. West Lumber Co.*, 227 So. 2d 486 (Fla. 1969), where the Florida Supreme Court upheld a claim for injuries suffered in a car accident by the employee who was on the way to an employer-sponsored sales meeting. The employer had directed the employee to take the employee's own automobile for the trip. "The fact that claimant's personal convenience was being served, as well as the interest of the employer, does not preclude recovery. An employee whose activities are serving a personal *and* business purpose is within the

3. CONCLUSION

The question of employer encouragement with respect to the defense of employee intoxication is unanswered in Florida, although other jurisdictions resolve the issue through case law or statute. Nevertheless, through the application of the doctrine of estoppel, as well as argument by analogy to scope of employment situations where the employer either directs, encourages or allows certain employee conduct, the Florida claimant has legal authority to prevent the employer from successfully raising the defense.

However, the employer can limit the effectiveness of the claimant's position by asserting that, since drinking is solely in the employee's beneficial interest, any claim for workmen's compensation benefits for injuries to an intoxicated employee should be denied. Although the Florida Supreme Court has not yet ruled on this issue, its reluctance in some areas, *e.g.*, recreation, to disturb holdings of lower courts which upheld the defense of employee intoxication suggests that the Florida claimant will have difficulty in successfully pursuing a claim for workmen's compensation when his intoxication is caused, even in part, by actions of his employer.

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scope of the Workmen's Compensation Act." *Id.* at 488 (emphasis added). *See also* Zipperer v. Peninsular Life Ins. Co., 235 So. 2d 473 (Fla. 1970).

Equal Protection for Aliens: The Sliding Scale of Judicial Review: *Foley v. Connelie*

Recently the Supreme Court, in the case of *Foley v. Connelie*,¹ upheld a New York statute which limited the appointment of members of the state police force to citizens of the United States.² *Foley*, an Irish resident alien, brought a class action seeking a declaration that the New York statute in question³ violated the equal protection clause of the fourteenth amendment. After *Foley* was certified as representative of a class of those similarly situated, a three-judge district court granted a summary judgment to the defendants,⁴ from which the plaintiff appealed to the Supreme Court of the United States. A divided Court upheld the statute and refused to grant relief.⁵

Historically, aliens have often suffered discrimination of various economic and social kinds. Starting long ago, states enacted legislation discriminating against aliens in a wide range of activities⁶ and, prior to World War II, the Supreme Court displayed a great deal of tolerance toward those state laws.⁷ During this period of non-interference by the Court, the sole decision striking down a discriminatory state law against aliens was *Truax v. Raich*.⁸ In *Truax*, the Court invalidated a state law

1. 435 U.S. 291 (1978).

2. N.Y. Exec. Law §215(3) (McKinney Supp. 1976), which reads in part: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States. . . ."

3. *Id.*

4. *Foley v. Connelie*, 419 F. Supp. 889 (S.D. N.Y. 1976).

5. 435 U.S. 291.

6. *Terrace v. Thompson*, 263 U.S. 197 (1923) (aliens forbidden to own land for the purpose of farming); *Heim v. McCall*, 239 U.S. 175 (1915) (public works contracts); *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927) (operating pool halls); *Trageser v. Gray*, 73 Md. 250, 20 A. 905 (1890) (selling liquor); *Commonwealth v. Hana*, 195 Mass. 262, 81 N.E. 149 (1907) (peddling goods); *Wright v. May*, 127 Minn. 150, 149 N.W. 9 (1914) (acting as auctioneers).

A more detailed description of earlier discrimination against aliens especially in the employment area is provided in Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HASTINGS CONST. L.Q. 1029 (1975).

7. *Id.*

8. 239 U.S. 33 (1915).

requiring employers of five or more persons to hire at least 80% of their employees from among qualified electors or native-born United States citizens. However, the Supreme Court asserted in dicta that the "special public interest" in state regulation of a wide variety of governmental concerns could justify less favorable state treatment of non-citizens.⁹ This proposition became known as the "special public interest" doctrine¹⁰ and later became the basis upon which the Court upheld a broad range of discriminatory practices against aliens. The decision in *Truax* is best understood as an expression of the Court's devotion to the employers' liberty of contract and property during the *Lochner* era.¹¹ However, *Truax* did not prove to have a substantial impact on the continued trend of discrimination against aliens in the area of employment. *Truax* stood alone among many contrary decisions.¹²

The Court's indulgence in discrimination against aliens quickly dissipated after World War II.¹³ Later cases greatly reduced the scope of the "special public interest" doctrine¹⁴ as a result of a broadened interpretation of Congress' plenary authority over immigration¹⁵ and a judicial recognition that alienage itself constituted a suspect classification.¹⁶ The former practice of upholding discriminatory statutes was rapidly replaced by a new trend of decisions striking down such legislation.¹⁷ By the 1970's, the Supreme Court was insisting that states were generally powerless to treat aliens as a distinct class for reasons of federal supremacy¹⁸ and, further, that such treatment also amounted to

9. *Id.* at 39.

10. *Graham v. Richardson*, 439 U.S. 365 (1971).

11. In *Lochner v. New York*, 198 U.S. 45 (1905), a statute which prohibited employers from requiring employees of bakeries to work more than sixty hours a week was held unconstitutional at the behest of a bakery owner, on the grounds that it interfered with the liberty of contract of his employees. *See also* *Hires v. Davidowitz*, 312 U.S. 52 (1940).

12. *See* note 6 *supra*.

13. In two decisions in 1948, the Supreme Court began to reformulate its position on the equal protection doctrine as it applied to discrimination against aliens. *See* *Oyama v. California*, 332 U.S. 633 (1948) (striking down a provision of the California Alien Land Law); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (invalidating a California state law denying fishing licenses to aliens ineligible for United States citizenship).

14. 439 U.S. 365.

15. *Id.*

16. *Id.*

17. *Id.* *See also* note 13 *supra*; *In Re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

18. 403 U.S. at 378: "State laws that restrict the eligibility of aliens for welfare

an invidious discrimination.¹⁹ Thus, in *Graham v. Richardson*,²⁰ the Court declared invalid state statutes denying welfare benefits to resident aliens and, in *Sugarman v. Dougall*,²¹ the Court invalidated a statutory prohibition against employment of aliens in the state competitive civil service.²² Similarly, the Court has ruled that resident aliens may not be excluded from practicing law²³ or from practice as licensed civil engineers.²⁴ The Court became highly critical of blanket prohibitions against the employment of aliens and other legislation which was neither "narrowly confined" nor "precisely drawn" and "swept indiscriminately" against aliens in the area of employment.²⁵

Today, aliens in the United States are still deprived of the right to vote²⁶ and, consequently, are lacking "the most basic means of defending themselves in the political processes."²⁷ This is one of the major reasons why alienage has been elevated to "suspect classification."²⁸ The usual objection to judicial intervention (*i.e.*, that the popularly-elected legislature is the more democratic arena for deciding public issues) is absent, and the courts have deemed it necessary to offer their special protection to those who are not adequately represented in the legislature. This political powerlessness, when combined with the historical discrimination which aliens have suffered, makes it readily arguable that alienage should be treated as a suspect classification. However, the

benefits merely because of their alienage conflict with overriding national policies in an area constitutionally entrusted to the Federal Government."

19. For a definition of invidious discrimination, *see* *Levy v. Louisiana*, 391 U.S. 68 (1968).

20. 403 U.S. 365.

21. 413 U.S. 634 (1973).

22. *Id.* While the statute rested on a legitimate state interest in having loyal employees and in establishing the states' own form of government, the statute was neither narrowly confined nor precise in its application, and therefore failed.

23. In *Re Griffiths*, 413 U.S. 717, 729 (1973), rejecting as insufficiently substantial the state interest in maintaining high professional standards, and disagreeing with the argument that "status of holding a license to practice law places one so close to the core of the political process as to make [one] a formulator of government policy."

24. *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976).

25. *Sugarman v. Dougall*, 413 U.S. at 643; *accord*, *Examining Bd. v. Flores de Otero*, 426 U.S. at 605-606.

26. *See* *Minor v. Happersett*, 88 U.S. 163 (1874).

27. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 580, 456 P. 2d 645, 654 (1969) (*en banc*).

28. To determine what criteria the Supreme Court employs in deciding whether a class is to be deemed suspect, *see* *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

concept of suspect classifications is a modern phenomenon; thus, it is not surprising that the decisions which seem to place alienage in this category date from the 1970's.

It has been well settled by the Burger Court that states carry a tremendous burden of justification when attempting to legitimize discrimination against aliens in the employment arena.²⁹ This is a result of the recent extension of the equal protection doctrine to the Supreme Court's finding that alienage is a suspect classification. However, suspect classifications are not forbidden classifications. Instead, the courts merely indicate that such classifications will be subject to close judicial scrutiny. Whether all suspect classifications will receive the same level of close judicial scrutiny has been the subject of great controversy in recent years. The term "strict scrutiny" has come to mean that certain kinds of government-imposed inequalities must be justified as necessary for the achievement of a compelling state interest.³⁰ Because alienage is a suspect classification with respect to the states,³¹ statutes which preclude aliens from certain types of employment are subject to strict scrutiny³² and a state must show some overriding "special public interest"³³ in order to justify such a classification. Further, a state must select a means to pursue that purpose which does not unnecessarily burden constitutionally protected conduct.³⁴ However, this standard, at best, has been difficult to comprehend. This is due in part to the notion of a rigid "compelling state interest" standard of review in suspect classification cases. In reality, the level of judicial scrutiny applied by the Supreme Court varies along a continuum depending upon the interest at stake. The more the Court feels the interest at stake to be fundamental or the more the legislative classification approaches being suspect, the higher the degree of judicial scrutiny the Court will apply.

"Several recent decisions addressing the issue of aliens' right to work indicate that suspect class statutes of alienage is slowly eroding. As a result, it is possible that state action against aliens will no longer

29. See note 17 *supra*.

30. See *McLaughlin v. Florida*, 379 U.S. 184 (1964).

31. See *In Re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

32. *Graham v. Richardson*, 403 U.S. 365 (1971); *Korematsu v. United States*, 323 U.S. 214 (1944).

33. 379 U.S. 184 (overriding statutory purpose is required to uphold a statute having a racial classification).

34. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

be strictly scrutinized.”³⁵ This gradual erosion has been caused by the reluctance of the Supreme Court to equate the rights of aliens with those of United States citizens in areas that are possibly considered “politically tinged.” The idea of the “political community” has been the basis for the Court’s distinction between citizen and alien rights both in and out of the employment area.³⁶ Citizens, as members of the “political community,”³⁷ possess many political privileges to which aliens have no constitutional right. The courts have recognized that some state interests might justify a disqualification of non-citizens from employment³⁸ and, therefore, have never held that aliens have a “constitutional right to vote or hold high public office.”³⁹ The rights to vote,⁴⁰ hold high public office,⁴¹ and serve on juries,⁴² are seen as political rights that go to “the heart of our system of government.”⁴³ This is so because these rights entail the formulation of public policy and community standards in addition to participation in the operation of governmental affairs. Using this conception of a “political community,”⁴⁴ the courts have upheld restrictions on the rights of aliens by reasoning that a state has a compelling interest in sheltering its concept of a “political community.”⁴⁵ The courts evidently feel that a state’s “political community” would slowly dissipate if it were not restricted to those who are familiar with this country’s political and social standards.⁴⁶ Whether this theory has any basis in either fact or reason is questionable.

35. D. Chin, *Aliens' Right to Work: State and Federal Discrimination*, 45 *FORDHAM L. REV.* 835, 838 (1976) (hereinafter referred to as Chin).

36. 413 U.S. at 648-49; 405 U.S. at 334; *United States v. Gordon-Nikkar*, 518 F. 2d 972 (5th Cir. 1975).

37. *Id.* See also *Surmeli v. New York*, 412 F. Supp. 394 (S.D. N.Y. 1976).

38. 413 U.S. 634. The Court’s reservations expressed in *Sugarman* show that the implications are that the principle of alienage as a suspect classification is far from being fully developed. Accordingly, the Court left the door open for a remission in the principle that alienage will continue to be a suspect classification.

39. *Id.* at 717.

40. *Id.* at 648.

41. *Id.* at 658.

42. 518 F. 2d at 975.

43. *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md. 1974) (three-judge court), *aff'd mem.*, 426 U.S. 913 (1976).

44. 405 U.S. at 344; 413 U.S. at 648-49; see *Surmeli v. New York*, 412 F. Supp. 394, 397 (S.D. N.Y. 1976).

45. 405 U.S. at 344.

46. *Foley v. Connelie*, 419 F. Supp. 889, 895 (S.D. N.Y. 1976), 435 U.S. 291.

The political distinction between aliens and citizens has resulted in a series of cases which, if not conflicting, are at the very best confusing. It is clear that the nature of some professions requires that citizenship be considered before hiring.⁴⁷ However, the degree of consideration which will be permitted and the occupations for which it will be allowed is where the confusion lies. The perplexity is a result of certain professions "skirting the border between purely political functions such as holding public office and purely apolitical positions such as driving taxi cabs."⁴⁸ Thus, lawyers,⁴⁹ civil servants,⁵⁰ teachers⁵¹ and state troopers,⁵² for example, engage in occupations that lie on the uncertain line; they are awaiting the stamp of judicial approval permitting citizenship to be included in the many criteria required for the particular position. In 1973, the Supreme Court rendered two key decisions on the same day, each dealing with the political distinctions between citizens and aliens.⁵³ Both decisions dealt with state restrictions on the rights of aliens to employment. *Sugarman v. Dougall*⁵⁴ addressed the validity of a New York civil service law⁵⁵ which made citizenship a requisite to holding any permanent position in the competitive class of the state civil service. In striking down the New York law as violative of the equal protection clause, the Court stated:

We recognize a State's interest in establishing its own form of government, and in limiting participation in the government to those who are within "the basic conception of a political community." But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the state employs must be precisely drawn in light of the acknowledged purpose.⁵⁶

47. See text accompanying notes 41 and 46 *supra*.

48. Chin, *supra* note 35.

49. 413 U.S. 717.

50. 413 U.S. 634.

51. *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D. N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1977) (No. 76-808).

52. *Foley v. Connelie*, 435 U.S. 291.

53. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In Re Griffiths*, 413 U.S. 717 (1973).

54. 413 U.S. 634 (1973).

55. N.Y. Civil Service Law §53(1)(1976), reads in part: "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

56. 413 U.S. at 642.

Evidently the Court has recognized that some employees “who participate in the formulation and execution of government policy”⁵⁷ are permissibly vulnerable to discrimination based on alienage because it is within a state’s power to define and limit its “political community.”⁵⁸ However, any such limitation must be “precisely drawn” and not overly broad. The Court specifically noted in dicta that a limitation on the employment of aliens, when narrowly confined, would be valid where alienage was relevant in maintaining a state’s conceptual “political community.”⁵⁹

In *Sugarman*, the Court left the door open to discrimination against aliens by recognizing that some state interests might justify a disqualification of non-citizens from employment.⁶⁰ However, that door was closed to but a crack on the same day when the Court decided *In Re Griffiths*.⁶¹ *Griffiths* made it quite clear that the proposition set forth in *Sugarman* would be strictly construed by invalidating a Connecticut court rule which limited the practice of law to citizens.⁶² The Court noted: “Lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.”⁶³ Thus, aliens are protected from discrimination in the legal field because lawyers are not sufficiently connected with the “political community” so as to justify a state’s interest in excluding aliens from this type of employment. What the Court seems to be seeking in order to sustain discriminatory statutes against aliens in the employment area is a kind of loyalty to the United States as an important requisite to faithful performance of the occupation in question. Holding high public office is an example of such an occupation.⁶⁴ However, it is doubtful that this standard can be applied extensively beyond the holding of high office since the Court has rejected the so-called “membership in the political community” argument

57. *Id.*

58. 405 U.S. at 344.

59. 413 U.S. at 649.

60. *Id.* at 647.

61. 413 U.S. at 717.

62. *Id.*

63. *Id.* It is unclear whether the Court is referring to state attorneys and United States attorneys as distinguished from those who practice privately.

64. 413 U.S. at 648.

in both the civil service employment⁶⁵ and bar admission⁶⁶ contexts. Perhaps other forms of state employment are sensitive to a possible conflict of national loyalties. The Court, in *Foley v. Connelie*,⁶⁷ raised the political distinctions between aliens and citizens which, for the first time, became the basis of the Court's decision to uphold an anti-alien statute in the employment area.

The first issue which the majority confronted in *Foley* was whether citizenship may be a relevant qualification for fulfilling important non-elective executive, legislative and judicial positions held by officers who participated directly in the formulation, execution or review of broad public policy. Relying on language used in *Sugarman*, the Court upheld this narrow exclusion⁶⁸ and recognized "a State's historical power to exclude aliens from participation in its democratic political institutions,"⁶⁹ as part of the sovereign's obligation "to preserve the basic conception of a political community."⁷⁰ The Court next focused upon the question of whether the occupation of state trooper fit into this narrow exclusion. In holding that it does, the Court noted:

The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life.⁷¹

The Court reasoned that "a policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community'⁷² who exercises no broad power over people generally."⁷³ Therefore, police officers fall within the category of

65. *Id.* at 634.

66. 413 U.S. 717 (1973).

67. 435 U.S. 291 (Upholding N.Y. Exec. Law §215(3) (McKinney Supp. 1976)).

See note 2 *supra*.

68. 435 U.S. at 300. See *In Re Griffiths*, 413 U.S. 717 (1973). This decision qualified the exception stated in *Sugarman v. Dougall*, 413 U.S. 634 (1973), and shows that this exception was to be construed within narrow limits.

69. 435 U.S. at 295.

70. *Id.*

71. *Id.* at 297.

72. See *Truax v. Raich*, 239 U.S. at 41.

73. 435 U.S. at 298-99.

“important non-elective. . . officers who participate directly in the . . . execution . . . of broad public policy.”⁷⁴ The Court concluded that “in the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position.”⁷⁵

The final question addressed by the Court was the degree of scrutiny to be applied in assessing the validity of the statute in question.⁷⁶ The majority first acknowledged that recent cases generally reflect a “close scrutiny of restraints imposed by States on aliens.”⁷⁷ Nevertheless, the majority states in dicta that it has never suggested that “such legislation is inherently invalid, nor that all limitations on aliens are suspect.”⁷⁸ The rationale is that it would be inappropriate “to require every statutory exclusion of aliens to clear the high hurdle of ‘strict scrutiny’, because to do so would ‘obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.’”⁷⁹ Consequently, the Court stated: “Our scrutiny will not be so demanding where we deal with matters firmly within a State’s constitutional prerogatives.”⁸⁰ The Court then went on to say: “The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.”⁸¹ According to the Court, this lessened degree of scrutiny is no more than a “recognition of the fact that a democratic society is ruled by its people.”⁸²

Justice Stewart, in his concurring opinion, found it difficult to reconcile the Court’s judgment in this case with the full sweep of the reasoning and authority of past decisions. “It is only because I have become increasingly doubtful about the validity of these decisions (in at least some of which I concurred) that I join the opinion of the Court in the case.”⁸³ Justice Blackmun had no problem in agreeing with the result reached in *Foley*. Citing *Sugarman v. Dougall*, he wrote, when a state is acting in accordance with dictates as set out in that case, “it need

74. *Id.* at 300; *see also* *Sugarman v. Dougall*, 413 U.S. at 647.

75. *Id.* at 300.

76. *See* note 2 *supra*.

77. 435 U.S. at 294.

78. *Id.*

79. *Id.*

80. *Id.* at 296, citing 413 U.S. 647, 648.

81. *Id.*

82. 435 U.S. at 296.

83. *Id.* at 300.

justify its discriminatory classifications only by showing some rational relationship between its interest in preserving the political community and the classification it employs."⁸⁴

Justice Marshall, with whom Justices Brennan and Stevens joined dissenting, disagreed with the majority opinion that state troopers perform functions placing them within the narrow exception as set out in *Sugarman*,⁸⁵ preferring instead to follow the usual rule that discrimination against aliens is presumptively unconstitutional:

In one sense, of course, it is true that state troopers participate in the execution of public policy. Just as firefighters execute public policy that fires should be extinguished, state troopers execute the public policy that persons believed to have committed crimes should be arrested. But this fact simply demonstrates that the *Sugarman* exception, if read without regard to its context, "would swallow the rule."⁸⁶

Justice Marshall evidently felt that *Sugarman* unambiguously holds that a blanket exclusion of aliens from state jobs is unconstitutional. He further expressed, in what appears to be the most cogent argument of the entire case, his view that the phrase "execution of broad public policy,"⁸⁷ as enunciated in *Sugarman*, cannot be read to mean "simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature."⁸⁸

Justice Stevens, with whom Justice Brennan joined, dissenting, found a rule which disqualifies an entire class of persons from professional employment "doubly objectionable."⁸⁹ He was particularly concerned with identifying the "group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien."⁹⁰ Justice Stevens felt the disqualifying characteristic to be a foreign allegiance⁹¹ which raised a doubt concerning loyalty and trustworthiness so pervasive that a flat ban against the employment of

84. *Id.* at 302.

85. *Id.* at 303.

86. *Id.* at 303-304.

87. *Id.* at 304.

88. *Id.*

89. *Id.* at 307.

90. *Id.* at 308.

91. See *In Re Griffiths*, 413 U.S. at 726 (persons, other than citizens, can in good conscience, take an oath to support the constitution); *Hampton v. Mow Sun Wang*, 426 U.S. 88, 111 (1976).

any alien in "any law enforcement position"⁹² would be justified. "But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law?"⁹³ The dissenters here felt that, unless the Court repudiates its holding in *In Re Griffiths*,⁹⁴ it had to reject any "conclusive presumption that aliens, as a class, are disloyal or untrustworthy."⁹⁵ The dissenting members of the Court charged that, should the majority reject its analysis, it should not uphold "a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the discrimination."⁹⁶ The dissenters reasoned that, "[i]f there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court."⁹⁷

As a result of the majority's holding in *Foley v. Connelie*,⁹⁸ the standard enunciated in *Massachusetts Board of Retirement v. Murgia*,⁹⁹ for reviewing legislation which is to "the peculiar disadvantage of a suspect class,"¹⁰⁰ is severely weakened, as is *Graham*,¹⁰¹ which held state classifications based on alienage, nationality or race, inherently suspect and subject to close judicial scrutiny. The Supreme Court has refused to treat New York's classification as suspect and apply the degree of scrutiny which past decisions seem to have mandated. These past decisions of the Court have expressly held that any statute distinguishing aliens from citizens be "precisely drawn and narrowly confined."¹⁰² It is apparent that the statute in question¹⁰³ is neither "precisely drawn" nor "narrowly confined."¹⁰⁴ To the contrary, it is overly broad and thereby imposes an unnecessary burden on the basic right to have access to employment. It will be difficult, indeed, for the Court to reconcile the decision in *Foley* with past holdings which have been highly critical

92. 435 U.S. at 308.

93. *Id.*

94. 413 U.S. 717 (1973); *see also* text accompanying note 62 *supra*.

95. 435 U.S. at 308.

96. *Id.* at 311-12.

97. *Id.* at 312. "The Court has squarely held that a state may not treat employment as a scarce resource to be reserved for its own citizens."

98. 435 U.S. 291.

99. 427 U.S. 307 (1976).

100. *Id.*

101. 403 U.S. 365 (1971).

102. 413 U.S. at 644.

103. N.Y. Exec. Law §215(3) (McKinney Supp. 1976).

104. 413 U.S. at 644.

of blanket prohibitions against employment of aliens and of statutes which "sweep indiscriminately against aliens by restricting jobs to citizens only."¹⁰⁵ To attempt to predict the future course of the Supreme Court on this subject would be to engage in pure speculation. Past inconsistencies clearly demonstrate that only the Court itself is equipped to explain the parameters of the *Foley* decision.

Douglas A. Blankman

105. *Id.*; *accord*, *Examining Bd. v. Flores de Otero*, 426 U.S. 527 (1976).

Broadcasters' First Amendment Rights Through the Courts with "The Seven Dirty Words:" F.C.C. v. Pacifica Foundation

On October 30, 1973, a New York radio station broadcast comedian George Carlin's recorded monologue, "Filthy Words,"¹ which consisted primarily of the repetitive use of seven four-letter words² depicting sexual or excretory organs and activities, which could not be said on the public airways. The recording was played near the close of a regularly scheduled noon-time talk show on Radio Station WBAI (FM) to highlight the preceding topic of discussion concerning the attitude of contemporary society toward language. Immediately prior to the broadcast, listeners were advised that the recording included language which might be offensive, and those not wishing to hear it were asked to "change the station and return to WBAI in fifteen minutes."³

On December 3, 1973, the Federal Communications Commission received a complaint from a father who had heard the broadcast while driving in his car with his young son.⁴ He wrote that, although he might understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."⁵ This complaint succinctly poses the problem: To what extent does the F.C.C. control the programming content broadcast by the stations it licenses?

Section 29 of the Radio Act of 1927,⁶ in its prohibition against

1. The monologue was from the Album "George Carlin, Occupation: FOOLE", Little David Records. Citizens Complaint Against Pacifica Foundation Station WBAI(FM), N.Y., N.Y., 56 F.C.C. 2d 94, 95 (1975).

2. *Id.* at 99. There were seven words complained of: "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit." See Appendix for text of the broadcast.

3. *Id.* at 96.

4. This was the only complaint lodged with either the F.C.C. or WBAI concerning the broadcast. *Pacifica Foundation v. F.C.C.*, 556 F.2d 9, 11 (D.C. Cir. 1977).

5. *F.C.C. v. Pacifica Foundation*, 98 S.Ct. 3026, 3030 (1978).

6. 44 Stat. 1172-1173 (1927).

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted

ensorship, unequivocally denied the Commission any power either to edit proposed broadcasts or excise any material considered inappropriate for the airwaves.⁷ "This prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties."⁸

The courts, both during the period between the original enactment of the 1927 provision and its reenactment in the Communications Act of 1934,⁹ and after, have consistently interpreted the provision the same way.¹⁰

Following its usual practice regarding the review of completed programming in the wake of a complaint,¹¹ the F.C.C. forwarded the complaint to WBAI licensee, Pacifica Foundation, to give it an opportunity

by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

7. 98 S.Ct. 3026, 3033 (1978).

8. *Id.*

Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on "censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular programs.

2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 641 (1947).

9. *KFKB Broadcasting Ass. v. Fed. Radio Commission*, 47 F. 2d 670 (D.C. Cir. 1931). The court held that it was within the Commission's power to deny license renewal to the station based on its evaluation that many of the programs broadcast served private interests of the licensee. The licensee was controlled by a doctor who in the course of a medical information program, often prescribed mixtures prepared by his pharmaceutical association.

Trinity Methodist Church, South v. Fed. Radio Commission 62 F. 2d 850 (D.C. Cir. 1932). The Commission refused to renew a license basing its decision on broadcasts by a minister who frequently referred to pimps and prostitutes and made bitter attacks on the Catholic Church.

10. *See, e.g., Bay State Beacon, Inc. v. F.C.C.*, 171 F. 2d 826 (D.C. Cir. 1948); *Idaho Microwave, Inc. v. F.C.C.*, 352 F. 2d 729 (D.C. Cir. 1965); *National Assn of Theatre Owners v. F.C.C.*, 420 F. 2d 194 (D.C. Cir. 1969) *cert. denied*, 397 U.S. 922 (1970).

11. The F.C.C. attempts to maintain a complete file on the licensee presenting all sides of an issue which may have arisen during the course of a license period. When the renewal application is submitted, this file will provide some basis for the Commission's action regarding the license. (Broadcast station licenses are issued for a period of three years.) In re Applications of Pacifica Foundation, 36 F.C.C. 147, 148 (1964).

for reply and comment. Pacifica's reply discussed its view of the validity of the broadcast. George Carlin was described as a "significant social satirist . . . [who] finds his material in our most ordinary habits and language" ¹² In explanation as to why the particular broadcast was made, the reply stated:

In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate . . . ¹³

The F.C.C. did not share the view that such material merited exposure on the public airwaves and issued a declaratory order to that effect. ¹⁴ The Commission based the order on the authority granted it by 18 U.S.C. § 1464 (1970), which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years or both." It found further statutory support in 47 U.S.C. § 303 (1970) which directs the Commission to "generally encourage the larger and more effective use of radio in the public interest . . . as public convenience, interest, or necessity requires."

No sanctions were imposed, but the Commission directed that the order be associated with the station license file. Receipt of any subsequent complaints would have forced the Commission to decide whether it should utilize any of the available sanctions granted it by Congress. ¹⁵

Within the framework of the order the Commission reformulated its definition of "indecent" in connection with Section 1464. ¹⁶ The

12. 56 F.C.C. 2d 94, 96 (1975).

13. *Id.* at 96.

14. *Id.* at 99. Such an order is viewed as a device to facilitate settling a controversy between a listener and a station. Reconsideration of the Commission's action is available, and if controversy remains judicial review may be sought immediately.

15. The Congress has specifically empowered the F.C.C. to (1) revoke a station's license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of § 1464. 47 U.S.C. § 312 (a) § 312 (b). § 503 (6)(1)(E) (1970). The F.C.C. can also (4) deny license renewal or (5) grant a short term renewal. 47 U.S.C. § 307, § 308 (1970).

16. 18 U.S.C. § 1464 (1970). "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000. or imprisoned not more than two years or both."

previous definition of "indecent"¹⁷ was offered by the Commission in 1970 in *In Re WUHY-FM*¹⁸ when it said that the standard in the broadcast field should be that "the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."¹⁹

Subsequent Court decisions, specifically *Miller v. California*,²⁰ furnished the basis for redefining "indecent." The Commission pointed out that "the concept of 'indecent' is intimately connected with the exposure of children to language that describes in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at the times of day when there is a reasonable risk that children may be in the audience."²¹ The *Miller* standard which protects language with serious literary, artis-

17. The F.C.C. definition was based on the obscenity standards of *Roth v. U.S.*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). At that time the community standard was held to be a national standard. *Jacobellis v. Ohio*, 378 U.S. 184 (1963). For the difficulties encountered by the Supreme Court between the *Roth* and *Memoirs* decisions, See Note, 75 YALE LAW JOURNAL 1364 (1966).

18. 24 F.C.C. 2d 408, 409 (1970). Here, a taped interview with rock singer Jerry Garcia of "The Grateful Dead" was broadcast between 10:00 and 11:00 P.M. on a program with "underground" orientation. Garcia's expression of his views on life in general was laced with some of the words under consideration in *Pacifica* used as adjectives, expletives or substitutes for phrases. Examples are: "I must answer the phone 900 f-----n times a day, man." "That kind of s-----t." "Political change is so f-----g slow."

19. *Id.* at 412.

20. 413 U.S. 15 (1973). In *Miller*, the matter of sending unsolicited sexually explicit material through the U.S. mails, in violation of a California statute, was examined. A definition of obscenity which marked a retreat from *Roth* and *Memoirs* was announced:

The basic guidelines for the trier of fact must be: a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth* supra at 489, b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 15. The *Memoirs* test of "utterly without redeeming social value" was rejected as was the national standard criteria from *Jacobellis*. This latter holding is further strengthened in *Hamling v. United States*, 418 U.S. 87 (1974).

The *Miller* Court suggested two definitions of conduct which would constitute "patent offensiveness:" (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. *Id.* at 25.

21. 56 F.C.C. 2d 94, 98 (1975).

tic, political or scientific value will be considered except when children are in the audience.²²

In reaching this conclusion, the Commission reiterated its view that the pervasive and intrusive nature of the broadcast media provide the rationale for closer scrutiny of material that might be suitable for some other form of expression.²³ The Commission outlined four important considerations to illustrate why broadcasting requires special treatment:

- (1) [C]hildren have access to radios and in many cases are unsupervised by parents;
- (2) [R]adio receivers are in the home, a place where people's privacy interest is entitled to extra deference, . . .
- (3) [U]nconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast and
- (4) [T]here is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.²⁴

Utilizing the new definition of indecent and considering the special nature of the broadcast media, the Commission sought to channel rather than prohibit the broadcast of such language with its order. The implication was that a different standard might conceivably be used when fewer

22. *Id.* *Pacifica* stated in 1964 in its license renewal application that "it is sensitive to its responsibilities to its audience and carefully schedules for late night broadcasts those programs which may be misunderstood by children, although thoroughly acceptable to an adult audience." 36 F.C.C. 147, 149 (1964).

The Commission, in its discussion of the relevance of a broadcast's being unacceptable for children cited also to *Sonderling Corp.* affirmed sub. nom. *Illinois Citizens Committee for Broadcasting, et al v. F.C.C.*, 515 F.2d 397 (D.C. Cir. 1975). This is "the first judicial decision upholding the F.C.C.'s conclusion that the probable presence of children in the audience is relevant to a determination of obscenity." 56 F.C.C. 2d at 94. Here the Commission dealt with two programs on radio call in shows which were broadcast during daytime hours in which oral sex was a topic of discussion. One exchange is cited by the F.C.C. as follows:

Female listener: . . . of course I had a few hangups at first about—in regard to this, but you know what we did—I have a craving for peanutbutter all that (sic) time so I used to spread this on my husband's privates and after a while, I mean, I didn't even need the peanut butter anymore.

Announcer: (laughs) Peanut butter, huh?

Listener: Right. Oh, we can try anything-you-know-any, any of these women that have called and they have, you know, hangups about this, I mean they should try their favorite-you-know, like, uh. . .

515 F.2d at 401, n.4.

23. 56 F.C.C. at 97.

24. *Id.*

children were in the audience and the program had some literary, artistic, political or social value.²⁵

COURT OF APPEALS RULES FOR PACIFICA

Those who had hoped that a definition of "indecent" might finally be authoritatively construed by the courts in connection with Section 1464,²⁶ were to be disappointed when the United States Court of Appeals for the District of Columbia relied on Section 326 of the Communications Act to vacate the Commission's Order.²⁷

The Act provides:

Nothing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.²⁸

The three judge court was split. The two judges comprising the majority concurred on the result but did not reach the conclusion by the same route. Judge Tamm, who wrote the opinion, reasoned that the *Miller*²⁹ obscenity standard as utilized by the Commission in its order, required a finding that the subject matter of the Carlin broadcast was protected speech under the first amendment,³⁰ and he therefore viewed the action of the Commission as censorship under Section 326. He went on to say that, even assuming the F.C.C. might regulate non-obscene or "indecent" speech, the order was overbroad for failure to take context into account³¹ and vague for failure to define the class it sought to

25. *Id.* at 98.

26. *See* note 16 *supra*.

27. *Pacifica Foundation v. F.C.C.* 556 F.2d 9 (1977).

28. 47 U.S.C. § 326 (1970).

29. 556 F.2d 9, 16 (1977). *See* note 19 *supra*.

30. U.S. Const. Amend. 1 (1791):

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

31. Judge Tamm interpreted the order as, in effect, creating a sweeping ban when there is a reasonable risk that children will be in the audience. An amicus brief indicated that large numbers of children are in the audience until 1:30 a. m. and indicated the number of children does not fall below one million until 1:00 a.m. 556 F.2d, at 14. He

protect.³²

In his concurring opinion, Judge Bazelon addressed the first amendment question. He reasoned that Section 326 prohibits all censorship of broadcast programming content by the F.C.C. but that Section 326 is limited by Section 1464,³³ which in turn must be limited by the first amendment.³⁴ He then looked to the standards of protection in other media to determine if the unique characteristics of broadcasting justified the expansion of governmental regulation.³⁵ The factors he considered included privacy in the home,³⁶ the protection of unconsenting adults,³⁷ the threat of a flood of filth on the airwaves,³⁸ the significance of the technological scarcity of spectrum space,³⁹ and the presence of children in the audience.⁴⁰ Despite this multilevel examination, Judge Bazelon also determined that there was no justification for creating a new area of regulated speech and found the order of the Commission to be unconstitutional.⁴¹ Thus, the order was held impermissible as

emphasized that under this order works of Shakespeare and portions of the BIBLE might not be considered suitable. 556 F.2d at 17.

32. *Id.* at 17. Judge Tamm questioned which children the Commission was trying to protect by its order, since age of minors is not mentioned as a factor, although it is considered a significant factor in analyzing capacity for individual choice. *Rowan v. Post Office*, 397 U.S. 728 (1970). Nor did the captive audience theory impress Judge Tamm. He found it persuasive only where it is impractical to avoid exposure, and apparently he did not consider a twist of the dial an impractical measure. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

33. *See* note 16 *supra*.

34. 556 F.2d at 18. The first amendment to the Constitution provides in part: "Congress shall make no laws . . . abridging the freedom of speech or of the press".

35. *Id.* at 20.

36. *Id.* at 25, citing to *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), which held individuals may require mail advertisers to remove their names from mailing lists and to stop sending lewd or offensive materials.

37. 556 F.2d at 25, Citing to *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1925). An ordinance making it a public nuisance for a drive-in theater to show films containing nudity where the screen was visible to the public was held invalid. The public, if offended, must avert its eyes. This measure is advised in *Cohen v. California*, 403 U.S. 15, 91 (1971) where an individual was prosecuted for entering a courthouse wearing a jacket with the words, "Fuck the Draft" on the back.

38. 556 F.2d at 29. This fear was considered unrealistic in view of the economic impact of a public which considers itself overwhelmed by objectionable programming.

39. *Id.*

40. *Id.* at 28. Citing to *Ginsberg v. New York*, 390 U.S. 629 (1968), where a New York Statute prohibiting knowing sales to minors of materials which appeal to purient interests was upheld on the basis that children lack the full capacity for choice.

41. 556 F.2d at 30.

censorship, and the words were not to be stripped of protection without consideration of content or redeeming value.⁴²

Judge Leventhal, the lone dissenter, chided the majority for treating the F.C.C. order as though the broadcast of any of the "seven dirty words" was prohibited when it held only "that the language *as broadcast* was indecent and prohibited by 18 USC 1464."⁴³ He pointed out that the Commission had indeed channeled its order in that it specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent, particularly when children are in the audience" would not force on the general listening public only those ideas "fit for children."⁴⁴ He felt that the early afternoon hour of the broadcast was vital to the order.⁴⁵

As he construed the order, it reflected an effort to define the word "indecent" in terms of the same underlying considerations which prompted the decision of the Supreme Court in *Miller*.⁴⁶ In summation of his position, Judge Leventhal said:

As a judge of what the Constitution calls an 'inferior court,' my duty is to apply *Miller* unless and until the Supreme Court modifies it . . . It leads me to affirm the F.C.C.'s effort to apply *Miller* in the context of daytime broadcasting—when the protection of children is a compelling state interest.⁴⁷

SUPREME COURT REVERSES FIVE TO FOUR

On appeal to the high Court,⁴⁸ in the opinion of a majority of the Justices, Carlin's own estimation of his words as those ". . . you couldn't say on the public, ah airwaves, um, the ones you definitely wouldn't say ever . . ." ⁴⁹ prevailed.

42. *Id.* at 21.

43. *Id.* at 31.

44. *Id.*

45. *Id.*

46. *Id.* at 32. Even the dissent in *Miller* abstained from discussing state power over distribution of obscene material to juveniles. Judge Leventhal felt that the decision pointed out that "exposure to children marks a special enclave in the law of freedom of publication."

47. *Id.* at 37.

48. *F.C.C. v. Pacifica Foundation*, 98 S.Ct. 3026 (1978). Strong dissent was registered by Justices Brennan, Marshall, Stewart and White in two opinions authored by Justice Brennan and Justice Stewart.

49. *See* Appendix for text of the broadcast.

The Court, limiting the scope of review, found no effect of adjudication, rule making or promulgation of regulations in the Commission's Order.⁵⁰ Justice Stevens, writing for the majority, stated the Court's policy of confining its review to judgments, not statements in opinions, thus avoiding deciding unnecessary constitutional questions which might be raised by such statements.⁵¹ The Court's examination was confined, therefore, to the specific fact situation of the case: Was the Carlin recording indecent as broadcast? Whether or not the Commission's declaratory order was to be upheld hinged on the determination of that issue. To answer the question, the Court examined the two statutes which were prominent in the opinion of the lower court and posed two additional questions: Was the Commission's action censorship within the meaning of 48 U.S.C. § 326?⁵² May speech which is not obscene, nevertheless, be restricted as "indecent" under 18 U.S.C. § 1464?⁵³

The Court did not take issue with the traditional Commission practice of reviewing completed broadcasts in the course of its regulatory activity⁵⁴ and noted that until this case the Court of Appeals for the District of Columbia had consistently agreed that this type of review was not the sort of censorship at which Section 326 was directed.⁵⁵ The Court pointed out that "[a] single section of the 1927 Radio Act was the source of both the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language,"⁵⁶ and, therefore, Congress plainly intended to give meaning to both provisions. Justice Stevens concluded that Section 326 did, indeed, allow the Commission to sanction licensees who broadcast obscene or indecent language.⁵⁷

50. 98 S.Ct. at 3032.

51. *Id.* at 3032, 3033.

52. 48 Stat. 1091; 47 U.S.C. § 326 (1970).

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

53. 18 U.S.C. § 1464 (1970). "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years or both".

54. 98 S.Ct. at 3033. *See* note 9 *Supra*.

55. *Id.* at 3034.

56. *Id.*

57. *Id.* at 3035.

The Court then examined the meaning of "indecent" as it related to Section 1464 to determine if the F.C.C. could sanction non-obscene language. Pacifica argued that the meaning of "indecent" was subsumed by the definition of obscenity delineated in *Miller*.⁵⁸ If this argument had been accepted, the absence of prurient appeal would have been critical in determining the validity of the Commission's order. The Commission had determined that the manner and content was patently offensive and indecent, but distinguished the latter concept from obscenity on the basis of lack of appeal to prurient interests.⁵⁹ Pacifica relied primarily on the Supreme Court's interpretation of "indecent" under Section 1461⁶⁰ in *Hamling v. United States*⁶¹ where the words "obscene," "lewd," "lascivious," "indecent," "filthy" or "vile" were taken as a whole and limited to "obscene." The majority distinguished the two statutes, however, pointing out that Section 1461 deals primarily with printed matter in sealed envelopes traversing the mails while Section 1464 deals with the content of public broadcasts.⁶² While the standard as to the mails does require a showing of obscenity,⁶³ the Commission has repeatedly interpreted Section 1464 to encompass more than the obscene.⁶⁴ Based on prior decisions and the history of Section 1464, the Court rejected Pacifica's argument and concluded that prurient appeal was not a component of indecent language.⁶⁵

58. See note 19 *supra*, for discussion of *Miller* standards.

59. 556 F.2d at 98. Pacifica did not argue that the components of the Commission's indecency definition were not present in the Carlin Broadcast.

60. Section 1461 is directed at "mailing obscene or crime inciting matter — every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . ."

61. 418 U.S. 87 (1974).

62. 98 S.Ct. at 3036.

63. 418 U.S. 87 (1974).

64. [W]hile a nudist magazine may be within the protection of the First Amendment . . . Similarly, regardless of whether the 'four letter words' and sexual description set forth in 'Lady Chatterley's Lover,' (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activities on radio or TV would raise similar public interest and § 1464 questions.

Programming Policy Statement, 44 F.C.C. 2303, 2307 (1960). See also WUHY-FM, 24 F.C.C. 2d 408, 412 (1970); Sonderling Broadcasting Corp., 27 R.R. 2d 285, on reconsideration, 41 F.C.C. 2d 777 (1973), *aff'd* on other grounds *sub nom*, Illinois Citizens Committee for Broadcasting v. F.C.C., 515 F. 2d 397 (1975); Mile High Stations, Inc., 28 F.C.C. 795 (1960); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962).

65. 98 S. Ct. at 3036.

Finally, Justice Stevens addressed the constitutional attacks made by Pacifica. By refusing to step outside the bounds of the specific "factual context," the court rejected Pacifica's first contention that the breadth of the Commission's interpretations required reversal whether the broadcast of "filthy words" was protected or not.⁶⁶ The Commission had apparently emphasized the narrow scope of its order to the satisfaction of the Court, thus the Court was unwilling to rule on the basis of hypothetical situations which might or might not arise in the future.⁶⁷

The Court also found its ruling to be consistent with *Red Lion Broadcasting Co. Inc. v. F.C.C.*,⁶⁸ where it rejected an argument that the Commission's regulations defining the fairness doctrine were so vague as to abridge the broadcasters' freedom of speech.⁶⁹ The Court dismissed concerns of self censorship in the context of this controversy with the observation that "at most, however, the Commission definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities"⁷⁰ and felt that the effect would be one of form, not content, since there are very few thoughts that could not be expressed by less offensive language.⁷¹

Pacifica's insistence that the first amendment forbids curtailing the right to broadcast material which is not obscene led the Court to examine the effect of the content, the context, and the medium of delivery on any interpretations of speech as protected or not. The opinion stopped short of finding a general power to regulate the broadcast of "indecent" speech in any circumstances but did not indicate that such a notion was abhorrent or even implausible.⁷²

In outlining the limitations which have emerged, the Court cited to *Shenck v. United States*,⁷³ the earliest case of significance in which the problem of protected speech arose. There Chief Justice Holmes observed that only where a "clear and present danger" to the public wel-

66. *Id.*

67. *Id.* at 3037. "Invalidating any rule on the basis of its hypothetical application to situations not before the court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

68. 395 U.S. 367 (1969).

69. *Id.* The Court rejected the notion that broadcasters would respond to the vagueness by refusing to present controversial political and social programs.

70. 98 S. Ct. at 3037.

71. *Id.* at note 18.

72. *Id.* "[I]f the government has any such power, this was an appropriate occasion for its exercise."

73. 249 U.S. 47 (1919).

fare arose could expression be prohibited.⁷⁴ The Court proceeded to note other instances of expression where regulation has been considered appropriate;⁷⁵ for example, “fighting words,”⁷⁶ distinctions between commercial speech and other varieties,⁷⁷ libels against private citizens as opposed to public officials⁷⁸ and obscenity which might be wholly prohibited.⁷⁹ In this analysis, the specific matter of the “seven dirty words” arose again, and the Court found no rationale for protection on a content basis. The Court recognized that the government must remain neutral in the marketplace of ideas and found no political idea or opinion at issue. It characterized the monologue as a point of view and offered it no special protection.⁸⁰ Two instances were cited in which one of the seven words was afforded protection,⁸¹ but the Court recalled there was

74. *Id.* at 52. This case involved the wartime mailing circulars to draftees urging noncompliance and insubordination. Justice Holmes wrote:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

75. 98 S. Ct. at 3038.

76. *Id.* Citing to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) as the first in a line of cases where the state interest in preventing violence curtailed the speaker's rights: “the fear was that the provocativeness of the speech would so enrage either the immediate addressee or audience generally so that violence might result.” See GUNTHER, *CONSTITUTIONAL LAW*, 1164 (9th ed. 1975).

77. 98 S. Ct. at 3038 citing *Bates v. State Bar*, 433 U.S. 350, 381 (1977). See also *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

78. 98 S. Ct. at 3038 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

79. 98 S.Ct. at 3038 citing *Roth v. U.S.*, 354 U.S. 476, *rehearing denied*, 355 U.S. 852 (1957) sparked the controversy concerning first amendment protection of obscenity. See also *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973). See note 19 *supra*. *C.F. Young v. American Mini Theatres*, 427 U.S. 50 (1976) where an ordinance seeking to contain the showing of explicit “adult” movies by means of zoning regulations was upheld.

80. 98 S.Ct. at 3038. The Court in Note 22 offered no reason why it could not accept Carlin's monologue as satire, but hints that, if it could, protection might be in order.

81. *Id.* at 3039 citing *Hess v. Indiana*, 414 U.S. 105 (1973), a reversal of a disorderly conduct conviction. The Court noted that the words, “We'll take the fucking street later, or again,” were not obscene when uttered by an anti-war demonstrator after

no dispute as to the “vulgar,” “offensive” or shocking quality of the language and merely assumed *arguendo* that the Carlin language would be protected in other contexts.⁸²

The Court noted that the broadcast media have historically received the “most limited first amendment protection.”⁸³ This may be readily observed if the status of newspaper publishers is contrasted to that of broadcasters in the matter of fairness in presenting issues to the public.⁸⁴ Although newspaper publishers need not provide space for replies from those they criticize,⁸⁵ broadcasters must provide reasonable free time for reply to the targets of their criticism.⁸⁶ The Court examined the two qualities of the broadcast media which make them unique: the pervasive presence in the lives of all Americans, especially considering the privacy of the home,⁸⁷ and the accessibility to children, even those too young to read.⁸⁸ In the eyes of the Court the fact that individuals may merely turn the dial to the “off” position or another station does not offer enough protection to the unwilling listener in his home.⁸⁹ What the Court saw as more important, however, was the policy of supporting “parents’ claim to authority in their household and the government’s interest in the well being of its youth.”⁹⁰

The Court found the Commission’s examination of context and its use of the nuisance theory appropriate. The opinion emphasized the variables such as time of day and the content of the program in which the questionable language is used. In addition, audience composition and the differences between radio, television and even closed circuit television must be considered. The opinion concluded by alluding to Mr.

police had cleared the street. *See also* *Cohen v. California*, 403 U.S. 15 (1971), *See* note 25 *supra*. The Court in *Cohen* rejected the argument that unwilling viewers would be offended by a jacket bearing the words “Fuck the Draft” as there was no evidence that anyone had objected.

82. 98 S.Ct. at 3039.

83. *Id.* at 3040.

84. *Id.*

85. *Id.* citing to *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

86. 98 S. Ct. at 3040 citing *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367., 390 (1969). In application of the fairness doctrine, the Court said “[i]t is the purpose of the first amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee”

87. 98 S.Ct. at 3040.

88. *Id.*

89. *Id.*

90. *Id.*

Justice Sutherland's characteristic of nuisance as "merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard"⁹¹ and held that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."⁹²

In his concurring opinion, Justice Powell, joined by Justice Blackmun, considered the channeling of the order is an effort to protect children in the audience most appropriate.⁹³ He agreed that the unique qualities of broadcasting and the resulting limitations placed on the media's first amendment protection, as well as its widespread availability in the home and to young children, were basic to the decision. He conceded that the listener may tune out and that broadcasters may warn before the program begins, but Justice Powell was particularly concerned with the unsuspecting listener who has no warning. The covers of books and records or the marquees of theaters were considered to offer a warning, but the unwilling broadcast listener might be required to "absorb the first blow" of offensive speech.⁹⁴ In public, this might be acceptable, but the listener in the home required special consideration.⁹⁵ He considered it sufficient protection that the Carlin material is available at live performances and on records and that it is not entirely prohibited from the airwaves.⁹⁶

Justice Powell departed from the majority in order to take issue with the extent to which the majority examined the content of the broadcast. In his opinion, the Justices of the Supreme Court are not the sole arbiters of "valuable" speech and the resulting degree of protection, and that "line(s) may be drawn on the basis of content without violating the government's obligation of neutrality in its regulation of protected communications."⁹⁷ It appears that it was Justice Powell's belief that the

91. *Id.* citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

92. 98 S.Ct. at 3041.

93. *Id.* at 3044.

94. *Id.* at 3045.

95. *Id.* at 3046. Justice Powell did not brush aside the argument of *Butler v. Michigan*, 352 U.S. 380, 383 (1957), that adults will be reduced to listening only to what is appropriate for children, and instead said it is a problem to be reckoned with, but not with the result that the Commission should have no power to regulate this type of broadcast.

96. *Id.* at 3046. In addition to the late evening hours, Justice Powell writes that there is no apparent prohibition of the broadcast of "discussions of the contemporary use of language at any time during the day." Curiously this is how Carlin's broadcast is characterized by *Pacifica* and the Court of Appeals. 556 F.2d 9 (1977).

97. 98 S.Ct. at 3046, 3047 quoting *Young v. American Mini Theaters*, 427 U.S.

Commission's order would have been more appropriate if it were specifically a regulation of time of broadcast.

The four dissenters unanimously disagreed with the majority's broad interpretation of "indecent" in Section 1464.⁹⁸ The Court had recently construed the descriptive language of Section 1461 in *Hamling v. United States*,⁹⁹ the dissenters saw no rationale for departure from that rule. They felt "indecent" had the same meaning as "obscene" as defined by *Miller*,¹⁰⁰ and that this was not a novel construction.¹⁰¹ They also noted that the F.C.C. had indicated it followed this construction as to the 47 U.S.C. § 223 (1968) prohibition of "obscene, lewd, lascivious, filthy or indecent" telephone calls.¹⁰² Furthermore, although Section 1461 and Section 1464 were not enacted together, they were codified together in the 1948 Criminal Code obscenity chapter, and the dissent read them as prohibiting nothing *more*.¹⁰³ That the Carlin monologue was not obscene was, in the opinion of the dissenters, undisputed. Therefore, they reasoned that the Commission had no statutory authority to ban the broadcast.¹⁰⁴

Justice Brennan was not so temperate in his dissenting opinion where he was joined by Justice Marshall.¹⁰⁵ In fact, in his opinion, whether or not the pig was obscene, the majority had burned the house to roast it!¹⁰⁶ He deplored what he viewed as a step toward the

50, 63-73 (1976) where the Court held "regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political or philosophical message the film may be intended to communicate".

98. 98 S.Ct. at 3055. Justice Stewart's dissent, in which Justices Brennan, White and Marshall join.

99. 418 U.S. 87 (1974). The words "obscene," "lewd", "lascivious", "indecent", "filthy" or "vile," were taken as a whole and construed to mean "obscene."

100. See note 19 *supra* for Miller discussion and standards.

101. 98 S.Ct. at 3056. Justice Stewart cites to *Dunlop v. U.S.* 165 U.S. 486, 500-501 (1897), and *Manual Enterprises v. Day*, 370 U.S. 478, 482-484, 487 (1962).

102. 98 S.Ct. at 3056 note 7. When the Federal Communications Act was amended in 1968 to prohibit "obscene, lewd, lascivious, filthy or indecent" telephone calls, Pub. L. 90-299, 82 Stat. 112, 47 U.S.C. § 223, the F.C.C. indicated that it thought this language covered only "obscene" telephone calls. See H.R. Rep. No. 1109, 90th Cong., 2d Sess., 7-8 (1968).

103. 98 S.Ct. at 3056.

104. *Id.* Two additional points are addressed in the footnotes of the dissenting opinion. First, the F.C.C.'s attempted use of 47 U.S.C. § 303(9) failed as an independent basis for its action. Second, the general rule of levity in construction of criminal statutes supported the dissent's position.

105. 98 S.Ct. at 3047.

106. *Id.* at 3049.

“homogenization of radio communications”¹⁰⁷ and could find no justification for the majority holding, given either the intrusive nature of the broadcasting media or the presence of unsupervised children in the audience.¹⁰⁸ Justice Brennan wrote that “the invasion of a privacy interest must be affected in an intolerable manner before government action in prohibiting discourse is justified.”¹⁰⁹ Additionally, the action of the individual in listening, even in the home, should more properly be viewed as having an affirmative component, as a “decision to take part . . . in an ongoing public discourse.”¹¹⁰ This is a situation far removed from the “intrusive modes of communication, such as sound trucks,” [since] “[t]he radio can be turned off” . . . —and with a minimum of effort.”¹¹¹ The *Pacifica* decision reflected, in his opinion, an improper balancing of interests totally unsupported by precedent. He noted that *Rowan v. Post Office Department*,¹¹² on which the court relied, left the decision as to the offensiveness of material, and whether or not such material may come into the home, entirely in the hands of the individual householder.¹¹³

Undeniably, he felt, the government has a special interest in the well-being of children; this has been provided for by the “variable obscenity” standard of *Ginsberg v. N.Y.*¹¹⁴ The subsequent *Miller* decision has not been specifically related to the *Ginsberg* formulation, but Justice Brennan insisted that controlled speech, even as to children, must have some significant erotic content.¹¹⁵ He felt that “[t]he Court’s refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults, material which may not constitutionally be kept even from children.”¹¹⁶

107. *Id.* at 3048.

108. *Id.* In Justice Brennan’s opinion, there are no “limiting principles” by which to maintain either standard.

109. 98 S.Ct. at 3048, quoting *Cohen v. California*, 403 U.S. 21 (1971).

110. 98 S.Ct. at 3048. See Note, *Filthy Words, the F.C.C., and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 618 (1975).

111. *Id.* at 3049, citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

112. 397 U.S. 728 (1970). See note 34 *supra*.

113. 98 S.Ct. at 3049.

114. *Id.* at 3050, citing 590 U.S. 629 (1968), Justice Brennan noted the adoption of a standard in that case “that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors.”

115. 98 S.Ct. at 3050.

116. *Id.*

Justice Brennan was disturbed by what he termed the lack of principled limits for the two major elements on which the decision was based. To what extent may control in the name of intrusion into the home and the protection of children evolve? If taken to the logical extreme, much of what was considered appropriate might be subject to regulation,¹¹⁷ and he was not content to rely on either the judgement of the F.C.C. or the ability of the Court to assess the worth of the various types of speech.¹¹⁸ "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand."¹¹⁹

Justice Brennan pointed out that words chosen to express an idea may be, in a sense, interwoven with the idea itself and that, in purging the words, a censoring of the idea will result.¹²⁰ He also believed the majority's reliance on *Young v. American Mini Theatres*¹²¹ was in error since *Young*, unlike *Pacifica*, had "goals other than the channeling of protected speech."¹²² No apparent object other than the channeling of speech existed in the Commission's order, and while *Young* did not restrict the access of the material in the marketplace, Justice Brennan believed the order in *Pacifica* totally prohibits broadcasters from sending or listeners receiving the material.¹²³

Finally, he deplored the "ethnocentric myopia" of the Court for a

117. *Id.* at 3051: *i.e.*, The rationale could justify the banning from the radio of many great literary works, repress a good deal of political speech such as the Nixon tapes, and even some parts of the BIBLE.

118. *Id.* at 3052.

119. *Id.*

120. *Id.* at 3053, referring to Justice Harlan's opinion in *Cohen v. California*, 403 U.S. 21, 23, 25 (1971).

[M]uch linguistic expression serves a dual communicative function . . . In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

121. 427 U.S. 50 (1976). The Court in *Young* found zoning ordinances seeking to contain exhibition of potentially offensive material in the interest of maintaining the integrity of the neighborhood to be an acceptable form of regulation.

122. 98 S.Ct. at 3053.

123. *Id.* at 3054. As with the words themselves, Justice Brennan believed that the choice of the medium of delivery lies outside the hands of the government.

decision which he felt reflected a lack of sensitivity to at least some of the subcultures in our nation.¹²⁴ Justice Brennan felt the holding might be likely to affect broadcasters in serving some minority groups and, consequently, Justice Brennan finds the character of the holding reflected "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting and speaking."¹²⁵

IN THE WAKE OF THE DECISION

The decision strikes down a major effort by the broadcasting establishment to stake out new first amendment protection for that media.¹²⁶ *Broadcasting* magazine, the major journal of its industry, editorially deplored and was astonished by the court ruling which, in its opinion, had created a substitute for the eroded justification of "scarcity" of broadcast facilities to give the government hands on control. Armed with the criteria of broadcasting's pervasiveness and its unique access to children, future regulators have been practically invited to intrude in broadcast operations.¹²⁷

The National Association of Broadcasters fears that with *Pacifica* under its belt, the F.C.C. will not stop with the seven dirty words and the original list of words will be expanded, further abridging broadcasters' first amendment freedom.¹²⁸ That fear may not be unrealistic. Georgia legislator Julian Bond recently announced plans to file a suit against the F.C.C. for failing to act on his complaint that a gubernatorial candidate used the word "nigger" in his political advertising. Bond attempted, unsuccessfully, to intervene in the *Pacifica* case to have the word included as the eighth dirty word. Although Bond is opposed to such censorship, he feels that if there are seven proscribed words, why not eight?¹²⁹

124. *Id.* Several studies were cited which indicated that in the Black vernacular at least such words as "fuck" and "bullshit" have no obscene or even derogatory component except in certain contexts.

125. *Id.* at 3054.

126. The whole commercial broadcasting industry intervened in the action in support of *Pacifica* to argue against the "F.C.C.'s authority to create a new constitutional exception for the prosecution of the broadcasting industry". BROADCASTING July 10, 1978, at 58.

127. *Id.*

128. *Id.* at 21.

129. INSIDE RADIO, August 14, 1978, at 1.

The Court emphasized the narrowness of the holding. The F.C.C., both in speeches and in the recent decision on a Morality in Media complaint against WGBH-TV, Boston, has indicated that it will follow the Court's insistence that the ruling was narrow. Commissioner Tyrone Brown in a July 23, 1978, speech to the Oklahoma Association of Broadcasters said that the Commission would not use *Pacifica* "as an excuse for increased intervention" in programming decisions.¹³⁰ This pledge was backed up by the Commission's July, 1978 decision to renew the license of WGBH-TV,¹³¹ rejecting the complaint filed by Morality in Media of Massachusetts regarding allegedly obscene and indecent material broadcast by the station.¹³² In rendering the decision the Commission stated: "We believe that we should construe the *Pacifica* holding consistent with the paramount importance we attach to encourage free ranging programming and editorial discretion by broadcasters . . ." ¹³³ The WGBH decision, according to F.C.C. Chairman Charles D. Ferris, "should show that the F.C.C. is not going to become a censor . . . hopefully it will prevent an outpouring of audience complaints based on occasional words."¹³⁴

While the Commission disavows that the *Pacifica* decision will serve as a basis for more program control, it remains to be seen whether or not the decision will be invoked by the F.C.C. and the other regulatory agencies in proceedings now in progress.¹³⁵ Is it true that, in the words of Chairman Ferris, the holding of the *Pacifica* decision is so narrow that the likelihood of its being invoked "is about as likely to occur as Halley's Comet,"¹³⁶ or will *Pacifica* stand as marshall for a forming parade of horrors?

Fran Avery Arnold
Cara Ebert Cameron

130. BROADCASTING, July 24, 1978 at 32.

131. 43 R.R. 2d 1436 (1978).

132. *Id.* The Commission held that the examples cited by MMM did not meet either the Supreme Court's definition of obscenity or "indecent" as the Court held its ruling did not extend to the occasional use of an expletive. The words complained of as indecent were broadcast twice in one program aired after 11:00 P.M. and one word was broadcast in a play at 5:30 P.M. The Commission said late night programming was not included within the *Pacifica* Ruling, nor would the broadcast of one word be included.

133. *Id.*

134. BROADCASTING, July 24, 1978, at 32.

135. Specifically both F.C.C. and F.T.C. inquiries into children's television programming and advertising.

136. BROADCASTING, July 24, 1978, at 31.

APPENDIX

The following is a verbatim transcript of "Filthy Words" prepared by the Federal Communications Commission.¹³⁷

"Aruda-du, ruba-to, ruba-to. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah well, the bitch is the first one to notice that in the litter Johnnie right (murmer) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame.

137. 98 S. Ct. at 3041. Printed here with permission of Uptight Enterprises and Little David Records.

Uh, shit and fuck. The word, shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know. it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you, man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, budd. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full,

all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am FUCK. (laughter) FUCK OF THE MOUNTAIN. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list.

I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight and thank you also. (clapping, whistling)"

Criminal Law: Weighing the Need for Procedural Safeguards in Plea Bargaining: *Bordenkircher v. Hayes*

On January 8, 1973, Paul Hayes was indicted by a Fayette County, Kentucky grand jury for forgery of a check in the amount of \$88.30, a violation of a Kentucky statute punishable by a term of two to ten years in prison.¹ During plea negotiations attended by Hayes, his retained counsel, and the clerk of the court, the state prosecutor offered to recommend a five-year sentence, provided that Hayes would plead guilty. The prosecutor informed the accused, however, that, upon a refusal to plead guilty, he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act. Such an indictment, together with a conviction on the forgery charge, would subject Hayes to a mandatory sentence of life imprisonment in light of his two prior felony convictions.² At the time of the original indictment, the prosecutor was in possession of sufficient evidence to ask the grand jury for an indictment under the Habitual Criminal Act.³ When Hayes

1. KY. REV. STAT. §434.130 (1973) (repealed 1975).

2. KY. REV. STAT. §431.190 (1973) (repealed 1975).

At the time of Hayes' trial, the statute provided that "[a]ny person convicted a . . . third time of a felony . . . shall be confined in the penitentiary during his life." That statute has been replaced by KY. REV. STAT. §532.080 (Supp. 1977) under which Hayes would have been sentenced to, at most, an indeterminate term of 10 to 20 years. §532.080(6)(b). In addition, under the new statute, a previous conviction is a basis for enhanced sentencing only if a prison term of one year or more was imposed, the sentence or probation was completed within five years of the present offense, and the offender was over the age of 18 when the offense was committed. At least one of Hayes' prior convictions did not meet these conditions.

Bordenkircher v. Hayes, 434 U.S. 357, 359 n. 2 (1978). See note 3 *infra*.

3. [Hayes] was 17 years old when he committed his first offense. He was charged with rape but pled guilty to the lesser included offense of "detaining a female." One of the other participants in the incident was sentenced to life imprisonment. [Hayes] was sent not to prison but to a reformatory where he served five years. [Hayes'] second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although [Hayes'] prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in

subsequently refused to plead guilty, he was indicted under the habitual criminal statute, was found guilty on the forgery charge, was found to have two prior felony convictions and was sentenced to life imprisonment.⁴

The Kentucky Court of Appeals,⁵ in an unpublished opinion,⁶ upheld the conviction and sentence, holding that "the prosecutor's decision to indict [Hayes] as an habitual offender was a legitimate use of available leverage in the plea bargaining process."⁷ The United States District Court for the Eastern District of Kentucky agreed and denied a petition for writ of habeas corpus.⁸

The United States Court of Appeals for the Sixth Circuit, relying on *Blackledge v. Perry*⁹ and *North Carolina v. Pearce*,¹⁰ unanimously

imprisonment; yet the addition of a conviction on a charge involving \$88.30 subjected [Hayes] to a mandatory sentence of imprisonment for life. 434 U.S. at 370 (Powell, J., dissenting).

4. 434 U.S. at 359.

5. The Kentucky Court of Appeals is no longer the highest state court since, by amendment to the Constitution of Kentucky, effective January 1, 1976, the judicial system has been changed. The highest state court is now the Supreme Court of Kentucky. KY. CONST. §109.

6. *Hayes v. Commonwealth*, No. 73-766 (Ky. March 1, 1974), *memorandum opinion not to be cited as authority*.

7. 434 U.S. at 359.

8. Opinion of the District Court is unreported. 434 U.S. at 360 n. 4.

9. 417 U.S. 21 (1974). *Perry* was convicted in the District Court of North Carolina on the misdemeanor charge of assault with a deadly weapon. Entitled as of right to a trial *de novo* in the Superior Court, *Perry* filed a notice of appeal. Prior to the trial *de novo*, the prosecutor returned to the grand jury and obtained an indictment increasing the misdemeanor to "the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury." *Id.* at 23. *Perry* pleaded guilty and "was sentenced to a term of five to seven years in the penitentiary." *Id.* The Court held that it was "not constitutionally permissible for the State to respond to defendant's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29. In a footnote to the *Perry* opinion, the Court called for a different result where the prosecution could not have brought the felony charge initially. *Id.* at 29 n.7.

10. 395 U.S. 711 (1969). *Pearce* was convicted for assault with intent to commit rape. Subsequently, *Pearce* was successful in collaterally attacking his conviction but, upon retrial, was reconvicted and given an increased sentence. *Pearce* was decided with *Simpson v. Rice*. *Id.* *Pearce's* sentence was increased by 2 years, 11 months. *Id.* at 713 n. 1. *Rice's* sentence was increased by 25 years. *Id.* at 714 n. 4. The Court held that imposing an increased sentence upon reconviction, without delineating the reasons for the increase, after a defendant had successfully appealed his original conviction, was tantamount to punishing the defendant for having his original conviction set aside and, therefore, was a violation of due process of law. *Id.* at 726.

reversed and held that Hayes was denied due process of law because the prosecutor's tactics placing Hayes "in fear of retaliatory action for insisting upon his constitutional right to stand trial."¹¹ The Sixth Circuit remanded the case, ordering that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument."¹²

The United States Supreme Court granted certiorari¹³ and, in a five to four decision,¹⁴ reversed and HELD: "the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."¹⁵

The ruling in *Hayes* can best be explained by the Court's view that "this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop the charge as part of the plea bargain."¹⁶ In plea bargaining cases, the Supreme Court has traditionally approved of procedures where the state encourages guilty pleas by providing for a lesser penalty or by promising to recommend a lighter sentence or to reduce charges.¹⁷ Under such a system, it is inevitable that the entry of a plea by a defendant will be encouraged to some extent by the "fear of the possibility of a greater

11. *Hayes v. Cowan*, 547 F.2d 42-45 (6th Cir. 1976).

12. *Id.* at 45.

13. 431 U.S. 953 (1977).

14. 434 U.S. 357 (1978). Stewart, J., delivered the opinion of the Court, in which Burger, C.J., and White, Rehnquist, and Stevens, J.J., joined. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, J.J., joined. Powell, J., filed a dissenting opinion.

15. 434 U.S. at 365.

16. 434 U.S. at 360-61.

17. *Brady v. United States*, 397 U.S. 742 (1970). In this decision, which promotes the legitimacy of plea bargaining, the Court held Brady's guilty plea valid as voluntary, even though his plea may have been coerced by the death penalty provision of the Federal Kidnapping Act (held to be unconstitutional in *United States v. Jackson*, 390 U.S. 570 (1968)). The Court found that Brady's plea was motivated by his "desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." 397 U.S. at 751. *Parker v. North Carolina*, 397 U.S. 790 (1970), decided the same day as *Brady*, involved similar issues and produced the same judicial result. See Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEXAS L. REV. 193, 252 (1977) [hereinafter cited as Dix].

penalty upon conviction.”¹⁸ The Court has also accepted as inevitable and permissible the fact that the plea bargaining system discourages defendants from asserting their trial rights.¹⁹ “By tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.”²⁰

However, the Supreme Court has also prohibited states from imposing penalties upon defendants for choosing to do “what the law plainly allows them to do.”²¹ In *North Carolina v. Pearce*,²² the state was prohibited from increasing, without adequate explanation, a defendant’s sentence upon reconviction that followed a successful appeal. Such an unexplained increase in sentence was found to be a product of state vindictiveness against a defendant for exercising his right to appeal. “Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.”²³ In *Blackledge v. Perry*,²⁴ once the defendant had indicated his intention to exercise his statutory right to trial *de novo*, the state was prohibited from bringing a more serious charge based on the same conduct.²⁵ The bringing of such an increased charge was similarly found to be a product of prosecutorial vindictiveness against a defendant for exercising his right to appeal. It was held to be a violation of due process of law for “the State to respond to Perry’s invocation of his statutory right to appeal by bringing a more

18. 434 U.S. at 363.

19. *Id.* at 364. The *Hayes* Court cited *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), where the Court considered *inter alia* the constitutionality of circumstances in the criminal process which encourage the waiver of constitutional rights. In discussing the holdings of the plea bargaining cases on this issue, the *Chaffin* Court stated: “Although every such circumstance has a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *Id.* at 31.

20. 434 U.S. at 364.

21. *Id.* at 363.

22. *See* note 10 *supra*.

23. 395 U.S. at 725.

24. *See* note 9 *supra*.

25. The North Carolina two-tiered system allows a misdemeanor defendant convicted in an inferior trial court to seek, as of right, a new trial in a court of general jurisdiction. N.C. GEN. STAT. §7A-290 (Supp. 1977).

serious charge against him prior to trial *de novo*.²⁶

The question before the Court in *Hayes* was whether the Sixth Circuit Court of Appeals was correct in placing a new procedural safeguard on plea bargaining by applying the due process prohibition against prosecutorial vindictiveness, established in *Pearce* and *Perry*, to the plea bargaining procedure used by the prosecutor in *Hayes*.

The Sixth Circuit, in applying the rule expressed in *Pearce* and *Perry* to the plea bargain procedure used by the prosecutor in *Hayes*, had made two findings. First, the bringing of an increased charge after plea negotiations had failed was the product of prosecutorial vindictiveness against Hayes for exercising his right to plead not guilty.²⁷ Second, the prosecutor abused his broad discretionary charging powers by using those powers to coerce Hayes "into foregoing his right to trial."²⁸

With regard to the Sixth Circuit's findings, the Supreme Court observed that, even though the prosecutor in *Hayes* did not procure the indictment on the increased charge until after the plea negotiations had ended, Hayes was fully aware of the terms of the offer.²⁹ Further, the

26. 417 U.S. at 23.

27. 547 F.2d at 44.

28. *Id.*

29. 434 U.S. at 360. The Court indicated that it may have reached a different result in "a situation . . . where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." *Id.* In a footnote to that statement, the Court cited *United States ex rel. Williams v. McMann*, 436 F.2d 103 (2nd Cir. 1970), and *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1370 (9th Cir. 1976), stating that it did not necessarily endorse the decisions. *Id.* at 360 n. 5.

In *United States ex rel. Williams v. McMann*, Williams, indicted for selling heroin, agreed to plead guilty to the lesser offense of attempted sale and was sentenced to an indeterminate term of 3 to 7 years. A few days after sentencing, the prosecution discovered that Williams had been convicted of a felony in 1949 and returned him to court for mandatory sentencing as a second felony offender. As a recidivist, Williams faced from 3¾ to 15 years in prison. Williams was granted permission to withdraw his guilty plea and was tried and convicted on the original indictment. "At sentencing, Williams' attorney for the first time questioned the constitutionality of the older 1949 conviction. The prosecution did not take issue with the contention; Williams was accordingly treated as a first felony offender." 436 F.2d at 104. Williams was sentenced to a term of 5 to 10 years. On petition for writ of habeas corpus, Williams relied on *North Carolina v. Pearce*, *supra* note 10, and contended that he should only have been tried for attempted sale and, upon conviction, should only have received a maximum sentence of 3 to 7 years (the terms of the plea bargain). The Second Circuit affirmed the lower court's denial of the writ, distinguishing *Pearce* by the fact that the increased sentence in *Williams* stemmed from a conviction for a more serious crime. The *Williams* court

Court noted that the effect of the Sixth Circuit's ruling would require a finding of prosecutorial vindictiveness and a "violation of due process of law whenever [a prosecutor's] charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations."³⁰ The Court went on to point out the importance and benefits of plea bargaining to the criminal justice system, citing the case of *Blackledge v. Allison*.³¹ In addition, the Court discussed the failure of the Sixth Cir-

went on to explain that, when a defendant revokes his plea, the state is not required to maintain its part of the plea bargain. Interestingly, Circuit Court Judge Hays, who concurred in the *Williams* opinion, pointed out that, in *Simpson v. Rice*, *supra* note 10 (the companion case to *Pearce*), "[t]he fact that Rice had reneged on his part of the plea bargain did not prevent the Court from giving him the benefit of the lower sentence which had previously been imposed upon him." 436 F.2d at 107.

In *United States v. Ruesga-Martinez*, the appellant was charged with the misdemeanor of unlawful entry into the United States, even though the prosecution was aware that appellant was a multiple offender and could have been charged with a felony. The appellant pleaded not guilty and later refused to sign a waiver of his right to trial before a district judge, a statutory right under 18 U.S.C. §3401(b). Subsequently, the U.S. Attorney charged the appellant with the felony violation as a multiple offender. Appellant was found guilty and sentenced to 18 months imprisonment. The Ninth Circuit, applying *North Carolina v. Pearce*, *supra* note 10, and *Blackledge v. Perry*, *supra* note 9, reversed and held that there was "a significant possibility that such discretion [on the part of the prosecutor] may have been exercised with a vindictive motive or purpose, [and] the reason for the increase in the gravity of the charges must be made to appear." 534 F.2d at 1369. The prosecution contended, *inter alia*, "that it was entitled to bring the more serious charges as a consequence of its authority to engage in plea bargaining." 534 F.2d at 1370. The Ninth Circuit conceded that it had "consistently reaffirmed the right of the prosecution to bring a heavier charge in the event that the accused reneges on his bargain, [but] no plea bargain was entered into in the present case." *Id.* Finally, and most important in the plea bargaining/vindictiveness context, the Ninth Circuit stated, "[w]e find no merit in [the prosecutor's] suggestion that the power of the prosecution to adjust the charges against an accused at will inheres in its power to engage in plea bargaining." *Id.* at 1370-71.

30. 434 U.S. at 361.

31. 431 U.S. 63 (1977). In *Allison*, the Court held that a petition for a writ of habeas corpus should not have been summarily dismissed where the petitioner was challenging the validity of his guilty plea alleging an unkept promise accompanied by specific factual allegations, the truth or falsity of which could not be determined from the record. As to the importance and benefits of plea bargaining, the Court stated:

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there

cuit to consider the existing procedural safeguards in plea bargaining, *i.e.*, “the importance of counsel during plea negotiations, *Brady v. United States*³² . . . the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*³³ . . . and the requirement that a prosecutor’s plea bargain promise must be kept, *Santobello v. New York*³⁴”³⁵

The Supreme Court clearly disagreed with the findings of the court of appeals that the products of state vindictiveness, found to exist in the *Pearce* and *Perry* situations, requiring a due process restraint on the state’s sentencing and charging powers, were also present in the *Hayes* plea bargain situation.

In giving its reasons for finding the court of appeals “mistaken” in its opinion, the Court first reaffirmed the principle, established in *Pearce* and *Perry*, that vindictiveness against “a defendant who had chosen to exercise a legal right to attack his original conviction” is a violation of due process.³⁶ However, the Court, citing *Colten v. Kentucky*³⁷ and *Chaffin v. Stynchcombe*³⁸ (both of which were decided in light of *Pearce*), emphasized that the due process violations in *Pearce*

may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Id. at 71.

32. 397 U.S. 742. Addressing the issue of procedural safeguards, the *Brady* Court stated:

[O]ur view . . . is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendant’s admissions that they committed the crimes with which they are charged.

397 U.S. at 758.

33. 395 U.S. 238 (1969). In *Boykin*, the Court held that it was reversible error for the trial judge to accept a guilty plea without an affirmative showing on the record that it was intelligently and voluntarily made.

34. 404 U.S. 257 (1971). In *Santobello*, the Court held that a state’s failure to keep a commitment made during plea bargaining requires that the judgment be vacated and the case be remanded for determination as to whether the circumstances require specific performance of the agreement, or that the defendant be given the opportunity to withdraw his guilty plea. *Id.* at 262-63.

35. 434 U.S. at 362.

36. *Id.*

37. 407 U.S. 104 (1972).

38. 412 U.S. 17 (1973).

and *Perry* “lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.”³⁹ In applying the *Pearce* rule to *Colten* and *Chaffin*, the Court had considered whether the allegedly vindictive state action contained the requisite elements of retaliation. In *Colten*, the state action was an increased fine subsequent to an exercise of right to trial *de novo*. The Court considered whether the *de novo* court had any relationship with the court which had originally convicted the defendant or any relationship with the previous decision which would motivate it to retaliate against the defendant. Finding *inter alia* that the *de novo* court was separate and distinct from the original court, the Supreme Court distinguished *Pearce* on the fact that *Pearce*’s retrial and reconviction, resulting in an increased sentence, took place in the same court which had first incorrectly convicted *Pearce*.⁴⁰ In *Chaffin*, the allegedly vindictive state action was an increased sentence imposed by a jury subsequent to a successful appeal. The Court considered whether the jury could have been motivated to retaliate against the defendant, but found that the jurors had no knowledge of the prior sentence and would have been “unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.”⁴¹ Therefore, to apply the due process restraints against vindictiveness on the sentencing or charging powers of the state, there must be a clear showing that the danger of vindictiveness exists, but such danger will be found to exist only where the requisite elements of retaliation are present.

Arguendo, the requisite elements of retaliation born out of the application of *Pearce* to *Chaffin* and *Colten* were present in the *Hayes* case. The prosecutor in *Hayes* was certainly “sensitive to the institutional interests that might occasion” (and in this case did occasion) increased charges by a prosecutor “desirous of discouraging what he regards as meritless” pleas of not guilty. However, in applying the *Pearce* and *Perry* rule to *Hayes*, the Court was able to create a new

39. 434 U.S. at 363.

40. Other facts leading the Court in *Colten* to find that there was no retaliatory motive in imposing an increased sentence were: that the *de novo* court was not being “asked to do over what it thought it had already done correctly,” that the *de novo* court did not have to find error in the lower court’s decision, and that “in all likelihood the trial *de novo* court is not even informed of the sentence imposed by the inferior court.” 407 U.S. at 118.

41. 412 U.S. at 27.

element of retaliation and distinguish the cases. The Court found that the requisite element of retaliation present in *Pearce* and *Perry*, but lacking in *Hayes*, was the "State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right."⁴² In support of its finding that state action arising out of a plea bargain is not unilaterally imposed, the Court looked to the dissenting opinion of Justice Brennan in *Parker v. North Carolina*,⁴³ where he characterized plea bargaining as a "give-and-take negotiation . . . between the prosecution and the defense, which arguably possess relatively equal bargaining power."⁴⁴ Therefore, the Court reasoned, since plea bargaining in its ideal state is not unilateral, but rather "a give-and-take negotiation," the standard for measuring the possibility of vindictiveness in plea bargaining is whether "the accused is free to accept or reject the prosecution's offer."⁴⁵

Having established unilateral state action as a requisite element of retaliation, the Court rationalized its refusal to find the possibility of vindictiveness in the *Hayes* plea bargaining situation by expounding on the public policy need to preserve the state's leverage in plea negotiations. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."⁴⁶ To protect this "mutuality of advantage," the Court re-

42. 434 U.S. at 362 (emphasis added).

43. 397 U.S. 790 (1970). In *Parker*, the majority held that a law which allowed for the waiver of the death penalty on a capital charge if the accused pleaded guilty had no effect on the validity of a guilty plea. Justice Brennan, in a separate dissenting opinion, called for a "particularly sensitive scrutiny of the voluntariness of guilty pleas entered under this type of death penalty scheme." *Id.* at 809 (Brennan, J., dissenting). Brennan reasoned that, while plea bargaining was a "give-and-take negotiation . . . between the prosecution and the defense, which arguably possess relatively equal bargaining power," the imposition of a legislative penalty as severe as a death sentence to encourage guilty pleas upset the balance in bargaining power. *Id.*

44. 397 U.S. at 809 (Brennan, J., dissenting).

45. 434 U.S. at 363. Whether a criminal defendant faced with a threat from the prosecutor is reasonably able to make an intelligent choice was questioned by Justice Blackmun in his dissenting opinion. See text accompanying notes 54 and 55 *infra*.

46. 434 U.S. at 363. The *Hayes* Court relied on *Brady v. United States*, *supra* note 17, for its "mutuality of advantage" argument. In *Brady*, the Court stated:

[T]he State and the defendant find it advantageous to preclude the possibility of the maximum penalty authorized by law. . . . It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than

fused to deny to prosecutors the leverage gained by threatening to bring increased charges against a defendant subsequent to unsuccessful plea negotiations.

The Court also addressed the court of appeals' finding that the prosecutor in *Hayes* abused his broad discretionary charging powers by using those powers as leverage in the plea negotiations. Recognizing that the charging of defendants is entirely within the prosecutor's discretion, the Court quoted *Oyler v. Boles*,⁴⁷ which stated that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."⁴⁸ The *Hayes* Court refused to hold that a prosecutor's "desire to induce a guilty plea" was an "unjustifiable standard" on which to base his charging decision.⁴⁹ Since the *Hayes* Court had already expressed its intention to protect the prosecutor's leverage, it is not surprising that the Court would not restrict that leverage by curtailing the prosecutor's discretion in bringing charges. The Court found that to hold otherwise "would contradict the very premises that underlie the concept of plea bargaining itself."⁵⁰ Although it conceded that broad

might be imposed if there were a guilty verdict after a trial by judge or jury. 397 U.S. at 752.

47. 368 U.S. 448 (1962). *Oyler v. Boles* was consolidated with *Crabtree v. Boles*. The facts in *Crabtree* and the due process arguments propounded by the defendant against the procedure used by the prosecutor to charge the defendant under the West Virginia recidivist statute help to define the issues involved in *Hayes*. *Crabtree* had pleaded guilty to forging a \$35 check, an offense punishable by a term of 2 to 10 years in prison. *Id.* at 450. In accordance with West Virginia's habitual criminal statute, W. VA. CODE §6131 (1961), the prosecuting attorney, just prior to sentencing, filed an information charging that *Crabtree* had two prior felony convictions. *Id.* at 450. "The trial judge, after cautioning *Crabtree* of the effect of the information and his rights under it, inquired if he was in fact the accused person. *Crabtree* . . . represented by counsel . . . admitted in open court that he was such person." *Id.* at 450-51. The Court then sentenced *Crabtree* to life imprisonment. In a petition for a writ of habeas corpus, *Crabtree* argued, *inter alia*, "that procedural due process under the Fourteenth Amendment requires notice of the habitual criminal accusation *before* the trial on the third offense or at least in time to afford a reasonable opportunity to meet the recidivist charge." *Id.* at 451-52. The Court held that *Crabtree* was not deprived of due process because "the record clearly shows that both petitioners personally and through their lawyers conceded the applicability of the law's sanctions to the circumstances of their cases." *Id.* at 454.

48. *Id.* at 456.

49. 434 U.S. at 364.

50. *Id.* at 364-65.

prosecutorial discretion carries with it the potential for abuse, and that there are constitutional boundaries on its breadth, the Court made it clear that the conduct of the prosecutor in the instant case was well within those boundaries.⁵¹

Finally, the Court, expressing its concern that plea bargaining had only recently been accorded legitimacy by the Supreme Court,⁵² was wary of imposing any restrictions on the process which could have the effect of causing plea bargaining to revert to its clandestine past.

Because plea bargaining has become the principal method of determining guilt and sentence in the American system of criminal justice, a majority of the Court was understandably cautious in regulating a process which plays such an enormous role in the judicial system. The majority in *Hayes* held that a prosecutor's *threat* to reindict was no different from the situation where a prosecutor offers to drop a charge. The majority also found that Hayes had made a voluntary and intelligent choice among his alternative courses of action. However, Justice Blackmun, in his dissenting opinion, questioned whether a defendant faced with a threat from a prosecutor is reasonably able to make an intelligent choice.⁵³ Where the defendant is faced with clear-cut alternatives and he knows what he has been charged with and what the possible penalties will be, he can probably make an intelligent choice. However, when a defendant must evaluate a prosecutor's propensity for carrying out his threats of bringing an increased charge, the possibility for an intelligent choice among alternatives is significantly reduced.⁵⁴ A contrary holding in *Hayes* would have prohibited a prosecutor from bring-

51. *Id.* at 365.

52. *Id.* The Court cited to *Blackledge v. Allison*, 431 U.S. 63, 76 (1977), where it had stated:

Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in *Santobello v. New York*, 407 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.

The *Santobello* opinion has the distinction of being the first Supreme Court opinion where the Court actually stated that plea bargaining was "an essential component of the administration of justice" which, "[p]roperly administered, . . . is to be encouraged." 404 U.S. at 260.

53. 434 U.S. at 369 n. 2.

54. *Dix*, *supra* note 17, at 257. *Dix* categorizes a defendant's "anticipation of unfavorable exercise of official discretion" as an "unacceptable influence upon the decision to waive." *Id.*

ing an increased charge after plea negotiations had failed. Such a prohibition would have encouraged prosecutors to bring all possible well-grounded charges against a defendant prior to plea bargaining, thereby allowing him to make an intelligent choice among his alternatives.

The effect that such a restraint on prosecutors would have on defendants was considered by Justice Blackmun in his dissenting opinion:

The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.⁵⁵

Thus, it was Blackmun's view that the function of a prosecutor is to serve the public interest, and any charge a prosecutor brings against a defendant should be calculated to serve the ends of the criminal justice system. A similar view was expressed by Justice Powell in his dissenting opinion:

[In *Hayes*], the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single \$88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.⁵⁶

The minority in *Hayes* was willing to provide the accused with procedural safeguards in the plea bargaining arena, even at a cost to him. It was the dissenters' view that the public interest in a fair and effective criminal justice system is not subordinate to the interest of the prosecutor.⁵⁷ Therefore, according to a minority of the Court, prohibit-

55. 434 U.S. at 368.

56. *Id.* at 371.

57. The view that the prosecutor's function is to serve the public interest is also reflected in the ABA Standards Relating to the Prosecution Function, §3.9 (Approved Draft, 1971):

3.9 Discretion in the charging decision.

(a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.

ing a prosecutor from bringing an increased charge after plea negotiations have failed would allow a defendant to make an intelligent choice in plea bargaining, would protect the accused from prosecutorial vindictiveness and would help to insure that the public interest was being served.

The majority opinion in *Hayes* will maintain plea bargaining in its status quo. The minority argues for plea bargaining reform through restraints on prosecutorial discretion.⁵⁸ In light of the fact that plea bargaining, in its present form, is under attack by prosecuting attorneys,⁵⁹ defense attorneys,⁶⁰ and commentators,⁶¹ the majority's decision

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense of the offender;

(iv) possible improper motives of a complaint;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

58. See generally National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts* at 3 (1973).

The Commission recognizes that those who criticize the informal administrative processing of criminal defendants do so primarily because the administrative procedure involves numerous discretionary decisions made by the various participants in the process, especially the prosecutor. It is this discretionary nature of administrative processing—and the actual or potential abuse of the power to make discretionary decisions—that needs attention.

59. See generally M. HEUMANN, *PLEA BARGAINING, THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* (1977).

60. *Id.*

may hinder the improvement of the plea bargaining process.

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61. See, e.g., Dix, *supra* note 17, at 260; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

Prevailing Defendant's Right to Recover Attorney's Fees in an Action Under Title VII of the Civil Rights Act of 1964: *Christianburg Garment Co. v. Equal Employment Opportunity Commission*

Rosa Helm, a female employee at the Christianburg Garment Company, filed a Title VII action¹ against her employer, charging racial discrimination. The charge was filed with the Equal Employment Opportunity Commission and, in 1970, the Commission notified her that its efforts at conciliation had failed, and that she had a right to sue her employer on her own behalf. She did not do so. In 1972, almost two years after the Commission notified Rosa of her right to sue, Congress amended Title VII² and authorized the Commission to bring prompt judicial action on its own behalf, whenever it appears necessary, to carry out the purposes of the Act.³ The Act, as amended, was to apply to all "charges pending with the Commission"⁴ on the effective date of the amendments.

As a result, the Commission filed a lawsuit⁵ against Christianburg Garment Company, Rosa's employer, alleging that it had engaged in unlawful employment practices in violation of the Civil Rights Act of

1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, Unlawful Employment Practices - Employer Practices

(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

2. Pub. L. 92-261, 86 Stat. 103 (March 24, 1972). The amendment gives the Commission the power to bring civil actions against an employer where the Commission is unable to secure a conciliation agreement from the employer to refrain from further unlawful employment practices and to obtain voluntary compliance with the Act.

3. 42 U.S.C. § 2000e-5(f)(2).

4. Section 14 of Pub. L. 92-261 provides that: "The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 . . . shall be applicable with respect to charges pending with the Commission on the date of the enactment of this Act . . . and all charges filed thereafter."

5. *Equal Employment Opportunity Commission v. Christianburg Garment Co., Inc.*, 376 F. Supp. 1067 (W.D. Va. 1974).

1964.⁶ The employer moved for summary judgment on the grounds that Rosa Helm's charge was not "pending" on the effective date of the amendments. The Commission contended "that charges as to which no private suit had been brought as of the effective date of the amendments remained 'pending' before the Commission so long as the complaint had not been dismissed and the dispute had not been resolved through conciliation."⁷ The Virginia District Court⁸ granted summary judgment on behalf of the employer, concluding that:

[W]hen Rosa Helm was notified in 1970 that conciliation had failed and that she had a right to sue the company, the Commission had no further action legally open to it, and its authority over the case terminated on that date. Section 14's reference to "pending" cases was held "to be limited to charges still in the process of negotiation and conciliation" on the effective date of the 1972 Amendments.⁹

The garment company, as the prevailing party, then petitioned the court for an award of attorney's fees against the Commission, as provided for in Section 706(k) of Title VII.¹⁰ The Virginia District Court, finding that "the Commission's action in bringing the suit cannot be characterized as unreasonable and meritless,"¹¹ refused to grant attorney's fees. The Fourth Circuit Court of Appeals affirmed¹² and certiorari was granted¹³ by the Supreme Court. The United States Supreme Court, in an opinion¹⁴ expressing the unanimous view of the eight¹⁵ participating Justices, affirmed the court of appeals' decision denying attorney's fees to the defendant and HELD: (1) a district court can, in its discretion, award attorney's fees to a prevailing defendant pursuant

6. *Supra* note 1.

7. *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 414-15 (1978).

8. 376 F. Supp. 1067.

9. 434 U.S. at 415, n. 3.

10. 42 U.S.C. § 2000 e-5(k):

In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, reasonable attorney's fee as a part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

11. 434 U.S. at 415.

12. 550 F. 2d 949 (4th Cir. 1977).

13. 432 U.S. 905 (1977).

14. 434 U.S. 412.

15. Justice Blackmun took no part in the consideration or decision of this case.

to Section 706(k), but only upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so,"¹⁶ (2) the district court exercised its discretion squarely within the permissible bounds of Section 706(k) in declining to award attorney's fees to the employer as a prevailing defendant;¹⁷ and (3) the Commission's action against the employer based on its interpretation of Section 14 of Title VII was not frivolous, unreasonable or groundless.¹⁸

In the United States, prevailing litigants are generally not entitled to collect a reasonable attorney's fee from the losing party.¹⁹ This "American Rule," as it has been referred to,²⁰ has been much criticized and is a departure from the practice followed in England.²¹ There has

16. 434 U.S. at 422.

17. *Id.* at 424.

18. *Id.*

19. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). (*Alyeska* expressly reaffirmed the American Rule, although certain exceptions were recognized).

20. See 6 MOORE'S FEDERAL PRACTICE § 54.77(2) at 1703; *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *United States Steel Corp. v. United States*, 519 F. 2d 359 (3rd Cir. 1975).

21. The English have been awarding attorney's fees as costs since 1275. See Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963), for an article in which the author argues in favor of adopting a system like that of the English in which attorneys' fees would be considered costs of litigation. It is his feeling that a great deal of the congestion in our courts is due to the present system in which it is financially advantageous to go to court. A plaintiff may have a groundless claim, but may realize financial advantage by going to court because the defendant will often settle immediately for an amount that is less than the expenses of contesting the case. A defendant may also realize an economic advantage by continuing the litigation, even after realizing that he has no defense, or after judgment against him, to increase the plaintiff's attorney's fees and hope to get the plaintiff to settle for less than the true value of the case. In essence, the author feels that the present system represents an expense to one litigant that results in economic advantage to the other. See also Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAND. L. REV. 1216 (1967) in which the author analyzes the historical reasons and philosophical basis for the evolution of the "American Rule." The author believes that access to the courts without fear of having to pay an opponent's fees is so deeply ingrained in our system that it is often claimed that due process considerations demand retention of the American system despite the many arguments and movements in favor of reform. The reform movement is viewed as an outgrowth of a shift in emphasis from individualism to the importance of society as a whole. At the heart of the reform movement lie two fundamental concepts: the idea of resolving disputes by settlement and compromise rather than through litigation, and the idea that justice demands that the aggrieved party be made whole and that, to do so, attorney's fees must be included as damages.

been no adequate historical explanation for the departure from the English Rule.²² It is interesting to note that, in early Colonial America, most courts adopted the English Rule and costs and fees were awarded to prevailing parties in actions at law.²³ However, the underlying philosophy was not that of full compensation for the wronged party, and a ceiling was put on the amount of fees which could be awarded. That ceiling was never raised to reflect increased costs. In addition, new states joining the Union rarely provided for attorney's fees to be taxed as costs and, if they did so provide, the award was merely perfunctory. Some commentators have concluded that "it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees."²⁴ Others have suggested that, because the new government had to create a willingness in its citizens to submit to the judicial system to resolve their disputes, there was a conscious effort on the part of the new government not to create any deterrents to the use of the courts, but to insure free access to them.²⁵

Another reason often cited for the historical evolution of the American Rule is the spirit of individualism which permeated early American life. As a consequence of this philosophical outlook, it was only natural that parties involved in legal disputes would resolve the issues among themselves. Theoretically, our system established a set of laws and procedures whereby every person would be able to represent himself adequately without the need for an attorney.²⁶ Hence, the feeling arose that attorneys were "considered a luxury, rather than a necessity, [and] one who wished to utilize their services should not be compensated for this indiscretion."²⁷ Further,

the assertion of individual rights was so important to the early American that litigation flourished and was encouraged under "[w]hat Dean Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end." Inherent

22. Dawson, *Lawyers and Involuntary Clients: Attorney's Fees from Funds*, 87 HARV. L. REV. 1597, 1598 (1974).

23. Note, *Attorney's Fees: Where shall the Ultimate Burden Lie?* 20 VAND. L. REV. at 1218.

24. *Id.* at 1219, n. 17.

25. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. at 81.

26. *Id.*

27. *Id.*

in the rules of this "sport" is the idea from which our rule on fees developed, that is, the idea that each individual must bear whatever burdens, including all costs, litigation might cause.²⁸

However, despite the general rule that attorney's fees are not taxed as costs, Congress has provided limited exceptions and has made specific provisions for attorney's fees under certain federal statutes. These statutory allowances can best be categorized in the following ways: (1) those which make fee awards *mandatory* for *prevailing plaintiffs*;²⁹ (2) those which *permit* fee awards to *prevailing plaintiffs*³⁰ and (3) those which are most flexible and leave it to the *discretion* of the court to award attorney's fees to *either plaintiffs or defendants*.³¹ Section 706(k) of Title VII of the Civil Rights Act of 1964 falls into the category which allows the district court to exercise its discretion in awarding attorney's fees to the prevailing party.

The Supreme Court, in arriving at a decision in *Christianburg*, reviewed cases arising under the third category of statutes which allow for awards of attorney's fees at the court's discretion. In rendering its decision, the Court considered *Newman v. Piggie Park Enterprises*.³²

28. Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAND. L. REV. at 1220-21.

29. "See, e.g., The Clayton Act, 15 U.S.C. § 15; the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); Packers and Stockyards Act, 7 U.S.C. § 210(f); the Truth in Lending Act, 15 U.S.C. § 1640(a); and the Merchant Marines Act of 1936, 46 U.S.C. § 1227." 434 U.S. at 415, n. 5.

30. "See, e.g., the Privacy Act of 1974, 5 U.S.C. § 552(a)(g)(2)(B); Fair Housing Act of 1968, 42 U.S.C. § 3612(c)." 434 U.S. at 416, n. 6.

31. "See, e.g., Trust Indenture Act of 1939, 15 U.S.C. § 7700(d); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(a); Federal Water Pollution Prevention and Control Act of 1972, 33 U.S.C. § 1365(d); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2(d); Waste Control Act of 1972, 42 U.S.C. § 4911(d)." 434 U.S. at 416, n. 7.

32. 390 U.S. 400 (1968). *Piggie Park* involved a class action brought under the Public Accommodations portion of the 1964 Civil Rights Act, to enjoin racial discrimination at the defendant's drive-in restaurant and sandwich shop. The appellate court found that the defendant had discriminated against Blacks at its shops. The issue before the Supreme Court was whether or not the prevailing party was entitled to attorney's fees under the applicable portions of the statute. (See note 33 *infra*). The Supreme Court, in a frequently quoted opinion, found that the plaintiff was entitled to attorney's fees under the statute and that prevailing plaintiffs would usually be entitled to attorney's fees unless there were exceptional circumstances which would render such an award unjust. The Court based its decision on the theory that plaintiffs act in the shoes of the government and often receive no monetary award for bringing such actions. They are therefore entitled to be made whole. *Id.* at 402.

which involved a statute almost identical to the one at issue in this case.³³ In *Piggie Park*, the plaintiffs brought an action under Title II of the Civil Rights Act of 1964.³⁴ The plaintiffs prevailed and the United States Court of Appeals instructed the district court to award them attorney's fees "only to the extent that respondents' defenses had been advanced for purposes of delay and not in good faith."³⁵ The Supreme Court in *Piggie Park* held, however, that a prevailing plaintiff under this statute

should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust . . . [because] . . . when a plaintiff brings an action under that Title he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority.³⁶

The Court also noted in *Piggie Park* that, if the intent of Congress was only to allow prevailing plaintiffs to recover an award for attorney's fees against a defendant who had acted in bad faith and made completely groundless contentions for purposes of delay, it would not have been necessary to create a new statutory provision because, under certain judicially created exceptions, "it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'"³⁷ In light of the fact that no statute was necessary to award attorney's fees to the prevailing plaintiff when the defendant's behavior created a valid exceptional circumstance, the Court in *Piggie Park* concluded that the statute was necessary to insure that a prevailing plaintiff

33. 42 U.S.C. § 2000a-3(b): "In any action commenced pursuant to this subchapter, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

34. 42 U.S.C. § 2000a, *et. seq.* This Act provides that "all persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."

The Act further allows for the bringing of a civil action for injunctive relief where a party believes that someone is about to engage or has engaged in unlawful practices pursuant to this Act.

35. 390 U.S. at 401.

36. *Id.* at 402.

37. *Id.* at 402, n. 4.

in a Title II action would, as a matter of course, be awarded a reasonable attorney's fee, unless to do so would be unjust.³⁸

In a subsequent case also cited in *Christianburg, Albemarle Paper Co. v. Moody*,³⁹ the Court made it clear that the standard enunciated in *Piggie Park* for awarding attorney's fees to a prevailing plaintiff was equally applicable to an action under Title VII of the Civil Rights Act.⁴⁰ Hence, it was established that, in actions arising under the category of statutes which allow the district court to exercise discretion in awarding attorney's fees to the prevailing party, the prevailing plaintiff should ordinarily be awarded attorney's fees in all but special circumstances.

The principal case presented the Court with the question of what standard should be applied in determining whether a successful defendant in a Title VII action should be awarded attorney's fees. The garment company, employer/defendant, contended that the same standards which are applied to a prevailing plaintiff should equally apply to a prevailing defendant. In other words, the garment company espoused the theory that, barring circumstances which would make an award unjust, prevailing defendants should receive attorney's fees as a matter of course.⁴¹ On the other hand, the Commission/plaintiff argued

38. *Id.* at 402. See also *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976), for an example of a situation where the court found special circumstances which would support a denial of attorney's fees to the prevailing plaintiffs. Retired male employees filed a lawsuit alleging sex discrimination in a retirement plan which gave male retirees a smaller share of the retirement fund than similarly situated female employees. The district court found the plan discriminatory but refused to award attorney's fees to the plaintiffs. The Fourth Circuit Court of Appeals upheld the denial of attorney's fees on the ground that the employer acted with reasonable speed to redress its unintentional violation of the Act, once the violation became known, by amending the plan to eliminate its illegally discriminatory aspects *before plaintiffs' suits were filed*.

39. 422 U.S. 405 (1975). In this case, a certified class of present and former Black employees brought an action against their employer and the employees' union, seeking injunctive relief against any acts at the plant which violated Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The petitioners had argued that they were entitled to back pay, but the district court, relying on *Piggie Park*, declined to grant it on the ground that there was no evidence of bad faith non-compliance with the Act. The Supreme Court, however, refused to apply *Piggie Park* to an award of back pay, stating, "[t]here is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the attorney's fees provision of Title VII, 42 U.S.C. Section 2000e-5(k)." *Id.* at 415.

40. *Id.*

41. See *Equal Employment Opportunity Commission v. Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977); *United States v. Allegheny Ludlum Industries, Inc.*, 558 F.2d 742 (5th Cir. 1977) for examples of federal courts which have expressed the same view as the defendant company/employer in this case.

that prevailing defendants should receive an award of attorney's fees only if the plaintiff acted in bad faith. The Supreme Court did not agree with either position. The Court indicated that the language of the statute is permissive and discretionary and neither invites, nor requires, the mechanical application which the defendant garment company sought to impose. The Court, relying once again on its decision in *Piggie Park*, pointed out that there are equitable considerations which favor an award of attorney's fees to a prevailing plaintiff which do not apply to a prevailing defendant. In distinguishing the equities involved, the Court noted that the plaintiff is viewed as the chosen "instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'"⁴² and that, when an award for attorney's fees is given in a Title VII action to a prevailing plaintiff, it is awarded against a violator of federal law.⁴³

The Court found that the legislative debate indicated that the public policy behind allowing an award of attorney's fees is to facilitate the bringing of meritorious suits.⁴⁴ Reasonable attorney's fees are frequently awarded to private litigants to encourage compliance with the well-recognized Congressional policy of having Title VII enforced, to a large extent, by individuals acting as "private attorneys general."⁴⁵ Under the "private attorney general" theory, prevailing plaintiffs are viewed as having vindicated a policy that Congress considered of the highest prior-

42. 434 U.S. at 419.

43. *Id.*

44. *Id.*

45. *Carey v. Greyhound Lines, Inc.*, 380 F. Supp. 467 (D.C. La. 1973). The plaintiff, James Carey, brought a lawsuit against the defendants, Greyhound and the local unions, alleging racial discrimination and seeking an injunction to prevent the defendants from interfering with his right to equal employment opportunity. He also sought a provision for change in the seniority system, an award for back pay and attorney's fees. The court found that the defendants had engaged in unlawful employment discrimination and required a change in the seniority system. Although it declined to grant back pay to the plaintiff, it did award attorney's fees. In justifying the award, the court stated:

Notably, the awarding of attorney's fees is not conditioned on a finding that the Title VII defendant has intentionally engaged in an unlawful employment practice. Reasonable attorney's fees are frequently awarded to private litigants in order to encourage compliance with the well recognized Congressional policy of having Title VII enforced to a large extent by individuals acting as "private attorneys general." In view of this policy of citizen enforcement, plaintiff is entitled to an award of reasonable attorney's fees

Id. at 474.

ity. If plaintiffs are forced to bear their attorneys' fees in every case, perhaps few aggrieved parties would be in a position to seek judicial relief.⁴⁶ In addition, the right of a plaintiff to recover an attorney's fee under Section 706(k) has been held not to be affected by the fact that the plaintiff instituted the action under Title VII as a "test case,"⁴⁷ or that the defenses presented were not entirely without merit,⁴⁸ or that there was no intentional violation of the Act by the defendant in that he acted in good faith reliance on, or compliance with, a state statute.⁴⁹

46. 390 U.S. at 402.

47. *Lea v. Cone Mills, Corp.*, 438 F. 2d 86 (4th Cir. 1971). In this case, the Black female plaintiff sued under Title VII, alleging that the defendant, Cone Mills Corporation, had failed to hire Black females, although it hired Black males and white females. The plaintiffs prevailed on the merits and obtained an injunction against the unfair practices, thus opening the way for employment of Black women in defendant's plant. The appellate court awarded attorney's fees to the plaintiffs and, in so doing, stated:

Plaintiffs prevailed on the merits. They not only obtained an injunction against unfair employment practices but also opened the way for employment of Negro women in the Cone Mills plant. True, specific employment was not sought, and even if the application was solely a predicate for this suit, these facts ought not defeat the claim for attorney's fees. This pronouncement upon their rights, and the requirement of Cone Mills to observe them in the future, were ordered in implementation of the Equal Employment Opportunities Act. Plaintiffs should not be denied attorney's fees merely because theirs was a "test case."

Id. at 88.

48. *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971). In this case, the district court found that the defendant's seniority system violated the Equal Employment Opportunities Act but declined to award attorney's fees to the prevailing plaintiffs. The defendants had claimed that they were justified in discriminating because of an overriding legitimate purpose in maintaining the racially discriminating practice. The district court, in denying plaintiffs an award of attorney's fees, stated: "While more meritorious defenses have in some cases been presented, the defenses here cannot be fairly characterized as extreme. Therefore, the Court declines to award counsel fees as part of the costs for the plaintiffs." *Id.* at 804. *See also* 319 F. Supp. 835, 843 (M.D.N.C. 1971).

The plaintiffs appealed the denial of attorney's fees. The appellate court reversed and awarded attorney's fees, noting that: "[A]ttorney's fees are to be imposed not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed Congressional policy against racial discrimination." 444 F. 2d at 804.

49. *LeBlanc v. Southern Bell Tel. and Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971). The defendant telephone company, pursuant to a Louisiana statute, refused to allow female employees to work more than eight hours per day or forty-eight hours per week. An action was brought against the telephone company by female employees charging unlawful discrimination in employment. The district court held that the Louisiana statute had been preempted by the Civil Rights Act of 1964 and, therefore, the plaintiffs

The Supreme Court, as indicated above, did not find merit in the viewpoint of the Commission that a prevailing defendant could recover attorney's fees only if the plaintiff had acted in bad faith. Instead, the Court recognized that Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis"⁵⁰ and intended to award attorney's fees to help defendants defend against frivolous and factually baseless actions.⁵¹ A defendant seeking attorney's fees relies on equitable considerations other than the plaintiff's "private attorney general" theory. An award for the defendant is conditioned upon such considerations as the propriety of the plaintiff's conduct and whether there was vexatiousness, bad faith, abusive conduct or an attempt on the part of the plaintiff to harass or embarrass the defendant.⁵²

prevailed and were awarded attorney's fees. On appeal, defendants argued that they had relied in good faith upon the state statute and should not be held liable for a failure to predict that the statute would be deemed unconstitutional. The appellate court upheld the award of attorney's fees and stated:

There is no requirement that the prevailing party be the victim of intentional discrimination. The courts have uniformly awarded attorney's fees in these cases even where the prevailing party was unable to recover back pay or other damages because the defendant was relying in good faith on a state statute . . . This is a recognition of the Congressional purpose to have Title VII enforced in large part by the individuals wronged acting as private attorneys general . . . Awarding attorney's fees to the prevailing party is one way of insuring that this Congressional intent will be effectuated and that individuals will not be deterred from bringing Title VII suits. These plaintiffs have been the victims of an unlawful employment practice, it is only fair that they be allowed to recover the considerable sums they have expended to vindicate not only their rights but also the rights of many other working women.

Id. at 611.

50. 434 U.S. at 420.

51. See *Lee v. Chesapeake & O.R. Co.*, 389 F. Supp. 84 (D. Md. 1975). An employee brought suit against the railroad company and a local labor union under the equal employment provision of the Civil Rights Act of 1964. The plaintiff admitted that he had no reasonable grounds to believe that the union had discriminated against him because of his race. Having prevailed on motions for summary judgment, the defendant union sought attorney's fees. The court, in granting them, quoted from *Paddison v. Fidelity Bank*, 60 F.R.D. 695, 699 (E.D. Pa. 1973):

While a defendant does not act as a "private attorney general" in a Title VII action, . . . a prevailing defendant is entitled to recover reasonable attorney's fees under 42 U.S.C. § 2000e-5(k) when required to defend against a frivolous or factually baseless action brought under Title VII . . . "[s]uch an award [of attorney's fees] would normally be made to prevailing defendants only if the case had been unreasonably brought

389 F. Supp. at 85.

52. See, e.g., *Robinson v. KMOX-TV, CBS Television Station*, 407 F. Supp.

The Court, in rendering its decision in *Christianburg*, was influenced by two recent circuit court cases. In one, *United States Steel Corporation v. United States*,⁵³ the court denied an award of attorney's fees to a successful defendant while, in the other, *Carrion v. Yeshiva University*,⁵⁴ the court upheld the award to a successful defendant. The significance of these cases is the court's application of the same standard in arriving at different results: that the action must have been "unreasonable, frivolous, meritless or vexatious"⁵⁵ and not merely brought in bad faith. To define these abstract words, the Court in *Christianburg* said:

"[m]eritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a District Court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.⁵⁶

1272 (E.D. Mo. 1975). In this case, the defendant did everything possible to expedite the lawsuit and to cooperate with the plaintiff so that the plaintiff would have prompt adjudication of his claim. However, the plaintiff failed to pursue discovery after the defendant had voluntarily waived time limits set forth in the Federal Rules of Civil Procedure, and the suit was dismissed for plaintiff's failure to proceed. In light of the plaintiff's conduct, attorney's fees were awarded to the defendant. *See also* *Matyi v. Beer Bottlers Union* 1187, 392 F. Supp. 60 (E.D. Mo. 1974), where the defendant was awarded attorney's fees where, prior to the filing of the lawsuit, the plaintiff had filed charges of illegal discrimination with the National Labor Relations Board, Missouri Commission on Human Rights, and the Equal Employment Opportunities Commission, and each of these agencies had determined that the plaintiff's charges were without merit.

53. 519 F. 2d 359 (3rd Cir. 1975). The appellate court upheld the denial of attorney's fees to the prevailing defendant (U.S. Steel) in a Title VII action on the grounds that the Commission's actions were "a bona fide effort to seek information and there is nothing to indicate that the demand for access was brought to harass, embarrass or abuse either the petitioner [U.S. Steel, the defendant below] or the enforcement process, nor can we say [the E.E.O.C.'s] action was unfounded, meritless, frivolous or vexatiously brought." *Id.* at 363.

54. 535 F. 2d 722 (2nd Cir. 1976). In this case, attorney's fees were awarded to a prevailing defendant because the plaintiff had previously brought substantially similar charges in state court and, in that suit, the trial judge determined that the plaintiff had perjured herself. In addition, the court of appeals concluded that the suit was motivated by malice and vindictiveness.

55. *Id.* at 727, 519 F. 2d at 363.

56. 434 U.S. at 421.

The Court's decision sets a standard which allows for the award of attorney's fees to the defendant in a Title VII action even if the plaintiff did not act in bad faith. This would mandate the imposition of attorney's fees against the plaintiff if that plaintiff continued to litigate after it became clear that the claim was groundless, frivolous or unreasonable.⁵⁷ This is logically consistent with past precedent. If bad faith was the sole standard, it would not have been necessary for Congress to statutorily provide for an award of attorney's fees since the common law already provides that a prevailing party is entitled to such an award if the opposing party acts in bad faith.⁵⁸

There are few areas of uncertainty left by the *Christianburg* decision. The Court has laid the foundation for an increase in the number of awards of attorney's fees to prevailing defendants by clarifying the standards for allowing their recovery and by formulating a standard which is not grounded solely on the bad faith of the plaintiff. This could, for example, provide a tremendous advantage to a small businessman/defendant with limited finances who is forced to pay a substantial cost in defending a frivolous, unreasonable and groundless lawsuit. If such a defendant is confident of his legal position, he can aggressively defend against frivolous or nuisance suits with the knowledge that, if he prevails, he will recover his attorney's fees.

By setting a reasonable standard for plaintiff's liability for defendant's legal fees in Title VII actions, the Court's decision may cause prospective litigants to stop and think before commencing an action or asserting a defense. It may thus serve as a deterrent to bringing frivolous, time-consuming litigation, and court congestion may ultimately be reduced. Perhaps the threat of having to pay the winning party's attorney's fee will even encourage out-of-court settlements and/or compliance with Title VII. However, inherent in the decision is the risk that the fear of having to pay double attorney's fees may keep meritorious litigants, especially the poor, from seeking relief through the courts.

The fact remains, though, that as a result of the *Christianburg* decision, the Supreme Court has established a double standard for the recovery of attorney's fees in Title VII actions. The Court has affirmed that it is easier for prevailing plaintiffs to recover attorney's fees than

57. *Id.* at 422.

58. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) and *Vaughn v. Atkinson*, 369 U.S. 527 (1962), for examples of cases where, in the absence of a statutory provision, the prevailing party received attorney's fees based on the fact that the opposing party had acted in bad faith.

for prevailing defendants.⁵⁹ The prevailing plaintiff receives the award as a matter of course (barring exceptional circumstances which would make such an award unjust), despite the fact that the defendant is able to present a meritorious, albeit unsuccessful, defense.⁶⁰ On the other hand, the prevailing defendant's right to an award is conditioned upon a finding that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, . . . if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense."⁶¹

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59. The Supreme Court, in footnote 20 of its opinion, recognized that some courts considered that there should be a distinction between awarding attorney's fees against a losing private plaintiff and against the Commission as a losing plaintiff. However, the Court rejected this idea and indicated that the same standard should apply.

60. *Supra* note 48.

61. 434 U.S. at 422.

Constitutional Law: The Element of Scienter Saves the Florida Simple Child Abuse Statute From Being Unconstitutionally Vague: State v. Joyce, State v. Hutcheson

Appellees, George Joyce and Alvin Leige Hutcheson were charged by information, in the counties of Orange and Duval, respectively, with the crime of simple child abuse¹ pursuant to Section 827.04(2) Florida Statutes. The crime is committed by “(i) depriving a child of necessary food, shelter, or medical treatment, willfully or by culpable negligence; and (ii) by permitting, knowingly or by culpable negligence, the child’s mental or physical health to be materially endangered.”² Hutcheson was charged with committing both forms of child abuse against his three-year-old daughter,³ while Joyce was charged only with permitting “material endangerment” of his child’s health.⁴

Each of the appellees moved to dismiss the informations filed against them, claiming that the simple child abuse statute is unconstitutionally vague, indefinite and overbroad.⁵ Additionally, Hutcheson con-

1. As distinguished from aggravated child abuse which is proscribed by § 827.03 FLA. STAT. (1975). In the recent case of *Faust v. State*, 354 So. 2d 866 (Fla. 1978), the Supreme Court of Florida upheld § 827.03 FLA. STAT. (1975) against a challenge that the statute was unconstitutionally vague and overbroad.

2. *State v. Joyce*, 361 So. 2d 406, 407 (Fla. 1978) (Boyd, J., concurred specially with opinion). Prior to being amended in 1977, § 827.04(2) FLA. STAT. (1975), provided: Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence permits the physical or mental health of the child to be materially endangered, shall be guilty of a misdemeanor of the first degree, punishable as provided in Sections 775.082, 775.083, or 775.084.

3. The Information filed against Hutcheson specifically alleged as follows: Alvin Leige Hutcheson, III, on the 21st day of November, 1976, in the County of Duval, and the State of Florida, did willfully or by culpable negligence, deprive a child, to wit: Misty Hutcheson, age three (3) years, of the necessary food, clothing, shelter, or medical treatment, or did knowingly or by culpable negligence permit the physical or mental health of said child to be materially endangered, contrary to the provisions of Section 827.04(2), Florida Statutes.

Brief of Appellee Hutcheson at 2, *State v. Hutcheson*, 361 So. 2d 406 (1978).

4. 361 So.2d at 407.

5. *Id.*

tended that the phrase "materially endanger" was unconstitutionally vague and overbroad because it did not advise the ordinary man of specifically what conduct is prohibited by the statute.⁶ The respective trial courts granted each appellee's motion to dismiss, thus directly passing upon the constitutional validity of Section 827.04(2) Florida Statutes.⁷ On direct appeal⁸ of the consolidated cases, the Supreme Court of Florida reversed and HELD: Section 827.04(2) Florida Statutes (1975) is not unconstitutionally vague, indefinite and overbroad.⁹

Common law required that crimes be defined with appropriate definiteness.¹⁰ In *International Harvester Co. of America v. Kentucky*,¹¹ the United States Supreme Court held that the requirement of definiteness in penal statutes is an essential element of due process of law.¹² This standard was adopted more than forty years ago by the Supreme Court of Florida in the case of *Brock v. Hardie*,¹³ and has since been consis-

6. Brief of Appellee Hutcheson at 2, *State v. Hutcheson*, 361 So.2d 406 (1978).

7. 361 So.2d at 407. In dismissing the information against Hutcheson, the trial court stated as follows:

The statute under attack is Florida Statute Section 827.04(2), child abuse. In the case of *Winters v. State* (Fla. 1977), (Case No. 49,987), decided on March 31, 1977, the Florida Supreme Court struck down the negligent treatment of children statute, Florida Statute Section 827.05, in that the statute was vague, indefinite and overbroad, violative of due process of law. The statute sub judice suffers the same defects and therefore is unconstitutional on its face.

Brief of Appellee Hutcheson at 3.

8. FLA. CONST. art. V, §3(b)(1) provides: "The supreme court: (1) Shall hear appeals from final judgments of trial courts . . . passing on the validity of a state statute"

9. *State v. Joyce*, 361 So.2d 406, 408 (1978).

10. *Pierce v. United States*, 314 U.S. 306, 311 (1942).

11. 234 U.S. 216 (1914).

12. *Id.* U.S. CONST. amend. XIV provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" See *Connally v. General Const. Co.*, 269 U.S. 385, 395 (1926) (application of the statute depends upon the varying impressions of the juries; the constitutional guaranty of due process cannot be allowed to rest upon support so equivocal); *Collins v. Kentucky*, 234 U.S. 634, 638 (1914) (challenged statute violated the fundamental principles of justice embraced in the conception of due process of law).

13. 114 Fla. 670, 154 So. 690 (1934). In *Brock*, the court in determining the constitutional validity of a state anti-trust statute, stated as follows:

Whether the words of the Florida Statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because . . . a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ

tently reaffirmed by that court.¹⁴

To withstand a constitutional challenge for vagueness, a penal statute must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.¹⁵ The statute must also set forth ascertainable standards of guilt;¹⁶ however, such standards must

as to its application violates the first essential of due process of law.”

154 So. at 694. Definiteness in penal statutes has also been held to be a requirement of the Florida Constitution. *See Steffens v. State*, 343 So.2d 90 (Fla. 3rd DCA 1977). In *Steffens*, the defendant petitioned for a writ of habeas corpus, after being convicted for violating a municipal ordinance which prohibited, *inter alia*, topless waitresses and entertainers. *Id.* The petition for the writ was granted and the state appealed. *Id.* In holding the municipal ordinance to be unconstitutionally vague, the court stated:

The law is well settled that a penal statute or ordinance which forbids the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution (1968).

Id. at 91. *See* text accompanying note 12 *supra*. FLA. CONST. art. I § 9, provides: “No person shall be deprived of life, liberty or property without due process of law”

14. *See, e.g., State v. Llopis*, 257 So.2d 17 (Fla. 1971); *Zachary v. State*, 269 So.2d 669 (Fla. 1972); *State v. Dinsmore*, 308 So.2d 32 (Fla. 1975); *State v. Wershow*, 343 So.2d 605 (Fla. 1977).

15. *Papachristov v. Jacksonville*, 405 U.S. 156, 162 (1972); *See Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Harris*, 347 U.S. 612 (1954).

16. *Winters v. New York*, 333 U.S. 507, 515 (1948). In *Winters*, the defendant was charged with possessing, with intent to sell, certain obscene magazines, contrary to subsection 2 of §1141 of the New York Penal Laws (repealed and superceded 1950) which provided as follows:

§ 1141. Obscene prints and articles

1. A person . . . who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell . . . or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .

Is guilty of a misdemeanor

333 U.S. at 508. In determining that the penal statute was unconstitutionally vague because there was no ascertainable standard of guilt, the court also noted that the standard for certainty of a penal statute is higher than for a statute which relies on civil sanctions for enforcement. *Id.* at 518. The Court observed, however, that the entire text of the statute may furnish an adequate standard for certainty. *Id.* *See also* *Raeback v. New York*, 391 U.S. 462 (1963) (per curiam). *But see* *Smith v. Peterson*, 313 Cal. App. 2d 241, 280 P.2d 522 (1955) (the fact that the meaning of a statute is difficult to ascertain or susceptible to different interpretations does not render the statute void).

not be unreasonable or impossible to understand.¹⁷

Other courts have proposed additional reasons for objecting to penal statutes which are indefinite. Some courts and commentators have suggested that such statutes encourage the police to rely upon criteria outside the statute in determining whether an arrest should be made.¹⁸ Further, statutes which are indefinite or vague in effect delegate to judges and juries the legislative power to determine which acts shall be criminal.¹⁹

In construing penal statutes, the courts must balance two competing considerations.²⁰ It is well established that there is a presumption of the constitutional validity of penal statutes²¹ and that, if possible, a court should construe a penal statute so as not to conflict with the constitution.²² It is also well established that, where there is doubt as to the

17. *United States v. Petrillo*, 332 U.S. 1 (1946). In *Petrillo*, the defendant was charged with violating a provision of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946, ch. 138, 60 Stat. 89 (1946) (current version at 47 U.S.C. § 506 (1970)) which provides as follows:

Sec. 506(a) It shall be unlawful by the use of express or implied threat of the use of force . . . to coerce . . . a licensee — (1) to employ or agree to employ in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services.

332 U.S. at 3. The Court held that the statute was not unconstitutionally vague and stated as follows: "The language here challenged conveys a definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *Id.* at 8. *See e.g.*, *Roth v. United States*, 354 U.S. 476 (1957).

18. *See Note, The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76 (1960).

19. *United States v. Cohen Grocery Co.*, 225 U.S. 81, 87 (1921) (Congress cannot delegate legislative power to the courts and juries).

20. *See Brief of Appellant at 7, State v. Joyce*, 361 So.2d 406 (Fla. 1978).

21. *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, the Court stated that, when construing penal statutes: "[e]very presumption is to be indulged in favor of the validity of the statute." *Id.* at 668.

22. *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977). In *Gale*, the defendant was charged with selling sound on tape without the owner's consent in violation of Section 543.041(2) FLA. STAT. (1975). In upholding the constitutional validity of the statute against an attack for vagueness the court stated:

This court is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution.

Id. at 153.

constitutional validity of a penal statute, it must be strictly construed in favor of the accused.²³

In *Joyce*, the appellees had argued that the trial court's invalidation of Section 827.04(2) Florida Statutes was consistent with the Florida Supreme Court's earlier decision in *State v. Winters*.²⁴ The court in *Winters* had reiterated the requirements that penal statutes be strictly construed and that their meaning should be sufficiently explicit so that members of the community may determine what conduct is prohibited.²⁵ In holding that Section 827.05 Florida Statutes was unconstitutionally vague, the *Winters* court had observed that, under the statute, a person with no intent to do wrong could be punished because the statute did not require willfulness or culpable negligence as an essential element of the offense.²⁶ The *Winters* court also examined the language of the statute concerning "necessary shelter" and observed that the statute provided no guidelines for determining what specifically qualifies as "necessary."²⁷ While acknowledging that it is not necessary to constitutional validity that the statute furnish detailed specifications of the conduct prohibited,²⁸ the court stated: "Such a statute is dangerous and does not provide due process of law."²⁹

23. *United States v. Resnick*, 299 U.S. 207, 209 (1937). See *State v. Llopis*, 257 So.2d 17 (Fla. 1971) (penal statutes are to be strictly construed in favor of the person against whom the penalty is sought to be imposed); *Allure Shoe Corp. v. Lymberis*, 173 So.2d 702 (Fla. 1965); *Reino v. State*, 352 So.2d 853 (Fla. 1977); *United States v. Insko*, 496 F.2d 204 (5th Cir. 1974).

24. 361 So.2d at 407. In *Winters*, the defendant was alleged to have negligently deprived his seven children of "necessary shelter" by allowing them to live in an insect infested structure which had garbage strewn on the floor, a clogged toilet and no mattresses or bedsheets for the children. *Winters* was charged by information with violating § 827.05 FLA. STAT. (1975) (superseded by §827.05 FLA. STAT. (1977)) which provides as follows: "Negligent treatment of children — whoever negligently deprives a child of, or allows a child to be deprived of necessary food, clothing, shelter or medical treatment is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084." *State v. Winters*, 346 So.2d 991, 992 (Fla. 1977).

25. 346 So.2d at 993.

26. *Id.* at n.1. The court in *Winters* observed that the language of § 827.04(2) FLA. STAT. (1975) and § 827.05 FLA. STAT. (1975) is similar but distinguished the former in that it requires willfulness or culpable negligence as an element of the crime.

27. *Id.* at 993. The court pointed out that, under the language of the statute, a palatial mansion might fail to qualify as "necessary shelter," if it had no heat.

28. *Id.* See *Orlando Sports Stadium, Inc. v. State*, 262 So.2d 881 (Fla. 1972); *Smith v. State*, 237 So.2d 139 (Fla. 1970).

29. 346 So.2d at 993. Boyd, J., in a dissenting opinion stated with respect to the phrase "necessary shelter" that: "The requirement that the support be necessary to the

In *Joyce*, the court distinguished its holding in *Winters* by stating that the basis for its decision declaring Section 827.05 Florida Statutes to be unconstitutionally vague and indefinite was that the statute criminalized acts of simple negligence.³⁰ The statute under attack in *Winters* did not require scienter; however, Section 827.04(2) Florida Statutes, does require willfulness (scienter) or culpable negligence as an essential element of the crime of child abuse. The *Joyce* court pointed out that this distinction had been noted in its decision in *Winters*.³¹

The element of scienter or criminal intent is not always a constitutional requirement for upholding the constitutional validity of penal statutes.³² For example, most states have regulatory statutes which have been enacted in exercise of the state's police power. The purpose of such statutes is usually to achieve some social betterment, rather than to punish criminals.³³ Statutes which do not require scienter as an element of the offense are considered *mala prohibita*,³⁴ rather than *mala in se*,³⁵ and such statutes have been held to meet constitutional muster.³⁶

child prevents conviction of those who offer minimum support. Since economic abilities of persons charged with the duty of care vary, a more specific standard cannot be enacted. The statute is not vague." *Id.* at 994. *See* United States v. Reese, 92 U.S. 214 (1876).

30. 361 So.2d at 407.

31. *Id.* See note 26 *supra*.

32. United States v. Balint, 258 U.S. 250 (1928). In *Balint*, the Court discussed the requirement of scienter in criminal statutes and stated:

While the general rule at common law was that scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.

Id. at 251.

33. *Id.*

34. In *Coleman v. State*, 119 Fla. 653, 161 So. 89, 90 (1935), the court defined *mala prohibita* as: "[T]hose things which are prohibited by statute because they infringe upon the rights of others, though no moral turpitude may attach, and they are crimes only because they are prohibited by statute."

35. *Id.* The court in *Coleman* defined *mala in se* as: "[T]hose acts which are immoral or wrong in themselves such as burglary, larceny, arson, rape, murder, and breaches of the peace . . ." 161 So. at 90.

36. *Lanz v. Dowling*, 92 Fla. 848, 110 So. 522, 525 (Fla. 1926), where the court wrote, "[W]hen a statute makes criminal an act not *malum in se* or infamous without requiring the act to be knowingly or willfully done, criminal or fraudulent intent is not an element of the offense and need not be proven."

The *Joyce* court noted that the United States Supreme Court has consistently upheld the constitutional validity of penal statutes which require scienter as an essential element of the offense.³⁷ Statutes making it a crime to sell goods at “unreasonably low” prices with intent to destroy competition,³⁸ to “knowingly” transport explosives through congested areas,³⁹ or to sell meat falsely labeled “Kosher” with “intent to defraud,”⁴⁰ have all withstood constitutional challenges for vagueness because scienter was an essential element of the offense.

In *Screws v. United States*,⁴¹ the United States Supreme Court upheld the constitutional validity of a federal statute which was similar to the statute under attack in *Joyce* in that it required “willfulness” to commit the offense. The Court held that the statute was saved from being held void for vagueness only because it required scienter as an element of the offense.⁴² The Court in *Screws* reasoned that in requiring that the act be “knowingly” or “willfully” committed, the accused could not later claim that he had no warning or knowledge that his act was a violation of the law.⁴³ The United States Supreme Court has defined

37. 361 So.2d at 407.

38. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963) (selling “below cost” with predatory intent, was held to be within the statute’s prohibition against selling at “unreasonably low” prices).

39. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (defendant was charged with violating a statute which made it a crime to knowingly violate a federal regulation).

40. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925). In *Sherman*, the defendant was charged with violating the Laws of New York, 1922, cc.580, 581 (current version at N.Y. Agriculture and Markets Law § 201-a (1972) (McKinney)) which made it a crime for: “[A]ny person, who with intent to defraud sells, or exposes for sale any meat preparation and falsely represents the same to be Kosher.” *Id.* In upholding the constitutional validity of the statute, the Court stated: “[S]ince the statute requires specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement.” *Id.* at 502-03.

41. 325 U.S. 91 (1945).

42. *Id.* at 101. In *Screws*, the defendant, a county sheriff in Georgia, allegedly beat a negro prisoner to death while transporting him to the county jail. *Screws* was charged with violating § 20 of the Criminal Code, 18 U.S.C.A. § 52 (current version at 18 U.S.C. § 242 (1970)) which makes it a crime to “willfully subject” a person to deprivation of his civil rights while acting under color of state law. *Id.* Justice Douglas, in speaking for the majority stated: “[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.” *Id.*

43. *Id.* at 102.

“willfulness” as “bad faith or evil intent;”⁴⁴ or as possessing a “bad motive.”⁴⁵ The Supreme Court of Florida has similarly defined “willfulness” as having an “unlawful intent.”⁴⁶ The highest courts of Illinois⁴⁷ and Pennsylvania⁴⁸ have upheld the constitutional validity of child abuse statutes similar to Section 827.09(2) Florida Statutes against challenges for vagueness because the statutes required “willfulness” (scienter).⁴⁹

Additionally, with respect to the term “culpable negligence,” the court in *Joyce* noted that in the recent case of *State v. Green*,⁵⁰ another

44. *United States v. Murdock*, 290 U.S. 389, 398 (1933) (conduct is defined as criminal if one “willfully” fails to pay tax, to make a tax return, or to keep required tax records and furnish needed information).

45. *Spies v. United States*, 317 U.S. 492 (1943) (statute made it a felony to willfully attempt to evade a tax).

46. *Chandler v. Kendrick*, 108 Fla. 450, 146 So. 551 (1933).

47. *People v. Vandiver*, 51 Ill.2d 525, 283 N.E.2d 681 (1971). In *Vandiver*, the defendant allegedly beat his three-year-old stepdaughter. He was charged by information pursuant to ILL. REV. STAT. ch. 23, § 2354 (1969) which provides as follows:

It shall be unlawful for any person having the care or custody of any child, willfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or willfully cause or permit such child to be placed in such a situation that its life or health may be endangered.

Id. at 682. The Illinois court also distinguished the statute on the basis that it required that the act be done “willfully.” Citing *Screws v. United States*, 325 U.S. 91 (1945), the court stated: “Thus, the statute requires more than a mere voluntary doing of an act from which injury to health may result. This additional requirement of willfulness has been held to avoid uncertainty which may otherwise render a vague and indefinite statute invalid.” 51 Ill.2d 526, 283 N.E.2d at 682.

48. *Commonwealth v. Mack*, 359 A.2d 770 (Pa. 1976). In *Mack*, the defendant was charged pursuant to a state statute which makes it a crime to endanger the welfare of children. *Id.* at 771. The statute was taken, with two minor changes, from the American Law Institute’s Model Penal Code § 230.4 which provides: “A parent, guardian or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child’s welfare by violating a duty of care, protection or support.” *Id.* at n.2. In upholding the constitutional validity of the statute, the court observed that the phrase “endangers the welfare of a child” is not esoteric and is easily understood by members of the public. *Id.* at 772. The aforementioned statute is similar to § 827.04(2) FLA. STAT. (1975) in that both require that the prohibited conduct be done “knowingly.” See note 2 *supra*.

49. *Id.*

50. 348 So.2d 3 (Fla. 1975). In *Green*, the defendant was alleged to have injured a person by discharging a pistol. He was charged by information pursuant to § 784.05 FLA. STAT. (1975). In the opinion, the court quoted the statute which provides:

(1) Whoever, through culpable negligence, exposes another to personal injury shall be guilty of a misdemeanor of the second degree, punishable as provided in

criminal statute which required “culpable negligence” had withstood a constitutional attack for vagueness.⁵¹

The court also recognized that, in *Winters*, the language concerning necessary shelter had been faulted by the court for not providing sufficient guidelines for determining the degree of deprivation necessary to constitute a violation of the statute.⁵² Justice Boyd, in his dissenting opinion in *Winters*, attacked the court’s implication that the phrase “necessary” was vague and thus violative of due process.⁵³ It is apparent from the record that the trial court in Duval County may have relied upon this language in granting the appellee’s motion to dismiss and in holding Section 827.04(2) Florida Statutes to have suffered the same defects as Section 827.05 Florida Statutes in *Winters*.⁵⁴ The court in *Joyce*, however, stated that the language in its opinion in *Winters* faulting the term “necessary” was dicta and formed no basis for its holding.⁵⁵

The court reasoned in support of this contention that, if the language criticizing the term “necessary” shelter had been held to suffer from the constitutional infirmity of vagueness, then its prior decision in *Campbell v. State*⁵⁶ would have been addressed and expressly overruled

§ 775.082, § 775.083, or § 775.084; (2) Whoever through culpable negligence inflicts actual personal injury on another shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Id. at 4. The defendant argued that the general public does not understand the meaning of the term “culpable negligence” and therefore cannot know what acts are prohibited by the statute. The court defined “culpable negligence” as “[T]he omission of an act which a reasonably prudent person would do or the commission of an act which such a person would not do.” 348 So.2d at 4. The court observed that members of the public would recognize that reckless acts, which create a risk of danger, were prohibited by law, whether or not they understood the meaning of culpable negligence. *Id.*

51. *Id.*

52. 361 So.2d 406 at 407.

53. 346 So.2d at 994. *See* State v. Joyce, 361 So.2d 406, 408 (Boyd, J., concurring specially).

54. *See* note 7 *supra*.

55. 361 So.2d at 407.

56. 240 So.2d 298 (Fla. 1970), *appeal dismissed*, 402 U.S. 936 (1971). In *Campbell*, the defendant allegedly whipped and beat his seven-year-old stepdaughter. Campbell was charged by information with violating § 828.04 FLA. STAT. (1969) (superseded by § 827.04 FLA. STAT. (1977) which provides as follows:

Torturing or unlawfully punishing children—whoever tortures, torments cruelly or unlawfully punishes, or willfully with malice, wantonly or unlawfully deprives of necessary food, clothing, or shelter, any person under the age of sixteen (16) years, and whoever willfully with malice or wantonly torments or deprives of necessary sustenance or raiment, or unnecessarily or excessively chastizes or

in *Winters*. In *Campbell*, the court upheld the constitutional validity of the former child abuse statute,⁵⁷ which contained the phrase “unnecessarily or excessively chastizes” against a challenge for vagueness. The *Campbell* court stated: “Criminal laws are not to be considered vague simply because the conduct prohibited is described in general language.”⁵⁸

Next, the court dealt with appellee Hutcheson’s contention that the term “materially endanger” was also unconstitutionally vague. The word “materially” was defined by the Court as “to an important degree” and “endanger” was defined as “to expose to danger.”⁵⁹ In holding that the terms were not unconstitutionally vague, the court reasoned that the statute prohibits conduct which, in a significant way, permits the physical or mental health of a child to be exposed to danger.⁶⁰ The court then held that this language was sufficiently clear to inform men of common understanding of the conduct prohibited by the statute.⁶¹

Finally, the court held that Section 827.04(2) Florida Statutes is not unconstitutionally vague, indefinite and overbroad⁶² and, in an effort to clarify its prior holding in *Winters*, the court once again emphasized that its criticism of the term “necessary” was dicta where inconsistent with its holding in *Joyce*.⁶³

Justice Boyd, concurring specially, noted that he had dissented in *Winters* because of the court’s treatment of the term “necessary” and also stated: “I am happy to see the Court, today, recede from language in *Winters* which, at the very least, intimates that in matters of child

mutilates his child or ward, or whoever willfully with malice or wantonly deprives such child or ward of necessary treatment and attention is guilty of a felony, and upon conviction thereof shall be punished by imprisonment not exceeding two years or by fine not exceeding two thousand dollars (\$2,000.00) or both.

Id. at 299. The court held that the words complained of “unnecessarily or excessively” were not unconstitutionally vague when considered with the entire text of the statute. In *Winters v. New York*, 333 U.S. 507 (1948), the United States Supreme Court held that where a statute is uncertain, the entire text of the statute may provide the standard of certainty needed to defeat a constitutional challenge for vagueness. *See also* *State v. Lindsey*, 284 So.2d 377 (Fla. 1973).

57. 240 So.2d at 299.

58. *Id.*

59. 361 So.2d at 408. The court cited WEBSTERS NEW 20th CENTURY DICTIONARY (2d ed. 1957) when defining both terms.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

abuse a standard of what is 'necessary' for a child's welfare is too vague to apprise the public of unlawful conduct."⁶⁴

In *State v. Joyce*, the Supreme Court of Florida implicitly recognized that "there are some areas of human conduct where legislatures cannot establish standards with great precision."⁶⁵ Child abuse is one such area. There is growing concern among the general public with respect to acts of child abuse. Public policy demands that children be protected from abuse. However, the specific acts which constitute child abuse are often difficult to articulate in statutory terms. The United States Supreme Court has interpreted the Constitution to forbid prosecution pursuant to criminal statutes which are vague. In *Joyce* the court left intact an effective tool with which the state protects the welfare of its children. The court also hastily clarified its misleading and ambiguous decision in *Winters* in order to prevent other courts from mistakenly following in the steps of the Orange and Duval County Courts. The Supreme Court of Florida, while not addressing the issue of whether a person can be convicted of violating Section 827.04(2) Florida Statutes by culpable negligence alone, has determined that if the acts of child abuse are done willfully, the constitutional requirements are satisfied.

Edward J. Culhan, Jr.

64. *Id.* (Boyd, J., concurring specially with opinion).

65. See *Smith v. Goguen*, 415 U.S. 556, 581 (1974).

Wrongful Death: Florida Still Requires “Live Birth” as Prerequisite to Recovery: Duncan v. Flynn

Morace C. Duncan brought an action for the wrongful death of his son, John Norris Duncan. He named as defendants Dr. John D. Flynn, an obstetrician; St. Joseph's Hospital; and their insurers, alleging that the doctor's negligent failure to recognize the necessity of a Caesarian section resulted in the death of the baby during the process of delivery. The trial court entered summary judgment in favor of all defendants, holding that the plaintiff had no claim for the wrongful death of the “unborn fetus.”¹ The Second District Court of Appeal affirmed the summary judgment² and held that: 1) as a matter of law the decedent was not born alive, and 2) the “unborn viable fetus” was not a “person” under Florida's former wrongful death statute.³ The Florida Supreme Court upheld the district court's ruling on both issues in a 4-3 decision with a dissent filed by Justice Karl.⁴

The facts showed that, after Dr. Flynn induced labor and the baby's head emerged, it became apparent that his shoulders were too broad to pass through the birth canal. Dr. Flynn and two assisting physicians tried various procedures for about twenty critical minutes with no success. They then realized that the baby's heartbeat had ceased and determined that the child could not be saved. At this point the physicians concentrated their efforts on saving the mother's life. With plaintiff's permission, they severed the child's head and removed the rest of its body by Caesarian section. The baby was full term and weighed fourteen pounds, eight ounces (head and torso). The death certificate listed cardiovascular failure due to strangulation as the cause of death.⁵

This case marks Florida's most recent failure to divorce itself from the ranks of the dwindling minority of states which still require a live

1. *Duncan v. Flynn*, 342 So. 2d 123, 124 (Fla. 2d DCA 1977).

2. *Id.* at 127.

3. §§ 768.01-.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973).

4. *Duncan v. Flynn*, 358 So. 2d 178, 179 (Fla. 1978), *rehearing denied* May 24, 1978.

5. 342 So. 2d at 124.

birth before allowing a wrongful death claim.⁶ It was decided under the former Wrongful Death Act⁷ because the death occurred three and one-half (3½) months prior to the effective date of the current Wrongful Death Act.⁸ It is likely that the outcome would have been similar if decided under the current Wrongful Death Act, as each provides a cause of action for the wrongful death of any "person."⁹ Thus, it is a noteworthy decision because it is a reaffirmation of the view that Florida courts have embraced under both the old and the new Wrongful Death Acts.¹⁰ Florida has once again followed the old common law doctrine that it is cheaper to kill someone than to hurt him. Ironically, while adhering to this doctrine, the justices have previously conceded that the policy arguments in favor of recovery are compelling.¹¹ Why should Florida cling

6. Of the thirty-eight states which have confronted the issue to date, only twelve states, including Florida, have required that the death be subsequent to a live birth before allowing a claim for wrongful death. These states include, Arizona: *Kilmer v. Hicks*, 22 Ariz. App. 552, 529 P. 2d 706 (1974); California: *Bayer v. Suttle*, 23 Cal. App. 3d 361, 100 Cal. Rptr. 213 (Dist. Ct. App. 1972); Iowa: *McKillip v. Zimmerman*, 191 N.W. 2d 706 (Iowa 1971); Missouri: *State v. Sanders*, 538 S.W. 2d 336 (Mo. 1976); Nebraska: *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W. 2d 229 (1951); New Jersey: *Graf v. Taggert*, 43 N.J. 303, 204 A.2d 140 (1964); New York: *Endresz v. Friedberg*, 24 N.Y. 2d 478, 248 N.E. 2d 901, 301 N.Y.S. 2d 65 (1969); North Carolina: *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966); Pennsylvania: *Marko v. Philadelphia Transp. Co.*, 420 Pa. 124, 216 A. 2d 502 (1966); Tennessee: *Durrett v. Owens*, 212 Tenn. 614, 371 S.W. 2d 433 (1963); Virginia: *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E. 2d 440 (1969).

7. §§ 768.01-.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973).

8. §§ 768.16-.27 FLA. STAT. (1977). This current wrongful death statute became effective July 1, 1972, and the decedent's death occurred March 20, 1972. The current wrongful death statute's format and language has remained the same since it became effective in 1972. Section 768.18(2), however, was amended in 1977. *See* FLA. STAT. 768.18(2) *as amended* by ch. 77-468, § 40, 1977 Fla. Sess. Law Serv.

9. The court noted this similarity in *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978), where it wrote: "[I]t is clear that our decision in *Stern* interpreting the scope of the term 'person' as used in the new Wrongful Death Act applies with equal force to the identical term as it appeared in the old Wrongful Death Act." *Id.* at n.3.

10. *See, e.g., Stokes v. Liberty Mutual Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

11. The supreme court in *Stern* conceded, "[T]he reasons for recovery are compelling . . . it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death." 348 So. 2d at 306. *See also* *Simon v. United States*, 438 F. Supp. 759 (S.D. Fla. 1977) where Judge Atkins wrote: "I am sympathetic to the compelling arguments in favor of recovery and cognizant of the inequities inherent in allowing a tortfeasor who so severely injures a fetus that it dies before birth to escape the liability which would have been imposed had the child survived birth, however briefly." *Id.* at 761.

to the minority view while recognizing the policy reasons for allowing recovery?

This was addressed in *Duncan v. Flynn*,¹² where the Supreme Court of Florida relied on the principles set forth in two earlier cases¹³ in pronouncing that a baby must die subsequent to a live birth to give rise to an action for wrongful death.¹⁴ In *Stokes v. Liberty Mutual Insurance Co.*¹⁵ the Supreme Court of Florida held that an unborn fetus was not a "minor child" under Florida's former Wrongful Death Act.¹⁶ However, that court specifically noted¹⁷ that it did not determine whether a still-born fetus is a "person" under the old general Wrongful Death Act.¹⁸ It is puzzling that the court in *Stokes* took pains to make that distinction, but phrased its holding in the all-encompassing terms "a right of action for wrongful death can arise only after the live birth and subsequent death of the child."¹⁹ If the court truly meant to espouse such a broad rule of law, then the distinction it made between Sections 768.01 and 768.03 of the Florida Statutes would be senseless. If the baby must die after a live birth to give rise to a wrongful death action, then it would follow that the unborn fetus²⁰ can be neither a "minor child" nor a

12. 358 So. 2d 178.

13. *Stokes v. Liberty Mutual Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

14. 358 So. 2d at 178.

15. *Stokes v. Liberty Mutual Ins. Co.*, 213 So. 2d 695 (Fla. 1968) (parents had no cause of action for death of stillborn fetus from prenatal injuries which resulted from negligence of a motorist).

16. *Id.* See § 768.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973) which read:

Whenever the death of any minor child shall be caused by the wrongful act, . . . the father of such minor child . . . may maintain an action . . . and may recover not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess.

17. 213 So. 2d at 698.

18. *Id.* See § 768.01 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973) which read:

Whenever the death of any person in this state shall be caused by the wrongful act, . . . of any individual . . . or . . . corporation . . . and the act . . . is such as would, if the death had not ensued, have entitled the party thereby to maintain an action . . . and to recover damages in respect thereof, then and in every case the person or persons who . . . would have been liable to an action for damages, . . . notwithstanding the death of the person injured. . . .

19. 213 So. 2d at 700.

20. "Unborn" and "stillborn" are used interchangeably in this discussion. Ac-

“person.” But the court in *Stokes* cautioned, “[w]e are not here called upon to determine whether the still-born fetus is a ‘person’.”²¹ Obviously the court intended to leave unanswered the question of whether an unborn fetus is a “person” under the general wrongful death statute and merely required a live birth for a claim under the special Wrongful Death of a Minor provisions.²² This does not, however, preclude a claim under the general wrongful death statute.

In *Stern v. Miller*,²³ decided under the current wrongful death statute,²⁴ the Florida Supreme Court reaffirmed the broad rule of law mentioned in *Stokes*,²⁵ but failed to recognize the internal inconsistency²⁶ of the *Stokes* decision. The court in *Stern* restricted the scope of its review to a determination of the legislative intent behind the new Wrongful Death Act.²⁷ The court reasoned that, because *Stokes* was decided before the new wrongful death statute was enacted, the legislature is deemed to have implicitly accepted the judicial construction of the word “person” contained therein by failing to further define it when the opportunity arose.²⁸ At first glance, this argument may seem valid, but the court ignored the immutable fact that the *Stokes* decision did not even purport to construe the word “person,” but expressly limited its inquiry to the proper construction of “minor child” under the former Wrongful Death of a Minor Child statute.²⁹

The Supreme Court of Florida now reaffirms that fallacy by holding in *Duncan v. Flynn*³⁰ that *Stern*³¹ is dispositive of the issue—this in the face of the clear trend toward allowing wrongful death claims for

tually, “unborn” refers to the child while it is still *in utero*, whereas “stillborn” refers to the child which died *in utero* and has been expelled from the mother’s body. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, unabridged (1971).

21. 213 So. 2d at 698.

22. For the distinction between those two sections see notes 16 and 18 *supra*.

23. 348 So. 2d 303 (Fla. 1977) (a fetus, which was alleged to have been viable and to have been fatally injured by defendant’s negligence in an automobile accident, was held not a “person” for purposes of the Wrongful Death Act).

24. §§ 768.16-.27 FLA. STAT. (1973). The court in *Stern* cited the “current wrongful death statute” as shown, 348 So. 2d at 303. See note 8 *supra*.

25. 213 So. 2d at 700.

26. *Id.*

27. 348 So. 2d at 307.

28. *Id.* at 307-08.

29. See text accompanying notes 16 and 18 *supra*.

30. 358 So. 2d 178.

31. 348 So. 2d 303.

the death of a viable fetus.³² The court's rationale is that it is following the legislative intent, yet the only convincing indication of that intent is found in the new statute itself,³³ and the result in *Duncan* appears to be contrary to the express intent of the legislature. Not only does Florida continue to adhere to the anachronistic view denying recovery for the wrongful death of the unborn child, but it has now adopted a very restrictive definition of "live birth."

The Florida Supreme Court found, *as a matter of law*, that the

32. *Verkenner v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838 (1949) was the first case to allow such an action. Since then, twenty-five other states have adopted that view. The court in *Stern v. Miller*, 348 So. 2d at 305 listed the following cases from those twenty-five states: Alabama: *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); Alaska: *Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1972); Connecticut: *Gorke v. LeClerc*, 23 Conn. Supp. 256, 181 A. 2d 448 (1962); District of Columbia: *Simmons v. Howard University*, 323 F. Supp. 529 (D.D.C. 1971); Delaware: *Worgan v. Greggo & Ferrara, Inc.*, 11 Terry 258, 50 Del. 258, 128 A. 2d 557 (1956); Georgia: *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E. 2d 100 (1955); Illinois: *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E. 2d 88 (1973); Pleasant v. Certified Growers of Ill., Inc., 39 Ill. App. 3d 83, 350 N.E. 2d 65 (1976); Indiana: *Britt v. Sears*, 150 Ind. App. 487, 277 N.E. 2d 20 (1971); Kansas: *Hale v. Manion*, 189 Kan. 143, 368 P. 2d 1 (1962); Kentucky: *Mitchell v. Couch*, 285 S.W. 2d 901 (Ky. 1955); Orange v. State Farm Mutual Auto Ins. Co., 443 S.W. 2d 650 (Ky. App. 1969); *Rice v. Rizk*, 453 S.W. 2d 732 (Ky. App. 1970); Louisiana: *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923); *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. 1951); Massachusetts: *Mone v. Greyhound Lines, Inc.*, 331 N.E. 2d 916 (Mass. 1975); Maryland: *State Use of Odham v. Sherman*, 234 Md. 179, 198 A. 2d 71 (1964); Michigan: *O'Neill v. Morse*, 385 Mich. 130, 188 N.W. 2d 785 (1971); Minnesota: *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838, 10 A.L.R. 2d 634 (1949); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W. 2d 334 (1974); Mississippi: *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); Nevada: *White v. Yup*, 85 Nev. 527, 458 P. 2d 617 (1969); New Hampshire: *Poliquin v. MacDonald*, 101 N.H. 104, 135 A. 2d 249 (1957); Oklahoma: *Evans v. Olson*, 550 P. 2d 924 (Okla. 1976); Ohio: *Stidham v. Ashmore*, 109 Ohio App. 431, 11 Ohio Ops. 2d 383, 167 N.E. 2d 106 (1959); Oregon: *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P. 2d 636 (1974), *rehearing denied*, 520 P. 2d 361 (Or. 1974); Rhode Island: *Presley v. Newport Hosp.*, 365 A. 2d 748 (R.I. 1976); South Carolina: *Fowler v. Woodward*, 244 S.C. 608, 138 S.E. 2d 42 (1964); *Todd v. Sandidge Constr. Co.*, 341 F. 2d 75 (4th Cir. 1974); Washington: *Moen v. Hanson*, 85 Wash. 2d 597, 537 P. 2d 266 (1975); West Virginia: *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E. 2d 428 (1971); Panagopoulos v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); Wisconsin: *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 34 Wis. 2d 14, 148 N.W. 2d 107 (1967).

33. § 768.17 FLA. STAT. (1977) entitled "[l]egislative intent" states that "[i]t is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-.27 are remedial and shall be liberally construed." (emphasis added).

Duncan baby was not born alive.³⁴ This raises two questions: 1) Were the criteria used to define "live birth" valid; and 2) Was a strict rule of law defining "live birth" warranted?

Consider the factors used to determine whether or not there was a live birth. The court held that the child must acquire a "separate and independent existence of its mother"³⁵ evidenced by "expulsion (or in a Caesarian section, by the complete removal) of the child's body from its mother with evidence that the cord has been cut and the infant has an independent circulation of blood."³⁶ It appears that the court has identified the most commonly used criteria³⁷ (although respiration is often mentioned),³⁸ but has inexplicably required proof of every factor. The plaintiff pointed out that the baby's head was born spontaneously and life existed for at least twenty minutes until death occurred by "cardiovascular failure due to strangulation."³⁹ These facts would certainly tend to indicate that the baby had achieved an independent circulation and respiration before the cessation of his heartbeat tones led the doctors to believe that he could not be saved. The only elements of "live birth" not satisfied were expulsion from the mother's body and severance of the umbilical cord. These are precisely the acts which plaintiff claimed were prevented by defendant's negligence. Although the criteria used were not unprecedented, the reason for requiring proof of each one is unclear.

A strict rule of law defining live birth is neither necessary nor useful. Justice Karl recognized this fact in his dissenting opinion,⁴⁰ in which Justices Adkins and Hatchett joined. That such a rule is unnecessary becomes apparent upon perusal of the relevant case law. Several jurisdictions allow the jury to decide the issue as a question of fact.⁴¹ Moreover, the variety of circumstances and contexts to which the rule

34. 358 So. 2d at 179.

35. 342 So. 2d at 126.

36. *Id.*

37. Annot., 65 A.L.R. 3d 413 (1975). The question of when a live birth occurs usually arises in the context of homicide statutes.

38. See, e.g., *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W. 2d 1014 (1936); *States v. Collington*, 259 S.C. 446, 192 S.E. 2d 856 (1972); *Bennett v. State*, 377 P. 2d 634 (Wyo. 1963).

39. 342 So. 2d at 124.

40. 358 So. 2d at 179.

41. See *Bennett v. State*, 377 P. 2d 634 (Wyo. 1963); *State v. Toney*, 98 W. Va. 236, 127 S.E. 35 (1925); *Hubbard v. State*, 72 Ala. 164 (1882); *People v. Chavez*, 77 Cal. App. 2d 621, 176 P. 2d 92 (1947); *But see Justus v. Atchison*, 53 Cal. App. 3d 556, 126 Cal. Rptr. 150 (1975) (restricting application of *Chavez* to homicide cases).

must be applied make it somewhat less than useful, especially when compared with the alternative. The most logical resolution of the issue would be to present the evidence and expert medical testimony to the jury and let that panel decide whether or not a live birth occurred. A fact finder's determination would eliminate the need for a strict, inflexible rule of law and allow for a complete consideration of all relevant facts in each case. The facts of the present case provide us with a sterling example of the disadvantages of the rule adopted in Florida. The death certificate showed cardiovascular failure due to strangulation as the cause of death. Strangulation denotes compression of the windpipe until death occurs by cessation of breathing.⁴² The physicians noticed that the baby's heartbeat tones disappeared some twenty minutes after the head had emerged from the birth canal. Surely these facts would be sufficient to raise a *permissible* inference of live birth. This is especially true since there has never been formulated a satisfactory definition of live birth on which the courts could agree.⁴³

There are several public policy considerations which support the majority view.⁴⁴ First, the viable fetus is a human life capable of existence independent of the mother and there should be a remedy for the wrongful extinguishment of such a life. Otherwise there is a wrong with no remedy. Is not the purpose of tort law to avoid this situation?⁴⁵ The majority view achieves the desirable goal of shifting the loss from the survivors to the wrongdoer. Since an action for prenatal injuries can be brought once a child is born,⁴⁶ it seems incongruous to preclude recovery where the injury is so severe as to cause death *in utero*.⁴⁷ The instant case presents the precise situation cited by commentators and courts to discredit the position taken by the supreme court.⁴⁸ It appears that the

42. C. TABER, *TABER'S CYCLOPEDIA OF MEDICAL DICTIONARY* (13th ed. 1977); *WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE*, unabridged (1971).

43. Annot., 65 A.L.R. 3d 413 (1975).

44. Annot., 15 A.L.R. 3d 994 (1967).

45. Dean Prosser states that the purpose of tort law is "to afford compensation for injuries sustained by one person as a result of the conduct of another," the goal being to "adjust these losses." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 1 at 6 (4th ed. 1971).

46. *Day v. Nationwide Mutual Ins. Co.*, 328 So. 2d 560 (Fla. 1976); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 55 at 336-7 (4th ed. 1971).

47. See Comment, *The Conditional Liability Rule—A Viable Alternative for the Wrongful Death of a Stillborn Child*, 28 U. FLA. L. REV. 187. See also §§ 768.16-.27 FLA. STAT. (1977).

48. See generally *Stern v. Miller*, 348 So. 2d 303, 306 (Fla. 1977); *Todd v.*

statute in Florida disallows a wrongful death action where the injury is serious enough to cause death of the fetus before birth, but allows an action for damages if the child suffers less serious injury not resulting in death.⁴⁹ This allows the tortfeasor to avoid liability by inflicting the ultimate injury.⁵⁰ It has been argued that since this factor refers to intentional conduct it is not relevant to cases involving the presumably more prevalent negligent conduct.⁵¹ But the fact remains that the tortfeasor, whether acting negligently or intentionally, is provided with a legal incentive to prevent this "live birth" of the child. Surely such an unthinkable result was not intended by the legislature and should be avoided by the courts.

Aside from these policy considerations, the unique facts of the instant case emphasize the problems inherent in the position adopted in Florida. This case can be distinguished from the cases discussed above because here the child died during an attempt at delivery, allegedly as the result of the negligent methods and procedures of the defendant. In the other cases discussed, the child died either in the uterus or subsequent to delivery. Those cases invariably involved pre-natal or post-natal injuries, never injuries *during* parturition. The facts of this case are unique and do not admit of the simplistic characterization of the child as an "unborn viable fetus," a "stillbirth" or a "live birth." The requirement of live birth precluded recovery to the survivors for the death of their child without any rational basis or justification. The pain and suffering directly experienced by the mother may give rise to a separate case of action, but that relates to a separate and distinct injury. While it is true that the wrongful death statute is in derogation of common law and might, therefore, be strictly construed, both the legislature and the courts have recognized its remedial nature and have agreed that a liberal construction is called for.⁵² Where is this liberal construction?

Due to its strict rather than liberal construction of the statute, the court entered summary judgment against the defendant. Summary judgment is appropriate when there is no genuine issue of material fact and

Sandidge, 341 F. 2d 75, 77 (4th Cir. 1964). See also note 47 *supra*.

49. 328 So. 2d 560.

50. 341 F. 2d at 77.

51. 62 AM. JUR. 2d *Prenatal Injuries* § 15 at 623 (1972).

52. See § 768.17 FLA. STAT. (1977); *Klepper v. Breslin*, 83 So. 2d 587 (Fla. 1955) (pertaining to the old wrongful death statute). § 768.17 FLA. STAT. (1977) states that, "[s]ections 768.16-768.27 are remedial and shall be liberally construed."

the moving party is entitled to judgment as a matter of law.⁵³ The question of "live birth" has been held to constitute a genuine issue of material fact in other jurisdictions.⁵⁴ The court's insistence on infringing upon what is generally the jury's domain is totally unjustifiable. Keeping in mind that Florida courts have not previously ruled on when "live birth" occurs, instituting a strict rule of law could defeat the purpose of the Wrongful Death Act.⁵⁵

Case law in Florida clearly disfavors summary judgments in negligence cases.⁵⁶ This is especially true with regard to medical malpractice cases such as the one at hand.⁵⁷ Summary judgment is a harsh remedy which should be administered very cautiously,⁵⁸ so as not to deprive a litigant of a full and fair trial on the merits of the case. In view of the close question of whether a live birth ever occurred, the propriety of a summary judgment in this case was indeed questionable.

In *Duncan*, a young couple lost their child through the negligence of another, yet were not afforded the opportunity to try the case on its merits. After recognizing the compelling nature of the public policy arguments in favor of recovery, the Florida Supreme Court based its position on a questionable "legislative intent" rationale. The court also pronounced a flat rule of law defining live birth as "expulsion of the child's body from its mother with evidence that the cord has been cut and the infant has independent circulation of blood,"⁵⁹ which seems to be an injustice to the plaintiff in this case.

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53. FLA. R. CIV. P. 1.510(c).

54. See note 41 *supra*.

55. As stated, the purpose of the Wrongful Death Act is "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17 FLA. STAT. (1977).

56. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1965); *Visengardi v. Tyrone*, 193 So. 2d 601 (Fla. 1966).

57. *Id.*

58. *Pearson v. St. Paul Fire and Marine Ins. Co.*, 187 So. 2d 343 (Fla. 1st DCA 1966); *Jones v. Stoutenburgh*, 91 So. 2d 299 (Fla. 1957); *Seven-Up Bottling Co. of Miami v. George Const. Corp.*, 166 So. 2d 155 (Fla. 3d DCA 1964).

59. 358 So. 2d at 179 (Karl, J., dissenting).

Rohan, Patrick J., Zoning and Land Use Controls, Vols. I to V. Matthew Bender, 1978. \$50.00 per volume.

Webber, Susan and Wright, Robert R., Land Use in a Nutshell. Minnesota: West Publishing Co., 1978. xxv, 316 pp. \$5.95.

*Reviewed by Ronald Benton Brown**

Two noteworthy additions to the literature of land use planning law have arrived this year, WRIGHT and WEBBER'S LAND USE IN A NUTSHELL¹ and ROHAN'S Treatise on ZONING AND LAND USE CONTROLS.² These two works employ extremely different approaches to the same body of law. The Treatise is massive; eight volumes are planned.³ The Nutshell, on the other hand, is a brief explanation of the principles of land use planning law.

Few will ever read the Treatise cover to cover. Normally, an attorney with a problem will attempt to pinpoint the section or sections which provide the answer. Unfortunately, a novice to land use planning law would not be competent to begin this search. The novice would first need a general overview of the law, and the Treatise does not provide this. The Nutshell could be the solution to this need in addition to being a study aid for law students. Unfortunately, it is not a very satisfying solution.

In three hundred small⁴ pages, the Nutshell attempts to explain both public and private land use controls. The Nutshell covers a wide span of relevant law, but a result of such broad coverage in such a brief work is superficiality. The sections dealing with private controls⁵ and the English system⁶ particularly suffer. Possibly, for the same reason, the

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The reviewer would like to thank Attorney Robert Eisen for his assistance.

1. Hereinafter referred to as Nutshell.
2. Hereinafter referred to as Treatise.
3. Matthew Bender 1978-79 Catalogue at 63.
4. Approximately 4¾ inches × 7½ inches.
5. Nutshell at Chapter III.
6. Nutshell at Chapter XIII.

Nutshell simply does not read well. Much of the text is written in an unsure and unclear manner, as if the authors were uncomfortable with the format or with the subject matter. The paragraphing is frequently awkward and there are far more case citations in the text than seem necessary for an introduction, yet it fails to give a coherent set of secondary authorities. Sometimes it cites other text books or articles, but frequently no references are made. Further, most of the case citations seem to perform no useful function other than possibly to relate the Nutshell section to a particular case used in a casebook. The Nutshell also fails to introduce the specialized research materials of land use law.⁷

Additionally, the Nutshell, as a device designed for a novice, suffers from two flaws. The text occasionally compares one concept with another, the latter of which has not yet been explained.⁸ Secondly, the extremely limited space forces the authors to make certain assumptions about their readers, but the reader is not informed what those assumptions are. Here, it seems that the reader is assumed to have some background in constitutional law, especially the 14th Amendment, and administrative law. A novice, not realizing this, might miss the underlying rationale of much of the law.

The authors of the Nutshell acknowledge their affinity for the Beuscher, Wright and Gitelman casebook.⁹ It is possible that if these two, the Nutshell and the casebook, were used together, the cumulative effect would be to provide a complete explanation.¹⁰ Nothing, at this point, seems to suggest that the Nutshell would be more appropriate or more effective as a secondary source for one particular casebook than another and it seems unlikely that a neophyte, not presently enrolled in a course, would ever use a casebook to learn the basics. The Nutshell used alone, however, is not enough.

It seems odd that a basic concept like cumulative zoning is practically ignored by the Nutshell. It is mentioned only in the context of discussing exclusionary zoning, and then only to the extent that "some

7. D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* (1971) [Hereinafter referred to as HAGMAN, *URBAN PLANNING*].

8. Easements and covenants are compared before either is explained. Nutshell at Chapter III § 3. Both are compared with zoning in Chapter III § 14 when zoning is not explained until Chapter VI.

9. Nutshell at xvi. For a review of that casebook, J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE* (2d ed. 1976), see 48 U. COLO. L. REV. 641 (Summer 1977).

10. See, e.g., J.J. Brown's book review of D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN DEVELOPMENT LAW* (1973) and HAGMAN, *URBAN PLANNING* at 6 *THE URBAN LAWYER* 742 (Summer 1974).

modern ordinances are not cumulative."¹¹ This is an important concept which a beginner could not be expected to understand instinctively.¹²

Despite these shortcomings, the Nutshell can provide an introduction to the Treatise. For example, a reader interested in possible limitations of urban growth would find the major cases¹³ explained in one brief section of the Nutshell.¹⁴ As the Nutshell is only an introduction, it is not surprising that there is no mention of the "Boca Cap," the ordinance of the City of Boca Raton, Florida which is the apex of growth controls attracting national attention.¹⁵

Turning to the Treatise for in-depth coverage of growth controls, it would be easy to locate the section which covered the "Boca Cap" in Chapter 4, "Time Controlled Zoning," because the Treatise is logically organized, includes a good table of contents, and very usable indexes. Following complete and lucid explanations of *Ramapo*¹⁶ and *Petaluma*,¹⁷ the "Boca Cap" is explained, complete with an extensive factual explanation.¹⁸ Unfortunately, this 1978 Treatise refers only to *Arvida Corp. v. City of Boca Raton*, case No. 74-1344, in the Florida District Court of Appeal.¹⁹ It fails to alert the reader to the landmark case, *Boca Villas Corp. v. Pence*,²⁰ in which a Florida trial court held the "Boca Cap" to be unconstitutional. It is unfortunate that a work of such depth and quality should suffer from an oversight of this magnitude. Relying on the Treatise, a researcher would not find this critical case.

11. Nutshell at 145.

12. For concise explanations see BEUSCHER, et al., *supra* note 8, at 725; HAGMAN, URBAN PLANNING, *supra* note 7, at §§ 1.02 (c), 1.05 (2)(e), and Ch. 14.

13. *Edwards v. California*, 314 U.S. 160 (1941); *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972); *Construction Industry Ass'n. of Sonoma County v. City of Petaluma*, 552 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Wilson v. Hidden Valley Municipal Water Dist.*, 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967); *Steel Hill Development v. Sanbornton*, 469 F.2d 956 (1st Cir. 1972).

14. Chapter V, § 4.

15. See *Zoning and Population Control—Courts are Reacting to New Problems in Old Ways*, 5 F.S.U. L. REV. 463 (1977).

16. *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

17. *Construction Industry Ass'n. of Sonoma County v. City of Petaluma*, 552 F.2d 897 (9th Cir. 1975).

18. Treatise at § 4.03(1)(b).

19. This decision was reported at 312 So.2d 826 (Fla. 4th DCA 1975).

20. 45 Fla. Supp. 64 (Fla. 15th Cir. Ct. 1976).

Nevertheless, Rohan's Treatise, **ZONING AND LAND USE CONTROLS** is a well written, convenient and complete resource for beginning research on the law of public controls of land use. Its looseleaf format with projected annual supplement should make it a reliable up-to-date source, but the researcher should be cautious to check and update citations or risk finding that a recent development has not yet been processed into this massive work. It remains for the individual to decide if this Treatise is worth the substantial price tag.

The Nutshell is unfortunately less successful. Perhaps the feeling of dissatisfaction is a result in part of reading the back-cover advertisement, "A Succinct Exposition of the Law to Which a Student or Lawyer Can Turn for Reliable Guidance." This book, as the preface states,²¹ was designed primarily for law students, but it seems unlikely that it could do more than give a student an awareness of those areas of the law which are involved in the control of land use. Only the final chapter²² provides something the student is unlikely to get from the casebook, an introduction to the conflict between the traditional values of the land use planner and the needs to preserve energy and the environment. This brief chapter alone does not justify purchasing the entire book.

21. Nutshell at xv.

22. Nutshell at Chapter XIV.

Higginbotham, A. In the Matter of Color: Race and the American Legal Process, the Colonial Period. New York: Oxford University Press, 1978. 512 p., \$15.00.

*Reviewed by Michael L. Richmond**

Sir Thomas More retreated to Utopia to find a place where "the simple, the plain and gross meaning of the law is open to every man."¹ Mad though it may be, the trial leading to Alice's frustrated denunciation of Wonderland as a deck of playing cards² is no more insane than some of our more celebrated cases of recent years. Indeed, for as many years as there has been a legal profession, men have criticized its body of "literature." The history of legal writing affirms the irony in the Lord Chancellor's pompous proclamation: "The Law is the true embodiment of everything that's excellent."³

Contemporary critics stress the negative aspects of legal writing. "It seems lawyers have forgotten that communication is their business," bemoans one,⁴ while another places the problem in its historic context, blaming a "tradition of obscurity" for "written documents which are incomprehensible to all but the legally qualified."⁵ Admittedly, we are seeing a slight shift in emphasis: from the breast-beating of unconstructive critics, to those who manifest efforts to improve legal writing. One of the more outstanding examples of this approach is a fine article by Reed Dickerson,⁶ long a champion of artful legislative drafting. Dickerson's practical advice for utilizing "talk-back" from the item being drafted complements Gertrude Block's account of her efforts to teach good writing habits to law students⁷ and Donald Cohen's account of

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1. MORE, T., *UTOPIA* at 213 (Harv. Classics ed. 1910) (1st Eng. ed. London, 1551).

2. CARROLL, L., *ALICE'S ADVENTURES IN WONDERLAND* (1st ed. London, 1865).

3. GILBERT, W., *IOLANTHE Act I* (London, 1882).

4. Siegel, 'Plain English' Law Likely to Produce More Low Comedy Than High Drama, *NATIONAL LAW JOURNAL*, November 27, 1978 at 27.

5. Willis, *Making Legal Documents Readable: Some American Initiatives*, 52 L. INST. J. 513 (1978).

6. Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It*, 29 J. LEGAL EDUC. 373 (1978).

7. Block, *Improving Legal Writing*, 52 FLA. B. J. 778 (1978).

similar efforts at the University of Michigan School of Law.⁸

Still, this trend continues to emphasize the negative aspect of legal literature. Since correction of a problem requires its concomitant exposition, examples of artless legal drafting obscure the obverse of the coin. Improvement of writing skills in the legal profession more properly stems from stressing examples of adept legal prose and urging attorneys to follow suit. Judge Edward Re, one of the more vocal advocates of better legal writing, noted at a recent meeting of SCRIBES that the judiciary could encourage better briefs by citing the actual language of the briefs in their opinions. "All lawyers will properly deem it to be high praise for a learned justice to acknowledge 'agreement' with counsel's statement of the issue in the brief."⁹ Any attorney familiar with his lucid opinions knows that the judge practices this theory in his own drafting.

Ephraim London adopted the same approach in compiling *The Law as Literature*. His Introduction comments: "Great literature should ignite or inspire; but whether it does depends in part on the reader. I believe each work included here met that test when I read it, though in some instances the flame gave more light than heat."¹⁰ James White, in his exceptional test, *The Legal Imagination*, sought a similar end.

To ask how to read and write well is to ask practically everything, one might say, and indeed a legal education could be defined by saying that one learns to read and write the professional language of the law, to master a set of special ways of thinking and talking.¹¹

Thus, attorneys and law students must view and analyze the finest examples of legal prose, in the hope they will attempt to pattern their own communicative efforts after them. The student who emulates Cardozo's prose after reading the *Palsgraf* case¹² will have learned far more than the one who learns the questionable rule of law it embodies. Writers can profit equally with jurisprudential scholars from reading Gray's *Nature and Sources of the Law*.

The appearance of an example of legal prose of this calibre should

8. Cohen, *Ensuring an Effective Instructor-Taught Writing and Advocacy Program: How to Teach the Teachers*, 29 J. LEGAL EDUC. 593 (1978).

9. Re, *The Partnership of Bench and Bar*, 16 CATH. LAW. 194, 207 (1970).

10. LONDON, E., ed., *THE LAW IN LITERATURE* at xi (1960).

11. WHITE, J., *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* at xxxi (1973).

12. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

demand the attention of the profession with the same immediacy as the pronouncement of a major decision by the Supreme Court. Attorneys should devour the pages of such a work, discussing it in their gatherings, and attempting to make their own writings conform to its standard. *In the Matter of Color*¹³ merits this attention.

“Legal writing” by its very definition is writing with a purpose, and Higginbotham gives the legal profession an example at which it should aim. Every sentence of his work is designed to persuade, to impel the reader inevitably to complete agreement with his conclusion: that the courts of colonial America subverted their own values to the economic development of the states. *In the Matter of Color* emerges as a dispassionate, objective trial of the colonial judiciary for its role in the development of slavery. The success of the book lies both in its approach and in the author’s polished realization of his task.

The author’s manifold skills as an advocate evince themselves on every page, as he presents a model of delicately restrained reasoning. This is by no means a warm book; it coldly dissects the opinions of colonial courts, using each one as yet another piece of evidence in the development of its case. Successful lawsuits result from the thorough marshalling of facts, and Higginbotham utilizes his experience as an attorney to produce his book. Cases and statutes are neatly laid before the reader in grim array, while the author seldom intrudes upon their presentation. Only when all facts have been placed before the reader does the author abandon the role of expositor for that of commentator; only after the evidence has been presented does the advocate address the jury.

Were the author to have approached his subject in any other way, the force of his argument would have been lost in the inevitable accompanying rhetoric. The facts alone are sufficiently compelling; Higginbotham wisely avoids any gloss until they have been permitted to make their own impression. Despite painful compulsion to write this book,¹⁴ Higginbotham holds his more eloquent prose in check for the proper moment and, in so doing, achieves a masterpiece. His use of language in achieving his ends exemplifies the finest in legal prose, for it is totally integrated with the concept of the book itself.

The starkness with which Higginbotham paints his mural of perversion of the judicial system suffuses his language as well. In developing

13. HIGGINBOTHAM, A., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978) (Hereinafter “HIGGINBOTHAM”).

14. Discussed at text accompanying note 20 *infra*.

evidence to prove his hypothesis, Higginbotham writes terse, unembellished sentences designed to frame the facts they depict. Cases unfold with brutal simplicity, the holdings laid bare on an otherwise vacant canvas. "Thus, although he committed the same crime as the Dutchman and the Scotsman, John Punch, a black man, was sentenced to lifetime slavery. For the white servants, an additional four years of service was deemed sufficient punishment."¹⁵

Not needing to dwell at length on the *Punch* case, Higginbotham does not indulge himself. His only commentary in the body of the test is concise and direct: "Such differentiation of treatment reflected the legal process's early adoption of social values that saw blacks as inferior. To make rigid the social stratifications these values called for, the court turned social biases, at will, into hard legal judgments."¹⁶

Each sentence falls on the reader's senses with the weight of another count in a lengthy indictment. The writer's art lies in the very simplicity of his words, telling their story in simple and bleak form. Every judicial decision, every legislative enactment, parades unadorned before the reader.

When the instances of betrayal of judicial ideals presented for each jurisdiction concerned overwhelm the reader, Higginbotham breaks his style and lets his unbridled writing capability come through. In his summary segments, he demonstrates a command of language which ranks with the most eloquent. "The black slaves' plight was one of daily imposition of brutality by the laws which sanctioned his enslavement; no part of the legal process was his ally, the courts not his sanctuary."¹⁷ The most skillful attorney could not address a jury more effectively than Higginbotham approaches his readers. Using language as his tool, he inexorably guides his audience to the only conclusion possible. His final sentence exemplifies his skill, recapitulating all of the themes he has presented and still concluding on a note of hope.

But once the drafters and signers of our Declaration made the decision not to weaken their moral argument for nationhood by attempting to rationalize the lie many of them were living, they made inevitable the irony that the truth they espoused, and not their example, would eventually guide their progeny to a society more just than their own.¹⁸

15. HIGGINBOTHAM at 28.

16. *Id.*

17. *Id.* at 58.

18. *Id.* at 389.

Higginbotham demonstrates the most basic tenet of legal prose: language should contribute to reaching the goal for which the writer strives. James Raymond comments: "Almost every brief and opinion can be made more effective by the judicious use of literary techniques."¹⁹ Lawyers must tailor their language to the task at hand. Expository phrases must be brief and concise. Flights of rhetoric should be reserved for advocacy of causes or discussion of facts developed elsewhere.

This is a remarkable volume in its scholarship and content as well as its prose. The exhaustive research underlying its writing has produced as complete a bibliography and set of footnotes as the most meticulous academician could demand. These are complemented by an index as thorough in scope as it is easy to use, and a table of cases. The legal profession needs more examples of this marriage of research and writing, and should take pride in a member who so tastefully unearths and interprets one of its less glorious moments.

Judge Higginbotham attributes the germ of this book to his unjust treatment at the hands of President Edward Charles Elliot of Purdue University. The young freshman and eleven of his black classmates had been denied access to the heated dormitories of Purdue, solely because the law did not specifically compel the university to grant blacks admission to that housing. Returning from his interview with Elliot, Higginbotham realized his compulsion to right this wrong.

Almost like a mystical experience, a thousand thoughts raced through my mind as I walked across campus. I knew then I had been touched in a way I had never been touched before, and that one day I would have to return to the most disturbing element in this incident - how a legal system that proclaims "equal justice for all" could simultaneously deny even a semblance of dignity to a 16-year old boy who had committed no wrong.²⁰

That the callous bigotry of a public official could yield a brilliant work of this scope and nature connotes the highest possible praise for its author. The legal profession owes Judge Higginbotham a great debt for this volume, yet we must regret the pain from which it came.

In much the same vein, we must recognize two truths. The pain which the colonial slave laws caused human beings must be recognized by the legal profession for it to cope with the problems thus engendered.

19. Raymond, *Legal Writing: An Obstruction to Justice*, 30 ALA. L. REV. 1, 16 (1978).

20. HIGGINBOTHAM at viii.

We must also bend our skills to ensuring that the law does not again oppress humanity for the sake of an economic system.

This is not a pleasant book to read, for it reminds us of judicial and legislative actions which we would feel more comfortable overlooking. At the same time it is a remarkably hopeful book, for it anticipates the development of the law to the point where past inequities are recompensed while having the courage to bring us to an awareness of a shameful past. This is the first volume of a projected series by the judge, which will trace the treatment of blacks in American jurisprudence. The legal profession needs the example set by Judge Higginbotham and should eagerly anticipate the appearance of future volumes in the series. Lawyers must realize the power of the law to perpetrate evil, and *In the Matter of Color* burns the dangers of abuse of the legal process into our minds. Lawyers have an equally great need for examples of fine legal prose, of which Judge Higginbotham has given us a model to emulate. All attorneys should read this book—for what it tells us about our profession, and for what it can show us about superb legal writing.

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