

# *Nova Law Review*

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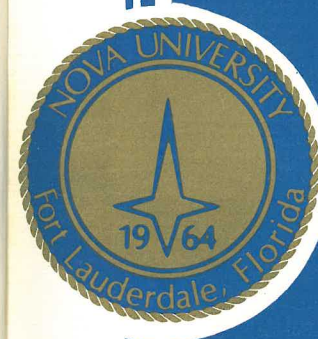
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## Nova Law Review Full Issue

# NOVA LAW REVIEW



Remarks at the Nova University Forum ..... *Alan Dershowitz*

## ARTICLES

American Popular Culture's View of the Soviet Militia:  
The End of the Police State? ..... *Sharon F. Carton*

The Public Policy Exception: The Need to Reform Florida's  
At-Will Employment Doctrine After *Jarvinen v. HCA*  
*Allied Clinical Laboratories* and *Bellamy v. Holcomb* ..... *Stephen G. De Nigris*

Of Forfeiture, Facilitation and Foreign Innocent Owners:  
Is a Bank Account Containing Parallel Market Funds  
Fair Game? ..... *Alan S. Fine*

Commentary: AIDS Testing of Health  
Care Workers ..... *State Representative Lois J. Frankel*

The Doctrine of Merger With Respect to Real  
Estate Transactions: Taking the Bull by the  
Horns ..... *Edwin M. Ginsburg*

Access To "Private" Documents Under the  
Public Records Act ..... *Robert Rivas*

Judicial Review and Legislative Deference:  
The Political Process of Antonin Scalia ..... *David Schultz*

Protection and Custody of Children in United States  
Immigration Court Proceedings ..... *Judge J. Daniel Dowell*  
*Judge Philip J. Montante, Jr.*  
*Judge Ira Sandron*  
*Judge Jose Simonet*

## THE DEATH PENALTY

Enactment of the Florida Death Penalty Statute, 1972:  
History and Analysis ..... *Malcolm Stewart*

Recent Florida Capital Decisions ..... *Gary Caldwell*

## NOTES AND COMMENTS

Crime and Punishment? Judges' Gavels Become the  
Latest Weapon in the War on Drugs ..... *Michael E. Coviello*

*Payne v. Tennessee*: The Arbitrary Imposition of  
the Death Penalty and a Review of Florida Case Law  
Since *Booth v. Maryland* ..... *Michael P. Koller*

*Harmelin v. Michigan*: Effective Application  
of Anti-Drug Legislation or Cruel and Unusual  
Punishment? ..... *Louise S. McAlpin*

Sanctions and the Inherent Power: The Supreme  
Court Expands the American Rule's Bad Faith  
Exception for Fee Shifting—*Chambers v. NASCO, Inc.* ..... *Alexander B. Rotbart*

*Hernandez v. New York*: Applying *Batson* to  
Peremptory Strikes of Bilinguals—Should Language  
Ability be a Surrogate for Race? ..... *Ronnie R. Savar*

Cumulative Index

VOLUME 16

SPRING 1992

NUMBER 3

# NOVA LAW REVIEW

VOLUME 16

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## TABLE OF CONTENTS

Remarks at the Nova University Forum . . . . . *Alan Dershowitz* 1009

### ARTICLES

American Popular Culture's View of the Soviet Militia:  
The End of the Police State? . . . . . *Sharon F. Carton* 1023

The Public Policy Exception: The Need to  
Reform Florida's At-Will Employment Doctrine After  
*Jarvinen v. HCA Allied Clinical Laboratories* and  
*Bellamy v. Holcomb* . . . . . *Stephen G. De Nigris* 1079

Of Forfeiture, Facilitation and Foreign Innocent Owners:  
Is a Bank Account Containing Parallel Market Funds  
Fair Game? . . . . . *Alan S. Fine* 1125

Commentary: AIDS Testing of Health  
Care Workers . . . . . *State Representative Lois J. Frankel* 1161

The Doctrine of Merger With Respect to Real  
Estate Transactions: Taking the Bull by the  
Horns . . . . . *Edwin M. Ginsburg* 1171

Access To "Private" Documents Under the  
Public Records Act . . . . . *Robert Rivas* 1229

Judicial Review and Legislative Deference:  
The Political Process of Antonin Scalia . . . . . *David Schultz* 1249

Protection and Custody of Children in United States  
Immigration Court Proceedings . . . . . *Judge J. Daniel Dowell* 1285  
*Judge Philip J. Montante, Jr.*  
*Judge Ira Sandron*  
*Judge Jose Simonet*

### THE DEATH PENALTY

Enactment of the Florida Death Penalty Statute, 1972:  
History and Analysis . . . . . *Malcolm Stewart* 1299

Recent Florida Capital Decisions . . . . . *Gary Caldwell* 1357

### NOTES AND COMMENTS

Crime and Punishment? Judges' Gavels Become the  
Latest Weapon in the War on Drugs . . . . . *Michael E. Coviello* 1431

*Payne v. Tennessee*: The Arbitrary Imposition of  
the Death Penalty and a Review of Florida Case Law  
Since *Booth v. Maryland* . . . . . *Michael P. Koller* 1463

<i>Harmelin v. Michigan</i> : Effective Application of Anti-Drug Legislation or Cruel and Unusual Punishment? .....	<i>Louise S. McAlpin</i>	1501
Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting— <i>Chambers v. NASCO, Inc.</i> .....	<i>Alexander B. Rotbart</i>	1527
<i>Hernandez v. New York</i> : Applying <i>Batson</i> to Peremptory Strikes of Bilinguals—Should Language Ability be a Surrogate for Race? .....	<i>Ronnie R. Savar</i>	1567
Cumulative Index .....		1603

## Remarks at the Nova University Forum

**Alan Dershowitz\***

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Thank you so much. It's really a pleasure to be down here in warm climates. I have really enjoyed having met so many of you before and look forward to meeting many of you afterwards and look forward to the questions which I, find contentious and stimulating. I met last night with some people from the Law School and the University and I find this place to be a real miracle. The fact that a new university and a new law school, relatively new at least, could have been established during these trying times of budgetary constraint is a real credit to President Fischler, Dean Abrams, and Vice-President Goldstein and I really want to wish them continued good luck.

While watching the news this morning with the first anniversary of the invasion in the Middle East, thinking about the current events and about the world in terms of how it's changed in the last year, particularly the destruction of the Soviet Union, I was reminded of a visit I made to the Soviet Union back in 1974, on behalf of dissidents, talking about hopeless causes in those days, people like Natan Scharansky and Edith Udell. I remember meeting with Edith Udell who was then going to jail the next morning for the terrible crime of simply wanting to join her family in Israel and having protested about that. I met her in front of St. Basil at five o'clock in the morning in order to avoid detection by the KGB. I expected to meet a forlorn and distraught woman who was facing the inevitability of imprisonment and instead I found a bouncy and vivacious woman waiting to confront the Soviet legal system. I remember she said, "Before we begin our serious discussion, Professor, tell me a joke or a story that Americans tell which reflects life in America." So I thought a moment and I said, alright, and I told her the story of poor Mr. Schwartz who got sick one day in Boston and was taken to the Massachusetts General Hospital, the fanciest pavilion . . . where only presidents and actors go. And he was there for two or three

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days, getting great care. Finally he insisted that he wanted to go to the smaller little hospital down the road, the Beth Israel Hospital. It wasn't as good as Massachusetts General. So he goes to the Beth Israel Hospital and the young intern there, who was a little jealous that he wasn't an intern at Massachusetts General said, "Mr. Schwartz, I see you'd agree with us here that the medical care in Massachusetts General is not what it's cracked up to be." And Schwartz said, "no, the medical care was fantastic. I can't complain." He said, "it must be the nurses". "No, the nurses were wonderful. I can't complain" "Was it the X-ray technicians?" "No, the X-rays were excellent. I can't complain." "It must have been the food there, all the watercress salad they gave you." "No, the food was very good. I can't complain." He said, "then why did you switch to our hospital.?" And Schwartz said, "simple, here I can complain!"

And I said that was the essence of being an American. Here we can complain. In fact, not only can we, but we must. It's part of our obligation as a democracy. Indeed, there is even a constitutional amendment about it; the right to petition government for the redress of grievances. That's a fancy word for complaint.

So, today, in the spirit of the First Amendment, I am going to complain a little bit. I am going to exercise my right to complain. I want to complain about the fact that, as we see emerging nations throughout the world, particularly in Eastern Europe, expecting and demanding more freedom and more rights and more liberties, that we in this country seem to be neglecting our rights. We seem to be taking them for granted; we seem to be regarding them often as inconveniences. We are impatient about these rights, particularly the rights of minorities. These rights excite us at a time when we are beginning our celebration of the two-hundredth anniversary of the Bill of Rights, an unusual document we talk about as constitutional amendments. They are really not constitutional amendments. The first ten amendments to our Constitution are part and body of the Constitution. The Constitution itself, which is a document not of rights but of power, would never have been enacted had it not been for a promise that there was going to be a Bill of Rights to restrain the power of the central government. People like Thomas Jefferson, who said in 1787, "were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." Thomas Jefferson, Madison, Hamilton and others told us we didn't have to choose. We can have both newspaper and government. We could have both freedom of speech and the power of

the government to defend us in case of war.

The irony, and one repeated I think throughout American history, is that it was generally the citizens themselves who have sought to constrain our rights in the interests of safety, security and convenience. Sometimes the interests were even less compelling: xenophobia, bigotry, intolerance. The greatest crisis of constitutional democracy occurs when the majority demands that minority rights be abridged. The conflicts between the power of the many and the rights of the few raise the most profound questions about our theory of government.

You know, it's interesting, when you have government by the minority, as you had in communist countries, and as you have in most countries throughout the world today, such as in the Middle East and Asia, then rights are often majority rights. In South Africa, the rights are the rights of the majority who try to participate in government. But when you have a real democracy, such as the one that we have in this country, then rights tend to be the rights of minorities. Power is the power of the majority. How does a democracy justify its Bill of Rights which allow minorities to overrule the majority? Every time one of our first ten amendments to the Constitution or any of the other provisions, the 14th, 13th, 15th amendments are also part of the structure of our government before the Civil War and the close of the war amendments were really part of the peace treaty that resolved the conflict between North and South, between slavery and freedom; every time the Constitution is invoked to strike down legislatively-enacted statutes that constrain a popularly-elected official, we have made an uneasy compromise with democracy. In that sense our Bill of Rights is somewhat analogous to the Ten Commandments or other constraints upon majority will within a religion.

I am reminded of the good news, bad news story when Moses came back from Sinai bearing the Commandments and then he said, "Ladies and Gentlemen, the good news is I got him down to ten. But the bad news is that he still kept the prohibition against adultery." Well, that might not have been so popular in those days but, nonetheless, it is one of the Commandments.

Now, religious society and secular society, of course, are different. Throughout our two hundred year span as a constitutional democracy, many efforts, theoretical, jurisprudential have been made to justify the constraints on majority action. Though no single accepted rationale has ever emerged as the definitive one, the general consensus has been that our experiment with restraining the powers of the majority have worked tolerably well. The greatest threats to our liberties have always

come from tangent majorities, impatient about the rights of minorities. I always remember comedian Yakov Smirnoff, who came from the Soviet Union, saying, "The day I got my citizenship and stood at the Statue of Liberty this great feeling overcame me and I started to ask myself, what can we do to keep these damned immigrants out!" There is a sense, when you become a majority, how would you feel about the threats of minorities.

From the very beginning of our history, Thomas Jefferson, Adams, and Hamilton were willing to tolerate limitations on our freedom. The Alien and Seditious Acts were virtually contemporaneous with our First Congress. And what did it do? It undercut the First Amendment quite dramatically. The trial of Aaron Burr for sedition virtually came at the time of the beginning of our constitutional rights. Thank God we had a Chief Justice in place, John Marshall, who presided over that trial and defined treason so narrowly and specifically that we were able to live within the constraints of the First Amendment. Slavery in this country! Thurgood Marshall has pointed out, that the Constitution started out describing slavery and defining African-Americans as three-fifths of a person. It's not the kind of a Constitution that could have endured forever but for the amendment process. Nativism, the persecution of immigrants, segregation, racism, anti-Japanese hysteria at the beginning of the Second World War, the detention of 100,000 people of American descent because of their racial background, and the hysteria over McCarthyism. Last night I was privileged to read a brilliant law review article, really a book, written by Professor Marc Rohr of your faculty here, entitled "Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Years", which tell us the terrible story of how we almost lost our First Amendment in our quest to end communism both here and abroad and the great victory of both the First Amendment and our fight against tyranny and communism. We didn't need to sacrifice the First Amendment to destroy communism. Communism self-destructed because of its absence of a First Amendment, because of the absence of a way of expressing oneself under totalitarian regimes. And I think we have a great deal to be proud of as to how we eventually allowed communism to defeat itself, without allowing it to become tyranny in this country and to repress our own Bill of Rights.

Of course our Bill of Rights has provided far less than perfect protection against the excesses of tangent majorities. But it has continued and contributed, and continues to contribute to the prevention of popular tyranny. The First Amendment certainly has occasionally imposed



unnecessarily restrictive checks on majority power. Surely during the New Deal the way in which the courts used the first ten amendments and the Fourteenth Amendment to the Constitution to prevent social welfare legislature from being enacted, shows one excess. Many Americans believe that the Warren Court went too far in protecting the rights of criminals in relation to the interests of the victims. Reasonable people could have different views on that one and my view is not in accordance with that popular conception but nonetheless I understand the opposing points of view.

But this balance is very much a part of a dynamic system of government which eschews too much concentration of power. American sovereignty! You know, it's interesting, when Tocqueville came to America, 150 years ago, he came looking for where sovereignty led. He was used to Britain where you can find sovereignty in either the King or in the Parliament, or in France where you can find sovereignty in the president. He came to the United States and he thought he would find sovereignty in the president and they said, no, the president isn't really sovereign. The legislature isn't really sovereign. The judiciary isn't really sovereign. And he went back in a state of confusion because he was looking in the wrong place. Sovereignty in America is not located within a particular branch of government. It is located within a process of government; the process of checks and balances; the process of separation of power. It's very hard to see a process in a day. You can't take a snapshot of a process. You can only take a videotape of a process. But Tocqueville wasn't here long enough to see the process in operation. But our concept of checks and balances, and our process of separation of powers are an extremely subtle and well-functioning form of sovereignty. But beyond that abstract concept is a common sense distrust of untrammelled authority, born out of the very histories and experiences which combined to create the very diverse American character.

We are a nation of minorities. We are a nation of dissidents, of immigrants, of risk-takers, of skeptics, of pariahs, of experimenters, and of naysayers. We are distrustful and ornery mavericks. We are a tyrant's nightmare and an anarchist's dream. Our slogans, anachronistic as they may seem, tell us something profound about our sense of individualism. Don't tread on me! Give me liberty or give me death! Show me! Question authority! Yesterday's quaint slogans have often become today's rude bumper stickers, T-shirt logos or wall graffiti. But whatever the medium, the American message has been similar for over two centuries. We need breathing room. We will not submit to regi-

mentation. We demand our liberties.

Against this historical landscape, the Bill of Rights can be viewed as an insurance policy protecting against tyranny. As with all insurance policies, payment of the annual premium is no fun at all. You get nothing material in return, at least not right away. We pay a heavy premium every time a guilty criminal is freed in the name of the Fourth Amendment; every time a pornographer or a racist is permitted to instill their hate in the name of the First Amendment; every time a girl is allowed to make a "wrong choice" in the interests of freedom of choice; every time an indigent seminary student is denied governmental tuition payments for his or her religious education that would violate the Establishment Clause.

But as with any insurance policy, we pay these premiums in exchange for partial protection against disasters that are specifically unpredictable and generally inevitable. No insurance policy can prevent death or disability but it can ease their ravages. Sometimes a good insurance policy even reduces the risk by requiring those who control to take precautions as conditions to reducing premium payments. Likewise, the Bill of Rights by itself cannot prevent oppression. I think it was Learned Hand who said, "If there is oppression in the souls and hearts of the American people, no Bill of Rights can ever keep it from coming to fruition. And if there is liberty in the hearts and souls of the American people, no Bill of Rights may be necessary." As to the latter, I think he was wrong, with all due respect. The Bill of Rights is necessary. It slows down the passions. It makes us think long term. It makes us understand that there are minority rights to be balanced against majority rights. It sends an important message to those who would seek power through dubious means. We Americans take our rights seriously and you ignore that message at considerable political risk. The downfalls of Richard Nixon, Joseph McCarthy, Eichmann are great testaments to the American allergy to traffic in constitutional rights. During the past two hundred years, we have paid many constitutional premiums and accumulated much equity in our collective insurance policy. What you have here is not merely a term policy; it is a whole life policy and an investment in our future as a free country.

There are those today who would turn our Constitution into a narrow, authoritarian tool for advancement of particularistic philosophies, doctrines and even religions. Evangelist Pat Robertson has called the Constitution a "Christian document" and has promised to "rescue us from non-Christian judges who have been misconstruing it in a secular manner." Presidential Candidate Pat Buchanan has made similar

points, though he has added the cosmetic of calling it a “Judeo-Christian document” hoping perhaps to make it more acceptable to Jews as well as Christians. It won’t work. The Constitution is not a document for some, even for the majority. It is a document for all. It is a document for the increasing number of non-Christians or non-Jews who are coming to this country, and who are making this country the most diverse and heterogeneous experiment in the history of humankind. Some politicians view the Bill of Rights as an encumbrance to their political programs which should be interpreted grudgingly to somehow reflect an original intent, an intent they claim to know. But if there was any original intent in the minds of the Framers, it was general and broad to create an enduring charter of liberty capable of responding to changing conditions.

I remember having a debate recently with Chief Justice Rehnquist. Chief Justice Rehnquist, I think, doesn’t like me because the *New York Times* asked me a couple of years ago what did I think of the fact that more Americans knew the name of Judge Wapner than the name Justice Rehnquist. And I said I was not surprised, Wapner was a better judge. But in the course of my debate with Chief Justice Rehnquist about judicial intent, I told a story that comes from the Talmud. The Talmud is that great, old Jewish document which is akin to the United States Reports. It simply reflects all the cases, stories and controversies that occurred during several millennia of Jewish litigation. The story that I wanted to tell was the story of the great Rabbi Eliezer, who was engaged in an acrimonious dispute with some other rabbis in the seminary about the meaning of a particularly arcane provision in the Bible. Eliezer was so certain that he was correct in his interpretation of the Bible that he brought forward every imaginable argument. But the other rabbis did not accept his interpretation. Finally, in excess frustration, he invoked the original intent of the Author of the Bible, God Himself. Eliezer implored, “if the Halakah, the authoritative meaning of the Law, agrees with me, let it be proved from Heaven.” Whereupon a booming heavenly Voice cried out to the others, “Why do you dispute with Rabbi Eliezer, seeing that the Halakah, the Jewish law, agrees with him?” Pretty authoritative evidence, that the original author would say it. But another of the rabbis, Joshua, rose up and rebuked God for interfering in this very human dispute. “Thou hast long since written the Torah and we pay no attention to a heavenly voice.” The message was clear: God’s children were telling their Father it is our job, as the rabbis, to interpret and give meaning to the Torah that you gave us so many years ago. You gave us a docu-

ment to interpret and a methodology for interpreting it. Now, please, leave us to do our job. According to the tradition, God laughed, agreed, and said to the angels, "My children have defeated Me in argument." Well, if no single person, divine or otherwise, can tell us what the authoritative meaning of the Bible is, certainly the idea of looking for divine intervention to explain to us general phrases in the Constitution is always going to be an exercise in futility. I can just imagine Jefferson, Hamilton and Madison in constitutional heaven today, looking at Justice Rehnquist, Robert Bork and Antonin Scalia looking and poring over the text of the constitutional amendments saying, "They must have meant this!" And Hamilton, Jefferson and Madison saying "We just never thought of those models! It never occurred to us how to deal with wire tapping! It never occurred to us how to deal with current problems that are facing the American people. Please use your own common sense, use your own experience, use your own points of view subjected to widespread debate. But come, please, to your own conclusions."

I worry very much about the insensitivity that so many have today towards civil liberties. You know, if you ask people in America, are you are a civil libertarian? They all say, oh, yes, sure, we agree with civil liberties. Do you agree with the First Amendment? Oh, sure, we agree with the First Amendment. Do you believe in the Bill of Rights? Sure, we believe in the Bill of Rights. But then when you ask them more particularistic questions, it turns out that for most Americans, civil liberties and the Bill of Rights mean rights for us; rights when we think our interests are disturbed. They have so little understanding about the concepts of rights for others. I think about Patrick Buchanan who never, ever supports the rights of people charged with crimes. He is always in favor of a law and order approach. He always believes in the rights of victims. But he's upset when it comes to Nazi war criminals. Pat Buchanan has never found a Nazi war criminal that he couldn't support. In fact, Allen Ryan, head of the Justice Department's Special Investigation Office recently said, "Many people are asking why is Pat Buchanan so in love with Nazi war criminals?" You have to ask yourself that question, what is it about Nazi war criminals that would attract the attention of a Pat Buchanan who generally doesn't support the rights of any criminal defense.

Or, to switch from right to left, look at William Kunstler, who said, "I defend only people who I love." I'll never forget the time when he asked me to defend him, having been charged with contempt of court in the Chicago Seven case, I said, "Bill, I'll defend you but I

don't love you." And he then threw his arms around me and kissed me and said, "It's good enough that I love you, Alan." Well, Bill doesn't love me anymore, even though he won his case, because I have been very critical of his selective use of the Bill of Rights.

But take an issue that certainly attracted the attention of so many people down here for so long a period of time. How many radical feminists do we know that believe in the Bill of Rights and the Constitution except when it comes to the rights of people charged with rape where they would suspend constitutional rights. Catherine MacKinnon said recently in an article in the *New York Times*, that we ought to change the burden of proof on rapes from beyond a reasonable doubt to a simple by a preponderance of the evidence, as a kind of an affirmative action program towards the rights of women. Or right to lifers, who have discovered within the Constitution, a right to protest or a new right, a right to life, but who don't support or have any sympathy for the right to choice. Or many of my Jewish friends who believe in freedom of speech but who were on the side of the city of Skokie when it tried to ban Nazis from marching through the city of Skokie, finding within the Bill of Rights an exception where it suited their own particular convenience or ideology. How many African-Americans do we know who believe in freedom of speech except when it comes to the right of a white diplomat from South Africa to speak at a university campus. How many gays do we know who support the right of freedom of expression for gays but would ban homophobic speech. How often we see with the political-correctness doctrines today on campus; a selective invocation of rights when it serves the interests of the left but not the interests of the right. How many times do we hear from those who are wealthy that the most important right in the Constitution is the right to preserve property; that the right of liberty certainly can be compromised in the interest of property. How many poor people or advocates for the poor see in the Constitution only a welfare right but not a right of property. How many of those who are religious read only the first part of the First Amendment talking about free exercise, and neglect the Establishment Clause. And how many who are irreligious see in the First Amendment only the Establishment Clause, without looking at the opposite side of the coin, the right to practice one's religion freely.

I want to spend the last few minutes of my talk on one particular right that nobody ever advocates. That is, the rights of criminal defendants. A job that I have taken over the past twenty-five or thirty years. It's a very thankless right because virtually all of the other rights I have spoken about have advocates. There are people who vote and who

defend the rights of the religion, the rights of life, the rights of property and others. But when it comes to defending the rights of people charged with crimes, you don't win elections on a platform of saying "I am for the criminal". I have often wondered, in Florida, the only state I know of where people run for the office of public defender, what's the program, what's the platform? "I am going to be the best public defender in Broward County! I am going to free more guilty people than my predecessor! I am going to invoke more constitutional rights! You are going to see a higher rate of recidivism under me than under any of my predecessor!" You run that way or you run by saying, "Vote for me. I won't fight that hard. I'll put one arm behind my back and I'll protect all of you. You should put me in as public defender." That's how you run for public defender because advocating the rights of criminal defendants is so unpopular. It's no surprise that you don't see any Nobel prizes for those who defend the rights of criminal defendants. Nor would you ever see a president of the United States get up and make the following speech. "I am now going to appoint as the new justice to the Supreme Court a man or a woman who has devoted her life or his life to defending pornographers, rapists, murderers. That's what we need on the Supreme Court. Someone who will speak up for the rights of thieves, disenfranchised elements of our society." You know, you ask yourself, how did he ever get on the United States Supreme Court. Name me justices who have ever stood up for the rights of criminal defendants and I will tell you a one word answer, accident, total accident. When you think of the great justices who have supported the rights of criminal defendants over time, who have they been? Earl Warren, appointed as governor of California, former district attorney, former attorney general, tough "law and order" type and he gets on the Supreme Court and suddenly he is in favor of the rights of criminal defendants. William Brennan, never had any reputation as an advocate for the rights of defendants. He had been a justice in the New Jersey Supreme Court where most of his cases had to do with sewage and other phenomena in New Jersey. Suddenly he gets on the United States Supreme Court and is freed from the constraints of politics and he becomes a beacon on the rights of criminal defendants. The only justice in history ever appointed to the Supreme Court who has had a record and a reputation for defending the rights of criminal defendants was Thurgood Marshall and who was appointed, I think, largely and importantly, because for two hundred years we have not had an African-American on the United States Supreme Court. The next African-American appointed to the Supreme Court surely was not

one who supported the rights of criminal defendants, perhaps except if they were charged with harassment. We'll wait and see how those cases turn out. But the rights of criminal defendants certainly have been a benchmark of how we define our constitutional system and yet we see people appointed to the Court for all kinds of other reasons but not because of their defense of the rights of criminal defendants.

It's a hard job. Some of you probably are criminal defense lawyers or at least are friends of criminal defense lawyers. We've all had the same experience. When we defend somebody who is popular everybody loves you. "Oh, you are doing a great job." You know, when I speak in the financial community, people come over and pat me on the back and say "we really appreciate that you are representing Michael Milken. We think he is unjustly accused of a crime." Or when I represent a Doctor Spock people from the radical community say "oh you are doing a terrific job. You know, we really like the fact that you are representing somebody charged with that particular . . . ." Or if I represent somebody who, as mentioned before, was accused of pornography, a Harry Reems in the latest film made right down here twenty or twenty-five years ago, the people from that industry find you to be something of a hero. But everybody disagrees with most of the people we represent most of the time. My bellwether is always my mother and my mother finds most of my clients thoroughly disagreeable. She happens to like Leona Helmsley. But it's rare to find any criminal defense lawyer who can continue to represent defendants who will give them any kind of popularity contests. A great lawyer from Florida, Roy Black, when involved in the defense of William Kennedy Smith, made as many enemies as he made friends. The *New York Times* op-ed piece recently called him sexist for using words like hysterical to describe the complaining witness. I thought it was a poor choice of words myself. Others regard him as a great hero and a great lawyer. I think the one thing you can say about many lawyers, particularly a lawyer like Black is that he was thoroughly professional. He did a very, very good job. He played by the rules. He did what a defense attorney is supposed to do.

You know the famous old story of the defense lawyer who cabled his client, "justice has prevailed." His client cabled back, "appeal immediately!" We are not necessarily in the justice business. That is, the American system of criminal justice is based on a very interesting theory. It's a theory that we achieve justice not by everybody in the system trying directly to reach justice but by everybody in the system trying to achieve what's best for them. It's almost like the way capitalism works

in a free market economy. In a free market economy, every single participant in the economy does not have his or her particular goal, to achieve a kind of economic equilibrium. We hope that the invisible hand of Adam Smith would bring about some kind of economic revolution and everybody fights for his own piece of the pie. Our adversary system of criminal justice, which is entirely compatible with the capitalist system of economy, the free market systems, works in somewhat the same way. If everybody works hard and if everybody is on an equal plane, the William Kennedy Smith case revealed, I think, how actions sometimes in equal level plane deal with participants, and if everybody has a roughly equal access to resources, and roughly equal access to excellent counsel, the system in the end will work.

What does it mean, "the system in the end will work?" Does it mean the truth will always come out? No. Because truth is only one, and perhaps the most important goal of the system but only one important goal of the system. The system's goal is fair process. The system's goal is achieving as many of the equities that the system is capable of achieving. Justice is a summation of all the other virtues that our system is capable of achieving. It's a very hard system to justify. It's a very hard system to explain. The hardest question I'm asked all the time, as I said, not only by my mother. I am asked by my children. I am asked by my students. I am sure at some form or another I will be asked by you, is how can I sleep at night defending people I know to be guilty. And I do know that some of my clients are guilty. How do I know that they are guilty? They told me. Why did they tell me? Because I promised that if they told me I wouldn't tell you. And if they told me, I would never use that against them. It's a very important part of the system that I encouraged them to tell me the whole truth. That way, if they want to lie on the stand, I can try to talk them out of it. If they want to do something that's improper, I can try to persuade them that most of the time it's not in their best interests to do it. Unfortunately, sometimes it may be in their best interests to violate ethical and legal rules and then a lawyer really has a very difficult job. So the role of the defense lawyer is part to understand, it's part to explain, it's part of the system and a process which generally produces good results but at a very high cost. And so I invoke the insurance policy analogy, even in talking about why I defend guilty clients.

I defend guilty clients, first of all, because there aren't that many innocent ones around, and let's talk about that for just a minute. Isn't that a wonderful thing to say about the American system of justice. The vast majority of people who are charged with crimes in this coun-



try are guilty and thank God for that! Would we want to live in a country where the vast majority of people charged with crimes are innocent. That might be Iraq, it might be China, it might be the former Soviet Union but it's not America. One of the reasons why the vast majority of people charged with crimes are, in fact, guilty is because we criminal defense lawyers are prepared to fight the government, as they find to charge somebody with a crime, whether or not the person charged is guilty or innocent. We keep the government honest. We make sure that we can never get to a situation where the government can say, a ha!, this time I'll cross the line and charge somebody who is innocent because the lawyer will not be vigorous, the lawyer will not defend, the lawyer will not use all the resources available to her or him, so that the ability to challenge the government at every turn is a big difference between the rights in the United States and the rights in totalitarian countries. In this country we have the most fundamental right of all, the right to be wrong, the right to make a mistake. The right to be wrong if you are a journalist, to make an honest mistake, that's what the *New York Times'* Mr. Sullivan gave us. The right to defend somebody who is guilty, the right not only to defend when the person is innocent.

In the Soviet Union there is a rule, or there used to be a rule, I don't know whether it exists under the new Russian government constitution, that you could not get up in court and defend somebody who you knew to be guilty. Socialist democracy demanded that if you knew the person to be guilty you had to plead that person guilty. Well, how do you determine whether or not you knew somebody to be guilty? Well, very simple. If the person was eventually found guilty and you defended him on the ground that he was innocent, you were presumptively in violation of the law. And that presumes, of course, that the system would never make a mistake. We know our system is imperfect. We know that it makes mistakes.

I started out with a story that came from the Soviet Union. Let me end with a story that takes place many years ago in China. The story is about a Chinese farmer who calls in his family one day and says, "We had a terrible family tragedy. Somebody has pushed the family outhouse into the Yangtze River. Now, children, tell me which one of you did it." Nobody says a word. And finally the father said, "maybe this will loosen your tongues. Let me tell you a story about a faraway place called America and a young boy who is called in by his father. And his father said, 'somebody chopped down my cherry tree. Who was it who chopped down my cherry tree?' And this young man

said, 'Daddy, I cannot tell a lie. It was I who chopped down your cherry tree.' And the father embraced him and hugged him and kissed him and this young man, George Washington, became the president of the United States. Now, does anybody want to tell me who pushed the outhouse into the Yangtze River?" The youngest boy comes forward and says, "Daddy, I cannot tell a lie. It was I who pushed the outhouse into the Yangtze River." Whereupon the father slapped him and beat him and pushed him. And the young man said, "But George Washington's father loved George Washington when George Washington chopped down his father's cherry tree." The father replied, "His father was not sitting in the cherry tree!"

I tell the story to illustrate the principle that justice can not be done by those who represent solely the clients that are perceived victims of rights. Most of us find it easier to identify with the father in the outhouse because so many of us are pushed around these days, so many of our own rights are interests are being violated. But justice, I believe, must be done from a somewhat loftier perch. Thank you very much.

## Articles

### American Popular Culture's View of the Soviet Militia: The End of the Police State?

Sharon F. Carton\*

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#### TABLE OF CONTENTS

I. INTRODUCTION .....	1024
II. THE ROLE OF THE POLICE IN THE SOVIET CRIMINAL JUSTICE SYSTEM .....	1025
A. <i>Recent Changes in the Soviet Union</i> .....	1025
B. <i>Nature and Origin of the Soviet Militia</i> .....	1029
C. <i>Role of the Militia in Criminal Investigations</i> .....	1031
D. <i>Role of the Procuracy in Police Supervision</i> ..	1035
E. <i>Role of the KGB in the Criminal Justice System</i> .....	1036
F. <i>Police and the Criminal Code</i> .....	1037
III. PORTRAYAL OF SOVIET POLICE IN AMERICAN POPULAR CULTURE .....	1039
A. <i>Soviet Police in American Detective Fiction</i> ...	1040
1. Introduction .....	1040
2. The Inspector Rostnikov Series .....	1041
a. <i>Kaminsky's Characters</i> .....	1041
b. <i>The Role of Police Procedurals in Humanizing Police</i> .....	1048
c. <i>Rostnikov's Police and Perestroika</i> .....	1052
3. Martin Cruz Smith's Arkady Renko Novels .....	1053
a. <i>Renko as an Existential Hero</i> .....	1053

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b.	<i>Comparisons between the Renko and Rostnikov Series</i> .....	1056
B.	<i>The Militia in Western Films</i> .....	1059
C.	<i>The Soviet Police in American Television</i> ....	1063
IV.	ACCURACY OF WESTERN MEDIA'S PORTRAYAL OF MILITIA .....	1066
A.	<i>The Apologists' Controversy</i> .....	1066
B.	<i>The Role of the Soviet Police in Political Crimes</i> .....	1069
C.	<i>The Soviet Police in Soviet Detective Fiction</i> .	1075
V.	CONCLUSION .....	1076

## I. INTRODUCTION

The now-defunct Soviet Union and the term "police state" have been synonymous for many years, at least from the Stalinist era until, possibly, the Gorbachev era. Yet for those Westerners to whom the concepts were indistinguishable, the "police" generally signified the *secret* police, that is, the KGB. The Soviet Union had another police force, one more comparable to that known by Americans and other Westerners.

This "non-secret" police force, in the Soviet Union and now in the Commonwealth of Independent States, is called the militia. Although its role in the USSR criminal justice system has, in Western popular culture, been a distant second to that of the KGB, it has recently begun to come into its own. The militia and its personnel have played a part in recent years in most forms of Western media, including film, television, and literature.

In this article, the treatment of the Soviet militia in these different media are explored. After an introduction surveying the nature and role of the Soviet police in the years leading up to and following the abortive August 1991 coup and the dissolution of the Soviet Union, the article will consider the expanding role of the militia in fiction, more specifically, in the genre of detective novels. It will focus on two series of mysteries, the Inspector Rostnikov police procedurals of Stuart M. Kaminsky, and the two novels by Martin Cruz Smith, *Gorky Park* and its sequel, *Polar Star*.

The depiction of the Soviet police in modern film will be addressed next. Two recent movies, *Red Heat* and *Gorky Park*, the film based on the Martin Cruz Smith novel, will be discussed in this context.

The third medium to be considered is television. Its portrayal of

the Soviet police in two recent television programs, *Cops* and *48 Hours*, will be compared with each other and with the treatment accorded the militia in other media.

Finally, the article will address the role of the militia in political cases. In that context, the manner in which Western media have portrayed the Soviet police, and in turn the Soviet criminal justice system, will be considered in light of the nature of the Soviet rule of law in reality.

## II. THE ROLE OF THE POLICE IN THE SOVIET CRIMINAL JUSTICE SYSTEM

### A. *Recent Changes in the Soviet Union*

This article was begun before the West became so responsive to, if not so freshly aware of, the profound changes rocking the Soviet Union. *Perestroika* and *glasnost* were still newsworthy, but had already moved from illuminating the front pages of the daily news to constituting the daily fare of the consumers of breakfast television. Everyone knew, if not the translations of these words, at least their symbolic representation of the opening of the Soviet Union.

By the time this article was completed, the Soviet Union no longer existed, and Mikhail Gorbachev had been supplanted by Boris Yeltsin, then President of the Russian Federation, and now President of the largest of the Commonwealth's Independent States.

The author of this article briefly questioned whether this topic any longer held any significance: First, if the reformed Soviet Union was no longer a "police state," was any Western impression of the Soviet police in the United States hopelessly outdated? The question was answered for this author by Natan Sharansky, in his July 1989 Introduction to the Vintage Edition of his 1988 autobiography *Fear No Evil*:

[I]n the Soviet Union, everything has changed—and nothing has changed . . . . On the one hand, the number of political prisoners has declined sharply. The number of emigrants is quickly growing, and virtually every day the Soviet press uncovers new areas of history, ideology, and politics that can now be criticized. And for the first time since 1917, Soviet elections sometimes provide a real opportunity for voters to choose from among a number of candidates.

On the other hand, there are harsh new decrees and regulations. The dictatorship of the Party, the only party, remains immovable, and the centralization of power in the hands of a single

individual continues to grow.<sup>1</sup>

Second, of course, even more changes followed this July, 1989 assessment. Along with the reconstitution of the USSR as the CIS came striking changes in the role of the Communist Party,<sup>2</sup> one factor considered to be primary in the nature of the rule of law in the CIS. But Sharansky himself seemed aware of the rapid pace with which these changes could be expected: "The more liberal the times, the more history is changed."<sup>3</sup> This author nonetheless became convinced that the role of the police in a police state, as examined in Western popular culture, remains a viable topic.

Initially, it should be recognized that the role of the Soviet police during the abortive August 1991 coup was not that of a neutral bystander. The Chief of Police, that is, the head of the Ministry of the Interior, Boris Pugo, was one of the architects, or at least frontmen, of the coup.<sup>4</sup> Thus, as one commentator notes, the failure of the coup was that much more astonishing in light of the fact that "the men who led the coup had everything going for them: the armed forces, the KGB, the Party, the police."<sup>5</sup>

As will be discussed, the Soviet police shared its authority with, and operated subject to control by, the Committee for State Security (KGB) and the procuracy, the latter functioning as a cross between a prosecutor and an ombudsman. But in the pre-coup months during which Gorbachev turned away from reform and toward the right, the police found themselves with an additional partner in the "fight against crime": the military.

President Gorbachev gave his approval to a joint order . . . announcing that . . . city streets throughout the country would be jointly patrolled by the police and the military, both carrying as-

1. NATAN SHARANSKY, *FEAR NO EVIL* xi (1989).

2. "During the past two years . . . several new laws curtail [party] interference with the courts. One of the laws makes it a crime to pressure a judge to influence the outcome of a case." A.B.A. J., July 1990, at 32. This latter practice is known as "telephone justice, the contacting of judges by party officials concerned about the outcome of a particular case. This . . . problem has become so acute that a standard joke is that there are three kinds of law in the USSR: criminal, civil, and telephone." *Juris*, Summer 1990, at 17 (footnote omitted).

3. SHARANSKY, *supra* note 1, at xii.

4. See, e.g., VLADIMIR POZNER, *EYEWITNESS: A PERSONAL ACCOUNT OF THE UNRAVELING OF THE SOVIET UNION* 22 (Random House 1992).

5. *Id.* at 214.

sault weapons and, where and when necessary, backed up by armored vehicles. This measure, [the Soviet people] were told, should be understood as a special effort on the part of the law-and-order forces to combat crime in the streets.<sup>6</sup>

Along with the promise and limited realization of widespread reform came widespread crime.

People became less secure, not more so. Crime suddenly shot sky high, reaching a level unheard of before in the Soviet Union. Muggings became common, along with a host of other violent crimes. People began to fear the evening streets, steel doors became the craze as citizens looked for ways to protect their homes from murderous thieves.<sup>7</sup>

Indeed, in a poll taken in January 1991, "the desire for less democracy and more law and order had increased by a startling 19 percent," from twenty percent in November 1990 to thirty-nine percent in January 1991.<sup>8</sup>

During 1990, the KGB was working to consolidate its power and undermine Gorbachev. In October of that year, the KGB head Vladimir Kryuchkov announced great success against organized crime. "Having thus demonstrated the KGB's efficiency as the nation's top crime fighter, Kryuchkov made his move: To successfully combat organize crime, he said, the KGB must legally be charged with that duty. Laws had to be passed specifying the concrete status of the KGB and the police."<sup>9</sup>

In the months leading up to the coup, the KGB had a great stake in fostering the impression that the Soviet system was in grave jeopardy. "[T]he idea of danger was very much part of the siege mentality, which had . . . been carefully nurtured by the KGB: The greater the threat to the system and its leaders, the more the KGB was necessary."<sup>10</sup>

Under Gorbachev, it was hoped that with the diminished role of the KGB would come a strengthening of the rule of law in the Soviet Union. But even after the elimination of Article VI of the Soviet Con-

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6. *Id.* at 165.

7. *Id.* at 126.

8. *Id.* at 171.

9. POZNER, *supra* note 4, at 111.

10. *Id.* at 118.

stitution, which enshrined the Communist Party of the Soviet Union as the country's leading force, the Party continued to hold sway over every aspect of Soviet life. "Departization," or diminution of the Party's influence,<sup>11</sup> was not so easily achieved: "[A]s long as the Party continued to have a presence in the workplace, in the armed forces, in the police and the KGB, in short, everywhere, Article VI continued to exist, if not in letter, then certainly in spirit."<sup>12</sup>

While the role of the police in the republics of the CIS is still too new to be definitively gauged, there are several key elements to be noted. First is the evolving role of the KGB in Russian life, including crime control. In an article describing the soaring human rights complaints being filed in Russia, it was noted that people have more faith in voicing their complaints because "the KGB is clearly no longer as repressive as it once was."<sup>13</sup> At one juncture, Russian President "[Boris] Yeltsin ordered the merger of the KGB and Interior Ministry into a security organization that many feared would crack down on critics of his harsh economic reforms."<sup>14</sup> The measure was struck down by Russia's Supreme Court, but a KGB representative,

predicted that another powerful security agency will have to be created to strengthen the government's hand. "Society is too unstable. There are processes raging, nationalism, crime, unrest . . ." [The KGB spokesman] dismissed concerns of repression and said the reformed KGB is not the old, oppressive KGB. "We have unbuttoned our shirts to let people see us," he said. "We cannot do wrong now because people are watching."<sup>15</sup>

But it is premature at best to expect overwhelming reform on the part of the KGB. "The old KGB and the new KGB are the same people under different bosses,"<sup>16</sup> according to a Russian journalist.

Second, the dissolution of the Soviet Union has seen an increase in crime,<sup>17</sup> nationalism,<sup>18</sup> and anti-Semitism.<sup>19</sup> It remains to be seen how

11. *Id.* at 209.

12. *Id.*

13. Juan O. Tamayo, *In Russia, Freedoms Spur Rights Complaints*, MIAMI HERALD, Feb. 10, 1992, at A1.

14. *Id.*

15. *Id.*

16. *Id.*

17. Juan O. Tamayo, *Crime Flourishes Alongside Freedom In Russia's Cities*, MIAMI HERALD, Jan. 22, 1992, at A1.

18. David Hancock, *Russian Jew Finds U.S. No Refuge*, MIAMI HERALD, Jan.



the police are used to control and contain the rising crime and, in particular, hate crime, and whether the result will be an increase in repressive measures to the detriment of the rule of law.

### B. *Nature and Origin of the Soviet Militia*

By way of background to the media treatment of the militia, a short introduction to the nature of the police<sup>20</sup> in the Soviet Union pre-dissolution is helpful. As stated above, what we as Westerners think of as the police was called the militia in the USSR.

In the Soviet Union (as in most other East European countries) the police [was] called "militia," a name which goes back to the times when a popular militia was formed to replace the police of the *ancien régime*. In the language of Soviet newspapers "police" [had] a distinctly unfriendly ring and [was] used only with reference to bourgeois police.<sup>21</sup>

The militia operated under the jurisdiction and authority of the Ministry of the Interior.<sup>22</sup> The Supreme Soviet of the Soviet Union established the parameter of the police's authority in a 1973 decree, "[o]n the basic duties and rights of the Soviet militia in protecting pub-

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11, 1992, at A1; see also James Carney, *Russia Yeltsin's Enemies: Communists, Ultra-Nationalists, Rival Reformers and Disgruntled Soldiers Are All Breathing Down the President's Neck*, TIME, March 9, 1992, at 32-34; Ken Gluck, *Dissatisfied Russians Turning To Nationalism*, MIAMI HERALD, March 2, 1992, at A11.

19. Hancock, *supra* note 18, at A1; Gluck, *supra* note 18, at A11.

20.

[T]here may be said to be two police forces in the Soviet Union: the state security police, or KGB; and the "ordinary" police, or militia. There is also a third type of Soviet police function, the so-called People's Patrols (*Druzhiny*), or auxiliary police. In their present form the People's Patrols have existed since 1958, and are empowered by the 1960 R.S.F.S.R. Statute to perform, *inter alia*, the following tasks: maintain public order; combat petty crime (a responsibility shared with the ordinary police, courts and Procuracy); enforce traffic regulations; and combat the neglect of children.

H.J. BERMAN, JUSTICE IN THE U.S.S.R., AN INTERPRETATION OF SOVIET LAW 286-87 (1976).

21. I ENCYCLOPEDIA OF SOVIET LAW 520 (F.J.M. Feldbrugge ed. 1973) [hereinafter ENCYCLOPEDIA].

22. *Id.*

lic order and fighting crime."<sup>23</sup>

The decree consists of ten articles, and is considered the "most general All-Union enactment concerning the Soviet police."<sup>24</sup>

Article six of the decree establishes the duties of the militia, related to "either the maintenance of public order or the fight against crime."<sup>25</sup> In sixteen points,<sup>26</sup> the duties are listed, including the following "public order" categories: "traffic control, measures against public drunkenness, implementation of the internal passport system, control of arms, explosives, etc., providing strongarm assistance to other governmental agencies (where required) and, generally, aid to the population and the authorities in cases of natural disasters."<sup>27</sup> The points also list the militia's responsibilities for crime control, including "measures to prevent crime, arresting suspects, criminal investigation, . . . [and] various practical activities in the execution of criminal penalties and administrative supervision of released prisoners, former recidivists . . . ."<sup>28</sup>

Militia authority for administrative supervision was governed by the Regulations on Administrative Supervision by Militia Organs,<sup>29</sup> which established three categories of people subject to administrative police supervision,

persons who have been recognized as "especially dangerous recidivists"; persons who have served a sentence for a serious crime and who have not shown that they have bettered themselves during their sentence; and persons who, after having served a sentence for a serious crime, frequently violate public order and have not heeded a previous police warning.<sup>30</sup>

Under this jurisdiction, the militia has broad authority to impose restrictions on persons falling within any one of these three categories, including the power to "place such persons under house arrest, limit their freedom to travel outside the . . . city, forbid their presence in specific places, or require them to report once or several times a month

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23. *Id.* at 739.

24. *Id.*

25. *Id.*

26. ENCYCLOPEDIA, *supra* note 21, at 739.

27. *Id.* at 739-40.

28. *Id.* at 740.

29. VED. VERKH. SOV. SSSR (July 26, 1966).

30. *Id.*

at the police station.”<sup>31</sup> The penalty for disobeying such militia order is an administrative fine imposed by the people’s judge.<sup>32</sup>

The decree provided for police responsibilities, authority and rights. The powers of the militia, as set forth in Article seven, included “checking passports, entering buildings and houses, ordering people to appear at the police office, imposing fines, photographing and fingerprinting suspects, arresting or detaining suspects of drunks, taking measures to ensure the safety of traffic, and requisitioning means of transport.” The police were also entitled, in limited specified circumstances, to carry and make use of firearms.<sup>33</sup>

The organization of the police was based on a 1962 decree of the USSR Council of Ministers, entitled “Regulations on the Soviet Militia.”<sup>34</sup> The internal organization of the police was structured “along military lines; police discipline is regulated by disciplinary police regulations issued by the governments of the Union republics.”<sup>35</sup>

At the top of the organizational pyramid is the Chief Department of the Militia within the USSR Ministry of Internal Affairs. There are militia departments within the republican ministries of internal affairs (except the RSFSR); at lower levels the police constitute[d] by far the most important branch of the internal affairs departments; the head of the latter department and the police chief are one and the same person . . . .<sup>36</sup>

The internal organization of the police consisted of the following sections: regular, or uniformed section; the criminal investigation section; the section for the “struggle against theft of socialist property”; the section in charge of internal passport; the motor vehicle section; sections for training and administration; and a section for prosecution and preliminary investigation.<sup>37</sup>

### C. *Role of the Militia in Criminal Investigations*

The militia shared its responsibility for participation in criminal

31. *Id.*

32. *Id.*

33. *Id.*

34. ENCYCLOPEDIA, *supra* note 21, at 521.

35. *Id.*

36. *Id.*

37. *Id.* at 522.

investigations. Soviet criminal procedure codes drew a distinction between those crimes which are serious enough to warrant a formal "preliminary investigation," and those minor offenses investigated by mere "inquiry."<sup>38</sup> In general, the less serious offenses were investigated by the militia. However,

[e]ven in instances in which a preliminary investigation is to be conducted, the police normally perform[ed] certain initial investigatory actions before transferring the case to an investigator (e.g., formal commencement of a criminal case, search and seizure, detention and interrogation of a suspect, and interrogation of witnesses). This is also called an inquiry.<sup>39</sup>

The major difference between the two types of investigations was the greater extent of due process protections afforded the more serious crimes—those commenced by preliminary investigation rather than inquiry.<sup>40</sup>

The primary responsibility for most criminal investigations lay with the designated "investigator."<sup>41</sup> This investigator supervised the section for criminal investigation within the Office of the Procuracy. This is contrasted with those crimes which are not so designated in the Code of Criminal Procedure, and which therefore become the responsibility of the militia.

The section for prosecution and preliminary investigation is concerned with those aspects of the police functions which involve the police directly as a part in criminal proceedings, i.e. either as a "reporting" agency . . . or as "investigator . . .," in those cases where the preliminary investigation is not conducted by investigators from the *Prokuratura* [procurator] or the State Security.<sup>42</sup>

Thus, the preliminary investigation will be commenced by an investigator in the procurator's office, based on information from the militia. "The investigator may perform investigatory acts himself or may delegate them to other agencies, typically the police."<sup>43</sup>

Throughout the course of his investigation, the investigator com-

38. *Id.* at 190.

39. ENCYCLOPEDIA, *supra* note 21, at 191.

40. *Id.*

41. *Id.*

42. *Id.* at 527.

43. *Id.*

piles a dossier which details the progress of his investigation.<sup>44</sup> “The dossier, which often includes several hundred pages, is then made available to the prosecution, defense, other parties and the court before trial . . . .”<sup>45</sup>

After the conclusion of the preliminary investigation, the dossier is submitted to the office of the procurator, along with, when warranted, a “conclusion to indict.” The ultimate decision to prosecute then rests wholly within the province of the procurator.<sup>46</sup>

A Soviet defense attorney, in her 1982 book, *Final Judgment*, describes the division of labor in a criminal investigation as follows:

[A] lengthy preliminary investigation [preceding trial was] conducted by bodies that are organizationally independent of the courts. These are the procuracy, the police, the Ministry of Internal Affairs, and—in cases that fall within the competence of the security services—the KGB. Police work of course include[d] both preventing crime and making inquiries to identify suspects once a crime has been committed.

Soviet police, like all police forces, [ran] a network of undercover agents and maintain[ed] covert observation of known malefactors and the criminal underworld in general. *The main work in unraveling crime, however, [was] done by officials of the investigatory departments of the procuracy, the Ministry of Internal Affairs, and the KGB.* They can initiate or discontinue investigations, and they ha[d] complete authority to conduct all necessary investigations.<sup>47</sup>

Another commentator describes the police powers as falling into two categories,

criminal procedural powers and others. Police powers in criminal procedure are enumerated in arts. 89-101 and 117-124 of the RSFSR Code of Criminal Procedure. The most important is the power to arrest . . . . Outside the sphere of criminal procedure the police [were] given a number of powers by a variety of enactments such as the power to arrest in specific instances, to impose on-the-

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44. ENCYCLOPEDIA, *supra* note 21, at 527.

45. *Id.*

46. *Id.*

47. DINA KAMINSKAYA, *FINAL JUDGMENT* 51 (Michael Glenny trans. 1982) (emphasis added).

spot fines, to commandeér means of transport, etc.<sup>48</sup>

Thus, in what we normally think of as police work, the militia operated either together with or subordinate to two bodies: the procuracy, whose investigators conduct preliminary investigations in the more serious offenses, and the KGB in what are considered political crimes. The militia may function as part of the procuracy (for the more serious crimes) or independently of the procuracy (for the more minor crimes). In reality, however, the militia are always subordinate to the office of the procurator.

While this might seem to minimize the role of the militia to a great extent, this does not suggest a cavalier disregard for the political pedigree of those who would serve in the militia. "Recruiting for the police force is done with special care to ensure political reliability and candidates are screened by Party . . . bodies."<sup>49</sup> As Kaminsky's series of novels suggests,<sup>50</sup> the odd candidate of questionable "political reliability" nonetheless might manage to slip through the nets.

Adherence to the dictates of the police, which, as discussed in the context of the television documentaries on the Soviet police, seems to be an area needing improvement, is controlled by,

a system of sanctions against the persons who disobey the police instructions or obstruct the performance of such duties. Resisting a police officer . . . in the execution of his duties in connection with the maintenance of public order entails the penalties provided by art. 191-1 of the RSFSR Criminal Code.<sup>51</sup>

The provisions of the Criminal Code which protect the life of police officers extend to allow for the death penalty for an attempt on an officer's life, "the only provision in the RSFSR Criminal Code with a mandatory capital sentence."<sup>52</sup>

48. ENCYCLOPEDIA, *supra* note 21, at 522.

49. *Id.*

50. *See infra* notes 81-108 and accompanying text.

51. ENCYCLOPEDIA, *supra* note 21, at 522; Art. 191-1 UK RSFSR.

52. ENCYCLOPEDIA, *supra* note 21, at 522-23. *But see* FLA. B. NEWS, November 15, 1989, at 17 (Soviet attorney Anna Meschanskaya, interning with the Palm Beach County, Florida Public Defender's Office, stating that in the USSR, "there are some 47 articles in our criminal codes which have the death penalty . . .").

#### D. *Role of the Procuracy in Police Supervision*

In a sense, the entire Soviet criminal justice system functioned at least nominally under the auspices of the Procuracy, or *Prokuratura*.<sup>53</sup>

The Procuracy, or *Prokuratura*, [was] one of the Soviet system's 4 branches of government. It [was] a state organ fulfilling the constitutional function of supervising exact compliance with the laws of the Soviet Union. As opposed to all other state organizations, which are in principle organized on the basis of double subordination . . . , the *Prokuratura* [was] organised on a clearly centralist basis and its subordination is hierarchical from the bottom upwards

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The *Prokuratura* had its origins in the Union republics as early as May 28, 1922,<sup>55</sup> and all subordinate procuracies of, for example, the Union republics and autonomous republics were within the jurisdiction and supervision of the Procuracy of the Soviet Union.<sup>56</sup> After the office was used during the Stalin regime "to blindly execut[e] the instructions of the security forces [KGB]," regulations were issued fortifying the role of socialist legality in the operations of the Procuracy, and minimizing the potential for abuse of power.<sup>57</sup>

In many cases, though, the role of procurator as neutral ombudsman, or guardian of the legal system, may be illusory. According to one account by a woman working on behalf of Soviet political prisoners in the 1970s: "The Soviet legal system has a unique element, the *procurator's office*, which is theoretically supposed to see that the laws are correctly applied and that justice is administered. In reality, however, the procurator's office is part of the penal apparatus itself, thus rendering the prisoner defenseless and without rights."<sup>58</sup>

The Procuracy was led by the Procurator General of the Soviet Union, appointed for a five year<sup>59</sup> term by the Supreme Soviet. He ap-

53. ENCYCLOPEDIA, *supra* note 21, at 545. *But see infra* text at subsection IIE.

54. ENCYCLOPEDIA, *supra* note 21, at 545.

55. *But see* ABRAHAM, THE JUDICIAL PROCESS 293 (4th ed. 1980) (the procuracy was "conceived by Czar Peter the Great in 1722 and revived by Lenin after a five-year lapse in 1922.").

56. ENCYCLOPEDIA, *supra* note 21, at 546.

57. *Id.*

58. IDA NUDEL, A HAND IN THE DARKNESS: THE AUTOBIOGRAPHY OF A REFUSENIK 41 (1990) (emphasis in original).

59. KONST. SSSR art. 167; *see* ABRAHAM, *supra* note 55, at 293 (Procurator

pointed Union republic procurators for five year terms, who in turn appointed lesser procurators for their own five-year terms.<sup>60</sup> Procurators generally possessed higher legal education, and the powers of the Procurator General included an ability to initiate legislation and seek legal interpretation by the Presidium of the Supreme Soviet.<sup>61</sup>

The responsibilities of the procuracy for supervising the militia included supervision of arrests, searches, seizures, and procedures relating to internal passports (identity certificates). The procuracy also had jurisdiction over any citizen complaints relating to actions of the militia.<sup>62</sup> As discussed above, investigators in the Office of the Procurator conducted the preliminary investigations of more serious crimes, while the militia operate subordinately to—and under certain circumstances, separately from—the office of the procurator in conducting inquiries of more minor offenses.

### E. *Role of the KGB in the Criminal Justice System*<sup>63</sup>

The Committee for State Security, or KGB,<sup>64</sup> was, along with the procuracy and the militia, assigned the responsibility for criminal investigation, and supervision of criminal investigations otherwise assigned the procuracy and militia in cases affecting state security.<sup>65</sup>

Most descriptions of the KGB duties in Soviet sources contain the following elements: the protection of the security of the state; the fight against spies, saboteurs, traitors and foreign agents; the fight against political crimes (crimes against the state); the protection of

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General is appointed for a five-year term). *But see infra* note 161 and accompanying text (discussion on seven-year term for Procurator General); *see also* ENCYCLOPEDIA, *supra* note 21, at 546.

60. ABRAHAM, *supra* note 55, at 293.

61. *Id.*

62. ENCYCLOPEDIA, *supra* note 21, at 548.

63. For more extensive discussion of the role of the KGB in political cases, see *infra* notes 139-63 and accompanying text.

64. The original secret police was the Cheka, established in 1917, and was succeeded in 1922 by the GPU, or State Political Administration. The NKVD (People's Commissar of International Affairs) took over in 1934. In 1946, the NKVD became the MVD (Ministry of Internal Affairs), and the KGB assumed the responsibility over national security. BENET, READERS ENCYCLOPEDIA 179 (3rd ed. 1987).

65. ENCYCLOPEDIA, *supra* note 21, at 600-01.



the border of the USSR; [and] the protection of state secrets

...<sup>66</sup>

The KGB was given authority by virtue of its police duty for "some investigative functions in criminal procedure."<sup>67</sup> In certain cases with security aspects, which extended to smuggling, mass demonstrations, and illegal entry into or exit from the USSR, KGB investigators actually conducted the investigation themselves, rather than supervising militia or procuracy investigators. Determining which cases involve security aspects, however, is a subject given to much exposition in both fictional and nonfictional treatments of the Soviet criminal justice system.<sup>68</sup>

#### F. *Police and the Criminal Code*

The role of the primary bodies of criminal investigation in the Soviet Union—the procuracy, the militia and the KGB<sup>69</sup>—was governed by Codes of Criminal Law and Criminal Procedure implementing the "Fundamentals of Criminal Procedure of the USSR and the Union Republics," and the Fundamentals of Criminal Legislation of the USSR and the Union Republics," along with the 1977 Brezhnev Constitution.<sup>70</sup> The Criminal Codes and Codes of Criminal Procedure in exist-

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66. *Id.*

67. *Id.*

68. See *infra* notes 139-63 and accompanying text (discussion on reforms regarding political crimes).

69. UPK RSFSR, art. 3 (delegating the "Duty of Initiating Criminal Cases and Detecting Crimes" to the court, procurator, investigator, and agency of inquiry); see also UPK RSFSR, art. 20 (the role of the Procuracy); UPK RSFSR, art. 29 (role of the militia).

70.

In reaction to "the indefiniteness encouraged by Stalin and his heirs" the 1958 fundamental principles of criminal law were designed to usher in a more clearly defined concept of social danger. [T]he Fundamentals had to be followed by detailed criminal codes in each of the republics before the full sweep of the reform could be determined, and this occurred only in 1960 and thereafter. Since the state and military crimes were still defined solely by the federal government, the codes of the republics merely incorporated in their entirety the 1958 statutes on those subjects, but the specifications of other offenses and the penalties to be applied were left to the local leaders, guided as usual, by the Communist Party members among them who saw to the preservation of considerable but not complete uniformity. Within two years after adoption of the Fundamentals, criminal

tence in the Gorbachev presidency dated back to the Khrushchev era, and for the most part reflect a reformist jurisprudence following the Stalinist period of repression.<sup>71</sup>

Moreover, before dissolution the Soviet Union was struggling with proposed reforms<sup>72</sup> in their criminal justice system, chiefly relating to due process protections in the area of criminal procedure.<sup>73</sup> One commentator notes that "[t]he academic reformers in Moscow now seek to introduce the 'principle of adversarialness' into the new codes to be adopted in the next year or two."<sup>74</sup>

Many of the proposed changes were aimed at reducing the likelihood of bureaucratic interference, or "telephone justice," in the criminal justice system.<sup>75</sup> Previously, judicial decisions under party-ap-

policies veered again towards the more severe. As campaigns were conducted to eradicate various types of crime, amendments to the Criminal Code were introduced to increase flexibility by offering a wider range of punishment.

J.M. HAZARD, W.E. BUTLER & P.B. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980's* 149 (Parker School of Foreign & Comparative Law Columbia University 1984).

71. G. Fletcher, *In Gorbachev's Courts*, N.Y. REV. OF BOOKS, May 18, 1989.

72.

Laws also have been adopted extending greater rights to criminal defendants, offering protection against bureaucratic abuse, and establishing freedom of the press and the right to assembly. But, as of late August, no final action had been taken on legislation for the right to freedom of religion, to form political groups and to emigrate.

S.B. Goldberg, *A More Perfect Union Part I: A Lawyer in Moscow*, A.B.A. J., Oct. 1990, at 62.

In March, the party finally capitulated to a constitutional amendment of Article VI of the Soviet Constitution, eliminating the party's monopoly on the country's leadership. Some months earlier, Gorbachev appointed a group of scholars, party officials and legislators to write a new constitution. The hope is that, unlike its three predecessors, the new constitution will prescribe actual rights and powers rather than simply state policy. No one, however, expects to see a new constitution anytime soon.

*Id.* Gorbachev has become a firm advocate of the concept of a "law-based state," lessening the power of the bureaucracy. *Id.* at 60.

73. "Subjects of reform include the role of defense attorneys [and] the number of acquittals . . ." *Justice Soviet Style*, JURIS, Summer 1990, at 17 [hereinafter *Justice*].

74. *Justice*, *supra* note 73, at 16.

75. "In 1989 several laws were passed to strengthen the judiciary and address party interference, or telephone justice—when a call from a party official decides a case." *Id.* at 60.

pointed judges were viewed as too susceptible to this type of interference.<sup>76</sup> Chief among the proposed changes was a measure that would increase the power of defense attorneys by accelerating their entry into a case. "Under the current code, a Soviet lawyer is permitted to see his or her client only at the end of the preliminary investigation."<sup>77</sup>

Under the proposed change, defense counsel would have access to their clients before the preliminary investigation is concluded. Commentators seemed to agree both on the likelihood of this change being effected, and on the extent to which this change would benefit the Soviet criminal justice system.<sup>78</sup>

Other proposed reforms included abolishing the death penalty and increasing the number and authority of "lay assessors," juror-like civilian participants in trial decision-making.<sup>79</sup>

### III. PORTRAYAL OF SOVIET POLICE IN AMERICAN POPULAR CULTURE

The purpose of this article is to survey, in an admittedly anecdotal manner, the Western *opinion* of Soviet police. In order to achieve this purpose, this article addresses the treatment accorded Soviet police in American popular culture. Three media are considered: fiction, television, and film.

With regard to fiction, this article discusses primarily two series of novels: first, the series of Soviet police procedurals by Stuart M. Kaminsky and second, the two novels by Martin Cruz Smith, *Gorky Park* and its sequel, *Polar Star*.

The television shows discussed in this article are two programs devoted to the Soviet police. The first was an episode of the Fox Network's show "Cops." To date, it has aired twice, once in 1989 and once in 1990. The other program on the Soviet police was an episode of the

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76. *U.S. Justice Opens Eyes of Soviets*, MIAMI HERALD, April 8, 1990, at 13. The problem "has become so acute that a standard joke is that there are three types of law in the USSR: criminal, civil, and telephone." *Justice*, *supra* note 73, at 17.

77. *Justice*, *supra* note 73, at 17.

78. E.g., Slobogin, *The Soviet Legal System*, FLA. B.J., July/August 1989, at 31; see also Osakwe, *Modern Soviet Criminal Procedure: A Critical Analysis*, 57 TUL. L. REV. 439 (1983) (referring to the current climate of resistance to criminal justice reform).

79. Slobogin, *supra* note 78, at 32; see also Osakwe, *supra* note 78, at 590 (referring to other suggested areas needing reform).

CBS series, "48 Hours," taking place in two cities in the Soviet Union.

Finally, the third category is the Soviet police in the movies. In this category, the article discusses both the feature-length film of Martin Cruz Smith's novel, *Gorky Park*, and the somewhat lighter Arnold Schwarzeneger vehicle, *Red Heat*.

The approach or goal of this article is twofold: first, to contrast the differing styles of presentations regarding Soviet police and second, to assess the extent of accuracy in American representation of Soviet police. With regard to the former, it demonstrates how the varying genres of American culture differ in their depiction of Soviet police more by the viewpoint of the author or artist than by the nature of the genre. The "parallax," therefore, is generated by the idiosyncratic style of Stuart Kaminsky, for example, as opposed to Martin Cruz Smith, rather than by the choice of television, for example, over fiction.

With regard to the second goal, the article at two intervals considers the issue of accuracy: first, by assessing the works of the media against the backdrop presented in the section preceding this analysis and second, by considering the media portrayals in the context of political investigations.

## A. *Soviet Police in American Detective Fiction*

### 1. Introduction

Several recent works of Western fiction have taken one of the most fecund genres of modern popular culture, the mystery, or more specifically, the detective novel,<sup>80</sup> and transplanted the characters to the Soviet Union. It is the purpose of this article to analyze some of these novels, and evaluate the significance and influence of the Soviet setting in these works and on the genre itself. The article focuses primarily on the seven Inspector Porfiry Rostnikov police procedurals by Stuart M. Kaminsky,<sup>81</sup> and on Martin Cruz Smith's *Gorky Park* and *Polar Star*.

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80. This article has, where possible, skirted the realm of another mystery fiction terrain, that of Soviet spy novels penned by Western as well as Eastern authors, and focuses instead solely on fiction about police investigation rather than espionage adventures. The distinction was not always possible to maintain. Letter from Carol Brener to the author (July, 1990) (owner of New York, New York mystery bookstore, Murder Ink.).

81. STUART M. KAMINSKY, *THE MAN WHO WALKED LIKE A BEAR* (1990); STUART M. KAMINSKY, *A COLD RED SUNRISE* (1988); STUART M. KAMINSKY, *A FINE RED RAIN* (1987); STUART M. KAMINSKY, *RED CHAMELEON* (1985); STUART M. KAMINSKY,

## 2. The Inspector Rostnikov Series

Over the last ten years, Stuart M. Kaminsky has written seven novels in the series of Soviet police procedurals featuring Inspector Porfiry Rostnikov. In chronological order, they are: *Death of a Dissident* (1981); *Black Knight in Red Square* (1984); *Red Chameleon* (1985); *A Fine Red Rain* (1987); *A Cold Red Sunrise* (1988); *The Man Who Walked Like A Bear* (1990) (hereinafter "*Bear*"); and *Rostnikov's Vacation* (1991).

### a. Kaminsky's Characters

Like most police procedurals, *Bear* takes up several cases on the plates of the Soviet militia detectives featured in the series, Inspector Porfiry Rostnikov and his two assistants, Emil Karpo (alias "The Vampire") and Sasha Tkach. Kaminsky offers the following description of his chief protagonist, Inspector Rostnikov:

Porfiry Petrovich Rostnikov was, with good reason, known to his colleagues as the Washtub. There was nothing imposing about the fifty-seven-year-old man with one good leg and one very bad one, but Rostnikov had his passions—his books, his wife and son, his job, his weights.<sup>82</sup>

The younger of Rostnikov's two assistants is Sasha Tkach:

Sasha was usually successful with reluctant witnesses. He was handsome if a bit thin and looked much younger than his twenty-nine years. His hair fell over his eyes, and he had an engaging habit of throwing his head back to clear his vision. He also had a rather large space between his upper teeth, which seemed to bring out the maternal response in most women . . .<sup>83</sup>

Witnesses might be disposed to confess to Rostnikov's other associate, Emil Karpo, but for quite different reasons, having more to do with terror than with maternal instincts:

Karpo was over six feet tall, lean, with dark, thinning hair and pale

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BLACK KNIGHT IN RED SQUARE (1984); STUART M. KAMINSKY, DEATH OF A DISSIDENT (1981).

82. STUART M. KAMINSKY, THE MAN WHO WALKED LIKE A BEAR 7 (1990).

83. *Id.* at 26.

skin that contrasted with the black suit he wore. He looked corpse-like, and his dark eyes were cold and unblinking. When he spoke, his voice was an emotionless monotone . . . . [T]wenty years of fanatical pursuit of enemies of the state had earned him the nickname of the Vampire among his colleagues. The name seemed particularly appropriate when a peculiar look crept into Karpo's eyes, and at those moments even those who had worked with him for years avoided him.<sup>84</sup>

Some insight into what these novels tell us about western perceptions of the Soviet police is afforded by comparing the Rostnikov books with a series of American police procedurals. There is repeated indication that Stuart Kaminsky patterns his work to a large extent on the paradigmatic police procedurals by Ed McBain, the so-called "87th Precinct" novels. Kaminsky makes frequent references<sup>85</sup> to these novels; Inspector Rostnikov is a self-styled fan of the pseudonymous McBain's detective fiction.

In his right hand, Rostnikov held a paperback copy in English of Ed McBain's *The Mugger*. He had read the book five years earlier and about four years before that. It was time to reread [sic] it . . . . Rostnikov read: "For as the old maid remarked upon kissing the cow, it's all a matter of taste." He had read the line before but for the first time he thought he understood the joke and he smiled slightly, appreciatively. Americans were most peculiar. Ed McBain was peculiar, including in his police novels pictures of fingerprints, maps, reports, even photographs. Delightful but peculiar.<sup>86</sup>

It is reasonable to infer from such references, as well as from the nature of the Rostnikov books, that these allusions are not gratuitous. One is then led to wonder what is the significance of setting a police procedural in such an unlikely location. Given that the police procedural is one of the most formulaic, not to say rigid, among the detective genre, it is likely that the reader is being consciously steered toward comparing the two examples—one set in a fictitious Eastern metropolis, and one in an all too identifiable Moscow.

Kaminsky is not a newcomer to detective fiction or to inventive locales. His outstanding serio-comic mysteries featuring private investi-

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84. *Id.* at 29-30.

85. See, e.g., STUART M. KAMINSKY RED CHAMELEON 13 (1985).

86. STUART M. KAMINSKY, A COLD RED SUNRISE 8-9 (1988).

gator Toby Peters are set in the Hollywood of the 1930s and '40s, and mix fictitious characters with real personalities from the era, ranging from the actors playing munchkins in the 1939 film<sup>87</sup> "The Wizard of Oz"<sup>88</sup> to Eleanor Roosevelt<sup>89</sup> to Albert Einstein<sup>90</sup> and, most recently, to maestro Leopold Stokowski.<sup>91</sup> Each of the books in the series appears meticulously researched, accurately (or at least, to this layperson, credibly) depicting Los Angeles in the pre-war and then World War II years.

In some ways, Peters and Rostnikov resemble each other. Physically, at least, neither cuts an imposing figure. Rostnikov, a.k.a. "The Washtub," is described as "a short, squat man in his fifties with a non-descript Moscow face."<sup>92</sup> Toby Peters, too, is in his fifties, his nose broken too many times (usually by his older brother, Leo), his body pummeled by too many battles and too many bullets.

Still, the Toby Peters books could not, by any stretch of imagination or critical hindsight, be classified as political or ideological; the only evident philosophy is Peters' insouciant equanimity toward his rather feckless, almost accidental ability to wrest victory from a series of missteps that could only charitably be characterized as an investigation.

Inspector Porfiry Rostnikov bears a passing resemblance to Peters, né Tobias Pevsner, only in the fatalism both characters share. Inability or unwillingness to "get with the program" is, in Peters, a former police officer, comic companion to his iconoclastic, out-of-step haplessness. In Rostnikov, where "the program" is not Soviet criminal law but political, usually KGB, directive, this divergence from convention is deadly serious, and both cause and symptom of his disagreement and disfavor with the Soviet government.

The System, in Toby Peters' books, may be said to be represented by Peters' estranged brother, police lieutenant Leo Pevsner. Although Peters frequently, humorously, is subject to physical violence at his brother's hands because of Peters' sarcastic, provoking attitude, the penalty for straying is far more dangerous for Rostnikov and his fam-

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87. Kaminsky's "day job" is as a professor and chair of the Division of Film at Northwestern University where he teaches film history, criticism, and production.

88. STUART M. KAMINSKY, *MURDER ON THE YELLOW BRICK ROAD* (1977).

89. STUART M. KAMINSKY, *THE FALA FACTOR* (1984).

90. STUART M. KAMINSKY, *SMART MOVES* (1986).

91. STUART M. KAMINSKY, *POOR BUTTERFLY* (1990).

92. STUART M. KAMINSKY, *A COLD RED SUNRISE 8* (1988).

ily. It has proven capable of resulting in his ostracism, the threat of exile to Siberia, and his son's military assignment to Afghanistan.

The degree of levity in tone is not the most notable distinction between the two series, though it is consistent with what most sets the two apart. In the Toby Peters' books, Peters' chief antagonists are the objects of his criminal investigations, the assorted miscreants whom he has been charged with identifying or capturing. His only obstacles are his own ignorance or faulty methodology, although a hard-of-hearing landlady and a lethal dentist friend, the latter with whom he shares office space, are occasional impediments to his success. His brother is more irascible than intractable, and Leo's partner, Phil, often serves to pave the way to cooperation between Toby and the police.

For Rostnikov, the perpetrators of the various crimes which he is charged with investigating are often the least of his worries. Much in the books is concerned with Rostnikov's machinations and maneuverings aimed at eluding or bypassing his superiors. If Rostnikov occasionally acquires a political agenda, along with his assigned role of investigator, it is motivated by a stalwart compulsion to survive and to protect his family.

Rostnikov would never be more than a chief inspector in the MVD, a position higher than might be expected of him considering his inability to control his tongue, his frequent impetuosity, and his politically hazardous Jewish wife—a wife who had no interest at all in either religion or politics. Fortunately, Rostnikov had an ambition; he was politically uninterested. His job was to catch criminals and occasionally punish them at the moment of capture. Usually, however, the game—and he saw it as a game—ended when he caught the criminals and turned them over to the procurator's office for justice. It didn't matter to Rostnikov whether the law was reasonable or not. The criminals knew the law and knew when they were violating it.<sup>93</sup>

Rostnikov is never seen as a cavalier subversive, one who, at odds with the regime, thwarts them for the sheer literary sake of endearing himself to Western audiences or, as with some Western pop icons of recent decades, to thumb his nose at authority. A disrupting presence, Rostnikov battles the entrenched government representatives because they threaten him or his family, not because he is an ideologically-motivated counterculture renegade. Porfiry is an apparently uncompli-

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93. STUART M. KAMINSKY, *BLACK KNIGHT IN RED SQUARE* 18 (1984).



cated man, much like Toby Peters, but where his superior officers, either in the police department or in the KGB, play a complicated game, Rostnikov has the moral stamina and intellectual capacity to rival their own byzantine inventiveness. Unlike the Western police or politicians in some other works of modern popular culture, the government, for Rostnikov, is not represented by foolish, ineffectual theorists, to be contrasted by the street-smart, all-knowing pragmatic detective. Rostnikov's encounters are with antagonists of equal intellect and insight; their agenda may be antonymous to his own, but neither Rostnikov nor his readers would make the mistake of underestimating their abilities or the threat posed by the same.

These encounters, almost always verbal exchanges across an office desk, yield brilliant dialogues of shading and nuance, in which the participants seem to be speaking in code, and as much is decided by the superior official's decision as to whether or when Rostnikov is permitted to be seated, as it is by what either speaker actually says.

Toby Peters, he of the ready wisecrack and equally ready six-shooter, allowed his rebellion to flower by challenging the police department and, ultimately, by resigning from it. Rostnikov's challenges are perforce more stilted and subtle. He can no more patently disagree with his superiors than he can resign from his job.

The closest Rostnikov came to complete disassociation was his scheme to give life to the dreams of his Jewish wife, Sarah, of emigrating from the Soviet Union. When this fell through, Rostnikov was left only with his careful, deliberate determination of doing his job and safeguarding his family. His wife and their son, Joseph, are almost always at risk, whether it be the vague threat of action being taken because of Sarah's religion, or the actualized threat of a reassignment of Joseph to Afghanistan. It is this more than any physical danger to Porfiry Rostnikov that lends the novels their air of intrigue, fear, paranoia, and dramatic tension.

Subsequent to the beginning of the series, Rostnikov has suffered professional disgrace and personal sorrow, the latter occasioned by fear over Joseph's transfer to the front, and the former by his demotion from the office of the Procurator General to the less prestigious MVD.

Rostnikov had recently been transferred "on temporary but open-ended duty" to the MVD, the police, uniformed and nonuniformed, who directed traffic, faced the public, and were the front line of defense against crime and for the maintenance of order. It had been a demotion, the result of Rostnikov's frequent clashes with the . . . KGB. Before the demotion, Rostnikov had been a senior in-

spector in the office of the Procurator General in Moscow . . . .  
Too often, Rostnikov's path had crossed into the territory of the KGB which is responsible for all political investigations and security. The KGB, however, could label anything from drunkenness to robbery as political.<sup>94</sup>

Or, as Kaminsky relates elsewhere: "It wasn't that Rostnikov was a troublemaker. Far from it. It was simply a matter of the KGB's being involved in so much that it was difficult to avoid them."<sup>95</sup> His demotion meant, in part, that on one case he was lumbered with a representative of the procuracy supervising his investigation.<sup>96</sup>

The characters in Ed McBain's paradigmatic 87th Precinct novels have, throughout the decades, matured and developed into three-dimensional individuals with problems and pleasures which occasionally form an unrelated backdrop to the crimes under investigation by the officers of the precinct. To that extent, the characters have become familiar companions to the series' readers, who eagerly await the next installment of what may feel like a romantic serial, to learn whether Detective Bert Kling's romance with Detective Eileen Burke has met a fate similar to that of all of Kling's historically disastrous romantic entanglements,<sup>97</sup> or whether Detective Steve Carella and his deaf-mute wife, Teddy, are still blissfully happy.

More often, however, these personal triumphs and tragedies are skillfully interwoven in McBain's plots. The Kling-Burke relationship, for example, is at risk because of a case in which Detective Burke<sup>98</sup> suffered a traumatizing rape while acting as a decoy to catch a rapist in the area. Even where these personal aspects of a police officer's life, depicted in the books, are extraneous to the criminal investigations of the precinct, they are pertinent simply by virtue of their irrelevance; that is, they are reflective of the difficulty of living a normal, civilian life in a police officer's "off-duty hours."

The quotation marks parallel the point McBain seems to be mak-

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94. STUART M. KAMINSKY, *A COLD RED SUNRISE* 18 (1988).

95. STUART M. KAMINSKY, *A FINE RED RAIN* 3 (1987).

96. STUART M. KAMINSKY, *A COLD RED SUNRISE* 24 (1988).

97. See Ed McBain's 87th Precinct novel, *Ice*, for a description of how Detective Bert Kling lost his first love, Claire, in a fatal bookstore shooting, and later his wife, Augusta, to another man. ED MCBAIN, *ICE* 101-05 (1983).

98. McBain enjoyed an inside joke in *Ice* where Burke makes passing reference to Raquel Welch, who portrayed a female police officer temporarily assigned to the 87th Precinct in the Burt Reynolds movie, "Fuzz". *Id.*

ing, though it cannot necessarily be inferred that it is anything so heavy-handed as the "message" of the books: For police officers in the real-life world McBain seems to be depicting, there is nothing as clear-cut as "off-duty." This generates the dysfunctional relationships in the lives of the detectives, and the way their personal lives seem so inextricably entwined with their professional world.

This theme is replicated resoundingly in the Porfiry Rostnikov police procedurals. Nowhere is it sounded as palpably as in the life of Rostnikov himself, where every move in his cat-and-mouse game with his superiors ripples in his would-be personal, that is to say family, life.

Rostnikov's two associates in the police department, Sasha Tkach and Emil Karpo, are unlike Rostnikov in that they represent two extremes: Tkach is the naive innocent, bright though occasionally ineffectual; young enough in age and appearance to have been used to impersonate a student, he has a wife and infant who form the focus of his life, even to the extent of his occasionally trying to include his wife in his work.

For Sasha, there is no political subtext, no intrigue, no sinister antagonists for him to outmaneuver. It might be said, however, that he enjoys this blissful ignorance only because, and to the extent that, Rostnikov, his superior number, serves as a buffer between Sasha and the political elements at work.

Emil Karpo, nicknamed "The Vampire," is at the other end of the spectrum. He is a gaunt and frightening personality, wholly and disconcertingly devoted to his police work. That devotion is unsettling to the more balanced Rostnikov; where Rostnikov, in self-defense perhaps, must occasionally keep his work on his mind even when at home, Karpo goes home each day to work on his professional journal, in which he keeps records of all his cases. Karpo's belief in the system which he represents is absolute; he is humorless, obsessed, strong, devoutly loyal and fearless, as in this scene:

"And you like your work," said Rostnikov.

"I am satisfied that within the parameters of our system and the reality of human fallibility I perform a worthwhile societal function," Karpo said.<sup>99</sup>

Rostnikov's skepticism is equally baffling to Karpo:

Though he had been much decorated and had nearly lost both his life and leg in the war against the Axis, Rostnikov had never, since

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99. STUART M. KAMINSKY, *THE MAN WHO WALKED LIKE A BEAR* 59 (1990).

Karpo had known him, displayed the slightest revolutionary zeal or interest in politics. And yet Rostnikov was known to be the most effective and relentless criminal investigator in Moscow. It was a constant puzzle for Karpo but one he tried not to address. To even consider it was a distraction from his duty.<sup>100</sup>

Sasha's eagerness and youthful innocence may be his prime assets, Rostnikov's his agile intellect, but for Karpo it is his stubborn, even obstinate fealty to Communist ideals. Sasha never ponders the state's corruption—he is too busy coping with his struggling new family—and Rostnikov battles it daily for his integrity and survival, but it is for Karpo the bane of his existence.

Emil Karpo was a police inspector. He had his duty, and his duty was clear, as clear as the law. If others evaded the law, moved around it, teased its corners, corrupted it, it would not deter him from his duty. Compassion would lead to destruction. The law was all there was, the law and the State, which created the law. There was no morality, only law.<sup>101</sup>

Where Karpo is aware on a certain level of the weaknesses in the system, Sasha seems to deal with it only in the inconveniences of food and housing shortages. It is not communism Karpo abhors but the current inability to implement it with the perfection its principles merit.<sup>102</sup> Sasha, on the other hand, seems perpetually troubled by a vague sense of uneasiness or occasional depression, which the books lightly suggest may be inspired by the current malaise in the system, or frustration by the limitations imposed by political considerations.

#### *b. The Role of Police Procedurals in Humanizing Police*

Two of the chief themes which characterize and typify police procedurals are the accurate replication of the routine procedure employed by police officers and, as natural corollary, the boredom, even tedium, of that daily procedure. In that respect, police procedurals, as "slice of life" dramas may be seen as stark contrasts to the "lone wolf" private investigator type of mystery, in which the hero is all that one expects of a hero in current pop culture, large part rebellious antihero,

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100. *Id.* at 60.

101. *Id.* at 117; *see also id.* at 165.

102. *Id.* at 232 (suggesting a new crisis of faith).

isolated, inventive, quirky, creative, and romantically attractive.

In police procedurals, the “heroes” are seen as prosaic, plebeian working stiffs, working within the system, for whom their job is just a paycheck, who solve cases slowly and stolidly, dependent on their partners and their opposite numbers within different branches of the local and other law enforcement networks. Their lives are exciting only when they err in following procedure, and when they are in danger, it is not perceived by the reader as the thrilling escapades of an adventurous romantic hero, but rather as the terrifying risk of what is normally a mind-numbingly boring job. The reader is not meant to enjoy a vicarious adventure, because they can too closely identify with the middle-class prole punching the clock, who stumbles into a deadly hazard.

Where McBain’s chronicles of the 87th Precinct are lauded for their verisimilitude, in Kaminsky’s police procedurals the average reader is at a loss to gauge the accuracy and realism in which the American author depicts the Soviet police system. The plodding steps which Rostnikov and his associates follow to solve their cases seem legitimately routine, but we are only now, and only slowly, gaining some familiarity with the reality which Kaminsky is attempting to portray. Like the detectives at the 87th Precinct, Rostnikov and his men are perceived as heroic only in the sense that, because they are not glamorous men of daring, their achievements and triumphs are the stuff of the virtuous but unexceptional common man, and all the more impressive for that.

Western perception of the so-called Soviet “police state” is that there prevails a presumed state of paranoia among the citizens against the government and, by implication, its representatives. If forced to articulate the source of the terror, most Westerners would probably name the KGB, seen as the enforcers of repressive government’s arbitrary “system” of law.

Enlightened, or given one’s perspective, naive jurists and laypersons in the East and West alike might point in rebuttal to the existence of a Western-style Soviet Constitution, penal code, court system, and system of legal representation, which seemed to incorporate an almost recognizable guarantee of due process. All these elements, as they were revealed to Westerners, seemed to disprove or at least contradict the suspicions.

The Rostnikov books provide a credible compromise viewpoint tending to suggest that the reality is somewhere in between: There *was* a repressive, capricious, authoritarian, official presence, and there *was* a familiarly mundane set of rules and implementers or watchdogs of

those rules, the KGB and the police, respectively. Both coexisted, uncomfortably, not side by side so much as one shadowing and haunting the other. Rostnikov, more than his two subordinates, epitomizes the haunted police department.

Police procedurals are most effective to the extent that they are successful in personalizing while demystifying the police. Kaminsky achieves this in his Rostnikov books as well as McBain does with his 87th Precinct series, though it is a far more extraordinary accomplishment for Kaminsky. Some westerners are predisposed to discredit the essential humanity of their local police, but the inherent bias toward, and even fear of, police officers in a communist country runs far deeper. Their police are seen here as being indistinguishable from the political system, charged with enforcing not a criminal justice system for their protection but a repressive political regime.

Where local police are scorned in the West, it is because they are perceived as implementing an essentially just system in an unjust way. Police in a communist state are deprecated by Westerners because the criminal justice system is viewed as intrinsically flawed, or corrupt. What the Rostnikov books manage to do is to shed light on the distinction between Soviet law and Soviet politics; there *is* a line between police and state in the so-called *police state*. Kaminsky is not so noticeably ingenuous, or disingenuous, as to suggest that the two systems—criminal justice and political—do not impact on each other to the citizens' detriment, but the books manage to reveal a line between what is to most Westerners a blurred bifurcation.

In humanizing the members of a police department, authors of police procedurals manage a precarious balance in making the officers: likeable characters, in some way sufficiently ingratiating that the readers will cheer for them, care about them, identify with them, but not idolize them as unbelievably flawless; sufficiently amiable that the readers will enjoy following them about their daily business, but not happy or shallow enough for the reader to gloss over their tedious, depressing, and unremittingly unrewarding work; and part of a team that generally gets results without meshing smoothly, where its members are not interchangeable but neither are they so independent or indispensable that they would be better off working outside.

That last ingredient is what distinguishes the denizen of police procedurals from his fictional cousin, the "lone wolf" private investigator, who is idiosyncratic enough to function chiefly if not solely outside

any official system.<sup>103</sup> The characters in police procedurals must be seen as poignantly human, flawed individuals, much as we see ourselves, placed in tense and involving, but not unbelievable or sensational, life-threatening situations, and prevailing by tapping astonishing resources of heroism within themselves.

In a very real sense, the genre is able to provide its readers with a point of reference for their local police systems. The system thereby is given a face and a name, or several faces and names; never mind that those names and faces are fictitious. Police procedurals succeed only to the extent that they are credible simulations of real life. The characters must seem, feel and sound real for the plot to have any meaning. Unlike most other "thrillers," police procedurals are not devoured because they provide a fantasy adventure life for their readers; they are instead valued because they recreate a different type of tedium, because, with apologies to Hannah Arendt, they depict the "banality of evil."

Readers of police procedurals will then substitute the 87th Precinct's Steve Carella or Meyer Meyer for the phrase "police officer," and see three dimensions, shades of grey, substance and texture where once they would only have seen a one-dimension, essentially inhuman cog in the System. Some readers can even go further and substitute these fleshed-out fictitious human beings for "police department," determining that, arguably, there is no system other than, or greater than, the sum of the individuals comprising that system.

The Soviet police procedurals of Stuart Kaminsky have two additional obstacles toward achieving a similar goal: First, the political system imposes a layer of danger and deception on the functioning of these individuals; however admirable and approachable the officers' instincts and intentions, the KGB is only too likely to thwart these, potentially distancing the would-be do-gooder police from their citizens and readers. Second, the daily life of an Eastern-bloc country is so alien and hidden from us that an author is hard-pressed to achieve the sense of intimacy and routine.

Kaminsky scales both hurdles admirably. He injects the same degree of detail and *hamishness* into the lives of his Soviet police officers that he does with Toby Peters' Hollywood existence half a century ago, whether by describing Toby's subsistence on Depression-era private investigator's fees by eating cold cereal for dinner, or grimly recounting Sasha Tkach's queuing for bare essentials on endless, perhaps pointless

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103. *But see infra* notes 109-19 (discussing Martin Cruz Smith's policeman who functions, notwithstanding his employment, in just such an antiheroic role).

lines. Kaminsky thereby manages to make the reader feel the characters' hunger, pain, fear, frustration—and rare exhilaration—so palpably that we can experience the enmity of the KGB as a threat *external* to the Soviet police officers, than that as linked to, or aligned with, the police. The Soviet police are identified with as victimized or terrorized by the KGB; the KGB is enemy to the police as to the citizen, and the reader is enabled to identify with the police as with the citizens.

To this end, Kaminsky uses the KGB to provide a large measure of the dramatic tension, even overshadowing the villainy of the criminals being sought and investigated. While the KGB remains an intimidating, powerful adversary, the police become the reader's heroes rather than the puppets of the antagonists or persecutors. Once Kaminsky has convinced us, to our colossal astonishment, that the Soviet police are human beings as well as police officers, it is a small leap of faith to reach the understanding that human beings doing ordinary jobs are the same the world over.

### c. *Rostnikov's Police and Perestroika*

Kaminsky's later Rostnikov novels make frequent references to the recent changes in the Soviet Union. "Yes, things had changed recently. People talked of . . . democratization, but those things could change back again with a bullet, a quiet coup."<sup>104</sup> Kaminsky paints the general public as frustrated with the economic problems resulting from *perestroika*,<sup>105</sup> including new crimes, as described by Rostnikov's supervisor in the militia:

Criminals are preying on newly formed cooperative businesses. Street fighting among rival gangs of youths has reached murderous levels right in our city. Some people have claimed that General Secretary Gorbachev's political and social reforms, which have relaxed state controls, are to blame for this grave new crime wave.<sup>106</sup>

But along with the negative changes came hopeful new signs of impending reforms in the Soviet criminal justice system: In a conversation with Rostnikov, his supervisor, known as "The Wolfhound," a man with largely ceremonial duties unlike the work Rostnikov was permit-

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104. STUART M. KAMINSKY, *THE MAN WHO WALKED LIKE A BEAR* 20-21 (1990).

105. *Id.* at 32, 34, 88.

106. *Id.* at 44.



ted to perform as part of the procuracy,<sup>107</sup> has the following to say about the reforms:

I am permitted an investigative staff, your staff, consisting of personnel who are not wanted in other departments but, for reasons I cannot always fathom, are too valuable simply to dismiss. We are permitted to function, investigate as long as we remain harmless, unthreatening to other investigative bodies . . . . My political future is suddenly very promising, Porfiry Petrovich. If I—we—do not stumble. If the reforms continue, we may emerge with more than a ceremonial image . . . .<sup>108</sup>

By the end of *Bear*, Rostnikov has again wrested a measure of triumph from his superiors and his two chief professional antagonists—the KGB and the criminals he is investigating. To say he has thwarted the criminals *or* the KGB would overstate the case.

### 3. Martin Cruz Smith's Arkady Renko Novels

#### a. *Renko as an Existential Hero*

Martin Cruz Smith has written two novels featuring Arkady Renko, a once-and-future Chief Inspector with the Procurator's Office. Where Porfiry Rostnikov is middle aged, with a bad leg and the descriptive sobriquet of "The Washtub," Arkady Renko is young and handsome, slightly disheveled but nonetheless a dashing romantic figure, a loner betrayed by his wife.

Martin Cruz Smith's Arkady Renko series, while nominally police procedurals in that its central figure is a police officer, treat that figure as sympathetic as he exists in a state of alienation from the militia. He is sympathetic, therefore, only insofar as he is estranged from his official status; by the sequel to *Gorky Park*, Arkady Renko's estrangement is complete: He is "exiled" aboard the eponymous freighter, Polar Star.

It is this characteristic which distinguishes Smith's books from novels both about Soviet police and American police; that is, Kamin-sky's procedurals bear greater resemblance to McBain's 87th Precinct novels than to Smith's two books, despite their settings. Smith's work falls rather within the subgenre of "lone wolf" detective novels, the Chanderlesque antihero popularized in cinema by Humphrey Bogart.

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107. *Id.* at 27, 41.

108. *Id.* at 154.

While Smith's and Kaminsky's books both reflect extensive research, and take pains to familiarize the reader with their unusual setting, Smith's seem to use that setting as exotic backdrop for a tale of alienation and disaffection from authority. Kaminsky, on the other hand, treats the role of the Soviet militia almost as a character in itself.

Renko, even more than Rostnikov, serves as existential hero, alienated as Soviet policeman because he is forced to operate without rules, like any private detective functioning outside the law, or more technically, within a set of illogical, unreasonable, arbitrary or corrupted rules. Like a private detective "wannabe," Arkady is forced to devise his own moral code because of that set of illogical or corrupted rules that comprise his job.

"Even Pribluda [Renko's KGB nemesis] should know that Gorky Park was for recreation, not education . . . . The lesson was cold, too old, pointless. It wasn't justice as Arkady had come to expect and detest."<sup>109</sup>

"Arkady had few illusions about his work. He was senior homicide investigator, a specialist in murder in a country that had little well-organized crime and no talent for finesse."<sup>110</sup>

In three years as a deputy investigator and two years as chief investigator, [Renko]d encountered fewer than five homicides that rose above childlike stupidity, or following which the murderer hadn't presented himself or herself to the militia drunkenly boastful or rueful. The Russian murderer had great faith in the inevitability of his capture, all he wanted was his moment onstage. Russians won wars because they threw themselves before tanks, which was not the right mentality for a master criminal.<sup>111</sup>

On one level it is Renko's alienated nature that enables him to find a solution to the riddles posed to him: in *Gorky Park*, three literally faceless bodies are found in the park; in *Polar Star*, the body of a young woman is caught in one of the ship's fishing nets.

However, Renko's disaffection does not provide him with anything like a way out of his maze. His sense of alienation quite literally renders him dysfunctional as a police officer. "Under the guise of pretense, without his will, a real investigation was taking shape."<sup>112</sup> Indeed, he

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109. MARTIN CRUZ SMITH, *GORKY PARK* 37-38 (1986).

110. *Id.* at 10.

111. *Id.* at 26-27.

112. *Id.* at 70.

will be robbed of his position because of who he is, what he does.

In *Gorky Park*, he was given a case on which he did not want to work, and in which he felt himself a pawn. It is a perfect symbol of his sense of weightlessness and lack of control. “[R]enko felt strangely light—light of [his wife], light of home, slipping out of an orbit that had been his life, falling away from gravity.”<sup>113</sup> By recognizing his own sense of powerlessness, Renko is both empowered and impotent:

There remained one more intriguing possibility: that the investigator himself had discovered—by accident, the way a man passes a mirror and suddenly notices he is unshaven, his overcoat worn at the collar—how shabby his work was. Or worse, how pointless. Was he a chief investigator or a processor of the dead, an adjunct of the morgue, his paperwork the bureaucratic substitute for last rites? A small point that, and merely indicative of socialist reality (after all, only Lenin Lives!).<sup>114</sup>

In the sequel, *Polar Star*, this sense of lifelessness and powerlessness will be reaffirmed. As the sequel opens, Arkady Renko has suffered a far more decisive fall from grace than Porfiry Rostnikov’s mere demotion. Because of his unorthodox actions in *Gorky Park*, or because of his nature, Arkady was dismissed from the procurator’s office for lack of political reliability, for what he flippantly refers to as “doing my job.”

Renko is told by the political officer; i.e., KGB representative, on the eponymous Soviet factory ship on which he now labors, “You have no home, no place to go.”<sup>115</sup> Thus *Polar Star* retains Renko’s sense of rootlessness, of *rulelessness*. Confused as to the changed nature of his relationship with Major, now Colonel, Pribluda of the KGB, Renko ruminates: “It was as if everyone traveled the world in the dark, never knowing where he was going, blindly following a road that twisted, rose and fell. The hand that pushed you down one day helped you up the next. The only straight road was . . . what?”<sup>116</sup>

There is, though, in *Polar Star*, the promise of hope, of redemption for Arkady.

[I]sn’t this what Arkady did, hide? First in the deep faraway of the

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113. *Id.* at 92.

114. *Id.*

115. MARTIN CRUZ SMITH, *POLAR STAR* 25 (1989).

116. MARTIN CRUZ SMITH, *GORKY PARK* 102 (1986).

psycho ward. Then, after Pribluda revived him, in Siberia and on the ship, carrying on inert and semidead . . .? Now, asleep in his narrow bunk, he asked himself, *Wouldn't it be good to be alive again?* [The murder victim] had swum back. Maybe he could, too.<sup>117</sup>

This promise may be attributed to Soviet political changes. Comrade Hess is a "fleet engineer" on the *Polar Star*.<sup>118</sup> The term, Renko determines, is a euphemism for naval intelligence; Hess is responsible for turning the tide against the KGB and in favor of Arkady in the murder investigation, "There is more than one mission," Hess tells the KGB officer. At that remark, "There was a pause," Smith reflects, "as if the entire ship had veered in a new direction."<sup>119</sup> The book ends, too, with a sense of optimism:

"You know, on the radio they're starting to refer to you as *Investigator* Renko, whatever that suggests."

"It could mean anything," Arkady said."

"True."

In *Gorky Park*, however, Renko has a great deal to say about the conflict between militia and KGB, as personified by himself and Major Pribluda.

The major might . . . start with a little joke, establishing a fresh, more amiable relationship, perhaps describing their current misunderstanding as purely institutional. After all, the KGB was maintained out of fear. Without enemies, outside or within, real or imagined, the whole KGB apparatus was pointless. The roles of the militia and the prosecutor's office, on the other hand, were to demonstrate that all was well.<sup>120</sup>

#### b. *Comparisons between the Renko and Rostnikov Series*

Martin Cruz Smith uses the KGB in *Gorky Park* and *Polar Star* as antagonists, much as a corrupt or simply hostile police department in the "lone wolf" detective novels set in the United States. In the Kaminsky books, however, it is the byzantine nature of the Soviet police, as it relates to the Soviet state, represented by militia superiors and the

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117. *Id.* at 105-06 (emphasis in original).

118. *Id.* at 87

119. *Id.* at 89.

120. *Id.* at 91.

KGB, that lends Rostnikov's employment its special poignancy.

A character like Emil Karpo could not exist in the United States, nor would he fit neatly into a Smith list of *dramatis personae*. One similarly gets the impression that Rostnikov would not have become the person he is without the treacherous path he has learned to tread in the Soviet militia. Only Sasha Tkach, almost a Bert Kling clone, could slip into an Ed McBain novel, but he is too complex a character for one to imagine him as one of Arkady Renko's colleagues. In *Gorky Park*, as in most of the lone wolf subgenre, the protagonist is sympathetic because he is alone; often he achieves this solitude and alienation through the plot device of a murdered partner. Indeed, Renko loses his only helpful associate, Pasha Pavlovich, early in *Gorky Park*, perhaps to achieve just this effect.

Renko bears the trappings of existential angst befitting a late 20th Century antihero, but the doom and gloom seem more romantic trappings *de rigueur* in the classic lone wolf detective fiction than the political, Kafkaesque fatalism or hopelessness with which Kaminsky manages, seemingly effortlessly, to imbue his series. The humor in existential anxiety has always lain just beneath—sometimes even *on*—the surface of great existential literature from *Waiting for Godot* to *Metamorphosis*. From two men waiting for an entire play for someone who never arrives, someone who may never exist, to a man who turns into a giant insect: The difference between the two lies in the difference between reality and fantasy. Maybe the truest humor derives not from injecting unbelievable twists into real life situations, but from lampooning what we are made to see in the irrational nature of reality as we know it and live it every day.

Kaminsky's Rostnikov series is the perfect vehicle for just such a goal, for two reasons: first, because cops are known to see more "reality" in one week than most of us can expect to encounter in our entire lives. Maybe they see reality at its ugliest, but in some ways they also get to see, and experience, reality, or life, at its fullest, and at its most impressive—heroism and camaraderie at its finest. Second, by setting his series in the Soviet Union, even if he had no political agenda, Kaminsky had an opportunity to present life, or reality, at its most absurd. Not unreal—somewhere between Kafka and the Twilight Zone, maybe—but eminently believable.

It must be remembered that credibility is the *sine qua non* of the authentic police procedural. Kaminsky manages to blend what we don't know about the Soviet Union—a place traditionally shrouded in mystery, illuminated only by images of a system in which due process as

we know it is twisted beyond recognition by an oppressive legal "order." It is a place we fear both because of what we know, and because of what we don't know. Kaminsky grounds his books in the requisite prosaic routine while not compromising—in fact, heightening—that fear.

The more we learn, the more terrified we become, and this is only the background of the books, almost but not quite separate and apart from the murder that is colorably the plot of the novels. We grow more frightened because the system is a way of life from which the heroes—the cops—will never be free. This is the classic stuff of existentialism as much as of police procedurals: The system is never subverted, but is rather used to triumph over the wrongdoer.

Occasionally a cop in the 87th Precinct might stray from the straight and narrow, might even bend the rules, but the system itself isn't portrayed as malevolent. At worst, slow or awkward, ironically misused, but not inherently malign. Rostnikov and his colleagues triumph despite the system—not by extricating themselves from it (that would be akin to extricating oneself from reality)—but by learning to adapt to the absurdity and thereby exploit it.

Porfiry Rostnikov plays the system better than his superiors (though we always get the uneasy feeling that his is only a temporary victory, holding the enemy at bay for a fleeting triumph); Sasha ignores it with the naivete of ignorance and the purity of youth; the Vampire survives because in his devotedly single-minded tunnel-vision, he credits the system with the genuineness and nobility of his own set of rules. Karpo would never believe us if we told him he was thinking for himself. He blindly perceives that he is serving the system, but in truth he is investing it with his own sense of justice.

Does the doublespeak of that system genuinely contain the values that Karpo serves? We take our cue from Rostnikov, the most enlightened of the trio, who shows us that even with the somewhat more evolved and still loyal party members in the police, the system (reality, from an unpolitical view, or the USSR, from a political reading) is absurd and dysfunctional. Not unreal, but all the more frightening because it is real. And, or at least until recently, because it bore indications of permanence.

Police function hampered by the weight of hopelessness and despair—the more intelligent, or aware or evolved or sensitive the personality, the greater the despair. In the Smith books, as well as in the Rostnikov series, a reader used to this sadness/frustration is left to wonder only if it is the existential *angst* standard in detective novels in

the classic mode, or borne of a more political *ennui*.

Kaminsky's series, like most police procedurals, is something of an ensemble piece, affording the reader more than one character to study and compare. With Smith's lone wolf or "cowboy" hero/antihero, we are left to question whether his sensibilities epitomize the author's ideal or his opinion as to the audience's ideal (i.e., highly aware, intelligent, sensitive to life's irony, bitterness, hopelessness, injustice, etc.)

Where hopelessness is a result not just of bureaucracy's muddle of red tape, but a political agenda, it is potentially that much more essential than the protagonist despair. But should he allow that despair to render him compliant, or wholly dysfunctional, the reader's sympathies are likely to pall.

Professional rivalries, bickering and infighting take on a life-or-death seriousness: In the Kafkaesque—or Orwellian—world where a wrong word to the wrong person could cost not just one's professional standing but one's freedom or even one's life, ruffling a colleague's feathers is risk-taking of almost self-destructive proportions.

Here again, Arkady, the more Chandleresque antihero, is dramatically required to sabotage his career, while Rostnikov is able, in a less glamorous, more plebeian fashion, to maintain the balance of power, occasionally stumbling and losing ground, but forfeiting a battle in order to return another day to fight again. If he is the less romantic of the two men, Rostnikov is closer to the mold of Western police procedural protagonist, more credible or convincing because his victories and defeats are almost always minor, and almost always temporary.

Surviving the occasional risks of their jobs and catching the wrongdoers whose crimes form the plot of these novels may not seem minor in theory, but these accomplishments are smaller in scope than are usually featured in novels. Renko's battles are fought against a backdrop of good and evil; Rostnikov is harassed and beleaguered, threatened and endangered, but his triumphs are more subtle, sounded in a cryptic dialogue or political double-entendres, in which even the conversants may not know for days who got the better of whom. Kaminsky occasionally supplies the obligatory chase or showdown, but the real dramatic tension lies in what is said, and not said, rather than in what is done. It provides a far more subtle and enduring gratification of an intellectual and visceral nature.

## B. *The Militia in Western Films*

Martin Cruz Smith's novel, *Gorky Park*, was made into a film in

1983 by Orion Pictures, starring William Hurt as Chief Investigator Arkady Renko, and also featuring Lee Marvin, Brian Dennehy, and Joanna Pakula.<sup>121</sup> The film is only sporadically faithful to Smith's plot,<sup>122</sup> but entirely consistent with his mood and characters.

William Hurt affected a jarringly inconstant English accent, perhaps to distinguish his character from the other American actors portraying Americans, and to align himself with the British actors portraying Russians. Aside from that distracting note, Hurt admirably captures the iconoclastic melancholy of Smith's Renko.

The movie neglects the complex relationship of Renko and Pribluda so well treated in Smith's novel, but otherwise is faithful to the competitive nature of procuracy,<sup>123</sup> militia and KGB. When Renko first begins his investigation, and demands of Pribluda a reason for the latter's presence on the scene, Pribluda explains that "the KGB decides what interests KGB."

The character of Renko in Dennis Potter's screenplay and Hurt's interpretation is true to the character in the novel. Renko is openly rebellious, disaffected, a man who has something to prove and nothing to lose: the archetypal "private eye." His hostility toward everyone but his trusted colleague Pasha is palpable. He is combative with the pathologist, with witnesses, and most significantly, with the KGB. This antagonism is a luxury Porfiry Rostnikov cannot afford, or will not allow himself.

Renko is compared with his father, the war hero General Renko, a man considered neat and tidy, as contrasted with Renko's patent disheveled lifestyle. The prosecutor cautions Renko: "Your father was just as insolent, but he could afford to be. He was good at his job."<sup>124</sup>

The film's Renko is almost a man without a sense of self, a man able to solve the case by assuming the identity, however fleetingly, with the initially anonymous victims, and then with the killer. Without being as firmly grounded (not to say earthbound) as, for example, Inspector Porfiry Rostnikov, Renko is able to be changed by the investigation

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121. The film was produced by Gene Kirkwood and Howard W. Koch, Jr., and directed by Michael Apted with a screenplay by Dennis Potter based on Smith's book.

122. The character of KGB officer Major Pribluda dies in the movie but not in the book, in which the two men ultimately gain respect and something like friendship for each other. Also, the movie omits Renko's trip to New York.

123. Here, as in the novel, the procurator is called a "prosecutor," and in the novel, the Procurator General, the "Prosecutor General."

124. Major Pribluda will later acknowledge to Renko that the prosecutor erred in underestimating Arkady's abilities.



in a way Rostnikov never is. Rostnikov has nothing to prove and a great deal to lose. Smith's novel accentuates the point by giving Renko a wife and having him forfeit that wife.

Renko, the true existential hero, is aware of the tragic, hopeless nature of his reality, and therein lies his despair. When asked by a friend what he is "up to," Arkady replies, "Saving a life."

"Whose?" he is asked.

"Mine," he responds. "I'm on a case that reeks of KGB involvement."

Renko is only too aware of his being "set up," but he suspects the wrong man. "Lies are not freedom," Renko tells Irina, the woman he comes to love, and it is his existential self-honesty, or his inability to avoid confronting the truth, that is his downfall and his salvation.

The film adds a particularly pointed observation of the nature of Soviet justice when Arkady tells a forensic expert of the need to investigate, notwithstanding the danger in his society of knowing the truth: "Too many people in our society . . . disappear . . . into the chasm . . . between what is said and what is done." Lies are not freedom, but truth is a little like death, a point made more explicitly in *Polar Star*.

From the sublime to the ridiculous, the credibility of Western films' portrayal of the Soviet police took a downward turn in the 1988 movie, *Red Heat*.<sup>125</sup> The movie, part mismatched buddy film, part fish-out-of-water caper, starred Arnold Schwarzeneger as militia Captain Ivan Danko, paired with James Belushi as the Chicago police department's Detective Sergeant Art Ridzik. The two are teamed to locate an escaped Soviet criminal in Chicago.

The film began with a comic book opening, a fight scene complete with kung-fu-type heightened sound effects for the punches landed. The opening credits featured equally discouraging bastardized cyrillic lettering (e.g., the backwards "R", which is pronounced "ya" in Russian, stood instead for the English letter "R").

This was not an auspicious beginning if credibility and accuracy were chief values. The film itself, while not unentertaining, did not improve with time. Captain Danko was a humorless, forbidding figure, at least in the first hour or so of the film, but less because of his uniform than because of Danko's stoic personality—and the physical presence of the actor portraying the Soviet officer. Indeed, bearing out the im-

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125. A Carolco-Lone Wolf-Oak film, directed by Walter Hill, produced by Walter Hill and Gordon Carroll, with a screenplay by Harry Kleiner, Walter Hill and Troy Kennedy Martin from a story by Walter Hill.

pression that the humorlessness was not a function of his nationality or profession was the fact that other Soviet militiamen, e.g., Danko's Russian partner, felt comfortable telling jokes.

Schwarzeneger's character's motivation was prime "lone wolf" material, avenging the death of his partner. The entire film, however, seemed calculated to inject every Western stereotype of Soviet society: Danko criticized pornography on the hotel television as "capitalism" (the correct phrase should've been "capitalist decadence," but the point was made). Danko was also portrayed as a brilliant chess player; while this might be imagined a fleeting reference to the mental fencing prevalent in Kaminsky's novels, it turns out instead to be no more than the use of another Russian stereotype.

Danko is asked by Peter Boyle's character, a police commander and Ridzik's supervisor, "How do you Soviets deal with all the tension and stress?" The answer, predictably, is "Wodka." Even though Danko appears to develop a sense of humor as the film progresses, it seems to be attributable to his contact with Belushi rather than an inherent character trait we are only beginning to glimpse.

Nor are the KGB omitted in the parade of Soviet stereotypes. Captain Danko, as he works with Belushi, manages to "hold out" on the KGB's representative, who is described in pointed euphemism as a "liaison officer" from Washington, D.C. The political commentary continues:

Danko: "Chinese had way [of dealing with criminals]. Take all drug dealers, line them up, shoot them in back of head."

Ridzik (regretfully): "Nah, never work here. Fucking politicians would never go for it."

Danko: "Shoot them first."

Schwarzeneger's character is not, however, without compassion. At one point in the film, he shoots out a door lock to let a relatively innocent young woman escape. Nor is Belushi, the representative of the American police, idealized. Ridzik is argumentative, foul-mouthed, bigoted and overly emotional, in sum, "a good cop, and a total expert at fucking up." He describes a group of blacks as a "basketball team," a racist stereotype. Yet it is Belushi's character who is seen as "teaching [Danko] a sense of humor."

In sum, while mildly entertaining, *Red Heat* may be considered a worthwhile entry in the category of Western media's depiction of Soviet police only until one recalls the far superior treatment given the topic by *Gorky Park*.

### C. *The Soviet Police in American Television*

Two recent television programs purport to document a slice of Soviet life in portraying their police at work. The first of the two is an episode of the Fox network program, *Cops*. It was first televised in July 1989, and rebroadcast early this year.

The episode, "Cops in Russia," was taped over sixteen days in Moscow and Leningrad by an American-Soviet film crew, reportedly "for the first time in history, thanks to *glasnost*." The program began its coverage with the Soviet Militia Training Academy, showing police recruits at jogging, morning exercises, martial arts class, combat course and dress inspection. The training appears rigorous, as might be expected of any police academy, but the scene ends with an unattributed voice-over claiming that, "In my personal opinion, only a real man can be a cop."

The program returns after commercial break with a Leningrad morning May Day celebration. The voice-over describes the widespread Soviet alcohol problem, exacerbated on holidays when people are inclined to celebrate. "The problem of alcoholism in this country is a very great social problem; and the task of the militia is to help the people get rid of this social evil," the speaker notes in Russian-accented voice.

We are next taken to a drunk-tank in the Central District of Leningrad, where we see a young man being removed from restraints in a chair used specifically for that purpose. The man is obviously debilitated and subdued, and when removed from the chair, is unable to stand on his own. As he is returned to the holding room, the voice-over dutifully reports that the other inmates are claiming that the young man had been beaten before placed in the restraining chair. A few moments later, we see another man, drunk and boisterous, being placed in a similar chair.

The closest the program gets to political commentary comes after a street patrol in the same Central District. A woman, victimized by burglary of the savings she had intended to use to buy a new mattress, complains of life in the Soviet Union: "All the world . . . knows that the Soviet people have only . . . all these achievements and they have no . . . they have nothing in their shops and they can buy nothing, practically."

The program follows the police in a shopping district investigation of sales fraud, and to the Nevsky District to apprehend a black marketeer. We are shown a glimpse of the police station, where sus-

pects are detained, its central dispatch, where emergency information is collected. The station appears much like any other metropolitan police station.

A surprising view of the Soviet mindset is provided when the militia raid a suspected drug house. The police have to break down the door, and when they question the man inside as to why he declined to open the door for them, his reply is that he was not obligated to open the door inasmuch as he is entitled to his privacy. This writer expected the suspect's next protest to be, "This is a free country, isn't it?"

As it happens, the son of the man arrested in that house helped the militia locate narcotics in a wardrobe. The boy, apparently ten or eleven years old, told the police that he had telephoned the police several times to report his father, but that no investigating officers ever appeared.

The program then follows the officers to a crackdown on motorcycle gangs, where gang members, who refused to pull over for the police, were forced by the police to a checkpoint (where the police check citizens' internal passports). When asked why the gang members would not pull over, they replied, "'Cause they felt like it, and the police are full of crap."<sup>126</sup>

This typifies the rather singular lack of fear or intimidation of the militia. Later, when a pair of "lovebirds, maybe" in a parked car are questioned by the police during a rooftop surveillance of suspicious cars, the two in the car shut and lock their doors and drive away, with two police officers attempting to jump onto the roof of the car. The suspects are soon apprehended, however, and when one of the officers demanded the girl turn over the keys to her car, she proclaims, "I won't, you have no right." The officer replies that he certainly does have a right, and that citizens must produce their papers for the police. The girl is noticeably underwhelmed, although the officer returns her keys only to allow her to drive herself and the officer to the police station.

While the "Cops" episode offers no explicit commentary or narrative, in allowing the events to speak for themselves, it makes a point quite eloquently. What we see seems strikingly familiar, but not familiar in that it is what one expected to see: It is familiar in the sense that it parallels what Americans see in their own streets and see on the streets of other cities on other episodes of "Cops."

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126. Courtesy of the translator/narrator.

The second of the two television programs on Soviet police is a June 1990 episode of the CBS news show *48 Hours* entitled "Moscow Vice", featuring a visit to the Soviet Union by members of the San José Police Department. The visit included a trip to Moscow, where the American police officers reported that it was not the heavy-handed police state they imagined.

The Soviet police had a different perspective on changes in their country. "Fear of the policeman is gone,"<sup>127</sup> one militia officer reported rather mournfully, notwithstanding the existence of the internal passport system, *i.e.*, the remnant of the police state. Another officer commented that the "police state is in a state of disrepair." This is entirely consistent with the rather brazen attitude of citizens toward the militia witnessed in the "Cops in Russia" episode.

According to the Soviets interviewed on *48 Hours*, there is concern that the internal changes will bring increasing crime, leading in turn to a backlash and renewed repression.<sup>128</sup> One officer reported that the shortage of housing left "no room for reason." This viewer was reminded of Inspector Rostnikov's colleague, the young Sasha Tkach, struggling to rid his cramped household of his mother.

The only other political commentary in *48 Hours* touched on the operations of the Organized Crime Unit. A Soviet policeman noted that the Unit can now focus on local extortionists or protection racketeers functioning in cooperatives; those criminals prey on legitimate businesses, but more lately also on black marketeers who are taking up the slack when state-run liquor stores fold.

It is noteworthy that both of the two television programs limited their coverage of Soviet police to nonpolitical crimes. In that sense, viewers were exposed only to the types of police activity paralleling that of American police. To what extent this accurately reflects the Soviet criminal justice system is discussed below, in the context of the activity of Soviet police in both political and nonpolitical cases.

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127. However, a satirical cartoon from the Soviet magazine *Krokodil* depicts a woman reassuring a man about the shadowy figures approaching their window: "Relax, it's not the police, it's just burglars." SOVIET HUMOR (1990) (by the editors of *Krokodil* magazine).

128. *48 Hours* (CBS television broadcast of June, 1990).

#### IV. ACCURACY OF WESTERN MEDIA'S PORTRAYAL OF MILITIA

##### A. *The Apologists' Controversy*

One final area of discussion which should be briefly considered is the treatment accorded the Soviet criminal justice system in another form: the area of both primary and secondary legal authority. A battle was waged in legal periodicals as to the reliability of the portrait of the Soviet legal system in texts and treatises written by Westerners, who may be said to have brought the Soviet legal system to the Western scholar.

It has been questioned whether those scholars who have been responsible for most if not all of Westerners' knowledge of the Soviet system have painted an inaccurately rosy picture. The question tends to hinge on the difference between the law on the books of the Soviet legal system and the law as practiced in the Soviet Union.

A chronic problem for scholarship about any legal culture is the question of how the "law on the books"—the official, published sources of law—correspond to the "law in practice," the way life is actually governed . . . . Law in practice is undoubtedly closer to law on the books in a society like that of the United States [than in developing countries], which traditionally has a high public level of legal consciousness and a press that is free to expose deviations from the letter of the law. Even in America, of course, the congruence is less than complete.

Distinguishing the law on the books from the law in practice is especially difficult—yet indispensable—in considering a society like that of the USSR, where propaganda is a pervasive part of daily life. State and Communist Party agencies supervise the dissemination of information and ideas in the Soviet Union, including official legal materials, and ensure that what is disseminated reflects well on the State and the Party. To be sure, propaganda and the publication of lies are scarcely unique to Communist statecraft, but propaganda is peculiarly prominent in the folkways of the Communist movement and its institutions. *In the Soviet Union, moreover, there is little internal check on the propaganda output, because the government has a monopoly of the means of communication and prohibits independent publication. A healthy measure of skepticism, therefore, is surely appropriate toward whatever is published under such a regime, including official legal materials.*<sup>129</sup>

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129. Marnion Schwarzschild, *Variations on an Enigma: Law in Practice and*

The difference between the law on the books and the law in practice in the Soviet Union seemed to come down to one prime factor: the Communist Party as embodied by the enforcement or vigilance of the KGB. "Perhaps the most difficult difference [between American and Soviet legality] for the American to grasp is the role of the Communist Party in legal affairs."<sup>130</sup> Professor John Hazard,<sup>131</sup> the author of those words, reviewing Dina Kaminskaya's book, *Final Judgment*, notes that some similarities exist between the American and Soviet regard for the rule of law:

Every American lawyer knows that social and political pressures are brought to bear on the administration of justice under some circumstances in the United States . . . . Political machines in the United States may dominate the process of selection of judges and district attorneys, but they have no propaganda apparatus at their disposal as does the Soviet security police, the K.G.B. Most significantly, American political machines are always subject to an opposition party, weak though it may sometimes be, and the press is not controlled.<sup>132</sup>

Professor Hazard describes "three basic points of contrast" between the American and Soviet systems: the increased role of political authorities; the heightened considerations of state security, "and, most importantly, the unique presence of the Communist party color[ing] the entire legal system."<sup>133</sup>

Also, "the Soviet judiciary, while nominally independent, actually adhere[d] to governmental and Party directives on penal policy, a fact not startling in light of the control that the Party has over the selection of judges."<sup>134</sup>

That same author added, in "defense" of the Soviet system:

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*Law on the Books in the USSR*, 99 HARV. L. REV. 685, 686 (1986) (emphasis added) (footnotes omitted).

130. John N. Hazard, *An Insider's View of the Soviet Legal System*, 84 COLUM. L. REV. 271 (1984).

131. "The mainstream of Anglo-American scholarship about Soviet Law is fairly represented by Professor John Hazard . . . [and] by professor William Butler." Schwarzschild, *supra* note 129, at 687 (the author apparently did not intend the remark as a compliment).

132. Hazard, *supra* note 130, at 271-72.

133. *Id.* at 271.

134. Dina Kaminskaya, *My Life as a Soviet Defense Attorney*, 82 MICH. L. REV. 902, 903 (1984).

[A]lthough one might reasonably argue that criminal procedures in most western countries . . . are substantially fairer because of their greater protections for the defendant, such a claim necessarily assumes that conviction of the innocent is a greater evil than absolution of the guilty. Most in the West probably agree that it is, but the fact that Soviet jurisprudence may take the opposite view need not ineluctably lead to the moral condemnation of Soviet society.<sup>135</sup>

The author *does*, however, condemn the Soviet Union for the "systematic suppression of political dissent."<sup>136</sup> Although the commentator acknowledges the existence of political abuse in Western countries, including the United States, he points out that the Soviet Union, given its repression of free expression, was far more successful at it than any of its Western counterparts.<sup>137</sup>

As Professor Hazard points out, even Soviet attorney Kaminskaya's book does not depict the Soviet legal system "as a farce." Rather, "she draws a line between the trials for common crimes and those for political opposition."<sup>138</sup> Professor Hazard goes on to characterize this distinction as bringing the Soviet leadership in line with the Tsars, "who, like all Emperors, feared for the safety of their regimes and of their persons, and reserved for themselves the prerogative of ruling by decree when they spied a political crisis."<sup>139</sup>

Chris Steele Perkins, a London-based photojournalist, was allowed virtually unprecedented access to the inside workings of the police and prisons in the Soviet Union. Perkins explains why he believes he was given such access: "[B]ecause it suited the Soviets; it gave them a chance to confirm a manifestation of glasnost, and no doubt it was intended to dispel the image powerfully etched in the western mind of the gulag and a relentless, ever-present KGB."<sup>140</sup>

But Perkins admits he "did not see anything of the KGB [or] political prisoners,"<sup>141</sup> and he remains skeptical if optimistic about what he has been shown: "Of course, I hadn't seen it all. People must still rely on the evidence of dissidents and others for details of the worst of the Soviet penal system. But why was I allowed to see any of it? Per-

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135. *Id.* at 903.

136. *Id.* at 904.

137. *Id.* at 904-05.

138. Hazard, *supra* note 130, at 272.

139. *Id.*

140. Fletcher, *Small Steps Towards Reform*, NEWSDAY, July 16, 1989, at 8.

141. *Id.*



haps because glasnost is a reality. The Soviet system may truly be reforming."<sup>142</sup>

To determine whether that sanguine view is accurate, it is necessary to turn to the sources Perkins himself acknowledges to be the authorities: political dissidents.

### B. *The Role of the Soviet Police in Political Crimes*

In keeping with the caveat raised in the preceding section, it is now incumbent on the author to sound a cautionary note to the analysis of media's treatment of the Soviet police. It would be disingenuous to discuss, at any length, the role of the Soviet Union's police without addressing the role of the militia—and indeed, that of the entire Soviet criminal justice system—in political cases.

In this context, it behooves us to consider the rule of law itself in the Soviet system. How much of what was discussed above, with regard to the checks and balances and due process, is in effect a true picture of the Soviet criminal justice system? In other words, how much of what was on the books was in the streets and in the courts of the Soviet Union?<sup>143</sup>

As indicated above, this is not a new question. Academic and scholastic battles have been waged over alleged apologists for the Soviet legal system, scholars who, in bringing knowledge of the Soviet legal system to the West, have been charged with bringing over only a misleading glimpse of Soviet law in theory, rather than accurate insight into what is Soviet law in practice. On one point most scholars seem to agree: Soviet law in practice approached Soviet law in theory in most areas<sup>144</sup> but one. That one exception, that potentially abrogates the

142. *Id.* at 15.

143. The legally trained Gorbachev is seen as being instrumental in efforts to institutionalize the rule of law in the Soviet Union, a process in-line with that of "democratization." S.B. Goldberg, *A More Perfect Union Part I: A Lawyer in Moscow*, A.B.A. J., Oct. 1990, at 60.

144.

[T]he legal system and machinery of justice in the Soviet Union—which in its outward structure and functioning was derived largely from the French system—grinds in an entirely different manner when it deals with an ordinary transgression, that is, not one involving the state as a politico-economic institution per-se. In the former case, adjudication will be effected by the tribunals involved in roughly the same manner known throughout the world; but in the latter, law becomes the political organ of state power, the instrument of the class that constitutes the regime of the land, a mere

rule, is the political case, the so-called "crimes against the state." In this area of the law, the Soviet criminal justice system failed miserably. This point of view is reflected not only in the words of the system's victims, e.g., Natan Sharansky's autobiography *Fear No Evil*, but also in the works of some of its accused apologists and even its practitioners.

It is in this sphere that one has to consider the gap between Soviet law on the books and in practice, and to wonder whether the cause of that gap is the perhaps diminishing but formerly preeminent role of the KGB, or something more elusive, something attributable to the Soviet Union as a "police state." Whether the ebbing dominance of the Communist Party,<sup>145</sup> leading to a changing role of the KGB to focus on foreign crimes rather than domestic, will bring the ideal of Soviet criminal justice, as codified, closer to the reality of criminal justice as practiced in *all* cases in the Commonwealth, is something still to be determined.<sup>146</sup>

Perhaps one of the most striking aspects of the Soviet criminal justice system for an American is what seems to be a curious admixture of due process and lawlessness, for lack of a better word, in its application. While the latter term only approximates the meaning intended, it serves better than "arbitrariness" or "capriciousness."

For one gets no impression of anything arbitrary or haphazard in the experiences documented by Natan Sharansky in his autobiographical *Fear No Evil*. A Westerner indoctrinated in the idea, not to say mythology, of the "evil empire" is hard pressed to fathom the depths of the byzantine mechanism of Soviet criminal justice. One expects, and indeed feels gratified by, reports of psychological abuse. It is the documentation of the orderly procedures implementing the Soviet criminal code that strike a Westerner as aberrant or inconsistent.

It is in this context that I feel compelled to highlight, however briefly, the bifurcation of the Soviet criminal justice system. The operations of the Soviet police prosaically, if artfully and gracefully, depicted by Kaminsky, and more sharply (though with no less melancholia) by Martin Cruz Smith, focus on crimes other than treason or espionage. For those two crimes, as Sharansky describes, it is the KGB rather

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adjunct of state power in pursuit of conformity within Soviet society.

ABRAHAM, *supra* note 55, at 287.

145. See *supra* notes 72-76 and accompanying text (discussing reforms relating to "telephone justice").

146. Mikhail Gorbachev was a law school classmate of Dina Kaminskaya. See generally KAMINSKAYA, *FINAL JUDGEMENT* (1985).

than the investigating prosecutor (or procurator, as the position is called in the Soviet Union) who calls the shots.

Yet even in this somber context, in which the KGB rather than the militia serves the police function of investigation and arrest, a Westerner is still surprised by the combination of the dominance of the rule of law and the more Kafkaesque chess game<sup>147</sup> of psychological mind games, or investigation by calculated and manipulative interrogation.

In other words, there were still procedures to be followed in the Soviet system of criminal justice, procedures paralleling and even in some instances exceeding the Western concept of due process.<sup>148</sup> It would be disingenuous, however, to overestimate the force and effect of these mechanisms as they apply to the crimes of espionage and treason. It is nonetheless noteworthy to a Westerner, or more specifically to an American, when the rules bearing an eccentric resemblance to our own system of civil rights and due process rear their collectively incongruous head amidst an Orwellian setting of double-talk and double-dealing.

There has been some word of changes in the area of political crimes in the latter years of the Soviet Union. George P. Fletcher, a Beekman Professor of Law at Columbia Law School, noted the following upon his return from a month-long study of the Soviet legal system:

Soviet criminal justice is evolving, but some trends are apparent. Before Gorbachev, the bureaucracy relied heavily on the crimes of possessing anti-Soviet literature and parasitism as techniques for dissent. Anyone who had a Hebrew grammar at home or a copy of Solzhenitsyn in his pocket might land in a prison camp for at least three years. Refuseniks who were fired and could not find substitute employment were prosecuted as parasites. *These measures have virtually disappeared, and I was told that the number of political prisoners has dwindled.*<sup>149</sup>

But for the accuracy of this assessment, perhaps we should let the words of two recent political prisoners speak for themselves: First, Lev Timofeyev, a Soviet economist and author imprisoned from 1985 to 1987 for "anti-Soviet agitation and propaganda":

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147. Both Kaminsky's and Sharansky's books use the game of chess as a metaphor for ideological conflict.

148. *48 Hours* (CBS television broadcast of June, 1990 airing California police officer's views on due process).

149. Fletcher, *supra* note 140, at 11.

When a Soviet *zek*, or prisoner, has a little free time (which rarely happens), he loves to try to figure out how many of us there are—all the prisoners, labor camp inmates, exiles, etc., throughout the USSR . . . [A]ccording to these estimates, it appears that there are at least 10 million of us. The majority of the prisoners were arrested “for violating the internal passport regimen . . .” or for “economic crimes . . .” There are separate labor camps for political prisoners, the majority of whom are writers, journalists and other critics of the regime . . . .

[When I was in prison], I did not experience hatred toward the jailers and camp officials, nor do I experience hatred now toward those who searched me and kept me under guard; who seized my notes; who forced me into cells and workshops; who clanged shut the bolts and locked me behind heavy doors. I was tormented when they deprived me of warm clothing and did not let me sleep; when they confiscated my letters and did not permit me to see my wife and children.

But now, when I write about them, I feel a deep loathing. Because they are all still at their jobs, alive and well. They are an enormous army, with complete power over millions of prisoners. *Is it so easy to speak of changes in my country? How will those changes ever happen for us?*<sup>150</sup>

Also, Natan Sharansky, released after nine years in a Soviet prison, speaks eloquently about his encounter with the Soviet criminal justice system: “At some level,” Sharansky notes, “every Soviet citizen lives in fear of the consequences of his actions, for he knows there is no presumption of innocence on the part of the KGB. That is what makes interrogations so sinister.”<sup>151</sup> Thus, references in the novels discussed above and in the television documentaries to the lack of fear and intimidation among the Soviet people for the militia do not take into account the terror held for the KGB.

Sharansky speaks, too, about the difference between the treatment he received as a political dissident and that of suspects and prisoners in nonpolitical cases, as when Sharansky discusses his last cell mate in Lefortovo, a nonpolitical swindler: “He was unfamiliar with the KGB, and viewed them with respect and fear. But he also had a highly developed curiosity, and listened eagerly as I told him about my own experiences with the KGB, both before and after my arrest.”

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150. *Id.* at 13.

151. NATAN SHARANSKY, *FEAR NO EVIL* 35 (1989).

Lefortovo [an investigative prison where Sharansky was held] is no police station: officially, fists aren't permitted here, and they don't yell at you. True, they can torture you with the cold and hunger of the punishment cell, but even there they address you formally . . . .

Years later, in a prison camp, I learned that I had been one of the lucky ones. As they led me down the deathly silent corridors of Lefortovo, I had no idea that next to the freight elevator was a room lined with rubber. If "state interests" demanded it, and if the KGB was certain that Western public opinion had no interest in their victim, they would bring him here, where the beatings were carried out by the very same officers who addressed me so politely . . . .<sup>152</sup>

To a reader of Kaminsky's novels, who has thus been exposed to the KGB's mental "chess matches," Sharansky's description of KGB interrogations seem familiar:

Where they had once used force, the KGB now preferred to engage you in long conversations, which often lasted the whole day . . . . The point of these incessant interrogations was twofold: first, to create an aura of legitimacy to mask what was still a legal farce, and, second, to induce you to reveal as much information as possible, even if it was already known to the investigators.<sup>153</sup>

Most pointedly, however, Sharansky details his experience with the difference between law on the books and law for political dissidents. For example, when Natan Sharansky and friends were arrested, prior to his ultimate arrest: "It soon became clear that these were preventive arrests, although such arrangements are against the law in the Soviet Union and are never admitted to."<sup>154</sup>

The KGB directly informed Sharansky of the results he would incur by failing to follow the KGB program and accept their proffered defense counsel: "Although the KGB doesn't participate in the trial, the court certainly takes us into consideration. I'm telling you clearly; if you agree to accept the lawyer we give you, you won't be given the death sentence."<sup>155</sup>

Sharansky was steadfast:

152. *Id.*

153. *Id.* at 36.

154. *Id.* at 85.

155. NATAN SHARANSKY, FEAR NO EVIL 171-72 (emphasis in original).

I . . . knew very well that the KGB firmly controlled the choice of lawyers admitted to 'their' cases. Only a lawyer with KGB clearance was permitted to participate in political trials, although the need for such clearance wasn't mentioned in any law. Moreover, lawyers who went too far in the defense of their clients had been known to lose their clearance.

Obviously, no serious lawyer would dare to defend my position, as this would mean exposing the fabrications of the KGB. Instead, he would try to 'reestablish the truth' by trying to show that the actions attributed to me were committed by other members of our group, and that I was the unwitting victim of more experienced Zionist provocateurs.<sup>156</sup>

Finally, Sharansky describes the impact of international opinion on the excesses of the KGB. When granted the liberties of exchanging notes with his mother, Sharansky tells us, "I hoped it was because of the international commotion over my case, and that the demand to permit a lawyer of my choice to defend me was so strong that the KGB was forced to show some signs of legality."<sup>157</sup> Sharansky describes in his book the period of anxious optimism in 1983, when the "*zeks*" (prisoners) awaited the results of the Madrid conference, where it was hoped Soviet concessions to Western opinion would result in improved human rights protections for the prisoners. But the "fragmentary information" that reached Sharansky and the other *zeks* seemed dismal parallel to Helsinki's promised, but unrealized, guarantees. "Prison is the most sensitive barometer of change, and *in prison nothing had changed*."<sup>158</sup>

Those words were written, or published, in 1988; Lev Timofeyev's were published in 1989. In 1992, Westerners must still wonder: In prisons in the Commonwealth, has anything changed?<sup>159</sup>

156. *Id.* at 172

157. *Id.* at 174.

158. *Id.* at 364.

159.

One night in December 1988, in a hotel in the Russian city of Perm in the Urals, I saw Gorbachev speaking on TV, from the United Nations. He said that there were no longer any political prisoners in the Soviet Union.

But the next morning I visited Perm 35, a prison camp four hours by car from Perm. The men named above were still in the camp, as were other political prisoners.

Now almost all the old political prisoners are out; some new ones have been taken from republics trying to break free of the Soviet Union. Most

### C. *The Soviet Police in Soviet Detective Fiction*

Edward Topol is a star in a relatively small constellation, that is, the field of Soviet mystery writers with Western exposure. Topol, a Soviet emigré now living in Ontario and Florida, adds to Soviet detective fiction an element neglected in Kaminsky's books and treated from a different perspective in Smith's: sex.

While Smith treats romance from the point of view of a male militia officer, specifically, Arkady Renko, Topol's first-person narrator is a female militia officer, policewoman Anna Kovina, militia lieutenant and "CID Investigator."

To this author, the main virtue of Topol's body of work is the illumination it casts upon the relationship between the militia and the KGB, as perceived by a Soviet emigré writing in the voice of a policewoman:

On the whole, relations between us in the militia and the KGB are pretty complicated; there's rivalry. They think they're the elite, the white bone and blue blood of national security; their pay and allowances are way above ours. *But we know who does the basic everyday dirty work, looking after law and order in the country.* Especially in Siberia, . . . , where the government has mobilized more than a million workers over the last few years . . . to develop the gas fields and construct the Siberia-Western Europe gas pipeline. Along with them, naturally, came drifters and profiteers, prostitutes and other criminal elements from all over the country, every one of them after a fast arctic ruble. Drunken brawls and knife fights in restaurants and workingmen's hostels, murders over women, fistfights in dance halls with fatal consequences, poaching in the taiga, gang rapes, under the influence of liquor or not; add to that narcotics, unreported syphilis, prostitution, speculation in furs and fruit—that's the criminal dungheap we have to rake over day after day. *The lily-white hands of the KGB, of course, keep well away.*<sup>160</sup>

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of the former prisoners still fight Gorbachev—some from seats in the parliaments of the departing republics.

Mikhail Kazachkov remains imprisoned. I think that he infuriated somebody in the KGB by trying to talk to me from the windows of a "hospital ward" where he and other militant prisoners were locked away during my visit.

A.M. Rosenthal, MIAMI HERALD, Oct. 17, 1990, at A15, col. 3.

160. EDWARD TOPOL, RED SNOW 10 (1986) (emphasis in original).

## V. CONCLUSION

How accurate, then, were the pictures of the Soviet criminal justice system that were presented in Kaminsky's and Martin Cruz Smith's novels? Were the documentaries of "Cops in Russia" and "48 Hours" truly nonfictional, and if accurate, did they present the full story?

With rare exception,<sup>161</sup> the research in the novels was impeccable, the presentation accurate and verifiable. While Kaminsky's tone differed drastically from that in *Gorky Park* and *Polar Star*, both authors successfully conveyed the conflict between the different bodies charged with implementing the law of criminal investigation, that is, the procuracy, the militia, and the KGB. Both series of novels also addressed, with admirable credibility and accuracy, the extent to which the KGB itself determines its own jurisdiction.

This authority on the part of the KGB, for determining which cases involving aspects of state security, is responsible for not only much of the novels' dramatic tension but also for imbuing the reader with a sense of the gap between "law on the books" and "law in reality," the gap attributable to political crimes more than to any sinister sensibilities in a so-called "police state." Far from exonerating the Soviet criminal justice system, the novels (and, to a lesser extent, the films) vilify this discrepancy: the tough cases making bad law, in effect.

The fact that both "48 Hours" and "Cops in Russia" completely sidestep the political cases, and, in turn, the role of the KGB in criminal investigations, renders them critically deficient. Unlike the meticulously comprehensive fiction of both Kaminsky's series and Smith's two Arkady Renko books, the television "documentaries" are therefore misleading and distorted tunnel-vision portraits of the Soviet militia. Even the somewhat melodramatic and even laughable portrayals in *Red Heat* at least pay lip-service to the militia-KGB dichotomy, though bordering on and, yes, crossing over into the realm of caricature.

Thus, in conclusion, the Western media of detective novels and film manage to convey with impressive accuracy the nature and role of the militia within the Soviet criminal justice system and the Soviet so-

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161. *A Cold Red Sunrise* discusses the seven-year term of the Procurator General as "the longest term of any Soviet official." STUART M. KAMINSKY, *A COLD RED SUNRISE* 17 (1988); see also, STUART M. KAMINSKY, *A FINE RED RAIN* 2 (1987). But see STUART M. KAMINSKY, *BLACK KNIGHT IN RED SQUARE* 15 (1984) (where the Procurator General is in her second ten-year term); see also note 59 and accompanying text.



ciety as a whole. Most notably, the works of Kaminsky and Smith effectively bridge the gap between pre- and post-*glasnost* and *perestroika*, and confront the extent to which these changes had and had not brought comparable reforms in the criminal justice system.

Although the Rostnikov and Renko series inform the readers of the role of the KGB in hamstringing the militia, they too stop short of confronting directly the issue of the other gap, that between political and nonpolitical cases. Both series come admirably close, in depicting KGB control over what constitute political cases within KGB jurisdiction, but neither has yet done more than acknowledge the existence of the realm of the political dissident in the Soviet criminal justice system.<sup>162</sup>

This author is hasty to add that this deficiency does not mitigate the tremendous accomplishment of either series in portraying, with remarkable verisimilitude, the nature of that system. Kaminsky's work in particular has succeeded in capturing the complex relationships of the governmental entities which administer criminal justice in the Soviet Union, and this reader for one looks forward to a more comprehensive treatment of the subject in his future entries in the Rostnikov series.

The question for west and east alike is what changes will be wrought in the criminal justice system in the new Commonwealth. As noted above, crime and nationalist fervor are both on the increase in Russia, for example. There is concern that the need to control those elements will lead to an erosion of the burgeoning reforms. There is growing evidence that the desire for law and order, not to mention economic salvation, may be empowering the "enemies" of reformists like Boris Yeltsin,<sup>163</sup> the Communist Party, the military and the nationalist extremists. While the dissolution has brought new hope and sanguine improvement in east-west relations, some are skeptical:

Warnings of a coming dictatorship have been as common in Moscow this winter as street-corner complaints about high prices. Down through Russia's history, authoritarianism has been the rule, reform and democracy the rare—and brief—exception. For that reason alone, the odds seem to dictate that President Boris Yeltsin's efforts to install a new system will founder and the strong hand will follow. Even Yeltsin has raised the specter. "I have faith

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162. Kaminsky's *Death of a Dissident* (1981) does, however, focus on the murder of a political dissident.

163. Carney, *supra* note 18, at 32.

in our reforms . . . . But if they fail, I can already feel the breath of the Redshirts and Brownshirts on our necks.”<sup>164</sup>

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164. *Id.*

# The Public Policy Exception: The Need to Reform Florida's At-Will Employment Doctrine After *Jarvinen v. HCA Allied Clinical Laboratories* and *Bellamy v. Holcomb*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1079
II. EMPLOYMENT AT-WILL IN THE UNITED STATES .....	1083
III. THE RULE DEVELOPS IN FLORIDA .....	1090
IV. THE GROWTH OF THE PUBLIC POLICY EXCEPTION ..	1096
V. OF CONTRACT OR TORT .....	1102
VI. THE TREND CONTINUES .....	1105
A. <i>Jarvinen v. HCA Allied Clinical Laboratories, Inc.</i> .....	1105
B. <i>Bellamy v. Holcomb</i> .....	1108
VII. THE NEED TO REFORM .....	1110
VIII. A PROPOSED STATUTE FOR WRONGFUL DISCHARGE ..	1116
IX. CONCLUSION .....	1122

## I. INTRODUCTION

"Silence," the King of the Turtles barked back, "I'm king, and you're only a turtle named Mack."<sup>1</sup>

The authority an employer exercises over an employee's continued job security is substantial. As a result, this relationship implicitly recognizes "that not every act of insubordination or misconduct ethically justifies an employer in firing [an] employee . . . ."<sup>2</sup> When discharge

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1. *Davis v. Williams*, 598 F.2d 916, 917 (5th Cir. 1979) (quoting SUESS, YERTLE THE TURTLE AND OTHER STORIES (1950)).

2. *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 616 (Pa. Super. Ct. 1980) (quoting *Resilient Floor & Decorative Covering Workers, Local Union 1179 v. Welco Mfg. Co.*, 542 F.2d 1029, 1033 n.4 (8th Cir. 1976)); Note, *Protecting Employees At Will*

does occur it is recognized to be an extreme industrial penalty since the employee's job, benefits and reputation are at stake.<sup>3</sup> To some commentators, discharge is the equivalent of industrial capital punishment.<sup>4</sup>

Yet, employees in the United States encounter dramatically disparate levels of protection against the risk of wrongful discharge. On one hand, those covered by a collective bargaining agreement and those employed by the federal, state and local governments enjoy substantial protection and can only be discharged for "just cause."<sup>5</sup> On the other hand, those working for an indefinite or unspecified term of employment are considered to be employees at-will. Under this doctrine, either party may terminate the employment relationship at any time or for any reason.<sup>6</sup> The resulting inequity becomes readily apparent since the rule permits an employer to discharge a long-term employee without regard to the years of satisfactory performance or the substantial opportunities the employee may have foregone to remain in the employer's service.<sup>7</sup> Thus, the common law "at-will" doctrine allows any employee under no specific term of employment or statutory protection to be discharged by his employer for good cause, bad cause, or for no cause at all without concern for legal liability. Despite marked im-

*Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983). The condition of the modern employee has been described as follows:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Thomas G. Lemley, Note, *Employment At Will: Missouri Recognizes the Public Policy Exception*, 52 MO. L. REV. 677 (1987) (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)) (emphasis in original).

3. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 616 (4th ed. 1985).

4. *Id.*

5. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980). In the federal sector, the employer agency must demonstrate some nexus between the conduct warranting discharge and the efficiency of the service. 5 U.S.C. § 7513(a) (1988).

6. *Smith v. Piezo Tech. and Prof. Admin.*, 427 So. 2d 182, 184 (Fla. 1983); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1328 (Fla. 3d Dist. Ct. App. 1985).

7. *See supra*, note 5.

provements in federal legislation protecting employee rights,<sup>8</sup> workers in Florida not covered by a collective bargaining agreement or individual employment contract enjoy only limited protections.<sup>9</sup> Furthermore, the Florida courts have significantly compounded the problem by consistently refusing to extend additional protection for workers in the ab-

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8. *E.g.*, Civil Service Reform Act of 1978, 5 U.S.C. § 7116 (1988) (protecting federal employees from discharge for exercising rights under the title); Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000-e-2a (1988) (protecting employees from discriminatory discharges); National Labor Relations Act of 1935, § 8(a), 29 U.S.C. § 158(a) (1988) (protecting employees while engaged in protected activity); Age Discrimination Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1988) (prohibiting dismissal of persons within the protected class); Occupational Health and Safety Act of 1970, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1988) (prohibiting discharge or discrimination against any employee for filing a complaint under this chapter); Railway Labor Act of 1926, § 2 Fourth, 45 U.S.C. § 152 Fourth (1988) (prohibiting interference by employers for protected activity).

9. FLA. STAT. § 40.271 (1991) (prohibiting discharge because of service on a jury); FLA. STAT. § 61.1301(2)(j)1 (1991) (prohibiting discharge against an employee because of an income deduction order); FLA. STAT. § 104.081 (1991) (prohibiting discharge for voting or not voting in any election); FLA. STAT. § 110.105(2) (1991) (prohibiting discrimination in state employment based upon sex, age, race, religion, national origin, political affiliation, marital status or handicap); FLA. STAT. § 112.042(1) (1991) (prohibiting discharge or discrimination by county or municipal employers on the basis of race, color, national origin, sex, handicap, religious creed); The Drug Free Workplace Act, FLA. STAT. § 112.0455(8)(p)-(t) (1991) (prohibiting employee discharge on the basis of prior medical history or who is voluntarily seeking drug rehabilitative treatment); FLA. STAT. § 112.044(3)(a)1 (1991) (prohibiting discrimination in employment because of age); The Whistle-blower's Act of 1986, FLA. STAT. § 112.3187(4)(a) (1991) (prohibiting discharge of an agency or independent contractor for disclosing information pursuant to this section); The Police Officer's Bill of Rights, FLA. STAT. § 112.532(5) (1991) (prohibiting discharge of a law enforcement officer for exercising rights guaranteed under the statute); The Firefighter's Bill of Rights, FLA. STAT. § 112.82(9) (1991) (prohibiting discharge of firefighter for exercise of rights guaranteed under the statute); FLA. STAT. § 250.481 (1991) (prohibiting discharge because of armed forces reserve obligations); FLA. STAT. § 440.205 (1991) (creating a statutory cause of action for wrongful discharge for employee's pursuit of a workers' compensation claim); FLA. STAT. § 447.17(1) (1991) (action for discrimination based on membership in a labor union); FLA. STAT. § 447.501(1)(b) (1991) (prohibiting certain employer unfair labor practices for public employees); FLA. STAT. § 448.07(2) (1991) (action for wage discrimination on the basis of sex); FLA. STAT. § 448.075 (1991) (prohibiting discharge or discrimination solely because individual has sickle-cell trait); The Human Rights Act of 1977, FLA. STAT. § 760.10(1)(a) (1991) (prohibiting discharge or discrimination in private employment on the race, color, religion, sex, national origin, age, handicap or marital status); FLA. STAT. § 760.50 (1991) (prohibiting discharge or discrimination on the basis of or belief that the individual has taken an HIV test or is infected with the HIV virus).

sence of specific legislative enactments, even when the employer's action can only be described as unconscionable.<sup>10</sup> As justification for this lack of intervention, the Florida courts assert that to overrule long-standing Florida law would create uncertainty in present employer-employee relationships and would be contrary to one of the basic functions of the law which is "to foster certainty in business relationships."<sup>11</sup> Yet:

[I]n a civilized state where reciprocal legal rights and duties around the words "at will" can never mean "without limit or qualification" . . . for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and not there for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counterbalancing rights and obligations that holds such societies together . . . . [T]here can be no right to terminate such [an employment] contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is

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10. *Bellamy v. Holcomb*, 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991) (employee discharged after subpoena of employer's wage and hour records); *Scott v. Estalella*, 563 So. 2d 701 (Fla. 3d Dist. Ct. App. 1990) (Florida statute protecting employees from discharge for jury service "in this state" did not apply to jury service in federal courts in Florida); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989) (subpoenaed employee terminated for testifying truthfully against employer); *Ochab v. Morrison, Inc.*, 517 So. 2d 763 (Fla. 2d Dist. Ct. App. 1987) (no cause of action for fired employee who refused to serve intoxicated patron, even though state statute prohibits serving habitual drunkards); *Ponton v. Scarfone*, 468 So. 2d 1009 (Fla. 2d Dist. Ct. App.), *petition for rev. denied*, 478 So. 2d 54 (1985) (no common law cause of action based upon public policy under state or federal sex discrimination laws when female's rejection of sexual advances is motivation underlying her termination from employment). *Contra* *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991) (arbitrator's award properly vacated as violative of explicit, well-defined and dominant public policy against sexual harassment). *Accord* *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980) (no wrongful discharge action for employee who was terminated for failure to withdraw daughter's injury suit); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985) (no cause of action against employer for employee refusing to violate federal and state environmental statutes and regulations); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

11. *Hartley*, 476 So. 2d at 1329; *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. 2d Dist. Ct. App. 1983). The court's statement ignores the fact that the courts can narrowly circumscribe a public policy exception to avoid uncertainty.

designed to discourage and prevent.<sup>12</sup>

By refusing to modify an outmoded nineteenth century principle in addressing twentieth century problems, the Florida judiciary perpetuates the uncertainty that it seeks to avoid. This article examines the underpinnings and development of the employment at-will doctrine as it expanded in the United States and in Florida, and focuses on the cases of *Jarvinen v. HCA Allied Clinical Laboratories*,<sup>13</sup> and *Bellamy v. Holcomb*.<sup>14</sup> This article concludes that the Florida Supreme Court should now recognize a narrow public policy exception to the at-will employment doctrine in light of the inequity of the *Jarvinen* and *Bellamy* decisions and further examines how other courts approach this issue, along with the theoretical basis for adopting such a policy. Finally, this article proposes specific statutory reforms for adoption by the Florida Legislature.

## II. EMPLOYMENT AT-WILL IN THE UNITED STATES

Commentators agree that the growth of the at-will doctrine can be traced to several developments during the late nineteenth century. The first factor involved the decline of the American courts in following the traditional English rule of employment.<sup>15</sup> While previously, the master bore the customary responsibility for the servant's health and well-be-

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12. J. Michael McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 CAMPBELL L. REV. 217 (1988) (quoting *Sides v. Duke Hosp.*, 328 S.E.2d 818, 826 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985)).

13. 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989).

14. 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991).

15. Amy D. Ronner, Comment, *Brockmeyer v. Dun & Bradstreet: The Narrow Public Policy Exception to the Terminable-At-Will Rule*, 38 U. MIAMI L. REV. 565 (1984). The employment at will doctrine supplanted English employment law. The Statute of Labourers provided that

no master can put away his servant during or at the end of his term of employment and that apprentices could be dismissed only upon reasonable cause. The statute influenced the English courts and the law of employment relations. The courts determined that when an employment contract contained the mention of an annual salary, the employer implicitly agreed to a one-year term of employment unless there was reasonable cause to discharge.

*Id.* at 566-67 (citations omitted); see 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1425 (1783). Consequently, the rule made it difficult for an employer to dismiss an employee without breaching the contract and incurring liability.

ing, the new employment theory supposed that by entering into a wage bargain, workers assumed the risk of on-the-job injuries.<sup>16</sup> The second factor entailed the willingness of the courts to recast the traditional employment relationship in terms of the emerging theory of contracts.<sup>17</sup> Third, with the advent of the industrial revolution, the courts favored a laissez-faire attitude concerning the employment relationship in order to further economic growth.<sup>18</sup> Fourth, the emergence of Horace Wood's

16. Note, *supra* note 5, at 1824-25.

As the nineteenth century progressed and society became more commercial, the relationship between master and servant changed. The "law of master and servant," being originally premised on a personal, often familial relationship under the category of domestic relations, was no longer suitable for employment that was commercial and involved large number of employees. With these changes in society, the application of the "settled" [English rule] no longer produced judicious results.

See David P. Weiss, Note, *Public Policy Limitations to the Employment At-Will Doctrine Since Geary v. United States Steel Corporation*, 44 U. PITT. L. REV. 1115, 1117 (1983) (citations omitted). Hence, the courts were no longer capable of dealing with the new commercial employer-employee relationship. Consequently, the courts utilized the new emerging theory of contracts to define the employment relationship.

17. Note, *supra* note 5, at 1824-25.

The principal consequence of this conceptual change was a drastic limitation in the employer's duties to the employee . . . . According to this formalistic approach, if the parties had intended the employment relationship to last for one year, they would have made that an express term of the contract.

*Id.* This approach relies upon two predominant theories in the late nineteenth century. First, "that manifestations of assent must be evidenced by definite, express terms if promises are to be enforceable. Thus, an employer's absolute discretion to terminate had to be presumed unless some definite duration was specified in the employment contract." *Id.* at 1825. Secondly, there must be mutuality of contract. "Mutuality of contract requires that both parties are bound or neither is bound to the contract. Symmetry is the crux of this definition of mutuality. Accordingly, terminable at-will employment contracts are valid because neither party is bound to the agreement." David Peck, *The Public Policy Exception to the Employment At-Will Rule: Illinois Creates and Amorphous Tort*, 59 CHI.-KENT L. REV. 247, 248 n.5 (1982). But several courts and commentators have pointed out that the symmetry and logical appeal of the contractual principle of mutuality of obligation has little or no legitimate economic justification to at-will employment because it is based upon the false premise of relatively equal bargaining power between employers and at-will employees. See Andre D. Bouffard, Comment, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception To The Employment At-Will Doctrine In Maine*, 38 ME. L. REV. 67, 70 n.7 (1986).

18. See Ronner, *supra* note 15, at 567.

The laissez-faire concept was based on the assumption that the individual



1877 *Treatise on the Law of Master and Servant*,<sup>19</sup> provided the already receptive courts with an additional basis to adopt the at-will doctrine.<sup>20</sup> Recognized as a prolific treatise writer of his time, Wood's theory stated that:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite

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should have complete social freedom to contract not only in his personal affairs, but also in his business relationships. The new rule was ushered in by the industrial revolution and its companion notions of social freedom and freedom of contract. Under this contractual approach to employment, the parties were bound only by obligations clearly intended; the parties set their own terms and any implied obligations became secondary to the employees' basic freedoms.

George R. Arrants, Jr., Note, *Labor Law-Employment At Will-Public Policy Exceptions to the Employment At Will Doctrine*, 53 TENN. L. REV. 199, 203 n.22 (1985).

19. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). One author writes that Wood himself was an enigma. He apparently was a practicing attorney in Albany, New York, but was not a member of the New York State Bar Association. In addition to his master and servant treatise, he edited or authored treatises on nuisances, torts and evidence, among others. See Jay M. Feinman, *The Development of The Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 n.68 (1976). The Albany Law Journal said:

Mr. Wood obtained an excellent reputation as a learned, accurate and original author . . . .

. . . . To bring order, simplicity and symmetry out of [the conflicting decisions on master and servant] was the work of a man of genius, and this we have before us.

15 ALB. L.J. 378-79, May 12, 1877; Feinman, *supra* note 68.

20. See Ronner, *supra* note 15, at 568.

The employment relationship in the late nineteenth century was considered to be strictly contractual in nature and the absence of expressed terms or a written contract created the at will arrangement. [Thus, the] contract based theory was a repudiation of the English rule which required just cause for termination of at will employment.

Arrants, *supra* note 18, at 203 n.23.

hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.<sup>21</sup>

Wood's rule has been widely criticized as a misreading and distortion of the law existing at the time.<sup>22</sup> A review of the authority relied upon by Wood reveals four flaws with his "inflexible rule." First, it is argued that Wood's treatment on the duration of service contracts lacked comprehensiveness and concern for detail.<sup>23</sup> Second, the four American cases cited as authority for the at-will theory were in fact far off the mark.<sup>24</sup> In actuality, two of the cases cited by Wood found job

21. WOOD, *supra* note 19, at 272 (citations omitted).

22. Feinman, *The Development of The Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Joseph De Giuseppe, Jr., *The Recognition of Public Policy Exceptions To Employment-At-Will Rule: A Legislative Function?*, 11 FORDHAM URB. L.J. 721, 724 n.6 (1983); Rodney A. Max, *A New Tort in Alabama: Wrongful Employment Termination in Violation of Public Policy*, 12 AM. J. TRIAL ADVOC. 39, 40 n.6 (1988); Laurie Schober Carnahan, Note, *Bushko v. Miller Brewing Co.: An Analysis of the Wisconsin Public Policy Exception to the Employment At Will Rule and a Call For Legislative Action*, 1987 WIS. L. REV. 689, 691 n.17 (1987); accord Gregory L. Grow, Note, *Sterling Drug, Inc. v. Oxford: Arkansas Adopts the Public Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 190 n.26 (1989); Lemley, *supra* note 2, at 678 n.10; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974); Weiss, *supra* note 16, at 1118 n.23.

23. Feinman, *supra* note 22, at 126.

24. *Id.*; see Shapiro & Tune, *supra* note 22, at 341. The first case, *DeBriar v. Minturn*, 1 Cal. 450 (1851), involved

the right of a discharged bartender to occupy a room in the tavern after he had been notified to leave by the end of the month. Essentially an action for unlawful ejection, the case touched only tangentially on the employment relationship. [The court] held only that the innkeeper had a right to eject a person living in his house after proper notification.

Shapiro & Tune, *supra* note 22, at 342 n.54.

*Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870), also contradicts Wood's assertion. The court found that there was no error in allowing the jury to determine the nature of the contract from written and oral communications, usages of the trade, the situation of the parties, the types of employment and all other circumstances.

Shapiro & Tune, *supra* note 22, at 342 n.54.

In *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871), the court found that indefinite duration by itself did not give the employer unfettered discretion to dismiss an employee. A mining captain discharged at the end of eight months was allowed to recover four additional months of pay because he had been assured that employment would be stable. The

security rights in the absence of explicit provisions on the length of employment.<sup>25</sup> Third, Wood's rule revolved around his incorrect assertion that no American court had approved the English rule in recent years. He continued that the employment at-will rule was inflexibly applied in the United States and that the English rule was only a yearly hiring, making no mention of notice.<sup>26</sup> Lastly, even though unsupported by legal precedent, Wood failed to offer any policy grounds for the adoption of this theory.<sup>27</sup> Feinman argues that it is possible to attribute too much influence to Wood himself.<sup>28</sup> However, he acknowledges that treatises were an important tool to the bar and bench in this period.<sup>29</sup> Therefore, a modern, comprehensive treatise stating a clear rule of practical application would inevitably attract a wide following and be cited as authority.<sup>30</sup> While Wood's treatise could not have alone caused the change to employment at-will, the rule would not have developed as quickly and uniformly as it did without it.<sup>31</sup> Despite the lack of analysis and authority, by the beginning of the twentieth century Wood's rule

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jury thought that hiring for a year could be reasonably inferred from the facts.

Shapiro & Tune, *supra* note 22, at 342 n.54.

Finally, *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871), concerned a business contract between the Army and private entrepreneurs for the transportation of goods; it had nothing to do with general hirings as such. A business had an outdated contract with an army quartermaster to transport goods across Minnesota and, at a time when the quartermaster could obtain no other transportation, the company insisted on a new arrangement at a higher price. The Supreme Court reversed a Court of Claims decision upholding the company's right to collect the additional price on grounds that the statute of limitations on the claim had run.

Shapiro & Tune, *supra* note 22, at 342 n.54.

25. Feinman, *supra* note 22, at 126. Judge Meyer, in his dissenting opinion in *Murphy v. American Home Prod. Corp.*, 448 N.E.2d 86, 95 (N.Y. 1983) (Meyer, J., dissenting), characterizes the New York court's adoption of Wood's rule in *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895), as bizarre in light of Wood's concession of a yearly hiring in England; the Court of Appeals adoption of the English Rule and the fact that Wood's rule was not supported by any of the cases cited by him.

26. Feinman, *supra* note 22, at 126.

27. *Id.*

28. *Id.* at 127.

29. *Id.*

30. *Id.*

31. *Id.*

became the primary doctrine governing employment duration.<sup>32</sup> Those courts adopting Wood's rule did so by simply citing to Wood's treatise or the cases cited by him directly.<sup>33</sup>

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32. Shapiro & Tune, *supra* note 22, at 342.

33. *Id.* One commentator writes:

Although courts today often feel obliged to pay lip service to the legitimacy of the at will rule, legal scholars are increasingly likely to view the rule as an anachronism. This conclusion follows from three sets of interrelated arguments, each suggesting that certain social, economic and institutional conditions have change since 1877. First, economic power has become increasingly concentrated in the hands of large, impersonal employers. This not only endangers individual freedom by creating the potential for employers to exploit employee vulnerability but also undermines the traditional assumption that employees can negotiate the terms of their employment contract using bargaining power equal to that of their employers. This does not conform to modern realities. At the time a job is extended and accepted, little bargaining actually takes place, only the rare employee can insist on negotiating terms of employment and the rest must accept the terms and conditions of employment prevailing in the workplace at the time of hire.

Second, the work force is no longer predominantly self employed and as a result today's wage earner is often completely dependent on employment related income. This reveals the inadequacy of the contract principles of freedom of choice and mutuality of rights. In this context, the employer's right to discharge employees at will becomes a right to impose significant social, psychological and economic costs on employees without providing justification. For the economically dependent employee who does not feel free to quit, the right to withdraw from the employment contract becomes a hollow right.

Third, employee expectations regarding employee rights generally and job security specifically have changed during the course of this century. Evidence of increasing employee dissatisfaction with the employment relationship and rising expectations regarding fair, nonarbitrary treatment is revealed by opinion polls, surveys and a growing number of lawsuits. Employees now expect management to provide job related reasons when decisions are made that affect their employment status. Evidence that norms of workplace justice are changing is also reflected in arbitration decisions. Arbitrators are increasingly insistent that procedural rules be observed and increasingly reluctant to uphold employee discharges except as an option of last resort. As a result it can no longer be suggested that employees, in accepting a job offer, agree as part of the employment bargain that they can be fired at will.

Fourth, contract principles are unsuited to modern institutional realities. Life in large scale organizations is characterized by a high degree of interdependence. This requires cooperation among all of the organization's members and a strong sense of commitment to the enterprise as well as

An even more dramatic pronouncement of the at-will doctrine occurred with the Supreme Court's decisions in *Adair v. United States*<sup>34</sup> and *Coppage v. Kansas*.<sup>35</sup> Both cases gave the at-will doctrine constitutional legitimacy. In those cases, the Supreme Court held that regulation of the employment relationship violated the parties' freedom to contract. These opinions represent the high water mark of the Court's insistence on laissez-faire principles in the labor area, despite a growing concern that freedom of contract was a cruel illusion because of the extreme differences in bargaining power between employers and employees.<sup>36</sup>

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each other. Contract principles, premised on freedom of choice and limited commitment, are ill suited for establishing the kind of employment relationship required by modern enterprises. Achieving harmony between legal principles and institutional realities requires alternative principles of association premised on mutual obligation and increased commitment.

Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMP. REL. L.J. 387 (1988) (citations omitted).

34. 208 U.S. 161 (1908). In this case, the Supreme Court invalidated a federal statute making it a criminal offense for an interstate carrier to discharge an employee simply because of the employee's membership in a labor organization. The high court concluded that the statute invaded the parties personal liberty and interfered with the right to contract. The Court wrote:

In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

*Id.* at 175.

*Adair* was overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941); see Richard D. Himberger, Comment, *Unjust Discharge: Why Nonunion Employees Need a Just Cause Statute*, 25 WILLAMETTE L. REV. 135 (1989).

35. 236 U.S. 1 (1915). In *Coppage*, the Supreme Court invalidated a Kansas statute that provided for a fine and imprisonment if an employer required an employee to agree not to become or remain a member of any labor organization during the term of employment. The Court then concluded that the employer's right to hire and fire at-will was a property right protected by the Constitution.

Today, so called "yellow dog" contracts are specifically illegal under several statutes. See, e.g., The Railway Labor Act, 45 U.S.C. § 151 (1988).

36. Arrants, *supra* note 18, at 204; Himberger, *supra* note 34; Ronner, *supra* note 15; see Note, *Protecting Employees*, *supra* note 2, at 1933; see also Note, *Protecting At Will Employees*, *supra* note 5, at 1982.

From a historical perspective, the Supreme Court's laissez-faire intervention and its attempts at restraining Congressional power to regulate the economy eventually culminated in a showdown between President Franklin D. Roosevelt and the High

### III. THE RULE DEVELOPS IN FLORIDA

The Florida courts were slow to expressly adopt Wood's rule after its first pronouncement in 1877. Yet, early Florida cases suggest that the doctrine was evolving.

In *Chiple v. Atkinson*,<sup>37</sup> the plaintiff sued the defendant in an action for tortious interference with a business relationship. Kehoe and Walker employed Chiple as a superintendent at a brick manufacturing business.<sup>38</sup> His employment agreement included a provision that he would be employed for a long period of time and that he had a "prospect and promise of obtaining an interest in the business."<sup>39</sup> The company dismissed Chiple after Atkinson convinced Kehoe and Walker that Chiple was a thief.<sup>40</sup> Chiple then commenced an action against Atkinson.<sup>41</sup> At trial, the court charged the jury as to terminable at-will employment as part of the proof Chiple needed to show in order to prevail against Atkinson.<sup>42</sup> The jury found for Chiple and awarded

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Court. Ravaged by the throes of an economic depression, the Roosevelt New Deal program was shattered by a series of judicial defeats. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933); see *Railroad Retirement Bd. v. Alton Ry.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act of 1933).

In February, 1937, President Roosevelt wrote Congress calling for a reorganization of the judicial branch or what has become known as the Roosevelt "Court Packing" plan. The plan proposed that for the appointment of additional judges to the federal bench for each judge over the age of seventy years who did not choose to retire. At that time, six Justices on the Supreme Court had passed the voluntary retirement age. The plan was rejected. However, within four years Roosevelt was able to replace all six justices as a result of retirement. The new Court took essentially a hands off approach on economic policy.

37. 1 So. 934 (Fla. 1887).

38. *Id.* at 935.

39. *Id.*

40. *Id.* Chiple never sued his former employers and named only Atkinson in the action. The case makes no mention as to why Chiple chose not to sue the partners.

41. *Id.*

42. *Chiple*, 1 So. at 935. The court charged the jury that: "If you find that the contract was not for a definite term, and there are no payments or other circumstances to show that the hiring was from period to period, then it would be a hiring from day to day, and terminable at the will of either party." *Id.* This instruction was not excepted to by either party to the lawsuit. Nor is there any supporting authority found in the case supporting this statement of the law.

damages. The defendant filed exceptions to several of the jury charges. On appeal, the Florida Supreme Court granted a new trial. The court reasoned that the term "long period of time" created a jury question as to the actual term of employment which suggested that Chipley could not be discharged except for cause.<sup>43</sup> Consequently, the jury would have to determine the actual length of employment since this factor controlled whether Chipley could maintain his action against Atkinson.<sup>44</sup>

Shortly after the turn of the century, the supreme court again addressed the issue of at-will employment in *Savannah, F. & W. Railway Co. v. Willett*.<sup>45</sup> In that case, Willett made an application for employment to the defendant after being solicited to apply for a conductor's position.<sup>46</sup> The defendant informed Willett that he would be employed if he reported for duty at once.<sup>47</sup> Willett resigned from his job and reported to a Savannah, F. & W. station at the company's direction.<sup>48</sup> After receiving his route assignment, Willett left the company's Sanford station and travelled to Kissimmee.<sup>49</sup> Upon arrival at the Kissimmee station, Willett was instructed to return to Sanford. The

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43. *Id.* at 941. The court wrote:

An agreement between the plaintiff and Kehoe & Walker for the continuance of the employment for a long period of time cannot be ignored as a feature of the case. This allegation means that the agreement entered into by them entitled the plaintiff, either expressly or by implication, to employment not only for a period of time, but for a long period. It means that a period of time was agreed upon by them; and whatever the period thus agreed on was, whether limited by months or years or otherwise, is to be proved. The language implies that there was at least some point of time in the future, ascertainable from the terms of the agreement, up to which the employment was to extend.

*Id.*

44. The term of employment was critical since Chipley alleged that he was discharged during his term of employment. This could only be done for just cause. If Chipley was an at-will employee with no definite term, then he could be discharged at any time for any reason. Accordingly, his claim for malicious interference with a business relationship could not be maintained against Atkinson if he could be discharged for no reason at all.

45. 31 So. 246 (1901).

46. *Id.* Willett had been employed as a conductor for nineteen years and sought a better paying job with the Savannah, F. & W. Railway.

47. *Id.* The facts indicate that Willett took the Savannah position in order to improve himself.

48. *Id.* Upon responding, Willett was examined and then assigned to a route.

49. *Id.* Willett travelled aboard one of the Savannah's trains to the new station.

company subsequently informed Willett on his return that he would not be employed unless he obtained a release or recommendation from his previous employer. When he could not obtain the recommendation, Willett was fired.<sup>50</sup> Willett sued the railroad. The case went to trial resulting in a verdict for Willett and Savannah appealed.<sup>51</sup>

The supreme court reversed the verdict and judgment. The court held that since Willett alleged no facts as to the duration of employment, the employment was at-will and terminable by either party. In its analysis, the court cited several cases and Wood's rule.<sup>52</sup> Each of the cases cited by the court were reminiscent of Wood's misapplication of the actual holdings and lack of analysis.<sup>53</sup>

50. *Savannah*, 31 So. at 246. The railway had not previously asked for this release or recommendation at the time it solicited Willett to work for them. Furthermore, the company was aware that Willett was working for another railroad and that he took the Savannah position in order to improve himself and for an increase in salary. The evidence before the court showed that Willett had faithfully and diligently performed his duties in the nineteen years that he had been a conductor. As a result of Savannah's actions, Willett was unable to obtain employment for twelve months.

51. *Id.* at 247. Willett claimed \$1500.00 in damages. The jury awarded \$744.83. *Id.* at 246-47.

52. *Id.* at 247.

53. *Id.* The court first cited to *Blaisdell v. Lewis*, 32 Me. 515 (1851). In that case, Blaisdell sued alleging that Lewis failed to hire him as promised. There was no time stipulated as to the duration of the service. Subsequently, Lewis never hired Blaisdell and was sued for the amount of money that Blaisdell would have made had he been hired. A jury returned a verdict for the plaintiff. The Maine Supreme Court reversed the verdict holding that because there was no fixed period of time of when Blaisdell's employment was to begin, there was no contract. The court then wrote in dicta that had Blaisdell gone to work, there was nothing to prevent Lewis from discharging him on that day. The Maine Supreme Court never cited any other precedent in its holding.

Today, the efficacy of the *Blaisdell* holding is dwindling with the Maine Supreme Court's recent pronouncement in *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984). In that case, the court indicated that it would not rule out the possible recognition of a public policy cause of action when the discharge contravenes some strong public policy. See, Andre D. Bouffard, Comment, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception To The Employment At-Will Doctrine In Maine*, 38 ME. L. REV. 67 (1986).

*De Briar v. Minturn*, 1 Cal. 450 (1851), the second case relied upon by the Florida Supreme Court, and previously rejected as a misstatement, was blindly cited by the court. The court then cited directly to Wood's treatise.

*Commissioners v. Brown*, 32 N.J.L. 504 (N.J. 1866), the third case cited by the court, involved a suit of a contractor against the water commissioners of Jersey City, New Jersey. Brown alleged that the commission refused to perform under a contract hiring Brown to lay submerged pipe across the Hackensack river. The enabling state



The court's next pronouncement of the employer-employee relationship occurred in *Florida Fire & Casualty Insurance Co. v. Hart*.<sup>54</sup> Hart alleged that he was elected secretary of the insurance company for a definite period of time and had been fired.<sup>55</sup> To support his allegations, Hart testified at trial that no information was given him that the position was temporary.<sup>56</sup> Hart proffered no evidence to support his allegations that he was elected secretary at a salary of \$200.00 per month until the next annual meeting. The court had little trouble concluding that Hart's lack of evidence was fatal to his claim.<sup>57</sup>

In 1934, the supreme court decided the case of *Knudsen v. Green*.<sup>58</sup> Knudsen alleged that he had an oral agreement with the de-

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statute authorized the water commission to enter into contracts for the pipe project. The statute set forth specific criteria concerning the particular manner in which contracts were to be advertised for and made. The statute further mandated that the contracts be in writing and that three copies were to be deposited with the controller of Jersey City and one retained by the commissioners. The commissioners subsequently passed a resolution authorizing that a contract be drawn up to utilize Brown as a pipe laying contractor. However, prior to the actual contract being drawn, the commissioners rescinded the resolution. At trial a jury found for Brown and awarded damages. On appeal, the New Jersey Supreme Court reversed. The court reasoned that the resolution was not a binding contract but only an authorization to begin negotiations for a contract. Furthermore, the court held that until there was an actual offer and acceptance, then either party was at liberty to withdraw from the negotiations. Thus, the court viewed the resolution only as a direction to the commission's engineer and attorney to prepare a contract for the pipe work and to submit the agreement to the commission for its approval before being executed. Finally, the court concluded that the commission's failure to pass a resolution approving the agreement signified that they did not consent to the agreement.

*Shaw v. Woodbury Glass Works*, 18 A. 696 (N.J. 1889), the final case cited by the court, involved the hiring of a workman for a definite period of time. The court concluded that the plaintiff failed to prove the agreement because neither the rate of wages nor the location of work had been agreed upon. The court reasoned that no agreement existed and that this was merely negotiations in contemplation of an agreement.

54. 75 So. 528 (Fla. 1917).

55. *Id.* at 529.

56. *Id.* at 532. This suggested that if Hart was not temporary, then he had a definite term of employment.

57. *Id.* The court noted that Hart's failed to proffer any evidence through the testimony of witnesses, the minutes of the board of directors or the charter or by-laws of the company. The court was quick to note that if Hart had come forward with this evidence, it would have supported his claim for wrongful discharge. *Id.* It seems clear that this case stands not so much as an expansion of the employment at-will doctrine as it does on how to prove a wrongful discharge case.

58. 156 So. 240 (Fla. 1934).

fendant for employment as captain and master of a house boat.<sup>59</sup> The duration of the alleged agreement was unspecified.<sup>60</sup> After Knudsen resigned from his current employment, Green refused to employ him and hired another person to serve as captain.<sup>61</sup> The trial court found that Green's actions entitled Knudsen to recover only \$300.00 for the first month's employment.<sup>62</sup> The court reasoned that because the amount in dispute was only \$300.00, it lacked subject matter jurisdiction and dismissed the case.<sup>63</sup>

The supreme court reversed the circuit court and held that the court did have jurisdiction. The court went on to resolve the dispute and found that a contract existed but that it did not bind the parties after the first month since the duration was indefinite. Accordingly, the court held the relationship to be terminable at-will despite the fact that the authority relied upon by the supreme court strongly militated against a finding of at-will employment.<sup>64</sup> In short, one case indicated that no specific term of employment needed to be agreed upon in order to establish a definite term if the custom of the trade implied a term of employment.<sup>65</sup> The second case held that a jury could infer a yearly

59. *Id.* at 241. Knudsen was employed as a mate on a vessel of the Standard Oil Company at the time of the hiring. He had a definite annual salary and benefits in the form of a retirement and other bonuses.

60. *Id.*

61. *Id.* Green assured Knudsen that Knudsen would not regret leaving Standard Oil. Moreover, Green offered Knudsen a monthly salary of \$300.00. Knudsen, relocated to Miami based upon those representations in October, 1930, and remained there until April, 1931 when Green repudiated the agreement. Thereafter, Knudsen attempted to obtain his former position at Standard Oil but was refused reemployment.

62. *Id.* Knudson alleged that his damages were \$15,000.00. Knudsen based this amount on the monies he lost as a result of terminating his employment with Standard. Once the trial court found that the damages were only \$300.00, it dismissed the case without further action.

63. *Knudsen*, 156 So. at 242.

64. *Id.* Interestingly, the court never cited to any of its earlier decisions in *Chipley* or *Savannah, F & W Ry.*, as support for this proposition. Rather, the court relied upon another series of cases from other jurisdictions as precedent. Most of the interpretations given by the supreme court were in fact strained and ignored other pertinent discussions in the cases.

65. In *Odom v. Bush*, 53 S.E. 1013 (Ga. 1906), the court interpreted a Georgia statute that provided that a hiring of indefinite duration could be terminated at the will of either party. Yet, the court wrote that: "Where a contract of hiring is made with reference to a general custom or business usage, which enters into and becomes a part of the agreement, the contract is not, of course, indefinite as to its duration the custom and usage fixes the term of the engagement." *Id.* at 1016.

hiring even if there was no specific evidence to support that inference.<sup>66</sup> The third case involved an employee who remained willing and able to perform his service contract and who was entitled to recover that portion of his unpaid salary.<sup>67</sup> The last case pertained to an expressed provision of an employment contract which evidenced a definite term of employment.<sup>68</sup> However, the contract could be terminated so long as a

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The court's statement certainly suggests a definite term of employment need not be explicitly agreed upon by the parties if the plaintiff can show by evidence that the custom or trade implies a certain term of employment which would become part of the employment contract. Even more significant, is the fact that the Georgia court acknowledged that wages payable for a stipulated period raised a presumption that the hiring was for that period. As a result, even if no term of employment was stated a definite term employment could still exist. On the other hand, if the proof indicates that the contract was for a longer term, the mere reservation of wages for a lesser period would not control. In other words, a plaintiff could be paid on a monthly basis but still have a contract for a year if the evidence supported this conclusion. The Florida Supreme Court seemed to ignore this portion of the opinion in reaching its conclusion. Under this analysis, if Knudsen proved that the industry standard of \$300.00 per month implied a longer term of employment, he would have been successful in his claim. At the very minimum, if the Florida Supreme Court followed through with the *Odom* rationale, the remand should have also allowed Knudsen to plead and prove the claim, if possible.

66. *Clark v. Ryan*, 11 So. 22 (Ala. 1892). Similarly, the court's reliance on *Clark* is misplaced. In that case, the Alabama Supreme Court relied upon Wood's treatise to state the employment at-will doctrine. See *supra* note 19. The court, however, approved the trial court's jury instruction that read if the jury did not believe that Ryan's employment was for a month, then a reasonable construction was that it was for a year. It seems clear that this holding is contrary to a finding of at-will employment. Recently, the Alabama Supreme Court recognized a limited exception to the at-will doctrine. For a discussion of the employment at-will doctrine in Alabama, see James W. Lampkin II, Comment, *Employment At Will: The Time has Come For Alabama To Embrace Public Policy As An Exception To The Rule Of Employment At Will*, 19 CUMB. L. REV. 372 (1989).

67. *Cleveland v. Towle*, 106 So. 60 (Ala. 1925). In *Cleveland*, the plaintiff sued after being fired. A jury found for the plaintiff and the Alabama Court of Appeals reversed the verdict. The Alabama Supreme Court reversed the court of appeals and held that where an employee has a contract for services to be performed and was discharged without fault on his part, he is entitled to recover his salary if he remains ready to perform.

68. *Derry v. Board of Educ.*, 61 N.W. 61 (Mich. 1894). In *Derry*, the plaintiff signed an agreement with the school board to teach for the following school year. The contract provided an express clause that allowed the school board to discharge the plaintiff upon one weeks written notice. When the board exercised that option, plaintiff sued. In a brief opinion, the Michigan Supreme Court upheld the dismissal based upon the clear express contractual language of the agreement. Accordingly, this holding did

week's notice was given.<sup>69</sup>

Twenty one years later, the supreme court firmly cemented the at-will doctrine in Florida jurisprudence in *Wynne v. Ludman Corp.*<sup>70</sup> Wynne's complaint alleged a definite term employment contract. It further alleged that Wynne's employment had been held over for an additional year under the prior terms. At trial, Wynne candidly testified that his employment was not for a definite time and that he could be terminated at any time.<sup>71</sup> Thus, his testimony did not support the allegations of his complaint and in fact proved the appellee's allegations.<sup>72</sup> The court, relying on its decisions in *Savannah, F. & W. Railway Co.*<sup>73</sup> and *Knudsen*,<sup>74</sup> reiterated its holdings in order to uphold the termination.<sup>75</sup>

#### IV. THE GROWTH OF THE PUBLIC POLICY EXCEPTION

Faced with a growing number of unconscionable discharges, several courts began to create exceptions to the employment at-will doctrine. One of the recognized exceptions is the discharge in violation of public policy. Under this doctrine, the courts allow recovery in tort for employees who are fired for refusing to violate a clear mandate of public policy.<sup>76</sup> The problem with this precept lies in the fact that its development has been erratic and not always without contradictions.<sup>77</sup> Even those who support the doctrine agree that the "Achilles Heel" of exception is in determining what constitutes public policy.<sup>78</sup> Still, several

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not deal with an at-will situation but the interpretation of clear and unambiguous contractual language.

69. *Id.*

70. 79 So. 2d 690 (Fla. 1955).

71. *Id.* at 691.

72. *Id.*

73. 31 So. 246 (Fla. 1901).

74. 156 So. 240 (Fla. 1934).

75. The result in *Wynne* is not as troubling as the court's other holdings because Wynne's complaint and testimony were completely contradictory.

76. See Giuseppe, *supra* note 22, at 754. Before applying the public policy exception most courts require that the plaintiff show more than a mere personal interest in retaining their employment. The employer's actions must harm not only the plaintiff but also society as a whole by circumventing a specific statutory pronouncement. Peck, *supra* note 17, at 263.

77. See Weiss, *supra* note 22, at 1121.

78. See Giuseppe, *supra* note 22; McGuinness, *supra* note 12, at 232 (the threshold question to be addressed in a wrongful discharge case premised upon public policy

courts have been able to formulate a workable definition of public policy. Some courts hold that public policy may be found in legislation, administrative rules, regulations or judicial decisions.<sup>79</sup> Other courts find public policy within a professional code of ethics.<sup>80</sup> Certainly, it is beyond dispute that once a legislature enacts a statute prohibiting certain conduct, that conduct is against public policy.<sup>81</sup>

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exception is whether or not a sufficient expression of public policy is alleged); Peck, *supra* note 17, at 255 (many courts recognize rather ethereal public policies not to be readily found in legislation, constitutions, or judicial opinions); Bouffard, *supra* note 53; Debra Greenberg, Note, *Employment At Will: A Proposal To Adopt The Public Policy Exception In Florida*, 34 U. FLA. L. REV. 614, 629 (1982) (court have long recognized that public policy of one generation might not be the public policy of another); Robert B. Gidding, Comment, *Pierce v. Ortho Pharmaceutical Corp.: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L. REV. 1187, 1193 (1981) ("not all sources express a clear mandate of public policy . . . absent legislation, other sources claimed to be a source of public policy would be subject to case by case judicial determinations"); Grow, *supra* note 22, at 201 (supreme court neglected to determine the proper scope of Arkansas's public policy exception); David J. Monz, Comment, *Wrongful Discharge Law In Connecticut: Time For A Workers' Bill Of Rights Through Enumerated Prohibitions Legislation*, 21 CONN. L. REV. 467, 477 (1989) (the degree to which public policy overrides at-will employment rights generally varies depending on the policies implicated); Comment, *Employment At Will*, *supra* note 63, at 380 (the concept of public policy is vague and subject to dispute when applied).

Some courts encounter little problem in defining the scope of public policy. *See, e.g.* *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) (public policy must be well defined and dominant and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) (discharge motivated by bad faith or malice or based upon retaliation is not in the best interest of the economic system or the public good); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (public policy may be found in legislation; administrative rules, regulations or decisions and judicial decisions and in certain instances a professional code of ethics).

Public policy is also described as:

community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like; it is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation.

BLACKS LAW DICTIONARY 1231 (6th ed. 1990).

79. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

80. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980).

81. *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985). The *Wagenseller* court also noted that a majority of states have either recognized some

While the full parameters of the doctrine are unclear, three definitive types of cases have evolved. First, are those cases where the firings were precipitated by the employee's refusal to obey directions of the employer to commit a crime or act contrary to public policy, or where the employee refused to give false testimony at a trial or administrative hearing.<sup>82</sup> The second area pertains to those cases involving whistleblowers or employees refusing to violate a code of ethics.<sup>83</sup> The last

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form of public policy exception or expressed a willingness to consider it under appropriate circumstances. The court concluded that while the interests of the economic system will be served by allowing employers to terminate employees for good cause or no cause, the interests of society will be served if employers are prevented from terminating employees for a cause that is morally wrong. *Id.* at 1031. Administrative rules and regulations can also be said to reflect public policy since all have their genesis in the statute's enabling statute absent any excess of delegated legislative authority.

82. *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1991) (discharged for reporting FAA safety violations); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985); *Ochab v. Morrison, Inc.*, 517 So. 2d 763 (Fla. 2d Dist. Ct. App. 1987) (refusal to serve intoxicated patron in violation of state dram law); *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (refusal to "pack loans" in violation of federal truth in lending law and state small loan regulation law); *Sides v. Duke Hosp.*, 325 S.E.2d 818, (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985) (refusal to commit perjury); *DeRose v. Putnam Mgt. Co.*, 496 N.E.2d 428 (Mass. 1986) (refusing to testify falsely against fellow employee at employer's demand); *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (1987) (refusing to violate Clean Air Act); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (en banc) (fired for instituting accounting practices to insure compliance with federal corrupt practices anti-bribery statute); *Troy v. Interfinancial, Inc.*, 320 S.E.2d 872 (Wash. 1984) (false testimony in deposition in lawsuit of another against employer); *Melchi v. Burns Int'l Sec. Serv., Inc.*, 597 F. Supp. 575 (E.D. Mich. 1984) (discharge for reporting violations to Nuclear Regulatory Commission); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982) (employee discharged to prevent testimony before grand jury or any subsequent criminal trial); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refusal to violate anti-trust laws and consent decree); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978) (employee discharged for refusing to alter results of tests on pollution control reports); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Was. 1977) (en banc) (refusal to commit perjury); *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959) (refusal to commit perjury before state legislature).

83. *City of Miami v. Coll*, 546 So. 2d 775 (Fla. 3d Dist. Ct. App. 1989) (discharge for reporting malfeasance, misfeasance and neglect of duty); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (filing complaint with FDA where employer violated lens testing regulations); *Maus v. National Living Ctrs., Inc.*, 633 S.W.2d 674 (Tex. Ct. App. 1982) (reporting inadequate patient care and neglect

area entails the employee's exercise of a statutory right.<sup>84</sup> In all cases in which plaintiffs prevailed, the courts recognized that the public's collective good outweighed the employer's right to fire. For example, the North Carolina courts recognized this premise when creating an exception to the at-will doctrine.

In *Sides v. Duke Hospital*,<sup>85</sup> the plaintiff was employed as a nurse anesthetist for more than eleven years prior to her dismissal.<sup>86</sup> While on duty, Sides refused to follow a doctor's order to administer anesthetics to a patient because she thought the drug would harm the patient.<sup>87</sup> The doctor administered the drug and the patient suffered permanent brain damage.<sup>88</sup> The patient's estate filed suit alleging medical malpractice.<sup>89</sup> Sides was deposed in the malpractice case but before she gave her deposition, several doctors at Duke and Duke's attorneys told her not to testify about all she observed. Some of the doctors warned her that she would be "in trouble" if she did so.<sup>90</sup> Despite these warn-

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of patients); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (relying on general criminal statutes for proposition that public policy favors citizen crime fighters); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Penn. 1974) (employee complaint over defective casings).

84. *Scott v. Otis Elevator*, 572 So. 2d 902 (Fla. 1991) (discharged for filing workers' compensation claim); *Hummer v. Unemployment Appeals Comm'n*, 573 So. 2d 135 (Fla. 5th Dist. Ct. App. 1991) (discharged for HIV treatment); *Aszkenas v. J.B. Robinson Jewelers, Inc.*, 560 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1990) (fired for serving on federal jury); *Neidhart v. Pioneer Fed. Sav. & Loan Ass'n*, 498 So. 2d 594 (Fla. 2d Dist. Ct. App. 1986) (responding to jury summons); *Blangy v. State*, 481 So. 2d 940 (Fla. 4th Dist. Ct. App.), *rev. denied*, 492 So. 2d 1330 (1986) (discharge because of length of jury duty); *Kilpatrick v. Delaware County Soc'y for Prevention of Cruelty to Animals*, 632 F. Supp. 542 (E.D. Pa. 1986) (OSHA prohibits discharge of employees in reprisal for exercising rights under the Act); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (dismissal in violation of first amendment guarantee); *Mobley v. Southern Plasma Corp.*, 366 So. 2d 480 (Fla. 1st Dist. Ct. App. 1979) (discharge for collective bargaining activities); *Montalvo v. Zamora*, 86 Cal. Rptr. 401 (5th Dist Ct. App. 1970) (implied action under minimum wage statute).

85. 328 S.E.2d 818 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985).

86. *Id.* at 820.

87. *Id.* at 821.

88. *Id.*

89. *Id.*

90. *Sides*, 328 S.E.2d at 821. Such a recommendation by counsel in Florida would certainly violate the rules of professional conduct. See RULES REGULATING THE FLORIDA BAR 4-3.4(a), which states that a lawyer shall not "[u]nlawfully obstruct another party's access to evidence; or . . . counsel or assist another person to do any such act."

ings, Sides testified "fully and truthfully" at the depositions and again at trial.<sup>91</sup> The trial resulted in an award of \$1,750,000 for the patient.<sup>92</sup> Concerned that her testimony in the case might cause her difficulties in her work with some of the doctors at Duke, Sides asked her supervisor to inform her of any complaints about her work so that she could address them.<sup>93</sup> Thereafter, several doctors displayed hostility towards Sides and refused to work with her.<sup>94</sup> Within a short period of time, Sides' supervisor informed Sides of her inadequate job performance, but refused to give her any specific examples. Sides was told that her performance would be monitored closely for the next three months.<sup>95</sup> Less than three weeks later, Sides was discharged.<sup>96</sup> Sides brought an action for wrongful discharge and for wrongful interference with her employment contract.<sup>97</sup> The trial court dismissed the suit.

In a unanimous decision, the court of appeals reversed the dismissal of the claims and held that Sides stated an action for relief under both contract and tort theories.<sup>98</sup> The court noted that there was a strong public interest in preventing the obstruction of justice.<sup>99</sup> As a

91. *Sides*, 328 S.E.2d at 821.

92. *Id.* The defendant doctor viewed Sides as the person who caused them to lose the case.

93. *Id.* The chief nurse refused to do this.

94. *Id.*

95. *Id.*

96. *Sides*, 328 S.E.2d at 821-22.

97. *Id.* at 822.

98. *Id.* at 825-28.

99. *Id.* at 823-24. Speaking for a unanimous court, Judge Phillips wrote:

These offenses are an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given. Indeed, as every citizen of ordinary intelligence must surely know, under our law before any witness can testify in any civil or criminal case he must solemnly affirm or swear that the evidence given by him "shall be the truth, the whole truth, and nothing but the truth." [W]e . . . believe that to deny that an enforceable claim has been stated in this instance would be a grave disservice to the public and the system of law that we are sworn to administer, no principle of which requires that civil immunity be given to those who would defile or corrupt it.

*Id.* (citations omitted). Section 90.605, Florida Statutes, requires that before testifying a witness must take an oath or affirmation that he will testify truthfully. FLA. STAT. § 90.605 (1991). If a witness refuses to either swear or affirm that he will tell the truth, he will not be allowed to testify. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 605.1



result, the court concluded that no employer could deprive an at-will employee of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case. The court opined: "If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward them for lawlessness at the unjust expense of their victims."<sup>100</sup>

Of equal importance was the action of the Texas Supreme Court in *Sabine Pilot Service, Inc. v. Hauck*.<sup>101</sup> Hauck was discharged by his employer for refusing to pump the bilges of the employer's boat into the water which would be a violation of federal law.<sup>102</sup> He subsequently sued his employer alleging wrongful discharge. The trial court granted summary judgment for the employer and the court of appeals reversed the judgment. The Texas Supreme Court affirmed.<sup>103</sup> The supreme court opined that in the intervening ninety seven years since the court first recognized the at-will doctrine in Texas, the employer-employee relationship and changes in American society required that public policy, as expressed in the laws of Texas and the United States, required a very narrow exception to the doctrine.<sup>104</sup> The court was sure to note that the narrow exception covers only the discharge of an employee for the sole reason that an employee refused to perform an illegal act.<sup>105</sup> The concurring justices applauded the decision, characterizing the at-will doctrine as a "relic of industrial times, conjuring up visions of sweat shops described by Charles Dickens," and concluded that the doctrine "belongs in a museum, not in our law."<sup>106</sup>

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(2d ed. 1984).

100. *Sides*, 328 S.E.2d at 826.

101. 687 S.W.2d 733 (Tex. 1985).

102. *Id.* at 734-35. Hauck saw a sign stating that this practice was illegal. He called the Coast Guard to confirm the illegality of the procedure. After receiving confirmation that the act was illegal, he refused to do what the employer ordered. He was then fired. *Id.*; see Comment, *Labor Law-Texas Employment At-Will-A State Position On Public Policy Comes Into Sharper Focus. Vasquez v. Bannworths*, 707 S.W.2d 886 (1986), 12 T. MARSHALL L. REV. 241 (1986).

103. *Sabine Pilot*, 687 S.W.2d at 734-35.

104. *Id.*

105. *Id.* at 736.

106. *Id.*; Comment, *supra* note 102, at 249. Justice Kilgarlin then observed: Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws . . . . Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and

## V. OF CONTRACT OR TORT

Perhaps the most difficult problem facing the Florida Supreme Court in dealing with an exception to the at-will employment doctrine is whether to treat the exception as a breach of contract or as a tort. Florida courts take a strict doctrinal approach to employer-employee relations and couch their concern in terms of a reluctance to interfere with the inherent right of the employer and employee to contract.<sup>107</sup> This strict doctrinal approach and the courts' refusal to allow an action under tort theory suggests that the Florida courts are more comfortable in defining the employment relationship under traditional contract theory. This may be the result of the courts' perception that contract theory provides a bright line basis for defining the relationship. Thus, the court simply looks to see if the relationship includes an exchange of mutual promises, consideration and mutuality.<sup>108</sup> If any one element is missing, there is no relationship.<sup>109</sup>

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legal institutions of our society . . . . The court admittedly carves out but one exception to employment-at-will, . . . but our decision today in no way precludes us from broadening the exception when warranted in a proper case.

*Id.*

107. *Hartley*, 476 So. 2d at 1329. One commentator astutely observes: "It is as though the turn of the century values concerning formalism, laissez-faire economics, stare decisis and deference to legislatures . . . still predominate in the South." Susan K. Datesman, Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-At-Will Rule*, 64 N.C. L. REV. 840, 841 (1986).

108. For a good review of the doctrinal basis under contract theory and the necessity of change, see Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980). One commentator suggests that contract theory could be properly applied to the public policy at-will exception the same as if the employer attempted to enforce an illegal condition in a term employment contract. If the court would find void as against public policy a condition allowing abusive conduct in a contract term, that court should not condone the abusive conduct simply because an at will contract is for an indefinite period of time. Illegal conduct is illegal conduct. J. Wilson Parker, *North Carolina Employment Law After Coman: Reaffirming Basic Rights In The Workplace*, 24 WAKE FOREST L. REV. 905, 931 (1989).

109. I believe that the true reasons for this strict doctrinal approach are set forth in Justice Ryan's dissent in *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (1981) (Ryan, J., dissenting).

The deteriorating business climate in this State is a topic of substantial interest. A general discussion of that subject is not appropriate to this dissent. It must be acknowledged, however, that Illinois is not attracting a great amount of new industry and business and that industries are leaving

Tort theory, on the other hand, attempts to reconcile the potentially conflicting sets of interests present in an at-will relationship.<sup>110</sup> Courts analyzing the at-will doctrine as a tort, balance the employer's interest in the ability to evaluate its workforce with a sufficient degree of flexibility to discharge an unproductive employee against the employee's interest in freedom from discharge for exercising legal rights or refusing to violate the law.<sup>111</sup> Once the courts are committed to protecting the employee's interest in the balance, the logical result is to utilize a third interest, the public interest, in the promotion of state public policy.<sup>112</sup> In the traditional form of contract based at-will employment, the Florida Supreme Court recognizes only one of these interests, that of the employer's, by granting the employer the absolute right to discharge an employee at-will for good cause, no cause or even morally bad cause.<sup>113</sup>

In contrast to Florida's strict doctrinal approach, contract based exceptions to the employment at-will doctrine have evolved from the obligations of the parties arising out of their relationship.<sup>114</sup> While

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the State at a troublesome rate. I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy which will permit an employer to discharge an unwanted employee, one who could be completely disruptive of labor-management relations through his police spying and citizen crime-fighting activities, only at the risk of being sued in tort not only for compensatory damages, but also for punitive damages.

*Id.* at 885.

110. See Bouffard, *supra* note 53, at 78-79. The three interest are the employer's interest, the employee's interest, and the public interest.

111. *Id.*

112. *Id.* The courts, therefore, use the public interest to resolve the conflict between the employer and the employee. The overall objective is to balance all three interests without favoring one set of interests over another. *Id.*

113. *Id.*; accord *Smith v. Piezo Tech. and Prof. Adminis.*, 427 So. 2d 182 (Fla. 1983); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (1980).

114. See Bouffard, *supra* note 53, at 80. In an insightful fashion, Gilmore argues that over the past forty years, we have seen the effective dismantling of the formal system of classical contract theory.

Speaking descriptively, we might say that what is happening is that contract is being reabsorbed into the mainstream of tort. Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. It should be pointed out that the theory of tort into which contract is being reabsorbed is itself a much more

Florida courts assess liability for breach of an expressed contract,<sup>115</sup> they refuse to find liability for breach of a policy manual<sup>116</sup> or through the implied duty of good faith and fair dealing.<sup>117</sup>

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expansive theory of liability than was the theory of tort from which contract was artificially separated a hundred years ago.

GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

115. *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856 (Fla. 4th Dist. Ct. App. 1989); *Maines v. Davis*, 491 So. 2d 1233 (Fla. 1st Dist. Ct. App. 1986); *Grapone v. City of Miami Beach*, 495 So. 2d 838 (Fla. 3d Dist. Ct. App. 1986).

116. *Lurton v. Muldon Mtr. Co.*, 523 So. 2d 706 (Fla. 1st Dist. Ct. App. 1988) (policy manual expressing dismissal only for just cause not enforceable). *Contra Staggs v. Blue Cross of Md., Inc.*, 486 A.2d 798 (Md. Ct. Spec. App.), *cert. denied*, 303 493 A.2d 349 (1985) (provisions in a policy manual which limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination may if properly expressed and communicated to the employee become a contractual undertaking by the employer that are enforceable by the employee). *Accord Woolley v. Hoffmann-LaRoche*, 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985); *Toussaint v. Blue Cross and Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980), where the court held:

that [an] employer statements of policy such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee . . . .

*Id.* at 892. Thus, where an employer establishes a company policy to discharge for just cause only, pursuant to certain procedures, makes the policy known to the employee and committed itself to abide by its policy, the relationship is not terminable at will.

117. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987); *Cook v. Alexander & Alexander of Conn., Inc.*, 488 A.2d 1295 (Conn. Super. Ct. 1985); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

Although not all courts recognize exceptions or limitations to the employment at will doctrine, courts in thirty-two states have adopted public policy exceptions, eleven states have applied the covenant of good faith and fair dealing, and twenty-nine states have used employee handbooks to find contractual limitations on terminations. A total of thirty-nine states now employ one or more theories to qualify the employment at will doctrine.

*Bullock v. Automobile Club of Mich.*, 444 N.W.2d 114, 119 (Mich. 1989), *cert. denied*, 493 U.S. 1072 (1990) (quoting Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988)).

The Florida Courts reject the implied duty of good faith and fair dealing as it pertains to at-will employment contracts. *See, e.g. Kelly v. Gill*, 544 So. 2d 1162 (Fla. 5th Dist. Ct. App.), *rev. denied*, 553 So. 2d 1165 (1989), *cert. denied*, 494 U.S. 1029 (1990); *Muller v. Stromberg, Carlson Corp.*, 427 So. 2d 266 (Fla. 2d Dist. Ct. App. 1982). Conversely, the courts are quick to imply a duty of good faith and fair dealing in its commercial contracts. *See Coira v. Florida Medical Ass'n*, 429 So. 2d 23 (Fla. 3d Dist. Ct. App. 1983), and cases cited therein. *See also* FLA. STAT. § 671.203 (1989)

## VI. THE TREND CONTINUES

A. *Jarvinen v. HCA Allied Clinical Laboratories, Inc.*<sup>118</sup>

Sandra Jarvinen was employed by HCA Allied Laboratories. HCA terminated Jarvinen after she responded to a subpoena and testified truthfully against HCA at trial.<sup>119</sup> As a result, Jarvinen sued HCA and two other defendants in a three count complaint. Count I, pertaining only to HCA, alleged that HCA terminated Jarvinen in retaliation for her testimony.<sup>120</sup> She further alleged that her dismissal violated public policy for witnesses to testify truthfully, without coercion, intimidation or threat of adverse consequences.<sup>121</sup> Subsequently, the trial

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(every contract or duty within the code imposes an obligation of good faith in its performance).

The Restatement (Second) of Contracts states that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). It is clear that nothing in the Restatement (Second) of Contracts suggests that it should not apply to employment contracts. See Parker, *supra* note 108.

118. 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989).

119. *Jarvinen*, 552 So. 2d at 242. Jarvinen was subpoenaed to testify in the trial of Dr. Raul Romaguera, a physician who was suing HCA. The allegations in Jarvinen’s complaint alleged that the testimony was truthful and that HCA viewed Jarvinen’s testimony as detrimental to its defense of the Romaguera lawsuit.

FLA. R. CIV. P. 1.410(e) provides that the “[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.”

120. *Id.*

121. *Id.*

Section 837.012 states:

(1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding, in regard to any material matter shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant’s mistaken belief that his statement was not material is not a defense.

*Nessmith v. State*, 472 So. 2d 1248, 1252 n.6 (Fla. 1st Dist. Ct. App. 1985), *rev. denied*, 484 So. 2d 10 (1986).

“Official proceeding” means a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or the other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, or other person taking testimony or a deposition in connec-

court dismissed the suit and entered judgment for HCA.<sup>122</sup> The Fourth District Court of Appeal affirmed the trial court's decision. The court held that Jarvinen could not state a cause of action since she was an employee at-will.<sup>123</sup> Nonetheless, Judge Glickstein, in a specially concurring opinion, urged the Florida Supreme Court to address the issue

tion with any such proceeding.

*Id.* at 1252 (quoting FLA. STAT. § 837.011(1) (1985)).

FLA. STAT. § 837.021 (1991) states:

(1) Whoever in one or more official proceedings, willfully makes two or more material statements under oath when in fact two or more of the statements contradict each other is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 914.13 (1991) states:

When a court of record has reason to believe that a witness or party who has been legally sworn and examined or has made an affidavit in a proceeding has committed perjury, the court may immediately commit the person or take a recognizance with sureties for his appearance to answer the charge of perjury. Witnesses who are present may be recognized to the proper court, and the state attorney shall be given notice of the proceedings.

FLA. STAT. § 914.14 (1991) states:

(1) It is unlawful for any person who is a witness in a proceeding instituted by a duly constituted prosecuting authority of this state to solicit, request, accept, or agree to accept any money or anything of value as an inducement to:

- (a) Testify or inform falsely; or
- (b) Withhold any testimony, information, document, or thing.

(2) Any person violating any provision of this section shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 914.22 (1991) states:

(1) A person who knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, or offers pecuniary benefit or gain to another person, with intent to cause or induce any person to:

(a) Withhold testimony, or withhold a record, document, or other object, from an official investigation or official proceeding;

(c) Evade legal process summoning that person to appear as a witness, or to produce a record, document or other object, in an official investigation or an official proceeding;

(d) Be absent from an official proceeding to which such person has been summoned by legal process; or

122. *Jarvinen*, 552 So. 2d at 242.

123. *Id.*

presented by Jarvinen.<sup>124</sup> Judge Glickstein viewed the actual issue as one which concerned whether a cause of action should exist for retaliatory discharge for failure to give false testimony.<sup>125</sup> His discussion spoke to those jurisdictions which recognize a narrow public policy exception for discharged employees who have chosen to testify truthfully and have consequently lost their jobs.<sup>126</sup>

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124. *Id.* at 243. Obviously concerned by the inequity presented in the case, yet bound by precedent of the supreme court, Judge Glickstein wrote: "I . . . write in the hope that the Florida Supreme Court will speak to the issue, given the court's concern for the administration of justice." *Id.*

At common law perjury, subornation of perjury and intimidation of witnesses were offenses. The Florida Legislature broadened the perjury prohibition through legislation. *See supra*, note 121. Other courts have manifested similar attitudes toward perjury offenses. *See Sides*, 328 S.E.2d at 823 ("[t]hese offenses . . . are an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly and a violation of all litigants in this state to have their cases tried upon honest evidence fully given.").

125. *Jarvinen*, 552 So.2d at 243.

126. *Id.* Judge Glickstein referred to several cases cited by Jarvinen in her brief, quoting their rationale but taking no further position on the issue except to indicate that several other courts created exceptions under these circumstances. *See, e.g.*, *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959); *Sides v. Duke Hosp.*, 328 S.E.2d 818, 826 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Wash. 1977). Judge Glickstein's opinion clearly reflects that he was disturbed by the inequity of the results in this instance and the necessity to encourage persons to testify truthfully. Unfortunately, the court passed up the opportunity to expand upon its discussion, or to utilize other procedural alternatives available to it in order to avoid upholding the trial court's dismissal of the complaint. In that regard, the court might have chosen to certify the question presented in the case to the Florida Supreme Court as one of great public importance. Article Five of the Florida Constitution provides:

(b) Jurisdiction - The supreme court:

. . . .  
 (4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

FLA. CONST., art V, § 3; *see Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); *accord FLA. R. APP. P. 9.030(a)(2)(B)(i)-(ii)* (1991).

Under certification jurisdiction, review by the Florida Supreme Court is discretion-

## B. *Bellamy v. Holcomb*

More recently, another court proceeding set the stage for the termination of an at-will employee in *Bellamy v. Holcomb*.<sup>127</sup> Karin Bellamy worked as a bookkeeper for Auto Intelligence Devices.<sup>128</sup> Bellamy brought an auto negligence action which was unrelated to her employment.<sup>129</sup> The defense attorney in that case issued a subpoena duces tecum for Holcomb's wage and hour records relating to Bellamy.<sup>130</sup> Holcomb refused to comply with the subpoena. The defense attorney then subpoenaed the company's bookkeeper. The bookkeeper testified that Holcomb instructed her not to bring or produce Bellamy's person-

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ary. Furthermore, since the court of appeal cannot intentionally render a decision which is in conflict with supreme court precedent, certification would have been the only viable alternative in order to redress the inequity perpetrated in *Jarvinen*. The supreme court notes its preference to this method of review. Speaking to the issue in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), the supreme court noted:

This is not to say that the District Court of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.

*Id.* at 434.

In the same vein, the case must present some indication of a need for immediate resolution in addition to a substantive basis for review. Certainly, dismissal from one's livelihood in lieu of committing perjury satisfies the immediacy requirement. For a thorough review of the "immediate resolution" standard, see *Department of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 737 (Fla. 1981) (England, J., dissenting). Finally, a simple majority of the merits panel at the district court of appeal is all that is needed to certify a question to the supreme court.

Jarvinen subsequently moved the district court of appeal for certification of the question to the supreme court. The court denied certification on November 21, 1989.

127. 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991). The reported case provides no facts. Thus, the facts portrayed in this comment are taken from the brief of the appellant filed before the court of appeal.

128. Appellant's Initial Brief at 1, *Bellamy v. Holcomb*, 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991) [hereinafter Appellant's Initial Brief]. Auto Intelligence Devices is the alter ego of appellee Holcomb.

129. *Bellamy*, 577 So. 2d at 610; Appellant's Initial Brief, *supra* note 128, at 5.

130. Appellant's Initial Brief, *supra* note 128, at 5; see FLA. R. CIV. P. 1.410(b) (providing "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein . . .").

The defense attorney made service of the subpoena duces tecum upon the company's records custodian on April 14, 1987. No records were produced in response to it. Appellant's Initial Brief, *supra* note 128, at 5.



nel records.<sup>131</sup> The defense attorney issued and served Holcomb's firm another subpoena duces tecum for a records custodian deposition to be held at Holcomb's office. On the day of the deposition, the attorney was informed upon arrival at the office that the records custodian was out of town.<sup>132</sup> In response, the trial court in the auto negligence case issued an order to show cause why Holcomb's company should not be held in contempt of court.<sup>133</sup> The order further directed that a company representative appear before the court on April 11, 1988.<sup>134</sup> Holcomb advised Bellamy after learning that he would be subpoenaed, "They'll have to find me first to serve me and I'm not easily found."<sup>135</sup> To his surprise, Holcomb was found and the trial judge held him in contempt for not producing the subpoenaed documents.<sup>136</sup> The day following the court hearing, Holcomb discharged Bellamy.<sup>137</sup> Bellamy instituted an action against Holcomb alleging several different theories of recovery.<sup>138</sup> Holcomb moved to dismiss the suit with prejudice. The trial court granted Holcomb's motion and Bellamy appealed.<sup>139</sup>

In a per curiam decision, the Fourth District Court of Appeal affirmed the dismissal of the lawsuit without further discussion.<sup>140</sup> Judge Polen, in his specially concurring opinion, believed that this question should be certified to the Florida Supreme Court as one of great public

131. Appellant's Initial Brief, *supra* note 128, at 5. The bookkeeper testified on November 17, 1987. *Id.*

132. *Id.* The subpoena was returnable on March 29, 1988.

133. *Id.*

134. *Id.*

135. Appellant's Initial Brief, *supra* note 128, at 6. Bellamy further alleged that when Holcomb was ordered to show cause, he stated that "I have every intention of firing you." *Id.*

136. *Id.*

137. *Id.* Bellamy's brief reflects the following account:

On April 12, 1988, the day after Holcomb appeared in court, Holcomb's personnel manager approached Bellamy laughing. The following exchange then took place:

Personnel Manager: You know it's coming.

Bellamy: Yes.

Personnel Manager: I have to fire you. I don't know why. I always have to do the dirty work.

*Id.* Bellamy's brief indicates that she was a conscientious employee who abided by the work rules set out in her employee's handbook.

138. Appellant's Initial Brief, *supra* note 128, at 6; Count I involved Breach of Unilateral Employment Contract; Count II Promissory Estoppel; and Count III Tortious Wrongful Discharge in Violation of Public Policy. *Id.*

139. *Id.*

140. *Bellamy*, 577 So. 2d at 609.

importance.<sup>141</sup>

## VII. THE NEED TO REFORM

Workers' rights continue to suffer in Florida. Relying on the courts' failure to modify the archaic notion that the legislature makes public policy,<sup>142</sup> employers enjoy a premium on continued lawlessness.<sup>143</sup> Moreover, the rationale for continuing the at-will doctrine is inconsistent in several aspects. First, the employment at-will doctrine is a creation of the Florida Supreme Court and not the legislature or common law.<sup>144</sup> Accordingly, the court is free to modify the doctrine without legislative action.<sup>145</sup> Second, the doctrine of stare decisis is of

141. *Id.*; Judge Polen's proposed certified question reads as follows:

Should a cause of action be recognized for tortious wrongful discharge (from employment otherwise terminable at will), in violation of public policy where an employee is fired because of her participation in a lawsuit which requires that the employee's earning records be produced by the employer pursuant to a subpoena?

*Id.* Conversely, Judge Stone opined in his specially concurring opinion that the certified question is properly one for legislative determination. *Id.*

142. *See, e.g.,* Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986) ("of the three branches of government, the judiciary is the least capable of receiving public input and resolving policy questions based on a societal consensus"); Greenleaf & Crosby Co. v. Coleman., 158 So. 421, 429 (Fla. 1934) ("acts of the legislature practically determine the policy of the state"); State *ex rel.* Church v. Yeats, 77 So. 262, 264 (Fla. 1917) (legislature establishes the public policy of the state unless restrained by some constitutional authority).

143. Applied to the *Jarvinen* holding, the court's holding creates a substantial dilemma: commit the crime of perjury and go to jail, or refuse to commit perjury and be fired. Alternatively, Jarvinen could refuse to testify and be held in contempt and sent to jail. Each alternative, is totally unacceptable given the courts' duty to insure the fair and impartial administration of justice.

The *Bellamy* holding is equally disturbing because the process utilized by the defense attorney was the civil rules of procedure as established by the supreme court. Thus, the results in this case now penalize an employee for using, or in *Bellamy's* case not using, the rules of civil procedure that were promulgated to secure the just, speedy and inexpensive determination in every action. *See* FLA. R. CIV. P. 1.010 (rules shall be construed to secure the just, speedy and inexpensive determination of every action).

144. *See* Chipley v. Atkinson, 1 So. 934 (Fla. 1887); Savannah, F. & W. Ry. v. Willett, 31 So. 246 (Fla. 1901); Florida Fire & Cas. Ins. Co. v. Hart, 75 So. 528 (Fla. 1917); Knudsen v. Green, 156 So. 240 (Fla. 1934); Wynne v. Ludman Corp., 79 So. 2d 690 (Fla. 1955).

145. In *County Sanitation Dist. v. Los Angeles County Employees Ass'n, Local 660*, 699 P.2d 835 (Cal.), *cert. denied*, 474 U.S. 995, (1985), the California Supreme Court wrote:

little import because the cases in which the supreme court premised its original adoption of at-will employment were not based on terminations for refusal to violate the law.<sup>146</sup> Accordingly, the supreme court's con-

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Plaintiff's argument that only the legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

*Id.* at 848.

Section 2.01, Florida Statutes, provides:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be in force in this state; provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

FLA. STAT. § 2.01 (1989). Since the employment at-will doctrine was not part of the English common law then in effect at that time, the supreme court is free to fashion a modification. *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952), supports this proposition. In that case, the court wrote:

When the rules of common law are in doubt, or when a factual situation is presented which is not within the established precedents, we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion. *It is only proper that in such cases we take into account the changes in our social and economic customs and present day conceptions of right and justice.*

When the common law is clear we have no power to change it.

*Id.* at 423 (emphasis added). Even more compelling, is the fact that the Florida Supreme Court has not hesitated in other respects to reject anachronistic common law concepts. *See, e.g., Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (abrogating the municipal immunity doctrine); *Morgenthaler v. First Atlantic Nat'l Bank*, 80 So. 2d 446 (Fla. 1955) (adopting American testator intent rule and rejecting English rule); *accord Holland v. State*, 302 So. 2d 806 (Fla. 2d Dist. Ct. App. 1974).

In *State v. Dwyer*, 332 So. 2d 333 (Fla. 1976), Justice Boyd writing for the court stated:

Stare decisis is a fundamental principle of Florida Law. It played an important part in the development of English common law and its importance has not diminished today. Where an issue has been decided by the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues . . . . In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court.

*Id.* at 335 (citations omitted).

146. The doctrine of stare decisis is ordinarily a wise rule of action which should be faithfully adhered to by the court so as to preserve the integrity of the judicial

tinued adherence to the at-will doctrine and reluctance to create a limited exception is an enigma in light of its own declarations. For example, in *Gilliam v. Stewart*,<sup>147</sup> the court stated: "We recognize that in this fast changing world the general welfare requires from time to time reconsideration of old concepts. When the district courts decide that ancient precedents should be overruled, we welcome their views and such should be unhesitatingly rendered . . . ."<sup>148</sup> Given those words and its own precedent, the court's reluctance to administer justice in the employment relationship is inconsistent and unsupportable.<sup>149</sup> In the

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administration of law. Nevertheless, the courts have the power to disregard the force of judicial precedent in a proper case. 13 FLA. JUR. 2D, *Courts and Judges* §156. Stare decisis is not a universal, inexorable command. *Id.* There are nevertheless occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law and to remedy a continued injustice. *Id.* at § 157. It will not be applied to factual situations when to do so would defeat justice. In that regard, both the Florida Supreme Court and the United States Supreme Court have departed from it to overrule an earlier decision. *Id.*

Changes in social and economic conditions may compel the extension of legal formulas and the approval of new precedents in order to achieve the administration of justice. In other words, when the reason for the rule changes, the rule itself should no longer stand and a new rule in harmony with changed conditions should be recognized. *Id.* at § 158.

While it is the function of courts to interpret rather than make law, it must nevertheless be borne in mind that the common law is not a collection of archaic, abstract legal principles as the briefs of the defendants imply—it is a living system of law that, like the skin of a child, grows and develops customs, practices and necessities of the people it was adopted for change. The common law had its genesis in customs and practices of the people, and its genius, as many of the country's greatest jurists and legal scholars have pointed out, is not only its age and continuity, but its vitality and adaptability.

*Sides*, 328 S.E.2d at 827.

147. 291 So. 2d 593 (Fla. 1974).

148. *Id.* at 594.

149. There are numerous examples where the supreme court and the district courts of appeal have created judicial remedies or judicially modified common law doctrines without any direction from the legislature. *See, e.g.*, *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla.), *cert. denied*, 464 U.S. 816 (1983) (refusal to submit to polygraph not grounds to dismiss public employee); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (adopting RESTATEMENT (SECOND) OF TORTS § 402(a)); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (rejecting contributory negligence and adopting comparative negligence); *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971) (establishing right of wife to recover for loss of husband's consortium), receding from, *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952); *Randolph v. Randolph*, 1 So. 2d 480 (Fla. 1941) (modifying common law doctrine that gave father superior right to custody of a child);

same vein, the supreme court's rationale in *Hoffman v. Jones*,<sup>150</sup> amply supports the reasons to place the at-will doctrine with the relics of the past. In that case, the supreme court abolished the doctrine of contributory negligence and adopted a comparative negligence system. The court's rationale spoke to the fact that the supreme court judicially adopted the doctrine of contributory negligence in 1886.<sup>151</sup> The court noted that it exercises broad discretion in changing or modifying a rule taking into account the changes in our social and economic customs and the present day conceptions of right and justice.<sup>152</sup> The court's own words are instructive:

Be that as it may, our own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated. . . . It may be argued that any change in this rule

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*Banfield v. Addington*, 140 So. 893 (Fla. 1932) (removing common law exemption of a married woman from causes of action based on contract or mixed contracts in tort); *Waller v. First Sav. & Trust Co.*, 138 So. 780 (Fla. 1931) (rejecting common law principle that action for personal injuries abated upon death of tortfeasor); *Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. 3d Dist. Ct. App. 1990) (recognizing new tort of negligent spoliation or destruction of evidence for prospective civil suit).

In *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d Dist. Ct. App. 1984), *rev. denied*, 484 So. 2d 7 (1986), the district court addressed the issue of whether to recognize a cause of action for negligent retention of hospital records. While not a previously recognized tort in Florida, the court wrote:

To be sure, the tort alleged is not a familiar one. That fact, however, hardly prevents it being recognized by us. As we are reminded by Professor Prosser:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

*Id.* at 1312 (quoting WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 1, at 3-4 (4th ed. 1971)); *see also* *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981) (adopting Greco inference); *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3rd Cir. 1969).

150. 280 So. 2d 431 (Fla. 1973).

151. *Louisville & Nashville R.R. v. Yniestra*, 21 Fla. 700 (1886).

152. *Hoffman*, 280 So. 2d at 434-35.

should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.<sup>153</sup>

The court found that the demise of the doctrine of contributory negligence has been urged by many scholars. Furthermore, the court's own research indicated that at least sixteen states, as well as several industrial countries, have adopted some form of comparative negligence in addition to several industrial countries.<sup>154</sup> In short, the court concluded:

[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community . . . . [t]he disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.<sup>155</sup>

Unfortunately, these words have little meaning when applied to the at-will relationship. Indeed, to place an at-will employee in a situation where she must choose between obstructing justice, committing a criminal act or loss of employment, engenders that very disrespect that the court speaks disdainfully of in *Hoffman*, and is tantamount to an unconscionable miscarriage, and the destruction of, the administration of justice.

Fourth, the criminal code of Florida is a legislative pronouncement of public policy and can be easily and narrowly applied in the employment at-will context.<sup>156</sup> Fifth, the Florida Legislature's enactments in-

153. *Id.* at 435 (citations omitted).

154. *Id.* at 436. Historically, the doctrine of contributory negligence was adopted by the courts to protect the essential growth of industries, particularly transportation. *Id.* The court also found that the courts created ancillary several doctrines to deal with the harshness of the doctrine.

155. *Id.* (citations omitted).

156. *See* FLA. STAT. § 775.012 (1991). This section reads in pertinent part: The general purposes of the provisions of the code are:

dicating that it is not inimical to modifying the employment at-will doctrine.<sup>157</sup> For example, in *Segal v. Arrow Industries Corp.*,<sup>158</sup> the employee filed a complaint against his employer seeking damages on the ground that he was wrongfully discharged because he filed a workers' compensation claim.<sup>159</sup> The trial court dismissed the action and Segal appealed. The Third District Court of Appeal affirmed the discharge concluding that no action existed, because Segal was an at-will employee. In response to this decision, the legislature statutorily overruled *Segal* the following year.<sup>160</sup> Lastly, entertaining actions based on a violation of public policy for refusing to commit a criminal act presents no evidentiary impediments as to proof.<sup>161</sup> Thus, a judicial

(1) To proscribe conduct that improperly causes or threatens substantial harm or individual or public interest.

(6) To insure the public safety by deterring the commission of offenses

*Id.* Under the current state of the law in Florida, an employer could direct an at will employee to commit murder at the risk of losing his job. While the employer could certainly be charged with solicitation under section 777.04(2), Florida Statutes (1989), the employee's discharge from employment nonetheless would be upheld. The thought, however, at using the criminal statutes as a basis for civil suit in an at will employment is a question left for another day. Yet, before a criminal statute could be used to imply a cause of action for civil liability, the plaintiff would have to meet the test set forth in *Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc). In that case, the court adopted the United States Supreme Court's analysis in *Cort v. Ash*, 422 U.S. 66 (1975), for determining whether a criminal statute implies a private cause of action. The test as set out by the Court involves a determination by the courts as to:

- (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted;
- (2) whether there is any indication, either explicit or implicit, of a legislative intent to create or deny such a remedy;
- (3) whether judicial implication is consistent with the underlying purposes of the legislative scheme; and
- (4) whether the cause of action is one traditionally relegated to state law and of concern to the states, such that a cause of action ought not to be inferred based solely upon federal law.

*Cort*, 422 U.S. at 78.

157. See, e.g., *supra* note 9.

158. 364 So. 2d 89 (Fla. 3d Dist. Ct. App. 1978).

159. *Id.*

160. FLA. STAT. § 440.205 (1991).

161. Even if the court were not inclined to create a broad public policy exception to at-will employment, it could easily create a narrow exception to pertain only to those claims which involve an employer requiring an illegal act, or retaliation for using the

modification of the at-will doctrine will pose no great impact on the court system or business relationships.<sup>162</sup>

### VIII. A PROPOSED STATUTE FOR WRONGFUL DISCHARGE

Soon after the Florida Supreme Court modifies the at-will doctrine, the Florida Legislature should enact legislation to codify the court's action. The statute should define what offenses will create a

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procedures set forth by the supreme court in litigating a dispute. Accordingly, claims could be disposed of quickly since a plaintiff would have to specifically show the criminal statute that an employer ordered the employee to violate. The standard burden for allowing a cause of action under this narrow exception would be the test similarly use to litigate cases under 42 U.S.C. § 1983. In that instance, the plaintiff's burden of establishing a prima facie case would be met if:

- (1) the plaintiff was employed by the employer;
- (2) the employer ordered the plaintiff to violate a specific criminal statute;
- (3) the employee refused to violate the statute, and;
- (4) the employee suffered an adverse employment action by the employer.

If the plaintiff meets this initial showing that the protected conduct was a substantial or motivating reason for discharge, the burden would then shift to the defendant to show that it would have taken the same adverse employment action in the absence of the protected conduct. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); *accord* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

Moreover, proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made. An employer may not, in other words, prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present and indeed the case.

*Price Waterhouse*, 490 U.S. at 252 (citations omitted).

If the employer meets this burden, then the employee would have to show that the reason given was pretextual. If the plaintiff fails to meet this burden, then the suit is dismissed.

162. There has been an concern by some courts that a change in the at-will doctrine will create confusion and uncertainty in business relationships. *See* Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d Dist. Ct. App. 1985); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. 2d Dist. Ct. App. 1983). Courts so disposed to this theory imply that existing businesses, or the influx of new businesses to Florida, will be harmed. To the contrary, since 1980, one year after the enactment of section 440.205, Florida Statutes, creating a wrongful discharge cause of action for filing a workers' compensation claim, only twenty six cases have been reported.



cause of action, remedies and a statute of limitations. The proposed statute should state the following:

**CHAPTER 91-\_\_\_\_\_**

**House Bill No. \_\_\_\_\_**

An act relating to wrongful discharge from employment; creating s. \_\_\_\_\_, F.S., providing for certain definitions, rights and remedies with respect to wrongful and retaliatory discharge from employment; providing for an effective date.

Be It Enacted by the Legislature of the State of Florida;

Section 1: **SHORT TITLE:** This act may be cited as the "Florida Wrongful Discharge From Employment Act".

Section 2: **PURPOSE:** The Legislature finds that the stability of its workforce is indispensable to the state's continued economic growth and to the vitality of its workers. As a result, the necessity in maintaining full employment and the interests of the employer to make legitimate business decisions are best served if the discharge of an employee is regulated under certain circumstances. Accordingly, the Legislature finds that the discharge of an employee for refusing to commit a criminal act or for exercising a statutory right specifically granted by law is against the public policy of this state. In this respect, the Legislature declares that the purpose of this act is to establish certain rights and remedies with respect to wrongful discharge. Except as limited in this act, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party.<sup>163</sup>

Section 3: **DEFINITIONS:** The following definitions apply to this act:

(a) "Constructive Discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative.<sup>164</sup>

(b) "Discharge" includes a constructive discharge as defined in subsection (a), any other termination of employment including voluntary res-

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163. This section allows for a structured balance to meet the needs of employers to effectively manage and operate a business and in making legitimate business decisions. Furthermore, the Act allows an employer to discharge an unproductive or disruptive with no civil liability at all since the Act protects only those employees for those enumerated causes of action as set forth in section 4 of the Act. *See* MONT. CODE ANN. § 39-2-902 (1991).

164. MONT. CODE ANN. § 39-2-903(1) (1991); *STEELE V. OFFSHORE SHIPBUILDING, INC.*, 867 F.2d 1311 (11th Cir. 1989).

ignation under duress or undue influence,<sup>165</sup> elimination of the job, lay-off for lack of work, failure to recall or rehire, and any other cutback in the number of employees for other than a legitimate business reason.

(c) "Person" includes an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, or unincorporated organization; any other legal or commercial entity; the state; or any governmental entity or agency.<sup>166</sup>

(d) "Employee" means a person who works for another for hire but does not include:

- (i) an independent contractor
- (ii) an elected public official or an appointee of an elected public official;
- (iii) a state, county, municipal or civil service public employee already statutorily protected against unjust discharge;
- (iv) a person elected to his employment by:
  - (a) shareholders, a board of governors or an executive committee;
  - (v) a member of top level management;
  - (vi) a person under a fixed term of employment for two or more years who has agreed in writing to waive his or her rights under the Act;
  - (vii) a volunteer serving without any form of compensation;
  - (viii) an individual working for his or her parents, legal guardian or spouse;
  - (ix) an employee on probation, except when such status is used as

165. MONT. CODE ANN. § 39-2-903(2) (1991).

A voluntary act is an act proceeding from one's own choice or full consent unimpelled by another's influence. However, an action cannot be voluntary if it is performed as a result of duress. Duress involves a step beyond mere illegality and implies that a person has been unlawfully constrained or compelled by another to perform an act under circumstances which prevent the exercise of free will. In order to show duress, a plaintiff must show (1) that one side involuntarily accepted the terms of another, (2) that circumstances permitted no other alternative, and (3) that said circumstances were the result of coercive acts of the opposite party. The plaintiff bears the burden of creating a fact issue with respect to a claim of duress. However, duress is not measured by a plaintiff's subjective evaluation of a situation; rather, a plaintiff must tender objective evidence that the retirement or resignation was the product of duress.

McLaughlin v. Department of Nat'l Resources, 526 So. 2d 934, 936 (Fla. 1st Dist. Ct. App. 1988) (citations omitted).

166. FLA. STAT. § 760.02(5) (1991).

a pretext for the exercise of rights enumerated in section 4 of this Act.

(x) domestic servants;

(xi) an individual protected against wrongful discharge under a collective bargaining agreement.<sup>167</sup>

(e) "Employer" includes any person employing 15 or more employees, for each working day in each of 20 or more calendar weeks in the cur-

167. Richard D. Himberger, Comment, *Unjust Discharge: Why Nonunion Employees Need A Just Cause Statute*, 25 WILLAMETTE L. REV. 135, 154 (1989).

Particular occupations are not covered by the Act. Elected officials and their appointees (e.g. city managers) are excluded because of the political nature of their appointment. Business officials are excluded for similar reasons.

[In the same vein,] [u]nder state public employee statutes, state and municipal employees may only be dismissed for just cause. These employees can be excluded from the Act's coverage.

*Id.* Similarly, employees covered by collective bargaining agreements are excluded from coverage since the majority of collective bargaining agreements specifically impose a "just cause" standard for disciplinary action or dismissal. *Id.*

High level managerial employees are excluded for several reasons. First, they are in a substantially better bargaining position and are economically compensated for the risks they bear. Second, they are party to the most sensitive type of strategic business planning and participate in considerable policy making activity. *Id.* at 154-55.

The Act generally excludes independent contractors as non-employees. It also excludes employees working under fixed-term employment contracts of two years or more who have waived their statutory rights against unjust dismissal in writing. Two justifications emerge. First, these individuals have voluntarily contracted away their statutory rights and should have to accept responsibility for their contractual decisions. Second, if such employees are discharged in violation of their contracts, they can sue for breach. In addition, the Act's fixed-term requirement assures that employers cannot coerce their employees into signing short-term waivers of just cause statutory rights.

Volunteer employees, individuals working for their parents, guardians, or spouses, and domestic servants have been excluded . . . . Volunteer workers do not receive financial compensation or barter in lieu of such compensation. Therefore, the available remedies of reinstatement with back pay or compensatory damages are inappropriate. Family members and domestic employees are excluded because of the "close personal relationships" that exist.

Because employers often require a probationary period to determine a worker's qualifications, this statute excludes all employees who have completed less than six months of service with their employer . . . . The burden is on the [probationary employee] to show that the employer used the six month period to mask willful acts of unjust discharge.

*Id.* at 155-56 (citations omitted).

rent or preceding calendar year and agent of such a person.<sup>168</sup>

(f) "Fringe benefits" means the value of any employer paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.<sup>169</sup>

(g) "Good cause" means reasonable, job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.<sup>170</sup>

(h) "Lost wages" means the gross amount of wages that would have been reported to the Internal Revenue Service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.<sup>171</sup>

(i) "Public policy" means the policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, administrative rule or pronouncements of the supreme court;<sup>172</sup>

(j) "Probationary Period" means the initial training period following hiring not to exceed six months;

(k) "Disciplinary Action" includes demotion, loss of pay, suspension, reduction in seniority, transfer, denial of promotion, reassignment or otherwise discriminated against, in regard to his employment with regards to the actions enumerated in section 4 of this Act;<sup>173</sup>

**Section 4: ELEMENTS OF WRONGFUL DISCHARGE.** A disciplinary action, discharge or constructive discharge is wrongful if it was in retaliation for:

(a) the employee's refusal to commit an unlawful act or violate a regulatory statute or administrative rule or regulation;

(b) the employee's performance of a public obligation;

(c) the employee's exercise of a statutory right;

(d) the employee's testimony before any criminal or civil proceeding, any administrative proceeding, or any arbitration, whether or not compelled by subpoena;

168. The definition of employer is taken from section 760.02(6), Florida Statutes (1989). By affixing the lower limit of employer, the Act will not become unduly burdensome on small employers and will not omit those employees who require the statute's protection the most.

169. MONT. CODE ANN. § 39-2-903(3) (1991).

170. *Id.* at § 39-2-903(5).

171. *Id.* at § 39-2-903(6).

172. *Id.* at § 39-2-903(7); *see supra*, notes 78-84.

173. FLA. STAT. § 112.532(4) (1991).

(e) the employee's report of any suspected violation of federal, state or local law made to any federal agency, state officer, department, board, commission or council of the executive branch or judicial branch of state or federal government, so long as the report was reasonably made and in good faith;

(f) reporting of any criminal or any safety violation of the Federal Aviation Act, 49 U.S.C. § 1301, et.seq., as long as the report was reasonably made and in good faith;<sup>174</sup>

(g) the initiation of any civil proceeding seeking recovery for personal injuries; or

(h) where the employer violated the express provisions of its own written personnel policy in discharging an employee for the exercise of subdivisions (a) - (g); or

(i) the discharge was not for good cause and the employee had completed the employer's probationary period of employment.

#### Section 5: REMEDIES

The remedy for any adverse employment action as described in section 4 of this Act is limited to the following:

(a) Reinstatement with back pay with interest from the date of disciplinary action or discharge;

(b) compensatory damages and/or punitive damages;

(c) removal of any record of the adverse employment action from the employee's personnel record, file, or any other medium used by the employer to maintain records of employees;

(e) injunctive relief;

(d) attorney's fees and costs.<sup>175</sup>

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174. A provision was specifically included to cover employees who report violations of the Federal Aviation Act. Its purpose is to cover situations where the courts have found that no cause of action under that statute existed for employees discharge for reporting flagrant safety violations of defective aircraft. It allows coverage for employees not protected by section 112.3187(4)(a), Florida Statutes (1989), and furthers the policy of this state to protect its citizens while flying. *Accord* Tritle v. Crown Airways, Inc., 928 F.2d 81 (4th Cir. 1991) (discharged for reporting FAA safety violations).

175. Section 5 provides for several traditional make whole remedies. One remedy included is a provision for reinstatement. It could be argued that in a wrongful discharge proceeding which the Act covers, the employee would not desire reinstatement because the employer-employee relationship will have deteriorated as a result of bad feelings engendered from the dismissal. On the other hand, this provision is entirely consistent with remedies available under the National Labor Relations Act, Title VII, and enumerable other statutes and arbitration awards. The Act will similarly prevent employer misconduct in making such wrongful dismissals since it provides for the

## Section 6: LIMITATION OF ACTION

(a) An action may only be maintained under this chapter within 90 days after the date of the adverse employment action or when the aggrieved employee reasonably should have known of the adverse employment action.<sup>176</sup>

## IX. CONCLUSION

The efficacy of the at-will employment doctrine is in serious doubt. Created by misapplied authority and distortion, the doctrine is treated as a treasured artifact from the nineteenth century by the Florida courts. While many courts have taken the forefront in the eradication or modification of the at-will doctrine, the Florida Supreme Court's unyielding loyalty to the doctrine places a premium on unlawful employer conduct. Consequently, employers have utilized the doctrine as leverage to violate federal and state laws with impunity. Such a result is both illogical and intolerable in light of the supreme court's other pronouncements, and the changes in society. Thus, the supreme court should no longer sanction the discharge by an employer of an employee who refuses to commit an unlawful act. Furthermore, the district courts of appeal should recognize the need for change and utilize the certification procedure to encourage the modification of the rule. Only

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award of punitive damages.

Removal of the adverse employment action requires that all evidence of the dismissal will be removed from a personnel record since these records will generally follow an employee from job to job. In addition, where the employee was wrongfully discharged, it is inequitable for the employer to maintain a permanent record indicating that the employee was a "bad employee." This section does not limit any other remedies in tort where the employer slanders or libels a former employee with a prospective employer. If anything, it encourages a "blind" recommendation.

Injunctive relief is provided for in order to allow a court to regulate the conduct of an employer who engages in persistent egregious conduct with respect to its employees. It is an extraordinary remedy and should only be granted in those cases where the employer's conduct is truly outrageous.

Attorney's fees and costs should be provided since it encourages plaintiffs to bring actions against an employer in order to enforce the statute, and encourages members of the bar to take on cases in order to protect workers' rights.

176. An employer should not have to have a potential cause of action lingering for several years, as is allowed under a general personal injury statute of limitations. Thus, section 6 forces a discharged employee to expeditiously bring its claim. This allows for an expedited resolution of the dispute and limits damages. Of course, an employee would be required to mitigate his damages under generally accepted principles of contract.

in this fashion, will the rule of law prevail over the rule of the market, and force the King of the Turtles to speak instead of shout.

# Of Forfeiture, Facilitation and Foreign Innocent Owners: Is a Bank Account Containing Parallel Market Funds Fair Game?

Alan S. Fine\*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1125
A. <i>Seize first, ask questions later: Operation Polar Cap and the Hawaii All Monies Cases</i> .....	1125
B. <i>Procedure in Civil Forfeiture Cases</i> .....	1129
II. LATIN AMERICAN PARALLEL MARKETS .....	1131
III. APPLICATION OF CIVIL FORFEITURE STATUTES TO DOMESTIC BANK ACCOUNTS .....	1133
A. <i>Traceable Proceeds or "Follow the Dirty Money"</i> .....	1134
B. <i>Facilitation, or "Follow the Dirty Money and Watch It Grow"</i> .....	1138
C. <i>Innocent Ownership</i> .....	1148
D. <i>Application of the Innocent Owner Defense in Parallel Market Cases</i> .....	1154
IV. CONCLUSION .....	1160

### I. INTRODUCTION

#### A. *Seize first, ask questions later: Operation Polar Cap and the Hawaii All Monies Cases*

Based on sworn testimony that 680 bank accounts in the United States containing nearly \$400 million<sup>1</sup> were the "operating accounts"

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1. Mary Hladky, *Lawyers of Many Stripes Watch Money Seizure Cases in Ha-*



of the Medellin cartel, U.S. District Judge William C. O'Kelley issued an order temporarily restraining them on April 16, 1990.<sup>2</sup> Within weeks almost 580 of those accounts were released.<sup>3</sup> The government then sought civil forfeiture of the remaining 100 accounts, 88 of which were in the Southern District of Florida representing in excess of \$17.6 million.<sup>4</sup> Almost two years later, claims to 82 of those accounts have been fully resolved returning 94 percent of the funds seized. The dispute over one account has been partially resolved returning thus far 86 percent of its funds. Approximately \$830,000 has been forfeited and less than one million dollars is still in dispute.<sup>5</sup>

In May 1989, the federal government sought civil forfeiture of twenty-four bank accounts seized in Miami and New York and transferred to Hawaii in what has become known as the *All Monies* cases.<sup>6</sup>

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waii, MIAMI REVIEW, May 11, 1990, at 1, 4.

2. *United States v. Pablo Emilio Escobar-Gaviria*, Cr. No. 89-086-A (N.D. Ga., April 16, 1990). This order was entered pursuant to 21 U.S.C. section 853(e)(2) (Supp. 1992) which provides for a temporary restraining order against the property of a defendant in a criminal case when an information or indictment has not yet been filed seeking forfeiture of the property. The issuance of such an order requires the government to demonstrate probable cause to believe that the property would, in the event of the owner's conviction on the imminent criminal charges, be subject to forfeiture. In other words, the 680 bank accounts were seized based on the false verification that they were owned by the defendants in the criminal case pending in Atlanta, Georgia. See *United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances*, 740 F. Supp. 842, 844 n.2, 850-51 (S.D. Fla. 1990) [hereinafter *Eighty-Eight Designated Accounts*].

3. Mike McQueen, *Prosecutors Face Tough Questioning on Frozen Funds*, THE MIAMI HERALD, June 9, 1990, at 4B.

4. *United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances*, No. 90-1203-Civ-NESBITT (S.D. Fla. - amended Complaint filed May 21, 1990).

5. Of the 78 claimants who have settled with the government, the following chart shows the number of claims corresponding to the percentage of funds returned:

100%	95-99%	90-94%	75-89%	66-74%	50-65%
44	13	9	8	2	2

In addition, four accounts were forfeited in full: two were by default, in one case the claim was withdrawn; and one forfeiture was by stipulation. Of the total \$830,000 forfeited, more than half, \$450,000, was by one claimant who settled with respect to seven Miami accounts and an unknown number of New York accounts.

6. All of the cases are styled *United States v. All Monies [the amount seized] In Account No. [ ] [name of claimant]*. For ease of reference, after the initial full citation, these cases will be hereinafter referred to as *All Monies* - [name of the claimant].

The cases were filed in Hawaii as a result of a criminal indictment concerning

Of the \$11.3 million seized from the twenty-four accounts, the federal government has returned in excess of \$9.5 million. The federal government lost three cases on the merits, two on improper venue grounds, and settled the remainder. The federal government was able to retain the accounts of the drug trafficker, which it won by default.<sup>7</sup>

In 1991 alone, more than \$643 million in cash and property was "stripped from drug traffickers and other criminals" by the United States government.<sup>8</sup> As the claimants in the *Polar Cap* and *All Monies* cases can testify, some of that money came from innocent owners who succumbed to the economic reality (some would say coercion) that the cost of litigating a civil forfeiture case can often exceed the amount at issue. Moreover, victory in such cases very rarely leads to the recovery of attorney's fees.<sup>9</sup>

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drug trafficking filed in Hawaii. See *United States v. Emilio Melendez-Bernal*, No. 89-00647 DAE (D. Haw. 1989). Melendez was convicted of conspiracy to import cocaine into the United States.

7. The author would like to express his appreciation to Hendrik Milne, Esquire, for his assistance in providing information about, and unreported memorandum decisions in, the *All Monies* cases. The statistics referred to in the text are derived from his Reply Brief for Appellant at 15, *United States v. All Monies* (\$572,426.63) in Account Number 2785800-1 in the Name of Wadi Kahhat, *appeal filed*, Nos. 91-15847, 91-15944, and 91-16159 (9th Cir. Feb. 19, 1992). With attorney's fees and interest, the government may return to claimants, in the aggregate, more than 95 percent of the amount of money it seized.

8. DEPT OF JUSTICE ASSET FORFEITURE PROGRAM ANN. REP. 8 (Mar. 30, 1992). The number of asset forfeitures has grown at an average annual rate of 99% since 1985. Since 1985 more than \$2.4 billion worth of property has been forfeited. Significantly, most of this money has been reinvested in law enforcement. *Id.* In other words, those agencies involved in a forfeiture receive a portion of the proceeds. More than \$830 million in forfeited property has been shared with state and local law enforcement agencies. *Id.* at Foreword. This "reinvestment" process gives an entirely new meaning to the expression "you eat what you kill." Further, the inclusion of this profit like motive calls into question the neutrality of law enforcement. No longer are police and special agents just "doing their job." Now they are working for increased resources including, in particular, larger budgets. See Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1127-28 (1988).

9. In *Operation Polar Cap*, the government was ordered to pay the attorneys' fees of one claimant under the Equal Access to Justice Act, 28 U.S.C. section 2412, because it seized and attempted to forfeit more than \$106,000 when its best argument for probable cause entitled it to seize only \$13,600. *United States v. Eight-eight (88) Designated Accounts*, 740 F. Supp. 842 (S.D. Fla. 1990).

In an *All Monies* case, thus far the government has been ordered to pay one claimant his attorney's fees. *U.S. v. All Monies* (\$637,944.57) in Account No. 29-0101-62 (Abusada), No. 89-00386 DAE (D. Haw. September 11, 1991).

Both established and emerging legal principles are being applied to the civil forfeiture of bank accounts pursuant to 21 U.S.C. § 881(a)(6)<sup>10</sup> and 18 U.S.C. § 981(a)(1)(A)<sup>11</sup> with uncertain results. Section 881(a)(6) seizures are based on allegations that a bank account, or its contents, are traceable proceeds of an exchange for narcotics or were used to facilitate drug trafficking. Title 18 U.S.C. § 981(a)(1)(A) provides for seizure of monies or other property which was involved in a money laundering transaction.<sup>12</sup> There are several defenses which an owner of a bank account may interpose to recover his seized funds. The innocent owner defense under both applicable statutes and, in proceeds cases, the lowest intermediate balance defense are the principle defenses.<sup>13</sup> This article analyzes the basis for, and de-

10. Title 21 U.S.C. section 881(a)(6) (Supp. 1992) makes the following property subject to forfeiture:

All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of the subchapter, all proceeds traceable to such an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of the subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

*Id.*

11. 18 U.S.C. section 981(a)(1)(A) (Supp. 1992) makes the following property subject to forfeiture:

Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 4313(a) of title 31 by a domestic financial institution regulated by the Securities and Exchange Commission or a partner, director or employee thereof.

*Id.*

12. By property involved in a money laundering transaction, I refer to all four predicate crimes in 18 U.S.C. section 981(a)(1)(A): section 1956 [money laundering], section 1957 [engaging in monetary transactions and property derived from specified unlawful activity], 31 U.S.C. section 5313(a) [currency transaction reporting requirement], and 31 U.S.C. section 5324 [prohibiting structuring transactions to evade the reporting requirement of 31 U.S.C. § 5313(a)]. Section 981(a) also provides for the forfeiture of property derived from many other acts including certain acts which are violations of the law of a foreign jurisdiction. *See* 18 U.S.C. § 981(a)(1)(B),(C),(D), and (E) (Supp. 1992).

13. Claimants to any type of property sought to be forfeited under these statutes

fenses to, seizures of bank accounts funded with purchases of U.S. dollars on the parallel markets of Latin America.

### B. *Procedure in Civil Forfeiture Cases*

Civil forfeiture proceedings follow the Federal Rules of Civil Procedure except where they are inconsistent with the Supplemental Rules for Certain Admiralty and Maritime Claims.<sup>14</sup> Typically, the government seizes a bank account, in whole or in part, with a seizure warrant based on a verified application and later files a verified complaint for forfeiture *in rem* to initiate civil forfeiture proceedings.<sup>15</sup> The distinguishing characteristic of such a proceeding is that it is "in rem." The defendant is the property to be forfeited, the property is the "guilty" party.<sup>16</sup> The government may seize property without proof of the

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may also raise defenses of undue delay and the property's non-involvement in the alleged illegal activity.

14. Title 21 U.S.C. section 881(b) and Title 18 U.S.C. section 981(d) incorporate the procedure of the customs laws. The customs laws in turn are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims which provide for the application of the Rules of Civil Procedure except to the extent they are inconsistent with the Supplemental Rules. SUPPLEMENTAL RULE A. One significant consequence of the application of the Supplemental Rules is that the pleading requirement is more stringent than the liberal notice pleading of Federal Rule of Civil Procedure 8. See SUPPLEMENTAL RULE E(2). The particularity requirement has been honored by some courts because of the drastic consequence of the government seizing and holding property. See *United States v. \$38,000 in United States Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987) (government may not seize and continue to hold property upon conclusory allegations that defendant property is forfeitable); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1216-19 (10th Cir. 1986).

15. The other common method of seizure is when the government files a verified complaint for forfeiture *in rem* and obtains an ex-parte warrant of arrest *in rem* simultaneously. See 21 U.S.C. § 881(d) (Supp. 1991), 18 U.S.C. § 981(d) (Supp. 1991). This article will discuss only judicial forfeitures because of the relative infrequency of administrative forfeitures of bank accounts and the consequent lack of ability to analyze the deliberative process involved in administrative determinations. At a recent seminar there was a discussion of a not yet implemented Department of Treasury decision to use administrative forfeiture for bank accounts of less than \$500,000. If implemented, this policy would move most bank account seizures into the administrative realm.

16. See Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916-927 (1991) (explaining how property can be "guilty" and a thorough critique of civil forfeiture doctrine); Winn, *supra* note 8; Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP

owner's complicity in the illegal conduct subjecting the property to forfeiture.

Civil forfeitures are hybrids of criminal, civil and admiralty practice. After the concept of guilty or tainted property, the most unusual aspect of civil forfeiture procedure is the burden of proof structure. As plaintiff, the government has the initial burden of demonstrating the existence of probable cause to believe that a substantial connection exists between the property to be forfeited and the underlying criminal activity.<sup>17</sup> The government's burden of proof is not to establish forfeitability beyond reasonable doubt, nor by clear and convincing evidence, nor by preponderance of the evidence. Rather, to show probable cause to believe that property is subject to forfeiture, the government's burden is less than *prima facie* proof, but more than mere suspicion.<sup>18</sup>

The nature of probable cause in civil forfeiture cases has four attributes: First, it is the same legal standard as that applied in a criminal context for arrests and search and seizure warrants.<sup>19</sup> Second, as in the criminal context, the government may prove probable cause using hearsay which would be excluded by the Federal Rules of Evidence in a typical civil case.<sup>20</sup> Third, the court, not a jury, determines probable cause.<sup>21</sup> Fourth, in determining probable cause, judges must view the evidence not with clinical detachment, but by applying their common sense to the realities of normal life.<sup>22</sup>

Once the government demonstrates probable cause, the burden of proof shifts to the claimant.<sup>23</sup> In order to prevail, the claimant must establish, by a preponderance of the evidence, that the property sought to be forfeited (e.g., all or certain funds in a bank account) was not

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L.Q. 169 (1973).

17. *United States v. \$4,255,000*, 762 F.2d 895, 903 (11th Cir. 1985), *cert. denied*, 747 U.S. 1056 (1986).

18. *Id.*

19. *United States v. Premises and Real Property at 4492 S. Livonia Rd., Livonia, New York*, 889 F.2d 1258, 1267 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 1017 (1991).

20. *U.S. v. Property Known as 6109 Grubb Road*, 886 F.2d 618, 622 (3d Cir. 1989).

21. 19 U.S.C. § 1615 (Supp. 1992).

22. *\$4,255,000*, 762 F.2d. at 904; *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985); *United States v. Herzbrun*, 723 F.2d 773, 775 (11th Cir. 1984). For example, the Eleventh Circuit allowed, in effect, judicial notice of "the fact that Miami has become a center for drug smuggling and money laundering." *\$4,255,000*, 762 F.2d at 904.

23. 19 U.S.C. § 1615 (Supp. 1992).

used in violation of the applicable statute, or that he is an innocent owner as defined in the applicable statute.<sup>24</sup> The claimant is entitled to a jury trial conducted under the Federal Rules of Evidence on his affirmative defenses.<sup>25</sup> A central feature of a parallel market bank account forfeiture case is explaining to the fact-finder the foreign client's culture, especially the purchase of dollars on the parallel market.

## II. LATIN AMERICAN PARALLEL MARKETS

A monetary parallel market is commonly understood to be a non-government means of exchange of different national monies. Parallel markets are also called black, grey and unofficial markets. The legality of participating in a parallel market is a function of the law of the country where the money is being traded.<sup>26</sup> The parallel market is a free market in the sense that one can purchase dollars at a negotiated exchange rate, rather than at the official rate established by a foreign government.

Money exchangers, known as cambistas in Latin America, operate as brokers of funds, often not even taking possession of the dollars that they sell. For example, a dollar purchaser pays his cambista local currency, check or wire transfer depending on the size of the transaction. In return the cambista provides dollars in cash, money order, wire transfer or check. Checks are usually from a third party with the payee's name filled in at the time of the transaction. Wire transfers come either from the cambista's account or directly from the account

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24. 21 U.S.C. § 881(a)(6) (Supp. 1992) and 18 U.S.C. § 981(a)(2) (Supp. 1992). See *United States v. One Single Family Residence*, 933 F.2d 976, 979 (11th Cir. 1991); *\$4,255,000*, 762 F.2d at 904; *United States v. One 1944 Steel Hulk Freighter*, 697 F.2d 1030 (11th Cir. 1983).

25. See *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 469-71 (7th Cir. 1980) (Sprecker, J., dissenting).

26. For example, there is no prohibition under Peruvian law regarding the exchange of national monies. In Colombia prior to February, 1991, participation in the parallel market was a "contravention cambiaria," a violation of the regulations governing exchange controls. Decreto 444 which established this regulation was in force from 1967 through January, 1991. A violation of Decreto 444 was not a "delito," a crime, and was not punishable by imprisonment. Rather, it was punishable by an administrative sanction of forfeiture of the amount of money that was involved in the transaction and a potential penalty of up to 200% of the amount forfeited. A person who was sanctioned under this provision and did not pay their fine was subject to administrative arrest and incarceration. Enforcement of this regulation was lax to say the least. And as noted, it was repealed in February, 1991.

of the person from whom he is buying dollars.<sup>27</sup>

The demand for dollars is fueled by individuals and businesses who need to maintain dollar accounts for a variety of reasons. Foreign individuals and businesses have held dollar accounts in the United States for more than a century for different reasons including personal security (i.e., concern over the lack of confidentiality of bank records which has led to violence, extortion and kidnapping) and preservation of wealth (due to the lack of stability of certain banking systems, high levels of devaluation of local currencies against the dollar, tax avoidance, and the perception of better investment opportunities available in the United States). Latin American importers have also maintained dollar accounts in the United States for a variety of reasons including a desire to escape the cost, delay and bureaucratic inconvenience of buying dollars from the [United States] government. Furthermore, the money in these accounts is used to purchase contraband products because they are unable to buy dollars from an official source for these purchases.<sup>28</sup> Additionally, if the rate of exchange for dollars is more favorable on the parallel market, people could easily purchase dollars in the official market may choose to purchase on the parallel market.

Cambistas obtain their supply of dollars from the parallel market in the form of cash, money orders and checks (usually with the payee left blank) and wire transfers. Their sources include tourists needing local currency, local residents who have received funds from family members living abroad, the return of flight capital, the under-invoicing of merchandise legitimately imported into their country, and sellers of contraband including coffee, gold, emeralds, cattle and, of course, drugs.

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27. The account from which the cambista transfers dollars must, of course, be located in a country which permits dollar denominated deposits. Cambistas operate from a casa de cambio (money exchange) or simply, a cambio. Often, the dollar purchaser does not pay the cambista until he receives the confirmation that his bank has received the funds.

The reported decisions on the parallel market involve exchanges of dollars for Colombian pesos or Peruvian intis. See \$4,255,000, 762 F.2d at 899; *United States v. All Monies* (\$477,048.62) in Account No. 90-3617-3, *Israel Discount Bank, New York* (Leloach), 754 F. Supp. 1467 (D. Haw. 1991).

28. Such products include electronics and clothing which are imported without being registered and, therefore, without paying taxes or tariffs.

### III. APPLICATION OF CIVIL FORFEITURE STATUTES TO DOMESTIC BANK ACCOUNTS

The civil forfeiture provisions of the Controlled Substance Act<sup>29</sup> were amended in 1978 to include forfeiture of proceeds of illegal drug transactions.<sup>30</sup> The purpose of the amendment, codified at 21 U.S.C. § 881(a)(6), was to strengthen the attack on drug traffickers by confiscating their profits.<sup>31</sup>

Bank accounts are subject to the risk of seizure when the United States government believes they are sufficiently related to drug trafficking or money laundering.<sup>32</sup> In the simplest proceeds case, the government may develop proof that a drug seller uses a bank account strictly for the deposit of dollars earned in drug sales. The government can also trace the proceeds if they are transferred to another account. The first account, the account into which the funds obtained in exchange for the drugs were placed, is called either a "primary" or a "direct recipient" account. The account which receives the transfer of funds is called the "secondary" or "indirect recipient" account. Under the above scenario the direct recipient account would be subject to forfeiture as proceeds traceable to an exchange for a controlled substance.<sup>33</sup>

As for the secondary account, the amount seizable<sup>34</sup> is equal to the amount of money transferred into it from the direct recipient account, or its account balance at the time of seizure, whichever is lower. These

29. Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 853 (1970).

30. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. 95-633, 92 Stat. 3777 (1978).

31. See 124 CONG. REC. S23055-56 (1978) (comments of Senators Nunn and Culver).

32. In particular, the dollars must be proceeds traceable to drug violations, used to facilitate the violations, constitute property involved in money laundering transactions or any property traceable to such money laundering property.

33. 21 U.S.C. section 881(a)(6) (Supp. 1992). Depending on the nature in which the deposits to the direct recipient account were made (e.g., repeated cash deposits in amounts less than \$10,000 with intent to avoid the filing of currency transaction reports) 18 U.S.C. section 981(a)(1)(A) (Supp. 1992) would also subject the direct recipient account to forfeiture through the incorporation of 31 U.S.C. section 5324 (Supp. 1992) (structuring).

34. "Seizable" is used herein to denote the government's presumptive ability to seize the asset and subject it to forfeiture proceedings. Since a claimant does not have the opportunity to assert his defenses until after the seizure, "seizable" does not imply "forfeitable."



funds are seizable regardless of the secondary account owner's lack of participation in, or even lack of knowledge of, the criminal activity leading to the deposits into the direct recipient account.

#### A. *Traceable Proceeds or "Follow the Dirty Money"*<sup>35</sup>

If a drug seller uses the cash he obtained in an exchange for drugs to purchase a car, the car is seizable. Likewise, if he writes a check from his account (the contents of which are exclusively proceeds of drug transactions) to purchase a car, that car is also seizable as a proceed traceable to the original exchange for drugs.<sup>36</sup> The federal government may seize assets which are far removed in time, place and nature from the original consideration earned from the illicit drug sale, provided it can trace the asset seized to the drug violations.<sup>37</sup> In the context of bank accounts, the government can also seize funds that have been transferred through numerous bank accounts so long as the funds seized are, in fact, traceable to drug violations. The government must

35. Although this traceable proceeds section discusses money earned from drug sales, all of the principles discussed are equally applicable to money derived in violation of one of the four predicate statutes enumerated in 18 U.S.C. section 981(a)(1)(A) (Supp. 1992). That is to say, since the enactment of section 981(a)(1)(A), a broad range of assorted criminal activity independent of narcotics may provide the initial funds which may be traced and seized.

36. By the same token, the cash or funds used to pay for the asset purchased by the drug dealer is also seizable. There is a debate concerning whether or not the government could forfeit *both* the cash and the asset purchased with the cash. See \$4,255,000, 762 F.2d at 905; *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1161 (2d Cir. 1986).

37. See Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522; *Banco Cafetero*, 797 F.2d at 1158.

The government is not entitled, however, to seize bank accounts when it cannot trace tainted funds into them. Although this proposition should be self-evident, in at least three of the *All Monies* cases: *All Monies (Abusada)*, *supra* note 9; *All Monies (Kahhat)*, No. CV-89-00687-HMF (D. Haw.); and *United States v. All Monies (\$76,285.91) in Account No. 95-6, in the Name of Henry Feiger*, Civ. No. 89-00471-HMF (D. Haw.); the government did just that. The government claimed that there was a connection between the defendant accounts and a money laundering operation based on tenuous evidence which did *not* include the tracing of even a dollar from the money laundering ring to the defendant accounts. See *All Monies (Abusada)*, 746 F. Supp. at 1438; *All Monies (Feiger)*, *supra* this note (March 5, 1990 - claimant's motion for summary judgment on probable cause granted), *set aside*, (August 7, 1990 - granting motion to dismiss on venue grounds); *All Monies (Kahhat)*, *supra* this note (August 8, 1990 - summary judgment granted on reconsideration).

have probable cause to connect the property with narcotics activity, but it need not link the property to a specific transaction.<sup>38</sup> The government does, however, have the burden of tracing a specific amount of money into a secondary account it seizes.<sup>39</sup>

If money is transferred from a secondary account after it receives tainted funds, how can the funds traceable to those deposits be identified? The nature of the proof necessary for tracing has been the subject of a limited number of reported decisions. The seminal case in this area, *United States v. Banco Cafetero Panama*,<sup>40</sup> adopted trust accounting principles to analyze whether the funds seized by the government were properly traceable to an exchange for narcotics in a section 881(a)(6) case. The court approved two approaches to determine whether an account contained traceable proceeds: "drugs-in, last-out,"

38. See, e.g., \$4,255,000, 762 F.2d at 903-04; *Banco Cafetero*, 979 F.2d at 1160. Examine the government's burden: it must only show probable cause, that is less than *prima facie* proof, to believe that a substantial connection exists between the property to be forfeited and the applicable criminal activity without even having to prove any specific drug violations and the government may prove probable cause with hearsay. Even calling it a burden seems a misnomer.

39. *United States v. William Savran & Associate, Inc.*, 755 F. Supp. 1165, 1183 (E.D.N.Y. 1991) (before the burden shifts to a claimant to show which funds in the account were clean funds "the government must first demonstrate that a *precise amount* of proceeds from the fraudulent scheme were deposited in a specific bank accounts which also contained untainted funds . . .") (emphasis in original) (citing D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 4.03(4)(d) (1991)). *Contra* *United States v. All Funds and Other Prop., Acct. No. 031-217362*, 661 F. Supp. 697, 700-701 (S.D.N.Y. 1986) (claimants consisted of a felon convicted of laundering in excess of \$150,000,000, two corporations which he controlled and used in his money laundering operation and another individual as receiver of the same company's assets; probable cause for forfeiture of the accounts because of vast nature of money laundering operation, no proof required as to any particular amount of money or account, burden placed on claimants to show that funds were not drug proceeds). This court cited *Banco Cafetero Panama* for placing the tracing burden on the claimants by selectively quoting the decision: "The risk of uncertainty in determining the traceability of [the money linked to drugs] is placed squarely on the claimant." *Id.* at 701 (citing *Banco Cafetero*, 797 F.2d at 1161). However, the full sentence from *Banco Cafetero* is: "Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, *once probable has been established.*" *Banco Cafetero*, 797 F.2d at 1161. Moreover, in *Banco Cafetero* the government had traced specific amounts of drug money into the accounts and was resolving the issue of who bore the burden of distinguishing clean funds from dirty funds *after* the government proved how much money in the accounts was dirty and there were intervening transfers.

40. 797 F.2d 1154 (2d Cir. 1986).

or “drugs-in, first-out.”<sup>41</sup> Since the enactment of section 981(a)(1)(A), these approaches could be rephrased as “tainted money in - last out” or “tainted money in - first out.” These approaches are employed when a tainted deposit cannot be closely matched with a tainted withdrawal.<sup>42</sup>

Assume \$25,000 of proceeds of drug transactions withdrawn from an account owned by a drug trafficker is used to purchase a car. The car dealer then deposits the \$25,000 into his dealership’s account which contained \$100,000 in clean money at the time of the tainted deposit.

1. If there are no intervening transactions in the car dealership’s bank account between the deposit of the \$25,000 and when the government comes knocking, \$25,000 from that account is seizable;<sup>43</sup>

2. If the only transaction after the tainted deposit is the car dealership’s transfer of \$10,000 out of its operating account to open a time deposit, the government may seize \$15,000 from the operating account and the entire time deposit under the tainted money-in, first-out approach or, the government could seize \$25,000 from the operating account under the tainted money-in, last-out approach; and

3. If the only transaction after the tainted deposit is the dealership’s transfer of \$120,000 from its operating account to open a time deposit, the government may seize \$25,000 from the time deposit under the tainted money-in, first-out approach or the \$5,000 balance remaining in the operating account and \$20,000 from the time deposit under the tainted money-in, last-out approach.

An important limitation on the government’s ability to seize funds from a secondary account is known as the lowest intermediate balance rule.<sup>44</sup> Under this rule, no matter how much tainted money is put into the account if, after the last tainted deposit, the account balance goes to zero and then is brought back to a positive balance with clean funds prior to the government’s seizure of the account, no funds in the ac-

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41. *Id.* at 1159. *Banco Cafetero* also discussed the accounting principle using a pro rata share method which would taint that portion of any withdrawal corresponding to the ratio of the amount of the tainted deposit to the funds in the account immediately after the deposit. *Id.* The pro rata share method was neither approved nor disapproved by the court.

42. *Banco Cafetero* assumes that if a tainted deposit can be precisely matched to a withdrawal then that withdrawal is presumptively tainted and vice-versa. In such instances there is no need to resort accounting principles.

43. Under a version of the facilitation theory in use by the government today and approved by one federal judge, the government could seize and seek forfeiture of the entire \$125,000. *See infra* text accompanying notes 70-79.

44. *Banco Cafetero*, 792 F.2d at 1159.

count are traceable proceeds. In other words, the lowest balance after the last tainted deposit and before the seizure of the account will be the most money the government could prove is traceable to an illegal transaction.

Although no published opinion has applied the lowest intermediate balance to limit the amount of forfeitable funds to something less than a tainted deposit, numerous unreported decisions and settlements have been based on the lowest intermediate balance rule.<sup>45</sup> This rule is viewed as an affirmative defense to a seizure because it is used to rebut the government's claim to have seized tainted funds. The claimant always has the right to prove that the government was simply wrong and that the funds seized are not tainted. The lowest intermediate balance rule provides the claimant with one very straight forward way of limiting the amount of forfeitable funds.

In situations where the government has not had access to the account records prior to seizure, this burden is appropriately placed on the claimant.<sup>46</sup> However, if the government has in fact had access to the account's records demonstrating the lowest intermediate balance defense prior to seizure, the claimant will be able to show that the government did not have probable cause to seize any funds in excess of the lowest intermediate balance.<sup>47</sup> Likewise, if the government purports to have traced funds from a direct recipient account through one or more indirect recipient accounts prior to the deposit into the claimant's account, then the government, in order to show probable cause to seize funds from the claimant's account, should have the burden of establish-

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45. In *United States v. Proceeds Deposited in Account No. 01008054, Bank of Credit and Commerce International, No. 88-1581-Civ-T13(C)* (M.D. Fla. February 8, 1990) (granting summary judgment in favor of the claimant on the basis that a negative balance in the interim between the deposit of the tainted funds and the government's seizure of the account was proof that none of the funds in the defendant account at the time of the seizure were tainted proceeds; \$400,000 was returned to the claimant).

This author is personally familiar with dozens of cases which have been settled by applying the lowest intermediate balance theory to the facts alleged by the government. Often this leads to the return of all or all but a small portion of the funds in an account. For example, in *Eight-eight (88) Designated Accounts, supra* note 3, at least thirty-two claims were resolved by agreement based on the application of the lowest intermediate balance rule returning \$1,912,084.08 to the claimants.

46. See, e.g., *Banco Cafetero*, 797 F.2d at 1161.

47. See, e.g., *United States v. Gavilan*, 849 F.2d 1246, 1249 (9th Cir. 1988) (allowing award of attorney's fees pursuant to the Equal Access Justice Act (EAJA), 28 U.S.C. section 2412, where the government knew of clear affirmative defense).

ing that the funds actually deposited in the claimant's account were tainted under the applicable tracing rules including lowest intermediate balance. After all, it is the government, not the claimant, who has access to the account records of the intervening accounts prior to the seizure.<sup>48</sup>

### B. *Facilitation, or "Follow the Dirty Money and Watch It Grow"*

Under 21 U.S.C. § 881(a)(6) any money used or intended to be used to facilitate any violation of the Controlled Substances Act is subject to forfeiture. The sole reported decision concerning facilitation in a § 881(a)(6) bank account seizure, *United States v. All Monies (\$477,048.62) in Account No. 90-3617-3 (Leloach)*,<sup>49</sup> found that property was "used to facilitate" if it made "the underlying criminal activity less difficult or more or less free from obstruction or hinderance."<sup>50</sup> The court also found that the connection between the property to be forfeited and the illegal activity must be "substantial," that is, more than incidental or fortuitous, but not necessarily indispensable to the commission of the offense.<sup>51</sup>

48. Indeed, if the records of such intervening transfers are available to the government for tracing purposes, the records of the account balances should also be available. In such a case, the government's failure to apply the lowest intermediate balance rule, if appropriate, to limit the amount eventually seized, could subject the government to sanctions under Federal Rule of Civil Procedure 11 for failure to conduct a reasonable inquiry into the facts giving rise to probable cause. Recovery for a claimant in such circumstances might also be available under EAJA, or if the government fails to obtain a certificate of reasonable cause (28 U.S.C. § 2465).

49. 754 F. Supp. 1467 (D. Haw. 1991).

50. *Id.* at 1473 (citing *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990)).

51. *Id.* (citing *Schifferli*, 895 F.2d at 989-90 and *United States v. Premises Known as 3639-2nd Street, N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989)). In *Schifferli*, a dentist's office was forfeited pursuant to 21 U.S.C. section 881(a)(7) which provides that all real property which is used to commit or to facilitate the commission of a violation of the Controlled Substances Act is forfeitable. The dentist was convicted of writing illegal prescriptions and his office was forfeited because it made it easier for him to hold himself out as a person authorized to write prescriptions. *Schifferli*, 895 F.2d at 991.

In *United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989), the government sought criminal forfeiture pursuant to 21 U.S.C. section 853(a)(2) of a ranch and all of the assets associated with it on the basis that the rancher used his ranch as a cover for a heroin distribution business. The rancher was convicted and the jury found that his

In *All Monies (Leloach)*, the claimant, Henry Leloach, was a cambista in Peru who used the defendant account both to receive dollars sent by his customers purchasing intis, and to send dollars to his customers purchasing dollars. At the time of seizure approximately one-half of the funds in the defendant account were proceeds directly traceable to the bank account of a narcotics trafficker containing the proceeds of his crimes. The government was able to establish probable cause for forfeiture of the entire account using the facilitation theory based on the following facts:

1. Melendez, a man convicted of conspiracy to import cocaine into the United States, identified the defendant account as one that he "controlled."<sup>52</sup> Melendez was a partner in Dirimex, another Peruvian casa de cambio,

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twenty-seven quarter horses were used to facilitate his drug trafficking but, interestingly, rejected the government's contention that the ranch was also used to facilitate the crimes. *Id.* at 546. The rancher used the ranch's telephone to transact most of his drug business and tape recordings of those telephone conversations revealed that he bought and distributed heroin using code words, the same words that he used to conduct his horse breeding business: "horses," "halters," "bails of hay," and "lead lines." *Id.*

There are numerous decisions upholding the forfeiture of conveyances, usually automobiles, on the basis of their facilitation of the narcotics transaction even though their involvement was indirect. *See, e.g.,* *United States v. One 1977 Lincoln V Coupe*, 643 F.2d 154, 157 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981) (automobile forfeitable because its presence "with its hood up" provided a convenient cover whereas two men alone in an alley might have appeared suspicious); *United States v. One 1968 Ford LTD Four Door*, 425 F.2d 1084, 1085 (5th Cir. 1970) (car forfeitable because it ran interference for fleeing felons); *United States v. 1980 BMW 320I*, 559 F. Supp. 382, 385 (E.D.N.Y. 1983) (car forfeitable because it provided a means of surveillance, was the look-out car); *United States v. One Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982) (car forfeitable because it laid the groundwork for the illegal activity by transporting the participants to search for a landing strip and storage building for the marijuana to be received).

Title 21 U.S.C. sections 881(a)(4) and (a)(7), however, have broader facilitation language than that found in sections 881(a)(6) or 18 U.S.C. section 981(a)(1)(A). Section 881(a)(4), after referring to the property to be forfeited states "which are used, or are intended for use, to transport, or *in any manner* to facilitate the transportation, sale, . . ." and section 881(a)(7) states "which is used, or intended to be used *in any manner or part*, to commit, or to facilitate the commission of . . ." (emphasis added). Neither section 881(a)(6) nor section 981(a)(1)(A) contain the "in any manner" broadening provision. Since these three subsections are all part of the same statute, and indeed the same paragraph, section 881(a), it must be presumed that Congress intended that they be treated differently.

52. *All Monies (Leloach)*, 754 F. Supp. at 1475.

2. Dirimex transferred funds into Leloach's account 38 times from 1987 through May 4, 1989 - only 23 days before the account was seized.<sup>53</sup> \$2,500,000 were tainted. The \$2,500,000 laundered through the defendant account was more than five times the amount actually seized.<sup>54</sup>

3. Leloach used his account to transfer money not only to his customers, but also to Dirimex's customers pursuant to the instructions of Melendez and Melendez's associates at Dirimex.<sup>55</sup> In fact, various deposits to and disbursements from Leloach's account had Melendez's handwritten name entered by either the claimant or one of his employees. The claimant could not explain why Melendez's name was written in his records and, in fact, contended that he dealt directly with another person at Dirimex.<sup>56</sup>

Based on the above facts, the court granted the government's motion for summary judgment on probable cause for forfeiture of the entire account based on the facilitation theory under both 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The court's discussion of the factual basis for probable cause concerned exclusively the use of the account to facilitate money laundering rather than drug trafficking.<sup>57</sup> The court did not distinguish between the nature of the underlying criminal activity which must be facilitated in order to forfeit the account and did not attempt to explain how the account facilitated a violation of the drug laws as opposed to the money laundering laws.<sup>58</sup>

What was the substantial connection between the portion of the account which was not traceable to a narcotics transactions and the narcotics transactions themselves? How did the clean money in the account make the underlying drug sales activity less difficult, less ob-

53. *Id.* at 1476. Leloach's records indicated, and apparently the government did not contest, that out of approximately 370 deposits into his account in 1988 and 1989, only 34 came from Dirimex. *Id.* at 1481. Since Dirimex was also a cambio and cambios broker funds, the fact that the funds "came" from Dirimex does not mean they came from an account titled Dirimex's name. The nature of the government's proof was *not* that all of Dirimex's money was dirty, but rather that, on occasions, Dirimex brokered funds supplied by Melendez. Further, many of the 34 deposits came from accounts which the government did not seek to prove were affiliated with drug trafficking.

54. *Id.*

55. *Id.* at 1474.

56. *Id.*

57. *All Monies (Leloach)*, 754 F. Supp. at 1473-76.

58. Although unstated, the court appears to have concluded that if an account is used to facilitate the laundering of drug proceeds it, *ipso facto*, facilitates the underlying drug crimes. The validity of this assumption is less than obvious.

structed or less hindered? A possible answer may be found in the court's conclusion that the account "provided a repository for the drug proceeds in which the legitimate money could provide a 'cover' for those proceeds, thus making it more difficult to trace the proceeds."<sup>59</sup> This answer, however, merely assumes that post-facto laundering of drug proceeds facilitates the underlying crime itself. This conclusion is not self-evident, especially in light of the other laws specifically criminalizing such laundering activity (e.g., 18 U.S.C. §§ 1956, 1957) and making such property forfeitable (e.g., § 981(a)(1)(A)).

*All Monies (Leloach)* is also significant because it is the first reported decision finding that section 981(a)(1)(A) reaches property, such as a bank account, which facilitates a violation of the predicate statutes.<sup>60</sup> Section 981(a)(1)(A) does not contain the word "facilitate." Rather it makes forfeitable any property "involved" in a transaction or attempted transaction in violation of the predicate acts. To graft the facilitation theory onto section 981(a)(1)(A), the court looked to the clear legislative intent "to include the money or other property laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense."<sup>61</sup>

The seizure of bank accounts based on allegations of money laundering facilitation has been addressed in only one other reported deci-

59. *Id.* at 1475-76. Tracing the proceeds, however, does not make the actual drug sales, the underlying criminal activity, less difficult, less obstructed or less hindered. The difference between the nature of the criminal activities which must be facilitated under section 881(a)(6) and section 981(a)(1)(A) is one which received no attention in *All Monies (Leloach)*, probably because there was also a section 981(a)(1)(A) forfeiture claim. In any bank account case involving only a section 881(a)(6) seizure, this could be a critical distinction. However, since the enactment of section 981(a)(1)(A) and in its revision in 1988, there is unlikely to be a bank account seizure involving only section 881(a)(6).

60. *Id.* at 1473. Apparently, the first decision interpreting section 981(a)(1)(A) to include facilitation is *United States v. Real Property Including any Building Appurtenances and Improvement Thereon Located at 4643 W. Kennedy Boulevard*, 1990 WL 305391 (M.D. Fla. February 12, 1990). The court denied emergency motions for the return of property seized pursuant to section 981(a)(1)(A). The claimants argued that seizure under section 981(a)(1)(A) was limited to the corpus, the amount actually laundered, in this case \$25,000, rather than the real estate and liquor licenses, in effect the businesses of the claimants. The court upheld the seizure of the businesses based on the legislative history authorizing seizure of property used to facilitate the laundering offense. *Id.*

61. *All Monies (Leloach)*, 754 F. Supp. at 1473 (citing 134 CONG. REC. S17365 (1988)).



sion.<sup>62</sup> In *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, (*Certain Funds*) the government sought forfeiture of several accounts under the direct control of alleged participants in a scheme to illegally obtain credit union funds.<sup>63</sup> The account owners transferred the tainted funds into the defendant accounts which had previously contained only clean money.<sup>64</sup> The claimants argued that the government could seize only the amount that was traceable to the alleged illegal activity.<sup>65</sup> The court rejected that argument, adopting the government's contention that "limiting the forfeiture of funds under the circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of [section 981(a)(1)(A)]."<sup>66</sup> The court cited *All Monies (Leloach)* and held that clean money which facilitated the money laundering was forfeitable: "[c]riminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue."<sup>67</sup>

Although no reported decisions other than *All Monies (Leloach)* have addressed the facilitation argument in the context of bank accounts which received money from parallel market purchases, there are two unreported decisions addressing this point.<sup>68</sup> Unlike *All Monies (Leloach)*, *Certain Funds* and *United States v. Real Property Located at 4643 W. Kennedy Blvd.*,<sup>69</sup> these two cases do not involve allegations that the owners of the account were knowing participants in the underlying criminal activity.

In *United States v. Security Pacific Int'l Bank Account No. 13934*, the government seized a money market account with an approx-

62. *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, 769 F. Supp. 80 (E.D.N.Y. 1991) [hereinafter *Certain Funds*].

63. *Id.* at 81-83.

64. *Id.*

65. *Id.* at 83.

66. *Id.* at 84.

67. *Certain Funds*, 769 F. Supp. at 84-85.

68. *United States v. Security Pacific Int'l Bank Account No. 13934*, No. 90-2222-Civ-MARCUS (S.D. Fla. April 25, 1991); *United States v. Certain Accounts, Together with All Monies on Deposit Therein*, No. 91-1018-Civ-KING (S.D. Fla. February 21, 1992).

69. *United States v. Certain Real Property Including Any Building Appurtenances Thereon Located at 4643 W. Kennedy Boulevard*, 1990 WL 305391 (M.D. Fla. Feb. 12, 1990).

imate balance of \$39,700 and a time deposit with an approximate balance of \$740,000 after the claimant attempted to deposit 76 money orders totalling \$40,000 into a *prior* money market account.<sup>70</sup> He purchased the money orders from a cambista in Barranquilla, Colombia. His bank refused the deposit, in part because many of the money orders were sequentially numbered. Pursuant to the claimant's request, the bank returned the money orders and he sought a refund from the cambista. The claimant returned the money orders to his cambista for two refund checks which he deposited into his account. They were returned unpaid. Approximately one month later, the claimant exchanged the two unpaid refund checks for five personal checks totalling \$39,000 from an associate of the cambista and deposited them into his money market account. After the deposit of the five checks but before the seizure, the claimant closed the account, opened a new money market account, and transferred the contents of the former to the latter.<sup>71</sup>

The court found that the following facts offered by the government established probable cause to believe that the new money market account *and the time deposit* were used to facilitate money laundering and structuring:

1. The cambista used by the claimant was involved in money laundering. The seventy-six money orders originally intended for deposit into the claimant's account were later sent for deposit to a bank in New York by "criminal cohorts" of the "extensive money laundering organization" who "whited-out" Security Pacific as the payee.<sup>72</sup>

2. The claimant's money market account automatically shifted its contents into a time deposit at prearranged intervals so that interest would accumulate at a higher rate and at the expiration of the time deposit its contents were returned to the money market account.<sup>73</sup>

3. The IRS determined *after* the seizure of the accounts that the associate of the cambista who gave the claimant the five checks for \$39,000 had other bank accounts which contained the proceeds of structured activity<sup>74</sup> and that the accounts contained three deposits to-

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70. Order Denying Claimant's Motion for Summary Judgment, Security Pacific Int'l Bank Account No. 13934, No. 90-2222-Civ-MARCUS (S.D. Fla. April 25, 1991) (all the money orders were for amounts less than \$10,000) [hereinafter *Security Pacific*].

71. *Id.*

72. *Id.* at 10.

73. *Id.* at 11.

74. *Id.* The opinion is not clear but seems to indicate that the five checks actually deposited in the claimant's account were not drawn from the bank accounts containing

talling \$63,000 from Miami bank accounts of another individual involved in the money laundering scheme.<sup>75</sup>

In denying the claimant's motion for summary judgment because there was a real dispute as to whether there was probable cause *at the time of the seizure*, the court reasoned as follows:

The defendant accounts are property traceable to the scheme because of the attempted deposit of the seventy-six money orders with Merlano's account number on the back. Additionally, Merlano has apparently admitted that although the money orders were not deposited, he was able to "cash" the money orders with Mr. Logreira [the man who gave him the five checks for \$39,000 in exchange for the two NSF checks from the cambista]. Further, the government asserts, the bank accounts were roll over accounts directly traceable to the account into which the seventy-six money orders were to be deposited. Based on these asserted facts, the government argues that claimant's motion for summary judgment should be denied . . . We agree.<sup>76</sup>

This decision is not carefully reasoned. Merlano's attempt to deposit the seventy-six money orders does not violate any predicate act leading to forfeiture since there was no evidence that he acted with the intent to launder the structuring proceeds. In fact, the government agent testified that he had no knowledge or reason to believe that Merlano was part of the "extensive money laundering organization" or that he participated in "whiting-out" the money orders.<sup>77</sup> This admission alone should have deflated the facilitation claim.

Even assuming the cambista had the intent to launder funds when she sold the money orders to Merlano, neither Merlano's original money market account nor the funds contained therein were property involved in an attempted money laundering transaction as a result of the failed deposit. The cambista did not know the account the money orders were going to be deposited into nor how much money was in that account. What the court failed to take into account was that property, in order to become tainted, must be used in an illicit manner by

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proceeds of structured activity.

75. *Security Pacific*, No. 90-2222-Civ-MARCUS at 11-12. See also Supplemental Response to Claimants' Motion for Summary Judgment at 13, *Security Pacific*, (March 5, 1991) and Reference No. 218199-005348 and the contents thereof (listing the Castro amounts).

76. *Security Pacific*, No. 90-2222-Civ-MARCUS at 14.

77. *Id.* at 8.

someone who has control of it. Although a person without wrongful intent can have his property seized as traceable proceeds of property which has been tainted by someone else, no other person can place a taint on his previously clean property. The only property involved in an attempted transaction in violation of 18 U.S.C. § 1956 and, therefore, subject to forfeiture, were the money orders themselves. If they had been deposited into the account, the funds corresponding to their value would have been seizable as traceable proceeds. However, the remaining funds in the account would not have been seizable.

The court relied on information acquired *post-seizure* that Merlano deposited the \$39,000 arguably traceable to the attempted deposit and erroneously concluded that both of the "accounts [the new money market and the time deposit - approximately \$800,000] are property traceable to the scheme . . . ."<sup>78</sup> Based on the evidence available at the time of the seizure concerning the failed deposit of the money orders and their ultimate attempted re-deposit, the government did not have probable cause to seize anything. The seizure of the accounts was, therefore, unlawful.<sup>79</sup> Only \$39,000 was properly traceable to the new money market account. Funds are traceable only if, in fact, they are transferred. Without Merlano's intent to launder the money, the failed deposit does not lead to any traceable proceeds.<sup>80</sup>

Moreover, the only taint as to the \$39,000 provided by Logreira in the form of five checks, was that they were exchanged for two NSF checks which were in turn exchanged for the seventy-six money orders.

78. *Id.* at 14.

79. The evidence concerning the actual deposit of the \$39,000 was volunteered by the claimant in an attempt to have his account freed. In addition, the evidence regarding the other three deposits, which the government also contended were structuring proceeds, came as a result of discovery during the case. Since *all* of the evidence regarding money being rolled over or deposited into the accounts came as a result of an unlawful seizure the evidence should have been suppressed. Since it was the only evidence which would have supported seizure of any funds in the account, all of the funds should have been released. See *United States v. Six Hundred Thirty-Nine Thousand, Five Hundred Fifty-Eight Dollars (\$639,558) in U.S. Currency*, 955 F.2d 712 (D.C. Cir. 1992); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983); *United States v. Certain Real Property on Hanson Brook*, 770 F. Supp. 722 (D. Maine 1991); *United States v. Leslie*, 598 F. Supp. 254 (D. Vermont 1984).

80. The government used the facilitation argument in the previous cases to seize an entire account where there was proof the account holder intentionally deposited tainted funds for the purpose of commingling them with clean money and thereby furthering the laundering activity. See *supra* text accompanying notes 36-56.

Once the money orders were exchanged for the two NSF checks and certainly by the time the two NSF checks were exchanged for the five clean checks,<sup>81</sup> the funds were, at most, property traceable to property involved in an attempted structuring transaction rather than the property involved in the attempted structuring violation itself. To conclude that after several exchanges the five checks were still property involved in the underlying attempted transaction, rather than merely property traceable to such property, stretches the facilitation theory beyond the breaking point. It would subject to seizure the full contents of the account into which the tainted funds were deposited and then all of the funds in every subsequent account into which any funds from that first account were deposited. The *Security Pacific* court applied the facilitation theory in such a way that if a single tainted dollar can be traced into an account, the entire account is seizable and every time a dollar leaves that account it infects all of the funds in all future transferee accounts, etc.<sup>82</sup> This absurd result is a consequence of the court's failure to limit the facilitation theory to accounts under the control of a wrongdoer.

A recent unreported decision which does a better job of parsing the complicated provisions of section 981(a)(1)(A) is *United States v. Certain Accounts, Together with All Monies on Deposit Therein*.<sup>83</sup> The district court granted various claimants' motions to dismiss the government's verified complaint based on facts similar to those present in *Security Pacific*. In *Certain Accounts*, the government sought the

81. The fact that the remitter of the five checks also had bank accounts, other than the one from which he drew the five checks, which contained proceeds of structured activity, may make the five checks suspicious but it certainly does not give rise to probable cause to believe that they are also proceeds of structured activity.

If, as the opinion implies but does not make clear, the claimants' new money market account received deposits directly from other accounts containing the proceeds of structured activity, then it would be subject to forfeiture but only to the extent of the amount of the deposits. The only basis for seizure of the entire \$740,000 in the time deposit would have been if the deposits to the money market account traceable to the structured activity totalled \$800,000 and all of those funds were transferred from the money market account to the time deposit prior to seizure.

This case was settled with the claimant forfeiting \$125,000 approximately \$900,000 (with interest). The amount forfeited is roughly the amount of all the arguably traceable deposits plus interest.

82. See, e.g., *United States v. Pole No. 3172*, Hopkinton, 852 F.2d 636, 639 (1st Cir. 1988) ("forfeitability does not spread like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment").

83. No. 91-1018-Civ-KING (S.D. Fla. Feb. 21, 1992).

forfeiture of entire account balances of thirty-one Miami bank accounts, twenty-seven of which, the "indirect recipient" accounts, had received funds from the other four and from an unidentified number of New York "direct recipient" accounts into which structured deposits were placed. Checks drawn on the direct recipient accounts were signed by the account-holder in blank and transported to Medellin, Colombia and Caracas, Venezuela where they were subsequently made payable to the claimants of the indirect recipient accounts and deposited into their accounts.<sup>84</sup>

The court held that the entire balance of the direct recipient accounts was property "involved in" the crime of money laundering and, therefore, subject to forfeiture. Secondly, the court found that the checks written on the direct recipient accounts were property "traceable to" property "involved in" money laundering.<sup>85</sup> The court, however, rejected the effort to forfeit the entire balances in the *indirect* recipient accounts, rather than just the amounts traceable to the direct recipient accounts. The government argued that the entire contents of the indirect recipient accounts were property involved in money laundering because they were facilitating the concealment of the tainted one. The court characterized the argument as creating a syllogism under which a tainted deposit from direct recipient account would subject all the funds in the indirect recipient accounts, and any subsequent accounts into which they were transferred, to forfeiture. Under the theory proposed by the government, no separate showing of "taint," i.e., intent to launder money, other than the mere tracing of tainted funds would be required to seize the entire balance in the indirect recipient account.<sup>86</sup> As the court observed:

Like a contagious disease, each direct account could contaminate any account that had dealings with it. The indirect accounts could then conceivably pass on the infection to other accounts, and so forth *ad infinitum*. The outer limits of this theory would be bounded only by Plaintiff's imagination.

This court rejects such a theory. The government's argument here would stretch facilitation theory — itself something of a bootstrap — to the breaking point. As the account in question becomes more distant from the initial illegal transaction, so too does probable cause to forfeit become more attenuated. This court holds that the

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84. *Id.* at 3.

85. *Id.* at 13.

86. *Id.*

government must allege facts other than the mere tracing of checks written against a suspect account. Under the Supplemental Rules, therefore, additional facts that give rise to the requisite "reasonable belief" that there is "substantial connection" to money laundering must be pled with particularity. A contrary rule would yield untenable results.<sup>87</sup>

During oral argument on the motions to dismiss, the court posed a hypothetical question: "If money from demonstrably dirty accounts was used to make unsolicited \$50 donations to Miami police officers, would the government have probable cause to seize the entire balances of all of those officers' accounts?"<sup>88</sup> The government responded affirmatively citing as safeguards to an unjust result its discretion in bringing the suit and the innocent owner defense. The court noted that these safeguards were inadequate stating "[t]he Supplemental Rules guarantee protection above and beyond plaintiff's good judgment, however well intentioned it may be."<sup>89</sup> As alluded to by the government in *Certain Accounts*, the claimant's ultimate defense is innocent ownership.<sup>90</sup>

### C. Innocent Ownership

Claimants to property seized under sections 881(a)(6) or

87. *Id.* at 13-14 (emphasis in original). In a footnote the court added: "This holding does not mean that money launderers may insulate themselves from the forfeiture laws by adding more layers to their financial network. The court simply holds that the government must provide some reasonable basis to conclude that probable cause can be shown *as to each layer* at trial, without sole reliance on the fact of transfer from one account to another." *Id.* at 14 n.11.

88. *Certain Account*, No. 91-1018-Civ-KING at 14 n.12 (summarizing the hypothetical question which is paraphrased based on the recollection of the several observers present at hearing).

89. *Id.* The court dismissed the complaint as to the entire balance of all the indirect recipient accounts with leave to amend. The government then attempted to settle some of the twenty-seven cases on the basis that the amount it could trace into the indirect recipient accounts would be forfeited and the balance would be returned with interest. For the claims it did not settle, the government filed new complaints against only the traceable amounts, or where it had some evidence of facilitation, it filed against the entire account balances.

90. There are those who have not derived much comfort from this safeguard since it places the burden on the claimant to prove a negative, that she did not know the funds were derived from drug trafficking or one of the other specified predicate crimes. Moreover, the government maintains possession of the funds during the litigation.

981(a)(1)(A) may defeat forfeiture if they prove not just that they are innocent of the underlying crime but also that their ownership of the seized property is innocent. This section attempts to explain how a person wholly innocent of any predicate act under section 881(a)(6) or section 981(a)(1)(A) might fail to qualify as an innocent owner.

Under section 881(a)(6) no property shall be forfeited "by reason of any act or omission established by [its] owner to have been committed or omitted without the knowledge or consent of that owner." This innocent owner provision was enacted to clarify the "original language which could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the matter in which the proceeds were obtained."<sup>91</sup> The legislative intent was further clarified by Senator Culver who said it was written "in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction."<sup>92</sup> Section 981(a)(2) provides the same innocent owner defense as section 881(a)(6) except that it is limited to the claimant's lack of knowledge, making no provision for lack of consent.<sup>93</sup> Section 981(a)(2) has not been construed by a circuit court of appeals and has no legislative history. Therefore, the innocent owner provisions are not discussed separately below because there is no analytical basis to distinguish section 981(a)(2) from the knowledge component of section 881(a)(6).

Despite the relatively straight forward language used in the statutes and the statement of purpose in the legislative history, the circuit courts of appeal do not appear to agree on the nature of the claimant's burden in proving lack of knowledge. The First, Fourth and Sixth Circuits, as suggested by the plain language of the statute and its legislative history, have held that a claimant must show only that he did not have actual knowledge that the property to be forfeited was the pro-

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91. Remarks of Senator Culver, 124 CONG. REC. 23056 (1978).

92. *Id.* Senator Nunn added that the purpose of the innocent owner provision was "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." Remarks of Senator Sam Nunn, 124 CONG. REC. 23057 (1978).

93. Title 18 U.S.C. section 981(a)(2) explicitly provides that a lienholder who was without knowledge of the illegal activity may also qualify as an innocent owner: "No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." However, there is no legislative history available on section 981(a)(2).



ceed of the underlying criminal activity.<sup>94</sup> The Fifth Circuit may also have adopted the actual knowledge standard.<sup>95</sup> However, a claimant who remains free from actual knowledge of the illegal acts underlying a traceable proceed by “sticking his head in the sand” will be deemed to have the requisite knowledge.<sup>96</sup>

The Second Circuit has not interpreted the section 881(a)(6) innocent owner provision but in section 881(a)(7) cases a claimant must show that either she did not have actual knowledge or, if she did, that she did not consent to the illegal use of her real property.<sup>97</sup> If the claimant has actual knowledge, in order to be an innocent owner she must prove a lack of consent by showing she did all that could reasonably be expected to prevent the illegal activity once she learned of it.<sup>98</sup> In the context of a section 881(a)(6) case these circuits are likely to follow the actual knowledge standard.<sup>99</sup>

94. *United States v. One Urban Lot Located at 1 Street A-1 Valparaiso, Bayamo, Puerto Rico*, 865 F.2d 427, 430 (1st Cir. 1989); *United States v. Lots 12, 13, 14 and 15, Keeton Heights Subdivision, Morgan County, Kentucky*, 869 F.2d 942, 946-47 (6th Cir. 1989); *United States v. \$10,694.00 U.S. Currency*, 828 F.2d 233-34 (4th Cir. 1987) (discussing section 881(a)(6)).

95. *United States v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas*, 919 F.2d 994, 999 (5th Cir. 1990) (discussing section 881(a)(7)).

96. *United States v. 1980 Red Ferrari, VIN No. 9A0034335, Oregon License No. GPN-835*, 827 F.2d 477, 480 (9th Cir. 1987)[hereinafter *1980 Red Ferrari*].

97. *United States v. Certain Real Property (890 Noyac Road)*, 945 F.2d 1252, 1260 (2d Cir. 1991); *United States v. Certain Real Property (418 57 Street)*, 922 F.2d 129, 131-32 (2d Cir. 1990); *United States v. 141st Street Corp.*, 911 F.2d 870, 876-880 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

98. *141st Street Corp.*, 911 F.2d at 879.

99. The Second Circuit read the “without the knowledge or consent” language of section 881(a)(7) in the disjunctive. That is, if the claimant fails to prove the absence of actual knowledge, she can still prevail if she shows that she did not consent to the use of the property for an illegal purpose. It involves owners of property whose occupants (tenant or husband) who used the real property in an illegal manner subjecting it to seizure. Once knowledge has been established, in order to give meaning to the term consent, the courts have imposed a duty on the claimant to prove that instead of merely acquiescing in the illegal conduct, which would have been consent, they took affirmative steps to prevent it. In other words, once knowledge has been established a claimant would automatically lose on the consent issue, unless she demonstrates that she took affirmative action to stop the illegal activity. Without imposing this requirement, the alternative available to the claimant of showing consent becomes meaningless. A claimant should prevail on an innocent ownership claim under section 881(a)(6) if they demonstrate their lack of knowledge and the government is unable to rebut that showing.

The Third Circuit has also adopted the disjunctive approach to section 881(a)(7)

Whether or not a claimant must do more than disprove actual knowledge that the funds were proceeds of specified illegal transactions is not clear in the Ninth and Eleventh Circuits due to inconsistent and ambiguous holdings.<sup>100</sup> In its first section 881(a)(6) innocent owner decision the Ninth Circuit required the claimant to prove the absence of actual knowledge, did not mention a negligence or all reasonable efforts test and found on the facts presented that the circumstantial evidence of knowledge was compelling.<sup>101</sup> However, in its next section 881(a)(6) decision, the court did not cite its prior decision or analyze the issue before announcing that the claimant's failure to exercise due care precluded reliance upon the innocent owner defense.<sup>102</sup> Not only is this latter decision suspect for its failure to address the plain language of section 881(a)(6) and the legislative history, but it cites as support a Ninth Circuit decision involving section 881(a)(4) in 1977 prior to the amendment to section 881(a)(4) adding a statutory innocent owner defense.<sup>103</sup> In a January 1992 unpublished decision, the Ninth Circuit, without citing to either of its prior section 881(a)(6) cases, applied the actual knowledge test.<sup>104</sup>

In the Eleventh Circuit, like in the Ninth Circuit, the quantum of knowledge necessary to be an innocent owner is not clear at this time.

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but sidestepped the issue of whether "knowledge" means actual knowledge. *United States v. Parcel of Real Property Known as 6109 Grubb Road, Millcreek Township, Erie County, Pa.*, 886 F.2d 618, 626 (3d Cir. 1989). The trial court had adopted an actual knowledge test. *Grubb Road*, 708 F. Supp. at 698, 702 (W.D. Pa. 1989).

100. There are no definitive decisions in the Third, Seventh, Eighth, Tenth and D.C. Circuit Courts of Appeal on the section 881(a)(6) innocent owner standards.

101. *1980 Red Ferrari*, 827 F.2d at 478-79.

102. *United States v. \$215,300, U.S. Currency*, 882 F.2d 417, 420 (9th Cir. 1989) (citing *United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386, 1389 (9th Cir. 1977)).

103. *Id.* Section 881(a)(4) was not amended until November 18, 1988 to provide for an innocent owner defense. *See* Pub. L. 100-690, § 6075(1)-(3), 102 Stat. 4181, 4324 (1988).

In *United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-30-71 (4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii*, 902 F.2d 1443 (9th Cir. 1990), the court seemed to adopt an actual knowledge standard in a section 881(a)(7) case. *Id.* at 1445 (the intent of the forfeiture statute "would be substantially undercut if persons who are fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners.") (rejecting the disjunctive reading of knowledge or consent in requiring the claimant to prove both that he did not know nor did he consent to the illegal activities).

104. *United States v. U.S. Currency, \$584,091*, 952 F.2d 1400 (9th Cir. 1992) (unpublished disposition text in WESTLAW).

In its first section 881(a)(6) decision addressing innocent ownership, the court explicitly stated that the standard was actual knowledge rather than constructive knowledge.<sup>105</sup> In the footnote following this statement the court questioned the government's invocation of *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>106</sup> which articulated a constitutional defense to forfeiture if a claimant could show that "he had done all that reasonably could be expected to prevent the proscribed use of his property." However, in the same footnote the court concluded that because it found that the claimant failed to meet the actual knowledge standard it would "leave for another day the question of the applicability of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. section 881(a)(6)."<sup>107</sup>

Five years later the court seemed to adopt the actual knowledge test for the application of the innocent owner provision in a section 881(a)(7) case.<sup>108</sup> The following year in another section 881(a)(7) case, the court explicitly held that "[a]pplication of the innocent owner defense turns on the claimant's actual, rather than constructive, knowledge."<sup>109</sup> Then, just two months later in *United States v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach, County Florida (15603 85th Avenue North)*, a panel of the Eleventh Circuit including one of the same judges who had just adopted the actual knowledge test, applied the "reasonably possible" language of *Calero-Toledo* to an unusual section 881(a)(6) case.<sup>110</sup>

In *15603 85th Avenue N.*, two brothers contributed funds to the construction of a house that they owned jointly. The district court found that the funds of the bad brother were exclusively the product of drug trafficking, but that the funds of the good brother were from legitimate sources. However, the district court also concluded that the good brother had actual knowledge that his brother's funds were derived from drug trafficking. The Eleventh Circuit held that legitimate funds are forfeitable when they are knowingly commingled with bad funds.<sup>111</sup>

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105. \$4,255,000.00, 762 F.2d at 906.

106. 416 U.S. 663 (1974)

107. \$4,255,000.00, 762 F.2d at 906 n.24.

108. *United States v. One Single Family Residence, Located at 15621 S.W. 209th Ave., Miami, Florida*, 894 F.2d 1511, 1513 (11th Cir. 1990).

109. *United States v. Real Property at 5000 Palmetto Dr., Fort Pierce, St. Lucie County, Florida*, 928 F.2d 373, 375 (11th Cir. 1991) (citing \$4,255,000.00, 762 F.2d at 906).

110. 933 F.2d 976, 982 (11th Cir. 1991) (footnote omitted).

111. *Id.* at 982.

After finding that the “good brother” had actual knowledge of the commingling of legitimate and drug funds, the court held he could still be spared forfeiture as an innocent owner if he proved that he did everything reasonably possible to withdraw his commingled funds or dispose of the property upon learning of the illegal nature of the other funds.<sup>112</sup>

The court’s decision can be interpreted as upholding the actual knowledge test while at the same time allowing a claimant who has actual knowledge of the illegal source of the funds to show that he did not consent to commingling his legitimate funds with those from an illegal source. This is essentially the same approach that the Second and Third Circuits have followed.<sup>113</sup> On the other hand, the court did hold the “reasonably possible” language of *Calero-Toledo* applicable to a section 881(a)(6) case for the first time.<sup>114</sup>

The failure of the Ninth Circuit, and possibly the Eleventh, to follow the plain language of the statute and instead impose a negligence standard derives from the Supreme Court’s dicta in *Calero-Toledo*. In this 1974 decision, a pleasure yacht was leased by its owners to Puerto Rican citizens. Fourteen months after it was leased, Puerto Rican authorities discovered one marijuana cigarette on board and sought its forfeiture pursuant to a Puerto Rican forfeiture statute.<sup>115</sup> The authorities conceded that the yacht’s owner was not involved in the lessee’s activities and “had no knowledge that its property was being used in connection with, or in violation of [Puerto Rican law].”<sup>116</sup> Recognizing the extraordinarily harsh result of allowing forfeiture of the yacht under such circumstances, the court noted the existence of “serious constitutional questions.”<sup>117</sup> One such constitutional question was whether an owner who proved not only that she was uninvolved in and unaware of the wrongful activity, but also that she had done all that reasonably could be expected to prevent the proscribed use of her property, could suffer its forfeiture.<sup>118</sup>

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112. *Id.* (citing *141st Street Corp.*, 911 F.2d at 878-879).

113. *See 141st Street Corp.*, 911 F.2d at 876-80; *Grubb Road*, 886 F.2d at 626.

114. *Id.*

115. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 1663, 1664-65, 1694 (1974) (Douglas, J., dissenting).

116. 416 U.S. at 668.

117. *Id.* at 689.

118. *Id.* The Court rejected the application of this defense in the case stating “no allegation has been made or proof offered that the company did all that it could reasonably do to avoid having its property put to an unlawful use.” *Id.* at 690. In other words,

Unlike section 881(a)(6) and section 981(a)(2), the Puerto Rican statute at issue in *Calero-Toledo* did *not* provide a statutory innocent owner defense. The *dicta* in *Calero-Toledo*, therefore, must be read as a defense of last resort. In other words, it is only applicable as a saving provision, when there is no statutory innocent owner defense. There is simply no legitimate basis to substitute a negligence test based on a constitutional defense for a statutory defense which specifically requires that a claimant only prove that she did not know or consent to the illegal activity.

There is no suggestion in the legislative history of section 881(a)(6) to explain or justify the basis for a negligence standard in the place of an actual knowledge standard. In fact, the enactment of the statutory innocent owner defense after *Calero-Toledo* has been interpreted as a congressional rejection of such a heavy burden.<sup>119</sup> Moreover, the First and Sixth Circuits which have adopted the actual knowledge standard have explicitly rejected the application of the "all reasonable efforts" test.<sup>120</sup>

#### D. *Application of the Innocent Owner Defense in Parallel Market Cases*

In a case involving a Colombian cambio which received cash from its customers, the Eleventh Circuit applied the actual knowledge standard and affirmed the forfeiture of more than \$4,255,000 in a bank account and more than \$3,686,000 in cash.<sup>121</sup> More than \$240,000,000

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because the claimant had not raised a constitutional claim for which there was no prior case law support, it was sunk.

119. *316 Units of Municipal Securities*, 725 F. Supp. at 180.

120. *One Urban Lot*, 865 F.2d at 430 (unlike *Calero-Toledo*, "we have a statute that provides for an exception for innocent owners. 21 U.S.C. section 881(a)(6). This statute does not in any way limit innocent owners to those who have done all that reasonably could be expected to prevent the proscribed use of the property. *Calero-Toledo*. In fact, the statute specifically refers to the knowledge and consent of the owner as the appropriate considerations in determining who is accepted."); *Lots 12, 13, 14, and 15*, 869 F.2d at 947 ("[t]he constitutional question [raised in *Calero-Toledo*] is not presented here, because the statute with which we are concerned [section 881(a)(7)] imposes no requirement that a person who claims the status of an innocent owner establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property").

121. *\$4,255,000*, 762 F.2d at 902. Although the Eleventh Circuit decision indicates in one place that the \$4,255,000 was currency, it indicates the to the contrary at a later reference and the district court decision is consistent with the latter reference.

in cash was deposited to the defendant account in less than eight months.<sup>122</sup> In addition to the numbing amount of money involved and the fact that it was all in cash, the claimant made several statements and made one request of the bank demonstrating his "gnawing belief that the funds being dealt with were tainted."<sup>123</sup> Since \$4,255,000 is a case with facts which are not likely to be repeated and involve the cambista himself, it is of limited predictive value in determining the limits of actual knowledge.

There are however two instructive decisions among the Hawaii *All Monies* cases. In *All Monies (Leloach)*, the claimant was a Peruvian cambista who bought his dollars from another cambista.<sup>124</sup> Considering itself bound by the Ninth Circuit's decision in \$215,300, the district court required the claimant to prove not only that he did not know of the illegal activity or willfully blind himself to it, but also that he "did all that reasonably could be expected to prevent the illegal use of his . . . account."<sup>125</sup>

The facts examined by the court focused on the legitimacy of the claimant's money exchange business. The court appears to have broken down the concept of legitimacy into two issues: whether the currency exchange business itself was legitimate and then whether Leloach's cambio in particular was legitimate. The court accepted Leloach's contention that his business operated within the monetary laws in Peru, but was unable to resolve whether or not the company violated Peruvian anti-flight capital laws.<sup>126</sup> The court then examined whether the claimant's cambio account was under the effective control of the money laundering organization. The court found numerous admissible facts indicating that it may have been under the actual control of Dirimex, another Peruvian cambio, as well as the particular partner of Dirimex who was the money launderer.<sup>127</sup> The court also noted several facially

See 762 F.2d at 898, 904; 551 F. Supp. at 316 (S.D. Fla. 1985).

122. \$4,255,000, 762 F.2d at 904.

123. *Id.* at 906. Claimant approached the vice president of the bank and asked if the government could seize the account. When advised that such a seizure was possible, the claimant asked if the bank would make his company a loan to cover the funds on deposit in the account in order to thwart a forfeiture. This conversation took place six months before the seizure. *Id.* at 900.

124. 754 F. Supp. at 1482 (for pertinent facts of this case, see *supra* text accompanying notes 53-57).

125. *Id.* at 1478.

126. *Id.* at 1478-79

127. *Id.* at 1479-80.

suspicious aspects of claimant's conduct of his money exchange business, but acknowledged the claimant's explanations and denied both the claimant's and the government's motions for summary judgment on the innocent ownership defense.<sup>128</sup>

The innocent owner issue was resolved favorably to the claimant in *All Monies (Abusada)*, who also purchased tainted dollars from Dirimex, but for personal use rather than in a commercial setting.<sup>129</sup> In *All Monies (Abusada)*, the court granted the claimants' summary judgment motion because they met their burden of establishing their innocent ownership defense.<sup>130</sup> The claimants produced unrefuted business records indicating that the transfers into their account were made through what they believed was a legitimate money exchange house. Claimants also swore they had no knowledge of the drug trafficker or of his illegal operation.<sup>131</sup> With respect to the money transferred into their account which the government contended was tainted, the claimants presented evidence that they paid for those transfers with money from their domestic Peruvian bank accounts.<sup>132</sup> In short, the govern-

128. *United States v. All Monies* (\$477,048.62) in Account No. 90-3617-3, Israel Discount Bank, New York, New York, 754 F. Supp. 1467, 1479 (D. Haw. 1991). The cambio's dollar bank account was maintained in New York, the records were kept there, the claimant never saw the records personally, and when the claimant's wife went to New York, she destroyed the records. The claimant did not want any paper trail in Peru connecting him with wealth because people who are known to be wealthy are subject to violence, kidnapping and extortion. *Id.* The claimant admitted that he never asked the people from Dirimex where they obtained their dollars. He contended, however, that such questions would have been futile because of the common practice of Peruvian cambistas to guard the confidentiality of their sources. *Id.* at 1480. He also offered two reasons for that confidentiality: a cambista who discloses his source can lose it to a competitor and inquiry into the sources of money may compromise the physical safety of both the clients and the people asking the questions because of the violence which can result if personal wealth becomes known. *Id.*

Of approximately 370 deposits into the subject account in 1988 and 1989, only 34 were the product of transactions between the claimant and Dirimex. Moreover, many of the 34 deposits came from accounts as to which the government did not offer any evidence to prove they were affiliated with drug trafficking.

129. 746 F. Supp. at 1440.

130. *Id.*

131. *Id.*

132. *Id.* In fact, at the time of seizure the government was unable to trace any tainted funds in the account. Approximately one year later, the government was able to trace approximately one-third of the account balance to allegedly tainted accounts. The court then held that an illegal seizure would not preclude forfeiture so long as the government could establish probable cause for the forfeiture without using evidence

ment failed to present evidence to rebut the claimants' proof that they neither knew nor consented "to any of the illegal activity taking place with respect to the defendant account."<sup>133</sup>

In the context of a bank account seizure, the illegal activity which the claimant must actually know of can only mean that the funds deposited into the account were proceeds of drug trafficking or money laundering. If the claimant is "without knowledge of the matter in which the proceeds were obtained" he is an innocent owner.<sup>134</sup> A foreign owner does not lose his innocence merely because he knows that the funds coming into his account were involved in a violation of a capital flight restriction, a currency exchange regulation or a tax law of his country.<sup>135</sup>

Once the claimant testifies that he did not know the dollars he purchased from the cambista were proceeds of drug trafficking or money laundering and the government has no evidence to show that his purchase was anything other than a typical parallel market purchase, can the government properly argue that the mere act of purchasing dollars on the parallel market demonstrates knowledge that the dollars purchased were tainted by drug crimes or money laundering? Clearly not. The appropriate inquiry is a subjective one: whether the claimant in a particular case had the requisite knowledge, not whether some tainted funds are laundered through the parallel market. Because virtually no claimant knows he is buying tainted money, whether a particular claimant has the requisite knowledge will turn, in almost all cases, on whether he was willfully blind.

In the legislative history of the Money Laundering Control Act of 1986, Congress gave explicit guidance on what would constitute knowledge in the money laundering context by citing<sup>136</sup> the leading case on willful blindness: *United States v. Jewel*.<sup>137</sup> In considering willful blindness to be the equivalent of knowledge, the *Jewel* court emphasized that the requisite state of mind was only different from positive knowl-

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tainted by the illegal seizure. *Id.* at 1438 (citing *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983)).

133. *Id.*

134. *See supra* text accompanying notes 90-91.

135. *See* 18 U.S.C. § 981(a)(1)(A) (Supp. 1992) (laws requiring filing of currency transaction reports, forbidding structuring of deposits, money laundering, or engaging in monetary transactions in property derived from specified unlawful activity).

136. SENATE REP. 99-433 at 9-10.

137. 532 F.2d 697 (9th Cir.) *cert. denied*, 426 U.S. 951 (1976).



edge "so far as necessary to encompass a calculated effort to avoid the sanction of the statutes while violating its substance."<sup>138</sup> Congress elaborated on this definition of knowledge by giving contrasting examples:

Thus a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of involvement with crime, cannot be convicted of the offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.<sup>139</sup>

To prove innocent ownership a claimant must credibly testify only that he did not know his cambista had any involvement in money laundering. The claimant must do no more. Requiring a claimant to have asked the cambista where he purchased his dollars would be an exercise in futility. Commercial considerations render it futile.<sup>140</sup> A

138. *Id.* at 704 (citation omitted).

139. SENATE REP., *supra* note 137. While the Senate's examples are given in the context of criminal *mens rea*, the same standard of knowledge should apply in a civil forfeiture setting. After all, in civil forfeitures it is the claimant who has the burden of proving the absence of the requisite knowledge.

Large numbers of foreign citizens' accounts have been seized and subjected to forfeiture until they could prove that the government had not properly traced the funds or that they were innocent owners. In contrast, very few car dealership accounts have been seized; why not more? Could it be that car dealers have more political clout than non-residents? Imagine the howls of protest in Washington if 680 or even 88 had their operating accounts seized the same day. Does the government merely give car dealers or jewelers, rather than Colombians and Peruvians, the benefit of the doubt? Is it because the example given by the Senate could be superficially read to condemn currency exchangers and exonerate car dealers? Seriously though, there is a shared perception in Colombia that innocent Colombian citizens are being made the scapegoats for the failure of the United States to conquer its drug problem.

140. Cynics might argue that is futile because a crooked cambista will never indicate that his sources are drug traffickers and money launderers. Assume a claimant had asked his cambista to identify the sources of his dollars and the cambista responded by saying that he got his dollars from tourists, exporters of legitimate goods who did not declare all of their receipts, wealthy Colombians/ Peruvians (that he personally knows are not involved in drug trafficking or money laundering) who want to exchange their dollars for pesos/intis in order to repatriate their capital, etc. Surely a

cambista is a broker. If he reveals his source of funds he runs the risk that his customers will deal directly with each other.<sup>141</sup> Additionally, the identification of sources of wealth is also discouraged if not outright refused because of the violence in the form of extortion, kidnapping and sometimes murder of wealthy individuals.<sup>142</sup> So long as the claimant has a good faith belief that he is not buying the proceeds of drug trafficking or money laundering, his account should be immune from forfeiture under the current state of the law. Purchasing in the face of suspicion that some of the funds available on the parallel market are tainted does not rise to willful blindness that the dollars his cambio is selling are, in fact, tainted. Even in Congress' example the car dealer who merely suspected his customer of involvement with crime, did not have the requisite knowledge.<sup>143</sup>

In the few claims still unresolved from Operation Polar Cap (IV) as well as in the *All Monies* cases, the government has attempted to defeat the innocent owner defense by expert testimony as to the percentage of tainted funds in the Colombian and Peruvian parallel markets. While it is beyond the scope of this article to opine on the validity of the research methods used to calculate such results, it should be noted that the estimates range from 25 percent to 60 percent on the Colombian parallel market.<sup>144</sup> The actual percentage of tainted funds in the parallel markets is a subject of intense debate.<sup>145</sup> Since the actual numbers are inherently unknowable any precisely stated percentage is unreliable.

While the actual percentage may be debated by economists and statisticians, the actual number is irrelevant for purposes of an innocent owner defense. It is the claimant's knowledge, not the expert's, that is relevant. A claimant may believe that drug traffickers launder money in the parallel market. However, if he has never had, and is not aware of any specific instances where *his* cambista has dealt in tainted funds, that should be sufficient to satisfy an actual knowledge/willful blind-

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claimant is not under an affirmative obligation to confirm the truth of the cambista's statement. *See, e.g., Banco Cafetero*; 797 F.2d at 1162 (claimant bank has no duty to investigate the source of its customer's deposits).

141. *See All Monies (Leloach)*, 754 F. Supp. at 1480.

142. *Id.* at 1479.

143. *See supra* text accompanying note 140.

144. Grosse, *Colombia's Black Market and Foreign Exchange*, forthcoming in *WORLD DEVELOPMENT* (1992).

145. *See* Deposition of Norman Bailey at 4, *Eighty-Eight (88) Designated Accounts*, No. 90-1203-Civ-NESBITT (S.D. Fla. January 29, 1991).

ness standard. To insist on more than that would, at a minimum, entail the application of the defense of last resort, the constitutionally based negligence standard. As discussed above, this is not the standard applicable to a statute which specifically provides an innocent owner defense.<sup>146</sup>

#### IV. CONCLUSION

The government has probably seized more than five hundred bank accounts based on purchases of dollars in the parallel markets of Latin America without any reason to believe that the owners of these accounts knew of the drug trafficking or money laundering source of some of the deposits. In terms of case specific results, this policy and its execution have been a dismal failure. More than 95 percent of the funds seized have been returned to claimants who are not themselves cambistas based on defenses of a lowest intermediate balance and/or innocent ownership. The government's lack of selectivity in applying the facilitation theory has resulted in the seizure of entire accounts instead of only seizing the traceable proceeds. Such prosecutorial indiscretion has imposed significant hardship on hundreds if not thousands of innocent bystanders in our war on drugs. Whether the *in terrorem* effect of such improvident actions truly jeopardizes the activities of the real money launderers or merely staggers our international banking and investment communities by driving innocent owners to other shores remains to be seen.

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146. See notes 91, 115, 116 and surrounding text.

## Commentary: AIDS Testing of Health Care Workers

**State Representative Lois J. Frankel\***

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It is very curious how some people think legislators can write laws that give people absolute protection from certain risks or harm. Laws which are well-considered may reduce risks and offer substantial protection from harm; for example, laws prohibiting murder or requiring the wearing of a seat belt. Both of those laws, when obeyed, save lives and reduce risks. But, obviously many people still commit murder. Even more people do not wear seat belts and get injured in automobile accidents. While saving thousands of lives each year, these laws do not offer absolute protection.

Each year in this country, and especially in Florida, many children lose their lives by drowning. Legislation which, for example, would require all open bodies of water to be fenced might save a few lives a year. But, the high cost and impracticality associated with the implementation of such a law would make it an unwise use of resources. Resources could be better spent teaching children about water safety and how to swim.

Every year when the state Legislature meets in Tallahassee, legislators are asked to consider hundreds and hundreds of proposed bills. There are already thousands of pages of law in statute books which regulates every part of our life and death.

However, it is my opinion, one which I believe is shared by most Americans, that before government interferes in, or mandates, certain behavior of a private citizen, a particular government action should be in the greater public or state interest. And, in looking to prevent a particular harm or reduce a risk, one must weigh the significance of the risk against the cost of reducing the risk both in economic and other social consequences. So, for example, in evaluating the law which requires seat belt usage, law makers would want to assess the cost of seat belts and enforcement versus the reduction in morbidities and mortalities.

This general discussion leads nicely to the more specific issue of whether law makers should require mandatory testing of health care

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\* Member, Florida House of Representatives, District 83; J.D., Georgetown University, 1973; B.A., Boston University, 1970.

workers (HCWs) for the human immunodeficiency virus (HIV) and/or restrict in any way the practice of an HIV-infected HCW. It is truly a political dilemma because public opinion polls clearly indicate the public overwhelmingly believes that the answer to this question is yes. This article will analyze the issue and soon it will become evident that the obvious and simple answer may not be so obvious and simple after all.

First, a review of the chronology of events leading to this discussion would be in order. In July of 1990, the Center For Disease Control (CDC) reported a transmission of HIV involving a Florida dentist and a twenty-two-year-old patient. The report issued by CDC indicated that the patient had no identifiable risk behaviors or factors, the dentist had AIDS at the time of the dental procedure performed, and that there was a high degree of DNA sequence similarity between the HIV strain infecting the patient and the dentist. On September 4, 1990, the Florida Department of Health and Rehabilitative Services released a letter written by the dentist to all his patients which advised that they seek counseling and testing. Subsequently, it was announced four other patients of the dentist had tested positive for HIV and also had a high degree of DNA sequence similarity.

On February 21, 1991, the CDC had an open meeting in Atlanta, Georgia, on the risk for transmission for blood-borne pathogens for patients during invasive procedures. Representatives from eighty organizations testified. Without exception, every organization opposed mandatory HIV testing. There was a least one individual representing himself who was a proponent of mandatory testing, however, and there were various groups and individual advocates who testified that HIV-infected professionals should voluntarily restrict their practice and/or disclose their positivity to their patients.

Prior and subsequent to the February CDC meeting, the first dental patient's family and attorneys went on a media campaign calling for the mandatory HIV testing of health care workers and for the disclosure by HIV-infected health care workers to their patients of HIV status. This media avalanche brought on a flurry of proposed legislation around the country including: United States Senator Jesse Helms<sup>1</sup> sponsored amendment, which imposed a criminal penalty on HIV-infected doctors who treat patients without disclosing their HIV status;<sup>2</sup>

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1. Helms, a Republican, is the senior United States Senator from North Carolina.

2. See 137 CONG. REC. S10331-01 (daily ed. July 18, 1991) (discussion of Helms amendment, No. 734).

and, Congressman Bill Dannemeyer's<sup>3</sup> bill which requires mandatory HIV testing for HCWs.<sup>4</sup>

Congress did not pass either of the foregoing proposals, but instead enacted legislation requiring states to enforce CDC recommendations or lose Title 42 funding which equates to billions of dollars for health, social service, environmental, and housing assistance from the federal government.<sup>5</sup> The new law read:

(a) Notwithstanding any other provision of law, a State shall, not later than 1 year after the date of the enactment of this Act, certify to the Secretary that such State has in effect regulations, or has enacted legislation, to adopt the guidelines issued by the Centers for Disease Control concerning recommendations for preventing the transmission, by health care professionals, of the human immunodeficiency virus and the hepatitis B virus to patients during exposure prone invasive procedures. Such regulations or legislation shall apply to health professionals practicing within the State and shall be consistent with Centers for Disease Control guidelines and Federal law. Failure to comply with such guidelines, except in emergency situations when the patient's life is in danger, by a health care professional shall be considered as the basis for disciplinary action by the appropriate State licensing agent.

(b) . . . [I]f a State does not provide the certification required . . . [w]ithin the 1-year period described . . . , such State, should be ineligible to receive assistance under the Public Health Service Act (42 U.S.C. 301 et. seq.) until such certification is provided."<sup>6</sup>

In other words, the pain of noncompliance to a state's budget would be unbearable.

On July 15, 1991, CDC proposed guidelines for preventing transmission of HIV or HBV<sup>7</sup> during exposure-prone invasive procedures. They advised: 1) all health care workers should adhere to universal precautions; 2) there was no basis for restricting the practice of health care workers from procedures not identified as exposure prone, provided universal procedures were practiced; 3) exposure prone proce-

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3. Dannemeyer is a Republican congressman from California.

4. See 136 CONG. REC. H3520-02 (daily ed. June 13, 1990) (consideration of House Resolution 4785).

5. See 137 CONG. REC. H7383-01 (daily ed. Oct. 2, 1991) (regarding 42 U.S.C. § 634).

6. *Id.*

7. Hepatitis B virus.

dures should be identified by medical/surgical/dental organizations and institutions at which these procedures are performed; 4) health care workers who perform exposure prone procedures should know their HIV antibody status; 5) health care workers who are infected with HIV should not perform exposure prone procedures unless they have sought counsel from an expert review panel and have been advised under what circumstances, if any, they may continue to perform these procedures. Such circumstances would include notifying prospective patients of the health care workers positivity before they undergo exposure prone invasive procedures.

The sixth recommendation by CDC was that mandatory testing of health care workers for the HIV antibody was not recommended. "The current assessment of risk that infected health care workers will transmit HIV to patients during exposure prone procedures does not support the diversion of resources that would be required to implement mandatory testing programs. Compliance of health care workers with the recommendations can be increased through education, training, and appropriate confidentiality safeguards."<sup>8</sup>

Following the release of these proposals CDC met immediate resistance. Professional organizations such as the American Dental Association said they would and could *not* publish a list of so-called risky procedures. The State of New York determined it would not cooperate; thus, risking the loss of billions of federal dollars. Even the American Medical Association, which at first had been one of the sole supporters of generating such lists, decided it could not develop such a list.

CDC again went back to the drawing board and at the time of the writing of this article stated it would be drafting yet another set of guidelines that would call for a case-by-case evaluation of HIV-infected HCWs.

It is with that backdrop that state legislatures across the country, including Florida's, must determine whether to follow CDC guidelines or give up federal public health dollars; or, to go further than federal law on the issue of testing and restriction. At least one state, Illinois, has passed a law which requires health care workers with AIDS to disclose that information to their patients. In discussing what, if any, action the Florida Legislature should take in this regard, this article will

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8. Centers for Disease Control, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 MORBIDITY AND MORTALITY WEEKLY REPORT, 1 (July 12, 1991).

look separately at the two issues of mandatory testing and restriction and disclosure.

On the issue of mandatory testing, we first need to address the question of risk. What is the risk that we seek to reduce by testing health care workers? After we examine the risk, we can then address the question of how much it would cost to reduce the risk in terms of economic and other consequences.

To understand risk, one should get a feel for the relative risk. CDC estimates that a person has approximately a one in 20,000 chance of being in an airplane crash, a one in 50,000 chance of being struck by lightning and, if pregnant, a one in 15,000 chance of dying due to pregnancy or childbirth complications.

CDC tells us that a patient has about a one in 2.6 million chance of being infected with AIDS by a dentist. Ironically, there is a one in 5,200 chance of being killed in a car accident on the way to the dentist. Where, however, the risk involves a known HIV-infected HCW, the odds of infection are reduced. For example, according to CDC there is a one in 416,667 probability for transmission to a single patient by a HIV-infected surgeon. The cumulative probability that an infected surgeon will transmit HIV to at least one patient over a period of seven years is even further reduced. CDC does caution that these probabilities are based on certain models that could be affected by many variables such as whether or not universal precautions are used.

Even so, of the 200,000 AIDS cases in the United States, there have been only five documented transmissions from health care worker to patient - that being the aforementioned case of the Florida dentist. In look backs of more than 2,100 patients of six different HIV-infected physicians, researchers have found no linkage between HIV-infected workers and HIV-infected patients.

According to the scientific community, there is a lack of scientific evidence indicating that there is more than an infinitesimal risk of transmission involved even where procedures are labeled exposure prone. Of course, there are those skeptics who claim that "there is so much we do not know" about AIDS. That raises the question whether law makers pass laws based upon what we know or what we don't know.

It appears that the risk of transmission of HIV infection from a HCW to a patient is not great. However because the harm we are seeking to reduce is death, we need to look at the cost and other consequences of reducing the risk.

The estimated cost of mandatory HIV testing varies depending



upon such things as who will be tested, the number of times the test will occur, and whether there will be counseling with the testing as currently mandated by Florida law. The Florida Health and Rehabilitative Service (HRS) agency estimates that there are 250,000 health care workers in Florida whose occupations put them in situations where there could possibly be a blood-to-blood exposure between a HCW and a patient. At a hearing of the Joint Task Force on AIDS Oversight, a joint legislative committee of the Florida Legislature, an HRS representative testified that it would cost \$50 million a year for all those workers to be tested on a twice-a-year basis. This figure takes into account not only the cost of a HIV test and in some instances a confirmatory test, but also the cost of counseling, increased personnel, laboratory space and equipment that would be necessitated by a deluge of new testing. That figure is more than twice what Florida currently spends on AIDS education, testing, counseling and treatment.

Should legislators during a time of recession and severe budget cuts divert so many millions of dollars to protect the public against what appears to be a minimal risk? And, there are other factors to consider.

Opponents of mandatory HIV testing claim that it would cause a false sense of security because the best and only real protection against transmission of infection is the use of universal precautions. There is an approximate six-week "window" period in which a person may be infected with AIDS but the virus will not be detected by a test. Thus, a person could be infected and show a negative test result and, obviously, a person could be infected any time subsequent to a negative AIDS test as well.

Then, there is the potential of the reduction of health care professionals willing to treat HIV-infected persons. If onerous conditions are placed on HCWs, there is justified concern many of these workers will question why they should risk their professional careers by treating HIV-infected patients. Sadly enough, a recent polling of the membership of the American Medical Association indicated only one-third of all primary care doctors believed that they had a responsibility to take care of AIDS patients.

There is the logistical problem of screening. How often should it be done, once a year, twice a year, after every blood exposure, or after every new sex partner?

There is also the concern that the initiation of mandatory testing for health care workers would just be the start of costly and questionably effective mandatory testing schemes for other groups of people. For

example, HRS estimates that the mandatory testing of all patients entering Florida hospitals in one year would cost \$175 million. The Illinois experience after passing law in 1988 requiring HIV tests of all persons applying for marriage licenses turned out to be a major failure. Not only did the number of marriages in the state drop by 17,000 in the year following the passage of the law, but there was a wasteful diversion of millions of dollars. In the year following passage, 156,000 people were tested and only twenty-six were found to be HIV positive. At an estimated cost of \$25 to \$100 per blood test, this represented a cost of \$150,000 to \$600,000 to find just one infected person.

In summary, in light of CDC guidelines, the relative unsophistication of the HIV test, the high cost of a mass testing scheme, the diversion of valuable dollars and the already minimal risk, it is not likely that many state legislatures will be adopting mandatory testing laws.

The question of what to do with the HIV-infected HCW is a more difficult issue than that of mandatory testing. Some legal medical experts who concur in their opposition to mandatory testing disagree on whether or not a HCW should be obligated to reveal his or her HIV status to their patient. Larry Gostin of Harvard writes that HCWs who are infected with HIV should not perform exposure prone procedures unless they have been before an expert review panel and then notify the patient before they undergo exposure prone invasive procedures.<sup>9</sup>

Chai R. Feldblum of Georgetown argues that remote risks associated with a provider are completely outside of the doctrine of informed consent. She contends that if providers are required to inform a patient of HIV infection they should also be required to disclose marital problems, substance abuse problems, insomnia or any other psychological or physical factor that might in some way endanger the patient. She argues that if a provider truly poses a real risk, the only solution is a restriction. Otherwise it is an unnecessary invasion of privacy of a provider.<sup>10</sup>

Disclosure is most likely tantamount to an automatic restriction since most patients would probably not seek the services of an HIV

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9. Larry Gostin, *HIV-infected Health Care Professional: Public Policy Discrimination and Patient Safety*, 18 *LAW, MEDICINE AND HEALTH CARE* 303 (1990). See Larry Gostin, *HIV-infected Physicians and the Practice of Seriously Invasive Procedures*, 19 *HASTINGS CENTER REP.* 32 (1989).

10. See Chai R. Feldblum, *A Response to Gostin: HIV-infected Health Care Professional: Public Policy Discrimination and Patient Safety*, 19 *LAW, MEDICINE AND HEALTH CARE* 134 (1991).

infected professional. However, the cost there to society is not minimal. There are figures suggesting a loss of \$1.6 billion dollars in training expenses for HIV-infected health care workers should they leave the profession.

Proponents of the now-defunct July 1991 CDC guidelines say that regardless of the minuteness of the risk, any error should be on the side of protecting the patients. This is the most popular political position to take. The correct social and health policy still remains fuzzy.

In Florida, we have elected to take an approach leaving the decision of how to handle HIV-infected health care workers to the professional regulatory boards and HRS. Under Florida Statute § 455.2224, the health-related regulatory boards are given the authority to handle, counsel and serve HIV and hepatitis-infected health care professionals under their regulations. So, for example, the Florida Board of Medicine is authorized to handle, counsel and serve any HIV or hepatitis-infected physician. A similar responsibility is given to HRS to serve, counsel or handle the health care workers that they license under Florida Statute § 381.045.

The Florida Board of Dentistry has already taken strong steps toward implementing its authority. It have strengthened infection control procedures and the penalties enforcing them. And, it proposes to refer HIV-infected dentists to the Impaired Practitioner Program which is currently used for dentists suffering from drug or alcohol abuse.

Florida law also requires AIDS education as a condition of licensing for all health care professionals under Florida Statutes §§ 455.2226, 455.2228, and 381.0034. The direction that the Florida Legislature has chosen to go on this issue is consistent with its longstanding approach to follow CDC guidelines and to avoid emotionalized legislation. Unfortunately, the recent incident of the apparent transmission of HIV infection from the Florida dentist to five of his patients has given another opportunity to right wing politicians to righteously declare that it is time to consider AIDS a public health disease and not a civil rights disease.

Such rhetoric is verbally wrong and inflammatory. In fact, we will never stop the spread of AIDS unless people feel they can come forward for testing, counseling and treatment without being punished or ostracized. Confidentiality, informed consent testing and anti-discrimination laws are not only compatible with public health but actually facilitate the fight against HIV infection.

The Florida AIDS Omnibus Bill of 1988 and Florida's subsequent AIDS legislation adopted this strategy and, therefore, the underpinning

of the Florida AIDS law is education, confidentiality and informed consent testing and strong anti-discrimination laws.

The question now is where do we go from here? If we give in to fear and hysteria and put into place what appears to be simple and obvious, but wrong, strategies, we will be wasting valuable dollars that could be used to save many lives. Unfortunately, there is no set of laws that will give the public absolute protection from HIV.

While the television talk show hosts spend hours debating whether we should test health care workers for HIV we allow hundreds of thousands of people to die from a known preventable health risk, i.e., breast cancer, infant mortality, hospital infections and even tired interns. We continue to sell tobacco and resist sex education in our schools.

As we struggle with this complex issue of testing, there are many things we know that we must do now. There must be improvements in infection control and non-stigmatized evaluation of HIV-infected health care workers. We must continue to focus on education and drug abuse treatment. And, at the top of the list is access to health care for the millions of Americans without it as vigorously recommended by the National Commission on Acquired Immune Deficiency Syndrome in its 1991 report.

Health care workers need to talk to their patients to alleviate their fears. Most importantly, politicians should not allow the issue to become political in any way. At stake are too many lives including those of our own children.

# The Doctrine of Merger With Respect to Real Estate Transactions: Taking the Bull by the Horns

Edwin M. Ginsburg\*

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## TABLE OF CONTENTS

I. PROLOGUE .....	1172
II. INTRODUCTION .....	1173
III. HISTORY AND BASIS OF THE DOCTRINE OF MERGER .....	1173
IV. DEVELOPMENT OF THE RULE IN FLORIDA .....	1178
V. ANALYSIS OF RECENT FLORIDA CASES: ARE THE EXCEPTIONS OVERTAKING THE RULE? .....	1182
A. <i>Merger Rule Applied; Contract Provision Unenforceable</i> .....	1183
1. Title Cases .....	1183
2. Accord and Satisfaction Cases .....	1183
B. <i>Exceptions to the Merger Rule; Contract Enforced</i> .....	1187
C. <i>Mistake, Accident, Fraud; Contract Enforceable</i> .....	1196
D. <i>Why Was the Merger Rule Applied, or Not Applied; An Attempt at Pigeon-holing</i> .....	1200
VI. "MERGER" HAS BECOME JUST A BUZZWORD; "ACCORD AND SATISFACTION" IS THE MORE APPROPRIATE DOCTRINE IN MOST CASES .....	1202
VII. CONCLUSION .....	1217
A. <i>Statutory Legislation</i> .....	1218
B. <i>Form Contracts</i> .....	1219
C. <i>Contract Preparation; Draftsmanship</i> .....	1221
D. <i>Enlightened Judicial Construction</i> .....	1223
APPENDIX OF FLORIDA CASES DEALING WITH THE DOCTRINE OF MERGER .....	1225

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## I. PROLOGUE

As I remembered it from law school (Property I, fall semester, 1961), once you closed, that was it! If a purchaser later on discovered a problem for which his seller would unquestionably be responsible under the contract of purchase and sale, forget it! That contract died. Something about a "doctrine of merger" that prevented suing on the original contract after the deal had closed.

So when the client walked into my office in 1979 (some eighteen years after my first encounter with "merger" back in Property I) complaining of no access to his recently purchased 4.5 acres of vacant land, my gut reaction (after first giving thanks that I had not represented him on the purchase) was: Forget it! "Merger" will preclude an action against his seller despite the seller's warranty of access under the contract of purchase and sale.

Preliminary research confirmed my recollection about the doctrine of merger, but also revealed that there were of course several exceptions to the doctrine. Maybe we could fall within one of those exceptions. Besides, we might also be of service to the client by obtaining access for his property ("right-of-way of necessity" rang another bell from Property I).

So, we took the case, and not without surprise summary judgment was promptly entered against us on our breach of contract action against the seller: The doctrine of merger barred our action.<sup>1</sup> The appellate court reversed, however, and sustained our claim, finding that we did in fact fall within one of those exceptions to the merger rule;<sup>2</sup> and the Florida Supreme Court upheld that ruling by denying certiorari.<sup>3</sup>

Now, another ten years have gone by and, having left private practice for the world of academia, I find myself *teaching* the doctrine of merger in Property class. This has prodded me to re-examine the rule and the growth of exceptions to the rule, and what I see is repeated misuse of the doctrine. If you'll stick with me for a while, I shall hope to adequately convey to you 1) why I conclude that the doctrine of merger has been bastardized, and 2) what I believe is the more legiti-

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1. Opler v. LaValle, No. 80-4345 (Fla. 11th Cir. Ct. 1980).

2. Opler v. Wynne, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981). Author's note: This is, of course, the same case as noted in the previous footnote.

3. Opler v. Wynne, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (Fla. 1982).

mate conceptual approach to analyzing these cases, namely that while there are a limited number of prescribed circumstances in which the doctrine of merger is the correct rule to apply, the vast majority of the factual situations should be viewed under the rules of accord and satisfaction.

## II. INTRODUCTION

The doctrine of merger, as it pertains to real estate transactions, is so easily and clearly stated as to defy its complexity: The covenants of the contract of purchase and sale are merged into the deed of conveyance upon the closing of the transaction, and such covenants are thereafter no longer enforceable.<sup>4</sup>

The *exceptions* to the doctrine, and the circumstances under which the doctrine is "inapplicable," are not so easily or clearly stated: Yet the number of recent Florida cases declining to apply the rule exceeds the quantity of cases in which the rule has been applied;<sup>5</sup> . . . which causes one to wonder: Have the exceptions overtaken the rule? More importantly, this provokes us to inquire whether the rule and its exceptions are being properly applied.

This article: 1) examines the history of and basis for the doctrine of merger as it applies to real estate contracts; 2) traces the development of the doctrine in Florida; 3) reveals a confusion in the case law in Florida, demonstrated by an attempt to categorize the various cases by those in which the doctrine is adhered to, versus those which fall within various exceptions to the rule; 4) attempts to analyze why the rule has, or has not, been applied in various situations; and 5) concludes that there *is* a rational basis conceptually and under very recent Florida case law for discerning when to apply the rule, and that the more appropriate doctrine to apply in most cases is that of accord and satisfaction.

## III. HISTORY AND BASIS OF THE DOCTRINE OF MERGER

A classic statement of the merger doctrine is:

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4. RESTATEMENT OF CONTRACTS § 413 (1932); *see also* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 10.12, at 696-97 (1984).

5. *See* APPENDIX OF FLORIDA CASES DEALING WITH THE DOCTRINE OF MERGER, *infra* [hereinafter APPENDIX].

In the absence of fraud or mistake, and in the absence of collateral contractual provisions or agreements which are not intended to be merged in the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, the agreement to convey being discharged or modified as indicated by the deed, and thereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed.<sup>6</sup>

Similarly, but more simply stated, the Florida courts have repeatedly stated the rule "that preliminary agreements and understandings relative to the sale of property usually merge in the deed executed pursuant thereto,"<sup>7</sup> and "acceptance of a deed tendered in performance of a contract to convey merges or extinguishes the covenants and stipulations contained in the contract . . . ."<sup>8</sup>

The classic statement of the doctrine of merger (hereinafter sometimes referred to simply as "the doctrine" or "the rule") has been repeated so frequently in essentially the form and substance as quoted above, that the courts and commentators may have lost sight of *why* the doctrine calls for the result of "extinguishing" the covenants of the contract.

The basis of the rule originates in the common law of England: Blackstone, in his *Commentaries on the Laws of England*, states that "whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is sunk or drowned in the greater."<sup>9</sup> Thus, with regard to the effect of the real

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6. RESTATEMENT OF CONTRACTS §§ 240(1)(b), 413 (1932). Because, as above quoted, such evidence is "inadmissible to vary or contradict" the deed, the parol evidence rule is sometimes stated as the basis for the merger rule, or it is said that the two rules are equated to or associated with each other. Professor Corbin disapproves of that connection, because the parol evidence rule is premised on the theory that the document represents the complete integration of the parties' discussions, negotiations and transaction, rather than operating to discharge an earlier agreement (as the deed operates to discharge the earlier contract under the merger rule). See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 316 (1962); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 587, at 506 (1960).

7. *Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967).

8. *Id.*

9. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 177 (1966).



property conveyance on the antecedent contract of sale, it is said that “[t]he lesser equitable estate created by the contract is necessarily merged in and swallowed up by the legal estate created by the deed.”<sup>10</sup>

As early as 1811,<sup>11</sup> and in a series of 1800s cases thereafter,<sup>12</sup> the common law of England had come to recognize this specific aspect of the doctrine of merger relating to real property contracts of sale merging into the deed of conveyance. Foremost among the reasons for application of merger to real estate contracts in the early English cases, was “*functus officio*,”<sup>13</sup>—the need for certainty and finality in land transactions, a point after which buyer and seller could no longer pursue claims under the contract.<sup>14</sup> The *functus officio* rationale is the natural consequence of the court’s recognition that parties to a contract for sale were entitled to (and frequently do) modify the contract (either knowingly, or without conscious act) prior to performance thereof; and—according to the law (and the needs of society)—there must come a point in time when all of these modifications reach fruition and are resolved with finality. That point is signified by the parties’ issuance and acceptance of the instrument of conveyance, which is nothing more than recognition of the elementary principle that a later agreement supersedes an earlier agreement addressing the same subject matter.<sup>15</sup>

At the same historical point in time, the early 1800s, American courts were likewise espousing the rule,<sup>16</sup> recognizing that “[a]rticles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed,

10. *French v. McMillion*, 91 S.E. 538 (W. Va. 1917) (the principle is well settled that a contract of sale is merged into the deed).

11. *Legge v. Croker* 1 Ball & B. 506, 12 R.R. 49 (Ir. Ch.) (1811).

12. *Id.*; see also *Brownlie v. Campbell* 5 App. Case. 925 (H.L. 1880); *Allen v. Richardson* 13 Ch. D. 524 (1879); *Besley v. Besley* 9 Ch. D. 103 (1878); *Mason v. Thacker* 7 Ch. D. 620 (1878); *Wilde v. Gibson* 1 H.L. Case. 605, 73 R.R. 191 (1848).

13. *Functus Officio* is defined as “A task performed. Having fulfilled the function . . . . Applied to . . . an instrument . . . which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.” BLACK’S LAW DICTIONARY 606 (5th ed. 1979); and “[O]f no further official authority or legal efficacy . . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 921 (1981).

14. “No rule of law is better settled than where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed.” R. DEVLIN, *THE LAW OF DEEDS* § 850a, at 1571 (3d ed. 1911).

15. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2d 1310 (1954).

16. *Houghtaling v. Lewis*, 10 Johns. 297 (N.Y. Sup. Ct. 1813); *Howes v. Barker*, 3 Johns. 506 (N.Y. Sup. Ct. 1808).

*prima facie*, an execution of the contract, and the agreement thereby becomes void, and of no further effect."<sup>17</sup> Indeed, in *Howes*,<sup>18</sup> Chief Justice Kent placed such emphasis on the merger rule that he referred to the deed as an insurmountable "impediment" to an action on the earlier contract—the deed being "the highest evidence of the final agreement of the parties."<sup>19</sup>

The doctrine of merger is said to be justified on the basis of various, stated reasons<sup>20</sup> other than, or in addition to, "functus officio." Nevertheless, no matter what the stated rationale, thorough analysis will always bring us back to the basis for the rule being that property transactions are inherently a "two-act" play<sup>21</sup> in which the two acts are separated by a lengthy "intermission;"<sup>22</sup> that the parties may during the intermission actually or impliedly change their initial agreement ("Act I"); and that whether or not they did in fact evoke a change, the second act (the closing) is deemed to carry out and fulfill the first act (the contract), so that the first act has been "swallowed up"<sup>23</sup> and is of no further legal effect.<sup>24</sup>

Along with the development of the merger doctrine to extinguish rights and obligations under the initial contract, there grew a series of *exceptions* to the rule that are utilized by the courts in those instances in which it would be inequitable, inappropriate, or simply unfair<sup>25</sup> to

17. *Houghtaling v. Lewis*, 10 Johns. 297, 299 (N.Y. Sup. Ct. 1813).

18. *Howes v. Barker*, 3 Johns. 506 (N.Y. Sup. Ct. 1808).

19. *Id.* at 528.

20. Other reasons for the doctrine: "Caveat emptor," the purchaser has a duty to investigate the title of the vendor. See Lyn L. Stevens, *The Role Of The Doctrine Of Merger In Contracts For The Sale Of Land—The Canadian Experience*, 8 U.B.C. L. REV. 35, 38 (1973). The right of the parties to modify their agreement during the interval between the contract and conveyance of the deed. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310, 1329 (1954); *Snyder v. Roberts*, 278 P.2d 348 (1955). Waiver and release of buyer's rights in the contract upon acceptance of deed. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310, 1312 (1954).

21. The contract of sale being "Act I," and the closing document(s) (e.g., the deed of conveyance) being "Act II."

22. The executory period being the "intermission;" i.e., the interval in between the two acts.

23. See *supra* note 10 and accompanying text.

24. *Sun First Nat'l Bank v. Grinnell*, 416 So. 2d 829 (Fla. 5th Dist. Ct. App. 1982). The court explained that the contract has been "fulfilled and exhausted," and it may have "historical, but no legal, significance." *Id.* at 834.

25. See CUNNINGHAM, *supra* note 4, at 697 n.60 (Merger may be so evidently unfair that a court may go to rather astonishing lengths to 'find' evidence that it was not intended by the parties.).

refuse to enforce the antecedent contractual covenants. The early New York case, *Bull v. Willard*,<sup>26</sup> for example, acknowledged and confirmed the merger rule, *prima facie*, but also recognized that “cases may arise in which the deed would be regarded as only a part execution of the contract,” and that the “unexecuted” covenants must remain enforceable under exceptions to the rule.<sup>27</sup>

In theory, the exceptions fall into several categories:

1. Fraud, mistake or accident<sup>28</sup>
2. Contract provisions that are not necessarily performed by the deed,<sup>29</sup> such as
  - a. “Collateral” or “independent” covenants.<sup>30</sup>
  - b. “Bifurcated” contract; “part performance.”<sup>31</sup>
  - c. Covenants that the parties “did not intend” to merge.<sup>32</sup>
3. Covenants that by their own terms inherently cannot be performed until *after* the conveyance.<sup>33</sup>

26. *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

27. The *Bull* court then stated that it is “a nice and difficult question” to determine whether contract covenants are to be deemed executed or not; i.e., whether or not to apply merger, and went on to establish several criteria (referred to hereafter in this article as the “*Bull* criteria”) to answer the question. The *Bull* criteria inquire whether the covenant in question “looks to” or is “connected with” the title, possession, quantity, or emblems of the land; if it is, the covenant is extinguished; if not, the covenant may survive. *Id.* at 645. The *Bull* criteria are discussed further in the text accompanying notes 192-98 *infra*.

28. Rather than being exceptions to the rule, some courts and authors comment that the rule is simply “not applicable” in these situations. *E.g.*, MILTON R. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 7.2, at 649 n.5 (3d ed. 1975).

29. *See Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967) (Merger “does not apply to those provisions . . . which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance.”).

30. *See Graham v. Commonwealth Life Ins.*, 154 So. 335 (1934) (sustaining the exception to the merger rule relating to independent covenants); *see also Peterson v. Peterson*, 431 So. 2d 672, 673 (Fla. 3d Dist. Ct. App. 1983) (“Where an agreement is collateral to, or independent of, the provisions of a deed, there is no merger.”).

31. *See Milu, Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967) (provisions regarding consideration to be paid usually do not merge).

32. *See Graham v. Commonwealth Life Ins.*, 154 So. 335 (1934) (exception exists to merger rule concerning provisions not intended to be in the deed).

33. *See Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983) (covenant to occupy premises could not be performed until after conveyance of the deed); *see also infra* note 138 and accompanying text.

#### 4. Covenants expressly provided to survive.<sup>34</sup>

Further discussion of these exceptions appears in Parts V.B. and V.C. of this article.

### IV. DEVELOPMENT OF THE RULE IN FLORIDA

Discussion and approval of the doctrine of merger in the case law of Florida is found as early as 1850, in the case of *Hunter v. Bradford*.<sup>35</sup> As in the several English and American cases of similar period,<sup>36</sup> *Hunter* enunciated the *principle* of merger but did not denominate it as such. In *Hunter*, the purchaser of property prayed to enjoin his seller from collecting sums due on the purchase money indebtedness for the reason that seller's title was defective,<sup>37</sup> contrary to the agreement for sale. The court sustained purchaser's defense to the debt (thereby giving life to the seller's contractual covenant to convey good title), notwithstanding that purchaser was, and had been, in possession of the property for several years under a "title bond" (described by the court as a "mere equitable title," an *agreement* to convey at a future date).<sup>38</sup> Key to this holding giving life to the original contract, was the court's finding that no deed of conveyance had been made or accepted, and that purchaser was in possession merely under the *agreement* to convey, an *executory* contract. For—continued the court—had the deed been given, the contract would have become executed, and the defense of defective title contrary to the original contract would be of no avail to the purchaser. That is, the covenant of title under the original contract would be deemed extinguished and unenforceable. Thus, the Court distinguished between an *executory* contract, found to be the case here, and an *executed* contract, in which case the defense would not be allowed and the purchaser would be relegated solely to remedies based upon his deed. The court thus stated the doctrine of merger, without calling it by that name:

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34. See *Gabel v. Simmons*, 129 So. 777 (Fla. 1930) (seller's covenant to refund purchase price did not merge into the deed because it was independent and not intended to merge).

35. 3 Fla. 269 (1850).

36. See *supra* notes 11, 12, 16 and accompanying text.

37. It is interesting to note that this earliest of Florida cases involved a matter of title to the land, a topic of great importance as appears *infra* at note 65 and accompanying text.

38. *Hunter*, 3 Fla. at 287.

Courts draw a distinction as to claims for equitable interposition between contracts *executed* and *executory* contracts, a distinction, we think, founded upon good sense and justice. "Where the purchaser has taken a deed with covenant of general warranty, under which he has entered, and remains in undisturbed possession of the land conveyed to him, if there be no fraud in the transaction, he cannot, before eviction, on the mere ground of defect of title, obtain relief in equity, or have the contract rescinded, or restitution of the purchase money. In such case, he must seek a remedy upon the covenant of warranty in his deed."<sup>39</sup>

Perhaps the first Florida case to speak of the merger doctrine by name, and in substance adopt the general rule in the classic sense as recited above,<sup>40</sup> was the 1930 decision, *Gabel v. Simmons*,<sup>41</sup> wherein the court adopted not only the *doctrine* of merger, but also certain of the major exceptions thereto. It seems that on August 25, 1925, the Simmonses, as purchasers, entered into a contract with Gabel, as seller, for the purchase of three lots for \$30,000, payable \$1500 on execution of the contract, \$6000 at closing, and the balance over a subsequent period post-closing. The contract contained a "special provision" (denominated as such by the court, repeatedly and—as we shall soon see—with good reason) to the effect that "[i]f purchaser is dissatisfied after 90 days from closing, all monies paid shall be returned with 10% interest."<sup>42</sup> The sale was closed on August 28, 1925, by purchasers paying the \$6000 due at closing, and by seller delivering the agreed-upon closing document. Prior to the expiration of the ninety days, as well as at the expiration of the ninety days, as well as within a reasonable time after the expiration of the ninety days, purchasers verbally and in writing expressed to seller their dissatisfaction with their purchase and requested (nay, demanded) return of the \$7500 that they had paid. Seller refused, and purchasers sued. Seller defended on the basis that the above-quoted special provision in the contract providing for refund was no longer enforceable because it merged into the closing document which was silent regarding any refund rights (and therefore no cause of action could arise from that document). The classic defense of merger! As it turned out, seller was right on the rule, but wrong because of

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39. *Id.* (citation omitted); see also *Musselwhite v. Oleson*, 53 So. 944 (Fla. 1910).

40. See *supra* note 6 and accompanying quotation.

41. 129 So. 777 (Fla. 1930).

42. *Id.* at 777.

“exceptions” thereto.

The Florida Supreme Court first confirmed its approval of the basic merger by deed rule of law, citing to Williston on Contracts<sup>43</sup> and Paige on Contracts,<sup>44</sup> and quoted with approval from the Pennsylvania Supreme Court:

[t]he general rule is that preliminary agreements and understandings relating to the sale of land become merged in the deed.<sup>45</sup>

The Florida Supreme Court then went on to hold that the merger rule was not applicable to this contract clause in this case for several reasons (“exceptions” to the rule):<sup>46</sup> The 90-day refund provision was an *independent covenant* that the parties did *not intend* to be incorporated into the closing document; delivery of the closing document was *merely part performance* of the contract, was *not* delivered by seller or accepted by buyer *as full performance* of the contract, so the contract *remains binding* as to its other provisions; and the closing document does *not cover* the *entire subject matter* of the original contract.<sup>47</sup> Additionally, and perhaps the court’s most important statement of rationale when analyzing the holding in this case from the viewpoint of the doctrine of merger in its classic sense, merger was held inapplicable here to the special 90-day refund provision because that covenant “constituted a *special agreement* which was *not appropriate* to be included in the [closing document]. . . .”<sup>48</sup> In other words, merger *is* applicable to contract provisions that are “appropriate” to be included in the closing document; but, merger should not be applicable to a provision that is “not appropriate” to be included in the closing document.<sup>49</sup>

*Gabel* was but one of four early 1930s Florida cases dealing with the merger rule.<sup>50</sup> *Graham*,<sup>51</sup> for example, followed *Gabel*, stating that

43. *Id.* at 778.

44. *Id.* (citing 4 PAIGE ON THE LAW OF CONTRACTS § 2568 (2nd ed. 1929)).

45. *Id.* (citing *Caveny v. Curtis*, 101 A. 853, 854 (Pa. 1917)).

46. *Gabel*, 129 So. at 778. The combined usage of several exceptions to the rule, as in *Gabel*, is analyzed further *infra* note 123 and accompanying text.

47. *Id.*

48. *Id.*

49. *Id.* The *Gabel* court’s theory runs parallel to the “*Bull* criteria” discussed later in this article, which as will be seen constitutes substantial underpinning for determining those (limited) situations in which use of the merger rule is conceptually correct (the “true merger” cases), namely where it *would be appropriate* for the closing document to include the subject matter of the earlier contract.

50. The other three cases are: *Graham*, 154 So. 335 (Fla. 1934) (discussed *infra*

“[i]t is a general rule that preliminary agreements and understandings relative to the sale of property usually merge in the deed and mortgage by which the original contract becomes executed.”<sup>52</sup> The court then again quoted with approval the very same statement from the Pennsylvania supreme court<sup>53</sup> as was quoted in *Gabel*, but found the contractual provision *sub judice* (a covenant regarding subordination of the purchase money mortgage to a construction loan mortgage) within several of the exceptions to the rule, and therefore enforceable.<sup>54</sup>

Thus, by the early 1930s the doctrine of merger (and several of its exceptions) had become firmly ingrained in Florida case law. During the next thirty years, however, the appellate courts in Florida were called upon to visit the rule only once.<sup>55</sup> Nevertheless, during the succeeding twenty-six-year period (from 1965 through current date), not less than twenty-two Florida cases have dealt with the doctrine of merger.<sup>56</sup> These latter cases, sometimes referred to in this article as the “recent Florida cases,” are summarized in the Appendix to this article and are discussed and analyzed throughout the balance of this article. Analysis of these recent Florida cases gives us pause to look closely at the conceptual basis for the doctrine of merger as stated, for example, in the early case of *Bull v. Willard*,<sup>57</sup> and here we question whether the recent cases are applying the correct doctrine. Thus, as the balance of this article unfolds, we trace the more recent Florida case law and approach the headline of this article: Taking the Bull by the Horns.

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at notes 51 through 54 and accompanying text); *White v. Crandall*, 143 So. 871, 879 (Fla. 1932) (“where the defendant has completed the purchase, accepted his deed, the transaction is closed, and the purchaser is confined to his action for breach of the covenant” contained in the deed); and *Riddle v. Coliver*, 156 So. 880 (Fla. 1934) (provision in original agreement of sale that buyer would assume existing mortgage was not “destroyed” by the fact that the deed of conveyance was only made “subject to” the mortgage).

51. *Graham*, 154 So. at 337 (sustaining the exception to the merger rule, concerning independent covenants and covenants not intended to be incorporated into the deed and whose subject matter is not covered by the deed).

52. *Id.*

53. *See Caveny v. Curtis*, 101 A. 853 (Pa. 1917).

54. *Graham*, 154 So. at 337 (the covenant subordinated a purchase money mortgage to an anticipated construction loan first mortgage).

55. *See Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947).

56. *See APPENDIX infra.*

57. 9 Barb. 641 (N.Y. Sup. Ct. 1850).

## V. ANALYSIS OF RECENT FLORIDA CASES: ARE THE EXCEPTIONS OVERTAKING THE RULE?

Of the twenty-two recent Florida cases dealing with the merger doctrine during the period from 1965 through current date, eight applied the rule and refused to enforce the contract provision, two augured applicability of the rule by dicta, while twelve cases found that the subject contract provision fell within some exception to the rule and was therefore still viable and enforceable.<sup>58</sup> Looking strictly at the last decade, merger was applied twice (maybe twice more, by dicta), while exceptions were found and the rule was rejected in ten cases.<sup>59</sup> Are the exceptions overtaking the rule? If so, why?

An attempt was made to categorize the decisions based upon the subject matter of the contractual provision. As seen in the Appendix,<sup>60</sup> this exercise proved worthwhile in certain respects,<sup>61</sup> yet in other respects the results were confusing and futile.<sup>62</sup> The following sections of this article discuss these decisions in the contexts of:

- A) Analyzing the cases in which the merger rule was applied, and the contract provision was therefore held unenforceable;
- B) Analyzing the cases that found exceptions to the merger rule, declined to apply the rule, and thus allowed enforcement of the antecedent contract;
- C) Analyzing the cases which held that the merger rule was not applicable due to mistake, fraud or accident, and therefore allowed enforcement of the contract;

58. See APPENDIX *infra*.

59. *Id.*

60. *Id.*

61. *E.g.*, *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (demonstrating a consistent application of the doctrine or of exceptions to the doctrine); *White v. Crandall*, 143 So. 871 (Fla. 1932) (same); see also *Bennett v. Behring*, 466 F. Supp. 689 (S.D. Fla. 1979) (those covenants involving matters of "title" consistently merge into the deed).

62. For example, several cases involved the same subject matter but the appellate courts reached inconsistent results. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (provision for award of attorney's fees do not merge into deed); *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d. 58 (Fla. 3d Dist. Ct. App. 1978) (seller's covenant regarding compliance with city codes does not merge into the deed). *But see* *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (seller's covenant against city code violations merged into deed); *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984) (provision for award of attorney's fees merged into deed).



D) Seeking to discern common threads as to why the merger rule was or was not applied.

## A. Merger Rule Applied; Contract Provision Unenforceable

### 1. Title Cases

### 2. Accord and Satisfaction Cases

The Florida case law has generally followed the majority view<sup>63</sup> and the "trend"<sup>64</sup> in applying the merger rule to those cases involving matters of title.<sup>65</sup> This conclusion is not only in accord with the dictates of *Bull*,<sup>66</sup> but also certainly makes sense as a consequence of the "same subject matter" rationale.<sup>67</sup> For, where the subject matter of the contract (here, a covenant concerning the quality of title) is the same subject matter as covered in the deed (typically, a *Warranty Deed*, warranting the quality of title), then it makes perfect sense to hold that the later instrument superseded the earlier with respect to that subject matter, thereby extinguishing any further legal efficacy of the earlier covenant. The difficulty arises, of course, in discerning what is a "matter of title."

Two fairly early Florida cases<sup>68</sup> dealt with restrictive covenants ["incumbrances" (sic) on the title, wrote the court]<sup>69</sup> and in both cases the merger rule was applied. In the first case, *White v. Crandall*,<sup>70</sup> the antecedent representation was alleged to have been that the land was free from encumbrances. In fact, it was shown that several building restrictions, race restrictions, and easements existed encumbering the land, and it was further shown that the documentation of these burdens

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63. Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2d 1310, 1327 (1954); Annotation, *Merger of Contract in Deed*, 84 A.L.R. 1008, 1024 (1932).

64. See CUNNINGHAM, *supra* note 4, at 697-98 nn. 57, 61.

65. See *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947); *White v. Crandall*, 143 So. 871 (Fla. 1932); *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (covenants concerning matters of title usually merge into deed); *St. Clair v. City Bank & Trust*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965).

66. See *infra* notes 192-99 and accompanying text.

67. See *infra* notes 190-91 and accompanying text.

68. See *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947); *White v. Crandall*, 143 So. 871 (Fla. 1932).

69. *White*, 143 So. at 879.

70. 143 So. 871 (Fla. 1932).

upon the land was of public record when title was conveyed and accepted. The Court held that the antecedent representations of free and clear title merged into the deed conveying this title, and were no longer viable.<sup>71</sup> The second fairly early case, *Volunteer Security*,<sup>72</sup> involved the opposite situation from *White*.<sup>73</sup> Rather than a covenant *against* encumbrances (as in *White*), the contract in *Volunteer Security* affirmatively contained the encumbrances to the land, which were residential, building and race restrictions that the buyer of the property sought to enforce. The deed to the subject property, however, was silent as to any restrictions. The court again held the doctrine of merger to be applicable, and ruled that the restrictions contained in the contract had merged into the (silent) deed, and were therefore unenforceable.<sup>74</sup>

Only one of the "more recent"<sup>75</sup> Florida cases dealt with restrictive covenants, and that was the Federal district court case, *Bennett v. Behring Corp.*<sup>76</sup> Similar to the accusation in *White*,<sup>77</sup> the complaint in *Bennett* was that restrictive covenants of record constituted a breach by seller of its promise under the contract of purchase and sale to deliver title free and clear of all encumbrances. The particular restriction on title complained of in *Bennett* required all homeowners in a certain 31-community development to become lessees under recreational facilities leases and to pay rental fees thereunder. In a class action on behalf of all homeowners, the plaintiffs contended that their seller (the defendant-developer of the communities) breached its contract promise of clear title by virtue of this encumbering restriction. The facts revealed, however, that a reference to this restriction appeared on the face of all of the deeds that were delivered to and accepted by the plaintiff-purchasers. Accordingly, defendant-seller argued—and the court so ruled—that any complaint that purchasers might have had for defective title contrary to the covenants of clear title as contained in their contracts of purchase and sale, was barred by the doctrine of merger. Those contract covenants respecting the quality of title merged away, or more accurately merged into, the deeds by which the original con-

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71. *Id.* at 871 (continuing: "The transaction became an executed contract of sale of the land. The purchase was completed and the defendant *accepted the title . . .*") (emphasis added).

72. 33 So. 2d 150 (Fla. 1947).

73. *White*, 143 So. 871 (Fla. 1932).

74. *Volunteer*, 33 So. 2d at 151.

75. The period from 1965 to date. *See supra* notes 55-56 and accompanying text.

76. 466 F. Supp. 689 (S.D. Fla. 1979).

77. *See White*, 143 So. at 871.

tracts became executed. The title covenants of the deeds controlled, and since the deeds were expressly made subject to the restriction, no action could lie thereunder for defective title. The Court went on to espouse that:

The plaintiffs' remedy would have been to refuse to close, [to refuse to] accept the deed, and sue on the contract. Failing this, plaintiffs' sole remaining remedy is to sue for a breach of covenant in the deed which is not possible since the exception to the covenant is clearly stated.<sup>78</sup>

Continuing in the line of "title" cases, the only other recent Florida case involving a covenant against encumbrances on title was *Stephen v. Brown*,<sup>79</sup> where again the seller covenanted under the written contract of sale that the conveyance of title would be free and clear of all encumbrances. The deed delivered and accepted at closing contained no covenant against encumbrances. Post-closing, purchaser sought rescission alleging that the property was in sub-standard condition contrary to the city code, that this violation constituted an encumbrance on title, and that seller knew of the violation (the "encumbrance") prior to the closing. The trial court's dismissal of purchaser's complaint was affirmed on appeal: The contractual covenant respecting this matter of title was not actionable, it having merged into the (naked) deed.

Another recognizable pattern in the Florida case law is adherence to the merger rule in factual situations evidencing orthodox accord and satisfaction. This pattern is clearly illustrated by a graphic analysis in outline form of the following two recent Florida cases:<sup>80</sup> In *St. Clair*,<sup>81</sup> there was:

1. *An agreement*: Seller covenanted, in the contract of sale, to convey by warranty deed.
2. *A problem*: During the executory period (between contract and closing), it was discovered that title to a portion of the property (a 15-foot strip on one side) was not insurable.

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78. *Bennett*, 466 F. Supp. at 701-02.

79. 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970).

80. See *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976); *St. Clair v. City Bank & Trust Co. of St. Petersburg*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965).

81. *St. Clair*, 175 So. 2d 791.

3. *A resolution*: To resolve the problem, the seller offered and the purchaser agreed to accept a quit-claim deed to the 15-foot strip.
4. *An accord and satisfaction*: In a subsequent action to foreclose the purchase-money mortgage given in connection with the sale, the purchaser-mortgagor raised as a defense that seller had failed to fulfill his covenant to convey by warranty deed. *Held, accord and satisfaction*; the obligation under the subject covenant had been discharged "by merger."<sup>82</sup>

In *Uwanawich*,<sup>83</sup> there was:

1. *An agreement*: Buyer and seller agreed, in the contract of sale, that the purchase-money mortgage would contain a thirty-day default clause.
2. *A problem*: During the executory period, a problem arose concerning the seller's insistence that the purchase-money mortgage be joined in execution by the buyer's wife (a non-signatory to the contract of sale).
3. *A resolution*: To resolve the problem, the seller offered to accept the mortgage without the wife's joinder if the thirty-day default clause were reduced to a fifteen-day period. Buyer agreed and the closing documents (deed and mortgage) were so executed and delivered.
4. *An accord and satisfaction*: In a subsequent action to foreclose the purchase-money mortgage, the buyer-mortgagor attempted to invoke defensive relief under the contracted-for 30-day default clause. *Held, accord and satisfaction*; that agreement had been discharged "by merger."<sup>84</sup>

A variety of particular contractual covenants were involved in the several other recent Florida cases examined in which the doctrine of merger was applied. The various types of covenants under adjudication included an attorney's fee provision,<sup>85</sup> a representation against code vio-

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82. *Id.* at 792. On point is Corbin's commentary:

If the contract of sale required the vendor to convey a perfect title by a warranty deed and the purchaser later accepts a quit claim deed as full performance, he can not enforce the original contract that required more. If this is correct, it should be described as a discharge by accord and satisfaction or substituted contract and not by "merger."

6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310-12 (1962).

83. *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976).

84. *Id.* at 118.

85. *See Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984); *see*

lations,<sup>86</sup> conditions for releasing property from a purchase-money mortgage,<sup>87</sup> and terms of payment for a business located on (but payment not directly secured by) associated real property;<sup>88</sup> and in each of these cases, the antecedent contractual covenant was held unenforceable because of the merger rule. Additionally, dicta in one very recent case<sup>89</sup> indicated that although the court did not have to reach this issue, merger would have applied and the court would have refused to enforce the contract condition discussed there (a warranty against violation of governmental regulations as of closing) had the plaintiffs' case not fallen for other reasons.<sup>90</sup> However, contrary to the consistency heretofore noted in the application of the rule to cases involving matters of title<sup>91</sup> and cases involving obvious accord and satisfaction,<sup>92</sup> no pattern or generalized rule of law can be gleaned from this latter group of miscellaneous Florida cases<sup>93</sup> that all applied the merger doctrine.

### B. *Exceptions to the Merger Rule; Contract Enforced*

Continuing our review of the recent Florida cases, we now proceed to analyze those in which the court declined to apply the merger rule, and accordingly enforced the provision of the original contract of purchase and sale on the basis that the particular contract covenant fell within an exception to the rule under the facts and circumstances sub judice. A side-by-side analysis of two recent cases, *Fraser*<sup>94</sup> and

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also *infra* note 141 and accompanying text.

86. See *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978); see also *infra* note 93 and accompanying text.

87. See *Sun First National Bank of Orlando v. Grinnell*, 416 So. 2d 829, 834 (Fla. 5th Dist. Ct. App. 1982) (the contract for sale was "fully performed when . . . closed." "Such a fulfilled and exhausted contract has historical, but no legal, significance . . .").

88. See *Soper v. Stine*, 184 So. 2d 892, 894 (Fla. 2d Dist. Ct. App. 1966) (A preliminary agreement for the sale of the business merged into the deed. The preliminary agreement was not "outside, collateral to, or independent of" the deed.)

89. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990).

90. *Id.* at 509-10 (court's decision of reversal was grounded on the lack of substantial evidence of the violation of governmental regulations). Consequently, the court's commentary that the cause of action "was dismissible," for merger reasons was dicta. *Id.* at 506 n.3.

91. See *supra* notes 65-79 and accompanying text.

92. See *supra* notes 80-84 and accompanying text.

93. See *supra* notes 85-90 and accompanying text.

94. *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978).

*Opler*,<sup>96</sup> both decided by the same court<sup>96</sup> and within three years of each other, demonstrates quite similar fact patterns, with conflicting results—one *applied* the rule and refused enforcement of the contract; the other found an *exception* to the rule and allowed enforcement of the contract covenant. This apparent clash may best be illustrated by comparing the two cases in outline form: In *Fraser*.<sup>97</sup>

1. *Contract provision*: "8. Seller further states that there are no code violations of the City of Miami Beach or the County of Dade."
2. *Facts*: Buyer knew, before closing, that there existed in the property violations of city building and zoning regulations.
3. *Buyer closed*.
4. *Court held*: Buyer could not recover for breach of the above-quoted provision. Buyer was precluded by the doctrine of merger. The contract provision merged into the deed.

In *Opler*:<sup>98</sup>

1. *Contract provision*: "F: *Ingress and Egress*: Seller covenants and warrants that there is ingress and egress to said property."
2. *Facts*: Buyer knew, before closing, that the property was without ingress and egress.
3. *Buyer closed*.
4. *Court held*: Buyer was entitled to recover for breach of the above-quoted contract provision. Buyer was protected by an exception to the merger rule. The contract provision did not merge into the deed.

An attempt to distinguish these two cases from each other provides a springboard to scrutinize various exceptions to the merger rule (which exceptions are not mutually exclusive, but in many cases overlap with each other). Both cases first acknowledged, confirmed, and restated the basic doctrine that as a general rule, all preliminary agreements and understandings relative to the sale of property usually merge

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95. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982).

96. The Florida Third District Court of Appeal.

97. 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978).

98. 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982).

into the deed of conveyance executed pursuant thereto.<sup>99</sup> And each decision then went on to consider and dispose of certain of the recognized exceptions to the rule. Succinctly stated, *Fraser* considered but rejected the “no intent to merge” exception and the “not necessarily performed by the deed” exception, while *Opler* sustained the “collateral” or “independent” covenant exception. Perhaps the distinction between the holdings in these two cases, although not specifically so analyzed or discussed in either opinion, stems directly from the inherent fact that in *Fraser* the covenant against code violations was a representation concerning the condition of the property itself (a covenant *on* the property), while the access covenant in *Opler* dealt with a condition not involving the deeded property *per se* but the availability of ingress and egress over lands outside the boundaries of the deeded property (a covenant *off* the property). In other words, consistent with the postulate developed later in this article regarding “true merger”<sup>100</sup> and the crucial common law requirement thereof that the subject matter of the contract must be one that is fundamental to or inherent in the land in question,<sup>101</sup> it can well be argued that the access covenant pertained to *terra firma* other than the land under contract and hence the doctrine of merger is out of the question.

The “no intent to merge” exception was stated by the court in *Milu* as follows: “The rule (of merger) . . . does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed . . .”<sup>102</sup> The “no intent” exception is often combined with one or more of the other exceptions to the rule. Thus, in *Milu*,<sup>103</sup> where the seller’s complaint against his buyer for payment of the balance of the sales price (which, per the contract was to be certain shares of stock) was based on the original contract of sale, and the buyer defended on the basis that the contract was no longer a viable instrument on which to base a cause of action because the sale was closed and a deed was delivered to and accepted by the buyer, the court invoked both the “no intent to merge” exception and the “not necessarily performed by the deed” exception<sup>104</sup> in sustaining the complaint

99. *Fraser*, 364 So. 2d at 534; *Opler*, 402 So. 2d at 1311.

100. See *infra* notes 202-07 and accompanying text; see also *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

101. See *infra* notes 192-98 and accompanying text; see also *Bull*, 9 Barb. 641.

102. *Milu, Inc. v. Duke*, 204 So. 2d 31,33 (Fla. 3d Dist. Ct. App. 1967).

103. *Id.*

104. The merger rule does not apply to contract provisions “which are not necessarily performed or satisfied by the execution and delivery of the stipulated convey-

and holding that the contract provision promising payment ("consideration") was still enforceable.<sup>105</sup> The same conclusion has been reached by the appellate courts of numerous other states, to the extent that it may be said that there is a general exception to the merger rule that permits enforcement of contract provisions relating to payment of consideration notwithstanding delivery and acceptance of the deed.<sup>106</sup> The reason for this generally recognized exception has been stated that in practice deeds of conveyance do not usually recite the consideration with particularity or accuracy<sup>107</sup> (rather, a typical recitation of consideration is often "Ten dollars and Other Good and Valuable Consideration"), and thus it cannot be concluded that the parties intended to fulfill the earlier consideration covenant by passage of the deed. It would seem, however, that the issue of whether the consideration covenant was or was not fully performed by passage of the deed, is an evidentiary question in the realm of accord and satisfaction rather than merger, a point developed further in Part VI of this article.<sup>108</sup>

The "no intent to merge" exception, combined with the "not necessarily performed by the conveyance" exception, also formed the basis of the court's decision in *Sager v. Turner*.<sup>109</sup> Relying strongly on *Milu*,<sup>110</sup> the plaintiff-buyer in *Sager* was allowed to recover against his seller for breach of seller's contract covenants that 1) buyer would be able to obtain all necessary permits and licenses to operate the property (a mobile home park), and 2) there existed no violations of any licenses, permits, local ordinances, restrictions or easements, notwithstanding the seller's arguments of merger.<sup>111</sup> Although at first blush the covenant against violations in *Sager* appears most identical with that in *Fraser*<sup>112</sup> and precedent within the same appellate district would be compelling of a merger holding, closer scrutiny reveals factual distinc-

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ance." *Id.*

105. "Contractual provisions as to considerations to be paid by the purchaser are ordinarily not merged in the deed . . ." *Id.* (emphasis added).

106. See Annotation, *Merger of Contract in Deed*, 38 A.L.R.2d 1310, 1334 (1954) (The deed is not conclusive as to the amount of consideration.).

107. *Id.*

108. "Merger" has become just a buzzword; "Accord and Satisfaction" is the more appropriate doctrine in most cases. See *infra* Part VI.

109. 402 So. 2d 1282 (Fla. 3d Dist. Ct. App. 1981).

110. *Milu, Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967).

111. *Sager*, 402 So. 2d at 1283.

112. *Fraser*, 364 So. 2d at 533.



tions in these two cases. In *Fraser*, it is recalled,<sup>113</sup> the buyer closed with knowledge of and in the face of existing building and zoning violations, and no recovery was allowed under buyer's subsequent action for breach of the contract of sale covenant against such violations, because of the doctrine of merger. In *Sager*, however, as the court pointed out, there was no evidence that this buyer knew of any violations pre-closing, and furthermore the contract covenant sued upon contemplated that *buyers* would obtain all necessary operational licenses and permits, obviously an act that could not take place until *after* closing<sup>114</sup> and which was dependent on there being no ordinance violations. Hence, the court extracted the buyers in *Sager* from the fatal consequence of the merger rule by the "no intent to merge" exception and by the additional exception that the breached contractual covenant was "not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance."<sup>115</sup>

The "collateral covenant" or "independent covenant" exception, relied on in *Opler*<sup>116</sup> and other recent Florida cases,<sup>117</sup> had its Florida genesis as the basis for the court declining to apply merger in the early 1930s cases of *Gabel*<sup>118</sup> and *Graham*.<sup>119</sup> The statement of the exception is rather straightforward: "Where an agreement is collateral to, or independent of, the provisions of the deed, there is no merger,"<sup>120</sup> Nevertheless, the theory behind this exception is really intertwined with the "no intent to merge" and the "not necessarily performed by the deed"

113. See *supra* note 97 and accompanying text.

114. See *Sager*, 402 So. 2d at 1283.

115. The *Sager* court took great pains to distinguish its holding from *Fraser*. *Sager*, 402 So. 2d at 1283. It was the *Sager* court's holding that the language "plainly survived the closing" *because* they contemplated an action (obtaining all necessary permits and licenses) to be taken by buyer *after* the closing. *Id.* The "action after closing" exception is discussed further *infra* notes 135-38 and accompanying text. See also *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (no merger found and contract provisions enforced for city code violation contrary to seller's representation as to quantity of units allowable in apartment building).

116. *Opler*, 402 So. 2d at 1311.

117. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989); *American Nat'l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988); *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983).

118. See *Gabel v. Simmons*, 129 So. 777 (Fla. 1930).

119. See *Graham v. Commonwealth Life Ins.*, 154 So. 335 (Fla. 1934).

120. *Peterson v. Peterson*, 431 So. 2d 672, 673 (Fla. 3d Dist. Ct. App. 1983) (separate agreement made to quit claim the property back to transferor if transferee ceased living on the property).

exceptions. These exceptions are akin to each other in that they all go to the heart of the merger rule in recognizing that for there to be a discharge of the antecedent covenant, the parties must have knowingly done so or the circumstances must be such that knowledge of the consequences of their action is imputed to them; and if such knowledge (or imputed knowledge) is absent, then the contract covenant will be saved by an exception to the rule.

For example, the contract covenant sought to be enforced by the buyer of the property in *Gabel*,<sup>121</sup> we recall,<sup>122</sup> was seller's promise that "[i]f purchaser is dissatisfied after 90 days from closing, all monies paid shall be returned with 10% interest." In denying seller's defense that the promise was unenforceable due to merger, the court relied upon a combination of several of the exceptions to the rule in order to sustain the life of the subject contract covenant:<sup>123</sup>

1. The covenant was "independent;" it "constituted a special agreement which was not appropriate to be included" in the closing document. Therefore, the covenant survived.
2. The covenant was "not intended" by the parties to be incorporated in the closing document. Therefore, it survived.
3. The delivery of the conveyance was merely "part performance of the contract, which remains binding as to its further provisions." Therefore, the subject promise survived.
4. The closing document did not "cover the entire subject-matter contracted for." Therefore, this promise—being subject-matter not covered by the closing—survived.

The theory thus was emerging, later confirmed by *Graham*,<sup>124</sup> that for the doctrine of merger to operate, the subject matter of the contract provision that is claimed to be unenforceable must be the same subject matter as was encompassed within (or, as is typically deemed included in) the document delivered and accepted at closing. When that parallelism exists, it may be said that the liabilities under the contract have been "discharged by merger;"<sup>125</sup> absent that parallelism, the covenant may be said to be one which is "outside of, collateral to, or independent of the provisions of the deed; [and] they survive delivery and accept-

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121. 129 So. 777 (Fla. 1930).

122. See *supra* notes 41-49 and accompanying text.

123. *Gabel*, 129 So. at 777-78.

124. 154 So. at 337-38.

125. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 310-12 (1962).

ance of the deed of conveyance and remain enforceable."<sup>126</sup>

In pursuance of this line of reasoning, seller's contract representation and warranty that sufficient water, sewer and electric service capacity was available at the property site was clearly seen by the court as an enforceable "collateral agreement" in *American National Self Storage v. Lopez-Aguilar*,<sup>127</sup> the court explained:

The continued efficacy, then, of collateral agreements which are not usually included in the terms of a deed is not affected by the merger rule [citing *Milu* and *Soper*]. Such collateral agreements call for acts by the seller which go beyond merely conveying clear title and placing the purchaser in possession of the property.<sup>128</sup>

Several general types of contract clauses have become stereotyped as "collateral" or "independent," and thus generally speaking are deemed exceptions to the merger rule almost as a matter of course, without the courts affording much discussion or analysis in the more recent individual cases.<sup>129</sup> One such type of clause, the seller's warranty concerning availability of water, sewer or other utilities, has already been examined.<sup>130</sup> Another stereotyped group of clauses, closely akin to the foregoing, is seller's representation about the nature or condition of the property, such as: "Seller warrants air conditioning and heating systems, . . . to be in working order at the time of closing."<sup>131</sup> Holding that this warranty did survive the closing, the court observed: "Our research reveals that the warranty in this case is the type of independent covenant *generally excepted* from the merger doctrine."<sup>132</sup> The court's prescient 1980 general observation in *Campbell*<sup>133</sup> has gained

126. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981) (seller covenants ingress and egress to the property), *rev. denied*, 412 So. 2d 472 (1982).

127. 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988).

128. *Id.* at 305; *see also In re Wildflower Landholding*, 49 Bankr. 246 (M.D. Fla. 1985) (rejecting a claim of merger respecting seller's contract covenants to make water and sewer services available to the property site (as well as additional covenants by seller to grant free golf and tennis club membership and to build a road) on the basis of the "no intent to merge" exception).

129. *See Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (attorney's fee provision falls within the collateral agreement exception).

130. *See supra* notes 127-28 and accompanying text.

131. *Campbell v. Rawls*, 381 So. 2d 744, 745 (Fla. 1st Dist. Ct. App. 1980).

132. *Id.* at 746 (emphasis added).

133. *Id.*

virtually universal acceptance in the past ten years.<sup>134</sup>

A natural by-product of the several exceptions already discussed (“no intent to merge,” “not necessarily performed by the deed,” “merely part performance,” “bifurcation,” “collateral” or “independent” covenant, and “not the same subject matter”), is the “action after closing” exception. It would seem only logical that where a party was without the legal power, capacity or ability to perform a contractually required act until *after* the closing, then inherent in that contract is not only the parties’ intent but a mandatory legal conclusion that the covenant survives the closing. This was part of the court’s reasoning, we recall, in *Sager*,<sup>135</sup> where the contract covenants sought to be enforced contemplated post-closing action (obtaining operating permits and licenses in a violation-free property), and thus it was the court’s holding that the covenants must be deemed to survive closing, must be enforceable or else the parties’ obvious intent could not be fulfilled.

This “action after closing” exception also formed the basis for allowing enforcement of the antecedent contract covenant in *Peterson*,<sup>136</sup> where the covenant sought to be enforced was grantee’s promise to reconvey the residence to grantor (grantee’s brother) if grantee should ever cease to occupy the property. In striking down grantee’s defense that his contract covenant to reconvey was no longer enforceable because it had merged into the deed, the court noted:

Here the agreement by its very terms reflects the intent of the parties that it be independent of the deed [citation omitted]. Moreover, the agreement, again by its very terms, could not become effective until *after* the delivery of the deed, since prior to that time Jack would have no life estate to forfeit by ceasing to occupy the property.<sup>137</sup>

The conclusion was obvious, therefore, that a covenant that could not possibly be performed until after delivery of the deed, must be “collateral to” and “independent of” that deed; and so held the two out-of-

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134. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989); *Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989); *American Nat’l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988); *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986); *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981).

135. See *supra* notes 114-15 and accompanying text.

136. See *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983).

137. *Id.* at 673 (emphasis added).

state cases<sup>138</sup> cited in *Peterson* in support of this proposition.

Another stereotypical clause has produced conflicting results and confusing analysis in the recent case law of Florida, and that is the "prevailing party attorney's fees" clause.<sup>139</sup> The conflict and confusion concerning the applicability of the doctrine of merger to this type of clause is glaring, as illustrated by comparing the holdings in following five cases. In each of these cases, an attorney's fee provision was contained solely in the particular contract of sale, and in each case enforcement of the contract clause was sought after the transaction had closed and the deed had changed hands. The holding in each of these cases was as follows:

1. *Campbell*:<sup>140</sup> Attorney's fees properly awarded to the prevailing party. No merger.
2. *Gordon*:<sup>141</sup> Prevailing party not entitled to attorney's fees, because that contractual provision merged into the deed.
3. *Fleischer*:<sup>142</sup> Attorney's fees denied on other grounds (namely, that the action was in *tort*, not "arising out of this *contract*"); however, substantial dicta approving and reaffirming the denial of attorney's fees in *Gordon*, based upon merger.
4. *Burkett*:<sup>143</sup> Prevailing party is entitled to attorney's fees. No merger.
5. *Field*:<sup>144</sup> Prevailing party is entitled to attorney's fees, the amount to be determined on remand. No merger.

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138. The cited cases were: *Industrial Development Foundation v. United States Hoffman Machinery Corp.*, 171 N.Y.S.2d 562 (1958) (agreement forfeiting life estate is not effective until after delivery of deed because there is no life estate to forfeit until delivery); *Chicago Title & Trust Co. v. Wabash Randolph Corp.*, 51 N.E.2d 132 (Ill. 1943) (agreement creating easement is not valid until deed is delivered).

139. The contract clause provided for the payment of attorney's fees:

*Attorney fees and costs:* In connection with any litigation arising out of this contract, the prevailing party whether Buyer, Seller or Broker, shall be entitled to recover all costs incurred including reasonable attorney's fees for services rendered in connection with such litigation including appellate proceedings and post judgment proceedings.

*Fleischer v. Hi-Rise Homes Inc.*, 536 So. 2d 1105-06 (Fla. 4th Dist. Ct. App. 1988).

140. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

141. *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984).

142. *Fleischer v. Hi Rise Homes Inc.*, 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

143. *Burkett v. Rice*, 542 So. 2d 480, 481 (Fla. 2d Dist. Ct. App. 1989) ("[T]his contract provision is not merged into the warranty deed.").

144. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990).

Part of the confusion in the cases involving attorney's fee provisions stems from the fact that in some of the cases the courts focus on the contract's attorney's fee provision itself in determining the merger issue, while in other cases the courts consider the attorney's fee clause an appendage of the primary contractual provision that formed the gravamen of the action or the defense to the action in answering whether or not merger should apply.<sup>145</sup> Nevertheless, even with the recognition of this dichotomy, there is still no consistency in the holdings, as illustrated by the five cases outlined above. Based upon the criteria approved in *Fleischer*<sup>146</sup> (the "*Bull* criteria" as hereinafter discussed),<sup>147</sup> it would seem that a sterile prevailing party attorney's fee provision, standing by itself, would be "collateral" and would not merge, since it does not involve title, possession, quantity, or emblements of the land. However, if the life of the attorney's fees provision is dependent upon the survival of the substantive contractual provision on which the action or defense was based,<sup>148</sup> then the attorney's fee provision must be viewed as "a bird riding on a wagon,"<sup>149</sup> so that the substantive provision must first be subjected to the *Bull* test, and then "as goes the substantive provision, so goes the attorney's fees."<sup>150</sup>

### C. *Mistake, Accident, Fraud; Contract Enforceable*

It has been said that "[t]he execution and acceptance of the deed does not affect the rights of the purchaser to relief against the vendor on the ground of fraud or mistake, if the purchaser was laboring under its influence at the time of his acceptance of the deed."<sup>151</sup>

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145. See *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989).

146. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

147. *Bull v. Willard*, 9 Barb. 641, 645 (N.Y. Sup. Ct. 1850). See *infra* notes 192-98 and accompanying text. The four *Bull* criteria cited in *Fleischer* are title, possession, quantity, and emblements. *Fleischer*, 536 So. 2d at 1107.

148. For example, when the attorney's fee provision is "piggy-backed" onto the substantive provision, as the court seemed to imply in *Gordon*. See *Fleischer v. Hi-Rise Homes Inc.*, 536 So. 2d 1101, 1104 (Fla. 4th Dist. Ct. App. 1988) (as to "possession").

149. This metaphor was used by Professor Powell to descriptively analogize a covenant that runs with the land. See 5 RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 670.2 (rev. ed. 1986).

150. "As goes Maine, so goes the nation." JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 1101(a) (14th ed. 1968).

151. SAMUEL WILLISTON, *WILLISTON ON CONTRACTS* § 926, at 784-87 (3d ed. 1963).

Thus, in two of the recent Florida cases,<sup>152</sup> the injured parties were able to avert the deadly decree of the merger rule by relying on the excuse of mistake. And it is significant to note that the contractual subject matters that thus survived passage of the deeds in these two cases involved 1) the title to the property, and 2) the quantity of land conveyed, which are both bastions of merger edict under the "*Bull* criteria"<sup>153</sup> and under recognized general rules, as developed elsewhere in this article.<sup>154</sup>

In *Southpointe*,<sup>155</sup> the first of these cases, the contract of sale provided for seller to sell to buyer the "Sunrise Golf Course Club House, cart sheds, and maintenance sheds."<sup>156</sup> After the closing of the sale, the buyer discovered that the deed of conveyance failed to include the maintenance shed property. Buyer sued seller for breach of its contract covenant to convey that (maintenance shed) property. Viewed in the language of *Bull*, the gravamen of buyer's cause of action was that there was a shortage in the *quantity* and *title* of the land actually conveyed versus the *quantity* and *title* of land that the seller had contracted to convey. Seller defended on the basis of merger, and seemingly he could not have been more correct in light of *Bull* and the long line of cases following *Bull*.<sup>157</sup> However, the buyer was saved from merger mortality by the court's finding that the omission of the maintenance shed property from the deed may well have been caused by a mistake (a factual issue to be determined on remand); and if in fact the omission was by mistake then the doctrine of merger would not apply. The court quoted *Corbin*<sup>158</sup> with approval:

This doctrine of merger by deed does not purport to apply primarily to cases of mistake, whether as to title or as to other facts . . . . If the case is one in which there was a real mistake as to title, or as to some fact on which title depends, and is a case in which the grantee did not intend to assume the risks of failure of title, there

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152. *Southpointe Dev., Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986); *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986).

153. See *infra* notes 193-94 and accompanying text.

154. See *supra* notes 65-79 and accompanying text.

155. *Southpointe Dev., Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986).

156. *Id.* at 1362.

157. See *infra* notes 195-98 (Merger operates automatically without parallel covenants in contract and deed in matters of 1) title, 2) possession, 3) quantity, and 4) emblements).

158. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960).

is now no good reason for refusing the appropriate form of relief that would be given in other mistake cases.<sup>159</sup>

Title and the quantum of estate conveyed were the subjects at issue in *Kidd*,<sup>160</sup> the other recent Florida case in which the plaintiff successfully invoked mistake as his excuse to the otherwise fateful blow of merger. In most of the merger cases, we have observed,<sup>161</sup> the complainant is the buyer who post-closing discovers a situation that is contrary to the representations or warranties of seller under the contract of sale. In *Kidd*, however, the injured party was the seller of an apartment building who had reserved to himself, in the contract, a right to occupy one of the apartments rent-free for the rest of his life. The deed executed at closing, however, which had been prepared by a closing agent, failed to reserve the life estate. The issue arose when seller, having lived in the apartment rent-free for thirteen months, was evicted at the behest of his buyer, and the court below found that no life estate existed because the covenant providing for it was contained only in the agreement of purchase and sale which had been extinguished by merger. The appellate court reversed, however, holding that seller's conveyance at closing of a quantum of estate larger than had been contracted for was a mistake, and

[w]hile the doctrine (of merger) is a viable one, we will not apply it where a mistake has clearly been made and equity demands reformation . . . . We choose to find a mutual mistake which permits the reformation of the deed so as to make it express the real agreement and intention of the parties.<sup>162</sup>

Situations involving fraud or mistake are most often not labeled by the courts as "exceptions" to the merger rule; rather, it is said that the doctrine of merger simply "does not apply" to these situations.<sup>163</sup> Thus,

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159. *Southpointe*, 484 So. 2d at 1362-63.

160. *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986).

161. See APPENDIX *infra*.

162. *Kidd*, 498 So. 2d at 970.

163. See *Kidd v. Fowler*, 498 So. 2d 969, 970 (Fla. 4th Dist. Ct. App. 1986); *Southpointe Development Inc. v. Cruikshank*, 484 So. 2d 1361, 1363 (Fla. 2d Dist. Ct. App. 1986); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960); MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 7.2, at 649; CUNNINGHAM, *supra* note 4, at 697 n.59. "[Merger] is said to be inapplicable to cases of fraud or mistake." *Pryor v. Aviola*, 301 A.2d 306, 309 (Del. 1973). The reason for the rule (that merger is inapplicable in cases of fraud) could not have been more aptly



it would seem that the real art to survival of the injured party's claim in these cases involves the characterization of the facts. The very same factual situation may be characterized to appear as 1) pre-closing fraud or mistake, in which case the merger rule simply "does not apply;" or 2) guiltless pre-closing activity, in which case the injured party searches (sometimes with success; other times not) post-closing for an "exception" to the rule. For example, why was it that (what turned out to be) an erroneous statement by a seller concerning ingress and egress,<sup>164</sup> or the absence of municipal code violations,<sup>165</sup> was actionable by the purchaser as an *exception* to the merger rule in each of those cases,<sup>166</sup> while (what turned out to be) an erroneous statement concerning the nature of a tenant's tenancy<sup>167</sup> was there actionable by the purchaser as fraud or misrepresentation?<sup>168</sup> We could suggest an intellectual answer to this question based upon scienter; i.e., whether the perpetrator knew or should have known pre-closing of the false or erroneous facts or circumstances.<sup>169</sup> Another answer, intellectually unsatis-

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stated than: "A contrary rule would work the absurd result of a fraudulent vendor being insulated from legal liability by his very success in obtaining consummation of the sale." *Id.*

164. *Opler v. Wynne*, 402 So. 2d Fla. 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982) (the contractual covenant warranting ingress and egress to the land is collateral or independent of the deed).

165. *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (seller's warranty against code violations did not merge into the deed because it was not intended to merge and it is not necessarily fulfilled or satisfied by the conveyance).

166. *Opler*, 402 So. 2d at 1311; *Sager*, 402 So. 2d at 1283.

167. *See Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989) (seller's representation that the tenants in possession at the time of contract were on a month to month lease was independent of the contract and "not the type that merges in a deed").

168. *See id.* at 1266 (A seller's (mis)representations "are *not the type* that merge in a deed at closing . . . because clearly they would be of no value or legal effect unless they did survive the closing and acceptance of deed which act they were *given to induce.*") (emphasis added).

169. *See, e.g., Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (The merger doctrine was held applicable to preclude recovery where plaintiff admittedly knew of code violations existent in the property before closing and nevertheless closed in face of them. The court took pains to point out however that this was a case for breach of contract and *not* an action for fraud, thereby indicating that if it were sounding in fraud then merger would be inapplicable); *see also Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (court emphasized the absence of any pre-closing knowledge by plaintiff of the code violations, and sustained the plaintiff's right to recover under an exception to the doctrine of merger).

fyng, was suggested by the court in *Steinberg*,<sup>170</sup> that it really doesn't matter whether the plaintiff's cause of action is grounded in fraud, mistake or breach of contract; the merger defense simply will not be available where seller's written representations later turn out to be erroneous.<sup>171</sup>

#### D. *Why Was the Merger Rule Applied, or Not Applied; An Attempt at Pigeon-holing*

Having traced the history of the merger rule from English common law, having looked at the reasons for the rule from its origination, having noted the adoption and development of the rule and its exceptions in early Florida case law, and having exposed some confusion and inconsistencies in recent Florida case law regarding applicability of the rule, we now address the perplexing question of why was the rule either applied or not applied in these various cases?<sup>172</sup>

One hypothesis in attempting to answer this question might be that the type of contractual clause involved dictates whether or not the merger rule should be applied. In pursuance of this hypothesis, all of the Florida cases since 1930 were chronologically charted and notated by 1) the nature of the contract clause involved, and 2) whether merger or not the merger rule was applied.<sup>173</sup> This exercise revealed that:

1. Merger applied in all of the title cases.<sup>174</sup>

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170. *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (holding, without stated rationale or analysis, that a complaint brought after closing and after discovery that apartment building could legally house only ten tenants under city code, and not twenty-three tenants as represented in contract, does state a cause of action either in fraud, or mistake, or for breach of contract representation, notwithstanding the defense of merger by acceptance of deed).

171. Of course, the conclusory holding in *Steinberg* allowing the cause of action is an intellectual void, and causes us to wonder why the opposite result was reached in *Stephan v. Brown*, where merger did apply to sustain the dismissal of plaintiff's complaint in a cause of action for breach of contract due to violation of city code provisions, where notification of such violations had been given to seller prior to closing. 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970).

172. Perhaps the more worthwhile question is: Why *should* the rule either be applied or not be applied in future cases? And even more thought provoking is the query: Is the merger rule the "right" rule for analysis and adjudication of these types of cases? These questions are addressed *infra* in part VI of this article.

173. See APPENDIX *infra*.

174. *Id.* (numbers two, five, nine, and thirteen).

2. Merger applied in the obvious (!??) accord and satisfaction fact patterns.<sup>175</sup>
3. Merger did not apply to covenants regarding the physical condition of the property; those clauses survived.<sup>176</sup>
4. Merger did not apply to covenants that (inherently) were to be performed post-closing; those covenants survived.<sup>177</sup>
5. Merger did not apply to covenants involving payment of consideration; those covenants survived.<sup>178</sup>
6. Merger did not apply to covenants concerning the priority status of mortgages; those covenants survived.<sup>179</sup>
7. The Florida decisions<sup>180</sup> appear to be following the national trends<sup>181</sup> with respect to the subject matter of the several different clauses summarized in paragraphs 1 through 6, above.
8. There is no consistency in the cases involving covenants against code violations.<sup>182</sup>
9. There is no consistency in the cases involving attorneys fee provisions.<sup>183</sup>

The problem with attempting to divide the cases into neat piles of

175. *Id.* (numbers six and ten).

176. *Id.* (numbers 14, 20, and 23).

177. *Id.* (numbers one, eight, and eighteen).

178. See APPENDIX *infra* (number eight); see also Annotation, *Merger of Contract in Deed*, 38 A.L.R.2D 1310 (1954).

179. See APPENDIX *infra* (numbers three and four).

180. See *supra* notes 174-79.

181. As to the national trend respecting "title" cases, see CUNNINGHAM, *supra* note 4, at 597 ("[Merger] is now largely limited to title provisions of the contract."). See also Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2D 1310 (1954) (covenants regarding matters of title usually merge into the deed). As to the national trend respecting "merger and accord and satisfaction," see 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1962). As to the national trend respecting the subject of "physical condition of the property," see Annotation, *Defective Home-Vendor's Liability*, 25 A.L.R.3D 383, 432 (1968) ("[E]xecutory covenants collateral to the passing of title do not merge in a deed."). See also Annotation, *Merger of Contract in Deed*, 38 A.L.R. 2d 1310, 1325 (1954) ([I]t is generally held . . . that provisions to make improvements or repairs; although not incorporated in the deed are collateral thereto and survive it."). As to the national trend respecting "post closing covenants," see *Wiley v. Berg*, 578 P.2d 384 (Or. 1978) (those covenants to be performed post closing survive merger). As to the national trend respecting "priority of a mortgage," see *Snyder v. Roberts*, 278 P.2d 348 (Wash. 1955) (covenants concerning the priority of mortgages usually do not merge into the deed); Annotation, *Vendee's Obligation—Deed—Merger*, 52 A.L.R.2D 647 (1955).

182. See APPENDIX *infra* (numbers nine, eleven, and twelve).

183. *Id.* (numbers 19, 24, 26, and 27).

1) "yes, merged," or 2) "no merger," based upon the type of contractual clause involved, is that the decisions in these cases generally do not rise or fall strictly on the clause, itself; so many other facts and circumstances bombard the court. So, while it would be convenient and orderly to pigeon-hole the various types of contract clauses so that determination of survival is simply a function of checking our master list to see whether the subject clause falls in the "merged" or the "no merger" column (and, in fact, certain types of clauses do lend themselves to such easy disposition),<sup>184</sup> the vast majority of the cases involve more complicated circumstances to the extent that the ultimate decision really turns on rationale *other than* the merger rule per se (although merger is cited by the court to substantiate its conclusion).<sup>185</sup> In other words, either applying merger or an exception to merger becomes the justification for the court's result-oriented decision, a determination reached on other grounds. Thus, the consistencies revealed by a sterile survey of the recent Florida cases,<sup>186</sup> and the conformity of the Florida cases to "national trends,"<sup>187</sup> is simply fortuitous with respect to documenting patterns or general rules in the applicability of the merger doctrine, because the preponderance of cases are not "true merger" cases at all but instead involve some form of accord and satisfaction.

## VI. "MERGER" HAS BECOME JUST A BUZZWORD; "ACCORD AND SATISFACTION" IS THE MORE APPROPRIATE DOCTRINE IN MOST CASES

The notion of applying the doctrine of merger to terminate obligations arising under real estate contracts developed, we recall, from the

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184. The "Title" cases.

185. See the discussion of *Opler*, *supra* notes 98-101 and accompanying text, as a case in point. In *Opler* a buyer's action for breach of the contract covenant of access was sustained, the court holding that "[t]he buyer's acceptance of the seller's deed as well as his acquiescence to the remainder of seller's performance did *not constitute a merger because the seller's covenant expressly warranted that there was ingress and egress to the land.*" 402 So. 2d at 1311 (emphasis added). This circuitous statement not only begs the question of merger, but sidesteps the true issue of the case, whether the parties intended that the covenant be released at closing. The court in essence resolved that issue in the negative, by allowing the contract action under the guise of several recognized exceptions to the merger rule.

186. See, e.g., APPENDIX *infra*.

187. See *supra* note 181.

common law precepts involving the merger of estates.<sup>188</sup> It is the thesis of this section of this article that although the theory is doctrinally correct and although the application of the theory in the early cases was correct, its employment in more recent years—both affirmatively, as well as negatively (through the growth of “exceptions” to the rule)—has deviated so far from the basic tenets of the merger doctrine that its use in current cases is for name recognition value only, and its true analytical worth has been bastardized. Furthermore, this article postulates that the theoretically correct doctrine applicable in most of these cases today is that of accord and satisfaction.

Applying the strict tenets of the common law doctrine of merger to the real estate transaction, the theory maintains that the conveyance of legal title at closing (such title being the “greater estate” as expressed in the classic common law statement of the doctrine) absorbs, annihilates and extinguishes the equitable title and rights under contract of sale (the “lesser estate”).<sup>189</sup> Since the tenets of the common law doctrine of merger further dictate that merger shall occur *only* when the two estates coincide in one and the same person, at one and the same time, in one and the same right, and for one and the same purpose,<sup>190</sup> then *a fortiori* the only time that the merger rule should apply in real estate transactions is where there exists identity in the content and substance of the contested contract clause and the instrument of conveyance. This identity requirement may be looked at as the need for “parallelism” between the contract and the deed, whereby the separate contract and deed provisions must address one and the same, identical, substantive subject matter in order that merger pertain.<sup>191</sup> This parallelism may be found to exist either 1) in actuality in the content of the two separate instruments, or 2) by implication because the subject at hand is so fundamental to real property that the law deems it embodied

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188. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1966).

189. *See supra* notes 9-10 and accompanying text.

190. *Id.* See also the very recent Florida case where the court, speaking of the doctrine of merger in a trust context, stated that, “merger applies *only* when the legal and equitable interests are held by one person and are coextensive and commensurate—i.e., the legal estate and the equitable estate are the same.” *Contella v. Contella*, 559 So. 2d 1217 (Fla. 5th Dist. Ct. App. 1990) (emphasis in original). “Coextensive” is defined as having the same scope or boundaries. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 439 (1981). “Commensurate” is defined as equal in measure or extent; corresponding in size, extent, amount or degree. *Id.* at 456.

191. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310 (1962).

within the content of both instruments.

Carefully adhering to the common law roots of the merger doctrine, the early cases (e.g., *Bull*)<sup>192</sup> seized upon four specific facets of any real estate transaction as appropriate for operation of the rule even if actual parallelism was missing: 1) title, 2) possession, 3) quantity, and 4) emblements (these four aspects being sometimes referred to in this article as the "*Bull* criteria").<sup>193</sup> Why? If the subject matter of the contract covenant sought to be enforced involves the title to the land, or the possession of the land, or the quantity of land conveyed, or the emblements of the land,<sup>194</sup> then—reasons *Bull*—merger must certainly, above all, be deemed to apply and the succeeding deed must be deemed to extinguish the earlier contract covenant because each of these four aspects are so basic, so essential in every real estate transaction that the law infers the necessary parallelism even if the parties' documents did not expressly manifest it. Simply put, these four aspects are inherent in the land.

The "*Bull* criteria" emerged as the answer to the basic question in these cases, which was phrased by the *Bull* court as being "a nice and difficult question, to determine whether covenants contained in an agreement for the sale of land are collateral to those providing for the execution of the deed, or are so connected with it, as to be at an end and become merged or satisfied in the execution of the deed."<sup>195</sup> The *Bull* court and the plethora of cases that followed and approved *Bull* thus analyzed and ruled that these four legal aspects, title, possession, quantity and emblements, are so basic to real property, are so "connected with it,"<sup>196</sup> that the law supplies their existence to Act II<sup>197</sup> of the real estate transaction play even when the parties themselves were silent in that Act, thereby fulfilling the common law requirement of identity and allowing the doctrine of merger to operate. And to complete the equation, *Bull* further states the corollary to the rule, that absent actual parallelism the lesser estate (the contract) will *not* be deemed merged into the greater estate (the deed) if the contract covenant *sub judice* involves some subject *other than* the title, possession,

192. *Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850).

193. *Id.*

194. *Id.* at 645.

195. *Id.*

196. *Id.*

197. "Act II" being the closing document(s); e.g., the deed of conveyance, that follows—after the intermission—Act I of the play, the contract of sale. *See supra* notes 21, 22 and accompanying text.

quantity or emblems of the land (i.e., if the contract covenant does not involve a "*Bull* criterion").<sup>198</sup>

Unfortunately, as the years passed, application of the doctrine of merger to decide real estate transaction cases was extended well beyond situations involving the title, possession, quantity or emblems of the land, and far into situations in which the two sets of provisions (those in the contract, and those in the deed) lacked identity and did not address the same subject.<sup>199</sup> The once clear and carefully circumscribed doctrine became a hackneyed rule of law, a buzzword or "handy phrase"<sup>200</sup> for the courts to invoke as justification for result-oriented decisions denying post-closing enforcement of the contract of sale. Demanding equal if not more time and attention, and perhaps a product of modernization (could *Bull* have envisioned contract covenants warranting the sound mechanical condition of the air conditioning equipment, or that water, sewer and electric service are available with sufficient capacity for a 45,000 square foot office building?),<sup>201</sup> the courts also found it necessary to develop a whole series of ad hoc exceptions to their supposed body of merger doctrine case law in order to justify result-oriented decisions allowing enforcement of the contract after the closing. Having lost its common law historical rudder, the classic doctrine of merger as applied to real estate transactions was bastardized and left floundering as an overextended rule, which resulted in cultivation of a multitude of exceptions as an attempt to maintain direction, but in reality served only to keep the "doctrine" on a circuitous course. Sadly, the once noble and useful doctrine is being swallowed by its exceptions.

*Fleischer v. Hi Rise Homes, Inc.*,<sup>202</sup> a December 1988 Florida case, however, steers us back to *Bull* to straighten our course in the application of the doctrine of merger. Whether knowingly or fortuitously, *Fleischer's* unnecessary reference<sup>203</sup> to *Bull* planted the seed

198. *Bull*, 9 Barb. at 644-45.

199. See, e.g., *Soper v. Stine*, 184 So. 2d 892 (Fla. 2d Dist. Ct. App. 1966) (applying the doctrine of merger to buyer's covenants to make deferred payments for inventory, fixtures and goodwill).

200. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1319, at 310 (1962) ("The phrase 'discharged by merger' . . . is merely a 'handy' phrase, of convenient uncertainty and obscurity, that is used so as to avoid the necessity of clear thinking and accurate analysis.").

201. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

202. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

203. *Id.* at 1107.

that prompts re-evaluation of the merger rule from a refreshing doctrinal viewpoint, reminding us of the common law roots and requirements of the rule. Hearken to the common law identity requirement, proclaims *Bull*, and recall that merger may occur *only* if the greater and lesser estates coincide in the same person, in the same right, and for the same purpose. Recall further that the identity requirement may be fulfilled in actuality (by parallel content),<sup>204</sup> or by implication (by the *Bull* criteria). But since all four *Bull* criteria may not necessarily be the salient property characteristics appertaining today,<sup>205</sup> most importantly recall the underlying philosophy of *Bull*, that the law will inject the deed with the parallelism needed to fulfill the identity requirement where the subject matter of the contract clause is a type that is inherent in all real property. These are the cases of "true merger," allowing for (nay, demanding) analysis and determination based on the doctrine of merger in its purest form. In any other situation, that is in the absence of either 1) actual parallelism of covenants in both the contract and the deed, or 2) parallelism inferred under the *Bull* umbrella of those covenants so inherently connected to the land, the issue of whether the covenant remains enforceable must be analyzed and decided based on the theory of accord and satisfaction.<sup>206</sup>

Thus, the facts of any case seeking enforcement of a real estate contract covenant after the closing must be critically analyzed in a two-step process (which is sometimes hereinafter referred to as the "Two-Step" analysis):<sup>207</sup>

1. Does the requisite parallelism exist (either in actuality, or by

204. Merger operates to discharge contractual obligations, much as accord and satisfaction, novation, or substitute contracts discharge, executory covenants. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1293, at 185 (1962).

205. Whether these particular four categories are still the only or the appropriate areas that fulfill the identity requirement, is a separate issue; e.g., does anyone know what an "emblem" is? However, identifying the specific areas of true merger is not as important as understanding that the principle of "sameness" or identity of right and purpose must apply to have a "true merger" situation; for once that element is taken into account, identifying specific areas will naturally follow.

206. "The actual use of the merger rule can often be explained as a way of regarding the delivery and acceptance of the deed as a sort of accord and satisfaction." *Reed v. Hasell*, 340 A.2d 157, 161 (Del. Super. Ct. 1975) (interestingly, merger was claimed by the purchaser to disallow seller's use of an exculpatory clause contained in the contract).

207. Not to be confused with the "Texas Two-Step," a popular country-western dance.



implication through a *Bull* criterion) to invoke operation of true merger?

—If yes (a “TRUE MERGER” case), the covenant is deemed extinguished and is unenforceable (absent fraud or mistake).

—If no (a “NON-MERGER” case), we are *not* dealing with an “exception” to the doctrine of merger. Merger should not even be a topic of discussion. For want of parallelism, merger cannot be called upon to decide the case. Does this mean, therefore, that the covenant is automatically enforceable? Absolutely not! We need to proceed to step number two, and ask

2. Has an accord and satisfaction occurred under this same set of facts (in this “NON-MERGER” case)?

The topic of accord and satisfaction, and its various ramifications, is justifiably the subject of numerous separate law review articles<sup>208</sup> and no pretense is here made to invade that territory. It is sufficient to say that the term is used in this article in its generally accepted sense, to identify that certain recognized method of discharging and terminating an existing obligation by the obligor rendering some performance different from that originally obliged and the obligee accepting the substituted performance as full satisfaction of his rights;<sup>209</sup> or, more simply put—a settlement.<sup>210</sup>

Applied to contract and deed in real estate transactions, the theory is that parties may—by this method called accord and satisfaction—discharge (or be deemed to have discharged) obligations existing under their contract for the sale of property by fulfilling substituted agreements or by rendering some performance acceptable to the other party even though different from that originally contracted for. The “accord” is the agreement (and therefore must be duly supported by consideration) to give on the one hand, and to accept on the other hand, something different from that originally and rightfully due, in full discharge of the original rights and liabilities. The “satisfaction” is

208. See Scott J. Burnham, *A Primer On Accord & Satisfaction*, 47 MONT. L. REV. 1 (1986); Joseph C. Sleeth, Jr., Comment, *Executory Accord, Accord and Satisfaction, and Novation - The Distinctions* 26 BAYLOR L. REV. 185 (1974); Note, *Contracts, Accord & Satisfaction, Liquidated Debt*, 14 TEMP. L.Q. 279 (1940).

209. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276, at 115 (1962).

210. *Id.* at 115. Settlement is defined as “Act or process of adjusting or determining . . . .” BLACK’S LAW DICTIONARY 1231 (5th ed. 1979).

the execution or performance carrying out the substituted agreement,<sup>211</sup> evidenced in the real estate transaction typically by the delivery and acceptance of the deed.

Hence, in the "NON-MERGER" case (which now more accurately should be called a "POSSIBLE ACCORD-SAT." case), the parties have delivered and accepted closing document(s) that are different (either by silence, or by some degree of conflict) from their original contract. The issue for analysis in terms of a possible accord and satisfaction becomes whether the parties by their manifested intentions and actions during the executory period or at closing arrived at a substituted understanding—or by law must be deemed to have reached such substitution—so that the delivery and acceptance of the closing document constitutes fulfillment of that understanding and a discharge of the original contract.

It is interesting to stop a moment and take note at this point that the presumptions of result are exactly opposite each other in the operation of the two theories under discussion (although this consequence should be of no influence in determining which theory is applicable under a specific set of facts). The presumption under the merger rule is that the contract covenant died; under accord and satisfaction, it is presumed to live. Under the doctrine of merger, the contract is deemed extinguished and therefore unenforceable, unless fraud or mistake can be shown. Under the theory of accord and satisfaction, the contract covenant is presumed to survive and thus be enforceable, unless it can be shown that the parties agreed otherwise. This theme weaves its way through the following analysis of several recent Florida cases, and we return to this topic and its significance, *infra*,<sup>212</sup> at the conclusion of this section.

Not surprisingly, if we analyze some of the recent Florida "merger" cases<sup>213</sup> through the Two-Step process we expose that what have heretofore been labelled as the familiar "exceptions" to merger, are actually misapplications of the doctrine and its body of departures. Because parallelism is lacking, the cases are not submissive to true merger. Thus, these "exceptions" should be cast aside, and these cases should be viewed more clearly and honestly in the context and theorem of accord and satisfaction. As an example of this strategy, let us re-

211. RESTATEMENT OF CONTRACTS § 417 cmt. a (1932); 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276 (1962).

212. See *infra* notes 274-75 and accompanying text.

213. The cases listed in APPENDIX *infra*.

examine several of the recent Florida cases that involved sellers' covenants negating code violations in the property,<sup>214</sup> and analyze whether the parties expressly or impliedly agreed during the executory period that the particular seller's liability under said covenant would terminate at closing (for otherwise, his liability carries on).

In each of these cases, *Steinberg*, *Fraser*, and *Sager*,<sup>215</sup> the respective seller represented or warranted in the contract of sale, but not in the deed of conveyance, that there existed no violations of city codes or ordinances in the property; and in each case, the purchaser closed and later brought suit for breach of the contract covenant. In *Steinberg* and *Sager*, the contract was held enforceable; in *Fraser*, the contract was held unenforceable.

Under the Two-Step analysis, we first probe for parallelism, either actual or by implication.<sup>216</sup> The reported facts in all three cases disclose no covenants against code violations contained in any of the deeds,<sup>217</sup> and such silence is typical.<sup>218</sup> Hence, there is no actual parallelism. Can parallelism be inferred under the *Bull* fundamentals?<sup>219</sup> Covenants against code violations fall neither within any of the four specific *Bull* criteria nor within the "inherent-in-the-land" rationale of *Bull*;<sup>220</sup> hence, the facts and logic compel a negative response to the inquiry of Step One—these three cases are *not* candidates for "true merger." We now proceed to Step Two.

Studied from the viewpoint of accord and satisfaction, the cardinal facts in *Fraser* are that the purchaser discovered the code violations during the executory period, confronted his seller with them, and stated his intention not to close.

However, after the seller threatened suit, the purchaser did close the transaction and he accepted the deed and possession of the prop-

214. See *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981); *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978); *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978).

215. *Sager*, 402 So. 2d at 1282; *Fraser*, 364 So. 2d at 533; *Steinberg*, 363 So. 2d at 59.

216. See *supra* note 207 and accompanying text.

217. See *Sager*, 402 So. 2d at 1283; *Fraser*, 364 So. 2d at 533; *Steinberg*, 363 So. 2d at 59.

218. See, e.g., FLA. STAT. § 689.02-03 (1990) (statutorily prescribed form of warranty deed).

219. See *Bull v. Willard*, 9 Barb. 641, 645 (N.Y. Sup. Ct. 1850); see also *supra* notes 192-98 and accompanying text.

220. *Id.*

erty. This interaction between purchaser and seller during the executory period and the resolution of their confrontation could well be seen as an accord, and of course closing the purchase and accepting the deed constituted the satisfaction. By his actions, the purchaser in *Fraser* is deemed to have agreed to acceptance of the property "as is," as he saw it with his own eyes.<sup>221</sup> Therefore, the contract covenant was correctly held unenforceable, *not* by the operation of merger but by an accord and satisfaction.<sup>222</sup>

However, in *Steinberg*<sup>223</sup> and *Sager*<sup>224</sup> there was no evidence of an accord during the executory period. Again, analyzing these cases from the viewpoint of accord and satisfaction, we start with the presumption that the seller's liability under his contract warranty against present code violations remains viable until exhausted by the statute of limitations.<sup>225</sup> Was there any action by purchaser and seller between the contract signing and the passage of the deed in either of these cases to evidence an understanding that seller's liability should end any earlier? Combing the facts in both cases, we find none. Significantly, although not singularly controlling, knowledge of the code violations came to light *after* the respective closings in both *Steinberg* and *Sager*,<sup>226</sup> thus, there could be no justification for supposing an accord based upon purchaser's resolution of he had been personally aware of prior to closing such as the purchaser in *Fraser*.<sup>227</sup> Moreover, there are no other facts apparent in either *Steinberg* or *Sager* to indicate any other intention by the parties to amend, modify or substitute their original agreement. There being no evidence of an "accord," the closing cannot be viewed as a "satisfaction" in either of these cases, and the earlier contract covenant lived on to be enforced in both cases.<sup>228</sup>

Any number of the other recent Florida "merger" cases<sup>229</sup> could likewise be analyzed from the Two-Step viewpoint suggested above.<sup>230</sup> Hopefully, a few more examples will be illustrative of the thesis sug-

221. *Fraser*, 364 So. 2d at 534 (purchaser who closes with knowledge of a breach of a contractual covenant is barred, by merger, from suing under the contract).

222. *Id.*

223. *Steinberg*, 363 So. 2d at 58.

224. *Sager*, 402 So. 2d at 1282.

225. *Id.* at 1283; *Steinberg* 363 So. 2d at 59.

226. *Sager*, 402 So. 2d at 1283; *Steinberg* 363 So. 2d at 59.

227. *See supra* note 221.

228. *Sager*, 402 So. 2d at 1283; *Steinberg* 363 So. 2d at 59.

229. *See APPENDIX infra.*

230. *See supra* note 207 and accompanying text.

gested herein, that merger has become just a buzzword and that these cases clamor for deeper analysis. In *Campbell v. Rawls*,<sup>231</sup> for instance, plaintiffs-purchasers' cause of action brought after the closing was based on seller's breach of that part of the contract of sale that provided: "Seller warrants air conditioning and heating systems, . . . to be in working order at time of closing."<sup>232</sup> The court affirmed enforcement of the contract, stating that "the warranty in this case is the type of independent covenant *generally excepted* from the merger doctrine."<sup>233</sup> Under the Two-Step analysis, was the topic of merger even germane to the court's consideration of the case? That is, was this case a potential "true merger" situation? The deed was apparently silent (as is typical)<sup>234</sup> with respect to the condition of the air conditioning and heating systems, so there was no actual parallelism. The only remaining inquiry, then, is whether the mechanics of heating and cooling systems "look to," or are so "connected with" the land<sup>235</sup> as to be deemed inefaceable to the real estate transaction. Assuming a negative response to this inquiry (the answer suggested by *Bull*, its legacy, and the dictates of common law),<sup>236</sup> there cannot possibly be true merger. Step Two, then, calls for scrutiny of the facts in search of possible accord and satisfaction. Interestingly, the seller's airconditioning warranty quoted above<sup>237</sup> went on to provide that "Buyer, at his expense, may inspect such systems [three] days prior to Closing, and in the event discrepancies exist, Seller will repair same at Seller's expense." Buyers (plaintiffs) did *not* inspect prior to closing, for had they done so their action could well have been viewed as the same "accord" as our previous analysis imputed to the purchaser in *Fraser*.<sup>238</sup>

The court in *Campbell* specifically addressed the question of whether the above-quoted "three-day" clause made it incumbent on the buyers to critique the equipment prior to closing, and the court re-

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231. 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980).

232. *Id.* at 745.

233. *Id.* at 746.

234. *See, e.g.*, FLA. STAT. § 689.02-.03 (1990) (statutorily prescribed form of warranty deed).

235. *See supra* notes 194-96 and accompanying text.

236. *See Bull v. Willard*, 9 Barb. 641 (N.Y. Sup. Ct. 1850); *see also supra* notes 194-96 and accompanying text.

237. *See supra* note 232 and accompanying text.

238. *See supra* notes 221-22 and accompanying text. The court achieved the same results with a merger analysis as it would have using an accord and satisfaction paradigm.

sponded in the negative, stating: “[W]e construe the plain language of the agreement to mean that the [buyers] were not required to inspect the premises three days before closing and report discrepancies [in order] to *preserve their rights* under the warranty.”<sup>239</sup> The reported facts in *Campbell* reveal no other suggestion of a superseding agreement or mutually agreed substituted performance.<sup>240</sup> Hence, since the contract is presumed to live unless an accord and satisfaction be shown, the plaintiffs’ cause of action for breach of contract should justifiably be sustained under this analysis. Same result; different theory. The court reached its conclusion to enforce the contract through *exceptions* to the merger doctrine;<sup>241</sup> our audit through the Two-Step process and the context of accord and satisfaction, which we proffer as the more intellectually honest approach, reaches the same result.

*American National Self Storage v. Lopez-Aguilar*<sup>242</sup> can well serve as another of the recent Florida cases to be looked at from the new Two-Step perspective. The plaintiff-buyer there sued his seller, we recall,<sup>243</sup> for breach of the seller’s representations and warranties under the contract of sale “that water, sewer and electric service are presently available at the property line or lines of the premises with sufficient capacity to accommodate a 45,000 sq. ft. office/warehouse building;”<sup>244</sup> and the cause of action was allowed, over the objection of merger, by virtue of several of the recognized *exceptions* to the merger rule.<sup>245</sup> The reported facts specifically state that the deed contained no warranty regarding the availability of water, sewer or electric service. Testing for true merger, there surely was no actual parallelism. The inquiry once again then becomes whether these covenants (about the availability of water, sewer and electric service) are sufficiently inbred, intrinsic and deep-rooted in the land so as to justify an implication of the identity necessary for true merger.

The *American National* court was certainly on the right track when it reviewed and recited roughly fifteen cases from Florida and other jurisdictions that demonstrated the dichotomy between the types of clauses that are “usually included in the terms of a deed” and there-

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239. *Campbell*, 381 So. 2d at 746.

240. *Id.* at 744.

241. *Id.* at 746.

242. 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988).

243. *See supra* note 127 and accompanying text.

244. *American Nat’l*, 521 So. 2d at 304.

245. *Id.* at 305-06.

fore merger is mandated, versus those types of clauses that “call for acts by the seller which go beyond merely conveying clear title and placing the purchaser in possession of the property” in which cases merger does not apply.<sup>246</sup> Indeed, the court’s conclusion negating merger with regard to this seller’s warranty of utilities availability was somewhat reminiscent of *Bull* when it reasoned that covenant “is not an agreement usually contained in a deed, related to the condition of the title to property, or satisfied by the execution and delivery of the deed.”<sup>247</sup> The court thus closely approached the “true merger” concept, but did not quite reach it. All that was missing at this point was an analysis of *why* merger did or did not apply in the fifteen or sixteen instances summarized, namely because the requisite identity in “right” and “purpose,” as required by the common law for the merger of estates,<sup>248</sup> either did or did not exist in the respective sets of contract and deed covenants. Instead, the *American National* court swerved to the “exceptions” sidetrack to overcome the merger defense.

The court, having reached the correct conclusion in Step One that true merger was unavailing, was then ready for analysis under Step Two, as to whether plaintiff’s cause of action on the contract might have been precluded by reason of accord and satisfaction. Again, the court was on the right track, and did in fact recognize that the parties might have intended to reach an accord and satisfaction but sufficient facts simply were not in the record.<sup>249</sup> Accordingly, the court remanded the case for further evidentiary hearing, at which time defendant-seller might “[attempt] to prove, by evidence other than the deed itself, that the parties intended that the warranty of the contract of sale was to be extinguished by the conveyance of the property;”<sup>250</sup> i.e., that the parties intended and reached an accord and satisfaction.

Another of the recent Florida cases, *Southpointe Development, Inc. v. Cruikshank*,<sup>251</sup> serves to illustrate that true merger is alive and well, as is a “true exception” to true merger, and that modern-day cases may scrupulously be resolved through analysis that extends only through Step One of the Two-Step process. Although it does not cite *Bull*, *Southpointe* clearly supports the *Bull* criteria. As recalled from

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246. *Id.*

247. *Id.* at 306.

248. *See supra* note 190 and accompanying text.

249. *American Nat’l*, 521 So. 2d at 306.

250. *Id.*

251. 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986).

earlier discussion,<sup>252</sup> the seller in *Southpointe* agreed to sell to the purchasers the "Sunrise Golf Course Club House, cart sheds, and maintenance sheds,"<sup>253</sup> and after closing it was discovered that the deed failed to convey the maintenance shed property; the purchasers sued.

At first blush this would appear to be a modern-day, open-and-shut case absolving defendant on the basis of true merger since it involved one of the four specific criteria of *Bull*, the quantity of land conveyed. Accordingly, the answer to the Step One question<sup>254</sup> is "yes," and it would seem that the trial court's summary judgment for defendant-seller should be affirmed without much ado: Covenants respecting the quantity of land to be conveyed merge into the deed and are extinguished.<sup>255</sup> However, just as there exist limited situations of true merger, so too are there limited situations that constitute legitimate exceptions to true merger,<sup>256</sup> and one of those situations happens to be in the case of mistake.<sup>257</sup> Thus, the court in *Southpointe* correctly reversed the summary judgment for seller grounded on merger and remanded the case for trial on the "unresolved material issues of fact relating to the parties' intention to convey the property in question and to *whether the omission was a mutual mistake.*"<sup>258</sup> The doctrine of merger thus remains viable to factual situations that embrace the requisites of "true merger," but so too is at least one rightful exception thereto, mistake—even with respect to such core *Bull* elements as "quantity" and "title."<sup>259</sup>

Nevertheless, and of most significance to analyzing the "merger" cases from the Two-Step viewpoint, *Southpointe* teaches by example that a true merger case may properly be resolved wholly at Step One. Having fulfilled the requisites to qualify as a case of true merger, the *Southpointe* real estate transaction must be steadfastly viewed as func-

252. See *supra* notes 155-59 and accompanying text.

253. *Southpointe*, 484 So. 2d at 1362.

254. See *supra* note 207 and accompanying text.

255. See *supra* notes 192-95 and accompanying text.

256. See *supra* note 163 and accompanying text. The classic exceptions to true merger are mistake, accident and fraud. The courts generally (and correctly) do not refer to these as exceptions, but instead simply say that merger "does not apply" here. See, e.g., *Southpointe Dev. Inc. v. Cruikshank*, 484 So. 2d 1361, 1362 (Fla. 2d Dist. Ct. App. 1986) ("[T]he principle of Merger *does not apply* in cases of mistake.") (emphasis added).

257. See *supra* notes 162-63 and accompanying text.

258. *Southpointe*, 484 So. 2d at 1362 (emphasis added).

259. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 604 (1960).



tus officio, and it would be doctrinally unsound to consider accord and satisfaction, if it is factually determined on remand that there was no mistake. *Southpointe* further illustrates, however, that progression to Step Two may nevertheless be warranted in a true merger case if in fact the omission in the deed was due to mistake, for even though the plaintiff is saved from the doom of merger by reason of the mistake, it is still conceivable that the actions of the parties during the executory period might evidence an accord that was fully satisfied by the delivery and acceptance of the deed.

In bringing this section to a close, it could not be more fitting than to harken back to the earliest Florida merger case of this century, *Gabel v. Simmons*,<sup>260</sup> as the bellwether of the Two-Step thesis propounded herein. With regard to Step One (whether the requisite parallelism exists to permit the operation of true merger),<sup>261</sup> *Gabel* warned us, ‘tho superficially, not to become engulfed in the merger rule where “not appropriate.”’<sup>262</sup> Yet *Gabel* itself and at least twenty-six subsequent Florida appellate cases became so mired,<sup>263</sup> and it was not until *Fleischer v. Hi Rise Homes, Inc.*<sup>264</sup> in December, 1988—by its reference to *Bull*—that we are directed out of our quag.

In rejecting defendant’s contention that plaintiffs’ action on the contract of sale was barred by merger (*i.e.*, in finding “exceptions” to the merger rule), the court in *Gabel* took pains to point out that it was “not appropriate” for a closing document to include a clause of the type on which the *Gabel* breach of contract action was based<sup>265</sup> (the provision for refund of buyers’ purchase price if they were dissatisfied with the property). Conversely, if it *was* appropriate for the closing document to include such a provision, then it follows that merger *would* apply. This initial stage of the court’s analysis concurs in theory with *Bull* and with Step One of the Two-Step thesis: If the requisite parallelism does not exist in order to invoke true merger, the contract covenant is *prima facie* enforceable. The court then could have set about Step Two, checking for an accord and satisfaction, but it didn’t. Rather, the court adjudicated the “merger” issue straightforward on

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260. 129 So. 777 (Fla. 1930).

261. See *supra* note 207 and accompanying text.

262. *Gabel*, 129 So. at 778.

263. *Id.* at 778; see also APPENDIX *infra*.

264. 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988).

265. *Gabel*, 129 So. at 778.

the basis of several of the well-known "exceptions" to merger.<sup>266</sup> Nevertheless, we can advance our analysis to Step Two and scrutinize the facts of *Gabel* to see if the elements of an accord and satisfaction were fulfilled.

Recall,<sup>267</sup> that plaintiff-buyer here sued his seller for refund of all monies paid (deposit and down payment at closing) based on a contract covenant by seller that "[i]f purchaser is dissatisfied *after 90 days from closing*, all monies paid shall be returned with 10% interest."<sup>268</sup> Purchasers requested (and then, demanded) return of their money on numerous occasions: Before, at, and after expiration of the ninety days. About a month after the expiration of the 90 days, defendant-seller attempted to mollify plaintiffs and attempted to delay return of the money so as "to allow them (plaintiffs) to dispose of the property at a profit to themselves," and promised to return the money at an extended date "if plaintiffs were still dissatisfied with their purchase."<sup>269</sup> Was there an accord and satisfaction under these facts? Impossible. The covenant contemplated performance *after* closing,<sup>270</sup> and all of the conversations and interaction of buyer and seller regarding the requested refund took place *after* closing. None of the activity or the conversations took place during the executory period, so there is nothing to support an accord, respecting which the closing might have in any fashion constituted a satisfaction. Perhaps the more relevant question is whether the parties' post-closing activities constituted a novation,<sup>271</sup> and while the court didn't actually raise this question, it answered it by ruling that the "new promise" to return the money at the extended date, which promise was made approximately 120 days after the closing, "did not affect the plaintiffs' right to a return of the money."<sup>272</sup>

The above discussion of several recent Florida cases not only illuminates the more honest and clear thinking of the "Two-Step" analysis, but also suggests why the modern trend of the cases is "pro-life" to the contract, favoring the enforceability of more and more contract

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266. See *supra* note 123 and accompanying text.

267. See notes 41-49 and accompanying text.

268. *Gabel*, 129 So. at 777 (emphasis added).

269. *Id.*

270. *Id.*

271. The "first cousin" of accord and satisfaction. See 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1300, at 228 (1962) ("A novation is like accord and satisfaction . . .").

272. *Gabel*, 129 So. at 778.

provisions.<sup>273</sup> For while the predominant number of recent decisions has been in favor of sustaining enforceability of the contract provisions through “exceptions” to merger, what these statistics really demonstrate is a shift in presumptions corresponding with the shift in theories suggested above—the shift from merger to accord and satisfaction. Under the doctrine of merger, of course, the contract covenant is presumed to have perished, but under the accord and satisfaction theory, the “more appropriate” theory in most cases as suggested above, the covenant is presumed mortal, viable and enforceable.<sup>274</sup> The recent statistics overwhelmingly bear out the trend towards enforcement of the contract covenants.<sup>275</sup> So in the shift of doctrines, and in the shift of presumptions, the burden of proof also changes from he who seeks to enforce the contract, to he who seeks to prevent enforcement. And perhaps, as touched on in the next section,<sup>276</sup> this is how it “should be” from a policy standpoint.

## VII. CONCLUSION

So now we reach the point where we lean back, acknowledge the problem, the confusion and the misapplication of the doctrine, and ask what can we do to rectify this situation.

More specifically, our travels have revealed that real estate buyers and sellers are repeatedly confronted with post-closing legal problems that could have been resolved by their contract covenants if raised pre-closing, but weren't. So the issue at this point in time (after passage of the deed) becomes: Is it too late? Not because of a statute of limitations; not because of laches; not because of caveat emptor or the parol evidence rule (although there certainly is overlap);<sup>277</sup> but because of a notion that all good things must (at some point in time) come to an end.<sup>278</sup>

From a broad, social policy perspective, we can view the problem thusly:

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273. See APPENDIX *infra*; see also *supra* notes 58-59 and accompanying text.

274. 6 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1276 (1962).

275. See APPENDIX *infra*; see also *supra* notes 58-59 and accompanying text.

276. See *infra* note 313 and accompanying text.

277. See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 573-76, at 356 (1960).

278. “Some time an end there is of every deed.” CHAUCER, THE KNIGHTS TALE, 1 (1778); BURTON E. STEVENSON, THE HOME BOOK OF QUOTATIONS 538 (10th ed. 1967).

Bestowing effect upon the doctrine of merger is typically a boon to the seller.<sup>279</sup> He stands released and discharged from otherwise enforceable contractual obligations. He got away with it, to the detriment of his buyer.

Refusing to recognize merger allows survival of contract covenants past the closing, and is typically a boon to the buyer.<sup>280</sup> He made his bed; he slept in it; and he gets a chance to re-make the bed if his slumber is disturbed. He gets a second bite at the apple, to the detriment of his seller.

Several ideas are posed as possible resolutions to the problem: 1) Statutory legislation; 2) Adoption of a "standard" provision on merger in widely used form contracts; 3) Educated and tailored contract preparation; and 4) Enlightened judicial construction.

#### A. *Statutory Legislation*

Legislate a hard and fast rule by statute. For example, all covenants of the contract of sale shall survive delivery of the deed. Or, all covenants of the contract shall be deemed extinguished by merger into the deed. Or, should the statute carve out particular contract covenants that shall always survive closing, and specify other contract covenants and subject matters that shall always be deemed extinguished and unenforceable? And if so, then which type of covenants shall survive, and which shall be extinguished? And, can statutory language be crafted to clearly identify the particular subject matters that shall always fall into one category or the other?<sup>281</sup> Perhaps this short series of questions demonstrates the futility of seeking to resolve the problem by statute.

Nevertheless, the National Conference of Commissioners on Uniform State Laws did propose resolution of the merger problem by statute, in its adoption of the Uniform Land Transaction Act (ULTA).<sup>282</sup>

279. The deed typically contains fewer seller covenants than the contract. *See, e.g.,* FLA. STAT. § 689.02-.03 (1990) (statutorily prescribed form of warranty deed). Strict merger reduces the number of covenants, by operating to enforce only the covenants in the deed. The seller then by the operation of merger emerges burdened with fewer obligations when he is freed from the contract covenants.

280. The buyer, conversely, typically wants all of the contractual covenants enforceable.

281. *See infra* notes 282-85 and accompanying text.

282. The act was approved by the Conference in 1975. *See* UNIFORM LAND

Proposed Section 1-309 of the ULTA essentially would have eliminated the doctrine of merger, in that it provided as follows:

Acceptance by a buyer or a secured party of a deed or other instrument of conveyance is not of itself a waiver or renunciation of any of his rights under the contract under which the deed or other instrument of conveyance is given and does not of itself relieve any party of the duty to perform all of his obligations under the contract.<sup>283</sup>

For whatever reasons (certainly going beyond the sole issue of merger), the ULTA was never adopted by even one state,<sup>284</sup> and as of June, 1991 "the ULTA is a dead horse."<sup>285</sup> Perhaps this too demonstrates the futility of endeavoring to resolve the merger issue through legislation.

### B. *Form Contracts*

Adoption of a standard position on merger by inclusion of an appropriate paragraph in the "standard form" real estate contract(s) in prevalent use by the bar and by real estate agents in the state, is another suggestion to resolve the merger problem.

Certainly, the courts respect the parties' manifested intent that the contract covenants shall, or shall not, survive the closing of the transaction.<sup>286</sup> Several popular printed-form contracts are in use in Florida today, and all of them are silent with regard to whether the covenants thereof survive passage of the deed.<sup>287</sup> Inclusion of a "standard"

TRANSACTIONS ACT, 13 U.L.T.A. 472 (1977) (history of the Act); Dunham, *Merger by Deed—Was It Ever Automatic* 10 GA. L. REV. 419 (1976) (comprehensive examination by a Commissioner on Uniform State Laws and the Chairman of the Special Committee which drafted the Uniform Act).

283. UNIFORM LAND TRANSACTIONS ACT § 1-309, 13 U.L.T.A. 500-01 (1977) (repealing the doctrine of merger for realty just as the U.C.C. made merger inapplicable for goods). See generally UNIFORM COMMERCIAL CODE § 2-607 (buyer can still sue for breach of contract after acceptance of tender); UNIFORM COMMERCIAL CODE § 2-608 (buyer can revoke acceptance of goods).

284. UNIFORM LAND TRANSACTIONS ACT, 13 U.L.T.A. 469 (1977 and Supp. I 1991); see also U.L.T.A. DIRECTORY OF ACTS (1991 Pamph.).

285. Telephone interview with John McCabe of the *National Conference of Commissioners on Unification of State Laws* (June 19, 1991).

286. See *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1981) (contract covenants were implicitly deemed to survive the closing).

287. An examination of ten prevalent form contracts used in Florida revealed no mention of any provisions for the survival or the discharge of contract covenants upon

merger provision would fill the void of this silence.

For example, The Florida Bar and the Florida Association of Realtors have for many years jointly prepared and utilized a standard, printed-form Contract for Sale and Purchase,<sup>288</sup> and a joint committee comprised of members from both of those associations continually reviews, revises and expands the form contract.<sup>289</sup> In its present form (latest revision, January, 1991) the contract contains no provision regarding merger. Similar to the proposal expressed above with regard to statutorily legislating the answer to the merger question, the proposition here is to "legislate" the answer by an omnibus clause in the printed-form contract, addressing survival *vel non* of all of the covenants, warranties, representations and other agreements of the parties as contained in that "standard" contract. As with the above statutory proposal, however, the same series of questions come to mind. Should the "standard" be that all covenants survive? Or, that all covenants are merged? Or, that some particular covenants concerning specified areas are deemed merged, but other specified covenants are deemed to survive? And, if so, which shall merge, and which shall survive? Could the bar and the Realtors ever concur on answers to the foregoing questions sufficiently to reach a "standard" acceptable to the real estate industry in our state? And, can we draft adequate language that will clearly identify those types of covenants intended to fall within either of the specified categories, or are the subject matters inherent in any real estate transaction of such nature as to defy clear expression in this type of dichotomy? Again, perhaps these questions demonstrate the futility of attempting to resolve the question of merger by a standard-form contract.

Nevertheless, the real estate professionals of the state of New York did just that in their latest, very recently revised standard-form Residential Contract of Sale,<sup>290</sup> providing that:

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delivery of the deed. Among those surveyed were, the Florida Association of Realtors and The Florida Bar (FAR/BAR) Contract for Sale and Purchase, the *Miami Board of Realtors* Contract for Sale and Purchase, and the *Coral Gables Board of Realtors* Contract of Purchase and Sale.

288. *Florida Association of Realtors and The Florida Bar, FAR/BAR Contract for Sale and Purchase* (1991).

289. *See generally FAR/BAR Contract Preparation Manual* (1988). This manual describes the Realtor-Attorney Joint Committee responsible for creating and updating the form contract, and generally explains the purpose of, and methodology for, the preparation of the *FAR/BAR* real estate Contract for Sale and Purchase.

290. *See N.Y. L.J.*, Mar 13, 1991, at 40. The article describes the creation of

Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive Closing.<sup>291</sup>

The "except as otherwise expressly set forth" introductory phrase to this omnibus provision borders on the humorous (were it not that multi-thousands or millions of dollars in real estate value rides on this form) when it becomes apparent by combing through this New York form contract that at least seven separate contractual covenants of this document are "excepted out" and are expressly stated to survive Closing.<sup>292</sup> On the other hand, this revelation may well reflect admirably upon the diligence of the members of the four committees that jointly prepared this latest revised form document,<sup>293</sup> for they obviously gave serious thought and consideration to determining on a subject-by-subject basis which provisions shall live and which shall die. Nevertheless, it must be noted that their *general* conclusion as evidenced by the omnibus provision quoted above<sup>294</sup> was to sustain the doctrine of merger, while the conclusion of the Commissioners on Uniform State Laws under the ULTA section quoted above<sup>295</sup> was to "repeal" the doctrine of merger.

### C. *Contract Preparation; Draftsmanship*

The reported facts in the Florida cases analyzed in this article<sup>296</sup> reflect that each of the respective contracts of sale was silent as to whether the covenant *sub judice* was meant to survive; specifically, the contracts did not contain survival or merger provisions.<sup>297</sup> Of course, had those contracts addressed the merger issue it is doubtful that we would have had the benefit of the case law generated by their litigation,

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*Form A-125, Residential Contract of Sale* by a joint committee chaired by Bernard M. Rifkin, consisting of representatives from the *Real Property Section of the New York State Bar Association*, the *New York State Land Title Association* and the *Committees on Real Property Law of the Association of the Bar of the City of New York* and of the *New York County Lawyer's Association*. *Form A-125* is available through Julius Blumberg Publishers, Inc., New York City.

291. Paragraph 11(c), *Form A-125, Residential Contract of Sale*, (New York).

292. Paragraphs 16(c), 17, 18(e), 21(c), 27, 28(f), 28(g), *Form A-125, Residential Contract of Sale*, (New York).

293. See *supra* note 290 for a list of the four committees.

294. See *supra* note 291 and accompanying text.

295. See *supra* note 283 and accompanying text.

296. See APPENDIX *infra*.

297. *Id.*

because as noted earlier<sup>298</sup> the Florida courts have given assurance that if the parties do state their intent regarding survival or merger in the original agreement, the court will respect that expression.<sup>299</sup> Thus, another suggestion to resolve the merger problem is that the contract preparer handcraft the parties' intentions into the original contract of sale by 1) expressly stating which covenants shall survive and which shall not,<sup>300</sup> or 2) more realistically, setting forth an omnibus survival or merger clause with specifically identified exceptions.<sup>301</sup> This obviously requires substantial attention to detail in the drafting of the agreement of purchase and sale.

In any particular real estate transaction, there will be various provisions that—if the buyer and seller were to stop and think about them—they would wish to have survive closing; and likewise, there will be other provisions that—upon thoughtful consideration—the parties would choose to have extinguished as of the time of closing. Careful consideration and draftsmanship at the time of preparing the contract would avoid subsequent litigation by resolving which provisions will survive, and which will die by merger.<sup>302</sup> The difficulty with this proposal is that typical real estate buyers, sellers and agents are not aware of, much less would they stop and think about, the doctrine of merger when negotiating a purchase and sale of real property, and most contracts of sale are entered into without the advice of counsel and are signed before the attorney ever sees the agreement. The real estate industry (buyers, sellers, brokers, and even many attorneys) is simply not educated to the doctrine of merger, so that the likelihood of considering the impact of merger and providing for it in the original contract is diminutive except in the more sophisticated and high dollar-volume transactions. Moreover, even if the parties or their representatives were aware of the merger issue pre-contract, it would merely add one more stumbling block to the negotiation process, pervading virtually every paragraph of the contract. Naturally, every buyer would like most (if not all) of his seller's representations, warranties and covenants to survive closing; and the typical seller wants to stand released of as much

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298. See *supra* note 286 and accompanying text.

299. See *supra* note 286.

300. For example, "[t]he provisions of this paragraph shall [or shall not] survive the closing of the transaction contracted for hereunder and the delivery of the deed conveying the subject property."

301. *E.g.*, an omnibus provision similar to the New York standard form contract provision (paragraph 11 (c), thereof) as quoted *supra* note 291 and accompanying text.

302. See *supra* notes 300-01.



liability as possible once he has closed and "walked away."

Notwithstanding, silence on the issue of merger is no virtue since, as emphasized by the review of cases in this article, there can be no reliance on the courts for consistency in either upholding or circumventing the doctrine of merger. Thus, given the opportunity,<sup>303</sup> there can be no excuse for counsel failing to tailor appropriate merger and survival provisions into careful real estate contract preparation. This is especially so in recognition of 1) the conflicting presumptions that result from applying either the merger doctrine or the theory of accord and satisfaction,<sup>304</sup> and 2) the conflicting predilections of typical buyers and sellers of real property.<sup>305</sup> Recognizing the various consequences conceivable from the several juxtapositions of these two sets of conflicts, it is incumbent on the prudent real property attorney to protect his client through advice, counsel and documentation concerning merger and survival provisions.

#### D. *Enlightened Judicial Construction*

When all is said and done, the real merger problems will rear their heads in controversies *in judicium venire*.

The likelihood of merger legislation is remote, if at all.<sup>306</sup> Complete resolution by express contract provisions, whether standard-form<sup>307</sup> or tailor-made,<sup>308</sup> is optimistic utopia but not a practical reality. Thus, the ultimate resolution of the veritable merger problems will remain in the hands of the courts, and the most productive and rewarding accomplishment of this article will be to suggest that the courts discard tunnel-vision merger rules and instead analyze potential merger cases through the Two-Step process formulated,<sup>309</sup> discussed,<sup>310</sup> and justified<sup>311</sup> above. Apply the doctrine of merger (and its resultant

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303. I.e., assuming that counsel has been engaged prior to the parties having executed their contract of sale (which is generally not the case in the realities of the real estate industry).

304. See *supra* notes 212, 273-74 and accompanying text.

305. See *supra* notes 279-80 and accompanying text.

306. See *supra* notes 282-85 and accompanying text (description of the quiet demise of a similar proposal).

307. See *supra* notes 290-92 and accompanying text.

308. See *supra* notes 300-01 and accompanying text.

309. See *supra* note 207 and accompanying text.

310. See *supra* notes 207-12 and accompanying text.

311. See *supra* notes 213-76 and accompanying text.

discharge of contractual obligations) only in cases of "true merger;" in all other cases, enforce the contractual obligations as covenanted by *sui juris* parties until terminated by the applicable statute of limitations, unless a substituted agreement—an accord and satisfaction—can be proven. This procedure comports with the basic common law tenets of the merger doctrine; it comports with the strong trend of recent decisions bent on contract enforcement; and this enlightened process of analysis and construction also conforms with our "current notions of justice, equity and fair dealing" as well as the current needs of our society.<sup>312</sup>

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312. See, e.g. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (court would not allow the doctrine of caveat emptor to shield a seller because to do so would fly in the face of society's needs). This article does not propose the frustration of society's needs by a rigid application of merger. Rather, this paper proposes a legally correct application of merger which will fulfill society's need for equity as well as judicial consistency. See *Contos v. Lipsky*, 433 So. 2d 1242, 1247-48 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, C.J., dissenting) (misinterpretation of the merger doctrine can be highly inequitable).

APPENDIX OF FLORIDA CASES DEALING WITH THE DOCTRINE  
OF MERGER\*

1. Seller's covenant to refund purchase price if buyer is dissatisfied with property after ninety days. *Gabel v. Simmons*, 129 So. 777 (Fla. 1930) (merger rule not applied).

2. Seller's oral\*\* representations of good right to convey, freedom from adverse claims and encumbrances, market value and development prospects, and covenant to resell at a profit. *White v. Crandall*, 143 So. 871 (Fla. 1932) (merger rule applied).

3. Seller's covenant subordinating the purchase money mortgage to an anticipated construction loan first mortgage. *Graham v. Commonwealth Life Ins.*, 154 So. 335 (Fla. 1934) (merger rule not applied).

4. Buyer's covenant to assume existing mortgage. *Riddle v. Collier*, 150 So. 880 (Fla. 1934) (merger rule not applied).

5. The contract contained restrictive covenants regarding the use of the land; e.g., only residential use, size and cost of structure, and race restrictions. *Volunteer Sec. Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947) (merger rule applied).

6. Seller's covenant to convey by warranty deed. *St. Clair v. City Bank & Trust*, 175 So. 2d 791 (Fla. 2d Dist. Ct. App. 1965) (merger rule applied).

7. Buyer's covenants to make deferred payments for the inventory, fixtures, and good will of a business. The business was located on certain real property also sold to same buyer, regarding which buyer gave seller a purchase money note and mortgage. *Soper v. Stine*, 184 So. 2d 892 (Fla. 2d Dist. Ct. App. 1966) (merger rule applied).

8. Buyer's covenant to pay balance of purchase price in shares of stock. *Milu Inc. v. Duke*, 204 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967) (merger rule not applied).

9. Seller's covenant that the property is free and clear of all encumbrances. *Stephan v. Brown*, 233 So. 2d 140 (Fla. 2d Dist. Ct. App. 1970) (merger rule applied).

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\* The cases are listed in chronological order. The 22 cases listed at Numbers six through 27 are those referred to in the article as the "recent Florida cases." See *supra* note 56 and accompanying text. Of these 22 recent Florida cases, the merger rule was applied eight times—dicta indicated that it would have been applied two more times—while the courts declined to apply the merger rule in the remaining twelve cases.

\*\* The court did not deal with any statute of frauds issues, but ruled under the doctrine of merger.

10. Contract provision that the purchase money mortgage would contain a 30-day grace period. *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. Ct. App. 1976) (merger rule applied).

11. Seller's representation as to compliance with city code respecting the quantity of rentable units in subject apartment building property. *Steinberg v. Bay Terrace Apartment Hotel*, 363 So. 2d 58 (Fla. 3d Dist. Ct. App. 1978) (merger rule not applied).

12. Seller's covenant against any city code violations. *Fraser v. Schoenfeld*, 364 So. 2d 533 (Fla. 3d Dist. Ct. App. 1978) (merger rule applied).

13. Seller's covenant to convey title free and clear of all encumbrances. *Bennett v. Behring*, 466 F. Supp. 689 (S.D. Fla. 1979) (merger rule applied).

14. Seller's warranty as to condition of air conditioning and heating system and provision for awarding attorney's fees to the prevailing party. *Campbell v. Rawls*, 381 So. 2d 744 (Fla. 1st Dist. Ct. App. 1980) (merger rule not applied in either situation).

15. Contingency clause regarding purchaser obtaining all necessary operating permits, and seller's covenant against violations of ordinances, easements, and deed restrictions. *Sager v. Turner*, 402 So. 2d 1282 (Fla. 4th Dist. Ct. App. 1981) (merger rule not applied in either situation).

16. Seller's covenant of ingress and egress. *Opler v. Wynne*, 402 So. 2d 1309 (Fla. 3d Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 472 (1982) (merger rule not applied).

17. Contract provisions specifying the terms and conditions for partial release of the purchase money mortgage. *Sun 1st Nat. Bank v. Grinnell*, 416 So. 2d 829 (Fla. 5th Dist. Ct. App. 1982) (merger rule applied).

18. Buyer's covenant to reconvey the property to seller if buyer ever ceased using the property as his permanent residence. *Peterson v. Peterson*, 431 So. 2d 672 (Fla. 3d Dist. Ct. App. 1983) (merger rule not applied).

19. Provision for awarding attorney's fees to the prevailing party. *Gordon v. Bartlett*, 452 So. 2d 1077 (Fla. 4th Dist. Ct. App. 1984) (merger rule applied).

20. Seller's covenants to provide water and sewer services, grant one year free golf and tennis club membership, and build a road for access to certain parts of the property. *Georskey v. Wild Flower Landholding Assoc.* 49 Bankr. 246 (M.D. Fla. 1985) (merger rule not applied).

21. Seller's covenant to convey additional property; i.e., property that was not included in the deed. *Southpointe Dev. Inc. v. Cruikshank*, 484 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1986) (merger rule not applied).

22. Seller's reservation of a life estate in a portion of the property. *Kidd v. Fowler*, 498 So. 2d 969 (Fla. 4th Dist. Ct. App. 1986) (merger rule not applied).

23. Seller's covenants regarding the availability and capacity of water, sewer, and electric services to the property. *American Nat'l Self Storage v. Lopez-Aguilar*, 521 So. 2d 303 (Fla. 3d Dist. Ct. App. 1988) (merger rule not applied).

24. Provision for awarding attorney's fees to the prevailing party. *Fleischer v. Hi Rise Homes Inc.*, 536 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1988) (merger rule applied in dicta).

25. Seller's representations concerning the tenancy of parties in possession. *Durden v. Century 21 Compass Points*, 541 So. 2d 1264 (Fla. 5th Dist. Ct. App. 1989) (merger rule not applied).

26. Provision for awarding attorney's fees to the prevailing party. *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d Dist. Ct. App. 1989) (merger rule not applied).

27. Seller's covenant negating any violation of governmental restrictions. *Field v. Perry*, 564 So. 2d 504 (Fla. 5th Dist. Ct. App. 1990) (merger rule applied in dicta).

# Access To “Private” Documents Under the Public Records Act

Robert Rivas\*

## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	1229
II. OVERVIEW OF THE PUBLIC RECORDS ACT . . . . .	1231
III. THE SEMINAL CASE: <i>BYRON HARLESS</i> . . . . .	1234
IV. EVOLUTION OF THE LAW SINCE <i>BYRON HARLESS</i> . . . . .	1237
A. <i>An Easy Case: Attorneys</i> . . . . .	1237
B. <i>The “Totality of Factors” Test</i> . . . . .	1238
C. <i>Another Test: The Essential Governmental Function</i> . . . . .	1239
D. <i>Confusion Among the Cases on Contracts with Agencies</i> . . . . .	1241
E. <i>The Florida Supreme Court’s Latest Venture Into the Field</i> . . . . .	1243
F. <i>The Special Case of the Private Records-Keeper</i> . . . . .	1244
G. <i>The Trade Mission Exception To “Acting On Behalf Of”</i> . . . . .	1246
V. CONCLUSION . . . . .	1247

## I. INTRODUCTION

Richard Roe described himself to his interviewers. “Square, loner—not with crowd.”<sup>1</sup> If he could live his life over, he would “eat less fast, be instantly likeable and charming, [and] lose 20 pounds.”<sup>2</sup> Mr. Roe trusted the interviewers and opened up to them, even giving

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1. *Byron, Harless, Schaffer, Reid & Assocs. v. State ex rel. Schellenberg*, 360 So. 2d 83, 90 (Fla. 1st Dist. Ct. App. 1978) [hereinafter “*Schellenberg*”], *rev’d sub nom. Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980) [hereinafter “*Byron Harless*”].

2. *Schellenberg*, 360 So. 2d at 90.

unflattering opinions of his own son.<sup>3</sup> After all, the lawyers for the interviewers had promised him complete confidentiality.<sup>4</sup> The lawyers were wrong.<sup>5</sup>

Every word he said to his interviewers and every document he shared with them, including his psychological test results, could potentially become public.<sup>6</sup> It made no difference that Mr. Roe submitted the details of his life to the consulting firm, Byron, Harless, Schaffer, Reid & Associates [hereinafter "Byron Harless"], along with a letter saying it was "absolutely essential" that the information be kept secret.<sup>7</sup> In that letter, he told Byron Harless that he could be fired from his current job if it were to become publicly known that he was interested in a new job.<sup>8</sup> Moreover, the public revelation of intimate private facts could "decrease . . . [his] effectiveness as a witness in hearings related to regulatory matters at the federal, state and local level."<sup>9</sup>

Unfortunately for Mr. Roe, he was being screened by the private consulting firm as a candidate for a job with an agency of the State of Florida—executive director of the Jacksonville Electric Authority [hereinafter "JEA"]. In Florida, the documents generated by private firms doing business with a government agency sometimes, by law, become public records. The documents telling Mr. Roe's life story fell into that category.

State agencies often contract for private enterprises to act on their behalf. Private institutions often spend public tax dollars. There is no limit to the number of ways the government, in the business of governance, entangles itself with the private sector. Hence, the public sometimes has a right of access to documents in the hands of private-sector businesses, charitable institutions and individuals when they perform services for the government or spend the government's money.

This article sets forth the law in Florida on the public's right of access to the documents of private-sector actors pursuant to Chapter 119, Florida Statutes, the Florida Public Records Act. The subject of the article is closest to the hearts of the media and government lawyers who frequently must define the right of reporters to inspect documents

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3. *Id.*

4. *Id.* at 87.

5. *Byron Harless*, 379 So. 2d at 640-41.

6. *Id.*

7. *Schellenberg*, 360 So. 2d at 90.

8. *Id.*

9. *Id.*

in the news-gathering process, but a far broader range of lawyers would be well advised to familiarize themselves with the subject.

The legal advisors for the JEA and Byron Harless, for instance, undoubtedly learned a bitter lesson when the provisions of Chapter 119, Florida Statutes, were applied to force the public release of many of Byron Harless's records on Richard Roe and other unsuspecting candidates. Today, any time attorneys in Florida represent a business enterprise contemplating a government contract, they should discern in advance whether any of their client's formerly proprietary internal documents might become subject to mandatory public disclosure<sup>10</sup> to any person who asks for them, regardless of that person's identity or motive.<sup>11</sup>

Unfortunately, as this article concludes, the Florida court cases are inconsistent in defining whether, and when, documents generated by private actors are "public records." In some circumstances, the public's right of access is clear. In others, the cases have not articulated a workable standard for determining whether the public has a right of access. The law therefore is badly in need of clarification.

## II. OVERVIEW OF THE PUBLIC RECORDS ACT

In its first sentence, Chapter 119 states: "It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person."<sup>12</sup> This sweeping declaration of legislative intent creates a presumption in favor of disclosure.<sup>13</sup>

Every government record is subject to public inspection and copying<sup>14</sup> unless it is specifically exempt by statute, and any statute creating

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10. *See id.* at 87. Similarly, the confidentiality expectations of private parties were dashed in *Times Publishing Co. v. St. Petersburg*, 558 So. 2d 487 (Fla. 2d Dist. Ct. App. 1990), *see infra* notes 57-60 and accompanying text, after counsel for the city and the Chicago White Sox went to great lengths to avoid being subject to the Public Records Act.

11. FLA. STAT. § 119.01(1) (1991) (records open for personal inspection "by any person"); *News-Press Publishing Co. v. Gadd*, 388 So. 2d 276 (Fla. 2d Dist. Ct. App. 1980).

12. FLA. STAT. § 119.01(1) (1991).

13. *E.g.*, *Sarasota Herald-Tribune Co. v. Community Health Corp.*, 582 So. 2d 730, 732 n.2 (Fla. 2d Dist. Ct. App. 1991); *Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 4th Dist. Ct. App. 1981).

14. The right to make copies of records follows from the right to inspect them. FLA. STAT. § 119.07(1)(a) (1991) ("the custodian shall furnish a copy"); FLA. STAT. § 119.08(1) (1991) ("[i]n all cases where . . . any person interested has a right to in-



an exemption is narrowly construed.<sup>15</sup> Chapter 119 contains specific exemptions for: 1) certain police investigative and intelligence-gathering materials,<sup>16</sup> 2) the identities of confidential informants,<sup>17</sup> 3) the questions and answer sheets of licensing examinations,<sup>18</sup> and 4) various other categories of documents. Scores of other exemptions are scattered throughout Florida Statutes.<sup>19</sup>

Circuit courts are given the power to enforce the law by ordering the release of documents wrongly withheld.<sup>20</sup> Any public records case must be given scheduling priority over other cases before the court.<sup>21</sup> If a plaintiff prevails in obtaining public records, the court is to order costs and attorney's fees to be paid by the agency even if the agency

spect . . . any public record, . . . any person shall hereafter have the right of access . . . for the purpose of making photographs of the same"). In his experience as a journalist, the author occasionally encountered a state official who conceded the right to inspect a particular document freely and take notes about it, but attempted to disallow its photocopying. It is unlawful to refuse to allow photocopying of any record required to be disclosed. *Schwartzman v. Merritt Island Volunteer Fire Dep't*, 352 So. 2d 1230, 1232 n.2 (Fla. 4th Dist. Ct. App. 1977). The alternative would be absurd. There is surely no reason to disallow photocopying if a person could read the document, transcribe it verbatim and circulate every word publicly; or if indeed every member of the public, including, specifically, those from whom the agency prefers to keep the document secret, could go to the agency and inspect the document. FLA. STAT. § 119.07(1)(a)-(b) (1991) sharply limits the fees an agency may charge for copies.

15. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979).

16. FLA. STAT. §§ 119.011, 119.07 (1991).

17. *Id.* § 119.07(3)(e) (1991).

18. *Id.* § 119.07(3)(c) (1991).

19. *E.g.*, pursuant to FLA. STAT. § 240.299(4) (1991), all records of State University System-certified "direct-support organizations," which are fund-raising foundations for the nine state universities, are exempt from Chapter 119 except the annual audit, management letter, and any supplemental data supplied to the Board of Regents. Special interests have obtained new enactments of such exemptions every year. By 1991, the Government-In-The-Sunshine Manual, updated annually by the Office of the Attorney General and published by the First Amendment Foundation, contained 83 pages of fine print listing exemptions scattered throughout the Florida Statutes; the previous year's edition contained 26 fewer pages. The Manual may be ordered by calling the First Amendment Foundation, (904) 222-3518. In 1985, responding to the growing list of such exemptions, the Florida legislature enacted the Open Government Sunset Review Act, which automatically repeals every exemption from Chapter 119 every 10 years unless the continuation of the exemption is "compelled" by a restrictive list of criteria in FLA. STAT. § 119.14((2) (1985). For a thorough review of the debate on exemptions, see Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U.L. REV. 705 (1985).

20. FLA. STAT. § 119.11(1) (1991).

21. *Id.*

acted in a good faith but with the mistaken belief that the documents were exempt from public disclosure.<sup>22</sup>

Suppose a person asks for a file of documents and the agency refuses to provide it. This person need not search through all of the Florida Statutes to determine for himself whether the agency had a lawful basis to refuse to produce the file. Chapter 119, Florida Statutes requires the agency, on his demand, to explain what statutory exemption the agency is relying on to withhold the file, and why the agency thinks the file is covered by the cited exemption.<sup>23</sup> If some of the documents in the file are not exempt, the agency must produce those documents, and cite a statutory exemption covering the others.<sup>24</sup>

The question of whether a document is exempt from public disclosure arises only after a determination that the document is one of the "records" of an "agency" within the meaning of the Public Records Act.<sup>25</sup> For purposes of the act, "public records" includes "documents

22. *Id.* § 119.12 (1991); *News & Sun-Sentinel Co. v. Palm Beach County*, 517 So. 2d 743 (Fla. 4th Dist. Ct. App. 1987). An exception to the attorney fee requirement, created in *Fox v. News-Press Publishing Co.*, 545 So. 2d 941, 943 (Fla. 2d Dist. Ct. App. 1989), is particularly relevant to this article. A private entity was the subject of a public records demand. The private entity filed suit for a declaratory judgment seeking guidance on whether it had to comply with the News-Press's public records demand. The court held that access to the records was not "unlawfully" denied because: 1) the recipient of the records demand was not an "agency," and 2) it filed suit promptly to seek judicial guidance; therefore, attorney's fees were not assessed. *See also* *PHH Mental Health Services, Inc. v. New York Times Co.*, 582 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1991). News media have been joined by the attorney general in lobbying the legislature to change the law to eliminate the *Fox* loophole. Letter from Gregg D. Thomas of Holland & Knight, Tampa, Florida to Media Lawyers Throughout the State (Jan. 4, 1991) (specifically explaining *Fox*; proposing legislative change; claiming attorney general's support; seeking additional support); Letter from Patricia Riste Gleason, Assistant Attorney General to Gregg D. Thomas (Dec. 18, 1990) (confirming attorney general's support; proposing revisions to section 119.12(1)) (copy enclosed with Thomas' letter to media lawyers).

23. FLA. STAT. § 119.07(2)(a) (1991); *Fox*, 545 So. 2d at 942.

24. FLA. STAT. § 119.07(2)(a) (1991); *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Co.*, 471 U.S. 1096 (1985).

25. A "public record" is a "public record" regardless of whether it is exempt from disclosure. FLA. STAT. § 119.011(1)-(2) (1991). This article focuses on whether the records of a private-sector actor are within the "definitional reach" of the Public Records Act. *See Schellenberg*, 360 So. 2d at 87-88. If the records of a private actor are "within the definitional reach," they might nonetheless be kept confidential because of an exemption from Chapter 119's requirement of disclosure. There are hundreds of exemptions, *see supra* note 19 and accompanying text, any one of which might cover

. . . made or received pursuant to law or ordinance or in connection with the transaction of official business *by any agency*.”<sup>26</sup> An “agency” includes any unit of government at the state or local level “and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”<sup>27</sup> The latter clause, first enacted into the law in 1975,<sup>28</sup> swept private-sector entities under the coverage of the Public Records Law. However, when is a private person or business “acting on behalf of any public agency?” The answer to that question is elusive.

### III. THE SEMINAL CASE: *BYRON HARLESS*

Predictably, private business enterprises resist the idea that their proprietary records are “public records,” and hence subject to all the mandates of Chapter 119. In *Shevin v. Byron Harless, Schaffer, Reid & Assocs.*,<sup>29</sup> a private consultant claimed that the law was an unconstitutional invasion of privacy when applied to require disclosure of documents that private parties, between themselves, had agreed to keep secret.<sup>30</sup>

Byron Harless was a management consulting firm hired by JEA to conduct the first phase of a nationwide search for a new executive director.<sup>31</sup> Byron Harless advertised nationally, took applications, and screened them for the JEA.<sup>32</sup> At some point, Byron Harless was to turn over to the JEA a report naming one or a few finalists. At that time the report became a public record. Counsel for the JEA advised that Byron Harless’s records were not public records.<sup>33</sup> The identities of those applicants who did not become finalists would never have to be made pub-

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any or all the documents of a private actor, as in the case of the example cited in note 11. If the advisor to a private-sector actor determines that it is in possession of public records, the next step is to determine if any or all of them are exempt from disclosure under Chapter 119. At that point in the inquiry, the most concise source of exemptions is the well-indexed Government-In-the-Sunshine Manual. *See supra* note 19. Also, government lawyers are normally familiar with the statutory exemptions dealing with their particular agency or field of specialty.

26. FLA. STAT. § 110.011(1) (1991) (emphasis added).

27. *Id.* § 119.011(2) (1991) (emphasis added).

28. *See Schellenberg*, 360 So. 2d at 87-88.

29. 379 So. 2d 633 (Fla. 1980).

30. *Id.* at 635.

31. *Id.* at 634-35.

32. *Id.* at 635.

33. *Id.*

lic; and as to the finalists, extensive information would remain in the private files of Byron Harless.<sup>34</sup>

In the meantime, applicants were assured of confidentiality until, and unless, they eventually became finalists. Even then, the extremely personal information used by Byron Harless to evaluate the candidates, but not turned over to the JEA, would never become public. Richard Roe was but one of several candidates who said they would suffer "dire consequences" if this confidentiality were breached.<sup>35</sup>

A Jacksonville television executive sought, and was denied, Byron Harless's records. He was joined by then Attorney General Shevin in suing for the disclosure of the records under Chapter 119. Byron Harless and some of the persons secretly identified in Byron Harless's files asserted a right of privacy under the state and federal constitutions. Chapter 119, they said, was unconstitutional to the extent that it required the release of their identities and certain other private information about them in Byron Harless's records.<sup>36</sup>

The Supreme Court of Florida, reversing the First District Court of Appeal, found first that the persons named in public records do not have a state or federal right to privacy that is violated by the release of public records.<sup>37</sup> Next, the supreme court refined the definition of "records,"<sup>38</sup> which the first district had defined too expansively.

But the supreme court accepted, and thus ratified without discussion, the first district's conclusion that Byron Harless was "acting on behalf of" a public agency.<sup>39</sup> On that point, the appellate court's ruling said:

A business entity such as the consultant must be regarded as "acting on behalf of" the public agency if the services contracted for are an integral part of the agency's chosen process for a decision on the question at hand . . . . Because the consultant was employed to perform and did perform a preliminary search and inquiry function which JEA thought necessary or desirable for its proper deci-

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34. *Schellenberg*, 360 So. 2d at 87.

35. *Id.*

36. *Id.* at 85-87.

37. *Byron Harless*, 379 So. 2d at 638-39.

38. *Id.* at 640. A "record" includes any materials "intended to perpetuate, communicate, or formalize knowledge of some type," and not their "precursors," such as notes made by a public official (or, in this case, a Byron Harless employee) purely for his own use.

39. *Id.* at 635.

sion, the consultant was "acting on behalf of" JEA and was therefore an "agency" to which the public records law applied.<sup>40</sup>

In other contexts, this quote provides little guidance about when the private sector is "acting on behalf of" a state agency. Whether the private party is "acting on behalf of" the public agency depends on how "integral" the private party's role is in the public agency's decision-making process, but what facts would make a consulting firm's role more "integral" to the decision-making process, and thus surely covered by the Public Records Law, or less "integral," and thus more likely to *not* be covered by the Public Records Law?

Some guidance might be derived from a case on the application of the Government-in-the-Sunshine Law, Chapter 286, Florida Statutes, which requires collegial boards and commissions to give notice of their meetings and open them to the public. The supreme court has stated that the Sunshine Law and the Public Records Act are "closely related in purpose and policy," and case law on one sometimes sheds light on the other.<sup>41</sup> In a Sunshine Law case, *Wood v. Marston*,<sup>42</sup> the supreme court required a faculty committee screening candidates for a University of Florida dean's post to meet in the open because of its "undisputed decision-making function in screening the applicants. In deciding which of the applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university . . . ."<sup>43</sup>

In *Wood v. Marston*, the committee would have to meet in the open even though the president or a faculty committee could in effect ignore its decisions by selecting a candidate from those eliminated by the committee. The committee is covered by the open-government law because, if the president or faculty were to *accept* the committee's recommendations, then the process by which some candidates were eliminated would never have been scrutinized publicly.<sup>44</sup> The policy choice to eliminate candidates would have been made in a closed session.

This analysis sheds light on whether a hired consultant's activities are an "integral" part of the decision-making process. If the consultant's activities *could* (even if they would not *necessarily*) foreclose JEA

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40. *Schellenberg*, 360 So. 2d at 88 (citation omitted).

41. *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983).

42. *Id.* at 934.

43. *Id.* at 938.

44. *Id.* at 939.

from further considering the candidates eliminated by Byron Harless, or limit the information JEA has about its candidates, then policy-making choices have been delegated to Byron Harless. This would be why Byron Harless's activities for the JEA are an "integral" part of the decision-making process by which JEA chose its director. With less influence over JEA's consideration of information and screening of candidates, Byron Harless would be less likely to be covered by the Public Records Law.

#### IV. EVOLUTION OF THE LAW SINCE *BYRON HARLESS*

The shortcoming of the *Byron Harless* analysis is that it helps to define "acting on behalf of" only in limited contexts. The analysis may be extended to a school board's screening of multiple sites for a new school,<sup>45</sup> for instance, or any other type of outsider-assisted process of screening many options down to a few. Still, it helps only to define when a private actor is *making a decision* "on behalf of" a state agency. What *other types* of *acting* "on behalf of" a state agency might there be?

##### A. *An Easy Case: Attorneys*

An attorney representing a public agency is a relatively clear case of a private party "acting on behalf of" the agency.<sup>46</sup> Since the attorney is the client's stand-in for purposes of the representation, the conclusion seems compelled that he is "acting on behalf of" the agency. That a staff attorney's documents are public records is obvious; what is less obvious, but no less true, is that the records of an attorney in private practice pertaining to his representation of a state agency in litigation or negotiation are public records also.

This conclusion may run counter to the intuition of a private lawyer, accustomed, as he is, to the notion that his files are made confidential by ethics, the attorney-client privilege, and the work-product doctrine.<sup>47</sup> Nonetheless, the confidentiality of an attorney's papers in all

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45. *Cf. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 570 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 17 Fla. L. Weekly S156 (1992) (No. 77,131).

46. See Jim Smith, *The Public Records Law and the Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exemption*, 14 STETSON L. REV. 493 (1985) (authored by the then-attorney general of Florida).

47. *Smith, supra* note 46. Smith says there is no attorney client privilege "per

these doctrines is one running to the client, not the lawyer. The client of a lawyer working for a government agency is the people; the expression of those peoples' will can be made only by the legislature; and the legislature has waived any attorney-client privilege or work-product exemption by enacting Chapter 119. There are several exemptions to Chapter 119, narrowly crafted and limited in duration, to protect certain secrets when their release could damage an agency's position in litigation<sup>48</sup> or negotiation.<sup>49</sup>

### B. *The "Totality of Factors" Test*

Another test for gleaning when a private actor is "acting on behalf of" an agency, found in *Schwartzman v. Merritt Island Volunteer Fire Department*,<sup>50</sup> has come to be called the "totality of factors test."<sup>51</sup> In *Schwartzman*, community volunteers organized a nonprofit corporation to operate the county-owned fire fighting equipment. The corporation received \$850 a month in tax money; the county paid for all supplies and equipment and owned the fire station property; and all county funds were placed in the same bank accounts with money the corporation obtained in such fund-raising activities as fish fries.<sup>52</sup> The court held that the "totality" of these facts led "irresistibly to the conclusion that this department is subject to the Public Records Act."<sup>53</sup>

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se," and a "limited" attorney work-product doctrine, because there are narrowly focused exceptions to the Public Records Act resembling the attorney-client privilege and work product doctrine. To this author, it seems more logical to say that the Public Records Act waives any attorney-client privilege or work product exemption in behalf of the public, but that certain documents may be withheld from the public, not under an attorney-client privilege or work product exemption, but under exemptions to the Public Records Act. *See* *Edelstein v. Donner*, 450 So. 2d 562, 562 (Fla. 3d Dist. Ct. App. 1984) (referring to "a non-existent work product exemption to the Public Records Act"). Either view obtains the same result by different semantics.

48. *E.g.*, FLA. STAT. § 119.07(3)(n) (1991) (work product exemption no longer applies when litigation ends).

49. *E.g.*, *id.* at (3)(p) (appraisals of real property sought by an agency by purchase or eminent domain exempt from disclosure until conditional acceptance of a contract for sale).

50. 352 So. 2d 1230, 1232 (Fla. 4th Dist. Ct. App. 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978).

51. The name "totality of factors test," was first used in *Sarasota Herald-Tribune Co. v. Community Health Corp.*, 582 So. 2d 730, 733 (Fla. 2d Dist. Ct. App. 1991).

52. *Schwartzman*, 352 So. 2d at 1230.

53. *Id.* at 1232.

The court held that if certain private-sector entities pass the totality of factors test, *all* of their documents become public records.<sup>54</sup> It is not clear why this is so. Under the logic of *Byron Harless*, only those records pertaining to an activity carried out "on behalf of" the county would be public records. Suppose the Merritt Island volunteers engaged in some activities that were *not* on behalf of the county. If they organized a fish fry to contribute money to help an accident victim, they might generate planning memoranda, correspondence with the victim's family, tickets, contracts with vendors and other documents. Why should these be public records if the volunteers are not acting on behalf of the county for purposes of the charity drive?

The court must have meant that everything the volunteers undertake is "on behalf of" the county because the entity would not exist were it not for the county; none of its activities could be segregated from the county's contribution of money and property. If so, the totality of factors test can be understood to apply when so much of an entity's money and property comes from an agency that it would not exist were it not for the agency. Then, every document is a public record.

This would not be inconsistent with *Byron Harless*; it would simply deal with a set of circumstances in which the *Byron Harless* analysis would not be helpful. The Merritt Island Volunteer Fire Department was not assisting the county in the type of decision-making process to which *Byron Harless* applies; instead, it was deemed to be totally a creature of the government.

### C. *Another Test: The Essential Governmental Function*

In *Fox v. News-Press Publishing Co.*,<sup>55</sup> the totality test was applied in a manner so different that it really is not the same test at all. Fox had entered into a contract to tow wrecked and abandoned vehicles from public streets and property.<sup>56</sup> Concluding, ostensibly based on *Schwartzman*, that the documents generated in carrying out Fox's contract with the city were "public records," the Second District Court of Appeal said:

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54. *Id.* The totality test was followed in *Tribune Co. v. Palm River Volunteer Fire Department*, 7 Fla. Supp. 2d 32 (Fla. 13th Cir. Ct. 1984), although the Palm River volunteers received no direct cash operating subsidy from the county. Thus, the totality need not be quite as total as was the case in *Schwartzman*.

55. 545 So. 2d 941 (Fla. 2d Dist. Ct. App. 1989).

56. *Id.* at 943.



While there is no one factor that determines when records of a private business under contract with a public entity fall within the purview of the public records law, a totality of factors which indicate a significant level of involvement by the public entity, such as the City in this instance, can lead to the conclusion that the records are subject to the Public Records Act.<sup>57</sup>

The court looked to the fact that the vehicles were being towed away pursuant to city ordinances enacted under the city's police powers. The contract called for the city police to have extensive control over the towing activities. Therefore, the court concluded, the totality of factors involved in the contract showed that the contractor was "clearly performing what is essentially a governmental function."<sup>58</sup>

In *Schwartzman*, the totality of factors pointed to the totality of the volunteer fire department's dependence on the government for its existence, and led to the conclusion that all its records were public. In *Fox*, a totality of factors pointed to whether the particular contract was one to perform an "essentially governmental function," and only the documents related to that function were deemed public records. *Fox*, in reality, did not depend on *Schwartzman*, but created a new test: an "essentially governmental function" test to determine if a particular activity undertaken by a private entity is one in which the entity is "acting on behalf of" a public agency to perform the agency's functions.

Reversing the facts in *Fox* and *Schwartzman* illustrates that the tests they use are not the same. Applying the *Fox* analysis to *Schwartzman* would require looking to a totality of factors involved in operating a volunteer fire department to determine if that activity was an "essentially governmental function." The *Schwartzman* court did not do that. The *Schwartzman* court applied the totality test to determine if the entity was a totally governmental entity. One test looks to the entity; the other, to the function. The *Schwartzman* test would find an entity covered by Chapter 119 if the entity were funded and maintained by the government, regardless of whether a particular function being undertaken by the entity was an "essentially governmental function."

The totality of factors test was applied in *Sarasota Herald-Tribune Co. v. Community Health Corp.*<sup>59</sup> There, the Second District

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57. *Id.* (citation omitted).

58. *Id.*

59. 582 So. 2d 730, 733 (Fla. 2d Dist. Ct. App. 1991).

Court of Appeal found *Fox* and *Schwartzman* to be consistent and purported to apply both of them<sup>60</sup> without recognizing the difference in their approaches. In reality, however, the court applied the *Schwartzman* approach.

In *Sarasota Herald-Tribune*, a private, not-for-profit corporation was created by a local Public Hospital Board to carry out many of the functions of the hospital tax district.<sup>61</sup> In applying the totality of factors test, the second district thoughtfully weighed the not-for-profit corporation's creation and existence, funding and capitalization, goals, purposes, ownership and interdependence with the local hospital taxing district.<sup>62</sup> Note that all these factors look to the character of the not-for-profit company, not to the character of the function being carried out by the company. Concluding that the not-for-profit corporation existed basically as a creature of the public hospital agency, the second district declared the not-for-profit company's records to be public records under Chapter 119.<sup>63</sup>

This reasoning and result would be consistent with *Schwartzman*, but the second district went one step further—and it was a step more consistent with *Fox* than with *Schwartzman*. The court said that if any *particular function* of the not-for-profit corporation were found *not* to be “performed on behalf of” the hospital board, the records related to that particular function would not be subject to mandatory disclosure under Chapter 119.<sup>64</sup>

This latter dictum contradicts *Schwartzman* and, indeed, the entire *Sarasota Herald Tribune* analysis. The court, in accord with *Schwartzman*, analyzed the characteristics of the corporation itself to find the corporation covered by Chapter 119. It did not look to whether operating a hospital is an “essentially governmental function,” as the *Fox* court would.

#### D. *Confusion Among the Cases on Contracts with Agencies*

*Fox*'s “essentially governmental function” analysis attempts to provide some guidance as to when a business enterprise that enters into a contract to provide goods or services to a public agency is “acting on

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60. *Id.*

61. *Id.* at 732.

62. *Id.* at 734.

63. *Id.*

64. *Sarasota Herald-Tribune Co.*, 582 So. 2d at 734.

behalf of" the agency, and thus subject to Chapter 119 as to that function.<sup>65</sup> Other cases, however, show how unworkable the "essentially governmental function" test can be under different circumstances.

In *Fritz v. Norflor Construction Co.*,<sup>66</sup> an engineering firm was held to be "acting on behalf of" a city when it served as city engineer in the construction of a wastewater treatment facility.<sup>67</sup> Throughout the court's opinion there was no mention as to how or why this type of contract, to provide a city with professional services, brought the engineers under the Public Records Act.

In contrast, *Parsons & Whittemore, Inc. v. Metropolitan Dade County*<sup>68</sup> found that none of three private-sector companies were "acting on behalf of" Dade County "merely by contracting with a governmental agency."<sup>69</sup> The three included the contractor of a solid waste facility, a firm that contracted to manage and operate the facility upon its completion, and a firm that guaranteed the obligations of the other two. The court, in *Parsons & Whittemore*, cited to *Fritz* for the proposition that "entities which perform an essentially governmental function come within the purview of section 119.011(2) only as to those functions which are performed in that capacity."<sup>70</sup>

Having acknowledged the governmental function test, the *Parsons & Whittemore* court said it was "unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation 'acts on behalf of' the agency."<sup>71</sup> This method of distinguishing *Fritz* does not explain why the engineering firm in *Fritz* had not "merely" contracted with the city to provide engineering services. *Parsons & Whittemore* might be understood to stand for the proposition that acting as the city engineer on a construction project is an "essentially governmental function." This might be a logical conclusion because cities often have a person on their staff who is nominally the "city engineer." However, if that is what the court meant, it did not say so.

Furthermore, *Parsons & Whittemore* did not separately explain why any one of the three corporations was individually distinguishable

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65. See *Fox*, 545 So. 2d at 941.

66. 386 So. 2d 899, (Fla. 5th Dist. Ct. App. 1980).

67. *Id.* at 901.

68. 429 So. 2d 343 (Fla. 3d Dist. Ct. App. 1983).

69. *Id.* at 346.

70. *Id.*

71. *Id.*

from the subject of the public records request in *Fritz*. One could say it is an “essentially governmental function” to build a waste water treatment plant since the private sector does not. On the other hand, one might say the contractor was not engaged in an “essentially governmental function” since governments normally do not undertake construction projects themselves, but hire contractors instead. It is far harder to explain why the firm that was to manage the waste water treatment plant was not engaged in an “essentially governmental function.”<sup>72</sup>

### E. *The Florida Supreme Court's Latest Venture Into the Field*

Even more difficult to distinguish from the engineering firm in *Fritz* is the architectural firm in *News & Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*<sup>73</sup> There, the Fourth District Court of Appeal held that an architect hired by a school board to design a school was not within Chapter 119.<sup>74</sup>

In affirming, the Supreme Court of Florida claimed that the district courts of appeal “generally have made the determination” of whether a private entity’s records are covered by Chapter 119 “based on the ‘totality of factors.’”<sup>75</sup> The supreme court thus pushed all the conflicting cases on “acting on behalf of” a public agency under one giant umbrella. Without mentioning *Fritz*, the supreme court described the *Schwartzman* “totality of factors” test and the *Fox* “essential governmental function” test as if they were on and the same.<sup>76</sup>

*Sarasota Herald Tribune* and *Parsons & Whittemore* were cited

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72. The *Parsons & Whittemore* opinion noted that the management firm was to manage the waste water treatment facility “upon its completion and purchase by the county, but the county has not yet purchased the plant.” *Id.* at 345. In *State ex rel. Florida Publishing Co. v. Kinard*, 14 Fla. Supp. 2d 170, 172 (Fla. 4th Cir. Ct. 1985), a trial court interpreted this fact as explaining why the contractor was not “acting on behalf of” the county. It does not help explain why the management firm was not performing an essentially governmental function in the third district’s view. If managing the facility were an “essentially governmental function,” and the management firm was already engaged in activities preparatory to managing the facility, why would the management firm not *already* be “acting in behalf of” Dade County for purposes of the Public Records Act?

73. 570 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 17 Fla. L. Weekly S156 (March 5, 1992) (No. 77,131).

74. *News & Sun Sentinel Co.*, 570 So. 2d at 1096.

75. *News & Sun Sentinel Co.*, 17 Fla. L. Weekly at S157.

76. *Id.*

in further support of the concept of a single “totality of factors” test. *Byron, Harless’s* analysis of whether a private entity played an “integral part” in a decision-making process became not a separate test designed for the unique situation of a decision-making process, but a “factor” within the supreme court’s super-totality of factors test.<sup>77</sup> By seeming to endorse the outcomes of so many of the district court cases, *News & Sun Sentinel Co.* seems to have left all their inconsistencies intact.

#### F. *The Special Case of the Private Records-Keeper*

At least one attempt by a private party to keep its business with the government private reached the point of being tragicomical. In *Times Publishing Co. v. City of St. Petersburg*<sup>78</sup> [hereinafter “*Chisox*”], the city and the Chicago White Sox commenced negotiations for the White Sox (represented by Chisox Corp., an appellee/cross appellant) to play in St. Petersburg’s Suncoast Dome. Because of politics in their home state, the White Sox required confidentiality concerning the existence of the discussions and the city assured them it would try to oblige.

Under a plan worked out by the city attorney and Chisox Corp., the city agreed never to take physical possession of any correspondence or draft contracts.<sup>79</sup> The city attorney took a five-inch stack of notes on the drafts. He felt that his notes were not public records because they were merely his own personal “precursors” to public records.<sup>80</sup> Armed with his notes, he shuttled back and forth between city officials and Chisox Corp. as the negotiations proceeded, yet nobody from the city ever took possession of any documents, wrote Chisox any letters or wrote themselves any memoranda.<sup>81</sup> To illustrate the sham character of this arrangement, it is worth quoting at length from a letter Chisox sent to the city. The city attorney helped draft the letter as part of his

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77. *Id.*

78. 558 So. 2d 487, 489 (Fla. 2d Dist. Ct. App. 1990).

79. *Id.*

80. *Id.* Whether the city attorney’s notes were in fact mere “precursors” and not public records was never resolved in *Chisox* for procedural reasons. *Id.* at 491-92. It seems clear, however, that some or all of the notes were not “precursors” but were subject to mandatory disclosure as public records because they were written to “perpetuate, communicate, or formalize knowledge of some type,” despite the city attorney’s effort to create a fiction to the contrary. *Byron Harless*, 379 So. 2d at 640.

81. See *Times Publishing Co.*, 558 So. 2d at 489-95.

participation in the secrecy arrangements.

This letter is provided to you in conjunction with a proposed draft Stadium Lease Agreement dated April 27, 1988 between Chicago White Sox, Ltd. and the City of St. Petersburg. While you are authorized to examine this document in your office, this document is not to leave your possession. You are not authorized to receive, possess, or copy this document. This document is not to come into your possession or custody and is not transmitted to you.<sup>82</sup>

In the text of a letter transmitted to the city, and in the possession and custody of the city, the letter declared itself not to have been transmitted to the city and not to be in the possession and custody of the city. This was like all the members of the White Sox pointing to a baseball, declaring it to be a catcher's mitt and agreeing to speak about the thing for the rest of the day as if it were a catcher's mitt. Unfortunately for the city the local appellate court insisted on calling a baseball a baseball.

The court ruled that many of the documents possessed by Chisox were really owned by the city and were merely left in the possession of Chisox to evade the Public Records Act.<sup>83</sup> Therefore, Chisox was "acting on behalf of" the city as the custodian of the city's records. From this emerges the most unusual definition of "acting on behalf of" an agency: A private entity "acting on behalf of" a city as its records-keeper.

Only two years earlier, in *News-Press Publishing Co. v. Kaune*,<sup>84</sup> the same court passed up an opportunity to create the records-keeper concept. Dr. Centafont was hired by the city to perform drug screening of the city's firefighters.<sup>85</sup> He kept the records, but, if a firefighter's blood or urine sample showed drug use, he was to take the results to the fire chief, show them to him, and then keep physical possession of the documents so that they would not become public record as part of

82. *Id.* at 489-90.

83. *Id.* at 492. Interestingly, a provision of Iowa's public records law would have made the second district's result easier to reach: "A government body shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions." *KMEG Television, Inc. v. Iowa State Bd. of Regents*, 440 N.W.2d 382, 385 (Iowa 1989) (citing IOWA CODE § 22.2(2) (1987)).

84. 511 So. 2d 1023 (Fla. 2d Dist. Ct. App. 1987).

85. *Id.* at 1024.

the firefighter's personnel file.<sup>86</sup>

The second district found Dr. Centafont's records not to be public records even though the city paid for them, they were about city employees, and they were showed to the fire chief to transmit information to the chief that the city was entitled to receive so that he could act on the information to remove, discipline or assist a firefighter.<sup>87</sup> After reading *Chisox*, it is impossible to explain why Dr. Centafont was not acting as the records-keeper for the city. Perhaps the court felt sympathy for the traditional notion that medical records are confidential. If so, the court could have kept the records secret by an expedient that would not have cast an analytically unsound gloss on the definition of "acting on behalf of" an agency. The medical records in *Kaune* were exempt from disclosure under a specific exemption from the Public Records Act's disclosure requirement. The court even so held.<sup>88</sup>

The fire chief, therefore, could have kept them in his office and kept them secret. The court could have ruled simply that the documents were exempt from disclosure even if they were public records. Perhaps the dictum that the documents were not public records should be ignored. Perhaps it is bad law after *Chisox*.

### G. *The Trade Mission Exception To "Acting On Behalf Of"*

*News & Sun-Sentinel Co. v. Modesitt*<sup>89</sup> illustrates well the unpredictable variety of contexts in which "acting on behalf of" might have to be defined. The records of the Florida Agricultural Trade Mission Group, which organized many private-sector agricultural interests for trade missions abroad,<sup>90</sup> were sought under the Public Records Act. Although the agriculture commissioner's own expenses on the trade missions were paid by the state, he served as custodian of funds contributed by the private interests to pay their expenses.<sup>91</sup> He used his position to secure cooperation from the U.S. federal officials and those of foreign governments to make the trade missions a success.<sup>92</sup>

The First District Court of Appeal said the records were "clearly" not public because the commissioner acted only as custodian of private

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86. *Id.*

87. *Id.*

88. *Id.* at 1026.

89. 466 So. 2d 1164 (Fla. 1st Dist. Ct. App. 1985).

90. *Id.*

91. *Id.*

92. *Id.* at 1165 (Wentworth, J., dissenting).

funds.<sup>93</sup> It is not clear why the public versus private character of the funds was controlling; in *Schwartzman*, private funds donated to the Merritt Island Volunteer Fire Department became subject to the Public Records Act because of the character of the entity.<sup>94</sup>

*Schwartzman* would require an inquiry into whether the Trade Mission Group owes its existence to the agriculture commissioner, yet *Modesitt* did not discuss whether the Trade Mission Group was acting on behalf of the state. If the Trade Mission Group were not acting on behalf of the state, the question is begged: Why did these private agribusiness firms turn their money over to the commissioner as custodian? They presumably wanted to be the *Official State of Florida Trade Mission Group*, which would mean they wanted to be seen as a state agency or be a quasi-public entity. Instead, the court saw the commissioner as a state official acting on behalf of the private sector. This case, in sum, does not fit into the analytic framework of any other case defining "agency" or "acting on behalf of" under Chapter 119. In fact, it contains no reference to any of the "acting on behalf of" cases cited in this article, or even to any particular subsection of Chapter 119.

## V. CONCLUSION

Countless businesses are engaged in contracts to perform services or provide goods to government agencies, and countless other entities are involved with government, spending its money, taking over its services, performing its functions. Perhaps the courts of Florida have not intelligibly defined when such private actors are "acting on behalf of" a public agency for purposes of Chapter 119 because of the infinite variety of potential factual settings in which government and the private sector work together.

For whatever reason, the decisions on this question in Florida are inconsistent and irreconcilable. They leave the public unable to predict, except in a few clear circumstances, whether records generated by a private actor will be subject to mandatory public disclosure.

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93. *Id.* at 1164.

94. *See Schwartzman*, 352 So. 2d at 1232.



# Judicial Review and Legislative Deference: The Political Process of Antonin Scalia\*

David Schultz\*\*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1249
II. ASSESSING SCALIA'S IMPACT AND PERFORMANCE: THE STATUS OF CURRENT SCHOLARSHIP .....	1251
III. JUDICIAL POWER, JUDICIAL REVIEW, AND DISCRETE AND INSULAR MINORITIES .....	1255
IV. SCALIA AND THE LEGISLATIVE PROCESS .....	1265
V. PARTY POLITICS, PATRONAGE, AND ADMINISTRATIVE ORGANIZATION .....	1271
VI. THE PARADOXES OF CAMPAIGN FINANCE REFORM ..	1275
VII. CONCLUSION: SCALIA'S POLITICAL PROCESS .....	1281

## I. INTRODUCTION

Since Antonin Scalia's appointment to the federal court of appeals in 1982, and his subsequent ascension to the Supreme Court in 1986, there has been a surprising number of legal scholars and members of the media attempting to ascertain his impact on constitutional doctrine

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and the Supreme Court. This scholarship is "surprising" because Scalia was on the federal bench for less than ten years, and has only been on the Supreme Court for about five years; yet he has already attracted relatively more attention than other Justices, such as White, Blackmun, and Stevens, who have been on the Court much longer.

In order to ascertain the accuracy of the current scholarship on Scalia and, more importantly, to assess the novelty of Scalia's political philosophy, this article examines the existing Scalia scholarship, the Justice's own scholarly writings, and the judicial opinions authored by Antonin Scalia. The phrase "Scalia's political philosophy" refers to his respective views on the basic institutions and processes of American government and politics, including the allocation of power among the major national institutions, the regulation of elections, and the staffing of federal positions through political hirings.

This article is divided into six sections. First, recent legal scholarship describing Scalia's jurisprudence, his role on the Court, and his view of the American political process will be briefly reviewed. Then, the Justice's conception of the role of the federal courts in American society is discussed. Specifically, the discussion will examine how Scalia approaches the logic of judicial action suggested by footnote four of *United States v. Carolene Products*.<sup>1</sup> The third section analyzes Scalia's view of legislatures (Congress in particular) and the presidency. Next, his views on patronage, political parties, and spoils will be examined. The fifth section focuses on Scalia's views on campaign finance reform. The article concludes with an overall assessment of Scalia's political philosophy. In brief, this article offers a tentative sketch of the Justice's views on the American political process and provides an appraisal of the claims made by the existing scholarship on Scalia.

The article is premised on the belief that the existing Scalia scholarship has in many ways failed to provide an accurate description of the Justice's political philosophy. It contends that Scalia's various scholarly writings and judicial opinions reveal a political philosophy that endorses a specific conception of the political process, which in turn endorses a political ideology sympathetic to classical Manchester Liberalism. Such an ideology, as originally articulated in 19th century England, emphasized limited government, faith in the marketplace, commitment to legalism, materialism, property rights, and enforcement

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1. 304 U.S. 144, 152 n.4 (1938).

of majoritarian morality as essential to the creation of free society.<sup>2</sup> This view of the political process usually supports a use of federal judicial power to secure that ideology. Additionally, Scalia's jurisprudence endorses a strong executive branch and a weak Congress because such a political alignment presently favors his political agenda.<sup>3</sup>

Thus, contrary to the existing Scalia scholarship which proposes that Scalia consistently applies an interpretive strategy and guides his opinions by judicial restraint, Scalia's ideology generates an inconsistently applied interpretive method that adopts a mercurial attitude towards legislative power and the political process.<sup>4</sup>

## II. ASSESSING SCALIA'S IMPACT AND PERFORMANCE: THE STATUS OF CURRENT SCHOLARSHIP

Scholarly analysis of Antonin Scalia began when the former University of Chicago law professor and editor of *Regulation*<sup>5</sup> became one of the conservatives that former President Reagan appointed to the federal judiciary. The former President's aim was to create a judiciary that was more sympathetic to the conservative issues he supported, than was the bench as it existed at that time.

James G. Wilson examined Judge Scalia's voting record on the court of appeals along with the record of other prominent Reagan appointees, including Judges Bork, Posner, Easterbrook, and Winter.<sup>6</sup> Surveying Scalia's voting record (along with the other four judges) in the areas of access to the courts, the First Amendment, procedural due process, equal protection, and governmental structure,<sup>7</sup> Wilson concluded that "President Reagan must be pleased with these men, who to varying degrees, have made major creative contributions to emerging right-wing jurisprudence. They have aggressively applied traditional

2. See KENNETH M. DOLBEARE, *DIRECTIONS IN AMERICAN POLITICAL THOUGHT* 16-18, 22-23 (1969).

3. See Arthur Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 161, 192.

4. David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1716 (1991); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1740 (1991).

5. A conservative journal published by the American Enterprise Institute.

6. See James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171 (1986).

7. *Id.* at 1181-1203.

conservative techniques: increasing judicial deference to other branches of government and imposing new limits on federal court jurisdiction."<sup>8</sup> Specifically, Wilson noted that in twenty-three decisions before Scalia involving criminal defendants, media defendants, and civil plaintiffs, he ruled against them twenty times.<sup>9</sup> However, in contrast to the other judges appointed by Reagan, Scalia has not sought to build elaborate constitutional theories. Scalia has eschewed theory building in lieu of reaching more pragmatic decisions.<sup>10</sup>

Upon his ascension to the Supreme Court, the initial series of articles examining Justice Scalia sought to ascertain whether or not there was a "freshman effect,"<sup>11</sup> or to see if in his first year on the bench he had any major impact on the doctrinal development of the Court. Thea F. Rubin and Albert P. Melone reviewed Scalia's first year decisions<sup>12</sup> and found that while he wrote less than his fair share of decisions the first year (a sign of the freshman effect), he did align himself with the conservative voting block and also appeared comfortable with his new role as Justice.<sup>13</sup> Thus, in their opinion, there was no real freshman effect. Additionally, studies of Scalia's first year decisions by Michael Patrick King<sup>14</sup> and Richard A. Brisbin, Jr.,<sup>15</sup> concluded that his conservative "decisions suggest . . . long-term influence on constitutional doctrine and the High Court."<sup>16</sup> They concluded that the Justice's conservatism demonstrates constitutional and political values that place

8. *Id.* at 1173. See BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 223-31 (1990) (similarly includes Scalia among those Reagan appointees considered to be leaders of the "new right" legal movement seeking to overturn the more liberal post New Deal and Warren Court decisions).

9. See Wilson, *supra* note 6, at 1178.

10. *Id.* at 1175. Cf. Jean Morgan Meaux, Comment, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and the State*, 62 TUL. L. REV. 225, 227 (1987).

11. A "freshman effect" is composed of three characteristics: 1) a new Justice is bewildered by new duties and needs an adjustment period to define his/her new role; 2) new Justices write fewer opinions than more senior Justices; 3) freshman justices tend not to vote or align themselves with a voting block.

12. Thea F. Rubin and Albert P. Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98 (1988).

13. *Id.* at 101-02.

14. Michael P. King, *Justice Antonin Scalia: The First Term on the Supreme Court-1986-1987*, 30 RUTGERS L.J. 1 (1988).

15. Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990).

16. See King, *supra* note 14, at 5-6.

him in the tradition of Justices Frankfurter and Bickel, and that he has indeed become a "Reagan Justice."<sup>17</sup>

Subsequent to his first year on the Court, studies of Justice Scalia turned in three directions. First, one set of commentary focused on his increasingly vocal and often times acrimonious opinions and dissents that included belittlement of, and harsh criticism towards, other Justices' opinions.<sup>18</sup> A second set of articles sought to examine his interpretive method, and the sources of his disagreement with other conservative members of the Court. Recent efforts to overturn several controversial Supreme Court civil rights decisions interpreting the 1991 Civil Rights Act highlight this controversy, as Congress sought to ensure its meaning in the legislation and protect it from judicial misconstruction.<sup>19</sup>

George Kannar, in his article, examines Scalia's approach to reading the Constitution.<sup>20</sup> Kannar attributes Scalia's literal interpretation of statutes and the Constitution to his pre-Vatican II catholicism and his father's professorial background in romance literature.<sup>21</sup> On the other hand, Daniel Farber and Philip Frickey locate Scalia's interpretive approach in the Justice's general distrust of legislative politics and his questioning of the ability to ascertain legislative intent from committee reports and comments of particular legislators.<sup>22</sup> Farber and Frickey agree with other studies that state that Scalia's methodology is important to his approach to the law.<sup>23</sup> Similarly, Arthur Stock notes that although Scalia is unwilling to defer to legislative intent and other

17. See Brisbin, *supra* note 15, at 28.

18. See Linda Greenhouse, *Supreme Court Dissenters: Loners or Pioneers?*, N.Y. TIMES, July 20, 1990, at B8; Linda Greenhouse, *Name-Calling in the Supreme Court: When the Justices Vent their Spleen, is there a Social Cost?*, N.Y. TIMES, July 28, 1989, at B10; S. Taylor, *Season of Snarling Justices*, AKRON BEACON JOURNAL, April 5, 1990, at A11; Christopher E. Smith, *Justice Antonin Scalia: Contradictions in the Opinions and Behavior of the Supreme Court's Institutional Guardian*, unpublished paper presented at the April, 1991, Midwest Political Science Association annual convention, Chicago, Illinois, 11-13 (1991).

19. Robert Pear, *With Rights Act Comes Fight to Clarify Congress' Intent*, N.Y. TIMES, November 18, 1991, at A1, col. 6.

20. See George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

21. *Id.* at 1300, 1316.

22. DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 89-95 (1991).

23. *Id.* at 89-91.

extra textual evidence when interpreting Congressional statutes,<sup>24</sup> he is willing to defer to extra textual evidence such as the *Federalist Papers* when interpreting the Constitution.<sup>25</sup> Stock argues that this interpretive strategy is "inconsistent"<sup>26</sup> and is meant to limit legislative power in order to benefit executive and judicial power.<sup>27</sup>

Jean Morgan Meaux, Richard Nagareda, and Jay Schlosser view Scalia's interpretive strategies, including his skepticism towards legislative intent and history, as important to his jurisprudence in the areas of executive and administrative authority,<sup>28</sup> the First Amendment,<sup>29</sup> and church/state issues.<sup>30</sup> Finally, Daniel Reisman contends that the Justice's interpretive method is not strictly a textual approach but appeals to extra-textual values, including a belief in a strong executive government.<sup>31</sup> Hence, Scalia's jurisprudence and appeal to a neutral methodology actually mask his commitment to executive power and his depreciation of congressional authority.<sup>32</sup>

Finally, a third line of scholarship has concentrated on Scalia's definition of the Court's role in American society, his attitude towards the other branches of government, and his views on substantive doctrinal issues such as the First Amendment. Gary Hengstler reviews Scalia's 1987 off bench remarks that endorse limiting the Court's appeals workload by creating special tribunals to handle routine issues such as social security disability and freedom of information disputes.<sup>33</sup> Christopher E. Smith argues that the Justice's "strong views on separation of powers and the institution of the Supreme Court place him at odds with his colleagues."<sup>34</sup> Moreover, Smith claims that Scalia's commitment to separation of powers has placed him in the role of "stalwart

24. See Stock, *supra* note 3, at 160-61.

25. *Id.* at 180.

26. *Id.* at 160.

27. *Id.* at 160-61, 190-91.

28. Meaux, *supra* note 10, at 227.

29. Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 722 (1987).

30. Jay Schlosser, Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 389-92 (1988).

31. David Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 50 (1988).

32. *Id.* at 92-93. See Strauss, *supra* note 4, at 1716; Tushnet, *supra* note 4, at 1740.

33. Gary Hengstler, *Scalia Seeks Court Changes*, 73 A.B.A.J. 20 (1987).

34. Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 785 (1990).

guardian of American governmental institutions.”<sup>35</sup> Another analyst, Brisbin, reaches a similar conclusion,<sup>36</sup> and also indicates that Scalia’s deference to Congress and the Presidency, as the primary policy making institutions, is important to his conception of American politics.<sup>37</sup> Both these authors agree, as do others, that the former University of Chicago law professor’s willingness to place limits on standing and deny access to the federal courts are attempts to preserve the federal judiciary, and especially the Supreme Court, as an elite institution in American politics.<sup>38</sup>

Overall, the Scalia scholarship characterizes him as a brilliant yet opinionated Justice, favoring a strict and aggressively enforced conception of separation of powers, limited access to the courts, and generally granting some deference to Congress, but more to the President. This scholarship, while noting Scalia’s conservative political views, mostly downplays the Justice’s ideologies as controlling his jurisprudence. Emphasis is placed upon his legal pragmatism, his democratic vision of American society, and most importantly, upon his interpretive methodology as crucial to the decisions that he reaches. How accurate is the legal scholarship in reaching these claims? Analysis of Scalia’s views on judicial review, the legislative process, patronage, and campaign finance reform, offer some interesting insights and clarifications.

### III. JUDICIAL POWER, JUDICIAL REVIEW, AND DISCRETE AND INSULAR MINORITIES

Previous scholarship examining Scalia’s view on the role of the judiciary in American society has concentrated on his views towards standing and separation of powers.<sup>39</sup> For example, Brisbin and Smith claim that Scalia is acting as an institutional guardian of the Supreme Court, that he wishes to preserve the Court as an elite institution, and that this goal may be secured by limiting access to the Court and by keeping the judiciary out of issues that ought to be resolved by the

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35. *Id.* at 809.

36. Brisbin, *supra* note 17, at 25-28.

37. *Id.* at 5-6.

38. See Smith, *supra* note 34, at 794-95; Brisbin, *supra* note 15, at 6-9; Meaux, *supra* note 10, at 227, 246; Schlosser, *supra* note 30, at 385; Schwartz, *supra* note 8, at 226-27; See also Patrice C. Scatena, *Deference to Discretion: Scalia’s Impact on Judicial Review in the Era of Deregulation*, 38 HASTINGS L. J. 1223, 1235, 1254 (1987).

39. See Brisbin, *supra* note 15, at 6-8; Smith, *supra* note 34, at 792-95.

political institutions of the government.<sup>40</sup> Evidence for these claims is found in numerous decisions Scalia wrote on the court of appeals and on the Supreme Court, as well as in scholarly works of Scalia written *before* becoming a justice on the Court.

In a 1979 essay,<sup>41</sup> while a University of Chicago law professor, Scalia argued that "Congress is . . . the first line of constitutional defense, and the courts—even the activist modern courts—merely a back-drop."<sup>42</sup> According to Scalia, "Congress has an authority and indeed a responsibility to interpret the Constitution that is not less solemn and binding than the similar authority and responsibility of the Supreme Court . . . . Moreover, congressional interpretations are of enormous importance—of greater importance, ultimately, than those of the Supreme Court."<sup>43</sup> However, while Congress is the institution primarily responsible for maintaining constitutional integrity, it does not have *carte blanche* authority to check the executive branch's authority or regulatory power through the use of legislative vetoes.<sup>44</sup> Instead, what Scalia argues in this essay is that the legislative veto is a form of "legislation in reverse,"<sup>45</sup> that legislative vetoes are clearly contrary to the intent of the Framers, and more importantly, a violation of Article I, Section 7, Clause 3 of the Constitution. Specifically, a legislative veto is a usurpation of executive authority granted to the President, and if the legislative veto is left unchecked, it will alter the constitutional balance between Congress and the presidency; ultimately undermining democratic government.<sup>46</sup>

This article suggests several points important to understanding Scalia's political philosophy. First, there is Scalia's concern to protect executive power along with his general deference to Congress to make policy and interpret the Constitution.<sup>47</sup> Thus, growing out of his notion of separation of powers, there is a sense of institutional identity and function for each of the three major branches of the government.

40. See Brisbin, *supra* note 15, at 7-9, 10-11, 25-26; Smith, *supra* note 34, at 809.

41. Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REG. 19 (1979).

42. *Id.* at 20.

43. *Id.*

44. *Id.* at 19.

45. Scalia, *supra* note 41, at 22.

46. *Id.* at 24-25.

47. Scalia's views towards Congress and legislative bodies will be examined. See *infra* notes 109 to 152 and accompanying text.



Scalia's respect for congressional constitutional interpretation reveals his willingness to make the judiciary less of a prominent and activist guardian of the Constitution than it had been in the past. Therefore, his defense of separation of powers suggests that even the judiciary has clearly delineated powers that can neither be encroached upon by other branches nor extended beyond by the courts.

In a 1983 article, written while serving on the federal court of appeals, Scalia's elaborates more fully on his vision of the judiciary.<sup>48</sup> In this article, Scalia claims that the doctrine of standing is a "crucial and inseparable element" of the concept of separation of powers.<sup>49</sup> He asserts that the failure to respect the notion of standing will result in both the "overjudicialization of the proces [sic] of self-governance,"<sup>50</sup> and in giving greater respect to the general claims of the citizenry rather than a single plaintiff with a particularized injury.<sup>51</sup>

Furthermore, Scalia claims that the Founders' conception of standing was developed to place limits upon judicial power.<sup>52</sup> However, in chronicling the evolution of the doctrine of standing, Scalia notes that it has expanded well beyond the original conception of the Founders. The standing requirement has diminished to such an extent that currently there is almost no limit upon the ability to bring cases to court.<sup>53</sup> The result of this expansion has been to require the courts to "address issues that were previously considered beyond their kin."<sup>54</sup>

It is inappropriate for the Court to be involved in matters such as majoritarian policy-making because that is not the function of the judiciary.<sup>55</sup> Instead, the concept of standing was "meant to assure that the courts can do their work well,"<sup>56</sup> and to "restrict[] the courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and [this] excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest[s] of the majority

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48. Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 27 SUFFOLK U. L. REV. 881 (1983).

49. *Id.* at 881.

50. *Id.*

51. *Id.* at 882.

52. Scalia, *supra* note 48, at 882.

53. *Id.* at 891-93.

54. *Id.* at 892.

55. *Id.* at 896. Scalia also suggests that even if they did assume this policy-making function, "there is no reason to believe they will be any good at it." *Id.*

56. Scalia, *supra* note 48, at 891.

itself."<sup>57</sup>

Overall, Scalia's claim in this article is that the concept of standing must be returned to the original understanding of that term.<sup>58</sup> Only by drawing a narrow definition of standing that respects particularized "concrete" injury<sup>59</sup> to an individual that separates her from the rest of the citizenry can the courts assume their traditional role of "protecting minority rather than majority interests."<sup>60</sup> As a result, the judiciary's main tasks, consistent with the logic of the Founders and De Tocqueville, is to protect the constitutional rights of minorities against the tyranny of the majority.<sup>61</sup>

References to Scalia's separation of powers and standing decisions are numerous and need not be reviewed here.<sup>62</sup> However, scholarly attention to Scalia's view on the role of the judiciary, as protecting the rights of minorities, has generally been ignored or limited to assertions that he is unsympathetic to their claims.<sup>63</sup> Yet, Scalia's claim that it is the role of the courts to protect minorities against majoritarian excess does not necessarily appear inconsistent with the role that the judiciary has assumed since 1938.

In what has been referred to as an otherwise unimportant case,<sup>64</sup> footnote four of *United States v. Carolene Products*<sup>65</sup> hinted at a new role for the judiciary in the wake of the triumph of the New Deal and the repudiation of the Court's "first" New Deal decisions.<sup>66</sup> In *Carolene Products*, the Court upheld economic regulations upon the

57. *Id.* at 894.

58. *Id.* at 897-98.

59. *Id.* at 895.

60. *Id.*

61. *Id.* at 893.

62. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting); *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986).

Additionally, in *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) and *Madden v. Texas*, 111 S. Ct. 902 (1991) (Scalia as Circuit Justice), Scalia indicates his desire to limit writs by death row inmates from state to federal courts and his intent to enforce the 90-day time limit for certs to be filed in death penalty appeals.

For an analysis of Scalia's views on standing and separation of powers, see Smith, *supra* note 34, at 792-99, and Stock, *supra* note 3, at 181-88.

63. See, e.g., Kannar, *supra* note 20, at 1298-99.

64. Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713 (1985).

65. 304 U.S. 144, 152 n.4 (1938).

66. Ackerman, *supra* note 64, at 714-15.

shipment of "filled" milk. The Court noted its willingness to defer to Congress regarding economic regulation, but in footnote four of Justice Stone's opinion, it was hinted that a different standard of scrutiny might apply in other cases. Specifically,

[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or racial minorities. Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny.<sup>67</sup>

Implied in this footnote is a definition of a judicial role and review that is aimed at promoting individual liberty, limiting legislative power, and protecting powerless minorities against intrusive and tyrannical majorities. It is a role that was subsequently adopted most enthusiastically by the Warren Court.

An accurate description of the Warren Court approach to the *Carolene Products* footnote is found in John Hart Ely's arguments about judicial review in *Democracy and Distrust*.<sup>68</sup> Ely argues that the role of the Supreme Court should be to keep the channels of political change open and to facilitate the representation of minorities in the political process. Relying upon Justice Stone's footnote number four in *Carolene Products*, Ely describes the job of the courts not as second guessing the substance of legislation, but as helping discrete and insular minorities protect their interests in the political process.<sup>69</sup>

The Constitution, according to Ely, is generally process orien-

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67. *Carolene Products*, 304 U.S. at 152 n.4.

68. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

69. *Id.* at 75-76.

tated;<sup>70</sup> it does not embody substantive values.<sup>71</sup> Among the processes deemed important in the Constitution is representation where different individuals and groups compete to influence legislative deliberations.<sup>72</sup> When certain interests are denied access to the political process, or when the representative system ignores or fails to represent a minority out of prejudice, hostility, or an incompatibility of interests, the political process has "malfunctioned."<sup>73</sup> The role of the judiciary is not to substitute a legislature's policy judgment with its own, but to take steps to ensure that unrepresented and unprotected interests and groups receive a fair and adequate opportunity to be heard in the political process. The judiciary's role is broadening and strengthening the democratic political process by striking down legislation that limits the access or ability of certain groups to protect themselves in the political process.

Ely's comments, as well as the Court's interpretation of footnote number four, were directed in support of intervention to protect blacks and women, among others, who either lack adequate political representation or who were the source of prejudice and discrimination. Thus, at least on its face, the logic of *Carolene Products* footnote number four and Scalia's comments that the primary function of the courts is to protect minorities against majorities appear to be consistent and compatible. In effect, it appears that Scalia accepts the basic role of the courts as defined by this footnote.

However, analysis of Scalia's affirmative action decisions, scholarly writings, and use of this footnote in his own decisions suggests disagreement with the role of the judiciary suggested by *Carolene Products*. First, a review of all of Scalia's D.C. Circuit Court of Appeals decisions during his tenure as Judge found no citations to *Carolene Products*.<sup>74</sup> During Scalia's tenure as Justice on the Supreme Court, there have been only six references to *Carolene Products* in Court opinions, and none have been directly made by Scalia.<sup>75</sup> There exists an interest-

70. *Id.* at 92.

71. *Id.* at 100. Ely qualifies his view that the Constitution is void of substantive values when he states that preserving liberty is a substantive value.

72. *Id.* at 103.

73. ELY, *supra* note 68, at 102-03.

74. The author would like to thank Professor Daniel Hays Lowenstein for this information.

75. See *Airline Pilots v. O'Neill*, 111 S.Ct. 1127 (1991); *United States v. Munoz-Flores*, 110 S. Ct. 1964 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *South Carolina v. Baker*, 485 U.S. 505 (1988); *New York State Club*

ing pattern within these six citations.

In *Nollan v. California Coastal Commission*,<sup>76</sup> Scalia was in the majority opinion and the dissenters cited *Carolene Products* (but not footnote four) in reference to economic regulation and eminent domain takings.<sup>77</sup> In two cases, *South Carolina v. Baker*<sup>78</sup> and *New York Club v. New York City*,<sup>79</sup> the majority cites *Carolene Products* in reference to special scrutiny to be given in reference to participants closed off from the political process<sup>80</sup> or placed in a suspect classification.<sup>81</sup> Scalia writes concurrences with the majority opinion in both cases, but specifically dissents from those sections of the majority opinion of both *Baker* and *New York Club* where *Carolene Products* is cited. In *United States v. Munoz-Flores*<sup>82</sup> Scalia concurs with the majority opinion, but *Carolene Products* is cited in a separate concurrence by Justices Stevens and O'Connor.<sup>83</sup> In *City of Richmond v. J.A. Croson Co.*,<sup>84</sup> Justice O'Connor writes the majority opinion and cites *Carolene Products* footnote four and John Hart Ely's *Democracy and Distrust* to uphold the proposition that powerless minorities (here, whites) deserve special protection.<sup>85</sup> Scalia concurs with the majority, but writes his own separate opinion. Only in *Airline Pilots v. O'Neill*<sup>86</sup> does Scalia specifically join an opinion in which *Carolene Products* is cited. In *Airline Pilots*, Justice Stevens' opinion for the Court cites *Carolene Products* and several other cases to support the proposition that "legislatures . . . are subject to some judicial review of the rationality of their actions."<sup>87</sup>

Overall, Scalia does not use *Carolene Products* as precedent or authority for a specific pattern of judicial review. In fact, as *Baker* and *New York Club* indicate, he seems to go out of his way to reject the *Carolene Products* premises. However, the Justice's failure to cite this

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Assn. v. City of New York, 487 U.S. 1 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

76. 483 U.S. 825 (1987)

77. *Nollan*, 483 U.S. at 893 n.1.

78. 485 U.S. 505 (1987).

79. 487 U.S. 1 (1987).

80. *Baker*, 485 U.S. at 513.

81. *New York*, 487 U.S. at 17.

82. 110 S. Ct. 1964 (1990).

83. *Munoz-Flores*, 110 S. Ct. at 1977.

84. 488 U.S. 469 (1989)

85. *Croson*, 488 U.S. at 495.

86. 111 S. Ct. 1127 (1991).

87. *Airline Pilots*, 111 S. Ct. at 1134.

case may not be an indication that he is hostile to minority rights or that he rejects the logic of footnote four. Instead, as Bruce Ackerman<sup>88</sup> and Neil Komesar<sup>89</sup> have pointed out, the logic and definition of the judicial role underlying *Carolene Products* is incomplete and in need of revision. Among other things, the footnote fails to clarify what constitutes political malfunctions or which minorities are discrete and insular.<sup>90</sup> Thus, Scalia's opinions perhaps reflect an attempt at reforming *Carolene Products* to give it new meaning, rather than a rejection of it. There exists good evidence for this proposition and it carries with it significant implications for Scalia's view of the political process.

In *Croson*, there are numerous passages indicating that the majority examined the openness of the legislative process in Richmond, Virginia. For example, the majority discussed the legislative history of the Minority Business Utilization Plan (the Plan), and inquired into the reasons given for the Plan, as well as the decision-making process that produced the Plan. The majority suggested that the deliberative process was not open and representative, but rather closed to nonminorities.<sup>91</sup> Additionally, the majority claimed that the Richmond political process failed to show how the 30 percent set aside for Minority Business Enterprises (MBEs) was reasonable or that the Plan was not simply the product of the "shifting preferences" of group and racial politics in the city. Overall, the majority stressed that their decision declaring the city of Richmond's Minority Business Utilization Plan unconstitutional was significantly motivated by their concern with the way the decision was made.<sup>92</sup>

Justice Scalia, in his concurrence, was most direct in his views, stating that this Plan looked to be no more than the product of pressure politics.<sup>93</sup> Scalia, in referring to the *Federalist Papers* and the

88. Ackerman, *supra* note 64, at 717.

89. Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

90. *Id.* at 411, 415, 424-25; see Ackerman, *supra* note 64, at 718, 723-24.

91. *Croson*, 485 U.S. at 479-85 (O'Connor, J.).

92. *Id.* at 493-500.

93. *Id.* at 521-26. In fact, as pointed out in Farber & Frickey, *supra* note 20, at 89-102, several of Scalia's decisions have noted that legislatures are often not acting in the deliberative fashion they are supposed to and, instead, are either adversely influenced by interest groups or pressure politics. Such a view of the legislative process has influenced Scalia's approach to statutory interpretation, which is to question legislative intent. Cf. *Hirschey v. FERC*, 777 F. 2d. 1 (D.C. Cir. 1985) and *United States v. Stuart*, 489 U.S. 353 (1989) for some of Scalia's observations on the deliberative pro-

problems of factions influencing a legislative process, suggested that the Court had a duty to inquire into the structure or fairness of the legislative process to prevent it from damaging the rights or interests of weak or unrepresented groups.<sup>94</sup> The majority, as noted above, referred to *Carolene Products* and reaffirmed its role in protecting discrete and insular minorities. The Court noted the black majority on the Richmond City Council and suggested that it had illegitimately worked to the disadvantage of a white minority that clearly needed some judicial protection. The conservative Rehnquist Court, Scalia included, demonstrated that it was concerned with the integrity of the political decision-making process and in preventing any groups from exerting any undue influence upon it. Scalia was not hostile to what he saw as a discrete and insular minority (the white minority) being persecuted by a majority. His objective in *Croson* was to invoke some type of strict scrutiny to keep the political process from closing out a weak minority.

Scalia's opinion in *Croson* does not necessarily suggest a hostility to *Carolene Products*, but rather indicates an unwillingness to use it to sustain affirmative action and preferential action for blacks. In Scalia's scholarly writings, he has stated that he is "opposed to racial affirmative action for reasons of both principle and practicality."<sup>95</sup> In his dissent in *Johnson v. Transportation Agency*,<sup>96</sup> Scalia rejects the gender based affirmative action program of Santa Clara County and argues that the hiring of a woman with a written employment test score less than a white male (Johnson) resulted in discrimination against Johnson.<sup>97</sup> Scalia's opinion reiterates his view expressed in *Croson* that affirmative action plans are simply the product of politics and not proper constitutional or social policy.<sup>98</sup>

Further insight into Scalia's interpretation of *Carolene Products* is found in three cases where he employs a revised form of footnote four logic, although he does not cite the case directly. First, in *Nollan v.*

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cess in Congress.

94. *Croson*, 488 U.S. at 824. After discussing Madison's views on the danger of factions and the tyranny of the majority in politics, Scalia states, in reference to the politics of the Richmond Plan: "The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group." *Id.*

95. See Antonin Scalia, *The Disease as Cure*, 1 WASH. U. L. Q. 147, 156 (1979).

96. 480 U.S. 616 (1987).

97. *Id.* at 662.

98. *Id.* at 676-77.

*California Coastal Commission*,<sup>99</sup> Scalia writes the majority opinion striking down a California zoning/environmental law compelling a property owner to give the public a right of way across his property to the beach and ocean. The majority considered this right of way an uncompensated taking. Scalia indicated that this law infringed upon individual ownership rights and that the strict scrutiny employed in this instance was necessary to prevent legislatures and the political process from singling out specific individuals to contribute to the public good.<sup>100</sup> Thus, property rights appear to deserve special protection against legislative action.

Scalia's dissent in *Austin v. Michigan Chamber of Commerce*<sup>101</sup> is a second appeal to *Carolene Products* logic. Scalia argues against a Michigan law that would place restrictions on the ability of some corporations to disperse money out of corporate treasury funds for political purposes.<sup>102</sup> According to Scalia, the requirement that money spent for political purposes be segregated from other corporate funds eliminates the voice of powerful associations and impoverishes public debate.<sup>103</sup> There is no evidence that placing limits upon the voice of these powerful associations would do what Scalia claims, i.e., "impoverishing public debate." Further examination indicates that Scalia is protecting a wealthy and well financed organization, against the majority. In many ways, this case, as well as *Croson v. Richmond*,<sup>104</sup> invokes the logic of footnote four of *Carolene Products* to protect wealthy corporations and white constituencies, neither of which can within easy reach of imagination (or traditional interpretations of *Carolene Products*) be considered "discrete and insular minorities" or closed off from the political process. In neither case is Scalia willing to defer to the electorally accountable branches to make policy; he asserts that the courts must intervene.

However, Scalia has no problem deferring to the political process in cases such as *Employment Division v. Smith*<sup>105</sup> where he appears to repudiate the logic of *Carolene Products* when it comes to protecting a Native American from majoritarian excess.

99. 483 U.S. 825 (1987).

100. *Id.* at 835 & n.4.

101. 494 U.S. 652 (1990).

102. For a fuller treatment of *Austin*, see *infra* notes 188 to 212 and accompanying text.

103. *Austin*, 494 U.S. at 694-95.

104. See *Croson*, 488 U.S. at 469.

105. 494 U.S. 872 (1990).



Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process . . . . It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . . .<sup>106</sup>

Thus, while Scalia is willing to defer to the political process to protect Native Americans, he is not willing to do so for corporations, and he appears to be quite content to raise white males, property rights, and corporations to the status of a discrete and insular groups, and to second guess legislatures in order to protect them.

Scalia has not abandoned *Carolene Products* and the logic of correcting political malfunctions, it just appears that his definition of when the system malfunctions is triggered by different interests, substantive (political) values, or policy preferences than had been triggered by the Warren Court. Thus, as Komesar correctly points out, *Carolene Products* is not completely process orientated and value neutral; substantive values determine when the logic is invoked and whom to protect.<sup>107</sup> Scalia's jurisprudence is not completely driven by method as Kannar and others claim,<sup>108</sup> but is guided perhaps by his substantive political values that determine how and when he will employ judicial review and scrutiny over the legislative process.

#### IV. SCALIA AND THE LEGISLATIVE PROCESS

As previously noted, Justice Scalia invokes the principle of separation of powers as deference to legislative and executive power and to remove the judiciary from consideration of political policy questions.<sup>109</sup> However, as the discussion of *Carolene Products* revealed, Scalia's view of legislative politics does not always consider it worthy of respect and deference. Instead, as Bernard Schwartz contends, the Justice views legislative policy decisions as nothing more than pressure politics.<sup>110</sup> Hence, attempts to ascertain intent of legislatures when reading statutes is unwise; the preferable method being to defer to the executive

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106. *Id.* at 890.

107. Komesar, *supra* note 89, at 411.

108. Kannar, *supra* note 20, at 1298-99.

109. See Brisbin, *supra* note 15, at 9-14.

110. See Schwartz, *supra* note 8, at 244.

branch when looking for meaning.<sup>111</sup>

There is evidence in various articles authored by Scalia that he respects the legislative process as the primary institution for policy making. In *The Doctrine of Standing as an Essential Element in the Separation of Powers*,<sup>112</sup> Scalia argues that the judiciary should keep out of those "affairs better left to the other branches."<sup>113</sup> Additionally, in *Originalism: The Lesser Evil*,<sup>114</sup> Scalia describes the basic decision-making process in a democracy: "A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well."<sup>115</sup>

Scalia further states that "the legislature would seem a much more appropriate expositor of social values" than the judiciary.<sup>116</sup> Thus, a vision of the political process that endorses legislative deference to make policy appears.

Clearly, there are examples of policies where Scalia would let the legislative process act. One, in Scalia's scholarly writings he states that "how much to spend for welfare programs is almost invariably a prudential [choice]" and this choice should not be excluded from the deliberations in the "governmental process."<sup>117</sup> Two, in *Liberty Lobby Inc. v. Anderson*,<sup>118</sup> Scalia argued that "legislatures rather than courts should determine whether damages in libel suits against the press should be limited."<sup>119</sup> Three, in *Stanford v. Kentucky*,<sup>120</sup> Scalia wrote the majority opinion upholding the imposition of the death penalty for 16 and 17 year olds. In this case, Scalia emphasized that his decision was grounded on the fact the imposition of the death penalty for individuals this age was not cruel and unusual since a "majority of the [s]tates that permit capital punishment authorize it for crimes committed at age 16 or above."<sup>121</sup> Thus, deference to the wisdom of state legislatures is important to upholding a death penalty policy. Four, in

111. *Id.*

112. 27 U. SUFFOLK L. REV. 881 (1983).

113. *Id.* at 891.

114. 57 CINN. L. REV. 849 (1989).

115. *Id.* at 862.

116. *Id.* at 854.

117. Antonin Scalia, *Morality, Pragmatism, and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 126 (1986).

118. 746 F. 2d. 1563 (D.C. Cir. 1984).

119. Meaux, *supra* note 12, at 231.

120. 492 U.S. 361 (1989).

121. *Id.* at 371.

*Rutan v. Republican Party of Illinois*,<sup>122</sup> Scalia contended that the use of spoils is not a violation of employees or potential employees First Amendment rights and that the merit system is not the only way to staff the government. In Scalia's words, "the whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives."<sup>123</sup> Thus, when to use party affiliation for hiring purposes is a legislative question.<sup>124</sup>

Five, as noted above in *Employment Division v. Smith*,<sup>125</sup> the Justice indicated that many values found in the Bill of Rights, such as those protections offered to the religious practices of minorities, are not banished from consideration in the political process. Therefore, legislatures may deliberate policy matters that affect personal religious practices of unpopular groups. Finally, as early as 1978, Scalia argued that in regards to abortion, the Court "had 'no business' deciding an issue which had been determined through the democratic process."<sup>126</sup> Not surprisingly then, in *Webster v. Reproductive Health Services*,<sup>127</sup> where a majority upheld several state restrictions upon the right to obtain an elective abortion, Justice Scalia contended that *Roe v. Wade*<sup>128</sup> should be overruled and that the Court should defer to other branches to make policy in this area:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.<sup>129</sup>

Moreover, in a somewhat paradoxical decision, *Rust v. Sullivan*,<sup>130</sup>

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122. 110 S. Ct. 2729 (1990).

123. *Id.* at 2752.

124. For a fuller analysis of Scalia's dissent in *Rutan*, see *infra* notes 154 to 174 and accompanying text.

125. 490 U.S. 872, 890 (1990).

126. See Meaux, *supra* note 10, at 228.

127. 492 U.S. 490 (1989).

128. 410 U.S. 113 (1973).

129. *Webster*, 492 U.S. at 532.

130. 111 S. Ct. 1759 (1991).

Scalia joins Rehnquist's majority decision which upheld a regulation of the Secretary of Health and Human Services barring abortion counseling in federally funded Title X clinics. The Court claimed that the Secretary's regulations were made pursuant to 42 U.S.C. sections 300-300a-6, which at 300a-4 stated that "none of the funds appropriated under this subchapter shall be used in programming where abortion is a method of family planning."

In this case, Scalia was willing to "second guess" Congress when there was no evidence presented that the legislation was the product of pressure politics. Additionally, while Scalia usually dissents from appeals to legislative history, he was willing here to join a decision that assumed or reconstructed a legislative history or intent, when both were noted by the majority to be ambiguous.<sup>131</sup> Scalia did not follow his usual methodological rules, or the usual canons of judicial interpretation and legislative deference that would assume that Congress was not seeking a constitutional challenge when it wrote this Act.<sup>132</sup> Scalia strayed from his usual approach in order to reach a constitutional issue on a policy issue that he felt strongly about.

These six examples, welfare spending, press liability, the death penalty, the religious practices of minorities, political patronage, and abortion are instances where the political process should be allowed to operate freely and unobstructed by judicial scrutiny. However, there are many policy areas where Scalia does not view the political process as worthy of deference. As noted above, in *Nollan v. California Coastal Commission*<sup>133</sup> Scalia seemed to suggest that property was deserving of some type of special protection against legislative excess.<sup>134</sup> An even clearer example of legislative questioning is in affirmative action. In *Johnson v. Transportation Agency*,<sup>135</sup> Scalia describes the origin of preferential treatment programs as being in pressure politics. "It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improve-

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131. *Id.* at 1767-68.

132. For clarification of this point, see *Rust*, 111 S. Ct. at 1778-80 (Blackmun, J., dissenting).

133. 483 U.S. 825 (1987).

134. See Antonin Scalia, *Economic Affairs as Human Affairs*, in J.A. DORN & H.G. MANNE, *ECONOMIC LIBERTIES AND THE JUDICIARY* 31, 37 (1987), where then court of appeals Judge Scalia argued for a "constitutional ethos of economic liberty" that will give more protection to economic rights.

135. 480 U.S. 616 (1987).

ment in the economic status of particular constituencies.”<sup>136</sup>

In *City of Richmond v. J.A. Croson Co.*,<sup>137</sup> Scalia views the 30 percent MBE set aside Plan as the product of the type of factional politics that Madison, in *Federalist No. 10*, sought to prevent.<sup>138</sup> In fact, Scalia states that “an acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.”<sup>139</sup> Thus, factions are clearly the source of affirmative action programs and they can damage the integrity of the legislative deliberative process.

In addition to affirmative action, there are other areas where the Justice second guesses the legislative process,<sup>140</sup> and there are general indications overall that Scalia is suspect of the integrity of legislative political decisions. In scattered opinions, Scalia seems to suggest that policy decisions often are either the product of pressure politics or staff work, with neither containing significant legislative deliberation or rationality than can be discerned. In *Hirschey v. F.E.R.C.*,<sup>141</sup> Scalia disagrees with the majority opinion’s attempt to use legislative intent to ascertain the meaning of a statute.

I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee’s bill. And I think it is time for the courts to become concerned about the fact that routine deference to the details of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.<sup>142</sup>

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136. *Id.* at 677.

137. 488 U.S. 469 (1989).

138. *Id.* at 522-24.

139. *Id.* at 523.

140. See *Morrison v. Olson*, 487 U.S. 654 (1988) (Scalia, J., dissenting), and *Mistretta v. U.S.*, 488 U.S. 361 (1989) (Scalia, J., dissenting) where Scalia refuses to defer to congressional legislation that would have authorized either the appointment of a special prosecutor to investigate alleged criminal activity in the executive branch or the creation of sentencing guidelines by members of the federal bench. In many ways, both decisions sought to “close” and not open the legislative deliberative process.

141. 777 F. 2d. 1 (D.C. Cir. 1985).

142. *Id.* at 7-8 (footnote omitted).

In *Green v. Bock Laundry Machine Co.*,<sup>143</sup> Scalia reiterates this theme.

I am frankly not sure that, despite its lengthy discussion of the ideological evolution and legislative history, the Court's reasons for both aspects of its decision are much different from mine. I respectfully decline to join that discussion, however, because it is natural for the bar to believe that the judicial importance of such material matches its prominence in our opinions—thus producing a legal culture in which, when counsel arguing before us assert that “Congress has said” something, they now mean, by “Congress,” a committee report.<sup>144</sup>

Additionally, in *Wisconsin Public Intervenor v. Mortier*,<sup>145</sup> Scalia questions the value of committee reports in clarifying whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>146</sup> was meant to supersede local state regulation of pesticides.<sup>147</sup> Here, he argues that not only are committee reports unclear on this issue, but that committee reports are not even relevant because they do “not necessarily say anything about what Congress as a whole thought.”<sup>148</sup> In Scalia's opinion, reading legislative history is a recent phenomena representing a “‘weird endeavor’” that is no more than a “‘psychoanalysis of Congress.’”<sup>149</sup>

Elsewhere, Scalia has expressed similar skepticism towards ascertaining legislative intent.<sup>150</sup> Overall, the inability to ascertain a comprehensive legislative history intent, or a history that details a legislative process that is truly deliberative, has led the Justice towards alternative means for interpreting statutory construction.<sup>151</sup>

143. 490 U.S. 504 (1989).

144. *Id.* at 529-30.

145. 111 S.Ct. 2476 (1991)

146. 7 U.S.C. §§ 136-1364 (1988).

147. *Mortier*, 111 S. Ct. at 2488-89.

148. *Id.* at 2489.

149. *Id.* at 2490 (quoting Justice Jackson in *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953)).

150. See *Chisom v. Roemer*, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting); *Sable Communications of California Inc. v. F.C.C.*, 492 U.S. 115, 133 (1989); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 750-51 (1989); *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum*, 485 U.S. 495, 501 (1988). See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989); Antonin Scalia, *Regulation: The First Year*, 6 REG. 19, 21 (Jan. 1982); Nagareda, *supra* note 29, at 722.

151. Farber & Frickey, *supra* note 20, at 89-90.

Consequently, despite claims by some that Scalia defers to Congress out of respect for its position as the primary policy making body, his own opinions reveal a deep distrust for the legislative process because: (1) local legislatures and perhaps Congress are often captured by factions and interest group politics; or (2) legislative choices are not the product of rational deliberation but the product of staff or committee work. Hence, while some of Scalia's own scholarly writings suggest legislative deference and respect,<sup>152</sup> Scalia's opinions often reject an appeal to legislative intent as an unreliable means to interpret statutes. Overall, we are left with a record that shows Scalia's view of legislative politics as one threatened by the evils that Madison feared in *Federalist No. 10*.

The question then becomes, how does Justice Scalia know when the legislative process is or is not tainted? When is pressure politics really pressure politics and not simply the reasonable mobilization of coalitions or minorities to produce a majority? How does Scalia separate good majority building in legislatures that respond to the will of the electorate from the catering to special interests? No rule is provided by the Justice, and this leaves us with many questions regarding the consistency, methodology, and aims of his statutory construction, unless we assume that the Justice is guided by some policy preferences that would tell him when deference is demanded or not.

## V. PARTY POLITICS, PATRONAGE, AND ADMINISTRATIVE ORGANIZATION<sup>153</sup>

In 1990, the Supreme Court, in *Rutan v. Republican Party of Illinois*,<sup>154</sup> held that the State of Illinois could not consider political affiliation when hiring, transferring, or promoting individuals because such a consideration violated the First Amendment rights of individuals applying for government employment.<sup>155</sup> *Rutan* was not an aberration or an

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152. See Brisbin, *supra* note 15; Nagareda, *supra* note 29, at 739; Scalia, *supra* note 114, at 854.

153. For a fuller treatment of this subject, see David Schultz, *Judicial Enforcement of Neutral Competence*, unpublished paper presented at the American Political Science Association annual convention, Washington, D.C., August 29-September 1, 1991.

154. 110 S. Ct. 2729 (1990).

155. Justice Brennan wrote the opinion for the majority which was joined by Justices White, Marshall, Blackmun and Stevens. Stevens wrote a separate concurring opinion. Justice Scalia wrote the dissenting opinion joined by Rehnquist, Kennedy, and

isolated judicial attack on spoils, but instead it represented a continuation and extension of a series of patronage decisions over the last 20 years in which the Court has attempted to place limits upon the ability of governmental units to employ the spoils system in the staffing of the bureaucracy.<sup>156</sup> Scalia's dissent in *Rutan* is interesting because it reveals the Justice's sense of how party politics, elections, and administrative organizations are related.

*Rutan*, a 5-4 decision, provoked the most intense debate on the Court surrounding judicial assault upon patronage and spoils since Powell's dissent in *Branti v. Finkel*.<sup>157</sup> Brennan wrote for the majority and was joined by Marshall, White, and Blackmun, with Stevens writing a separate concurring opinion. In dissent was the "Reagan" Court of Rehnquist, Scalia, O'Connor, and Kennedy.

The *Rutan* case grew out of a challenge to the Illinois governor's use of party affiliation when hiring, rehiring, transferring, and promoting individuals. The majority opinion of the Court struck down this practice as an unconstitutional infringement of the First Amendment rights of these individuals. Significantly, Brennan cited his decisions in *Elrod v. Burns*<sup>158</sup> and *Branti*; he extended those rulings, which had applied to patronage dismissals, to also include patronage hirings, transfers, promotions, and recalls after layoffs.<sup>159</sup> Brennan opined that the government interests in patronage were not vital enough to justify the limitation of the First Amendment rights of these workers.<sup>160</sup>

More importantly, the majority used this decision to engage in a debate with the dissenters from this case and *Branti* to justify the importance of limiting patronage in the governmental system. As in *Elrod*, Brennan argued that the preservation of the democratic process and party organization is not furthered by patronage.<sup>161</sup> Moreover, given that civil service rules have already limited the number of patronage positions available in the last few years, the linkage between parties and patronage is now weak. Thus, "parties have already survived the substantial decline of patronage employment practices in this

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O'Connor.

156. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

157. 445 U.S. 507 (1980).

158. 427 U.S. 347 (1976).

159. *Rutan*, 110 S. Ct. at 2731-32, 2739.

160. *Id.* at 2734.

161. *Id.* at 2737.



century.”<sup>162</sup>

In his dissent, Scalia launched a ferocious attack on the majority’s anti-patronage position by arguing that while the merit principle is clearly the “most favored” way to organize governments, it is neither the only way to do it nor does it enjoy exclusive constitutional protection.<sup>163</sup> In referring to George Plunkitt in his discussion of patronage, Scalia describes spoils as part of the American administrative/political tradition, but he backs off from claiming that it is of “landmark status . . . or one of our accepted political traditions.”<sup>164</sup>

Scalia’s dissent is founded upon two basic claims. First, he rejects the idea that the merit principle is the only constitutional way to organize the bureaucracy. Thus, he defers to legislative wisdom in making this choice. The choice of which way to staff the government should be up to elected officials and not the courts. Second, Scalia also defends patronage as having a rational basis because it supports strong parties, party government, and popular government. Clearly the second claim will be linked to his first, and more important constitutional claim.

The primary constitutional line of attack that Scalia uses in his dissent is to argue that the strict-scrutiny standard used by the majority in this case (as well as in *Elrod* and *Branti*) to protect the rights of federal employees is inappropriate, and ought to be rejected in favor of a balancing of interests test.<sup>165</sup> There are two parts to this claim for a new standard. First, Scalia argues that the restrictions on the speech of governmental employees has been held to be different from the restrictions that may be placed on the general citizenry.<sup>166</sup> Second, if the government does have more latitude to act with in regard to its own employees, then all the Court needs to ask is whether there is a rational basis for its regulations.<sup>167</sup> Thus, when Scalia turns to the issue of spoils and patronage, his argument will be that so long as the government can show a rational basis or how patronage serves a reasonable governmental purpose, and that this purpose outweighs the “coercive” effects on the employee, then the Court should defer to Congress.<sup>168</sup> In Scalia’s words, “the whole point of my dissent is that the desirability of

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162. *Id.*

163. *Id.* at 2747.

164. *Rutan*, 110 S. Ct. at 2748.

165. *Id.* at 2749, 2752.

166. *Id.* at 2749.

167. *Id.*

168. *Id.* at 2752.

patronage is a policy question to be decided by the people's representatives."<sup>169</sup>

The second part of Scalia's dissent is directed at showing how patronage does serve an important governmental interest. In presenting an argument in favor of patronage, Scalia states that "the Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success."<sup>170</sup> Scalia cites numerous works in the political science and public administration field that discuss how parties are important to American government and how strong parties provide challengers with the resources needed to take on an incumbent. Crucial to the formulation of a strong party, then, is the reward of patronage that will entice and reward workers.<sup>171</sup> Scalia indicates how parties, supported by patronage, will foster two party competition, the integration of excluded groups, and help build alliances.<sup>172</sup> Thus, all of these functions are important to democracy and can be aided by patronage.

In his dissent, Scalia does two important things. First, he seeks to place the justification for patronage upon the same or similar legal footing as the Hatch Act decisions which had upheld restrictions upon the partisan political activity of federal employees.<sup>173</sup> The second thing that Scalia does is to make a forceful argument for patronage that parallels a pre-civil service reform and Jacksonian defenses of spoils. In effect, Scalia joins Rehnquist and Powell from earlier patronage cases (as well as Rehnquist, Kennedy, and O'Connor in the *Rutan* dissent) in rejecting much of the language of neutral competence and administration reform that had sought to eradicate spoils.

Overall, what Scalia's dissent suggests is a vision of politics that endorses one of the most brazen types of partisan pressure politics and political activity, i.e., patronage.<sup>174</sup> In determining how an administrative agency should be organized and staffed, it should be up to a legislative body to determine if party affiliation is an appropriate qualification for employment. Not only does the *Rutan* dissent endorse legislative deliberations when Scalia has otherwise questioned it, but it

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169. *Rutan*, 110 S.Ct. at 2752.

170. *Id.* at 2753.

171. *See Id.* at 2753-58.

172. *Id.*

173. *See U.S. Civil Service Comm'n v. Postal Workers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

174. George Kannar, *Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia*, 12 *CARDOZO L. REV.* 1845, 1860 (1991).

also supports a free wheeling laissez-faire “to the victor belongs the spoils” vision of political activity. Political activity, party maintenance, and electoral activity should not be restricted or encumbered even by the First Amendment rights of government employees.<sup>175</sup>

## VI. THE PARADOXES OF CAMPAIGN FINANCE REFORM

The last arena of politics that this paper explores is the issue of campaign finance reform. Since becoming a Justice on the Supreme Court, Scalia has had the opportunity to rule on two cases involving the political spending of non-profit corporations. In both cases he ruled on First Amendment grounds to strike down applicable campaign finance restrictions.

In the first case, *Federal Election Commission v. Massachusetts Citizens for Life*,<sup>176</sup> the Supreme Court was confronted with the application of a Federal Election Campaign Act (FECA) provision<sup>177</sup> that “prohibits corporations from using treasury funds to make expenditures ‘in connection with’ any federal election and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund.”<sup>178</sup> Here, Massachusetts Citizens for Life (MCFL) was a nonprofit, nonstock corporation that supported pro-life issues through a variety of activities including an infrequently published newsletter. What was in question was whether section 441b of FECA applied to an MCFL newsletter published prior to an election primary that urged Massachusetts citizens to vote for pro-life candidates even though the publication did not specifically say “vote for Smith,” nor anyone else.<sup>179</sup> The Court held that this newsletter was a violation of section 441b. But, at the same time, the Court also held that this provision, as applied to MCFL, was unconstitutional because it excessively burdened the organization’s First Amendment rights.

In reaching this holding, the Court first asked whether requiring corporations to set up segregated funds for political expenditures was a

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175. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting), where Scalia upholds a Connecticut law that places restrictions upon who may vote in a Republican Party primary. This appears to be a counter example of a situation where he does not support a “wide open, no holds barred” form of political activity and organization.

176. 479 U.S. 238 (1986).

177. 2 U.S.C. § 441b (1988).

178. *Federal Election Commission*, 479 U.S. at 241.

179. *Id.* at 243, 249-50.

compelling enough state interest to justify incidental limits upon corporate free speech rights.<sup>180</sup> The Court answered yes and indicated that:

We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funnelled through the corporate form;" to "eliminate the effect of aggregated wealth on federal elections;" to curb the political influence of "those who exercise control over large aggregations of capital;" and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporation form of organization."<sup>181</sup>

Thus the Court, with Scalia in the majority, held that preventing the "corrosive influence of concentrated corporate wealth"<sup>182</sup> was compelling enough of a state interest to require separate segregated political funds to ensure that resources acquired in the economic marketplace do not have an unfair advantage in the political marketplace.<sup>183</sup> Segregated funds as prescribed by section 441b would ensure that the political ideas expressed by the corporation are an indication of the voluntary political support for the ideas articulated, and not the ability of a company to amass wealth through its economic actions.<sup>184</sup>

However, the Court noted that the justifications for section 441b restrictions do "not uniformly apply to all corporations."<sup>185</sup> Some corporations, such as the MCFL, "have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status."<sup>186</sup> Groups such as MCFL that were formed for ideological purposes, lacking shareholders, and not acting as a conduit for a business or a union, are really political associations and not corporations.<sup>187</sup> Therefore, the special accounting procedures and requirements that compliance with section 441b would entail are "more extensive than it would be if it (MCFL) were not incorporated."<sup>188</sup> Thus, because this segregated fund requirement is overly broad in its applica-

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180. *Id.* at 256.

181. *Id.* at 257 (footnotes omitted).

182. *Federal Election Commission*, 479 U.S. at 257.

183. *Id.*

184. *Id.* at 258-59.

185. *Id.* at 263.

186. *Federal Election Commission*, 479 U.S. at 263.

187. *Id.* at 264.

188. *Id.* at 254.

tion to the MCFL, its application in this case is unconstitutional.

Scalia's joining of the majority opinion in *Federal Election Commission* stands in somewhat curious contrast to *Austin v. Michigan Chamber of Commerce*<sup>189</sup> where he dissented from a majority holding that upheld a similar segregated fund requirement in Michigan.

The six-person majority held that corporations, even some non-profit ones such as the Michigan Chamber of Commerce,<sup>190</sup> could constitutionally be prohibited from using direct corporate treasury funds for independent expenditures to support or oppose candidates for office. Following upon arguments made in *Federal Election Commission* and *Buckley v. Valeo*,<sup>191</sup> the Court ruled that campaign finance laws may, to some extent, regulate the conditions affecting the marketplace of ideas to ensure that it functions fairly and efficiently. Specifically, the majority gave greater weight to an expanded definition of corruption that was referred to in *Buckley* and *Federal Election Commission*. Instead of viewing corruption as merely a narrow, individual quid pro quo exchange between a candidate and a lobbyist or interest group, the majority expressed concern over "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>192</sup> Therefore, the State of Michigan may constitutionally regulate corporate political activity more strictly than many expected the Court to allow. Corporate treasury spending to support or oppose candidates running for office, even by some non-profit corporations like the Chamber, may be prohibited.

Unlike the MCFL, the Michigan Chamber of Commerce was not deemed by the majority to be an ideological and voluntary political association and thus exempt from Michigan requirements to segregate political funds. Surprisingly, Scalia dissented. He opined that the Michigan law interfered with the First Amendment rights of the Chamber, which he presumably labeled a voluntary political association.<sup>193</sup>

Important to Scalia's dissent and response to the majority holding

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189. 110 S. Ct. 1391 (1990).

190. The Michigan Chamber of Commerce received its money from business members of the local chamber of commerce.

191. 424 U.S. 1 (1976).

192. *Austin*, 110 S. Ct. at 1397.

193. *Id.* at 1416.

are three claims.<sup>194</sup> First, he maintains that the majority's opinion is a departure from previous Court campaign finance cases. Second, that the holding is a clear case of censorship because it is not a narrowly tailored limitation upon the political expression of a speaker, i.e., a corporation. Third, and perhaps most importantly, even "if the law were narrowly tailored to serve its goal, . . . that goal is not compelling."<sup>195</sup> Overall, Scalia claims that the holding is inconsistent with the First Amendment, both by way of its original intent and by way of recent rulings on this Amendment.

To support these claims, Scalia argues against the majority's position that legislatures can regulate corporate speech because "[s]tate law grants (corporations) special advantages" that allow them to amass wealth.<sup>196</sup> In citing *Pickering v. Board of Education*<sup>197</sup> and *Speiser v. Randall*,<sup>198</sup> Scalia reminds the majority that the "[s]tate cannot exact as the price of those special advantages the forfeiture of First Amendment rights."<sup>199</sup> The only way speech can be limited is to secure a compelling state need. In this case, the majority's contention that large corporate treasuries and corporate spending are a threat to public discourse is not narrowly tailored enough to justify limits upon their ability to speak.<sup>200</sup> It is not narrowly enough drawn because the law excludes the "war chests"<sup>201</sup> of certain individuals whose wealth may similarly raise the potential of corruption,<sup>202</sup> while also including within the ban many corporations which may not be wealthy and are subject to the Michigan law.<sup>203</sup>

194. For a more in depth analysis of Scalia's dissent in *Austin*, see John S. Shockley & David Schultz, *The Political Philosophy of Money as Articulated in the Dissents in Austin v. Michigan Chamber of Commerce*, unpublished paper presented at the 1991 Midwest Political Science Association annual convention, Chicago, Illinois (April, 1991). Excerpts of that paper are reprinted here.

195. *Austin*, 110 S. Ct. at 1414.

196. *Id.* at 1408.

197. 391 U.S. 563 (1968).

198. 357 U.S. 513 (1958).

199. *Austin*, 110 S. Ct. at 1408. Note, however, that in both *Pickering* and *Speiser* the rights in question were those of individuals seeking public employment, and not corporations participating in the political process.

200. *Id.* at 1409, 1413.

201. *Id.* at 1413.

202. *Id.* at 1409-10, 1412-13. The Court has already held that these individuals cannot be prohibited from making independent expenditures to express their political views.

203. *Id.* at 1413.

Additionally, Scalia indicates that the Michigan Chamber of Commerce is more like a voluntary political association as described by the majority in *Federal Election Commission*, and De Tocqueville in *Democracy in America*.<sup>204</sup> Suppressing these voluntary associations, according to Scalia, is destructive. "To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish public debate."<sup>205</sup> Thus, to burden the Chamber with a segregated political fund requirement would be analogous to encumbering the MCFL with such a fund requirement. This requirement would place an excessive burden upon the free speech rights of the Chamber, and thus would be unconstitutional as applied in this case.

Moreover, Scalia contends that even if the law correctly distinguished between voluntary associations and corporations, and "if the law were narrowly tailored to achieve its goal . . . that goal is not compelling."<sup>206</sup> According to Scalia, the "potential danger"<sup>207</sup> of corporate wealth is not enough of a justification for the Michigan law to establish the narrow tailoring necessary to support the state's objective of restrictions upon corporate political speech. In effect, in breaking with the dicta that he joined in with the majority in *Federal Election Commission*, Scalia questions whether or not there could ever be a compelling enough state interest to place a limit upon a corporation's First Amendment rights. Scalia's contention is that the Michigan law is directed at corporations *qua* corporations, the wealth that they have amassed, and the presumed potential for corruption such wealth has in our society.<sup>208</sup> Such legislation, for Scalia, is clearly a form of censorship directed at the agent of a specific type of speech and is inconsistent with the First Amendment, the intent of Madison and Jefferson, as well as the observations of De Tocqueville on the need for free speech

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204. *Austin*, 110 S. Ct. at 1415-16. Although if the three criteria of *Federal Election Commission* to distinguish corporations from voluntary associations are applied, i.e., voluntary associations are formed for ideological purposes, lacking shareholders, and not acting as a conduit for a business or a union, then it is debatable whether the Chamber met any of these requirements very well or at all. Unfortunately, Scalia gives no argument to show the application of the *Federal Election Commission* rules to the Chamber of Commerce in *Austin*.

205. *Austin*, 110 S. Ct. at 1416 (emphasis in original).

206. *Id.* at 1413.

207. *Id.* at 1414.

208. *Id.* at 1415.

and voluntary associations in society.

Scalia also argues that the majority's special corporate exception for the regulation of political speech is inconsistent with previous rulings such as *FCC v. League of Women Voters of California*,<sup>209</sup> which struck down bans on political editorializing by noncommercial broadcasting systems. According to Scalia, the majority opinion misuses *FEC v. National Right to Work Comm.*<sup>210</sup> as precedent for its decision. Scalia argues that the majority leaps from an assertion in *FEC*, where the Court stated that "we accept Congress' judgment that the special characteristics of the corporate structure create a potential for . . . influence that demands regulation" to the overbroad and not narrowly tailored limitation upon all corporate speech in *Austin*.<sup>211</sup>

Scalia views this case as a departure from *Buckley v. Valeo*, which struck down direct contributions to candidates, but which left in place independent expenditures such as the type the Michigan law here aimed to prohibit. In effect, Scalia contends that while *Buckley* sought to eliminate direct *quid pro quo* corruption where money is given to a candidate with the understanding of reciprocity, the aim of the Michigan law is to address the "New Corruption" problem whereby the speech of one unpopular participant is reduced in order to "enhance the relative force of others."<sup>212</sup> Such a reduction of speech by one participant will have the net effect of reducing the total amount of speech in society, and will limit the amount of free expression, diversity of thought and exchange of ideas in society.<sup>213</sup> Thus, this law is a form of censorship.

Overall, Scalia's dissent in *Austin* amounts to the claim that the Michigan law as applied to the Chamber of Commerce is unconstitutional either because it burdens a voluntary political association, or because the law aims at suppressing corporation speech to eliminate corruption.

When Scalia's views in *Federal Election Commission* and *Austin* are examined together, he appears to be doing two things. First, Scalia seems to be rejecting the goal of corporate campaign finance reform he endorsed in *Federal Election Commission*. In *Austin*, he declared the

209. 468 U.S. 164 (1984).

210. 459 U.S. 197 (1982).

211. *Austin*, 110 S. Ct. at 1413 (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-10 (1982)).

212. *Id.* at 1411.

213. *Id.*



regulation to be a form of censorship. Second, he also appears to be moving towards an equivalence of corporations with De Tocqueville's notion of voluntary political associations. He does that without either providing an analysis of De Tocqueville to show the parallels between the two entities, or relying upon legal arguments to show why the rules formulated in *Federal Election Commission*, to distinguish associations from corporations, need to be amended, applied differently, or rejected.

Thus, if we follow the direction of Scalia's thought in *Austin*, we see that elections represent the expression of political ideas, that corporations are an important expression of political ideas, and thus, to regulate corporate spending in elections would be to suppress important First Amendment rights of free expression which would result in censorship and in damage to the electoral process.

## VII. CONCLUSION: SCALIA'S POLITICAL PROCESS

What does an analysis of Antonin Scalia's scholarly writings and judicial opinions in the areas of minority rights, the legislative process, patronage and administrative organization, and corporate campaign finance reform tell us about the Justice's political philosophy?

First, Scalia's approach to judicial review reveals a rethinking of the *Carolene Products* logic. The Justice appears unwilling to defer to legislative bodies in the areas of affirmative action and the protection of white males, property rights, and campaign finance reform as it effects corporations.<sup>214</sup> However, he seems content to defer in the areas of abortion, tort liability for the press, the death penalty, religious practices of minorities, and political patronage, among other policy areas. While it appears that Scalia is no longer willing to defer to legislatures in the areas traditionally covered by footnote four of *Carolene Products*, he does appear to be willing to second guess in new areas. Scalia's own writings suggest that he is often suspect of legislative integrity and perhaps that suspicion, or his interpretive methodology, might explain this facially erratic pattern of legislative deference. Yet, no clear rule or criterion in his decisions or writings has emerged to tell readers when judicial review is needed because the legislative process has malfunctioned. All that Scalia has given us are policy areas where the Justice will defer or not. Contrary to his claims and those by his critics,

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214. P.B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1815 (1991).

the Justice does not demonstrate a consistently applied attitude towards the legislative process.

Scalia's opinions in limiting campaign finance and patronage reform, and his views on party politics and governmental organization demonstrate a sympathy for what is traditionally more characteristic of the Jacksonian area than of the recent 20th century reform movement. It is a sympathy for a survival of the fittest, a free political market of democratic competition where all ideas and tactics are permitted and where to the victor of the political market belongs the spoils. Overall, Scalia's views in these policy areas describe a judicial role in the political process that is different than the role the Court has previously adopted from *Carolene Products*. Exactly where Scalia is headed is unclear, but it is definitely in a direction different from what is presently the case.

Second, Scalia's jurisprudence reflects a preference for policies that have been labeled as Manchester Liberalism.<sup>215</sup> This is a version of liberalism more supportive of property rights than civil rights, more supportive of the marketplace than the government, and more supportive of the enforcement of majoritarian morality than of respecting individual ethical choices when those choices are at odds with majoritarian preferences. In effect, Scalia's jurisprudence tends to be more supportive of the goals of classical liberal thought than of those goals supported by the 20th century New Deal welfare state.

Third, this article questions previous scholarship on the Justice which argues for the most part that Scalia's jurisprudence is primarily methodologically driven and that his methodology is consistently applied. Instead, this article presents a view of Scalia's political process that suggests a perhaps inconsistent deference to legislative decision-making if we assume that his jurisprudence is methodologically driven. If we assume that Scalia's jurisprudence is results orientated and that willingness to defer or not to other branches is controlled by his political philosophy and policy preferences towards specific issues, then his writings and decisions reveal a profound commitment to use judicial power to serve specific goals. Such a hypothesis should not come as a surprise. In an address to a conference on federalism,<sup>216</sup> Scalia cautioned conservatives to "keep in mind that the federal government is

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215. See *supra* note 2 and accompanying text.

216. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19 (1982).

not bad but good. The trick is to use it wisely.”<sup>217</sup> Clearly Scalia’s decisions seem to bear this caution in mind and reveal an attempt to use federal judicial power wisely to create a political process that nourishes policy preferences that the Justice supports.

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217. *Id.* at 22.

# Protection and Custody of Children in United States Immigration Court Proceedings

**Judge J. Daniel Dowell\***

**Judge Philip J. Montante, Jr.\*\***

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1285
II. AN OVERVIEW OF UNITED STATES IMMIGRATION COURT PROCEEDINGS .....	1287
III. TREATMENT OF CHILDREN BY THE IMMIGRATION AND NATIONALITY ACT.....	1288
IV. IN CUSTODY PROCEDURES IN EXCLUSION PROCEEDINGS .....	1289
V. DETENTION AND RELEASE.....	1291
VI. PENDING LITIGATION .....	1293
VII. RESPONSIBILITIES FOR UNACCOMPANIED OR ABANDONED FOREIGN NATIONAL CHILDREN.....	1294
VIII. CONCLUSION .....	1296

### I. INTRODUCTION

The grave consequences to an individual of an order expelling him or her from the United States has long been recognized. Deportation has been described by the Supreme Court as a "drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for mis-

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conduct of a residence in this country. Such a forfeiture is a penalty."<sup>1</sup>

In a recent United States Supreme Court case, *Ardestani v. INS*, Justice O'Connor, speaking for the majority, emphasized "the enormity of the interests at stake."<sup>2</sup> Justice Blackmun, speaking for the dissent, did not disagree with this proposition. He stressed that "the alien's stake in the proceedings is enormous (sometimes life or death in the asylum context) . . . ."<sup>3</sup>

These concerns over being forced to leave the country are especially important when children are involved. As a result, immigration proceedings recognize the right of children to special protection when their families are involved in deportation proceedings.<sup>4</sup>

The purpose of this article is to examine the current state of the law with respect to the treatment of children in immigration proceedings and to propose certain alternatives to further ensure their protection. To accomplish this purpose, the article first focuses on proceedings before the United States Immigration Court, and especially differentiation between exclusion and deportation proceedings. Then, the Immigration and Nationality Act's treatment of children will be explored and focus will be given to in-custody practices prior to exclusion proceedings. The article goes on to discuss the detention and release of aliens; pending litigation; and, children unaccounted for by the law. Finally, the authors conclude by offering alternatives to the existing

1. *Tan v. Phelan*, 333 U.S. 6, 9 (1948) (citation omitted).

2. *Ardestani v. INS*, 112 S. Ct. 515, 521 (1991).

3. *Id.* at 522. It is important to note that deportation has never been considered as punishment or criminal in nature and, thus, the procedures and safeguards identified with criminal prosecutions have been held inapplicable in the deportation context. *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *Carlson v. Landon*, 342 U.S. 524 (1952); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 149-54 (1923). Rather, deportation proceedings are deemed civil matters. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

However, the United States Supreme Court has extended other constitutional guarantees and procedural safeguards to juveniles in non-criminal "juvenile proceedings," because the potentially severe consequences of a juvenile proceeding are similar to a criminal trial despite the former's ostensibly "civil" nature. *John L. v. Adams*, 750 F. Supp. 288 (M.D. Tenn. 1990).

The custody of minors who are in exclusion and deportation proceedings is a rec-ondite and esoteric topic and is integrally intertwined with the issue of minor's rights in immigration proceedings. Although there is a plethora of identifiable classes of minors scattered throughout the Immigration and Nationality Act, there is a dearth of published cases, administrative or judicial, on the subject.

4. *In re Gault*, 387 U.S. 1 (1967).

standards.

## II. AN OVERVIEW OF UNITED STATES IMMIGRATION COURT PROCEEDINGS

In deportation cases, jurisdiction over the hearing matter vests, and proceedings before a United States Immigration Judge commence, when the charging document is filed by the Immigration and Naturalization Service (hereinafter INS) with the Office of the Immigration Judge.<sup>5</sup> Immigration Judges are similar to administrative law judges and serve under the jurisdiction of the Executive Office for Immigration Review (EOIR), which is a component of the United States Department of Justice.<sup>6</sup>

Hearings before an Immigration Judge may be either in deportation or exclusion proceedings.<sup>7</sup> Aliens entering, or seeking to enter, the United States are dealt with an exclusion proceeding. However, once an alien has been admitted to the United States, and permitted to pass through an INS or border patrol check point, he or she can only be expelled through deportation hearings.<sup>8</sup> This is not so, however, when the admission was only on a parole basis, and upon termination of the parole the alien is dealt with in exclusion proceedings rather than deportation proceedings.<sup>9</sup> Parole occurs when the INS-released alien is in the United States for an unspecified period of time while an application for admission is being adjudicated.

5. 8 C.F.R. § 3.14 (1991).

6. In 1983, the United States Department of Justice, by regulation, created EOIR as an administrative entity *separate* and apart from the INS. See 48 FED. REG. 8056 (1983) (amending 8 C.F.R. § 1, 3 & 100).

7. In deportation proceedings, the charging document is called an Order to Show Cause (hereinafter OSC) and Notice of Hearing. In exclusion proceedings, the charging document is called a Notice to Applicant for Admission Detained for Hearing before an Immigration Judge. With regard to minors in deportation proceedings, the statute specifically deals with service of an OSC on minors under the age of 14. 8 C.F.R. section 242.1(c) states that with respect to minors under the age of 14, the OSC and any warrant of arrest must be served in the manner prescribed in 8 C.F.R. section 242.1(c) upon the person or persons named in 8 C.F.R. section 103.5a(c). Service is made upon the person with whom the minor resides. Further, "whenever possible, service shall also be made on the near relative, guardian, committee, or friend". 8 C.F.R. § 103.5a(c)(2)(ii) (1991). Some of this refers more particularly to "incompetents," for whom the service is identical.

8. Matter of VQ, 9 I&N Dec. 78 (BIA 1960).

9. Matter of Lyy, 9 I&N Dec. 70 (BIA 1961).

In contrast, when an alien actually has entered the United States free from official restraint, even though the entry may have been surreptitious or in direct violation of law barring entry, the alien's removal can be accomplished only through deportation proceedings.<sup>10</sup>

### III. TREATMENT OF CHILDREN BY THE IMMIGRATION AND NATIONALITY ACT

Complicating the matter is the fact that there is no uniformity of treatment of children by the Immigration and Nationality Act (hereinafter Act). The Act uses different nomenclatures for treating minors and, at times, differing age criteria. For instance, the word "child" is a defined term in the Act and children, in turn, are defined as legitimate, illegitimate, legitimated, step-children, adopted, and orphaned.<sup>11</sup> While the term "infancy" is not defined in the Act,<sup>12</sup> minors are categorized broken as juveniles<sup>13</sup> and minors under fourteen.<sup>14</sup> Additionally, some minors are classified as Special Immigrants.<sup>15</sup> Furthermore, the statute references foundlings,<sup>16</sup> and minors in foster care.<sup>17</sup> In this morass of terminology, specific rights involving each definition are hidden. We shall limit our study to those involving release from custody in exclusion and deportation proceedings.

Yet another statutory definition of what constitutes minority con-

10. Matter of A, 9 I&N Dec. 536 (BIA 1961).

11. Immigration and Nationality Act of 1952 (INA) §§ 101(b), (c), 8 U.S.C. §§ 1101(b), (c) (1991). If the child is not the natural, legitimate child, there may be additional criteria which must be satisfied. For example, an adopted child must have been in the legal custody of, and reside with, the adopting parent or parents for at least two years. INA §101(b)(1)(E), 8 U.S.C. §1101(b)(1)(E) (1991).

12. INA § 212(a)(9)(b), 8 U.S.C. § 1182(a)(9)(b) (1991); INA § 237(e), 8 U.S.C. § 1227(e) (1991).

13. 8 C.F.R. § 242.24(a) (1991).

14. *Id.* § 242.3(a).

15. A Special Immigrant is one who has been declared dependent by a juvenile court and has been deemed eligible by that court for long-term foster care and for whom it has been determined in an administrative or judicial proceeding that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (1991).

16. A foundling is a person of unknown parentage found in the United States while under the age of five years until it is shown, prior to attaining the age of 21 years not to have been born in the United States. INA § 301(f), 8 U.S.C. § 1401(f) (1991).

17. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (1991).

cerns persons of unknown parentage found in the United States while under the age of five years. They are presumed to be United States citizens, unless it is shown, prior to their attaining the age of twenty-one years, that they were not born in the United States.<sup>18</sup> This provision, however, does not often come into play and is of relatively little importance.

#### IV. IN CUSTODY PROCEDURES IN EXCLUSION PROCEEDINGS

When aliens apply for admission into the United States and the inspecting immigration officer finds that they are not clearly and beyond a doubt eligible for entrance, the officer serves them with a notice that they have been placed in exclusion proceedings.<sup>19</sup> If they are at a border station, they may be taken into custody by the INS and detained for a hearing before an Immigration Judge.

If they have arrived by ship or aircraft, they remain in carrier custody until the INS decides to take custody. Minors, as well as adults, may be taken into custody.<sup>20</sup> The INS does not administer facilities strictly limited to the custody of minors. Thus, they may be placed in a facility meeting the criteria required by regulation for all detained aliens.<sup>21</sup>

When the alien is an infant, special problems arise. The term infancy is not a defined term in the Act or the regulations, but the regulations do provide for an examination by public health authorities. The Public Health Service, after examination, may certify infancy.<sup>22</sup> If the infant is accompanied by another alien whose protection or guardianship is required by the infant, and the infant is ordered excluded or deported, such accompanied alien also may be excluded or deported.<sup>23</sup>

If the infant is in custody of a citizen or national of the United States, the Act is silent on custody. Furthermore, there are no known cases which have dealt with this issue. When the nationality of the

18. INA § 301(f), 8 U.S.C. § 1402(f) (1991).

19. The form served upon the alien is a Notice to Applicant Detained for Hearing Before a United States Immigration Judge (Form I-122).

20. 8 C.F.R. § 235.3(d) (1991).

21. *Id.* § 235.3(f).

22. INA § 237(e), 8 U.S.C. § 1227(e) (1991). The Public Health Service appoints a medical officer who is a physician of the Public Health Service assigned or detailed by the Surgeon General of the Public Health Service to make mental and physical examinations of aliens. 42 C.F.R. § 34.2(e) (1991).

23. INA § 212(a)(9)(b), 8 U.S.C. § 1182(a)(9)(b) (1991).



child is known, the appropriate consular office may be advised in accordance with their *parens patriae* interest.<sup>24</sup> It would appear that release on parole to the custody of the appropriate consulate pending the proceedings would be the best course. An alternative to INS custody is to release minors, including infants, from custody during the pendency of the exclusion proceedings.

Release from custody in exclusion proceedings generally is by parole and may be with or without bond. Release on parole is not a matter of right but is left to INS discretion. That discretion is exercised by the INS in accordance with specific regulations.<sup>25</sup>

Although release of minors from custody in exclusion proceedings is referred to in the rules of release of minors in deportation proceedings, there are significant differences in application for release. Whereas release from custody in deportation proceedings is a matter of right, and it is the INS which must justify continued custodial detention, in exclusion proceedings parole is left to the INS discretion. While persons in deportation proceedings have a liberty interest under the Fifth Amendment to the United States Constitution, in exclusion proceedings, they have only the due process rights which Congress gives them.<sup>26</sup> In exclusion proceedings they are limited to requesting release by parole at the INS discretion.

Review of the denial of parole in exclusion procedures is by writ of habeas corpus to the appropriate United States District Court. The standard of review is abuse of discretion, a difficult burden to establish, even in cases where the detention is so seemingly without end as to be permanent.<sup>27</sup> This is the reason why there are so few cases generally dealing with release from custody in exclusion proceedings and no published cases specifically dealing with minors.

Taking custody of minors in either exclusion or deportation proceedings is a troublesome problem for the INS. In either case, since the release from custody of children involves not an actual release but a transfer of custody from the INS to someone else, the service is faced with having to screen prospective guardians for their suitability.<sup>28</sup> The

24. See 8 C.F.R. § 242.2(g) (1991).

25. 8 C.F.R. § 212.5(a)(20)(iii) (1991) (citing 8 C.F.R. § 242.24(b) regarding a deportation regulation concerning detention and release of juveniles, defined as minors under 18 years of age).

26. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

27. See *Lency May Ma v. Barber*, 357 U.S. 185 (1958); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

28. 8 C.F.R. § 242.24(b) (1991).

transfer of custody can be an even bigger problem, especially in deportation proceedings.<sup>29</sup>

The only references to INS custody of minors is contained in the provision of the Act which deals with foster care and the regulation dealing with release from custody.<sup>30</sup> Other than these two provisions, there is nothing in either the Act or the regulations which directly addresses issues pertaining to the custody of minors.

## V. DETENTION AND RELEASE

In contrast to the INS provisions above, which define minor as under the age of fourteen, the definition of juvenile for purposes of detention and release is an alien under the age of eighteen years.<sup>31</sup> With respect to juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, certain guidelines are applicable.<sup>32</sup> The order of preference to which the juvenile will be released to starts with the parent, then goes on to the legal guardian, and finally an adult relative who is not presently in INS detention.<sup>33</sup> There is a caveat that the juvenile should not be released if detention is required to secure the juvenile's timely appearance before the INS or the United States Immigration Court, or further, to insure the juvenile's safety or that of others.<sup>34</sup>

If neither parents, legal guardians, nor adult relatives not in detention are located to accept custody, and the juvenile has identified a person in one of these categories who is also in the INS detention, the decision of whether to simultaneously release the juvenile and the adult person is evaluated on a case by case basis.<sup>35</sup>

Where the juvenile's parent or legal guardian is in INS detention or out of the United States, the juvenile may be released to a person designated by the parent or the legal guardian in a sworn affidavit executed before an immigration officer or counselor officer as capable and willing to care for the juvenile's well-being.<sup>36</sup> Such individual must exe-

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29. *See infra* discussion on custody provisions.

30. INA § 101(a)(22), 8 U.S.C. § 1101(a)(22) (Supp. 1992); 8 C.F.R. § 242.34 (1991).

31. 8 C.F.R. § 242.24(a) (1991).

32. *Id.* § 242.24(b).

33. *Id.* § 242.24(b)(1).

34. *Id.*

35. *Id.* § 242.24(b)(2).

36. 8 C.F.R. § 242.24(b)(3) (1991).

cute an agreement to care for the juvenile and ensure the juvenile's presence at all future INS or Immigration Court proceedings.<sup>37</sup>

In unusual and compelling circumstances, the district director or chief patrol officer may exercise discretion and release the juvenile to an adult other than those falling within the specified categories above, provided that the adult executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future immigration proceedings.<sup>38</sup> Thus, the statutory provisions logically focus on the well-being of the juvenile, as well as ensuring that he or she will be present at future proceedings.

If a juvenile cannot be released into the custody of an adult and detention is determined to be necessary, the juvenile is referred to a "juvenile coordinator," whose responsibilities include finding suitable placement in a juvenile facility.<sup>39</sup> Further, if detention is determined to be necessary, the juvenile may be temporarily held by the INS authorities or placed in an INS detention facility having separate accommodations for juveniles, pending suitable placement made by the juvenile coordinator.<sup>40</sup>

In situations in which a juvenile does not wish to be released to his or her parents, who are otherwise suitable, the parents are notified and afforded the opportunity to present their views to the district director, chief patrol agent or Immigration Judge before a custody determination is made.<sup>41</sup>

Notice to parents also is required if the juvenile seeks release from detention, voluntary departure, parole, or any other form of relief from deportation, when the grant of such relief "may effectively terminate some interest inherent in the parent-child relationship and the juvenile's rights and interests are adverse with those of the parents,"<sup>42</sup> if the parent is presently residing in the United States. In such case, the parent shall be given notice of the juvenile's application for relief and afforded the opportunity to propound his or her views or interests to the district director or Immigration Judge prior to determination on the merits of the requests for relief.<sup>43</sup>

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37. *Id.*

38. *Id.* § 242.24(b)(4).

39. *Id.* § 242.24(c).

40. *Id.* § 242.24(d).

41. *Id.* § 242.24(e).

42. 8 C.F.R. § 242.24(f) (1991).

43. *Id.*

A distinction is made between juveniles who are apprehended "in the immediate vicinity of the border who reside permanently in Mexico or Canada," and all others. As to the former, before they are presented with a form for voluntary departure, they must be informed that they may make a telephone call to a parent, close relative, friend or an organization found on the free legal services list.<sup>44</sup> Other juveniles apprehended must be provided with access to a telephone and must, in fact, communicate with either a parent, adult relative, friend, or an organization found in the free legal services list prior to being presented with the voluntary departure form.<sup>45</sup>

Finally, when a juvenile is apprehended, he or she must be given a notice and request for disposition advising the alien of his or her rights.<sup>46</sup> Interestingly enough, the definition of minor, under fourteen years of age, is found only in this particular provisions, which provides that if the juvenile is under fourteen or unable to understand the notice, the notice shall be read and explained to the juvenile in a language that the juvenile understands.

As a practical matter, the better approach would be for agents of the INS to ensure the notice is read and explained to all juveniles in their native language, unless it is clear they understand English. This would have the effect of obviating the different age cutoff for juveniles, as opposed to minors.

## VI. PENDING LITIGATION

The INS policy of detaining alien children unless the regulatory requirements<sup>47</sup> have been met has been found unconstitutional by a majority of the en banc Ninth Circuit Court of Appeals in *Flores v. Meese*.<sup>48</sup> Since the appellate court concluded that the INS had acknowledged that the regulation was not necessary to ensure attendance at immigration proceedings or that release of the children so detained would create a threat of harm to the children or anyone else, the court's analysis was limited to the interests advanced by the INS.

The INS contended that detention of a child, when no parent or

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44. *Id.* § 242.24(g).

45. *Id.* If the juvenile, on his or her own volition, asks to contact a consular officer and, in fact, makes such contact, the requirements of this section are met.

46. *Id.* § 242.34(h).

47. See 8 C.F.R. § 242.24 (1991) (listing the applicable requirements).

48. 942 F.2d 1352 (9th Cir. 1991).

legal guardian was able to take custody, better served the child's interests than release to an adult whose living environment the INS was unable to investigate. In a related argument, the INS urged that the policy was necessary to protect the agency from potential litigation in the event harm should befall children so released.<sup>49</sup>

However, the court held that accepted principles of habeas corpus are applicable, citing *Carlson v. Landon*,<sup>50</sup> and that aliens have a fundamental right to be free from government detention unless a determination is made that such detention furthers a significant government interest. The court concluded the INS failed to support either of the above arguments as to the interests served by the regulations. Therefore, the INS failed to demonstrate the necessary furtherance of the significant government interest.

The dissent, led by Chief Judge Wallace, determined that the right involved was that of children to be released to unrelated adults without the INS approval and that it was a non-fundamental right. Accordingly, the appropriate test was not whether a significant government was furthered, but, rather, whether the INS interest, of protecting the children and avoiding potential liability, was legitimate and to which the regulation was rationally related. The dissent, affirmatively answered the latter question by emphasizing the significant deference courts traditionally have paid to immigration laws and to regulations promulgated by the political branches of government.<sup>51</sup>

The court majority affirmed the district court order which found the blanket detention policy unlawful. In addition, the majority ordered that children be released to responsible adults when no parent or legal guardian is available to take custody, where determined appropriate on a case by case basis. Further, the court directed that hearings be held before Immigration Judges for determination of the terms and conditions of such release.<sup>52</sup>

## VII. RESPONSIBILITIES FOR UNACCOMPANIED OR ABANDONED FOREIGN NATIONAL CHILDREN

While the above mechanisms appear to be in place for minors

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49. *Id.* at 1362.

50. *Id.* at 1359-60 (citing *Carlson v. Landon*, 342 U.S. 524 (1952)).

51. *Id.* at 1377. (Wallace, C.J., dissenting) (citing *inter alia* *Mathews v. Diaz*, 426 U.S. 67 (1976); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc)).

52. *Id.* at 1364.

under federal law, the next question is the protection to be afforded to a child who enters the United States without a parent or a legal guardian. This, in turn, raises a further issue: who is responsible and accountable for them pending the outcome of their deportation proceedings in Immigration Court?

Because federal law is silent on this issue, the ultimate answers may well be found by turning to the laws of those jurisdictions in which the Immigration Court proceedings are conducted. Since this article has been authored by judges situated in the Miami Immigration Court, it appears appropriate to reference Florida law in these issues, notwithstanding the fact that the ultimate status of alien children is governed by federal immigration law.

Moreover, most state laws, including those of Florida, make no distinction between a child who is a foreign national or a Florida resident. This is premised on the notion that the state has an overriding social and humanitarian interest in the welfare of *all* children, no matter what their citizenship or nationality, if they fall within the jurisdiction of the state.

In Florida, a mother and a father are jointly the natural guardians of their natural and adopted children during the latter's minority,<sup>53</sup> and if one parent dies, the natural guardianship passes to the surviving spouse and continues even if the surviving parent remarries.<sup>54</sup> Moreover, guardianship generally follows custody.<sup>55</sup>

The circuit courts in Florida have authority to award custody, and therefore guardianship, to a father, a mother, or non-relative, as the circumstances may dictate.<sup>56</sup>

Florida law also clearly provides that a " 'child who is found to be dependent' means a child who . . . is found to have been *abandoned* . . . or neglected by his parents or other custodians."<sup>57</sup> The word dependent has also been construed to mean any person who is in need of aid, assistance, maintenance and care. Additionally, a dependent child may be taken into protective custody<sup>58</sup> or may have a guardian appointed to supervise, oversee, and provide for their needs and welfare.

53. 28 FLA. JUR. 2d *Guardian and Ward* § 7 (1981).

54. FLA. STAT. § 244.301(a) (1991).

55. 39 AM. JUR. 2d *Guardian and Ward* §§ 65-66 (1968).

56. *Smith v. Smith*, 36 So. 2d 920 (Fla. 1948).

57. FLA. STAT. § 39.01(10)(a) (1991) (emphasis added).

58. FLA. STAT. § 39.401 (1991).

Since a child is classified as a minor under eighteen years of age,<sup>59</sup> then it naturally follows that they may not be competent to handle their own affairs and therefore are in need of protection.

What becomes of the unaccompanied or abandoned child who is placed in proceedings before the Immigration Judge and has no mother, father or other relative in the United States? Is this a dependent child or a child in need of services under the provisions of Florida law?

In Florida, the Department of Health and Rehabilitative Services normally has an affirmative duty to take steps for an unprotected minor, regardless of their legal residency or citizenship.<sup>60</sup> This would be one way to treat unaccompanied children, as described above. In the alternative, Florida law also allows for appointment of guardians ad litem. A guardian is one to whom the law has entrusted the custody and control of the person or incompetent<sup>61</sup> and one category of incompetency is one who because of minority is incapable of caring for him or herself.<sup>62</sup>

Most importantly, a guardian ad litem can only be appointed by a circuit court judge before whom litigation is pending, to represent the ward in that particular matter,<sup>63</sup> as governed exclusively by statute.<sup>64</sup>

In *Flores v. Meese*,<sup>65</sup> the Ninth Circuit confirmed the district court judge's determination that United States Immigration Judges should decide child custody decisions. Query whether it may be a necessary part of that responsibility for Immigration Judges to have the authority to appoint guardians ad litem on behalf of minors who find themselves before the Immigration Court?

## VIII. CONCLUSION

Because of the importance of both proper enforcement of both the United States immigration laws and the need to insure that minors in immigration proceedings have their rights and personal well-being fully protected, this issue should be addressed by Congress. The legislature

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59. FLA. STAT. § 744.102(11) (1991).

60. FLA. STAT. § 39.002 (1991).

61. See FLA. STAT. § 744.102(8) (1991).

62. See FLA. STAT. § 744.102(11) (1991).

63. See FLA. STAT. § 744.102(9) (1991).

64. *Poling v. City Bank & Trust Co.*, 189 So. 2d 176 (Fla. 2d Dist. Ct. App. 1966).

65. 942 F.2d 1352, 1364 (9th Cir. 1991).

should give serious consideration to vesting such authority in the United States Immigration Judges, who directly adjudicate deportation and exclusion proceedings. This would seem to be the best way to protect the legal interests of those children without parents or other responsible persons to see to their needs, who are faced with the prospect of forced removal from the United States.



# The Death Penalty

## Enactment of the Florida Death Penalty Statute, 1972: History and Analysis

Malcolm Stewart\*

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### TABLE OF CONTENTS

I. INTRODUCTION .....	1299
II. HISTORY .....	1301
A. <i>Furman v. Georgia</i> .....	1301
B. <i>The Florida Response</i> .....	1304
III. ANALYSIS .....	1330
A. <i>Public Attitudes Towards Capital Punishment</i> .....	1330
B. <i>The Legislature and the Court</i> .....	1336
C. <i>Furman as a Remand to the Legislature</i> .....	1342
D. <i>The Role of the Governor</i> .....	1348
IV. CONCLUSION .....	1351

### I. INTRODUCTION

On June 29, 1972, the United States Supreme Court issued its landmark decision in *Furman v. Georgia*,<sup>1</sup> vacating the death sentences imposed upon capital defendants in Georgia and Texas. The decision effectively invalidated all state death penalty statutes then in existence, thereby preventing the execution of over 600 inmates incarcerated on various death rows. Though the Court left open the possibility that more narrowly drafted capital sentencing statutes might survive judi-

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1. 408 U.S. 238 (1972).

cial scrutiny, many observers doubted that states would in fact choose to enact new laws.<sup>2</sup> Within the next six months, however, the Florida legislature passed, and the state's governor signed, a bill authorizing the imposition of the death penalty. By 1976, when the Supreme Court next examined the constitutionality of capital punishment, a total of thirty-five states had enacted capital sentencing statutes designed to comply with the ruling in *Furman*.<sup>3</sup> This article examines the process by which the Florida statute was enacted in 1972.

Although two members of the *Furman* Court argued that capital punishment was *per se* unconstitutional, the other three Justices of the majority stated only that the capital sentencing *procedures* then in place were constitutionally defective. The ensuing debate in Florida centered on the effort to devise a procedural scheme that would survive judicial scrutiny. That debate furnished an enlightening case study of constitutional decision-making by elected representatives. For the most part, the legislature was astute and conscientious in its efforts to parse the nine separate opinions issued by the Supreme Court in *Furman*. The evidence indicates, however, that legislators were motivated by pragmatic concerns rather than by any sense of *obligation* to abide by the Supreme Court's instructions. A bill that would be upheld (and thus could be enforced) was preferable to one that would be struck down; but any bill was preferable to no bill at all.

At the time *Furman* was decided, the case was widely regarded as brazenly undemocratic. In an abrupt and hazily reasoned fashion, it was said, the Court had brought an end to a form of punishment utilized in a large majority of the country. Justice Powell, in dissent, argued that,

[i]t is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in a manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition. Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is fore-

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2. For example, NAACP Legal Defense Fund attorney Jack Greenberg asserted that "[t]here will no longer be any more capital punishment in the United States." MICHAEL MELTSNER, *CRUEL AND UNUSUAL* 291 (1986).

3. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976) (Stewart, Powell & Stevens, JJ.) (listing statutes).

closed. The normal democratic process . . . is now shut off.<sup>4</sup>

In retrospect, however, it is clear that *Furman* stimulated rather than aborted the national debate over the death penalty. In an important sense the decision was not at all undemocratic. The Court ensured that capital sentencing schemes would not remain in operation simply because of inertial forces within the legislature. Rather, imposition of the death penalty would be allowed to continue only if it could be demonstrated that contemporaneous support for capital punishment remained strong. *Furman* did not simply command that the states adopt new capital sentencing procedures—it invited the states to decide anew whether they wished to have capital punishment at all.

Did *Furman* induce the Florida legislature to undertake a true re-evaluation of the propriety of capital punishment? The record is mixed. Certainly the decision brought an end to the legislature's prior unwillingness to discuss the issue. The burden of going forward was shifted to proponents of the death penalty, and abolition was conceded to be an option genuinely open for consideration. Had opponents of the death penalty been numerous within the legislature, it is quite possible that a thorough re-examination of the subject would have ensued. In the end, however, support for capital punishment was so overwhelming that the inquiry was a cursory one. Although *Furman* ensured that Florida would not retain the death penalty simply through legislative inertia, it did not induce the legislature to put aside its preconceptions and start from scratch.

## II. HISTORY

### A. *Furman v. Georgia*

The vote in *Furman* was 5-4; the five Justices in the majority issued five separate opinions, and no Justice in the majority joined the opinion of any other. Justices Brennan and Marshall concluded that capital punishment was *per se* violative of the Eighth Amendment ban on "cruel and unusual punishments." Justices Douglas, Stewart, and White did not go so far. Their opinions were not models of clarity, and there were differences of emphasis among them; all three Justices, however, appeared to share the view that the Texas and Georgia statutes were unconstitutional because they conferred upon juries unlimited dis-

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4. *Furman*, 408 U.S. at 461-62 (Powell, J., dissenting).

cretion to decide which defendants would live and which would die. Justices Stewart and White placed particular emphasis on the rarity with which capital sentences were actually imposed. Justice Stewart asserted that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>5</sup> Justice White argued that “the death penalty is exacted with great infrequency even for the most atrocious crimes . . . . [T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>6</sup>

Lurking at the edges of the debate was the question of race. Justice White’s opinion did not allude to the issue of racial discrimination, and Justice Stewart mentioned it only obliquely.<sup>7</sup> But, as the concurring opinions of Justices Douglas<sup>8</sup> and Marshall<sup>9</sup> made clear, capital punishment during the previous half-century had been disproportionately imposed upon blacks. That history of discrimination formed the centerpiece of the NAACP Legal Defense Fund’s constitutional challenge to the death penalty.<sup>10</sup> The evil of discretionary capital sentencing, then, was not simply that it could lead to “random” or “arbitrary” results. The absence of any check on the jury’s discretion also increased the danger that the death penalty would be applied in a racially discriminatory fashion. The attempt to develop improved capital sentencing schemes was, in an important sense, an effort to devise procedures

5. *Id.* at 309-10 (Stewart, J., concurring).

6. *Id.* at 313 (White, J., concurring).

7. *Id.* at 310 (Stewart, J., concurring) (“My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side.”) (citations omitted).

8. *Id.* at 249-51 (Douglas, J., concurring).

9. Justice Marshall noted that,

[a] total of 3859 persons have been executed since 1930, of whom 1751 were white and 2066 were Negro. Of the executions, 3334 were for murder; 1664 of the executed murderers were white and 1630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.

*Furman*, 408 U.S. at 364 (Marshall, J., concurring) (citations omitted).

10. See, e.g., Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL. REV. 158, 164-70 (1985).

that would reduce the likelihood that race could influence the choice between life and death.<sup>11</sup>

Several Justices, both in the majority and among the dissenters, emphasized that the constitutionality of certain types of capital sentencing laws remained an open question. Justice White noted that “[t]he facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us.”<sup>12</sup> Justice Stewart also reserved judgment as to the constitutionality of laws mandating a death sentence for particular crimes,<sup>13</sup> and Justice Powell observed that the legality of such statutes “remains undecided.”<sup>14</sup>

Mandatory sentencing was not identified as the only method by which states might seek to draft new death penalty laws. Chief Justice Burger suggested that “legislative bodies may seek to bring their laws into compliance with the Court’s ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty may be imposed.”<sup>15</sup> In the main, however, contemporary observers concluded that mandatory statutes would enjoy the greatest chance of Supreme Court approval. The concerns expressed by Justices Stewart and White—that vesting absolute discretion in the sentencing jury had led to unjustified variations in the treatment of similarly-situated defendants, and that the infrequency with which capital punishment had been imposed rendered it useless as a method of deterrence—seemed to many to be best addressed by a sentencing statute that gave the jury *no* discretion at the sentencing stage and provided that *all* defendants convicted of enumerated crimes would receive the death penalty.

There was a certain irony to the suggestion that the Eighth Amendment prohibition of “cruel and unusual punishments” might require that any capital sentencing statute be mandatory. As the Court had noted only a year prior to *Furman*, mandatory capital sentencing statutes had, in the distant past, been the norm within the United

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11. Controversy over the racially disproportionate impact of the death penalty has not yet abated. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

12. *Furman*, 408 U.S. at 310.

13. *Id.* at 307 (Stewart, J., concurring).

14. *Id.* at 417 n.2 (Powell, J., dissenting).

15. *Id.* at 400 (Burger, C.J., dissenting).

States.<sup>16</sup> Such statutes had been universally repudiated, however. If juries conscientiously followed their oaths, these laws led to unduly harsh results in cases which fell within the statutory definition of a capital crime but which, due to mitigating factors, seemed not to merit a death sentence. Moreover, juries were frequently tempted to disregard their oaths and acquit the defendant of a capital offense if they regarded him as undeserving of the death penalty.

It was to address these problems that discretionary sentencing schemes were enacted. Legislatures "adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."<sup>17</sup> Indeed, the principal thrust of the *Furman* dissenters' attack lay in their contention that the states might respond to the Court's decision by enacting mandatory capital sentencing statutes, and that such laws would be far more cruel and oppressive than the discretionary schemes struck down in *Furman*. Chief Justice Burger commented that "[i]f [mandatory sentencing] is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition."<sup>18</sup> Justice Blackmun agreed: "This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago."<sup>19</sup>

### B. *The Florida Response*

Within the State of Florida, editorial reaction to *Furman* was mixed. The *St. Petersburg Times* expressed strong support for the decision:

The American civilization reached a new height of respect for human life this week when the U.S. Supreme Court declared the death penalty unconstitutional . . . . Now that the high court has spoken, it is doubtful that the penalty will be revived, despite Chief Justice Warren Burger's attempt to make a place for it.<sup>20</sup>

The *Miami Herald* concluded: "Our own view is that capital punish-

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16. *McGautha v. California*, 402 U.S. 183, 198-201 (1971).

17. *Id.* at 199.

18. *Furman*, 408 U.S. at 401 (Burger, C.J., dissenting).

19. *Id.* at 413 (Blackmun, J., dissenting).

20. ST. PETERSBURG TIMES, July 2, 1972, at 2D.

ment can be (and has been) performed in irreconcilable error and that it is repugnant to take human life in the name of society.”<sup>21</sup> The *Tampa Tribune*, by contrast, excoriated the ruling:

The five Justices [in the majority] let their personal feelings or the emotions aroused by the cases of three members of a minority race lead them astray from a constitutional course . . . . The states’ Constitutional right to impose [capital punishment] ought to be restored—but it will be restored, we think, only by another Nixon appointment to the Supreme Court.<sup>22</sup>

The *Tallahassee Democrat* stated that “[t]he majority opinions give some indication of how far some justices have strayed from the nation’s Constitution.”<sup>23</sup> The paper also decried the ambiguity of the decision:

If the Congress or any State legislature should ever pass such a jumble of separate views and present them as law to be followed by the people, the Supreme Court itself would immediately and very properly rule it out as too vague and arbitrary for a citizen to understand and obey.<sup>24</sup>

The *Florida Times-Union* asserted:

Now, along comes the U.S. Supreme Court with a masterpiece of legal obfuscation which at least severely limits—and perhaps eliminates—use of capital punishment as a deterrent against capital crimes such as murder, kidnapping, and rape. The court has steadily been pulling the teeth of society so that its remaining response capability toward crime is so weak as to be almost laughable to the predatory criminal . . . . [I]n the dire straits in which the United

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21. *An End to Death Penalties, More or Less, and Unless . . .*, MIAMI HERALD, June 30, 1972, at 6A.

22. *What Punishment is Usual and Uncruel?*, TAMPA TRIBUNE, June 30, 1972, at 20A. A subsequent *Tribune* letter to the editor was less sanguine about the prospects for the Court should George McGovern be elected President: “The first vacancy would possibly be filled by a female Chicano under age 30, the next by a Yippie earning less than a thousand dollars a year who believed water should be used only for human consumption, the next by an impoverished octogenarian, etc.” John F. King, *Majority Rule Aborted*, TAMPA TRIBUNE, July 2, 1972, at 2C.

23. *Supreme Court Adds Fuel to National Controversy*, TALLAHASSEE DEMOCRAT, July 1, 1972, at 4.

24. Malcolm B. Johnson, *Death Penalty Decision Shows Prime U.S. Conflict*, TALLAHASSEE DEMOCRAT, July 2, 1972, at 2B.

States now finds itself in the battle against crime—to remove its most formidable weapon is cruel and unusual punishment for thousands upon thousands of citizens who will be murdered because the court has held their lives so cheap.<sup>25</sup>

Florida newspapers' initial reactions to *Furman* (whether pro or con) were generally emphatic and unequivocal. By contrast, Governor Reubin Askew's response was cautious and noncommittal:

I'm pleased that the Supreme Court has made a decision on the very difficult question of capital punishment. Apparently, however, the decision is limited in its application and we'll have to carefully review the actual court opinions before we can determine the effect upon those who are now under the death penalty in Florida.<sup>26</sup>

A supporter of capital punishment during his tenure as a state legislator, Askew had become ambivalent about the death penalty. In 1971, he had called upon the legislature to establish a moratorium on executions within the state, and to authorize the appointment of a commission to study the issue. The legislature had rejected both requests. In February 1972 Askew had issued an Executive Order staying all executions in Florida until July 1, 1973;<sup>27</sup> he again appealed to the legislature for the establishment of a study commission, a request that was again denied.

The Supreme Court in *Furman* had not expressly considered the constitutionality of the Florida capital sentencing law. Its holding was limited to the Georgia and Texas statutes. The Florida statute then in effect, however, gave the jury absolute discretion to grant or withhold mercy in a capital case, and therefore clearly fell within the *Furman* rationale.<sup>28</sup> The state conceded that the statute was invalid under *Furman*. The law was quickly declared unconstitutional by the Florida

25. FLORIDA TIMES-UNION, June 30, 1972, at A6.

26. ST. PETERSBURG TIMES, June 30, 1972, at 8A.

27. Executive Order No. 72-8 (1972). The stay order had no immediate effect; a stay order issued in 1967 by a federal district judge already prevented Florida from executing any of its death row inmates. *See Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967). No one was executed in Florida during Askew's eight years as governor, either prior to *Furman* or after passage of the new statute.

28. Florida law in effect at the time of *Furman* provided that "[a] person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment." FLA. STAT. § 775.082(1) (1971).



Supreme Court in *Donaldson v. Sack*,<sup>29</sup> and by the United States Court of Appeals for the Fifth Circuit in *Newman v. Wainwright*.<sup>30</sup> The state's death row inmates were resentenced to terms of imprisonment pursuant to orders issued in *Anderson v. State*<sup>31</sup> and *In re Baker*.<sup>32</sup> A Florida law passed in March 1972, with an effective date of October 1, 1972, provided that if the state's death penalty law were declared unconstitutional, all inmates under sentence of death would be resentenced to life imprisonment without the possibility of parole.<sup>33</sup> Since all the state's death row prisoners were resentenced prior to that law's effective date, however, all remained eligible for parole.

Although *Furman* clearly invalidated the Florida statutory scheme in effect on June 29, 1972, that scheme had in any event already been amended by the Florida legislature. A bill passed in March 1972, with an effective date of October 1, 1972, had established a new procedure for capital sentencing.<sup>34</sup> The statute listed eight aggravating and eight mitigating circumstances.<sup>35</sup> The law also provided for a bifurcated trial: if a defendant was convicted of a capital offense, a separate sentencing hearing would follow, at which both the defendant and the state could present "evidence of the circumstances surrounding the crime, of the defendant's background and history and any facts in aggravation or mitigation including but not limited to those circumstances enumerated in" the statute.<sup>36</sup> The defendant would continue to be sentenced to death unless a majority of the jury recommended mercy. The new law provided some degree of guidance to the penalty jurors, though the jury remained free to base its decision on factors not enumerated in the statute. For the moment, at least, it was unclear whether the new statute sufficiently constrained the jury's discretion to withstand a constitutional challenge.

The first significant step toward enactment of a new death penalty statute occurred on July 7, 1972. At a press conference in Starke, Florida, Attorney General Robert Shevin recommended passage of a new

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29. 265 So. 2d 499 (Fla. 1972).

30. 464 F.2d 615 (5th Cir. 1972).

31. 267 So. 2d 8 (Fla. 1972).

32. 267 So. 2d 331 (Fla. 1972).

33. 1972 Fla. Laws 118.

34. 1972 Fla. Laws 72.

35. The aggravating and mitigating circumstances were taken from the capital sentencing statute included in the Model Penal Code. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

36. 1972 Fla. Laws 72.

capital punishment law.<sup>37</sup> Shevin expressed the view that “in all likelihood neither Mr. Justice Stewart nor Mr. Justice White would find a statute calling for the *mandatory imposition of death* under certain enumerated circumstances offensive to the Eighth Amendment of the United States Constitution” and that a statute mandating a capital sentence for specified crimes was therefore likely to withstand Supreme Court review.<sup>38</sup> Shevin argued that only a mandatory statute could be upheld and that the Florida law scheduled to take effect in October was therefore a nullity:

The purpose this statute was designed to serve was to permit additional evidence to go before the jury so it could make a more intelligent disposition of its discretionary power to grant or withhold mercy. This was condemned by the Court in *Furman v. [Georgia]*, and as a consequence can no longer form any facet of a determination in a capital case.<sup>39</sup>

Shevin recommended passage of a bill mandating a capital sentence for anyone convicted of a premeditated killing “[o]f any law enforcement officer;” “[o]f any penal institution officer;” “[p]ursuant to a contract for profit;” “[c]ommitted or perpetrated during the commission of any felony directed against another person;” “[b]y an assassin or person taking the life of any state or federal official;” “[c]ommitted by a parolee or probationer previously convicted of first degree murder;” “[o]f a person in connection with the hijacking of an airplane, bus, train, ship or other commercial vehicle.”<sup>40</sup> Shevin further recommended that Governor Askew call a special session of the legislature, either immediately or after the November elections. Passage of a new capital sentencing bill during the April 1973 legislative session would be inadequate, he argued, because “[a]ny extended delay in remedial legislation . . . may unfortunately result in the loss of lives between the present

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37. The Florida Attorney General is an independently elected official who typically exercises considerable autonomy. During the fall of 1972, Shevin also proposed enactment of a sweeping new human rights statute and a strong reporters' shield law. ST. PETERSBURG TIMES, Nov. 10, 1972, at B3; ST. PETERSBURG TIMES, Nov. 5, 1972, at B1. Shevin served as Attorney General until 1978, when he sought the Democratic nomination for Governor. He won a plurality in the opening primary but was defeated in the runoff by Bob Graham who subsequently won the general election.

38. Memorandum from Robert L. Shevin, Attorney General of Florida 6 (July 7, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

39. *Id.* at 9.

40. *Id.* at 14.

day and the regular session of the Legislature.”<sup>41</sup>

On July 10 Governor Askew announced that he would not call an immediate special session of the legislature but would convene a special session after the November elections. In the meantime, he stated, he would appoint a commission to study both the desirability of capital punishment generally and the specific form that any death penalty statute might take. An immediate session could nevertheless have been called by agreement of the Senate President and House Speaker, or by a three-fifths vote within each chamber.<sup>42</sup> Senate President Jerry Thomas (D-Jupiter) pushed for an immediate session, arguing that “the general public is entitled to optimum protection.”<sup>43</sup> House Speaker Richard Pettigrew (D-Miami) demurred, however, arguing that “[t]his complex and vitally significant decision of sentencing one of our citizens to death deserves dispassionate and deliberative legislative study unfettered by the hectic and emotional demands of campaign time.”<sup>44</sup> Senator Thomas’ attempt to secure the necessary votes within the legislature received negligible support, eliminating the possibility of an immediate special session.<sup>45</sup>

During the late summer and early fall, several ad hoc committees were formed within the state to study the issue of capital punishment. On July 19 Representative Pettigrew appointed a House Select Committee, chaired by Representative Jeff Gautier (D-Miami) and com-

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41. *Id.* at 13.

42. Terrell Sessums, who succeeded Richard Pettigrew as Speaker of the House, recalls that,

[i]n 1968 when we revised the Constitution we were so offended by Governor Kirk’s tendency to call special sessions out of the clear blue sky that we—I don’t know that we really put any restrictions on the governor’s ability to call a special session, but we put in a proviso that the President of the Senate and the Speaker of the House could jointly call a special session. And we used that to suggest to the governor that if he was too imperial in calling special sessions without prior legislative consultations, we were going to call special sessions as soon as he left on vacation, or on a trade mission to Europe, or something like that . . . .

Interview with Terrell Sessums in Tampa, Fla. (Dec. 17, 1990).

43. William Mansfield, *Shevin Asks Executions to be Restored*, MIAMI HERALD, July 8, 1972, at 1A, 20A.

44. ST. PETERSBURG TIMES, July 20, 1972, at 1B.

45. Senator Thomas did not seek re-election in 1972; an immediate special session would thus have afforded him his only opportunity to participate directly in the enactment of a new death penalty statute. Senator Thomas switched to the Republican Party in December 1972 and ran unsuccessfully for Governor in 1974.

posed entirely of members of the Florida House. That committee's second session revealed confusion as to the nature of the group's assignment. When Tobias Simon, a Miami attorney appearing as a witness before the committee, commenced a broad, slashing attack on the death penalty, Gautier interrupted him:

Let me say, Mr. Simon, before I call for any questions from the committee members, that our committee was not charged with whether or not to reinstate the death penalty. That is the subject of another committee's deliberations. The Governor of the State of Florida, Reubin Askew, has appointed a committee to do just that. To recommend to the legislature whether or not the death penalty should be reinstated . . . I would suggest that if [the governor's committee] has a separate hearing that you should appear also, because his committee really is making the basic determination that you are alluding to today.<sup>46</sup>

Gautier's apparent impression that the committee's sole task was to draft suitable legislation was soon corrected. A few minutes later Gautier announced: "I received a note from the Speaker that he did not mean to limit the scope of this Committee's work and if, at the conclusion, the Committee feels that an alternative to the death penalty can be imposed, that we're certainly not restricted from recommending it."<sup>47</sup>

Even after this clarification, however, the focus of the Committee's inquiry was remarkably narrow. On August 18 the committee interviewed former death row inmates at the state penitentiary. One inmate characterized the judicial system in the panhandle as a "kangaroo court" and asserted that lies had been told throughout his trial. The possibility that an innocent man would be condemned to death (and, more generally, the fairness of capital trials in Florida) would seem highly relevant to the propriety of reinstating the death penalty—though a single inmate's unsupported claim of innocence might be of small probative value. Chairman Gautier, however, admonished the witness to confine his remarks to the topics before the committee: 1) whether the death penalty should be revived, 2) whether capital punishment deters, and 3) whether life imprisonment without parole

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46. *Hearings of the House Select Committee on the Death Penalty* 29 (Aug. 9, 1972) (unofficial transcript on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464) (hereinafter *House Hearings*—transcript).

47. *Id.* at 44.

would be an adequate alternative.<sup>48</sup> Committee members thereafter contented themselves with asking inmates what punishment would be appropriate if one of their best friends were murdered, or whether they would be “deterred” from resistance if they were robbed at gunpoint.

At the beginning of its fifth session on August 31, the committee voted 5-1 that the death penalty should be reinstated.<sup>49</sup> At no time did the committee discuss or debate the propriety of capital punishment. Gautier then admonished the witnesses that from this time forward their comments should be limited to the merits of particular bills.<sup>50</sup>

In accordance with Shevin’s recommendation, the bill developed by the House Committee attempted to eliminate jury discretion by mandating a sentence of death upon conviction. There were, however, significant differences between the Attorney General’s bill and the bill ultimately drafted by the committee. The Shevin bill mandated the death penalty only for certain categories of premeditated murder. As Assistant Attorney General Ray Marky explained, this limitation was seen as essential, since history had shown that a statute mandating death for all premeditated murders would lead to widespread jury nullification:

Jury nullification came about when the death penalty was geared toward homicides generally . . . . The fact that juries engaged in jury nullification when we were talking about all types of homicides does not mean that we are going to have jury nullification in specification [sic] types of crimes of a very aggravated nature.<sup>51</sup>

Shevin expressed uncertainty about the constitutionality of a bill requiring the death penalty for all first-degree murders:

By saying that all premeditated murders are mandatory death penalty you’re getting into the areas where juries have traditionally been willing to grant mercy . . . . You may be running headlong into another constitutional problem at the U.S. Supreme Court level and . . . you may be, in this instance, providing a punishment

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48. *Hearings of the House Select Committee on the Death Penalty* (Aug. 18, 1972) (tape on file at Florida State Archives, Tallahassee, Fla.) (hereinafter *House Hearings—tape*).

49. The only member of the committee to vote against reinstatement of the death penalty was Representative Gwendolyn Cherry (D-Miami), a longtime foe of capital punishment.

50. *House Hearings—tape*, *supra* note 48 (Aug. 31, 1972).

51. *House Hearings—transcript*, *supra* note 46, at 19 (Aug. 4, 1972).

that perhaps is a little bit too harsh.<sup>52</sup>

The committee, however, was unreceptive to the limitations established by the Shevin bill; committee members argued both that the criminal's punishment should not depend on the status of the victim and that the bill would create disruptive line-drawing problems. Ultimately the committee recommended passage of a bill mandating a sentence of death for five classes of crimes: premeditated murder, felony murder, treason, "[t]hrowing a destructive device which results in the death of a person;" and "[r]ape of a person under the age of thirteen."<sup>53</sup>

Other ad hoc committees meeting during the late summer and fall also recommended that the death penalty be reinstated. The Senate Council on Criminal Justice, appointed by outgoing Senate President Jerry Thomas, with Florida Supreme Court Chief Justice B.K. Roberts acting as honorary chairman, voted 12-2 to recommend a law making the death penalty mandatory for specified categories of murder and for the rape of a child under eleven.<sup>54</sup> Chief Justice Roberts asserted that "[t]here has been no capital punishment for six years and we are living in the greatest crime wave in the history of the world."<sup>55</sup> The presence

52. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

53. *Final report of the House Select Committee on the Death Penalty* 5 (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

The bill drafted by the committee did contain a definition of "premeditation" narrower than that which had prevailed under prior Florida law. The bill provided that, [a] premeditated design to kill is a fully formed conscious and deliberate purpose to take human life, formed upon reflection and deliberation and present in the mind at the time of the killing and which was not primarily induced by great and unjustified provocation on the part of the intended victim, nor was committed under a sudden heat of passion or other such condition which precludes the idea of reflection and deliberation.

Fla. HB 1-A § 2 (Spec. Sess. 1972). That definition was intended to ensure that killings committed during barroom brawls or lovers' quarrels would not be capital offenses, despite the fact that they were considered premeditated murders under prior Florida law.

54. ST. PETERSBURG TIMES, October 31, 1972, at 1B.

55. Chief Justice Roberts did not place all the blame on the absence of capital punishment. In the fall of 1972, the Florida Supreme Court briefly rescinded, then reinstated, the state rule requiring unanimous jury verdicts in criminal cases. Roberts dissented from the order reinstating the rule, arguing that "[w]e cannot escape the fact that numerous mistrials are a contributing factor to the greatest crime wave ever existing in this country." *Unanimity Stays in Jury Verdicts*, MIAMI HERALD, Dec. 7, 1972, at 2B (Street Edition).

of a sitting state supreme court justice on such a committee raised the obvious specter of a conflict of interest should a death penalty bill be passed and its constitutionality challenged. Chief Justice Roberts defended his participation on the ground that "I make recommendations to Legislative committees all the time as chairman of the Florida Judicial Council."<sup>56</sup> However, Roberts ultimately recused himself in *State v. Dixon*,<sup>57</sup> the case in which the Florida Supreme Court first passed upon the constitutionality of the state's new death penalty statute. The Florida Judicial Council (chaired by Roberts) also recommended reinstatement of capital punishment,<sup>58</sup> as did the Board of Directors of the Florida State Chamber of Commerce.<sup>59</sup>

The most far-reaching inquiry into the issue was conducted by the study committee appointed by Governor Askew. Chaired by E. Harris Drew, a former Florida Supreme Court Justice, the seventeen-member committee included two former governors of the state, three state Senators and three state Representatives, as well as eminent members of the bench, bar, and public. The committee was provided with a staff and was assisted by an advisory committee and a legal advisory committee.<sup>60</sup> The group held hearings throughout the state, taking testimony from the public, former death row inmates, police and correctional officials, and experts in the field of criminal justice. Governor Askew pledged to withhold judgment on the issue pending the preparation of the committee's report.

On October 20, the committee voted 9-6 to recommend reinstatement of the death penalty. Former Governor LeRoy Collins delivered

56. Tom Raum, *Six Are Winners With 'Walking' Races*, TALLAHASSEE DEMOCRAT, Nov. 15, 1972, at 2.

57. 283 So. 2d 1 (Fla. 1973).

58. ST. PETERSBURG TIMES, Nov. 5, 1972, at 1B.

59. ST. PETERSBURG TIMES, Sept. 15, 1972, at 4B.

60. The legal advisory committee was composed of five professors from Florida law schools. Its report concluded that "no constitutional basis can justify any attempt to reinstate capital punishment without an accompanying fundamental change in our system of criminal justice." *Final Report of the Governor's Committee To Study Capital Punishment* 114 (Nov. 21, 1972) (hereinafter Governor's Committee Report). A slightly revised version of the legal advisory committee's report has been published as Charles W. Ehrhardt et al., *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & CRIMINOLOGY 2 (1973). Two members of the committee have written a short article describing the legislative debate over reinstatement of the death penalty in Florida. See Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973).

an impassioned statement in opposition to reinstatement of the death penalty, asserting that capital punishment,

degrades us all and runs counter to values I have believed in and sought to uphold over my lifetime. In future years, I believe people will look back on the hangman's noose, the electric chair, and the gas chamber, as we now view the barbarous instruments and trappings of torture utilized by our ancestors.<sup>61</sup>

After reviewing in detail the statistical evidence presented to the committee, Collins concluded that the use of capital punishment bore no verifiable relationship to the rate of crime. He conceded that public support for the death penalty was substantial, but argued that public demand for executions "is due in large part to frustration over our failures in law enforcement and will go away in my judgment if our methods of dealing with criminals and potential criminals are made more effective and certain."<sup>62</sup> Recalling his tenure as governor, Collins stated that "I signed death warrants of twenty-nine men in my six years as governor. And I can still almost call each name, it caused such a traumatic experience for me."<sup>63</sup>

Chairman Drew, also opposing reinstatement, asserted that "I am as firmly convinced, as I am sitting here at this table, that this country has witnessed its last execution."<sup>64</sup> He found it "inconceivable," he explained, that the United States Supreme Court "could one day turn loose 600 people who had the shadow of death hanging over them, and in a short time turn around and say it's okay to execute others."<sup>65</sup> Despite his fervent opposition to reinstatement of the death penalty, Drew argued that *Furman* had been wrongly decided, characterizing it as "a flagrant usurpation of the power of the legislative branch of government."<sup>66</sup> In opposing reinstatement of the death penalty, he identified a diverse range of concerns: his belief that, "statistically, there is no evidence that its imposition contributes to the prevention of murder or other crimes;" the fact that "once such sentence is carried out, there is no way to effectively correct an error;" his perception that "intermina-

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61. Governor's Committee Report, *supra* note 60, at 126.

62. *Id.* at 129.

63. *Askew Study Group Backs Death Penalty*, TAMPA TRIBUNE, Oct. 21, 1972, at 1A, 20A.

64. ST. PETERSBURG TIMES, Oct. 21, 1972, at 1B.

65. *Id.*

66. Governor's Committee Report, *supra* note 60, at 122.



ble delays in the disposition of capital cases in the courts creates disrespect for all criminal laws;" and, perhaps most important, his conviction that reinstatement would be pointless given the likelihood that any new statute would be struck down by the United States Supreme Court.<sup>67</sup> Drew retained that conviction throughout the debate; after a statute was ultimately passed, he labeled it an "exercise in futility."<sup>68</sup>

In the end, the margin of support for reinstatement of the death penalty came from the state legislators on the committee, who voted 4-1 in favor.<sup>69</sup> That result seems unsurprising since advocates and opponents of capital punishment agreed that public support for the death penalty was overwhelming. One committee member, Representative Eugene Brown (D-Tavares), stated that an informal poll of his constituents showed 1100 in favor of the death penalty and fifty-two opposed.<sup>70</sup> Representative Brown noted that "[t]here's a message there, at least to one who's seeking public office."<sup>71</sup>

After the vote of the Governor's Committee, passage of a new death penalty statute appeared almost certain. There remained considerable controversy, however, concerning the form that such a statute should take. Attorney General Shevin, interpreting *Furman* to require the elimination of jury discretion in capital sentencing, had recommended that death be mandatory upon conviction for specified crimes. The House and Senate committees had agreed, though they had broadened the range of crimes for which death would be mandated. The

67. *Id.* at 123.

68. ST. PETERSBURG TIMES, Dec. 3, 1972, at 11A.

69. Voting in favor were Sens. Jim Williams (D-Ocala) and Louis de la Parte (D-Tampa), and Reps. Robert Johnson (R-Sarasota) and Eugene Brown (D-Tavares). Representative Cherry was the only legislator on the Governor's Committee who voted against reinstatement. Governor's Committee Report, *supra* note 60, at 142.

In the view of Hugh McMillan, Jr., Askew's assistant for legislative affairs, the most significant aspect of the Committee's vote was that "neither de la Parte nor Williams wanted to follow the senior statesmen [Collins and Drew] . . . . At that point they were both highly ethical, highly effective members of the state Senate." Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990). Their support for capital punishment was significant both because of Askew's respect for their views and because it suggested that any effort to block reinstatement would meet with opposition from Senate leaders.

70. Harold Stahmer, another member of the committee, recalls that Representative Brown "wheeled in on a dolly a pile of letters" as a visible symbol of his constituents' support for the death penalty. Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

71. ST. PETERSBURG TIMES, Oct. 22, 1972, at 9B.

Governor's Committee, by contrast, preferred a statute similar to the one passed the previous March, which required a bifurcated trial and consideration of aggravating and mitigating circumstances. The staff report of the committee argued that a mandatory sentencing law would not eliminate the potential for arbitrariness identified in *Furman*:

The jury's discretion to convict or not convict a defendant of a capital felony remains intact in the guilt or innocence phase of the trial. It is entirely conceivable that the jury will continue to send minority defendants to the electric chair by convicting them of the capital offense and that the more affluent majority will be spared by an arbitrary jury finding of guilt of a lesser-included offense, not capital.<sup>72</sup>

The bill ultimately recommended by the Governor's Committee was drafted by a subcommittee headed by Representative Robert Johnson (R-Sarasota).<sup>73</sup> That bill was modeled after the March statute but differed from it in two significant respects. First, the sentencing determination was to be based exclusively upon the statutory aggravating and mitigating circumstances, and the finding of at least one aggravating factor was a prerequisite to a sentence of death. Second, the choice between imprisonment and death was to be made not by a jury, but by a special panel made up of the judge who had presided at trial and two other circuit judges assigned by the Chief Justice of the Florida Supreme Court. The three-judge sentencing scheme, inspired by European trial procedure,<sup>74</sup> was defended as a means of reducing the likelihood of arbitrariness by utilizing sentencers who would be free from the passions of the local community in which the crime had occurred.<sup>75</sup>

Surprisingly little attention was paid to the possibility that the bill passed the previous March (with an effective date of October 1) itself

72. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

73. Governor's Committee Report, *supra* note 60, at 146.

74. Defending the bill on the House floor, Johnson stated that "I got this frankly out of reading extensively on capital punishment and found that it's being used in France, West Germany, Scandinavia, and most of South America." Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

75. On the House floor, Representative Johnson noted that the two additional judges would be appointed from outside the circuit where the crime occurred "because they don't stand election in that circuit. They don't have to face the emotional trauma of the people of that circuit every day, and they would be totally objective and unbiased in their decision." *Id.*

imposed sufficient constraints on the jury's discretion to meet constitutional requirements.<sup>76</sup> A special committee of the Florida Bar took the position that the March statute was constitutional,<sup>77</sup> as did Senator David McClain (R-St. Petersburg), the sponsor of the bill.<sup>78</sup> The legal advisory staff to the Governor's Committee disagreed, arguing that,

the statute apparently contains constitutional infirmities, since it does not require a finding of the presence of an aggravating circumstance prior to the imposition of the death penalty but rather allows the jury the same discretion in determining when the death penalty should be imposed that was condemned in *Furman*.<sup>79</sup>

The Attorney General's office, of course, had condemned the bill on the ground that any non-mandatory sentencing scheme would be constitutionally deficient. The Florida Supreme Court's enigmatic decision in *State v. Whalen*,<sup>80</sup> rendered on November 22, 1972, appeared to fore-

76. Robert Johnson recalls that "[t]he feeling was that that bill . . . was a band-aid type approach" that would not survive judicial scrutiny. Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

77. ST. PETERSBURG TIMES, Oct. 20, 1972, at 6B.

78. ST. PETERSBURG TIMES, Oct. 24, 1972, at 12B.

79. Governor's Committee Report, *supra* note 60, at 146.

80. 269 So. 2d 678 (Fla. 1972). *Whalen* involved a defendant who pleaded guilty to first degree murder shortly after the decision in *Furman*. The trial judge certified to the Florida Supreme Court the following question: "Does a trial court sitting as the sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of the penalty, have the power to impose the death sentence?" *Id.* at 679. Apparently the judge sought to invoke the provisions of the bifurcated trial law. The Florida Supreme Court, relying on *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), held that "[t]his question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Whalen*, 269 So. 2d at 679.

That is odd reasoning. In stating that there were no capital offenses in Florida, the *Donaldson* court meant simply that on the date of its decision (July 17, 1972), Florida had no constitutionally adequate *procedure* for capital sentencing. If the bifurcated trial law passed in March was sufficient to comply with *Furman*, then when the new law became effective on October 1, capital offenses would once again have existed. It therefore made no sense to say that the absence of capital offenses rendered moot the issue of the new law's constitutionality. The effect of *Whalen* was to remove all doubt that a new statute was required, while giving no indication as to the Florida Supreme Court's views on the constitutionality of non-mandatory capital sentencing.

Of course, even if the bifurcated trial law was constitutional, its retroactive application to a crime committed before its effective date might have been problematic,

close the possibility that the March statute could be constitutionally applied.

On November 20, Governor Askew broke his silence, announcing that he would recommend passage of a bill to restore capital punishment.<sup>81</sup> Two days later, in a twelve-page letter to the legislature, Askew placed his support behind the bill drafted by the Governor's Committee, calling it "the only proposal which, in my judgment, can pass constitutional muster."<sup>82</sup> Askew noted that "[i]n essence, this procedure is a modification of the state's 'bifurcated trial' law, which I recommended and the Legislature adopted at the last Regular Session, except that the list of aggravating and mitigating circumstances is made 'obligatory rather than advisory,' in order to limit discretion."<sup>83</sup>

On November 27 the House Select Committee on the Death Penalty held its first meeting of the new legislative session. Chairman Gauthier began by admonishing the witnesses to concern themselves only with the "technical aspects" of the various bills before the committee, and not to speak to the desirability of capital punishment.<sup>84</sup> A series of witnesses spoke in favor of the Governor's Committee bill, arguing primarily that it had the greatest chance of withstanding the scrutiny of the United States Supreme Court. Assistant Attorneys General George Georgieff and Ray Marky, arguing in favor of a mandatory sentencing law, were outspoken in their condemnation of the bifurcated sentencing scheme. Georgieff, reading *Furman* to require that the legislature rather than individual sentencers must decide precisely which crimes merit a sentence of death, stated:

I put it to you very plainly: if you put in *any* system that vests discretion in the people as to whether this individual should live or die and takes it out of *your* hands, which is what they condemned in *Furman*, I promise you that the result has to be the same, they'll strike it down. When *you* decide that an individual must die if he

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particularly if the sentencing was artificially delayed in order that the new law might be applied. *But see* *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). The *Whalen* court, however, did not suggest that its holding was influenced by retroactivity concerns.

81. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

82. Letter from Reubin Askew to Senate President Mallory Horne, and House Speaker Terrell Sessums 3 (Nov. 22, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

83. *Id.*

84. House Hearings—tape, *supra* note 48 (Nov. 27, 1972).

commits crime A or crime B, . . . then that is all that's necessary.<sup>85</sup>

Marky attacked the concept of a discretionary sentencing scheme, and also ridiculed the particular aggravating and mitigating factors used in the Governor's bill: "These standards are so nebulous, so vague . . . that I can fit them in every death case that I've ever handled . . . . The standards are ludicrous. They're vague, they're ambiguous, and they exist both pro and con in every death case . . . . That's the height of arbitrariness."<sup>86</sup> Indeed, Marky, who had previously stated that the Askew bill "absolutely defies" the ruling in *Furman*, suggested that the bill might be a ploy to scuttle capital punishment entirely: "Some people may be trying to pass a bill that is patently unconstitutional. Opponents of a bill have done that before, you know."<sup>87</sup> Ultimately the vote was 6-5 to report to the floor the mandatory sentencing bill drafted by the House Select Committee.

On November 28, the governor addressed the legislature at the special session. Governor Askew called for passage of a death penalty statute,<sup>88</sup> though he acknowledged that "I continue to have mixed feelings as to the necessity, the rightness, and even the legality of capital punishment in any form."<sup>89</sup> Askew again stressed his support for the bill recommended by his committee, arguing that a mandatory sentencing law was unsound as a matter of policy and unlikely to gain the approval of the United States Supreme Court:

I'm convinced that a law providing for mandatory imposition of the death penalty, with no opportunities for mercy, would merely prompt juries to convict on lesser charges. And the discrimination to which the court so clearly objected would still be present. It merely would take place sooner . . . in the conviction itself. The same groups discriminated against in the past would draw convictions of premeditated murder—and therefore die; while others

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85. *Id.*

86. *Id.*

87. Jere Moore, Jr., *Rift Develops over Capital Punishment*, TALLAHASSEE DEMOCRAT, Nov. 27, 1972, at 15.

88. Although the special session was initially scheduled for the purpose of debating a capital punishment bill, the session was not limited to that issue. The Governor's Proclamation convening the session also requested action on eight other topics, including ratification of the Equal Rights Amendment (on which the legislature ultimately declined to act). Fla. J. Senate 1 (Nov. 28, 1972).

89. *Id.* at 7.

would be convicted of lesser crimes, and therefore live. I think it's obvious the court would reject such a system and therefore render your efforts counter-productive.<sup>90</sup>

In arguing that the United States Supreme Court would strike down a mandatory sentencing statute, Askew emphasized the *Furman* dissenters' disapproval of such laws<sup>91</sup>—a tack also taken by his supporters in the legislature. Askew's speech was interpreted by many as a threat to veto any mandatory sentencing bill passed by the legislature—an implication that the governor would neither confirm nor deny.<sup>92</sup>

The debate over mandatory versus discretionary capital sentencing revealed a tension between the goals of consistency and individualized consideration that subsequent jurisprudence has not successfully resolved. On the one hand, fairness seems to require that all capital defendants (at least within a given state) should be judged by uniform criteria rather than by the idiosyncrasies of a randomly selected jury, and that race in particular should play no part in the sentencing decision. On the other hand, it may cogently be argued that no person should be put to death without an individualized assessment of his crime and of any evidence that he may proffer in mitigation.<sup>93</sup> Advocates of the mandatory approach essentially argued that the values of consistency and individualized treatment were irreconcilably in conflict and that, of the two, consistency was more important.

Proponents of the bifurcated trial approach believed that the two values could be accommodated. By drafting precise sentencing standards, the legislature could provide for an individualized assessment in

90. *Id.* at 7-8.

91. Askew noted that "Chief Justice Burger, who dissented from the court's recent decision regarding capital punishment, nevertheless condemned the mandatory approach as archaic. And the other members of the court who also dissented from the majority, concurred with the Chief Justice on that point." *Id.* at 8.

92. ST. PETERSBURG TIMES, Nov. 29, 1972, at 1B.

93. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), where the Court opined that an individualized sentencing determination is required in order to treat each defendant in a capital case with that degree of respect due the uniqueness of the individual and, in addition, because,

a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

*Id.* at 605.

every capital case while ensuring that all capital defendants would be judged by the same criteria.<sup>94</sup> To put it another way, the advocates of this approach argued that a system of “guided discretion” could strike a balance between the extremes of mandatory sentencing and standardless jury discretion that would be preferable to either.<sup>96</sup>

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94. The drafting of such statutes was not an enterprise that the Supreme Court had encouraged. In *McGautha v. California*, 402 U.S. 183 (1971), the Court had suggested that the effort was doomed to failure:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history . . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

*Id.* at 204. Indeed, the *McGautha* Court cited the Model Penal Code’s capital sentencing statute—which has served as the model for most post-*Furman* laws—as an example of the futility of such an exercise. *See id.* at 207 (“It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority’s exercise of discretion.”).

95. The Supreme Court’s capital sentencing jurisprudence has proceeded along two largely independent tracks. Decisions involving constitutional limitations on the states’ freedom to define aggravating factors have stressed the *Furman* principle that the sentencer may not be given unfettered discretion. *See, e.g.,* *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (“Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”). In discussing the states’ obligation to permit consideration of mitigating factors, however, the Court has stressed the need for an individualized sentencing determination. *See, e.g.,* *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”). The uneasy coexistence between these two lines of authority has in turn spawned a vigorous counterattack, articulated most recently, and at greatest length, in Justice Scalia’s concurring opinion in *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990).

Justice Scalia appears to overstate his case when he refers to “[t]he simultaneous pursuit of contradictory objectives,” *Id.* at 3064, and argues that the Court’s invalidation of mandatory capital sentencing in *Woodson v. North Carolina* was “rationally irreconcilable with *Furman*.” *Id.* at 3067. There is nothing incoherent or self-contradictory about the view that some medium between mandatory sentencing and unconstrained discretion is preferable to either extreme. Justice Scalia appears correct, however, in arguing that the individual sentencer’s *absolute* discretion to decide what factors are and are not mitigating cannot be squared with *Furman*. The quest for consistency requires that the legislature place *some* limitations on the factors which the judge or jury may consider in making its sentencing determination; the evil of unguided

The mandatory statute reported by the committee initially attracted "seventy or eighty co-sponsors" in the House.<sup>96</sup> In the end, however, supporters of the Governor's bill prevailed. The mandatory sentencing bill approved by the House committee was reported to the House floor on November 29. Representative Gautier, arguing in favor of the bill, circulated a memorandum from Attorney General Shevin. That memorandum stated that the Askew bill "flies into the teeth of that which was condemned in *Furman v. Georgia*"<sup>97</sup> and that "it continues to be my view that the more nearly legislation approaches the status of mandatorily imposing death, the more likely the chance of surviving [Supreme Court] scrutiny."<sup>98</sup>

Representative Johnson offered the Askew bill as an amendment. In contending that the Supreme Court would strike down a mandatory sentencing scheme, Johnson placed heavy emphasis on Chief Justice Burger's condemnation of a mandatory death penalty. The four *Furman* dissenters<sup>99</sup> would vote against such a statute, he argued, as

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discretion, after all, was that different sentencers might have widely varying notions as to the concerns that are relevant to the decision between life and death. The fact that this arbitrariness might be thought to work in favor of the defendant (by expanding the range of factors that might cause a jury not to impose a capital sentence) does not make the system consistent with *Furman*. The sentencing schemes condemned in *Furman* were struck down, it should be recalled, partly because of the *infrequency* with which capital sentences were imposed. The central premise underlying the opinions of Justices Stewart and White in *Furman* was that an otherwise lawful sentence of death could be rendered unconstitutional if other, similarly-situated defendants were spared due to the idiosyncrasies of local juries.

96. Robert Johnson asserts that Democrats "wanted their name on a bill—they wanted their name on a program, there's no question about that. They didn't want a bill passed that was under a Republican banner or Republican sponsorship." Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). In light of Askew's support for the bifurcated trial approach, it seems more accurate to describe that bill as a bipartisan, rather than a Republican, measure. Johnson is surely correct, however, in suggesting that the mandatory sentencing bill was strictly a Democratic product. Democrat Robert Shevin had first advanced the idea of mandatory sentencing; the bill itself was drafted by the House Select Committee, composed entirely of Democrats, that met during the fall of 1972.

97. Memorandum from Robert L. Shevin, Attorney General 2 (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

98. *Id.* at 4.

99. Representative Johnson's conclusion that all four *Furman* dissenters would oppose a mandatory sentencing scheme was presumably based on the fact that Justices Blackmun, Powell, and Rehnquist had joined Chief Justice Burger's dissent. Although Justice Blackmun's dissent (with which no other Justice joined) expressed abhorrence for mandatory death penalties, the dissents of Justices Powell and Rehnquist took no



would Justices Brennan and Marshall: "Now that's four men who say they will not accept mandatory death, and you have two more that say they will not accept anything. And that's six to three, no matter how you cut the pie."<sup>100</sup> Johnson also noted that sentencing is traditionally performed by judges and asserted that,

[w]e [on the Governor's Committee] read *Furman v. Georgia* to say that juries cannot play a part in sentencing . . . . We believed that if you have a bifurcated trial with a jury you still have the same subjection to arbitrary, capricious, and discriminating judgment in sentencing, and it would not be upheld. So we said, can we use one judge? And we felt that the Supreme Court would say one judge alone would have the same possibility of whimsical, freakish application . . . .<sup>101</sup>

Johnson concluded that "I really feel that what we have done is credible and it has the best chance of any to be upheld under *Furman v. Georgia*. I do know that mandatory death has none."<sup>102</sup>

The motion to amend passed by a vote of 70-47. Despite Governor Askew's emphatic support for the nonmandatory bill, Democrats voted 38-36 against the amendment; Republicans, perhaps swayed by Johnson's presentation, supported the Governor's position 34-9.<sup>103</sup> Proponents of the Governor's bill, moreover, were far more successful in rallying support outside the legislature than were advocates of mandatory sentencing. A long list of witnesses appeared in support of the Askew bill at the House Select Committee hearing on November 27; only Marky and Georgieff testified in favor of the mandatory bill. The pub-

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position on the issue.

100. Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

101. *Id.*

102. *Id.*

103. ST. PETERSBURG TIMES, Nov. 30, 1972, at 5B. Johnson's persuasiveness was due in part to his evident familiarity with the issue:

I personally had read everything there was at that time, the most recent studies on capital punishment . . . . I wrote about a sixty page document on capital punishment out of all the reports that I had read and out of the studies of the commission and I gave it to every member of the body, and when I stood and debated for several hours I think they believed that I . . . had some idea what I was talking about.

Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). A copy of Johnson's paper is on file at the Florida State Archives, Tallahassee, Fla., Series 757, Box 11.

lic defenders from all twenty Florida judicial circuits expressed a preference for the Governor's bill,<sup>104</sup> as did a statement issued on behalf of the Florida Prosecuting Attorneys Association.<sup>105</sup>

The question of *which* bill to pass was the only subject of contention on the House floor. After the successful motion to substitute the Askew bill for the measure approved by the Committee, the bill was approved by the astounding margin of 119-0. Representative Cherry, an adamant opponent of capital punishment in previous years, explained her vote on the ground that the Governor's Committee bill was "the best we can come up with" and maintained that sentiment within the legislature was "just like a steamroller . . . . Everybody wants to kill somebody . . . . They think they must do this in order to go home."<sup>106</sup>

Within the Senate there was general agreement with the use of an aggravation-mitigation hearing as opposed to a mandatory sentencing scheme.<sup>107</sup> The Senate, however, was unreceptive to the proposal for three-judge sentencing. Opposition to that feature of the Askew bill was based on several grounds: the state's tradition of jury sentencing in

104. The public defenders recommended that capital punishment not be reinstated but expressed support for the Askew bill in the event that a law was passed. (Telefax on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

105. On behalf of the Florida Prosecuting Attorneys Association, James T. Russell, President, stated that,

the Association believes that the bifurcated trial approach as set forth in the Governor's proposal has the best chance to be sustained in the United States Supreme Court and is the most realistic and practical procedure for eliminating the evils condemned by the U.S. Supreme Court in the Furman decision.

Statement on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11.

Representative Johnson argued on the House floor that "when you can come up with a bill that the state attorneys say is just, and fair, and reasonable in every manner, and the defenders say the same thing about [it], then I think that we have done a very credible job." Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

106. ST. PETERSBURG TIMES, Nov. 30, 1972, at 5B.

107. Senators Dempsey Barron (D-Panama City), Louis de la Parte (D-Tampa), and Jim Williams (D-Ocala) were particularly influential within the Senate on this point. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990); Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990); Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Interview with Richard Pettigrew in Miami, Fla. (Dec. 19, 1990). Senators de la Parte and Williams had served on the Governor's Committee.

capital cases;<sup>108</sup> the fact that the two additional judges would be assigned only after a conviction and thus would not have heard the evidence at trial;<sup>109</sup> the fear that three-judge sentencing would impose a strain on judicial resources;<sup>110</sup> and the possibility that the assignment of circuit judges would be subject to manipulation by the Chief Justice of the Florida Supreme Court.<sup>111</sup> The Senate bill placed the initial sentencing recommendation in the hands of the trial jury. If the jury recommended life, that recommendation was binding on the judge; but if the jury recommended death the judge could nevertheless sentence the defendant to life. The bill passed by a vote of 39-1. The lone opponent was freshman Senator Jack Gordon (D-Miami).<sup>112</sup> Gordon acknowledged that the bill had "refined" prior law but argued: "However refined a process, it is still a barbaric process. Refined barbarism is no way to preserve a social order that values the sanctity of human

108. FLORIDA TIMES-UNION, Dec. 1, 1972, at 14A.

109. *A Fair System to Punish Murderers*, TAMPA TRIBUNE, Dec. 2, 1972, at 14A.

110. William Cotterell, *Gov. Askew Not Likely to Get What He Wants*, TALLAHASSEE DEMOCRAT, Nov. 28, 1972, at 13.

111. Senator Dempsey Barron (D-Panama City) argued: "Suppose the chief justice was against capital punishment? His choice of the judges would be influenced by his own feelings. Or he might be a hanging chief justice which would be unfair to the defendant." FLORIDA TIMES-UNION, Dec. 1, 1972, at 11A.

Robert Johnson recalls that "Dempsey Barron took the lead on the Senate side. He was adamantly against the three-judge [panel] . . . [Barron] was a very strong defense lawyer and believed very strongly in the jury system" Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

112. Gordon explains that,

I had no intention of speaking on anything certainly the day I was sworn in. I figured I'd be patient until . . . April . . . On the other hand, I also expected that there'd be some opposition. I figured that it would probably pass, but there'd maybe be ten, twelve votes against it, primarily on religious grounds . . . So when the debate started, I just sort of waited for somebody else to say something, and nobody did.

Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

Gordon's opposition to capital punishment was based on his religious convictions rather than on civil liberties concerns:

From a Jewish theological perspective, [capital punishment] is not something you should be for . . . Even though there's an eye for an eye and a tooth for a tooth in the Bible, the history of Jewish jurisprudence, Talmudically, is that if the court sentences . . . someone to death more frequently than every sixty or seventy years, then they're supposed to get a new court.

*Id.*

life."<sup>113</sup>

The conference committee met on November 30 until well after midnight and then reconvened before 8:00 A.M.<sup>114</sup> The committee appeared ready to accept a compromise offered by Representative William Rish (D-Port St. Joe) under which each defendant would be given the choice between jury sentencing, three-judge sentencing, or sentencing by the trial court alone.<sup>115</sup> Edgar Dunn, Askew's general counsel, indicated that this arrangement was unacceptable to the Governor, and negotiations continued. Ultimately, the committee agreed upon a system whereby the jury would recommend a sentence of either death or life imprisonment and the trial judge, based upon his assessment of aggravating and mitigating factors, would make the final decision. The system approved by the conference committee thus permitted a single individual to sentence a defendant to death—a result that both the House and Senate sentencing schemes were designed to avoid.

The ultimate impact of Florida's "jury override" provision has proved anomalous. The initial decision to involve the trial judge in the sentencing process was intended as a protection for the defendant and was based on the belief that judges would be less prone to an emotional response than would a jury. The bill that emerged from the conference committee, however, permitted the judge to impose a capital sentence despite the jury's recommendation of mercy. That change stemmed from the conferees' belief that an "asymmetrical" sentencing scheme would be invalid under *Furman*.<sup>116</sup>

In practice, however, the jury override provision has furnished minimal protection to defendants. In only a small number of cases since the statute's enactment have trial judges overridden jury recommendations of death. Life recommendations, by contrast, have quite frequently been overridden.<sup>117</sup> As United States Supreme Court Justice

113. ST. PETERSBURG TIMES, Dec. 1, 1972, at 1A.

114. For a very interesting article describing the frenzied nature of the conference committee's work, see ST. PETERSBURG TIMES, Dec. 3, 1972, at 12B.

115. John Van Gieson, *House Approves Death Penalty*, TALLAHASSEE DEMOCRAT, Dec. 1, 1972, at 1.

116. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 70 (1985).

117. As of 1985, trial judges had overridden jury recommendations of life on 84 occasions. Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1413 (1985). Precise figures on overrides of death recommendations are unavailable. Professor Radelet states, however, that

John Paul Stevens has noted, "a procedure that was probably intended by the legislature to provide the defendant with two chances to obtain mercy seems actually to have provided the prosecutor with two opportunities to obtain the death penalty."<sup>118</sup> Efforts to amend or repeal the jury override provision have been rebuffed by the legislature, largely out of fear that any change in the statute will furnish new grounds for appeal for defendants previously sentenced.<sup>119</sup>

The bill as amended by the conference committee placed the final sentencing decision in the hands of the trial judge but did not indicate what deference, if any, was owed to the jury's recommendation.<sup>120</sup> Similar uncertainty characterized the statutory provision governing the Florida Supreme Court's review. The statute provided that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . . Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court."<sup>121</sup> The statute does not otherwise define the scope of the appellate court's review—whether it is limited to claims of legal error, for example, or whether it includes *de novo* reconsideration of the propriety of the capital sentence. Prior Florida law provided no guidance, since under the old death penalty statute, the Florida Supreme Court could not overturn a sentence of death unless it reversed the underlying conviction.<sup>122</sup>

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"[n]umerous inquiries to several criminal attorneys and state officials . . . make us confident that less than a dozen such cases have occurred [as of 1985] since the current statute was enacted." *Id.*

118. John Paul Stevens, *Legal Questions in Perspective*, 13 FLA. ST. U. L. REV. 1, 4 (1985).

119. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Mello & Robson, *supra* note 119, at 68, 71; interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). Johnson states:

I am not willing to vote to change one comma on the Florida capital punishment act. Period. If you change one comma, you open up every avenue of appeal that ever existed all over again . . . . They said it's constitutional, and until they change their minds, we're not going to change the law.

*Id.*

120. The bill stated only that "[n]otwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 1973 Fla. Laws 724 § 9, *codified at* FLA. STAT. § 921.141(3) (1972).

121. FLA. STAT. § 921.141(4) (1972).

122. Ehrhardt & Levinson, *supra* note 60, at 11.

The statute thus established a "trifurcated sentencing procedure"<sup>123</sup> which divided power among judge, jury, and appellate court, but the law gave no indication as to the proper allocation of responsibility among the three sentencing authorities.<sup>124</sup>

The Florida legislature was anxious to adjourn, and debate on the

123. *Alvord v. State*, 322 So. 2d 533, 542 (Fla. 1975) (England, J., concurring in part and dissenting in part).

124. The Florida Supreme Court's efforts to resolve these issues have not been entirely successful. Early on, the court held that "[a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The Florida Supreme Court's application of the *Tedder* standard has been erratic, however. *See Grossman v. State*, 525 So. 2d 833, 851 (Fla. 1988) (Shaw, J., concurring) ("During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent.").

Similar inconsistency has characterized the Florida Supreme Court's discussions of its own authority; compare *Songer v. State*, 322 So. 2d 481, 484 (Fla. 1975), where the court stated: "When the death penalty is imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted" with *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla. 1981) where the court stated:

Florida's death penalty statute . . . directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence . . . . This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude . . . . After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great . . . . Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

amended bill was minimal. The vote was 116-2 in the House and 39-1 in the Senate.<sup>125</sup> Governor Askew signed the bill a week later, describing it as a “good product of the legislative process;”<sup>126</sup> the Governor had previously explained that “I still prefer a panel of three judges, but I’m primarily concerned with the fact that the death sentence shouldn’t be mandatory.”<sup>127</sup> One legislator referred to the bill as “a model piece of legislation that all the other states will look at with a great deal of envy.”<sup>128</sup> Editorial reaction was generally favorable. The *Tampa Tribune* stated:

Justices of the Supreme Court in their readiness to bend the Constitution to fit their own sentiments may find the new Florida law as invalid as the old. But, if so, some of the responsibility for future callous killings of innocent citizens will rest with the Court, not with Governor Askew and the Legislature. They have fashioned a fair method for punishing the guilty and deterring the potential killer.<sup>129</sup>

The *Florida Times-Union* took the view that the death penalty is “in the opinion of many, including us, a deterrent to heinous crime. It is a protective device sorely needed by a society which has been stripped of many of its former protections against rampant crime.”<sup>130</sup> Only the *St. Petersburg Times* dissented:

Askew . . . should, but probably won’t, veto the compromise death penalty bill which fails to fully conform to standards he proposed. If Florida must bear the stigma of being the first state to try to restore capital punishment, it should be with a system less barbaric than the Legislature’s final product.<sup>131</sup>

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125. Representative Cherry and Representative Eugene Tubbs (R-Merritt Island) voted against the bill in the House, though two days earlier they had supported the bill which provided for three-judge sentencing. Senator Gordon again cast the lone negative vote in the Senate.

126. ST. PETERSBURG TIMES, Dec. 7, 1972, at 4B.

127. *Death Penalty Hits a Snag in Senate*, TALLAHASSEE DEMOCRAT, Nov. 30, 1972, at 14.

128. John Van Gieson, *Legislature Approves Death Sentence Bill*, TALLAHASSEE DEMOCRAT, Dec. 2, 1972, at 14 (quoting Representative George Williamson (R-Fort Lauderdale)).

129. *A Fair System to Punish Murderers*, TAMPA TRIBUNE, Dec. 2, 1972, at 14A.

130. FLORIDA TIMES-UNION, Nov. 24, 1972, at A8.

131. ST. PETERSBURG TIMES, Dec. 2, 1972, at 16A.

Significant misgivings remained, however, even among supporters of capital punishment. Several legislators expressed dissatisfaction that so important an issue had been debated and resolved in the frenzied setting of a special session. Senate President Mallory Horne (D-Tallahassee), for example, stated: "We all got caught up in the commitment to have a session. None of it really passed muster on the question of absolute emergency. I think we handled too much too fast."<sup>132</sup> Senator Louis de la Parte (D-Tampa) asserted: "If we're going to decide whether to have something as important as the death penalty in Florida, I don't think we should have to do it on a rush-rush-rush basis."<sup>133</sup> Governor Askew defended his decision to schedule a special session on the ground that "[h]ad I not indicated last summer that I would call a special session in the fall, the chances would have been better than average that the Legislature, in the middle of the campaign, might have called themselves back into session. This is better."<sup>134</sup> Also, many of the bill's proponents expressed serious doubts as to the prospects for a favorable decision in the United States Supreme Court. Senator Dempsey Barron (D-Panama City) stated that "it's very unlikely any bill we pass will have a great deal of influence on the Supreme Court."<sup>135</sup> Senator Jim Williams (D-Ocala), a supporter of the death penalty on the Governor's Committee and in the legislature, asserted that "[t]he next person executed will be in another generation, not ours. It's over. It's over."<sup>136</sup>

### III. ANALYSIS

#### A. *Public Attitudes Towards Capital Punishment*

No referendum was taken in Florida on the issue of capital punishment in 1972. No statewide polls were published. And, because legislative candidates were virtually unanimous in their support for the death penalty, the results of the November elections provide few clues as to popular sentiment on the issue. The available evidence indicates,

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132. Bill Purvis, *Legislature Passes Death Penalty Bill*, TAMPA TRIBUNE, Dec. 2, 1972, at 12A.

133. Tom Raum, *De La Parte Criticizes Special Session*, TALLAHASSEE DEMOCRAT, Nov. 29, 1972, at 24.

134. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

135. ST. PETERSBURG TIMES, Dec. 3, 1972, at 11A.

136. ST. PETERSBURG TIMES, Dec. 2, 1972, at 1A.



however, that a sizeable majority of the Florida electorate supported the enactment of a new capital sentencing bill. A poll of Pinellas County residents showed seventy-three percent in favor of reinstatement.<sup>137</sup> Letters to the editors of Florida newspapers ran heavily in favor of capital punishment.<sup>138</sup> The dearth of candidates who expressed opposition to the death penalty is itself an indication—albeit an indirect one—of the strength of popular feeling.

Perhaps the most compelling indication of the strength of public support for capital punishment in the fall of 1972 may be found in the arguments of those who opposed the death penalty. Those who argued against passage of a new capital sentencing statute did not claim to represent the views of a majority of Floridians. Instead, they expressly acknowledged their minority status and urged legislators to resist the pressures of public opinion. LeRoy Collins, for example, stated that “I know most people in the state want the death penalty, but I dissent.”<sup>139</sup> Miami attorney Tobias Simon, testifying before a legislative committee, referred to Florida abolitionists as “the silent minority.”<sup>140</sup> Virgil Mayo, president of the Florida Public Defenders Association, told the House Select Committee that he opposed capital punishment but acknowledged that “I say in all fairness if I sat in your position I’d vote for capital punishment . . . because I think that [representing the views of one’s constituents] is the duty of the elected representative.”<sup>141</sup>

In part, the public’s attitude reflected tradition. Participants in the 1972 debates suggest various explanations for the state’s history of support for the death penalty. James Aphthorp, Governor Askew’s chief of staff in 1972, states:

I think that the more rural parts of our state are no different from other parts of the South, and they generally support capital punish-

137. ST. PETERSBURG TIMES, Nov. 23, 1972, at 1B.

138. A *St. Petersburg Times*’ request for letters pro and con elicited 461 letters in favor of reinstatement and 142 against. ST. PETERSBURG TIMES, Nov. 30, 1972, at 23A. That result is especially striking in light of the *Times*’s fervent opposition to capital punishment and its status as Florida’s leading liberal newspaper.

The most poignant expression of support for capital punishment that my research has revealed is a letter to the editor from “A.C.” which concludes: “If some one [sic] were to murder me, my last wish would be that the one that did it hangs. And with my last breath I would condemn the Supreme Court.” A.C., *Letters*, TAMPA TRIBUNE, Dec. 6, 1972, at 23A.

139. *Reaction Favors Decision*, TALLAHASSEE DEMOCRAT, Dec. 2, 1972, at 14.

140. House Hearings—transcript, *supra* note 46, at 21 (Aug. 9, 1972).

141. House Hearings—tape, *supra* note 48 (Oct. 27, 1972).

ment. I think the . . . retirement areas of our state, where we have an older population, tend to support capital punishment; it's the view of older people, and people who are frightened at times about their personal safety . . . . Maybe the combination of those two things . . . .<sup>142</sup>

Richard Pettigrew notes that "Florida's always been . . . a state that's almost like a frontier state, in that there's a huge movement of new people in all the time,"<sup>143</sup> and argues that the influx of new residents creates a sense of instability and a consequent desire for strong measures to combat crime. Jack Gordon perceives a connection to the religious makeup of the state, arguing that support for capital punishment is rooted in the belief "that people ought to be punished for their sins—a very Calvinistic way of looking at the world."<sup>144</sup> Whatever its roots, in 1972 that tradition was well-established; at the time that *Furman* was decided, Florida's death row was by far the nation's largest.<sup>145</sup>

Other factors were significant as well. Sharply rising crime rates during the years prior to *Furman* created the impression of a society that was careening out of control.<sup>146</sup> Controversy over busing during

142. Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

143. Interview with Richard Pettigrew in Miami, Fla. (Dec. 18, 1990).

144. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990). Participants on both sides of the debate frequently invoked religious principles in justification of their positions. However, Harold Stahmer, a professor of religion who served on the Governor's Committee, states that the connection between religious affiliation and attitudes towards the death penalty turned out to be less predictable than he had anticipated:

Collins and I sat next to each other, and he's a pillar of his Episcopal church. We started—we'd get a list of people who had asked to appear before us. And there'd be a clergyman, and initially if they came from what I would call established denominations—Lutherans, Methodists, Presbyterians—I would assume they'd be opposed to the reinstatement of the death penalty. Didn't work that way. [Collins] and I sort of gave up guessing . . . . Sometimes the Baptists, the Fundamentalists who normally come on hard for retribution, they were kind of split. Some of them were high on retribution, and reinstatement, and others were opposed to it.

Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

145. Florida had 99 inmates on death row; Ohio was second with 55. *ST. PETERSBURG TIMES*, June 30, 1972, at 8A.

146. As LeRoy Collins pointed out, however, the incidence of non-capital crimes in Florida rose far more dramatically during the 1960s than did the rate of capital crimes. See Governor's Committee Report, *supra* note 60, at 127, 130.

the spring of 1972, and the disastrous performance of George McGovern's presidential campaign,<sup>147</sup> stirred distrust of "liberalism" in any form. Lingering public resentment at the campus and urban unrest of the previous decade, coupled, perhaps, with disgruntlement over the Warren Court's innovations in the field of criminal procedure, increased the electorate's impatience with those who appeared overly concerned with protecting the rights of society's "deviant" members and insufficiently committed to the maintenance of public order.<sup>148</sup> Any attempt to assess the relative importance of these various factors can only be a matter of speculation. It seems safe to say, however, both that elimination of capital punishment in Florida would have been a very difficult task in any year, and that 1972 was an extraordinarily unpropitious time to make the attempt.

Among proponents of the death penalty, there was no consensus as to the primary justification for capital punishment. Some advocates relied on retributionist arguments;<sup>149</sup> many expressed distrust of the state's parole commission and argued that murderers sentenced to life imprisonment would be released to kill again.<sup>150</sup> Supporters of the death penalty relied most heavily on the argument that the threat of capital punishment would deter potential murderers. These proponents rarely contended that the death penalty's deterrent effect could be demonstrated by statistical evidence.<sup>151</sup> They relied instead on anecdote-

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147. In 1972, Richard Nixon carried 72 percent of the Florida vote. ST. PETERSBURG TIMES, Nov. 12, 1972, at 17A.

148. Retired Circuit Judge Ernest Mason, a member of the Governor's Committee, stated: "I am of the opinion that of late too much emphasis has been placed upon the so-called humanitarian rights of the criminal at the expense of the victims of homicides or their relatives." Governor's Committee Report, *supra* note 60, at 125.

149. Stella Thayer, a Tampa lawyer who served on the Governor's Committee, recalls that Dr. Vernon Fox of Florida State University "was quite persuasive as a proponent. He had a concept of social aggression, and that if a society didn't ensure swift, prompt, and honest justice, then he felt that that deterioration continued down through all of society." Interview with Stella Thayer, in Tampa, Fla. (Dec. 17, 1990).

150. For example, a statement issued by the Florida State Chamber of Commerce's Board of Directors argued that "a life sentence does not mean a life sentence, as all convicted persons are entitled to be considered for parole after six months in Florida." (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

151. Indeed, proponents of capital punishment generally conceded that the empirical evidence failed to establish a deterrent effect. Robert Johnson states that the empirical evidence presented to the Governor's Committee "certainly raised various questions, the questions were debated very heavily. . . . But it certainly didn't sway the commission, obviously." Interview with Robert Johnson in Sarasota, Florida (Dec.

tal evidence,<sup>152</sup> or on the intuitive notion that an increase in the penalty for a given activity would reduce the frequency with which that activity occurred.

Due to the dearth of candidates who opposed reinstatement, newspaper coverage of the 1972 legislative campaign includes little discussion of the death penalty, and the elections themselves provided little opportunity to test the strength of public sentiment on the issue. It nevertheless appears to have been an article of faith among Florida lawmakers that any elected official who opposed capital punishment would risk political ruin. Mallory Horne, for example, recalls that,

I'd been Speaker of the House already, and had the pledges at the time to be President of the Senate, and I knew going into that debate . . . that if I didn't assume a comfortable consensus position, that I would give up the presidency of the Senate . . . . [I]t was that volatile a political issue . . . . You could not say that you were against the death penalty and survive politically.<sup>153</sup>

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18, 1990). Ernest Mason's response to the available statistical evidence was typical: "In spite of all the so-called expert testimony that we have heard, I am of the opinion that the death penalty is a deterrent to homicides and that it should be restored as such." Governor's Committee Report, *supra* note 60, at 125.

152. Anecdotal evidence of very dubious reliability was frequently treated with extraordinary seriousness. Senator Thomas, for example, read a statement provided by Palm Beach County sheriff's deputies which quoted a recently-arrested murder suspect as saying, "I should have killed two or three more people that I didn't like because according to the new Supreme Court ruling I can only get life imprisonment no matter how many I kill." ST. PETERSBURG TIMES, July 29, 1972, at 1B. Shevin recounted the tale of a New York bank robber who told his terrorized victims that "You have to have the death penalty, otherwise this can happen every day." House Hearings—tape, *supra* note 48 (Aug. 31, 1972). Representative Gautier stated that to him the most convincing evidence of the death penalty's deterrent value was the statement of one Florida prison inmate that without capital punishment his mother would be unable to walk safely to church on Sunday. *Id.*

153. Interview with Mallory Horne in Tallahassee, Fla. (Feb. 13, 1991).

Horne himself expresses substantial reservations about the wisdom of capital punishment—reservations based primarily on a general dissatisfaction with the criminal justice system:

I worry not so much about the death penalty as I do it in conjunction with the trial system itself. I worry about somebody being electrocuted that wasn't really guilty . . . . [T]here's just enough of a motivation on the part of prosecutors to succeed that I've just seen so many shortcuts by them—withholding evidence from the defendant, withholding knowledge of big, major doubt, and going ahead with the case nonetheless because the death itself was grisly. That's what worries me, and I can't separate that

Hugh McMillan, Jr., Askew's legislative assistant during 1972, states that "everybody was a little bit relieved that it was probably mainly a technical, legal, constitutional issue and not a political issue, 'cause the common wisdom was that on the political side, there's only one side; there's no political future to being against it."<sup>154</sup>

The fate of Senator Gordon—the only member of the 1972 Florida legislature who expressed an absolute opposition to the death penalty—is therefore illuminating. One might expect that the freshman Senator, having characterized capital punishment as "refined barbarism" during his first week in office, would suffer the ire of both his constituents and his colleagues. Gordon states, however, that his stance has never hurt him electorally<sup>155</sup> and that it significantly enhanced his stature within the legislative body:

[There were a] number of the north Florida legislators[] who were sort of in control of the Senate at the time . . . [and upon whom] it made a very positive impression . . . that somebody would be willing to take the unpopular position and take the heat and not let it bother him. So they came to rely on me and my word, and it was a strange alliance; we're not sharing too much political philosophy, 'cause they're pretty conservative, but the way legislatures work, being able to count on somebody when they tell you something is exceptionally important . . . I've twice been the Appropriations [Committee] chairman . . . from a [Senate] President I didn't support, because the north Florida gang wanted me there . . . So that's my estimate of what effect it had on me politically.<sup>156</sup>

The experience of a single official is admittedly a paltry basis upon which to draw conclusions as to the political climate in 1972. Gordon's experience at least suggests, however, that other assessments of the political costs of opposing the death penalty may have been overstated.

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out from any punishment.

*Id.*

154. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

155. Although the issue has sometimes arisen in campaigns, Gordon states that "I've generally answered it simply by saying it's just a matter of personal conscience." Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

156. *Id.*

## B. *The Legislature and the Court*

Commenting upon the bifurcated sentencing bill soon after its final passage, Robert Shevin stated: "Since the Legislature passed what may be a more socially acceptable bill, rather than constitutionally acceptable, it becomes our job to defend it and hope that I am wrong."<sup>157</sup> In defending the statute before the Supreme Court, Shevin characterized the legislature's actions in much the same way:

[W]hen I went to the legislative committees, the expression of the legislative body was this: We would rather pass a good law, a fair law that might be suspect, than to pass a mandatory death penalty, even if it's allowed by *Furman*, because it is harsh. And that's the kind of legislation the Florida legislature passed.<sup>158</sup>

There is a certain self-serving quality to these statements. Having lost the argument over mandatory sentencing, Shevin sought to convince the public that the legislature had not rejected his constitutional position at all, but had simply elevated policy over constitutional concerns. Shevin's statements nevertheless raise extremely important issues. How did the Florida legislature view its relationship to the United States Supreme Court? How conscientiously did the legislature consider its constitutional obligations? How ably did individual legislators, and other participants in the legislative debate, articulate the constitutional arguments on either side of the issue?

Participants in the committee debates did occasionally express the view that the legislature should pass the bill it deemed superior as a matter of policy rather than attempt to divine the preferences of the

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157. FLORIDA TIMES-UNION, Dec. 2, 1972, at A1. In light of the position taken by Shevin (and his assistants Ray Marky and George Georgieff) during the 1972 debate, the state's brief in the United States Supreme Court is illuminating. The brief—signed by Shevin, Marky, Georgieff, and one other attorney—was openly contemptuous of the petitioner's challenge: "[T]he positions advanced by Petitioner . . . whether measured in *Furman's* scale or that of any other rational thought process are lacking in any merit whatever . . . Respondent is at a total loss as to just how the Petitioner could conclude that the newly created Florida system violates *Furman v. Georgia*." Brief for Respondent at 85-86, 94, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706). It was of course entirely ethical for Shevin and his assistants to defend the statute in the courts despite their misgivings as to its constitutional status; but the contrast between their pre-and post-enactment rhetoric is surely striking.

158. Transcript of Oral Argument at 16, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706).

United States Supreme Court. Representative Brown, for example, argued that,

no one has the ability to predict what the next decision of the United States Supreme Court will be. So don't you believe that we're better off doing what we think is right within that framework rather than trying to make a decision based on what we don't know they're going to do?<sup>159</sup>

As a characterization of the legislature's principal motivation, however, Shevin's statements are simply insupportable. Presumably, the legislature did prefer a bifurcated sentencing bill to a mandatory statute as a matter of policy—after all, a quite similar bill had been passed in March, when constitutional concerns were not at issue. But advocates of a nonmandatory bill also argued throughout the debate that such a statute was more likely to withstand Supreme Court scrutiny than was a mandatory sentencing scheme. Governor Askew emphasized this point; witness after witness made the argument at the House Committee hearing on November 27, and Representative Johnson, leading the fight on the floor, made this the focus of his attack.

The debate over which bill should be enacted was thus, to a very large extent, a constitutional debate—a colloquy over the proper interpretation of the various opinions in *Furman*. That debate, it should also be stated, generally proceeded at a high level. Few legislators spoke on the floor, and there is no way of knowing how thoroughly the rank-and-file assimilated the arguments on either side. But the central arguments were accurately identified and skillfully articulated by the leading participants—Governor Askew and Representative Johnson in the one camp, Representative Gautier and the Attorney General's office on the other.

Despite the high quality of the debate, the ultimate vindication of the Florida statute was, in an important sense, fortuitous. Those who predicted that the Court would sustain a bifurcated sentencing law, but reject a mandatory statute, were proved correct: the Florida law was upheld, while mandatory laws were struck down in *Woodson v. North Carolina*<sup>160</sup> and *Roberts v. Louisiana*.<sup>161</sup> But their heavy reliance on the votes of the *Furman* dissenters proved to be unwarranted. Of the

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159. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

160. 428 U.S. 280 (1976).

161. 428 U.S. 325 (1976).

four Justices who dissented in *Furman*, only Justice Powell subsequently voted to strike down mandatory sentencing laws. Chief Justice Burger and Justice Blackmun, who in *Furman* expressed vehement disapproval of mandatory death penalty measures, voted to uphold the statutes at issue in *Woodson* and *Roberts*.

It is of course quite common for Supreme Court Justices to argue that a particular state policy should be upheld lest the government respond to its invalidation by adopting an even more retrograde approach.<sup>162</sup> And the Justice who employs such an argument does not thereby suggest that the feared alternative would be *unconstitutional*. On this point Robert Marky was more prescient than his opponents: while conceding that the dissenting Justices had expressed distaste for a mandatory death penalty, he insisted that "I don't think Burger and Blackmun will cross over the line of judicial restraint . . . I mean, that's the foundation of their judicial attitude."<sup>163</sup> Some state legislatures, it appears, adopted mandatory sentencing schemes in the mistaken belief that such action was required by the opinions of Justices Stewart and White. Florida lawmakers avoided that fate, at least in part, because of their misreading of two dissents.

In deciding *which* death penalty bill to support, I have argued that Florida legislators were heavily if not primarily influenced by constitutional concerns. Constitutional scruples appeared notably absent, however, when legislators decided whether to vote for any capital sentencing bill at all. Forty-seven members of the House, for example, voted against the proposal to substitute the Askew bill for the mandatory sentencing bill reported by the House Committee. Many of these legislators presumably acted in the belief that *Furman* required mandatory sentencing—indeed, that was the only argument advanced in favor of the mandatory approach. Yet all forty-seven voted "yea" on the next vote, when the choice was between a bifurcated sentencing scheme and no death penalty bill. Nor is there any evidence that these legislators perceived themselves (or were perceived by the public) to be on the horns of an ethical dilemma. The record suggests that the Florida legislature was acutely aware of the limitations placed upon it by the United States Supreme Court, but that legislators saw their relation-

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162. See, e.g., *Greenholtz v. Inmates of Neb. Penal Complex*, 442 U.S. 1, 13 (1979) ("if parole determinations are encumbered by [judicially mandated] procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole").

163. House Hearings—tape, *supra* note 48 (Nov. 27, 1972).



ship to the Court as one of *power* rather than of *duty*. These lawmakers were serious and conscientious in their efforts to understand the Supreme Court's instructions because they recognized that without Supreme Court approval no executions could take place. But they acknowledged no *obligation* to support only those measures which they believed would satisfy the standards announced by the Court.<sup>164</sup> Freshman Senator Bruce Smathers (D-Jacksonville) no doubt spoke for many legislators when he inserted into the Senate Journal the following explanation for his vote:

I am voting yea because of the necessity to reinstate capital punishment in Florida. I have many reservations as to the constitutionality as well as the content of many sections. However, the special session did not allow the necessary time for open hearings, nor careful consideration that a bill of this magnitude deserves. Rather than have no bill at all—I support this compromise.<sup>165</sup>

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164. A single legislator did state that, despite his support for the death penalty, constitutional scruples prevented him from supporting the bill drafted by the conference committee. Representative F. Eugene Tubbs (R-Merritt Island) inserted into the House Journal the following explanation for his vote:

I voted negative on the Capital Punishment Conference Committee report for the following reasons:

1. I do not feel that this legislation overcomes the objections raised by the nine Justices of the U.S. Supreme Court.
2. In the unlikely event that the U.S. Supreme Court finds this legislation constitutional, I have serious doubts that the death penalty will be utilized by the courts of Florida.

As I favor the death penalty and as I favor the three judge tribunal concept for sentencing, I cannot in good conscience vote for this bill.

Fla. J. House Rep., Dec. 1, 1972, at 51.

165. Fla. Sen. J. 40 (Dec. 1, 1972).

The argument here is that many legislators voted in favor of the Florida death penalty bill despite their serious doubts as to its constitutionality. One scholar has advanced the more disturbing suggestion that some state legislatures may have enacted death penalty statutes in the wake of *Furman* because they believed that the Supreme Court would strike them down:

Rather than inhibiting legislative action, the constitutional rhetoric had created an atmosphere in which legislators could have it both ways. They could satisfy some constituents by voting for capital punishment and yet explain their votes, to themselves and to their anti-death law constituents, on the plausible grounds that the law would never be applied.

GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 27 (1982). At least in Florida, the evidence does not support this theory. All the evidence indicates that a very large majority of the legislature supported capital punishment, believed that their

Two eminent students of the death penalty have recently argued that the explosion of post-*Furman* capital sentencing statutes was primarily the product of resentment at the United States Supreme Court's intrusion into an area traditionally reserved to the states. Noting that the great majority of post-*Furman* executions have occurred in southern states, these scholars contend that,

[r]ather than a resurgent national perception of capital punishment as the solution to the criminal homicide, what this pattern illustrates is a *state* response to a *federal* slight that was seen as arbitrary and unwarranted. There is, after all, a long history of disagreement with, and of political and legislative challenge to, the Supreme Court's antimajoritarian rulings.<sup>166</sup>

At least as to Florida, the evidence does not support this view. The meticulous efforts to decipher the various opinions in *Furman*, and thereby to divine the Supreme Court's instructions, bespeak an attitude very different from defiance. Some proponents of capital punishment did accuse the Supreme Court of overreaching, but no one appears to have urged that the desire to assert state autonomy furnished a sufficient reason for passage of a new statute. Representative Johnson, for example, argued that,

*Furman v. Georgia* was a very harsh case, in my opinion, and one which should never have been rendered. It was a great injustice to our nation . . . . But we can't argue with that now. I would say this to you, that whether or not *Furman v. Georgia* was ever decided, we should be here today anyway, deciding whether or not we can come up with a better system of justice for the state of Florida.<sup>167</sup>

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constituents supported it, and would have voted for a death penalty bill even if they had known that it would lead to executions. Moreover, the lengthy and often acrimonious debate over *which* sentencing statute should be enacted would have been altogether pointless if legislators had in fact assumed that no bill would survive judicial review. It is surely possible that *some* lawmakers who might otherwise have opposed the bill declined to do so in the belief that the courts would intervene, but there is no reason to suppose that these members formed a sizeable percentage of the legislature.

166. FRANKLIN ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 44 (1986).

167. Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

Many of the leading participants in the debate, moreover, did not quarrel with *Furman* at all, but expressly acknowledged the capriciousness of pre-*Furman* capital sentencing in Florida. When Governor Askew finally recommended passage of a new death penalty statute, he deplored the,

unbridled use of discretion in the sentencing process by which we have applied capital punishment, which has resulted in discrimination. This I found to be particularly true in Florida at the time the *Furman* decision was handed down, where out of twenty-six (26) inmates on death row for rape, nineteen (19) were black. I find it of paramount importance, therefore, both from a legal and moral standpoint, to recommend legislation to you which substantially improves the process.<sup>168</sup>

Ray Marky, testifying before a legislative committee, stated:

We must discern the difference between the jury reaching a competing conclusion of fact predicated upon reasonably accurate instructions from a jury whim because there was no instructions for them to follow whatever, which is what you had in *Furman*. See, in *Furman*, the judge just says, "It's up to you." . . . [W]e just said [to the jurors], "Here, go and have your fun, decide what you want to do with this human." So there was no real frustration of the legislative determination.<sup>169</sup>

Indeed, one of the most emphatic (and persuasive) denunciations of pre-*Furman* capital sentencing is set forth in Florida's brief to the United States Supreme Court in *Proffitt v. Florida*:

It is not surprising that sentences determined under the "system" condemned by *Furman* produced *uninformed, irrational, and freakish results* . . . . The legal "system," was not a "system" at all! It had none of the attributes of a "system" designed to achieve any degree of uniformity. Indeed, the "system" was such that the ultimate question was presented to twelve citizens without any guidance whatsoever who were told that they and they alone could determine the question within their unbridled and unfettered dis-

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168. Letter from Reubin Askew to Senate President Mallory Horne and House Speaker Terrell Sessums 2 (Nov. 22, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

169. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

cretion. Such a method is about as rational as submitting the issue of the defendant's *guilt* to a jury without instructing them as to applicable law and letting them wonder in utter speculation as to whether the accused committed any "crime." Such was the system which was finally found wanting by this Court because it conferred upon juries and/or judges the power to indiscriminately sentence a person to death and *actual experience* has demonstrated contradictory sentences were returned in cases involving similar crimes.<sup>170</sup>

At least in Florida, support for a new capital sentencing statute in the fall of 1972 cannot persuasively be portrayed as a means of defying the United States Supreme Court's decision in *Furman*.

### C. *Furman as a Remand to the Legislature*

Public officials at the time *Furman* was decided, and commentators then and since, have deplored the ambiguity of the Court's decision.<sup>171</sup> That ambiguity—which stemmed both from the opaque quality of the individual opinions and from the fact that each Justice in the majority wrote separately—unquestionably had significant costs. In Florida, for example, the legislature enacted the jury override provision in the mistaken belief that such action was required by *Furman*. If the Court's goal was to force legislatures to adopt new and more reliable

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170. Brief for Respondent at 89-91, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706). Tactical considerations might of course have induced the state's attorneys to refrain from a challenge to *Furman* when they defended the new statute before the United States Supreme Court. The state's brief, however, did not simply *assume* or even *concede* the correctness of *Furman*: it articulated the *strongest possible argument* in favor of that decision. Moreover, the state set forth the same argument in its brief to the Florida Supreme Court—a tribunal that would hardly have been flattered by references to the inequities of pre-*Furman* capital sentencing. See Brief for State of Florida at 14-15, *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) (No. 43,521).

171. See, e.g., Robert A. Burt, *Disorder in the Court: The Constitution and the Death Penalty*, 85 MICH. L. REV. 1741, 1758 (1987) ("*Furman* so starkly deviated from the traditional format that it can be characterized as a decision in which there was not only no Court opinion but no Court—only a confederation of individual, even separately sovereign, Justices."); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (*Furman* "is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."); Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 40 ("[T]he way that the *Furman* majority presented itself to the world—five separate opinions with none commanding the concurrence of any Justice other than its author—seemed almost deliberately calculated to make this judgment of dubious value as a precedent.").

capital sentencing schemes, the argument goes, why did the Court not clearly state what procedures would survive constitutional scrutiny? It may be, however, that *Furman* is best understood not as a failure to provide guidance, but as an effort to provoke debate. More precisely, *Furman* may be read as holding that death penalty statutes then in place were void on the ground of desuetude.

Alexander Bickel recognized that some rarely-enforced statutes may remain on the books even though they no longer embody the public will—partly because it is always more difficult politically to repeal a statute than to prevent its enactment, and partly because non-enforcement (or selective enforcement) may itself reduce the likelihood of a public outcry for repeal. “When [such a statute] is resurrected and enforced,” Bickel recognized, “it represents the *ad hoc* decision of the prosecutor, unrelated to anything that may realistically be taken as present legislative policy.”<sup>172</sup> The opinions of Justices Stewart and White—which argued that the infrequency with which capital punishment was imposed had transformed the death penalty from an instrument of policy to one of caprice—sounded a similar theme. These Justices employed the Eighth Amendment ban on “unusual” punishments as a textual basis for striking down the Texas and Georgia laws on a ground that was functionally indistinguishable from reliance on desuetude.<sup>173</sup>

By invalidating an infrequently used statute on the ground of desuetude, Bickel argued, the Court can shift to the statute’s proponents the burden of demonstrating that contemporaneous public and legislative support for the law still exists, while leaving open the possibility of re-enactment if such support can be gathered.<sup>174</sup> In a somewhat similar vein Chief Justice Burger, dissenting in *Furman*, acknowledged that he was,

not altogether displeased that legislative bodies have been given the opportunity, and indeed the unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment . . . . The legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as af-

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172. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 61-64 (1961).

173. At least one scholar has previously noted a possible connection between the Court’s decision in *Furman* and the jurisprudential theories of Bickel. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 26 (1982).

174. *Id.* at 63.

fecting the commission of specific crimes.<sup>175</sup>

It is at least plausible to suppose that some members of the *Furman* majority were influenced to vote as they did not simply by their perception that capital sentencing *procedures* were deficient, but by their desire to ensure that capital punishment would continue only if contemporaneous public support for the death penalty was sufficient to achieve the passage of new statutes.

It is clear, moreover, that when the Court revisited the issue in 1976, it assumed that a wide-ranging public debate over capital punishment had occurred in the four years since *Furman*. The opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*<sup>176</sup> stated:

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty . . .<sup>177</sup>

In a companion case, Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, also relied on the legislative activity as dispositive evidence "that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings."<sup>178</sup> Each of the thirty-five states listed, however, had a death penalty statute on the books in 1972 when *Furman* was

175. *Furman*, 408 U.S. at 403 (Burger, C.J., dissenting).

176. 428 U.S. 153 (1976).

177. *Id.* at 179-80.

178. *Roberts v. Louisiana*, 428 U.S. 325, 353 (1976) (White, J., dissenting).

Ray Marky had anticipated the possibility that the legislative reaction to *Furman* might influence the Supreme Court's conclusions as to the propriety of capital punishment. Testifying before the House Select Committee in 1972, Marky stated that "the contemporary notions [of decency] predicted by the Supreme Court in June of '72 after a lot of referendums and a lot of committees meet may be different." House Hearings—tape, *supra* note 48 (Nov. 27, 1972).

decided.<sup>179</sup> The legislative activity cited by these seven Justices can be regarded as “new evidence” only if we assume that the recent passage of a statute is a more accurate indicator of public sentiment than is the failure to repeal a law enacted in the distant past. That assumption seems reasonable enough; but it surely reflects Bickelian ideas of legislative inertia rather than the Supreme Court’s ordinary view that statutes of whatever vintage are presumed to embody the majority will.

The *Gregg* plurality’s reliance on recent legislative developments reflects another unspoken premise as well: that the process of enacting new capital sentencing *procedures* will in some way involve a debate as to the propriety of capital punishment *vel non*. That this premise is not necessarily accurate may be seen by considering the United States Supreme Court’s decision in *Spaziano v. Florida*.<sup>180</sup> In *Spaziano*, the Court upheld Florida’s jury override provision, which allows the trial judge to sentence a defendant to death despite the jury’s recommendation of life imprisonment. Suppose, however, that *Spaziano* had prevailed. Many Florida inmates would have been removed from death row, of course, but it hardly seems likely that a broad debate over the propriety of capital punishment would have ensued. The legislature would simply have repealed, quickly and with little discussion, the jury override provision. Much the same result could have been expected, it seems to me, if the *Furman* Court had clearly announced that the arbitrariness of prior capital sentencing could be prevented by the adoption of the standards articulated in the Model Penal Code.<sup>181</sup> It was the very *ambiguity* of the *Furman* decision which, by creating the sense that nothing could be taken for granted and that every aspect of the problem must therefore be explored, increased the likelihood of a debate which would include the wisdom of the death penalty itself.

For present purposes, my concern is not with whether the *Furman* Court actually sought to produce the “thorough re-evaluation of the entire subject of capital punishment” forecast by the Chief Justice, nor with whether the effort to produce such a re-evaluation would be an

179. Compare *Gregg* 428 U.S. at 179-80 n.23 (opinion of Stewart, Powell & Stevens, JJ.) with *Furman*, 408 U.S. at 340 n.79 (Marshall, J., concurring).

180. 468 U.S. 447 (1984).

181. Indeed, the Florida legislature’s actions during the spring of 1972 should dispel the notion that revision of capital sentencing procedures is necessarily accompanied by a re-examination of the propriety of capital punishment. In March 1972, the state enacted its bifurcated trial law, yet the legislature rebuffed Governor Askew’s request for the establishment of a commission to study the death penalty.

appropriate use of federal judicial power.<sup>182</sup> I am concerned instead with whether such a re-evaluation did in fact take place in Florida. Insofar as the legislature is concerned, the record is mixed. Certainly no meaningful deliberations occurred at the special session itself: Representative Gautier, in fact, began the November 27 meeting of the House Select Committee by admonishing the witnesses that their comments should be limited to the "technical aspects" of the various bills under consideration and that discussion of the propriety of capital punishment would be inappropriate. On the eve of the legislative session, passage of *some* death penalty bill was universally presumed to be inevitable, and controversy centered entirely on the nature of the statute to be drafted. Indeed, the sense of inevitability was so great as to induce "lesser-of-evils" reasoning even among those not ordinarily inclined towards moral relativism. Florida's Catholic bishops asserted:

It is certainly our hope that the time is not far distant when capital punishment will be abolished altogether. Many men of goodwill nevertheless remain since convinced that the death penalty serves as a strong deterrent of the more heinous crimes. For this reason alone it would be unrealistic to assume that capital punishment will not be restored on a very limited basis in Florida.<sup>183</sup>

The statement then went on to stress the importance of safeguards to prevent arbitrariness in capital sentencing.

To what extent did the legislative committees which met during the summer and fall provide a substitute for plenary consideration of the issue at the special session? The Senate Council on Criminal Justice, appointed by outgoing Senate President Jerry Thomas, drafted a proposed statute which established a mandatory death penalty; but the Council included only two Senators, held no hearings,<sup>184</sup> and offered no

182. See Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

183. Statement issued by the Catholic Bishops of Florida on Capital Punishment (Nov. 29, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

184. The Council explained that "[s]ince public hearings have been held by the Governor's Committee to Study Capital Punishment and by the House Select Committee on the Death Penalty, it would be an unnecessary expenditure of public funds for this Council to duplicate that procedure . . . ." Letter from Senate Council on Criminal Justice to Senate President Mallory Horne 1 (Nov. 20, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).



explanation for its conclusions.<sup>185</sup> The House Committee conducted far more extensive deliberations, but its attention was focused primarily on the question of what sort of bill should be drafted. Nor did the House Committee function effectively in its role as an assimilator of information and ideas on which other legislators could draw. Addressing the committee soon after its formation, outgoing House Speaker Richard Pettigrew cautioned the committee that much of the legislature in the special session would be new and that the committee's report should therefore be comprehensive.<sup>186</sup> Pettigrew stated: "I think you should have an in-depth majority and minority report or a series of minority reports, if need be, so that every viewpoint is available to the Legislature as a whole, come November."<sup>187</sup> The committee's final report, however, was only six pages long; the final four pages discussed the debate between mandatory and nonmandatory sentencing, and the only argument advanced in favor of enacting a new death penalty statute was that "[i]n reviewing the testimony received, there was actually very little opposition to the reenactment of capital punishment."<sup>188</sup>

To say all this is not to say that *Furman* accomplished nothing, or that the legislative response to the decision was reflexive or uninformed. The need to pass a law served to ensure that there existed a contemporaneous majority within the state favoring capital punishment; representatives were given ample time and opportunity to ascertain and act upon the wishes of their constituents. That is hardly an insignificant point: a principal aim of Bickelian jurisprudential techniques is to combat the inertial forces that often prevent the repeal of statutes that lack contemporary support. Moreover, *Furman* at least helped to create a climate in which abolition of the death penalty was deemed to be among the options "on the table." This was due largely, I have argued,

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185. The Council's final report included findings that "[t]he death penalty is a deterrent to homicide, and there is a place in the field of law enforcement for capital punishment; so the death penalty should be reinstated" and that "[t]he mandatory death penalty is the proper method to follow in reinstatement." *Id.* at 3. The only statement as to the basis for these conclusions was that "[t]he Council, in its deliberations, was able to draw upon the experiences of its members, the report of the Attorney General, and the reports of the Governor's Committee to Study Capital Punishment and the House Select Committee on the Death Penalty." *Id.* at 2-3.

186. House Hearings—transcript, *supra* note 46, at 3-4 (Aug. 9, 1972).

187. *Id.* at 6.

188. *Final Report of the House Select Committee on the Death Penalty 2* (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

to the ambiguity of the *Furman* opinions. Had the Supreme Court clearly identified the sort of sentencing scheme that would withstand its review, it is unlikely that the propriety of capital punishment would have been considered a legitimate subject for debate.

*Furman* did not, however, at least in Florida, produce the "thorough re-evaluation" more optimistically forecast by the Chief Justice: the legislature undertook no systematic study of the issue beyond its effort to determine the will of the people. This is not to say that legislators acquiesced in a policy of which they did not approve. There is every reason to believe that most lawmakers shared the public's view as to the morality and the efficacy of capital punishment. The point is that *Furman* did not induce either the public or the legislature to rid itself of its preconceptions and start from scratch; society did not so much "re-evaluate" the issue as simply "re-affirm" that it continued to adhere to its former view. Legislators *did* thoroughly and astutely debate the issue of mandatory versus nonmandatory sentencing; but in other respects the details of the statute ultimately passed did not reflect any special expertise as to the mores and problems of Floridians. The aggravating and mitigating factors were taken directly from the Model Penal Code; the jury override provision (the only feature of the statute that is distinctive to Florida) was an accidental feature that no one actually wanted and that has plainly failed to serve its intended function.

#### D. *The Role of the Governor*

Of all the participants in the Florida debate, the most enigmatic was surely Governor Reubin Askew. Governor Askew was, for most of the debate, a non-participant; he expressed no view on the issue until November 20, a week before the special session convened. His ultimate recommendation that a statute be enacted was accompanied by expressions of doubt as to the wisdom of his chosen course. Yet in the end, Askew must be deemed the most influential actor of all, in the sense that he, and he alone, might single-handedly have changed the outcome. Whether Askew's opposition could have prevented the enactment of a new death penalty statute remains a matter of conjecture.<sup>189</sup> Un-

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189. The question whether Askew's opposition could have prevented the enactment of a death penalty statute evoked widely varying reactions from those I interviewed. Mallory Horne states that "[i]f he had absolutely in the trenches opposed it—in the first place I don't believe it would have passed, but if it had passed, his veto

questionably, though, no other individual could have done so.

In the end, of course, Governor Askew recommended that a death penalty statute be enacted. Harold Stahmer, a professor of religion at the University of Florida who served on the Governor's Committee, states: "I sized [Askew] up that he'd stick his neck out on race, on integration, but he wasn't going to stick his neck out on the death penalty."<sup>190</sup> Jack Gordon notes that "Askew, like most governors—they don't like to be beaten. And so, they kind of use that veto pretty judiciously . . . I don't think that Askew was overridden in eight years, on anything—a product of very careful choosing."<sup>191</sup> Political considerations surely cannot be discounted. It seems clear that Askew would have had nothing to gain and much to lose by opposing the reinstatement of capital punishment, particularly if his opposition had ultimately proved unsuccessful. But it is at least equally plausible that the governor acted out of a sincere belief, after a period of exhaustive deliberation, that enactment of a new death penalty statute was in the best interests of the state. Governor Askew, after all, did not have the issue thrust upon him against his will; even prior to *Furman*, the governor had unsuccessfully urged the legislature to re-examine the propriety of capital punishment. Askew's aides (themselves adamant opponents of the death penalty) insist that political calculations played an inconsequential role in his decision.<sup>192</sup> Askew had shown himself willing

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would have been sustained. He was a very popular governor at the time." Interview with Mallory Horne in Tallahassee, Fla. (Feb. 13, 1991). Edgar Dunn expresses the view that Askew could have sustained a veto if he had put his weight behind it. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990). James Apthorp is more doubtful: "I don't think he could have changed the majority opinion in the legislature. It's possible he could have sustained a veto—maybe; that would have been hard, too. There was very strong support—still is—in the Florida legislature." Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991). Robert Johnson states unequivocally that "I have no doubt that if [Askew] had come out against capital punishment, we would have passed a bill and we would have overridden a veto." Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

190. Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

191. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

192. James Apthorp states:

I don't think he engaged in a lot of political considerations in thinking about the issue. I mean, it was there, there was the specter of doing something unpopular, but that didn't bother him a lot on other issues. He was . . . pretty courageous in taking public positions that didn't enjoy public support . . . He was never really afraid of public opinion as long as he felt good about what he was doing.

Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

to buck popular sentiment, particularly in the busing controversy that erupted earlier that year.

Throughout his years as a legislator, Askew had consistently supported capital punishment. As Hugh McMillan, Jr. (Askew's legislative assistant during 1972) explains, that position reflected the governor's professional background and his instinctive reluctance to break sharply from the past:

The governor as a young lawyer had been a prosecutor, and he's basically a very compassionate person, but he comes out of a pretty classically conservative value system. The few points where he really broke from that would be in his absolutely total commitment to racial justice . . . . His background would be the background of an essentially conservative person, which doesn't necessarily mean you'd be for or against capital punishment, but he's basically not looking for new ways to develop bold new approaches to things.<sup>193</sup>

Though no one was executed during his two terms as governor, Askew's perception of the unique responsibilities of his office appears to have led him to re-evaluate his position. As one of his closest aides puts it, "[i]t's a lot easier to favor capital punishment on some theoretical level than it is to have to sign a death warrant."<sup>194</sup> The same aide states that Askew,

started out and wound up in the same position, but he really had a struggle in between . . . . I think it was a real struggle between his religious beliefs and his civic duty . . . . He sort of came from the law enforcement, prosecutorial mindset at this issue. And he never quite got beyond that, in my view, except that he was nagged, and

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Hugh McMillan, Jr. agrees:

On an issue like this, he would be mostly trying to do what he thought was the right thing to do; and by mostly I mean like about ninety-nine percent . . . . I compare him to Lincoln in some ways, in that he wasn't necessarily looking for trouble, he wasn't necessarily looking for a chance to be a great leader, or a political hero, but he would absolutely not flinch from doing what he thought was the right thing to do.

Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990). Both Apthorp and McMillan recall that they attempted to persuade Askew to oppose capital punishment during the fall of 1972.

193. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

194. Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

bothered, and almost brought down by his religious beliefs.<sup>195</sup>

McMillan notes that “[p]articularly any suggestions that there was any racial bias or an economic class bias in the way it was either applied or administered—Askew would have a sensitivity to those kinds of concerns.”<sup>196</sup> That assessment is borne out by the governor’s emphatic denunciation of pre-*Furman* capital sentencing, in which Askew focused on the disproportionate frequency with which blacks had been sentenced to death. Askew may ultimately have become convinced—though not without lingering qualms<sup>197</sup>—that the sentencing procedure devised by the Governor’s Committee could alleviate the discriminatory aspects of the prior system, and that narrowly targeted use of capital punishment could be an effective deterrent to violent crime.

In the end, the precise mix of factors that led to Askew’s decision must remain unknowable—even to the man himself. But if any true re-evaluation of the issue took place in Florida during 1972, it took place in the office of the governor. It was the Governor’s Committee that undertook the most thorough and systematic inquiry into the issue. Only the Governor’s Committee, for example, made any effort to grapple with the empirical evidence concerning the deterrent value of capital punishment. The governor himself, almost alone among Florida public officials, appears to have made a genuine effort to set aside his preconceptions and think through the problem anew.

#### IV. CONCLUSION

The Florida legislature’s debate over the death penalty in 1972 furnishes a highly instructive example of the interaction between the

195. *Id.*

196. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

197. James Apthorp indicates that Askew remained troubled by the issue throughout his tenure as governor:

The things he did between 1972 and 1978, when he left—I mean it was six years that . . . he could have been faced with this issue, but he avoided it right down to the end. He stretched ‘em out, he sent ‘em back, he’d want to know more about ‘em; I mean, he’d ask for another report. He really had a hard time facing this issue . . . . He spent the whole six years struggling with it, and worrying about it, and trying to avoid having to do it, and all the time he maintained this public position in favor of having capital punishment, but it was really difficult for him.

Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

United States Supreme Court and the elected representatives of the people. The most obvious aspect of that interaction lay in the legislature's efforts to devise capital sentencing procedures that would withstand judicial scrutiny in the future. The debate within the legislature furnished an odd species of constitutional discourse. The aim was not to discover unifying principles shared by the Court generally. Rather, the legislature's technique was to examine each of the *Furman* opinions individually in order to determine each Justice's likely attitude towards the bills under consideration, and the preferences of the *Furman* dissenters consequently assumed as much importance as did the views of the majority. Given the disjointed nature of the *Furman* decision, however, no other method of constitutional inquiry would seem to have been possible; and it should be said that leaders on both sides of the debate were astute and careful in their parsing of the Supreme Court's "instructions." At the same time, however, legislators acknowledged no *obligation* to withhold their support from any bill that they believed the Court would disapprove. Legislators sought to pass the bill that enjoyed the greatest chance of Supreme Court approval; but virtually all members of the body deemed it preferable to support a bill of doubtful constitutionality rather than to support no bill at all.

The interaction between Court and legislature, however, went beyond lawmakers' efforts to devise capital sentencing *procedures* that would satisfy the Court's concerns. The Supreme Court's decision in *Furman*, I have argued, was not simply a command that new procedures be developed to determine which individuals would be condemned to die. The decision was, in addition, an invitation to renewed debate on the question whether capital punishment should be employed at all. An evaluation of the Florida legislature's performance during the fall of 1972 must ultimately depend on one's conception of the proper relationship between the people of a democracy and their elected representatives.

One version of democratic theory holds that the elected representative should act solely as a proxy whose duty is to determine, and then to advocate, the views of his constituents. Adherents of this position could have no quarrel with the Florida legislature's disposition of the death penalty issue. Insofar as the legislature's proper role is to give effect to the values and preferences of its constituents, the decision to reinstate the death penalty cannot be faulted. In concluding that capital punishment was not *per se* violative of the Eighth Amendment, the Supreme Court in 1976 was heavily influenced by the spate of legislative activity that had occurred in the four years since *Furman*. Passage

of new death penalty statutes, the Court concluded, was persuasive evidence that public support for capital punishment remained strong. At least as to Florida, that inference appears justified. Capital punishment was not foisted upon the public through parliamentary machinations. It was not the brainchild of a single charismatic individual. It was not a means of asserting state autonomy in defiance of the United States Supreme Court. The simplest explanation for the passage of the statute appears also to be the correct one; capital punishment was reinstated in Florida because a sizeable majority of the Florida public believed reinstatement to be a wise policy.

A second view of the legislative function emphasizes the need for independence on the part of individual lawmakers. Although the legislator's duty is to seek the public good, the argument goes, the premise of a *representative* democracy is that the people should elect officials who possess a heightened understanding of political issues. The legislator's responsibility, on this view, is to act upon his own conception of the common good. His decisions should be informed but not controlled by the opinions of his constituents. Judged against this model also, the performance of the Florida legislature in 1972 is difficult to criticize. Had every legislator voted his conscience, there would presumably have been more than one vote against the death penalty; but there is every reason to believe that a sizeable majority of Florida lawmakers sincerely shared their constituents' support for capital punishment.

A third model of legislative action stresses the importance of the lawmaking *process*. This view holds that legislatures can improve upon the wishes of the electorate—not because individual lawmakers necessarily possess superior insights into public problems, but because the fact-finding capabilities of the legislature, combined with the increased understanding that emerges through collective deliberation and debate, can enable the lawmaking *body* to develop solutions that no individual member could achieve on his own. Those who believe that the legislature is obligated to engage in a process of deliberation that goes beyond the ascertainment of public sentiment may be more troubled by the performance of Florida's lawmakers. Individual legislators may have thoroughly studied the issue of capital punishment; but the legislature, as a collective body, engaged in no meaningful deliberation before voting in favor of reinstatement.

Even a theorist who generally adheres to this conception of the legislative process, however, might be cautious about applying it to the issue of capital punishment. Some aspects of the issue may be incapable of resolution by means of deliberation and debate. Whether retribu-

tion is a legitimate function of the criminal justice system; whether it is inherently wrong for the state to kill individuals in service of public ends—these are questions which appear simply unsuited to rational argument.<sup>198</sup> To a significant extent capital punishment is one issue—abortion is another—on which the most committed members of the opposing camps may share so few common premises as to make a fruitful debate almost impossible. As to some of the moral issues implicated by the death penalty, it is doubtful that a legislative resolution can ever be more than a poll.

The question whether capital punishment acts as a deterrent to crime, however, would seem to be well-suited for elucidation through the fact-finding mechanisms of the legislature. As to this aspect of the problem, the Florida legislature's performance is more difficult to approve. Some individual legislators may have studied the available empirical evidence. But neither the House nor the Senate committee, nor the legislature as a body, made even a cursory effort to accumulate or consider the data bearing on this issue.

Models of legislative behavior tend to focus on individual issues viewed in isolation. Implicitly they ask how an ideal legislature would resolve a particular problem if it had no other business before it. Viewed against this version of the deliberative process theory, the enactment of the Florida death penalty is easy to criticize. The deliberations conducted by the Florida legislature did not remotely resemble the sort of inquiry one would expect from decisionmakers who deemed the issue important and regarded the propriety of capital punishment as a truly open question. At the same time, however, it seems unlikely that any other measure which attracted the opposition of only one legislator would have been more thoroughly discussed. The cursory nature of the legislative debate was to a large extent the result of the virtual unanimity of the Florida legislature. Though prolonged deliberation and debate might seem desirable as to any issue viewed in isolation, the truth is that a productive legislature has neither the time nor the resources to give exhaustive consideration to more than a small number of questions. These are almost certain to be issues which are perceived as both significant *and* hotly contested. When legislators believe that

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198. Jesse McCrary, Jr., a member of the Governor's Committee who opposed reinstatement, asserts that "any time you start talking about capital punishment, if one has dealt with it any at all, people have a mindset about it, and it's very difficult to change people about that. It's a very emotional problem . . ." Interview with Jesse McCrary, Jr. in Miami, Fla. (Dec. 20, 1990).



their intuitions about a public problem are universally shared, there is little reason to move beyond intuition.

It seems likely that some "critical mass" of opposition to a state's prevailing practice is necessary before the legislature can realistically be expected to undertake a true re-evaluation of the issue. The aftermath of *Furman* in Florida thus demonstrates both the potential and the limitations of Bickelian jurisprudential techniques. The Court's decision ensured that capital punishment would not remain in place unless contemporaneous public support could be demonstrated. It even created an atmosphere in which opposition to reinstatement was regarded as an alternative that was legitimately on the table. The Court could not, however, create a genuine clash of views where none had previously existed; and without disagreement there is unlikely to be debate.

# Recent Florida Capital Decisions

Gary Caldwell\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1358
II.	THE CHARGE AND DETERMINATION OF GUILT .....	1360
	A. <i>The Charge</i> .....	1360
	1. Presentation of Evidence .....	1360
	2. Access to Evidence by Defense .....	1362
	B. <i>The Elements</i> .....	1364
	1. Murder Perpetrated From Premeditated Design .....	1364
	2. Felony Murder .....	1365
III.	DETERMINATION OF THE SENTENCE .....	1367
	A. <i>The Jury Verdict Procedure</i> .....	1367
	1. The Jury as Finder of Fact .....	1367
	2. Jury Instructions .....	1368
	a. <i>The Heinousness Circumstance</i> .....	1368
	b. <i>Other Aggravating Circumstances</i> .....	1377
	c. <i>Mitigation</i> .....	1378
	B. <i>Reliance on the Penalty Verdict</i> .....	1385
	C. <i>The Sentencing Order</i> .....	1390
	1. Specific Findings Required .....	1391
	2. Specific Findings Not Required .....	1392
	3. Other Sentencing Order Issues .....	1395
	D. <i>Aggravating Circumstances and Mitigating     Evidence</i> .....	1395
	1. Aggravating Circumstances .....	1395
	a. <i>Sentence of Imprisonment</i> .....	1395
	b. <i>Prior Violent Felony</i> .....	1397
	c. <i>Great Risk</i> .....	1399
	d. <i>Felony Murder</i> .....	1401
	e. <i>Avoiding Arrest</i> .....	1402

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<i>f.</i>	<i>Pecuniary Gain</i> .....	1403
<i>g.</i>	<i>Hindering Law Enforcement</i> .....	1404
<i>h.</i>	<i>Heinousness</i> .....	1404
<i>i.</i>	<i>Premeditation</i> .....	1407
i.	Reloading or Rearming .....	1407
ii.	The Cold, Calculated Crime of Passion .....	1409
iii.	The Unreasonable Pretense ...	1411
iv.	Slightly Heightened Premeditation .....	1413
<i>j.</i>	<i>Law Enforcement Officers and Public Officials</i> .....	1414
2.	Mitigating Evidence .....	1415
IV.	APPELLATE REVIEW: CLOSE ENOUGH FOR GOVERNMENT WORK? .....	1418
A.	<i>Parker v. Dugger</i> .....	1418
B.	<i>Reweighing</i> .....	1420
C.	<i>Procedural Obstacles to Appellate Review</i> ...	1420
D.	<i>Counsel</i> .....	1424
E.	<i>Relief</i> .....	1426
F.	<i>Proportionality</i> .....	1429
V.	FINAL NOTE .....	1430

## I. INTRODUCTION

The death penalty applies to two offenses under Florida law; first degree murder<sup>1</sup> and capital drug trafficking.<sup>2</sup> Although Florida law also defines sexual battery of a minor as a capital offense, the Florida Supreme Court has ruled that the death penalty does not apply to that offense.<sup>3</sup> Section 921.141 of the Florida Statutes governs sentencing proceedings in first degree murder cases and Section 921.142 governs sentencing proceedings for capital drug trafficking offenses. As of this writing, Section 921.142 has not been used to sentence anyone to death. Accordingly, this article will examine only first degree murder cases and Section 921.141 sentencing proceedings.

The foregoing statute sets out a three-stage procedure for sentenc-

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1. FLA. STAT. § 782.04(1) (1991).

2. FLA. STAT. § 893.135 (1991).

3. See *Coler v. State*, 418 So. 2d 238 (Fla. 1982) (construing what is now FLA. STAT. § 794.011(2) (1991)).

ing in capital cases. Subsection 2 of the statute provides that, after the defendant has been found guilty, the jury is to render a penalty verdict:

- (2) **ADVISORY SENTENCE BY THE JURY.** — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
  - (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
  - (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.<sup>4</sup>

Subsection 3 provides for the trial court to engage in its own weighing of aggravating and mitigating circumstances, notwithstanding the jury's recommendation, and enter written findings of fact supporting the sentencing decision.<sup>5</sup> Nevertheless, the trial judge may not override a life verdict unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ."<sup>6</sup> Subsection 4 provides for automatic appellate review by the supreme court.<sup>7</sup>

During the period from January 1, 1990 through July 1, 1991, this author notes the Florida Supreme Court issued a total of 82 opinions on direct capital appeals.<sup>8</sup> In thirty-six cases, the supreme court affirmed the death sentences. In three, it ordered new sentencing proceedings before the trial judge. In eight, it ordered new sentencing proceedings with a new jury. In twenty, it reduced death sentences to terms of life imprisonment. In fourteen, it ordered new trials.<sup>9</sup> And, in

4. FLA. STAT. § 921.141(2) (1991).

5. FLA. STAT. § 921.141(3) (1991).

6. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The supreme court has followed this "*Tedder* doctrine" with uneven fidelity. In *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989), noting that it had been inconsistent in applying *Tedder* over the years, the court asserted that it would be more consistent in the future. Apparently keeping this promise, the court reversed all but one of the override sentences to come before it in the survey period. Thus, at least as of now, a life verdict almost guarantees a life sentence. Hence, defects in the penalty verdict procedure will necessarily result in defective sentencing decisions.

7. FLA. STAT. § 921.141(4) (1991).

8. One case, *Bryant v. State*, 565 So. 2d 1298 (Fla. 1990) involved the appeals of four co-defendants. The convictions of all four were reversed.

9. Again, *Bryant* is counted as one case here although the court reversed the convictions of all four appellants.

one, it ordered the defendant discharged. The author will not undertake to discuss each of these cases at length in this article. Rather, the author will examine pertinent changes or questions created by these recent decisions. This article, as shown in its table of contents, will evaluate capital cases in a step-by-step approach which follows a format beginning with the charge of a capital crime, proceeding through sentencing issues, and concluding with appellate issues.

## II. THE CHARGE AND DETERMINATION OF GUILT

### A. *The Charge*

Article 1, section 15(a) of the Florida Constitution provides that "[n]o person shall be tried for capital crime without presentment or indictment by a grand jury."<sup>10</sup> Although this requirement has been relaxed for capital sexual battery, a grand jury indictment is still a necessary predicate for a prosecution for first degree murder. In the past, Florida law has taken a dim view of attempts to open up grand jury proceedings: grand jurors, witnesses, and prosecutors are forbidden from discussing the proceedings; the defense has been denied access to transcripts of grand jury proceedings; and there have been no restrictions on the evidence presented to the grand jury by the prosecution. Recent decisions have called into question this traditional attitude toward grand jury proceedings.

#### 1. Presentation of Evidence

In *Anderson v. State*,<sup>11</sup> the court ended its long-standing prohibition of judicial inquiry into evidence presented to the grand jury and incorporated a long set of principles from other jurisdictions into Florida law. In Richard Harold Anderson's trial for first degree murder, an important state witness, Connie Beasley, admitted that her grand jury testimony differed from her trial testimony. Ms. Beasley testified to the grand jury that she saw Mr. Anderson with the decedent shortly before the murder, and that she later saw Mr. Anderson with blood on his clothes and hands, but that she did not see the murder. At trial, she testified that she was present when Mr. Anderson killed the decedent in accordance with a prearranged plan. Mr. Anderson unsuccessfully

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10. FLA. CONST. art. 1, sect. 15, cl. (a).

11. 574 So. 2d 87 (Fla. 1991).

moved to dismiss the indictment on the ground that it was based on perjured testimony. On appeal, the supreme court upheld the trial court ruling, concluding that the change in testimony did not "remove the underpinnings of the indictment," and that the perjurious portion of the grand jury testimony could not have affected the decision to indict.<sup>12</sup> Although it ultimately ruled against Mr. Anderson, the court substantially rewrote Florida law regarding grand jury proceedings:

We agree with the authorities cited by *Anderson* that due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury. This policy is predicated on the belief that deliberate deception of the court and jury by the presentation of evidence known by the prosecutor to be false "involve[s] a corruption of the truth-seeking function of the trial process," *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976), and is "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972) (citation omitted). Moreover, deliberate deception is inconsistent with any principle implicit in "any concept of ordered liberty," *Napue v. Illinois*, 360 U.S. 264, 269, (1959), and with the ethical obligation of the prosecutor to respect the independent status of the grand jury. Standards For Criminal Justice Section 3-3.5, 3-48—3-49 (2d ed.1980); *United States v. Hogan*, 712 F.2d 757, 759-60 (2d Cir.1983); *Pelchat*, 62 N.Y.2d at 108-09, 464 N.E.2d at 453, 476 N.Y.S.2d at 85 (the "cardinal purpose" of the grand jury is to shield the defendant against prosecutorial excesses and the protection is destroyed if the prosecution may proceed upon an empty indictment).

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The state violates that section when it requires a person to stand trial and defend himself or herself against charges that it knows are based upon perjured, material evidence. Governmental misconduct that violates a defendant's due process rights under the Florida constitution requires dismissal of criminal charges. *State v. Glosson*, 462 So.2d 1082, 1085 (Fla. 1985).<sup>13</sup>

*Anderson* is in keeping with a general trend toward opening up

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12. *Id.* at 92.

13. *Id.* at 90-92.

grand jury proceedings. A United States Supreme Court case during the survey period addressed the constitutionality of section 905.27, Florida Statutes, which forbids witnesses from discussing their grand jury testimony. In *Butterworth v. Smith*,<sup>14</sup> the Court held the statute unconstitutional insofar as it prevented a witness from discussing his own grand jury testimony.<sup>15</sup> The witness, a journalist, wished to write a news story about his testimony and experiences in dealing with the grand jury.<sup>16</sup> The Court ruled that Florida's interest in grand jury secrecy, when weighed against the first amendment rights of grand jury witnesses, diminished substantially in importance after conclusion of the grand jury proceedings.<sup>17</sup> It further noted that under present day criminal procedure requiring the disclosure of witnesses, the interest in grand jury secrecy is further diminished.<sup>18</sup>

## 2. Access to Evidence by Defense

*Anderson* and *Butterworth* point toward further litigation of grand jury issues. One likely area for controversy concerns access to transcripts of grand jury proceedings. Section 905.27(1) of the Florida Statutes allows for court orders for disclosure of grand jury testimony to ascertain whether it is consistent with testimony in court, to determine whether the witness is guilty of perjury, and for the purpose of "furthering justice."<sup>19</sup> In *Jent v. State*,<sup>20</sup> the supreme court affirmed denial of the defendants' motion for access to grand jury testimony, writing without further discussion that a "proper predicate" must be laid to obtain access to grand jury testimony. The court has never said what might constitute a "proper predicate." Subsequent decisions of other courts may provide the answer.

In *Pennsylvania v. Ritchie*,<sup>21</sup> the Court held that a defendant charged with rape of a minor was entitled to *in camera* review of the minor's welfare file notwithstanding that the file was confidential under state law. He was entitled to this review upon his assertion that the file

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14. 110 S. Ct. 1376 (1990).

15. *Id.* at 1379.

16. The grand jury was investigating alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department.

17. *Id.* at 1380-83.

18. *Id.* at 1382.

19. FLA. STAT. § 905.27(1) (1991).

20. 408 So. 2d 1024 (Fla. 1981).

21. 480 U.S. 39 (1987).

“might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence.”<sup>22</sup> Thereafter, the Pennsylvania Supreme Court held that *in camera* review of the records by the trial judge was not a sufficient safeguard for the defendant’s confrontation rights, and that therefore defense counsel is entitled to see the records.<sup>23</sup>

In *Hopkinson v. Shillinger*,<sup>24</sup> the court held that *Ritchie* applied to state grand jury testimony where exculpatory evidence “could have been presented” to a post-trial grand jury investigating Hopkinson’s cohorts. On rehearing *en banc*, the court affirmed denial of the writ of habeas corpus on other grounds, but let stand the panel decision on the grand jury issue.<sup>25</sup>

In *Miller v. Dugger*,<sup>26</sup> the appeals court applied *Ritchie* to Florida grand jury proceedings, requiring *in camera* review in federal district court.

In view of the foregoing, it seems likely that the defense will obtain greater access to grand jury testimony. But what if the grand jury testimony is not recorded? It would then be almost impossible for the defense to make a showing of improprieties regarding grand jury proceedings or testimony. In *Thompson v. State*,<sup>27</sup> the supreme court showed little regard for such concerns:

Thompson made three claims regarding the grand jury proceedings, two of which merit brief discussion. First, he contends that the trial court erred by denying his pretrial request to record the grand jury proceedings. Sections 905.17 and 905.27 of the Florida Statutes (1987), do not establish a duty to record grand jury proceedings, nor do we find any constitutional basis to impose such a duty in all cases. *In re Report of the Grand Jury*, 533 So.2d 873, 875 (Fla. 1st DCA 1988); *accord United States v. Head*, 586 F.2d 508 (5th Cir.1978). Although recordation may be the best and most desirable practice, *e.g.*, *State v. McArthur*, 296 So.2d 97, 100 (Fla. 4th DCA), *cert. denied*, 306 So.2d 123 (Fla.1974); *United States v. Head*, 586 F.2d at 511, that choice generally is one for the legislature. We agree with *McArthur* that the interests of jus-

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22. *Id.*

23. *Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989).

24. 866 F.2d 1185 (10th Cir. 1989).

25. *Hopkinson v. Shillinger*, 888 F.2d 1286 (10th Cir. 1989) (*en banc*).

26. 820 F.2d 1135 (11th Cir. 1987). Mr. Miller and Mr. Jent were co-defendants.

27. 565 So. 2d 1311, 1313 (Fla. 1990).



tice may require trial courts to order recordation in some instances. *McArthur*, 296 So.2d at 100. However, no showing was made to establish that Thompson had a particular need to preserve grand jury testimony through recording. Under these circumstances, the trial court did not abuse its discretion by denying the motion.

We also know of no statutory or constitutional authority to support Thompson's second contention, that the state should be precluded from conducting voir dire of prospective grand jurors. Implicit in the statutory right to challenge individual prospective grand jurors, section 905.04, Florida Statutes (1987), is the opportunity to obtain information from them about their qualifications. We have been presented with no argument to show why that should not be done through voir dire. Certainly, Thompson has a right to fair treatment by a lawfully composed grand jury. However, he did not present us with the record of the voir dire, nor did he present any evidence to show that his rights were jeopardized by the voir dire. This claim has no merit.<sup>28</sup>

It is curious for the court to uphold the refusal to record grand jury proceedings and then complain that Mr. Thompson did not provide a record of the voir dire of the grand jurors. Also curious is the court's failure to mention Rule 2.070(a) of the Florida Rules of Judicial Administration which provides for reporting of grand jury proceedings.

## B. *The Elements*

Under section 782.04(1)(a) of the Florida Statutes, first degree murder is the unlawful killing when "perpetrated from a premeditated design to effect the death of the person killed or any human being" or when "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" one of eleven listed felonies.<sup>29</sup>

### 1. Murder Perpetrated From Premeditated Design

Although Section 782.04 refers to murder perpetrated from a premeditated design, the term "premeditated design" is seldom used in the cases, and it is not defined for the jury. Instead, the cases and jury

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28. *Id.* at 1313.

29. FLA. STAT. § 782.04(1)(a) (1991). The felonies are: drug trafficking; arson; sexual battery; robbery; burglary; kidnapping; escape; aggravated child abuse; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; and unlawful distribution of various drugs.

instructions generally refer to "premeditated murder."<sup>30</sup>

## 2. Felony Murder

Can a defendant be guilty of felony murder if the felony occurs after the murder? The statute provides that an unlawful killing is first degree murder when it is committed by someone perpetrating or attempting to perpetrate an enumerated felony.<sup>31</sup> Strictly construed, this should mean that the felony cannot occur after the murder. But the Florida Supreme Court has not always been strict in its construction of the statute. For instance, it has construed "in the perpetration of" as

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30. The court defined "premeditated design" in *McCutchen v. State*, 96 So. 2d 152, 153 (Fla. 1957) as including an element of "deliberation" separate from "premeditation":

A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

The standard jury instructions are not so complete:

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing.

If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 854 (1990).

The last paragraph has the following annotation: "Transferred intent; give if applicable."

31. FLA. STAT. § 782.04 (1991).

including flight after completion of the felony.<sup>32</sup> Recent cases reflect the tension between the court's tendency toward loose construction and its duty of strict construction.

In *Jones v. State*,<sup>33</sup> the evidence showed that Randall Scott Jones and another man killed a man and woman and that Mr. Jones then had sexual union with the woman's body. He was convicted both of first degree murder and of sexual battery, but the supreme court reversed the sexual battery conviction because a victim of sexual battery must be alive at the time the battery occurs and, in *Jones*, the victim was dead at the time of the battery.<sup>34</sup> Although the court did not address the issue in the context of felony murder, it would stand to reason that, under *Jones*, a defendant could not be convicted of felony murder where the state did not prove that the decedent was alive at the time of the felony.

But *Holton v. State*,<sup>35</sup> decided only two weeks after *Jones*, suggested a different result:

As his next issue, Holton claims the evidence at trial was insufficient to support a conviction for first-degree arson. He correctly points out that an element of first-degree arson requires that the structure be occupied by a human being. However, even though the medical examiner testified that the victim's death occurred before the fire was set, the jury reasonably could have inferred from all of the evidence that Holton believed the victim was alive at the time the fire was set.

Holton also challenges his conviction for sexual battery with great force. This challenge is based on two grounds. The first centers on Holton's belief that the use of the word "person" in section 794.011(3), Florida Statutes (1985), contemplates that the victim of sexual battery must be alive. Holton argues, therefore that because the evidence could not conclusively establish the bottle was inserted in the victim's anus before death but could only prove that insertion occurred prior to the fire, the evidence was insufficient to support his conviction under section 794.011

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Again, we are persuaded that the jury could have believed that Holton thought the victim was alive at the time he initiated the sexual battery. Under the facts of this case, we find there was sub-

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32. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955).

33. 569 So. 2d 1234 (Fla. 1990).

34. *Id.* at 1237.

35. 573 So. 2d 284 (Fla. 1990).

stantial, competent evidence to support Holton's conviction for sexual battery with great force.<sup>36</sup>

The court cited no authority for the mental element it read into the crimes of arson and sexual battery and also did not note that it had previously held that arson and sexual battery are general intent crimes requiring no specific intent.<sup>37</sup>

### III. DETERMINATION OF THE SENTENCE

#### A. *The Jury Verdict Procedure*

The supreme court has frequently turned down opportunities to make the verdict more reliable by use of more accurate penalty phase jury instructions. During the previously-mentioned survey period, the supreme court continued to refuse to acknowledge problems with the standard jury instruction on the "especially heinous, atrocious, or cruel" and "cold, calculated, and premeditated manner without any pretense of moral or legal justification" aggravating circumstances.<sup>38</sup> Similarly, it affirmed trial court judges' refusals to instruct on various nonstatutory mitigating circumstances.

#### 1. The Jury as Finder of Fact

The traditional role of the jury is that of finder of fact. It would seem that in capital cases, this would involve making factual findings regarding aggravating and mitigating circumstances. On the other hand, the role of the capital sentencing jury has been characterized less as a fact-finder and more as a voice of the community; it is to make "a reasoned *moral* response to the defendant's background, character, and crime."<sup>39</sup> The characterization of the penalty verdict as "advisory" makes the jury's role yet more ambiguous.

Section 921.141 of the Florida Statutes provides that the jury is to determine whether sufficient aggravating circumstances exist and whether there are insufficient mitigating circumstances to outweigh the

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36. *Id.* at 290 (footnote omitted).

37. *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985) (arson); *Buford v. State*, 492 So. 2d 355 (Fla. 1986) (sexual battery).

38. FLA. STAT. §§ 921.141(5)(h), (i) (1991).

39. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis in original).

aggravating circumstances; but does not provide for special verdicts as to the circumstances.<sup>40</sup> The statute provides that the verdict is to be rendered by majority vote, but does not provide whether a majority is needed to find particular aggravating or mitigating circumstances.<sup>41</sup> Suppose that four jurors find the existence of only one aggravating circumstance, and four others find only the existence of a different circumstance, so that a majority of the jury rejects both circumstances. Has there been a finding of one of the circumstances, of both, or of neither? Neither the statute nor any decision of the Florida Supreme Court answers these rather basic questions.

## 2. Jury Instructions

### a. *The Heinousness Circumstance*

The “especially heinous, atrocious, or cruel” circumstance has been the subject of controversy and criticism for years. Commentators have written that it has not been applied consistently by the Florida Supreme Court and that the supreme court has adopted confusing and contradictory guidelines for its application.<sup>42</sup> This in turn has led to controversy regarding the standard jury instruction on the circumstance promulgated in 1981 and still in use during the early 1990s. That jury instruction states without elaboration that the jury may consider as an aggravating circumstance that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.<sup>43</sup> Some historical perspective is necessary for an understanding of

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40. FLA. STAT. § 921.141(2) (1991). The court has routinely denied arguments in favor of special verdicts on the sentencing circumstances. *Jones v. State*, 569 So. 2d 1234, 1238 (Fla. 1990) (citing such cases).

41. FLA. STAT. § 921.141(3) (1991).

42. See Craig Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 908 (1989); Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C.L. REV. 941 (1986); and Mello, *Florida’s “Heinous, Atrocious or Cruel” Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984). For an example of the confusion in the case law, compare *Mills v. State*, 476 So. 2d 172, 178 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986) (intent and method employed by the wrongdoers is what needs to be examined) and *Card v. State*, 453 So. 2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984) (fact that defendant enjoyed killing one consideration in finding factor) with *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1984) (rejecting use of defendant’s mental state to show heinousness).

43. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 859

the present controversy concerning this instruction.

In *State v. Dixon*,<sup>44</sup> the court upheld the constitutionality of the circumstance, writing:

The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.<sup>45</sup>

The court subsequently promulgated the following standard jury instruction regarding the circumstance:

That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.<sup>46</sup>

In *Proffitt v. Florida*,<sup>47</sup> the United States Supreme Court wrote concerning the heinousness circumstance:

[The Florida Supreme Court] has recognized that while it is arguable “that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something ‘especially’ heinous, atrocious or

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(1990).

44. 283 So. 2d 1 (1973), *cert. denied*, 416 U.S. 943 (1974).

45. *Id.* at 9. One can only speculate as to the difference between “extremely wicked” and “outrageously wicked.”

46. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 78 (1975).

47. 428 U.S. 242 (1976) (opinion of the Court joined by three justices with four justices concurring).

cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d, at 9. See also *Alford v. State*, 307 So.2d 433, 445 (1975); *Halliwell v. State*, *supra*, 323 So.2d at 561. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg v. Georgia*, *ante*, 428 U.S., at 200-203.<sup>48</sup>

It is noteworthy that the part of the *Dixon* definition on which the Supreme Court focused [that the killing must be "conscienceless or pitiless" and "unnecessarily torturous to the victim"] is not directly mentioned in the 1975 jury instruction.

In 1981, the Florida Supreme Court promulgated the standard instruction ["The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel"] in use through the survey period, deleting the *Dixon* definitions.<sup>49</sup>

So was the state of things when the supreme court decided *Pope v. State*.<sup>50</sup> There, relying on prior decisions of the Florida Supreme Court, the trial court applied the heinousness circumstance based on a finding that the defendant had not shown any remorse "having elected to steadfastly deny his guilt."<sup>51</sup> Holding this finding improper, the supreme court went on to condemn the *Dixon* definition of the circumstance as being too broad.<sup>52</sup> The supreme court specifically disapproved

48. *Proffitt*, 428 U.S. at 255-56 (footnotes omitted). The Court mentioned *Spinkellink v. State*, 313 So. 2d 666 (1975) ("career" criminal shot sleeping traveling companion) in a footnote. It is somewhat ironic in view of subsequent decisions holding that the heinousness circumstances does not apply when a person is killed while asleep or unconscious. The Florida Supreme Court's decision in *Spinkellink* does not specify what facts justified finding the circumstance.

49. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (1981). The substitution of "wicked" for "heinous" in the instruction is a mystery.

50. 441 So. 2d 1073 (Fla. 1984).

51. *Id.* at 1077.

52. *Id.* In a previous case, *Vaught v. State*, 410 So. 2d 147 (Fla. 1982), the court had disapproved of the *Dixon* definition as too narrow, writing:

Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the infliction of physical pain

of the “conscienceless or pitiless” phrase on the ground that it improperly focused on the “mindset of the murderer,” thus leading to improper application of the circumstance.<sup>53</sup> On the same ground it disapproved of the “utter indifference to, or enjoyment of, the suffering of others. . . ,” “the pitiless” portion of the definition of “cruel” in the 1975 instruction. It approved of use of the 1981 instruction, adding: “No further definitions of the terms are offered, nor is the defendant’s mindset ever at issue.”<sup>54</sup> Thus, the court eliminated the construction that had made the circumstance constitutional under *Proffitt*. The *Pope* instruction gives the jury no suggestion of the constitutional limitations on the circumstance. The jury is free to apply the circumstance to any homicide, for reasonable jurors could conclude that any murder is especially wicked, evil, atrocious, or cruel.

At this point, the Oklahoma death sentence of William Cartwright enters the story.<sup>55</sup> In sentencing Mr. Cartwright, an Oklahoma jury employed that state’s “especially heinous, atrocious, or cruel” aggravating circumstance.<sup>56</sup> The court’s instructions to the jury defined the circumstance in terms taken directly from *Dixon*.<sup>57</sup> Cartwright’s death sentence ultimately came before the United States Supreme Court, which unanimously held that the Oklahoma circumstance was uncon-

or mental anguish. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *White v. State*, 403 So.2d 331 (Fla.1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a “cold and calculating” or “execution-style” fashion. *See, e.g., Magill v. State*, 386 So.2d 1188 (Fla.1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

*Id.* at 151.

53. *Pope*, 441 So. 2d at 1077.

54. *Id.* at 1078.

55. *See Cartwright v. State*, 695 P.2d 548 (Okla. Crim. App. 1985).

56. *Id.*

57. *Id.* On habeas review of the death sentence, the Tenth Circuit wrote: “The jury at Cartwright’s trial had been instructed that the term ‘heinous’ means extremely wicked or shockingly evil; ‘atrocious’ means outrageously wicked and vile; ‘cruel’ means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.” *Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc). The federal appeals court traced the history of the circumstance and showed that Oklahoma’s definition derived from *Dixon*. *Id.* at 1487.



stitutionally vague because it gave the jury no guidance as to its application.<sup>58</sup> In reaching this result, the Court relied on its decision in *Godfrey v. Georgia*,<sup>59</sup> which found unconstitutional a Georgia death sentence based on a jury finding that the murder “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” The *Maynard* Court wrote:

[T]he language of the Oklahoma aggravating circumstance at issue — “especially heinous, atrocious, or cruel” — gave no more guidance than the “outrageously or wantonly vile, horrible or inhuman” language that the jury returned in its verdict in *Godfrey*. The State’s contention that the addition of the word “especially” somehow guides the jury’s discretion, even if the term “heinous” does not, is untenable. To say that something is “especially heinous” merely suggests that the individual jurors should determine that the murder is more than just “heinous,” whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is “especially heinous.” *Godfrey*, *supra*, at 428-429, 100 S.Ct. at 1764-1765. Likewise, in *Godfrey* the addition of “outrageously or wantonly” to the term “vile” did not limit the overbreadth of the aggravating factor.<sup>60</sup>

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58. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

59. 446 U.S. 420 (1980).

60. *Maynard*, 486 U.S. at 363-64. The premise underlying *Maynard* is that the Eighth Amendment requires greater definiteness in the definition of aggravating circumstances than the Due Process Clause requires of criminal statutes:

The difficulty with the State’s argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. *United States v. Powell*, 423 U.S. 87, 92-23, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *Palmer v. City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) (*per curiam*); *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 36, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a

The Florida Supreme Court has repeatedly refused to declare the *Pope* instruction unconstitutional. In *Smalley v. State*,<sup>61</sup> the court wrote:

His first claim involves the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. His argument is predicated on the United States Supreme Court's recent decision in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In that case, the Court relied upon its early [sic] decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), to hold that Oklahoma's aggravating factor of "especially heinous, atrocious, or cruel" was unconstitutionally vague. Smalley argues that because Florida uses the same words (section 921.141(5)(h), Florida Statutes (1987)), Florida's aggravating factor also is unconstitutionally vague under the eighth amendment.

Initially, we note that Smalley did not object to the standard jury instruction given on this subject which explained that in order for this circumstance to be applicable, it was necessary for the crime to have been especially wicked, evil, atrocious, or cruel. Therefore, to the extent that Smalley now complains of the jury instruction, the point has been waived. *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), *cert. denied*, 428 U.S.911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). However, Smalley's claim has broader implications because he contends that the aggravating circumstance of heinous, atrocious, or cruel is unconstitutionally vague under the eighth and fourteenth amendments. In order to set the issue at rest, we will discuss the merits of Smalley's argument.

It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

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result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

*Maynard*, 486 U.S. at 361-62.

61. 546 So. 2d 720 (Fla. 1989).

This Court has narrowly construed the phrase “especially heinous, atrocious, or cruel” so that it has a more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *E.g.*, *Garron v. State*, 528 So.2d 353 (Fla. 1988); *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *cert denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida’s sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.<sup>62</sup>

Thus, the supreme court avoided the jury instruction issue on the ground of procedural default, but went on to assert that the circumstance was constitutional as construed in *Dixon*.<sup>63</sup> The supreme court

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62. *Id.* at 722.

63. Close below the surface in *Smalley* is the notion that accurate penalty phase jury instructions are not necessary because the trial judge will apply the “correct” construction of the circumstance. This idea is contrary to the many cases in which the

apparently forgot that in *Pope* it had read *Dixon* out of the statute and jury instructions. Since *Smalley* did not purport to deal with the question of the constitutionality of the jury instruction, it would have seemed that another case would have to deal with that issue.

But thereafter, the supreme court acted as though *Smalley* had disposed of the issue. In *Brown v. State*,<sup>64</sup> the supreme court rejected an argument that the jury instruction on the premeditation aggravating circumstance was unconstitutionally vague under *Maynard* and wrote:

In *Maynard* the Court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State*, 546 So.2d 720 (Fla.1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. See *Jones v. Dugger*, 533 So.2d 290 (Fla.1988); *Daugherty v. State*, 533 So.2d 287 (Fla.1988). We therefore find no error regarding the penalty instructions.<sup>65</sup>

Similar findings resulted in *Roberts v. State*<sup>66</sup> and *Occhicone v. State*.<sup>67</sup> In the meantime, the court "approve[d] for publication" the following jury instruction resurrecting the *Dixon* definition condemned in *Pope*:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

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court has reversed for resentencing where the trial court committed error in instructing the penalty jury. It is also contrary to *Cochran v. State*, 547 So. 2d 928 (Fla. 1989) and other cases emphasizing the importance of the penalty verdict. Most curious of all, is how *Smalley* interplays with the presumption (espoused in *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991)) that the judge is presumed to follow the jury instructions. If the judge follows the jury instructions, and the jury instructions are unconstitutional, how can there be a presumption of correctness regarding the trial court's findings in the sentencing order?

64. 565 So. 2d 304 (Fla. 1990).

65. *Id.* at 308. *Jones* and *Daugherty* involved collateral attacks on death sentences. In both cases, the court held without analysis that *Maynard* did not apply where the trial court did not find the heinousness circumstance.

66. 568 So. 2d 1255 (Fla. 1990).

67. 570 So. 2d 902 (Fla. 1990).

8. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.<sup>68</sup>

In originally submitting the instruction,<sup>69</sup> the chairman of the jury instruction committee wrote that the committee decided that additional language, based on *Dixon*, improved the instruction enough to address any problems posed by *Maynard v. Cartwright*.

The supreme court made no mention of *Pope, Vaught*, or the *Smalley* line of cases. One can only wonder why it is necessary to amend the jury instructions if, as the supreme court has asserted, *Maynard* does not apply to Florida.

It is questionable whether the new instruction satisfies the requirements of *Maynard*. The new instruction's definitions of "heinous," "atrocious," and "cruel" are virtually identical to the definitions used at Mr. Maynard's Oklahoma trial, and are exactly identical to definitions declared unconstitutional in *Shell v. Mississippi*.<sup>70</sup> Although the final sentence includes the terms "conscienceless or pitiless" and "unnecessarily torturous" approved in *Proffitt*, the instruction does not inform the jury that the circumstance applies *only* to the conscienceless or pitiless crime that is unnecessarily torturous. Further, *Proffitt* itself is suspect on this point because it did not use *Maynard*'s Eighth Amendment analysis in ruling on the constitutionality of Section 921.141 of the Florida Statutes. The Court wrote in *Proffitt* that the aggravating and mitigating circumstances

require no more line drawing than is commonly required of a

68. Standard Jury Instructions, 579 So. 2d 75 (Fla. 1990).

69. After the court initially approved the instruction, the Florida Public Defenders' Association and the Volunteer Lawyers Resource Center sought reconsideration. The court then remanded the matter to the jury instruction committee for further consideration, and the committee proposed a different instruction, incorporating language from *Porter v. State*, 564 So. 2d 1060 (Fla. 1990). The supreme court rejected the *Porter* instruction, and denied rehearing, thus approving again the *Dixon* instruction and the original committee note.

70. 111 S. Ct. 313 (1990).

factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.<sup>71</sup>

*Proffitt* held only that the conscienceless/pitiless construction saved the circumstance from attack as being facially constitutional, but did not decide whether it defined the circumstance adequately for lay jurors. Finally, the new instruction does not inform the jury of various other restrictions on application of the circumstance, such as that acts performed on the dead body cannot be considered in determining the circumstance,<sup>72</sup> that lack of remorse cannot be considered,<sup>73</sup> and that there must be a showing of torturous intent.<sup>74</sup>

#### b. Other Aggravating Circumstances

In *Brown* and other cases discussed above, the court has flatly refused to apply the principles of *Maynard* to the premeditation aggravating circumstance.<sup>75</sup> Now the jury instruction on this circumstance merely tracks the language of the statute,<sup>76</sup> so it is likely to violate *Maynard* if the statutory language is unconstitutionally vague under the eighth amendment.<sup>77</sup> In *Rogers v. State*,<sup>78</sup> the supreme court as

71. *Proffitt*, 428 U.S. at 257-58.

72. See *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

73. *Id.* at 1240.

74. An on-again, off-again requirement.

75. "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. § 921.141(5)(i) (1991).

76. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 859 (as amended through March 30, 1989).

77. The Florida Supreme Court has never adopted a precise and authoritative construction of this circumstance. For a detailed discussion of the circumstance, see Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STET. L. REV. 47, 96-97 (1987) and Craig Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 907 (1989). As discussed in this article, the court produced considerable confusion in trying to define

much as acknowledged that the circumstance was on its face susceptible to misapplication, receded from prior applications, and wrote that it was to apply only where there was "heightened" premeditation.<sup>79</sup> Nevertheless, the court has not promulgated any jury instruction narrowing the circumstance as required by *Rogers*, and seems to consider the present instruction acceptable. Similarly, although the court has adopted narrowing constructions as to almost all of the other aggravating circumstances, the standard jury instructions merely track the statute and give no hint of these limiting constructions. The failure of the standard instructions to define the circumstances would seem to make them unconstitutional under *Maynard*.

### c. Mitigation

As originally promulgated, Section 921.141 of the Florida Statutes contained a list of eight mitigating circumstances.<sup>80</sup> During the first few years of the statute's operation, it was thought that the jury and judge could consider only the listed circumstances in reaching their sentencing decisions.<sup>81</sup> But, subsequent decisions by the United States Supreme Court have made clear that such a limitation on mitigation violates the Eighth Amendment.<sup>82</sup> Accordingly, the Florida Supreme

and apply the circumstance during the survey period.

78. 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

79. As discussed in this article, *Rogers* purported to define only the "calculated" element of the circumstance. In *Porter v. State*, 564 So. 2d 1060, 1063-1064 (Fla. 1990), the court indicated that the Constitution required the narrowing construction given in *Rogers*.

80. FLA. STAT. § 921.141 (1991). Over the years, the list has been shortened and otherwise modified in ways that narrow the application of the circumstances. One circumstance ("The capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.") has been eliminated. The duress circumstance ("The defendant acted under duress or under the domination of another person.") has been narrowed by requiring that the duress be "extreme" or the domination "substantial." The impairment circumstance ("At the time of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication.") now requires that the defendant's capacity be "substantially" impaired, although it no longer requires that the impairment be caused by mental disease or intoxication. On the other hand, the youth circumstance has been changed so that the "age" (rather than the "youth") of the defendant may be considered in mitigation.

81. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

82. *Id.*

Court has promulgated a "catchall" jury instruction to allow consideration of so-called nonstatutory mitigating circumstances.<sup>83</sup> But, although it has gone so far as to formally recognize "categories" of nonstatutory circumstances in *Campbell v. State*,<sup>84</sup> and to recognize various nonstatutory circumstances as "particularly compelling" in *Songer v. State*,<sup>85</sup> the court has refused without discussion to allow penalty phase instructions bearing directly on different nonstatutory circumstances.

In *Jackson v. State*,<sup>86</sup> the court gave short shrift to an argument that the trial court erred by refusing to instruct the jury according to a written list of nonstatutory mitigating circumstances prepared by the defense: "We find these contentions without merit. Florida's standard jury instruction complies with the constitutional principles set forth in *Lockett v. Ohio*."<sup>87</sup>

During the survey period, the court continued to disfavor jury instructions on nonstatutory circumstances. In *Randolph v. State*,<sup>88</sup> the court listed as "meritless and warranting no discussion" argument that "the trial court erred in refusing to instruct the jury separately on specific nonstatutory circumstances."<sup>89</sup>

In *Stewart v. State*,<sup>90</sup> a state witness testified that the defendant was "drunk most of the time" in the period after the shooting, and one Dr. Merin, a psychologist, testified that the defendant was (in the court's phrase) "impaired but not substantially so" at the time of the offense.<sup>91</sup> The defense sought a jury instruction on the "substantially impaired" statutory mitigating circumstance,<sup>92</sup> and, alternatively, an instruction on the same circumstance without the adverb "substantially." The trial court denied both requests.<sup>93</sup> Without comment or elaboration, the supreme court wrote that the trial court "properly re-

83. "Any other aspect of the defendant's character or record, and any other circumstance of the offense." FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §27, 860 (as amended through March 30, 1989).

84. 571 So. 2d 415 (Fla. 1990).

85. 544 So. 2d 1010 (Fla. 1989).

86. 530 So. 2d 269, 273 (Fla. 1988), *cert. denied*, 109 S. Ct. 882 (1989).

87. *Id.* at 273 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)).

88. 562 So. 2d 331 (Fla. 1990).

89. *Id.* at 339.

90. 558 So. 2d 416 (Fla. 1990).

91. *Id.* at 420.

92. "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." FLA. STAT. § 921.141(6)(f) (1991).

93. *Stewart*, 558 So. 2d at 420.



fused" to give the instruction without the adverb, but then held that the trial court erred by not instructing the jury on the "substantially impaired" circumstance:

The trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. (No instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.

The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be pre-conditioned by the judge's view of what they were allowed to know.

We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury's recommended sentence. This error mandates a new sentencing proceeding.<sup>94</sup>

Thus, the supreme court upheld the refusal to instruct on a nonstatutory circumstance<sup>95</sup> directly supported by the evidence and reversed the

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94. *Id.* at 420-21.

95. There can be little doubt that less than substantial impairment is a mitigating circumstance. *Cf. Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988) (jury could properly consider "psychological stress" as nonstatutory mitigation) and *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990) (error for judge to limit consideration of mental disturbance to "extreme" mental disturbance - Florida's capital sentencing statute does in

refusal to instruct on a statutory circumstance directly contradicted by the evidence.

Another paradox arises from *Nixon v. State*,<sup>96</sup> and *Jones v. State*.<sup>97</sup> After Joe Elton Nixon was convicted of first degree murder, kidnapping, robbery, and arson, the trial court at the penalty phase refused to give a defense requested jury instruction on the maximum penalties for the noncapital offenses of which he was convicted [defense counsel wished to argue that the jury could consider in mitigation the possibility that Mr. Nixon would receive long consecutive sentences for those offenses and would therefore never be released from prison].<sup>98</sup> The supreme court approved of the trial court's ruling on two grounds: first, that Rule 3.390(a), Florida Rules of Criminal Procedure, forbids jury instructions on the penalties for noncapital offenses; and second, that "[t]he fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime."<sup>99</sup> The court went on to note that, in any event, the proposed instruction did not state that the noncapital sentences could be considered as mitigation, that counsel did argue them as mitigation, and that the jury was instructed that the factors which it could consider in mitigation were unlimited.<sup>100</sup>

*Nixon* seems irreconcilably contrary to *Jones*, which had been decided less than three months earlier. In *Jones*, the court held that the trial court had erred by not letting defense counsel argue that the jury could consider in mitigation that the defendant could receive consecutive sentences for the two murders of which he was convicted:

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fact require that emotional disturbance be "extreme," however, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer).

96. 572 So. 2d 1336 (Fla. 1990).

97. 569 So. 2d 1234 (Fla. 1990).

98. *Nixon*, 572 So. 2d at 1344-45.

99. *Id.* at 1345.

100. *Id.* To the extent that *Nixon* stands for the principle that argument of counsel is a substitute for jury instructions, it is contrary to, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (failure to instruct on presumption of innocence - arguments of counsel cannot substitute for instructions by the court) and *Mellins v. State*, 395 So. 2d 1207, 1209 (Fla. 4th Dist. Ct. App. 1981) (argument of counsel no substitute for complete jury instructions - it is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction).

The standard for admitting evidence of mitigation was announced in *Lockett v. Ohio*, 438 U.S. 586, (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to *decline to impose* the death sentence." *McClesky v. Kemp*, 482 U.S. 279, 304, (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.<sup>101</sup>

In *Randolph, Stewart, and Nixon*, the supreme court refused to authorize various jury instructions regarding specific nonstatutory mitigating circumstances. The supreme court has not offered any detailed explanation for this refusal, and it is difficult to reconcile it with the announcement in *Campbell* that "categories" of nonstatutory circumstances are to be treated like the statutory circumstances, and with the general trend toward greater reliance on the jury's penalty verdict.<sup>102</sup> How, one wonders, can the penalty verdict be reliable where the jury does not receive instructions on the rather elaborate body of law governing the consideration of aggravating and mitigating circumstances?

The court's response would seem to be that the "catchall" instruction sufficiently directs the jury's attention to the nonstatutory evidence and gives the jury sufficient guidance in evaluating them. *Blystone v. Pennsylvania*,<sup>103</sup> lends support for such a position. Scott Wayne Blystone was convicted of first degree murder, robbery, conspiracy to commit homicide, and conspiracy to commit robbery. The evidence showed that he and others picked up a hitchhiker, and took him to a field where Mr. Blystone robbed and killed him.<sup>104</sup> The defense presented no

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101. *Jones*, 569 So. 2d at 1239-40. In *Cooper v. State*, 581 So. 2d 49, 52 (1991) (Barkett, J., concurring), Justice Barkett pointed out that evidence that the defendant would not be released from prison even after service of the mandatory minimum twenty-five years supported the mitigating circumstance that the defendant did not "in the future pose a danger to the community if he were not executed."

102. See *Campbell*, 571 So. 2d at 415.

103. 110 S. Ct. 1078 (1990).

104. *Id.* at 1080.

mitigating evidence at sentencing. After affirmance of his conviction and resulting death sentence on appeal, the United States Supreme Court granted certiorari "to decide whether the mandatory aspect of the Pennsylvania death penalty statute renders the penalty imposed upon petitioner unconstitutional because it improperly limited the discretion of the jury in deciding the appropriate penalty for his crime."<sup>105</sup> Mr. Blystone's principle argument attacked as unconstitutional the provision of the statute requiring imposition of the death sentence where the jury found at least one aggravating circumstance and no mitigating circumstances.<sup>106</sup> A subsidiary argument was that jury instructions pursuant to 42 Pennsylvania Consolidated Statutes section 9711(e) [which contains a list of mitigating circumstances similar to the list in section 921.141(6) of the Florida Statutes] were unconstitutional.<sup>107</sup> The Court wrote regarding this subsidiary argument:

Next, petitioner maintains that the mandatory aspect of his sentencing instructions foreclosed the jury's consideration of certain mitigating circumstances. The trial judge gave the jury examples of mitigating circumstances that it was entitled to consider, essentially the list of factors contained in § 9711(e). Among these, the judge stated that the jury was allowed to consider whether petitioner was affected by an "extreme" mental or emotional disturbance, whether petitioner was "substantially" impaired from appreciating his conduct, or whether petitioner acted under "extreme" duress. This claim bears scant relation to the mandatory aspect of Pennsylvania's statute, but in any event we reject it. The judge at petitioner's trial made clear to the jury that these were merely items they could consider, and that it was also entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." App. 12-13. This instruction fully complied with the requirements of *Lockett and Penry*.

Three Terms ago, in *McCleskey v. Kemp*, 481 U.S. 279, we sum-

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105. *Id.* at 1081. The Pennsylvania statute is generally similar to the Florida Statute in that it contains lists of aggravating and mitigating circumstances to be considered at sentencing. It differs in that it leaves the sentencing decision with the jury, and mandates that the jury sentence the defendant to death "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1990).

106. *Blystone*, 110 S. Ct. at 1084.

107. *Id.*

marized the teachings of the Court's death penalty jurisprudence:

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

We think petitioner's sentence under the Pennsylvania statute satisfied these requirements. The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.<sup>108</sup>

*Blystone* does not address the question of whether the trial court must instruct on specific recognized nonstatutory circumstances.<sup>109</sup> Thus it does not resolve the following questions arising from *Stewart*:<sup>110</sup> If the "catchall" instruction acts as a panacea by permitting consideration of all mitigation why was a new sentencing hearing required in *Stewart* and the cases cited in it? Could the jury not have used the "catchall" instruction as license to consider Dr. Merin's testimony? Why have jury instructions on the statutory circumstances at all, yet not have them on the *Campbell* categories? The Florida Supreme

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108. *Id.*

109. Curiously, neither the majority nor the dissent considered Mr. Blystone's specific argument, which was that the jurors could reasonably have concluded that they were forbidden from considering duress or disturbance that was not extreme or impairment that was not substantial.

110. 558 So. 2d at 416.

Court has yet to address these questions.

### B. *Reliance on the Penalty Verdict*

Florida's capital sentencing statute provides for an "advisory" penalty verdict rendered by the jury, but places on the trial court judge the responsibility for imposition of sentence.<sup>111</sup> But a jury verdict for life imprisonment is not merely "advisory." It has a powerful presumption of correctness and is to be overridden by the trial court only where "virtually no reasonable person" could agree with it.<sup>112</sup> The override procedure and the *Tedder* doctrine have been criticized both in and out of the court. Justice Shaw has written at some length in favor of abolition of the *Tedder* doctrine.<sup>113</sup> Other commentators have suggested that the override procedure itself cannot be administered consistently.<sup>114</sup> Both Justice Shaw and these commentators agree that the court has not been consistent in its application of *Tedder*.

Over the years, a recurring problem in the application of *Tedder* has arisen when the sentencing judge has had information typically from a pre-sentence investigation report<sup>115</sup> unavailable to the jury. In

111. FLA. STAT. § 921.141(2), (3) (1991).

112. *Tedder*, 322 So. 2d at 910. As noted in a previous section of this article, the supreme court de-emphasized the importance of the jury's role in *Smalley*, indicating that, since the judge knows the law and will therefore apply it accurately, it is not necessary that the jury be accurately instructed on the law.

113. *Grossman v. State*, 525 So.2d 833, 846-51 (Fla. 1986) (Shaw, J., concurring), *cert. denied*, 489 U.S. 1071 (1989).

114. Skene, *Review of Capital Cases: Does The Florida Supreme Court Know What It's Doing?*, 15 STET. L. REV. 263, 298-306 (1986). Mr. Skene writes that "it is hypocritical to deem a jury 'unreasonable' in discounting its sentence recommendation while upholding a verdict of guilt 'to the exclusion of and beyond every reasonable doubt.'" *Id.* at 305. See also Mello and Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31 (1985).

115. The use of pre-sentence investigation reports (generally referred to as PSI's) promises to be the source of litigation in years to come. Prepared by probation officers, these reports typically contain specific sections for "Victim Impact Statements" and for personal remarks and recommendations by police officers and prosecutors. Also, their preparation typically involves interviews with defendants without notice to, or the presence of, counsel. Thus the preparation of such reports often involves substantial violations of the principles set out in cases such as *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact statement), *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (effect of killing on law enforcement officers), and *Powell v. Texas*, 109 S. Ct. 3146 (1989) (statement of defendant to state psychiatrist for use at sentencing). See *Mills v. Dugger*, 574 So. 2d 63 (Fla. 1990) (declining to address issue on ground of procedural

*Cochran v. State*,<sup>116</sup> the court directly confronted this problem. Guy Cochran was convicted of first degree murder in the death of Carol Harris. The penalty phase of the jury proceeding occurred immediately after the guilt phase and resulted in a life verdict.<sup>117</sup> Prior to sentencing by the judge in that case, Mr. Cochran was tried and convicted of another first degree murder. Using, as an aggravating circumstance, this subsequent capital conviction of which the Harris jury was unaware,<sup>118</sup> the trial court overrode the life verdict and imposed a death sentence.<sup>119</sup> In reducing the sentence to one of life imprisonment, the Florida Supreme Court wrote that the existence of the additional aggravating circumstance did not make the jury's life verdict so unreasonable as to justify the override. The court recognized that in the past it had upheld override sentences in such circumstances, but wrote that the life verdict retains its strong presumption of correctness even when based on less information than is available to the judge. After examining the mitigating evidence presented by the defense, the court concluded that the evidence was sufficient to support a life sentence.<sup>120</sup> In response to a vigorous dissent by Justice Ehrlich, joined by Justices Shaw and Grimes,<sup>121</sup> and belatedly, to Justice Shaw's concurring opinion in *Grossman v. State*,<sup>122</sup> the *Cochran* majority acknowledged that the supreme court had not consistently applied *Tedder* in the past:

Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So. 2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):

During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have

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default).

116. 547 So. 2d 928 (Fla. 1989).

117. *Id.* at 929.

118. A prior conviction of a capital offense is a statutory aggravating circumstance. FLA. STAT. § 941.141(5)(b) (1991).

119. *Cochran*, 547 So. 2d at 929.

120. *Id.* at 932.

121. *Id.* at 933.

122. 525 So. 2d 833, 846-51 (Fla. 1986) (Shaw, J., concurring).

affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .

Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'<sup>123</sup>

During the survey period, the court seemed committed to keeping the promise of *Cochran*, reversing all but one<sup>124</sup> of the override sentences that came before it. The court substantially ratified *Tedder* in two cases. In the first, *Cheshire v. State*,<sup>125</sup> the court subtly extended *Tedder* by casting the sentencing judge's role as more like an appellate court than a factfinder. In the second, *Buford v. State*,<sup>126</sup> it applied *Tedder* even when there was a gulf of more than ten years between the life verdict and the ultimate imposition of sentence.

Steven Cheshire was convicted of two counts of first degree murder in the deaths of his estranged wife and a man with whom she was living. Although the defense presented no mitigating evidence, the jury rendered life verdicts as to both murders, but the trial court overrode one of the verdicts, and imposed a death sentence for the wife's mur-

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123. *Cochran*, 547 So. 2d at 933. The admission in *Cochran* that *Tedder* has not been consistently applied in the past may bode ill for the continuing constitutionality of the override procedure. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court upheld the procedure against a facial attack, but left open the question of whether it could later be challenged upon a demonstration that it was applied in an arbitrary manner: "We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. . . . [T]here is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death." 468 U.S. at 466. It may be that *Cochran* supplies the evidence found lacking in *Spaziano*.

124. *Zeigler v. State*, 16 FLW S257 (Apr. 11, 1991).

125. 568 So. 2d 908 (Fla. 1990).

126. 570 So. 2d 923 (Fla. 1990).



der.<sup>127</sup> On appeal, the Florida Supreme Court reduced the sentence to life imprisonment, finding that the jury could reasonably have extracted from the state's case evidence that could support a life sentence. The court's approach was novel in that it discounted the judge's rejection of controverted mitigating evidence.<sup>128</sup> In a prior felony conviction override case, the court had accepted the trial court's rejection of controverted mitigating evidence, apparently treating the trial court judge as the ultimate factfinder.<sup>129</sup> In *Cheshire*, however, the court seemed to consider it improper for the judge to make an independent evaluation of the mitigating evidence, writing that "under *Tedder*, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment."<sup>130</sup> If followed in subsequent cases, *Cheshire* will constitute a substantial advance toward regularizing the procedure by which trial court judges are to make sentencing decisions in cases involving life verdicts.

*Buford* involved an unusual example of the vitality of a life verdict. Robert Buford was convicted in 1978 for the rape and murder of a seven-year-old girl. Although the jury rendered a life verdict, the trial court imposed a death sentence. After lengthy litigation, resentencing was ultimately ordered by a federal court on the ground that the trial court had improperly limited its own consideration of mitigating evidence.<sup>131</sup> When the case came up for resentencing more than ten years after the original trial, a considerable amount of evidence was presented to the judge that was not available to the 1978 jury. Noting "the anomaly that the jury did not hear the additional mitigating evidence which must be considered in determining whether the life recom-

127. *Cheshire*, 568 So. 2d at 910.

128. *Id.* at 911. Thus, the court wrote: ". . .there was some evidence that Cheshire had been drinking at the time of the murder. Although the judge concluded that Cheshire was not sufficiently intoxicated, we nevertheless must acknowledge that a reasonable jury could have relied upon this evidence to conclude that Cheshire was not in control of his faculties." *Id.*

129. In *Thompson v. State*, 553 So. 2d 153 (Fla. 1989), the supreme court upheld an override sentence where the trial judge rejected the testimony of a defense psychiatrist that the defendant suffered from organic brain damage so that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

130. *Cheshire*, 568 So. 2d at 911.

131. *Buford*, 570 So. 2d at 924. The federal appeals court noted that the trial court's improper limitation was in violation of *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

mentation was reasonable" and that the override had previously been upheld on direct appeal, the court applied *Tedder* and found the override improper given the new evidence.<sup>132</sup> Thus, the supreme court held that the presumption in favor of the life verdict continues to apply even where the evidence presented to the judge differs considerably from the evidence heard by the jury.<sup>133</sup>

*McCrae v. State*,<sup>134</sup> extended the effect of *Buford*. James McCrae's override death sentence was initially affirmed in 1980,<sup>135</sup> but the sentence was eventually vacated because of a *Hitchcock* violation.<sup>136</sup> At the new sentencing hearing, much of the new mitigating evidence involved Mr. McCrae's life after he was initially sentenced to death: "while in prison and receiving treatment, McCrae has demonstrated an above-average intelligence and writing ability; has developed and evidenced strong spiritual and religious standards; has contributed to the lives of others; has demonstrated a high potential for rehabilitation and for making a contribution to the community; and has expressed sincere remorse for his actions."<sup>137</sup>

Contrary to the foregoing cases is *Zeigler v. State*,<sup>138</sup> in which the supreme court seemed to resort to the approach condemned in *Cochran*. Under *Cochran* and like cases, the Florida Supreme Court has looked to see whether the evidence could reasonably support the jury's life verdict and has resolved conflicts in the evidence in favor of the verdict. But in *Zeigler*, as in *Thompson*, the supreme court accorded the judge's sentencing order the presumption of correctness, and resolved conflicts in favor of the order rather than in favor of the verdict. It approved the trial court's rejection of mitigating evidence regarding Mr. Zeigler's character and involvement in church and community activities noting that it found "no error in the weight the trial

132. *Buford*, 570 So. 2d at 924-25.

133. *Douglas v. State*, 575 So. 2d 165 (Fla. 1991) involved a similar situation. After convicting Mr. Douglas of a 1973 murder, the jury rendered a life verdict, which the trial court overrode. After many years of litigation, a new sentencing hearing was ordered at which a substantial amount of additional mitigating evidence was presented. As in *Buford*, the supreme court reversed Mr. Douglas's resulting death sentence in light of the additional mitigating evidence.

134. 582 So. 2d 613 (Fla. 1991).

135. *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041 (1981).

136. *McCrae v. State*, 510 So. 2d 874 (Fla. 1987).

137. 582 So. 2d at 616.

138. 580 So. 2d 127 (Fla. 1991).

judge assigned to this mitigating evidence. The judge could properly consider the witnesses' relationships to the defendant and their personal knowledge of his actions in deciding what weight to give to their testimony."<sup>139</sup>

### C. *The Sentencing Order*

Section 921.141(3) of the Florida Statutes contemplates specific factual findings of the trial court respecting mitigating evidence. It provides in pertinent part that the trial court shall produce written findings upon which its sentence of death is based and also that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In holding Section 921.141 constitutional in *Proffitt v. Florida*,<sup>140</sup> the United States Supreme Court anticipated that this requirement of written findings would result in meaningful appellate review and therefore prevent arbitrary application of the death penalty.<sup>141</sup> Nevertheless, the Florida Supreme Court has sometimes held in the past that there is no requirement of specific findings as to nonstatutory mitigating circumstances.<sup>142</sup>

Eventually, the supreme court realized that the absence of specific factual findings resulted in uneven application of the death penalty and undertook to regularize the sentencing procedure.<sup>143</sup>

During the early 1990s, the court struggled with the obvious tensions between the principles espoused in *Rogers* and *Proffitt* and the practice upheld in *Mason*.

139. *Id.* at 130.

140. 428 U.S. 242 (1976).

141. *Id.* at 251.

142. *E.g.*, *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984). The supreme court wrote: "The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached." *Id.* at 380. The court did not seem to consider the absence of such express findings to be an impediment to its appellate review.

143. *See Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

## 1. Specific Findings Required

In *Campbell v. State*,<sup>144</sup> the court took a hard line against the *Mason*-sanctioned practice of not specifically considering mitigating factors in the sentencing order. Observing that "our state courts continue to experience difficulty in uniformly addressing mitigating circumstances," the court established the following guidelines to clarify the issue:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.<sup>145</sup>

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144. 571 So. 2d 415 (Fla. 1990).

145. *Id.* at 419-20. The quotation is from the opinion on rehearing. In the original opinion, the clause between the citation to *Rogers* and the quotation from the standard jury instructions stated: "The Court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature". 15 Fla. L. Weekly at S344. It also included a footnote, since deleted, saying, "We note that where uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." *Id.* at n.5.

Although the foregoing raises questions, as discussed in this article, it represents a fresh start toward regularizing consideration of mitigation; thus improving the quality of appellate review in capital cases. Further, it addresses an issue that has been the source of some criticism in the past: the rejection of un rebutted mitigating evidence.<sup>146</sup>

## 2. Specific Findings Not Required

In other cases, the court declined to reverse sentencing orders which did not comply with *Campbell*. Further, although *Campbell* seems to be dictated by *Proffitt* and *Rogers*, the court has refused to apply it to cases where the sentencing order preceded the court's decision in *Campbell*.

In *Floyd v. State*,<sup>147</sup> which was decided three months after *Campbell*, the court upheld a sentencing order, entered prior to *Campbell*, in which the trial judge apparently said only the following about the mitigating evidence: "[t]his court [sic] heard everything at the sentencing hearing that the Defendant chose to present. This court [sic] now finds that sufficient mitigating circumstances which would require a lesser penalty do not exist."<sup>148</sup>

Similarly, in *Bruno v. State*,<sup>149</sup> the court upheld a death sentence, entered prior to *Campbell*, where there were three statutory aggravating circumstances and no statutory mitigating circumstances. In that case there was no consideration of nonstatutory mitigation.<sup>150</sup> *Bruno*

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146. See Waters, *Uncontroverted Mitigating Evidence in Florida Capital Sentencings*, 63 FLA. B.J. 11 (1989). Of course, the general rule is that uncontradicted evidence must be accepted as proof of a contested issue. *E.g.* *M. Stevens Dry Dock v. G & J Inv. Corp.*, 506 So. 2d 30 (Fla. 3d Dist. Ct. App. 1987) (citing cases). In the past, the court had declined to apply this elementary principle to capital sentencing. *See, e.g.*, *Pope v. State*, 441 So. 2d 1073 (Fla. 1983) (approving of trial court's rejection of un rebutted evidence that defendant suffered from post-traumatic stress syndrome as a result of service in Viet Nam).

147. 569 So. 2d 1225 (Fla. 1990).

148. *Id.* at 1233 (emphasis in original).

149. 574 So. 2d 76 (Fla. 1991)

150. *Id.* at 83. The trial court rejected evidence that Mr. Bruno was "extremely" disturbed and suffered "substantial" impairment of his ability to conform his conduct to the requirements of the law, but apparently did not consider the nonstatutory circumstances of less than extreme disturbance and less than substantial impairment. The supreme court has acknowledged the existence of such nonstatutory circumstances. *See Cheshire v. State*, 568 So.2d 908, 912 (1990) (error to fail to consider nonstatutory mitigation). *Bruno* contains no mention of *Cheshire*.

does not reflect the express evaluation of nonstatutory circumstances required by *Campbell*.

In yet another case, *Gilliam v. State*,<sup>151</sup> the court wrote:

Appellant's penultimate argument is that the sentencing order does not reflect reasoned judgment because it fails to enumerate the *statutory* mitigating factors on which he presented evidence. We find the sentencing order sufficient. The order recites the statutory aggravating circumstances that were found proved, and the reasons supporting the findings. The order also recites the *nonstatutory* mitigating circumstances that the court found proved. In view of the trial judge's findings regarding nonstatutory mitigating circumstances, we can assume he followed his own instructions to the jury in considering the statutory mitigating circumstances, despite the fact that he did not enumerate them. As we noted in *Johnson v. Dugger*, 520 So. 2d 565, 566 (Fla. 1988): "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented." Appellant nevertheless argues that our recent decision in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), issued after the order under review was rendered, requires a different result. *Campbell* directs that "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." *Id.* at 419 (footnote omitted). It is unnecessary for us to reach the question whether this order complies, because *Campbell* is not a fundamental change of law requiring retroactive application. As we said in *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1990), only "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding" — in effect, "jurisprudential upheavals" — require retroactive application; "evolutionary refinements" do not.<sup>152</sup>

Taken literally, *Gilliam* seems to stand for the proposition that, if the judge has instructed the jury to consider mitigating factors, then it is to be assumed that the trial court has correctly considered mitigating factors. This proposition is in stark contrast to the observations in *Rogers* and *Campbell* that trial courts are often confused in how to go about

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151. 582 So. 2d 610 (Fla. 1991).

152. *Id.* at 612 (emphasis in original).

considering mitigating evidence.<sup>153</sup>

Another case which seems directly contrary to *Campbell* is *Sochor v. State*.<sup>154</sup> Dennis Sochor was convicted of first degree murder and kidnapping in the strangling death of a young woman he met at a bar on New Year's Eve. The only eyewitness testified that Mr. Sochor looked like a man "possessed" at the time of the murder, and several experts testified to Mr. Sochor's psychiatric problems.<sup>155</sup> Finding four aggravating circumstances<sup>156</sup> and no mitigating circumstances, the trial court sentenced him to death. The Florida Supreme Court struck one of the aggravating circumstances<sup>157</sup> but upheld the death sentence because the supreme court determined that to strike one aggravating factor where there were no mitigating factors was not a cause for re-sentencing.<sup>158</sup>

As an initial matter, it is impossible to square the statement in *Sochor* that evidence of childhood abuse can be ignored<sup>159</sup> with the statements in *Campbell*<sup>160</sup> that, as a matter of law, an abused childhood is a "valid" mitigating circumstance and in *Rogers*<sup>161</sup> that the sentencer must, as a matter of law, consider all mitigating circumstances. It is also impossible to square with those authorities the hold-

153. The court's unwillingness to apply *Campbell* to Mr. Gilliam's sentence on the basis of *Witt* is somewhat puzzling: *Witt* involved a bar against collateral challenges to convictions and sentences. It did not purport to limit claims on direct appeal. In *Gilliam* the court did not note this distinction.

154. 580 So. 2d 595 (Fla. 1991). EDITOR'S NOTE: Subsequent to the completion of this article, the United States Supreme Court vacated Dennis Sochor's death sentence and remanded the case for further action. Mr. Sochor's attorney was the author of this article and successfully argued a violation of Sochor's Eighth Amendment rights. Readers should refer to *Sochor v. Florida*, 112 S. Ct. 2114 (1992). Any further reference to *Sochor* should be taken in light of the court's opinion.

155. *Id.* at 599.

156. *Id.* The four circumstances were: that Mr. Sochor was previously convicted of a violent felony, that the killing occurred while he was engaged in the commission of a felony, that the killing was especially heinous, atrocious or cruel, and that the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

157. *Id.* at 603. The circumstance that the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification was struck.

158. *Id.* at 604.

159. "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion." *Id.*

160. 571 So.2d at 419 n.4.

161. 511 So.2d at 534.

ing in *Sochor* that it is discretionary with the judge and jury whether to consider in mitigation evidence of a psychiatric disorder.<sup>162</sup>

### 3. Other Sentencing Order Issues

*Campbell* is in keeping with a general trend toward improving the procedures governing sentencing orders. During the survey period, the supreme court continued to require that sentencing orders be rendered at the time of sentencing<sup>163</sup> although it has declined to apply this requirement to "pipeline" cases.<sup>164</sup> In keeping with the trend toward improving sentencing procedures, the court reduced a death sentence to life imprisonment in a case where the trial court's sentencing order contained no findings as to individual aggravating or mitigating factors.<sup>165</sup>

#### D. *Aggravating Circumstances and Mitigating Evidence*

##### 1. Aggravating Circumstances

###### a. *Sentence of Imprisonment*

Under section 921.141(5)(a), the jury and judge may consider in aggravation that the murder was committed by a person under sentence of imprisonment. Although a strict construction of the statute would be that the circumstance was directed at prison murders, cases have construed this circumstance to apply to sentencing alternatives or variations in which the defendant was not actually incarcerated at the

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162. *Sochor*, 580 So. 2d at 604.

163. The court established this requirement in *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989).

164. *See Stewart v. State*, 558 So. 2d 416 (1990). In *Christopher v. State*, 583 So. 2d 642 (Fla. 1991), the court reduced a death sentence to life imprisonment on this ground where the sentencing hearing occurred after *Grossman* was decided.

165. In *Bouie v. State*, 559 So. 2d 1113 (Fla. 1990), the trial court's sentencing order apparently said only the following by way of consideration of sentencing factors: "The court has considered the aggravating and mitigating circumstances presented in evidence in this cause and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 1116. The supreme court noted that the trial court's written assessment of sentencing factors is necessary for meaningful appellate review: "A trial judge's justifying a death sentence in writing provides 'the opportunity for meaningful review' in this Court." *Id.*



time of the murder.

In *Haliburton v. State*,<sup>166</sup> the evidence showed that Jerry Haliburton committed a murder after being released from prison under a program called "mandatory conditional release." This program (referred to as "MCR") involved release from prison after serving one's term less allowable gain-time and other credits, with continuing supervision "subject to all statutes relating to parole."<sup>167</sup> The Florida Supreme Court upheld application of the imprisonment circumstance, by analogy with previous cases upholding its application to parolees.<sup>168</sup>

In *Gunsby v. State*,<sup>169</sup> the court extended the circumstance to cover the time before the defendant actually began to serve his sentence. In upholding Donald Gunsby's death sentence, the court wrote:

[T]he record clearly establishes that Gunsby had been sentenced to incarceration but had not reported to jail as ordered and that a warrant had been issued for his arrest. These circumstances justify a finding that Gunsby was under a sentence of imprisonment at the time of this offense. We reject the contention that there must be an escape for this aggravating circumstance to apply, and we conclude that this aggravating circumstance was properly found. *See Songer v. State*, 544 So. 2d 1010 (Fla.1989).<sup>170</sup>

*Haliburton* and *Gunsby* were in keeping with a general trend against strict construction of aggravating circumstances. As such, they stand in marked contrast to *Trotter v. State*.<sup>171</sup> In that case, the trial court had applied the imprisonment circumstance where Melvin Trotter committed a murder while released to a "community control" program. The Florida Supreme Court reversed, writing:

Subsection 948.10(1), Florida Statutes (1985), provides that community control is "an alternative, community-based method to pun-

166. 561 So. 2d 248 (Fla. 1990).

167. FLA. STAT. § 944.291 (1979).

168. *Haliburton*, 561 So. 2d at 252. The cases applying the circumstance to parolees stem from *Aldridge v. State*, 351 So. 2d 942 (Fla. 1977). Curiously, Mr. Aldridge did not contest this use of the circumstance, so the court was not called upon to decide the propriety of its use.

169. 574 So. 2d 1085 (Fla. 1991).

170. *Id.* at 1090. Mr. Songer "did not break out of prison but merely walked away from a work-release job." 544 So. 2d at 1011. *Gunsby* certainly creates new law if it holds that walking away is not escaping.

171. 576 So. 2d 691 (Fla. 1990).

ish an offender in lieu of incarceration." Moreover, we have held that violation of probation is not an aggravating circumstance — probation is not equivalent to being under sentence of imprisonment, for the appellant was not incarcerated. *Bolender v. State*, 422 So. 2d 833 (Fla. 1982), *cert.denied*, 461 U.S. 939 (1983); *Ferguson v. State*, 417 So. 2d 631 (Fla. 1982); *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert.denied*, 451 U.S. 964 (1981). Penal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed. *Reino v. State*, 352 So. 2d 853 (Fla. 1977), *receded from on other grounds*, *Perez v. State*, 545 So. 2d 1357 (Fla. 1989).<sup>172</sup>

### *b. Prior Violent Felony*

Under section 921.141(5)(b) of the Florida Statutes, the sentencing jury and judge may consider as an aggravating circumstance that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. For the first eighteen years of this circumstance's existence, it was thought that it did not apply to juvenile adjudications of delinquency for violent offenses. But in 1990, the court suggested that it could apply to such adjudications. In *Campbell v. State*,<sup>173</sup> the court wrote, without further discussion that the trial court "correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convic-

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172. *Id.* at 694. *Reino* involved construction of a statute of limitation. Although *Trotter* appears to be the first Florida case to apply the rule of strict construction to an aggravating circumstance, the rule is hardly novel. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle, known as the "rule of lenity," is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. *Dunn v. United States*, 442 U.S. 100, 112 (1979) (rule of lenity rooted in fundamental principles of due process mandating that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed). The principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381 (1980).

173. 571 So. 2d 415 (Fla. 1990).

tions cannot be considered in aggravation.”<sup>174</sup> This somewhat cryptic statement is remarkable because it is directly contrary to the principle of strict construction of aggravating circumstances espoused seven days later in *Trotter*. It is also contrary to indications in *Young v. State*,<sup>175</sup> that it would be improper to consider the defendant’s juvenile record. In *Young*, the court held that there was no error in using a pre-sentence investigation report where the trial court stated that it did not rely on Mr. Young’s juvenile record.<sup>176</sup>

Other recent cases involving this circumstance show uncertainty as to its purpose and as to what evidence may be used to support it. For example, in *Stewart v. State*,<sup>177</sup> the court reiterated a prior interpretation that the purpose of the circumstance was to demonstrate violent propensity: “Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”<sup>178</sup> But violent propensity, *per se*, is not an aggravating circumstance under the statute, and in *Freeman v. State*,<sup>179</sup> the court held it was improper for the prosecutor to imply to the jury that the defendant was likely to commit future crimes if not incarcerated. In *Freeman*, the court simply took no notice of *Stewart* and *Elledge*.

Even more curious is the fact that *Freeman* overruled *sub silentio* the portion of *Elledge* on which the court relied in *Stewart*. In *Elledge*, the court had held admissible, as relevant to Mr. Elledge’s propensity to commit violent crimes, the testimony of the widow of a man he had killed in the course of a prior violent felony. But in *Freeman*, the court held that such testimony was impermissible under *Booth v. Maryland*.<sup>180</sup>

On the other hand, the court wrote in *Lucas v. State*,<sup>181</sup> “that [t]estimony by the victims, or others, about prior crimes is admissible if

174. *Id.* at 418.

175. 579 So. 2d 721 (Fla. 1991).

176. *Id.* at 725.

177. 558 So. 2d 416 (Fla. 1990).

178. *Id.* at 419 (quoting *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)). In *Hallman v. State*, 560 So. 2d 223 (Fla. 1990) the supreme court suggested a purpose the defense might have to present evidence regarding the facts of a prior violent felony, writing that the jury could have concluded that the circumstance was “entitled to little weight” given un rebutted evidence of the defendant’s limited involvement in the prior offense.

179. 563 So. 2d 73 (Fla. 1990).

180. *Id.* at 75-76 (citing *Booth v. Maryland*, 482 U.S. 496 (1987)).

181. 568 So. 2d 18 (Fla. 1990).

the defendant is given the opportunity to confront the witness.”<sup>182</sup> *Lucas* cited, among other authorities, *Rhodes v. State*.<sup>183</sup> In *Rhodes*, the court reached the odd conclusion that, although the confrontation clause applies to capital proceedings, the clause is not necessarily violated by the introduction of testimony founded on hearsay provided by persons whom the defendant cannot confront.<sup>184</sup> At the penalty phase of Richard Rhodes’ capital trial, the state produced the testimony of a Nevada police captain. The trial court allowed the captain to testify about his investigation of a violent felony committed by Mr. Rhodes, and allowed him to play a tape of an interview with the victim of that crime, who was unable to travel to Florida to testify.<sup>185</sup> The Florida Supreme Court held that use of the tape violated the confrontation clause, but ruled that the captain’s testimony, manifestly based on hearsay, was admissible because “the defendant [was] accorded a fair opportunity to rebut any hearsay statements.”<sup>186</sup>

### c. Great Risk

Under section 921.141(5)(c), the jury may consider in aggravation that the defendant “knowingly created a great risk of death to many persons.” The supreme court has in the past held that the circumstance does not apply simply because bystanders are present at the time of the murder.<sup>187</sup> It has also held that the circumstance cannot be based on mere possibilities. For instance, in *White v. State*,<sup>188</sup> the defendant committed six murders in a house. The trial court applied the great risk circumstance, reasoning that anyone [such as a friend or delivery person] coming to the house during the episode would have been in danger. The Florida Supreme Court reversed, holding that such speculation could not support application of the circumstance.<sup>189</sup>

During the survey period, the court reached apparently contradic-

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182. *Id.* at 21.

183. 547 So. 2d 1201 (Fla. 1989).

184. *Id.* at 1204.

185. *Id.*

186. *Id.* at 1204-05. *Rhodes* is difficult to reconcile with *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990) in which the court upheld the exclusion, on hearsay grounds, of the testimony of a defense witness at sentencing regarding interviews made during his investigation of mitigation.

187. *Kampff v. State*, 371 So. 2d 1007 (Fla. 1979) (two bystanders present in store when defendant shot ex-wife).

188. 403 So. 2d 331 (Fla. 1981).

189. *Id.*

tory results in two cases applying the circumstance. In *Hallman v. State*,<sup>190</sup> the evidence showed that Darrell Wayne Hallman engaged in a gun battle with a security guard outside a bank which he had just robbed. After shooting the guard, he hijacked an automobile, forcing the driver to take him from the scene.<sup>191</sup> The trial court applied the great risk circumstance in sentencing Mr. Hallman, but the state supreme court disapproved of the finding:

Next Hallman attacks the finding that he knowingly created a great risk of death to many persons. The trial court listed ten persons who were in the area of the shoot-out and could have been struck and remarked that the shoot-out occurred near a busy thoroughfare. Hallman argues that he and Hunick fired at each other from close range and that none of the bullets was aimed in the direction of a large number of people. At most, he maintains, there was only the chance that a bystander would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance.

Again, we agree with Hallman. We set out the standard for this aggravating circumstance in *Kampff v. State*, 371 So. 2d 1007 (Fla. 1979). We said:

“Great risk” means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon’s actions must be to “many” persons. By using the words “many” the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.

*Id.* at 1009-10. We have held that great risk of death to three people was insufficient. *Bello v. State*, 547 So. 2d 914 (Fla. 1989). The state’s reliance on *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985), *cert.denied*, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986), is misplaced. In that case the defendant fired more than a dozen shots in the area of a migrant labor camp, three persons other than the victim were in the line of fire and his four nearby accomplices ran the risk of death from return fire.

The trial judge referred to the presence of numerous people in the bank, and passersby on busy U.S. 98 to support his finding. The

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190. 560 So. 2d 223 (Fla. 1990).

191. *Id.*

evidence showed, however, that the seven persons in the bank ran almost no risk of being struck, as they were behind partitions and away from doors or windows and not in the line of fire. Five of the witnesses outside the bank either saw or heard the shooting, but only one of them was ever in the line of fire. It is true that there were a number of passersby on U.S. 98, but of the eight shots only one was definitely aimed in the direction of the highway and only two others could have been. We do not believe that the possibility that no more than three gunshots could have been fired toward a busy highway is proof beyond a reasonable doubt that Hallman knowingly created a great risk of death to many persons.<sup>192</sup>

The court was less indulgent in *Van Poyck v. State*,<sup>193</sup> in which the evidence showed that William Van Poyck and Frank Valdez, in an unsuccessful attempt to free an inmate from a prison van, killed one guard at close range, attempted to kill another at close range, and then, in their flight from the scene fired numerous shots at the police cars in pursuit, hitting three of them.<sup>194</sup> The Florida Supreme Court rejected without discussion Mr. Van Poyck's argument against application of the great risk circumstance.<sup>195</sup>

On its face, *Van Poyck* seems at odds with *Hallman*. The evidence recited in *Van Poyck* shows, at most, that several police officers were endangered. It does not show a great risk to "many persons" as required by *Hallman* and *Bello*.

#### d. *Felony Murder*

Section 921.141(5)(d) provides for consideration as an aggravating circumstance the fact that the murder was committed "while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb."<sup>196</sup>

In *Holton v. State*,<sup>197</sup> the court seemed to expand this circum-

192. *Id.* at 225-26.

193. 564 So. 2d 1066 (Fla. 1990).

194. *Id.*

195. *Id.* In all, the court rejected fifteen penalty arguments without comment, and discussed only one penalty issue at length on Mr. Van Poyck's appeal.

196. FLA. STAT. § 921.141(5)(d) (1991).

197. 573 So. 2d 284 (Fla. 1990).

stance. The evidence at Rudolph Holton's trial showed that the decedent was already dead at the time of the sexual union.<sup>198</sup> Therefore, under prior case law, there was no sexual battery. Nevertheless, the court upheld Mr. Holton's sexual battery conviction on the theory that Mr. Holton may have thought that the woman was still alive. The court extended this novel principle to the felony murder aggravating circumstance, upholding its application to Mr. Holton.<sup>199</sup>

### *e. Avoiding Arrest*

The sentencer may consider in aggravation that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."<sup>200</sup> In some cases, the Florida Supreme Court has held the state to a high burden of proof and has stricken the circumstance where it would otherwise arguably apply.<sup>201</sup> At other times, though, under seemingly similar circumstances, it has upheld the circumstance.<sup>202</sup> At least where a law enforcement officer has not been killed, the court will uphold the circumstance only where there is "strong proof" that avoiding arrest by eliminating a witness was the sole or dominant motive for the murder.<sup>203</sup> During the survey period, the supreme court did not undertake to further define the circumstance. But in *Derrick v. State*,<sup>204</sup> the supreme court did discuss its relationship to the premeditation circumstance.

In *Derrick*, Samuel Jason Derrick murdered Rama Sharma during a robbery. He killed Mr. Sharma to "shut him up" when he started screaming.<sup>205</sup> In sentencing Mr. Derrick to death, the trial court employed both the premeditation and the avoiding arrest circumstances.

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198. *Id.*

199. *Id.*

200. FLA. STAT. § 921.141(5)(e) (1991).

201. *E.g.*, *Garron v. State*, 528 So. 2d 353, 360 (Fla. 1988) (evidence insufficient to prove circumstance even though victim was on phone with operator asking for the police at the time she was shot); *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988) (no direct evidence of motive; defendant may have merely panicked when committing robbery).

202. *E.g.*, *Harmon v. State*, 527 So. 2d 182, 188 (Fla. 1988) (defendant became frightened when decedent spoke his name, indicating that decedent could identify him); *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988) (circumstantial evidence of existence of witness elimination sufficient).

203. *See, e.g.*, *Perry*, 522 So. 2d at 817.

204. 581 So. 2d 31 (Fla. 1991).

205. *Id.*

### The Florida Supreme Court disapproved:

The trial judge found that the murder was cold, calculated, and premeditated and that the murder was committed for the purpose of avoiding arrest. Under the facts as the judge found them, it appears to this Court that it is inconsistent to find that both of these factors apply. In finding that the murder was committed to prevent lawful arrest, the judge relied on Derrick's confession that he had to kill Sharma after Sharma recognized him. Yet, the judge also found the murder to be cold, calculated and premeditated because Derrick hid in the bushes with a knife waiting for Sharma and then chased Sharma twenty feet after the original attack to finish killing him. If Derrick did not decide to kill Sharma until Sharma recognized him, then it seems unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated.<sup>206</sup>

#### *f. Pecuniary Gain*

The aggravating circumstance that the murder was committed for pecuniary gain<sup>207</sup> usually arises where the murder occurs during a robbery or burglary, in which case it is "merged" with the felony murder circumstance, so that the two become a single circumstance.<sup>208</sup> In two recent cases, the trial judges merged the pecuniary gain circumstance with the premeditation circumstance. In *Downs v. State*,<sup>209</sup> which involved a contract murder, the trial court judge reasoned that the two circumstances would have to be established in every such case, so that they should be treated as one.<sup>210</sup> And, in *Anderson v. State*,<sup>211</sup> the judge treated them as one where there was a prearranged design to commit robbery and murder.<sup>212</sup>

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206. *Id.*

207. FLA. STAT. § 921.141(5)(f) (1991).

208. *E.g.* Bruno v. State, 574 So. 2d 76 (Fla. 1991). The jury instructions do not inform the jury of this merger doctrine, and the supreme court upheld the denial of a requested jury instruction on the issue in Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989). Hence, juries consistently apply the circumstance in an incorrect manner.

209. 572 So. 2d 895 (Fla. 1990).

210. *Id.* at 898 n.3.

211. 574 So. 2d 87 (Fla. 1991).

212. *Id.* at 90 n.2.



### g. *Hindering Law Enforcement*

The law enforcement circumstance<sup>213</sup> also usually disappears from consideration, being merged with the avoid arrest circumstance.<sup>214</sup>

### h. *Heinousness*

As noted in this article, the survey period saw no end to controversy regarding the heinousness circumstance. In addition to addressing or avoiding questions regarding jury instructions, the Florida Supreme Court experimented with formulae for application of the circumstance.

In *Porter v. State*,<sup>215</sup> the evidence showed that after threatening his estranged lover, Evelyn Williams, George Porter, Jr. shot and killed her in the hallway of her home early one morning. Mr. Porter then threatened the woman's daughter, at which point the woman's new lover, Walter Burrows, entered the room, struggled with Mr. Porter, and forced him outside. Mr. Porter apparently shot Mr. Burrows in the yard. The opinion discloses no further details about the shootings.<sup>216</sup> After Mr. Porter plead guilty to two counts of first degree murder and separate counts of armed burglary and aggravated assault, sentencing proceedings were held before a jury, which recommended death sentences in both murders. Finding, among other things, that the murder of Ms. Williams was especially heinous, atrocious, or cruel, the trial court sentenced Mr. Porter to death for that offense.<sup>217</sup> On appeal, the Florida Supreme Court wrote, regarding the heinousness circumstance:

Porter next argues that Williams' murder was not especially heinous, atrocious, or cruel. In the seminal case of *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), the Court addressed the meaning of "especially heinous, atrocious or cruel":

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outra-

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213. "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." FLA. STAT. § 921.141(5)(g) (1991).

214. *E.g.* Valle v. State, 581 So. 2d 40 (Fla. 1991).

215. 564 So. 2d 1060 (Fla. 1990).

216. *Id.*

217. *Id.* The court imposed a sentence of life imprisonment for the Burrows murder, finding that the aggravating circumstances were merely "technical."

geously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felons — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.<sup>218</sup>

Similarly, in *Cheshire v. State*,<sup>219</sup> the court wrote:

As his third issue, Cheshire argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree. The factor of heinous, atrocious or cruel is proper only in torturous murders — those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The physical evidence simply does not support such a finding here. At best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.<sup>220</sup>

From the foregoing, it would seem that the heinousness circum-

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218. *Id.* at 1063 (emphasis in original).

219. 568 So. 2d 908 (Fla. 1990).

220. *Id.* at 912.

stance applies only where the murderer intended that the killing be deliberately and extraordinarily painful.<sup>221</sup> But in *Hitchcock v. State*,<sup>222</sup> the court reached an opposite conclusion. In 1977, a jury convicted James Ernest Hitchcock of first degree murder based on evidence that he had sexual intercourse with his brother's thirteen-year-old step-daughter and then choked and beat her to death when she said she was going to tell her mother.<sup>223</sup> On habeas corpus review, the United States Supreme Court held that the sentencing jury and judge had been improperly limited in the consideration of mitigating evidence.<sup>224</sup> At resentencing, the jury recommended imposition of the death sentence. The trial court imposed that sentence, finding among other things, that the murder was especially heinous, atrocious, or cruel. On appeal, the Florida Supreme Court rejected Mr. Hitchcock's challenge to this finding:

That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. *Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111 (1985). Hitchcock stated that he kept "chokin' and chokin'" the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882 (1982). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." See *Doyle v. State*, 460 So. 2d 353 (Fla. 1984); *Adams; Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel.<sup>225</sup>

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221. *Porter* and *Cheshire* are difficult to square with the many cases applying the circumstance where the defendant has repeatedly stabbed, or has violently throttled, the decedent in a berserk frenzy with little or no evidence of torturous intent. *E.g.* *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) (defendant repeatedly stabbed decedent) and *Rivera v. State*, 561 So. 2d 536 (Fla. 1990) (while under extreme disturbance defendant strangled decedent).

222. 578 So. 2d 685 (Fla. 1990).

223. *Hitchcock v. State*, 413 So. 2d 741, 743 (Fla.), *cert. denied*, 459 U.S. 960 (1982).

224. *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

225. *Hitchcock*, 578 So. 2d at 692-93.

Thus, in *Hitchcock*, the court wrote that torturous intent was not necessary to application of the circumstance, without any mention of *Porter* and *Cheshire*, which had emphasized the necessity of such an intent. The tension between these cases is typical of the caselaw regarding this circumstance. *Hitchcock*, *Cheshire* and *Porter* show that the court is still far from finding uniform rules for its application.<sup>226</sup>

### i. Premeditation

The premeditation circumstance<sup>227</sup> was promulgated in 1979 in apparent response to a controversy regarding whether the heinousness circumstance applied where there was an "execution-type killing."<sup>228</sup> The Florida Supreme Court's interpretation of the circumstance has varied considerably from case to case. Commentator Jonathan Kennedy has written that the decisions on the circumstance through 1987 resulted in "a fully incoherent pattern."<sup>229</sup> The supreme court sought to narrow application of the circumstance in *Rogers v. State*,<sup>230</sup> holding that the "calculated" element required "heightened premeditation," meaning "a careful plan or prearranged design."<sup>231</sup> Cases during the survey period reflect the tension between the narrowing construction in *Rogers* and the court's previous tendency to read the circumstance broadly.

### i. Reloading or Rearming

Prior to 1990, the Florida Supreme Court had held with middling

226. Two cases decided on the same day highlight the problem. In *Sochor v. State*, 580 So. 2d 595 (Fla. 1991), the supreme court focused only on the decedent's state of mind: "The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim." But in *McKinney v. State*, 579 So. 2d 80 (Fla. 1991), the focus was on the defendant's state of mind: "The evidence does not show that the defendant intended to torture the victim."

227. FLA. STAT. § 921.141(5)(i) (1991).

228. For the history of the circumstance, see Kennedy and Barnard, *supra* note 77.

229. Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STET. L. REV. 47 (1987).

230. 511 So. 2d 526 (Fla. 1987).

231. *Id.* at 533. Subsequently, the supreme court suggested in *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990) that the Constitution requires the narrowing construction given in *Rogers*. But in *Eutzy v. State*, 541 So. 2d 1143, 1147 (Fla. 1989), the court characterized the *Rogers* construction as "a mere evolutionary refinement in the law," so as not to be applied retroactively.

consistency that the premeditation circumstance may be established by proof that the murderer rearmed himself or reloaded his weapon before delivering the fatal wound.<sup>232</sup> In two 1990 cases, the court refused to expand, and then eliminated, this body of law.

In *Campbell v. State*,<sup>233</sup> the evidence showed that James Campbell went to a house with the intent of robbing the occupants, who were apparently unknown to him. Sue Zann Bosler, who was in the bathroom at that time, heard the doorbell ring and then heard her father, Billy, grunting and groaning. When she came out, Mr. Campbell, who had been stabbing the father, attacked and stabbed her. After he stabbed Ms. Bosler, Mr. Campbell then resumed the attack on her father, who thereafter died from his injuries.<sup>234</sup> On appeal from Mr. Campbell's conviction and death sentence, the supreme court disapproved of the use of the premeditation circumstance:

We disagree with the court's finding that the stabbing was committed in a cold, calculated, and premeditated manner. The state argues that because Campbell stabbed Billy, then stopped when he attacked Sue Zann, and then returned to stabbing Billy, he had time to reflect upon and plan his resumed attack on Billy. See *Swafford v. State*, 533 So.2d 270 (Fla.1988), *cert. denied*, 109 S.Ct. 1578 (1989) (cold, calculated, and premeditated aggravating circumstance present where defendant shot victim, reloaded, then resumed shooting). This factor generally is reserved for cases showing "a careful plan or prearranged design." *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), *cert. denied*, 484 U.S. 1020 (1988). Campbell's actions took place over one continuous period of physical attack. His assault on Sue Zann provided him with no respite during which he could reflect upon or plan his resumption of attack on Billy, unlike the situation in *Swafford* wherein the act of reloading the gun provided a break in the attack.<sup>235</sup>

Although one might wonder how reloading a weapon, without more, shows "a careful plan or prearranged design," *Farinas v. State*,<sup>236</sup> rendered such speculation unnecessary. There, the court rejected the application of the premeditation circumstance where Alberto Farinas had to unjam his pistol three times before firing the fatal bul-

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232. See Kennedy, *supra* note 229, at 88-92.

233. 571 So. 2d 415 (Fla. 1990).

234. *Id.*

235. *Id.* at 418.

236. 569 So. 2d 425 (Fla. 1990).

lets while his estranged lover lay helpless on the ground. The court rejected the state's reliance on cases involving reloading, and overruled the reloading cases in a footnote:

The state's reliance upon *Phillips v. State*, 476 So. 194 (Fla.1985), is misplaced. In *Phillips*, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in *Phillips*, however, was predicated on *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984). We receded from this portion of *Herring* in our decision in *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, 108 S.Ct. 733 (1988).<sup>237</sup>

## ii. The Cold, Calculated Crime of Passion

*Rogers* did not purport to define the other elements of the circumstance ("cold," "premeditated," and "without a pretense of moral or legal justification"). As the statute is written, the state should have to prove these additional elements even where the murder was "calculated" as defined in *Rogers*.<sup>238</sup> In subsequent cases, the court seems to have missed this point and simply considered a showing of such a plan or design sufficient to establish the circumstance without more.

It would stand to reason that a crime of passion would not satisfy the "cold"<sup>239</sup> element of the premeditation circumstance. Thus in *Mitchell v. State*,<sup>240</sup> the court wrote:

We recently defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design. *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The medical examiner testified that the number of stab wounds and the force with which they were delivered were consistent with a killing consummated by one in a

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237. *Id.*

238. 511 So. 2d at 533.

239. Webster defines "in cold blood" as "without the excuse of passion; with deliberation." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 354 (Deluxe 2d ed.)

240. 527 So. 2d 179 (Fla. 1988).

rage. A rage is inconsistent with the premeditated intent to kill someone, and there was no other evidence of premeditation. Accordingly, we reverse the trial court on the finding that the murder was cold, calculated and premeditated.<sup>241</sup>

But in *Porter v. State*,<sup>242</sup> the supreme court upheld the application of the circumstance to "a crime of passion." It may be remembered from the discussion of the heinousness circumstance that, in *Porter*, the supreme court struck down application of that circumstance because the evidence was consistent with the theory that Porter's crime was one of passion. However, notwithstanding this finding, the supreme court upheld the application of the premeditation circumstance:

The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., *Hamblen v. State*, 527 So. 2d 800, 805 (Fla. 1988); *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. *Hamblen*, 527 So.2d at 805; *Rogers*, 511 So.2d at 533. See, e.g., *Koon v. State*, 513 So.2d 1253 (Fla.1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). *Hamblen* and *Rogers* show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process. Nor does it apply when a killing occurs during a fit of rage because "rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. *Mitchell v. State*, 527 So.2d 179, 182 (Fla.), cert. denied, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988). This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder

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241. *Id.* at 182; see also *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990).

242. 564 So. 2d 1060 (Fla. 1990). *Porter* and *Thompson* were decided the same day, but make no mention of each other.

well in advance.<sup>243</sup>

Thus, in *Porter* the court substituted one element of the circumstance, "calculated",<sup>244</sup> for the entire circumstance.

### iii. The Unreasonable Pretense

In *Banda v. State*,<sup>245</sup> the court interpreted the "without any pretense of moral or legal justification" portion of the circumstance as follows:

Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed "without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat. (1985). The state must prove this last element beyond a reasonable doubt, in addition to the other elements of this particular aggravating factor. See *Jent v. State*, 408 So.2d 1024, 1032 (Fla.1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencings. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. *Cannady v. State*, 427 So.2d 723, 730-31 (Fla.1983). We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony.

On the other hand, we have upheld the trial court's finding that no "pretense" existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a \$15.00 debt, but where the evidence showed that the victim had never been violent or threatening and

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243. *Id.* at 1064.

244. In *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), the supreme court quoted at length from the portion of *Rogers* defining "calculated" as involving a prearranged design or plan. Both *Hamblen* and *Rogers* involved killings during the course of robberies. *Koon v. State*, 513 So. 2d 1253 (Fla. 1987), also did not involve a "crime of passion". Mr. Koon killed a person who was going to testify against him in a counterfeiting case. Hence, none of those cases involved any question regarding the "cold" element.

245. 536 So. 2d 221 (Fla. 1988).



had been attacked by surprise and stabbed repeatedly. *Williamson v. State*, 511 So.2d 289, 293 (Fla.1987), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.<sup>246</sup>

In two cases during the survey period, the supreme court upheld application of the premeditation circumstance where the record showed some claim of legal or moral justification of the offense.

In *Pardo v. State*,<sup>247</sup> Manuel Pardo, Jr., a former police officer, was charged with killing nine people over a four-month period. Mr. Pardo admitted killing these persons but said he should avoid culpability "because he believed all the victims to be drug dealers, who 'have no right to life.'"<sup>248</sup> The court affirmed application of the premeditation circumstance without discussion of this claim of justification.

In *Gunsby v. State*,<sup>249</sup> the evidence showed that a friend was hospitalized after an altercation with an Iranian proprietor of a nearby grocery store. Announcing that he was "tired of those damn Iranians messing with the black," Donald Gunsby went to the grocery store with a shotgun and killed the brother of the man who had hurt his friend.<sup>250</sup> The supreme court rejected Mr. Gunsby's assertion that his delusion of being a protector of the black community formed a pretense of moral or legal justification so that the premeditation circumstance should not apply:

Gunsby claims that the trial judge erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Gunsby asserts that his delusion that he was a protector of the black community helped form a pretense of justification which renders this aggravating factor inapplicable. We disagree. The record is clear that Gunsby himself was never harassed or threatened in any way by the victim or by the victim's brother. In fact, the evidence reflects that Gunsby's delusion seemed to be directed toward ridding his neigh-

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246. *Id.* at 224-25.

247. 563 So. 2d 77 (Fla. 1990).

248. *Id.* at 78.

249. 574 So. 2d 1085 (Fla. 1991).

250. *Id.*

borhood of drug dealers. However, this murder was not predicated upon the fact that the victim was a drug dealer. We find that there exists no reasonable pretense of moral or legal justification under the circumstances of this case. Further, we find that this record clearly supports the heightened premeditation necessary to support this aggravating circumstance.<sup>251</sup>

In requiring that the pretense be reasonable, the court did not discuss the *Banda* definition of "pretense" as something alleged or believed on slight grounds; an unwarranted assumption.

#### iv. Slightly Heightened Premeditation

"Simple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, and premeditated manner."<sup>252</sup> In *Holton v. State*,<sup>253</sup> evidence showed that Rudolph Holton bound and garrotted Katrina Grady with pieces of nylon cloth.<sup>254</sup> One might imagine that this method of killing would involve a level of coldness and calculation sufficient to satisfy the premeditation circumstance, but the Florida Supreme Court disapproved of its application, stating that the strangulation "could have been a spontaneous act in response to the victim's refusal to participate in consensual sex."<sup>255</sup>

It would obviously be impossible to define the point at which "simple" premeditation becomes "heightened" such that the premeditation circumstance applies. Several cases indicate that the premeditation must have preceded the defendant's encounter with the decedent. The supreme court has repeatedly held that *Rogers* requires that the defendant "plan or arrange to commit murder before the crime begins."<sup>256</sup> In *McKinney v. State*,<sup>257</sup> the supreme court rejected the trial

251. *Id.*

252. *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990). *But see Valle v. State*, 581 So. 2d 40 (Fla. 1991), holding that the Ex Post Facto Clause did not bar retroactive application of the circumstance because it "only reiterated" the premeditation of first degree murder.

253. 573 So. 2d 284 (Fla. 1990).

254. *Id.* at 292. Apparently the evidence showed that Ms. Grady was aware of the strangulation.

255. *Id.*

256. *McKinney v. State*, 579 So. 2d 80 (Fla. 1991); *see also Hamblen v. State*, 527 So.2d 800 (Fla.1988) (angered when robbery victim set off alarm, defendant forced her into another room and shot her; error to find premeditation circumstance).

court's application of the premeditation circumstance. The evidence showed that Franz Patella stopped his car to ask Boris McKinney, a stranger, for directions. Mr. McKinney then jumped into Mr. Patella's car, hit him, and ordered him to drive to an overpass two blocks away. The entire sequence "took only minutes."<sup>258</sup> In striking the circumstance, the supreme court stated that there was no evidence that Mr. McKinney "planned to commit any crime at all until the opportunity presented itself. Since this crime occurred only through a chance encounter, the evidence does not rise to the level of 'heightened premeditation' required by this circumstance."<sup>259</sup>

*McKinney* and *Holton*, lead one to think that the premeditation circumstance could not apply where the defendant kills a police officer during a routine traffic stop lasting only a few minutes. *Farinas* adds support to such a conclusion. There, the court held that evidence showing the defendant abducted his estranged lover and shot and killed her when she tried to escape even though it took him several moments to unjam his gun was insufficient to support a conclusion of premeditation.<sup>260</sup> The supreme court thought otherwise in *Valle v. State*.<sup>261</sup> Upon being stopped for a traffic violation, Manuel Valle told his companion that he was going to waste the officer. He then walked over to the patrol car and shot the officer.<sup>262</sup> The trial court noted that "approximately 2 to 5 minutes [had] elapsed from the time the defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill Officer Pena."<sup>263</sup> Without any mention of *Rogers*, the supreme court breathed old life into new law by relying on the reloading cases of *Swafford* and *Phillips* in upholding the trial court's finding.

#### j. Law Enforcement Officers and Public Officials

The remaining two aggravating circumstances allow consideration of the decedent's status as a law enforcement officer<sup>264</sup> or a public offi-

257. 579 So. 2d 80 (Fla. 1991).

258. *Id.*

259. *Id.*

260. See *Farinas v. State*, 569 So. 2d 425 (Fla. 1990).

261. 581 So. 2d 40 (Fla. 1991). Although decided on the same day as *McKinney*, *Valle* contains no mention of the principles set out there.

262. *Id.*

263. *Id.*

264. "The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." FLA. STAT. § 921.141(5)(j) (1991).

cial.<sup>265</sup> The law enforcement officer circumstance has never been used independently of the other law enforcement circumstances (avoiding arrest and hindering law enforcement),<sup>266</sup> and the public official circumstance has apparently never been used.

## 2. Mitigating Evidence

Since the promulgation of Section 921.141, there has been considerable litigation regarding the nature of mitigation and the concept of "mitigating circumstances." As already noted, the consideration of mitigation was originally limited to the statutory mitigating circumstances. The process by which the trial court is to determine the existence of mitigation was not rationalized until *Rogers* and *Campbell* [observing that "our state courts continue to experience difficulty in uniformly addressing mitigating circumstances"] and the supreme court has not allowed jury instructions on various nonstatutory circumstances. As discussed above, the supreme court reached diametrically opposed results in *Nixon* [sentence for other offenses not relevant to defendant's "character, prior record, or the circumstances of the crime") and *Jones* [sentence for other offense constituted factor that might cause jury to decline to impose the death sentence]. Other cases during the survey period show similar confusion about the mitigation process.

In *Floyd v. State*,<sup>267</sup> the defendant unsuccessfully sought to argue to the jury the absence of various aggravating circumstances as mitigation. The Florida Supreme Court, in upholding the trial court's ruling, relied on the holding in *Stewart v. State*.<sup>268</sup> In so ruling, the supreme

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265. "The victim of the capital felony was an elected or appointed public official engaged in the performance of appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity." FLA. STAT. § 921.141(5)(k) (Supp. 1990).

266. *Valle v. State*, 581 So. 2d 40 (Fla. 1991). Although this circumstance was merged by the trial court with the other two law enforcement circumstances, the supreme court wrote that its retroactive application would not violate the Ex Post Facto Clause because it duplicated those circumstances.

267. 569 So. 2d 1225 (Fla. 1990).

268. 549 So. 2d 171 (Fla. 1989), *cert. denied*, 110 S. Ct. 3294 (1990). In *Stewart*, the court wrote:

The trial court properly rejected Stewart's confusing request that the jury be instructed on all possible aggravating factors so that he could argue that the absence of many of these factors was a reason for imposing a lesser sentence. Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented.

court ignored the fact that, in the past, it had used the absence of aggravating circumstances in support of its decision to reverse a death sentence,<sup>269</sup> and made no mention in *Jones* that mitigation consists of anything that might support a life sentence. Since the court has stressed that the death penalty is to be reserved for the least mitigated and most aggravated of murders,<sup>270</sup> it stands to reason that absence of aggravating circumstances will take a murder from the class of "most aggravated" murders and, therefore, support a life sentence. In its summary discussion in *Floyd*, the supreme court does not seem to have considered these matters.

In *Campbell v. State*,<sup>271</sup> the supreme court introduced the notion of "categories" of nonstatutory mitigation. Its nonexclusive list somewhat arbitrarily differentiates between "contribution to community or society" (category 2) and "charitable or humanitarian deeds" (category 5), and also differentiates between the preceding two and "potential for rehabilitation" (category 3). Furthermore, it does not list the most powerful of all mitigating circumstances; that the killing was the product of a heated domestic confrontation.<sup>272</sup>

Perhaps more important is the question of how the categories fit into the equation resulting in the sentencing decision. Although the

Fla.Std.Jury Instr. (Crim.) 78 (1981).

*Id.* at 174.

269. *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) (defendant took hostages and killed deputy who arrived and pointed gun at him; reversing death sentence, court observed that "the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent." *Id.* at 812).

270. *Songer v. State*, 544 So. 2d 1010 (Fla. 1989).

271. 571 So. 2d 415 (Fla. 1990).

272. Usually without recognizing this as a mitigating factor (the court typically addresses it in the context of proportionality review), the court has repeatedly asserted its importance. *E.g.*, *Blakely v. State*, 561 So. 2d 560 (Fla. 1990) ("'[T]his Court [has] stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted.' *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988). We have expressly applied this proportionality review to reverse the death penalty in a number of domestic cases. On the other hand, we have affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior 'similar violent offense.' In the instant case, *Blakely* had committed no prior similar crime. The killing resulted from an ongoing and heated domestic dispute and was factually comparable to that in *Ross v. State*, 474 So. 2d 1170 (Fla. 1985), wherein the husband bludgeoned the wife to death with a hammer or other blunt instrument. We reversed the death penalty there on proportionality grounds.") In *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), the court did (perhaps for the first time) specifically refer to a domestic relationship as a mitigating circumstance.

court often states that the sentencing decision is not to be reached by merely counting the aggravating and mitigating circumstances,<sup>273</sup> the number of circumstances is often of great importance in appellate decisions. For instance, the court will rarely uphold a death sentence where there is only a single aggravating circumstance.<sup>274</sup> Similarly, it will rarely reverse a death sentence where there are no mitigating circumstances.<sup>275</sup> In the eighteen cases in which death sentences were affirmed on direct appeal, the supreme court approved of an average of just over three aggravating circumstances per case. In those same eighteen cases, there was an average of between one and two mitigating circumstances [whether statutory or nonstatutory] found per case. Numbers do seem to count for quite a bit.

The question of how the "categories" of mitigation count is of much practical importance. How these "categories" fit into the sentencing calculus is open to question. On the one hand, a broad "category," such as category 2 ("contribution to community or society") may subsume a variety of nonstatutory "circumstances" (such as "exemplary work, military, family, or other record") which might count as several "circumstances" but as only one "category." On the other hand, a single "circumstance" (exemplary work record) may fit into two "categories" ("contribution to community or society" and "potential for rehabilitation"). Presumably further litigation will be needed to determine how the "categories" are to be used.

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273. *E.g.* *White v. State*, 403 So. 2d 331, 336 (Fla. 1981). The standard jury instructions do not inform the jurors of this principle.

274. In 1990, the supreme court reversed all three death sentences to come before it on direct appeal in which the trial court found only one aggravating circumstance. *Morris v. State*, 557 So. 2d 27 (Fla. 1990), *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990), *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990). Section 921.141(2)(a) speaks of a determination of whether "sufficient aggravating circumstances exist." FLA. STAT. § 921.141(2)(a) (1991). Taken literally, the use of the plural should forbid a death sentence where there is but one aggravating circumstance.

275. In 1990, the court upheld all eight death sentences to come before it on direct appeal where the trial court found no mitigation. *Reed v. State*, 560 So. 2d 203 (Fla. 1990), *Ventura v. State*, 560 So. 2d 217 (Fla. 1990), *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990), *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990), *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990), *Sanchez-Velasco v. State*, 570 So. 2d 908 (Fla. 1990), and *Lewis v. State*, 572 So. 2d 908 (Fla. 1990). In three of these cases (*Ventura*, *Floyd*, and *Sanchez-Velasco*), the trial court found only two aggravating circumstances.

#### IV. APPELLATE REVIEW: CLOSE ENOUGH FOR GOVERNMENT WORK?

An enduring theme of the United States Supreme Court's capital cases is the idea of heightened due process.<sup>276</sup> In upholding Florida's capital punishment statute in 1976, the Court emphasized the importance of full appellate review as a means of effectuating this principle.<sup>277</sup> Since 1976, the Florida Supreme Court has experienced considerable difficulty in trying to comply with the Eighth Amendment requirement of appellate review.

##### A. *Parker v. Dugger*

The United States Supreme Court expressed puzzlement about the Florida Supreme Court's procedure in review of death sentences in *Parker v. Dugger*.<sup>278</sup> At Robert Lacy Parker's capital sentencing proceeding for two murders, his attorney presented substantial statutory and nonstatutory mitigating evidence. Apparently giving this evidence some credit, the jury rendered life verdicts for both crimes. Nevertheless, the trial court imposed a death sentence for one of the murders. The sentencing order made no mention of nonstatutory circumstances, but did include a statement that "[t]here are no mitigating circumstances that outweigh the aggravating circumstances."<sup>279</sup> On appeal, the Florida Supreme Court struck two of the aggravating circumstances found by the trial court, but nevertheless affirmed the death sentence on the ground that the trial court "found no mitigating circumstances to balance against the aggravating factors."<sup>280</sup>

Eventually the case came to the Supreme Court on collateral review. In writing for the Court, Justice O'Connor agreed with Mr.

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276. "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S.:153 (1976) (plurality opinion) (citing cases). "In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Mills v. Maryland*, 108 S.Ct. 1860, 1866 (1988). See also *Proffitt v. Wainwright*, 685 F.2d 1227, 1253 (11th Cir. 1982) ("reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty decisions]") and *Beck v. Alabama*, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination).

277. *Proffitt v. Florida*, 428 U.S. 242 (1976).

278. 111 S. Ct. 731 (1991).

279. *Id.*

280. *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985).

Parker that the Florida courts had acted arbitrarily and capriciously in failing to treat his mitigating evidence adequately.<sup>281</sup> Since much of the mitigating evidence was uncontroverted, and since the trial court sentenced Mr. Parker to life imprisonment for one of the murders, she reasoned that the trial judge had necessarily found the existence of some mitigating evidence.<sup>282</sup> Noting that the Florida Supreme Court presents itself as a reviewing court rather than a reweighing court, Justice O'Connor stated that a purely reviewing court would have ordered a new sentencing proceeding rather than weigh the mitigating evidence against the diminished list of aggravating circumstances, and find it lacking.<sup>283</sup> In the alternative, she reasoned that a reweighing court would have reweighed the evidence or conducted a harmless error analysis based on the mitigating evidence found by the trial court, and noted that the Florida Supreme Court had not done so because it refused to recognize the existence of the mitigating evidence:

What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.<sup>284</sup>

Reinforcing the importance of full appellate review in Florida's capital sentencing scheme, the Court found that the state supreme court had failed in its duty, stating:

The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings.<sup>285</sup>

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281. *Parker*, 111 S. Ct. at 759.

282. *Id.* at 736-38.

283. *Id.* at 738.

284. *Id.* at 739.

285. *Id.* at 739-40. The comment that "there is a sense in which the court did not review Parker's sentence at all" can apply with equal force to other Florida capital decisions. *See, e.g.*, *Lewis v. State*, 572 So. 2d 908, 912 (Fla. 1990), in which the court conducted no independent review, writing only that the trial court's findings were "sup-



Thus, while holding that the Florida Supreme Court had failed to act as either a reviewing court or a reweighing court, the Court indicated that the state system of appellate review had failed to comport with the requirements of the Eighth Amendment.

### B. *Reweighing*

As noted in *Parker*, the Florida Supreme Court has declined to engage in the appellate reweighing of aggravating and mitigating circumstances contemplated in *Proffitt*.<sup>286</sup> During the survey period, the supreme court reaffirmed its position by stating, in *Freeman v. State*, “[t]he trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty. It is not this Court’s function to reweigh these circumstances.”<sup>287</sup>

### C. *Procedural Obstacles to Appellate Review*

More generally, *Proffitt* contains the notion of consistency in resolution of the merits of issues on appeal.<sup>288</sup> In keeping with the principle of full appellate review in capital cases, the general rule in this country is to limit the use of technical obstacles to appellate review in capital cases.<sup>289</sup> Florida, however, has fostered the application of the contemporaneous objection rules<sup>290</sup> and other procedural obstacles to appellate review, although this policy has not been without inconsistency, as shown by recent decisions.

In *Floyd v. State*,<sup>291</sup> the supreme court held that even though the

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ported by the record and we find no error.”

286. See *Atkins v. State*, 497 So. 2d 1200 (Fla. 1986); *Smith v. State*, 407 So. 2d 894 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982).

287. *Freeman*, 563 So. 2d at 77.

288. *Proffitt*, 428 U.S. at 242.

289. 41 C.J.S., *Homicide* § 414, nn. 23-28.

290. Florida actually has several codified contemporaneous objection rules. The ones that usually apply to criminal cases are section 90.104, Florida Statutes (pertaining to evidentiary objections), and Rule 3.390 (d) and (e), Florida Rules of Criminal procedure (pertaining to jury instructions). Various other rules and statutes (such as Rules 3.600, Florida Rules of Criminal Procedure pertaining to motions for new trial and Rule 2.070, Florida Rules of Judicial Administration, pertaining to recording of court proceedings, and section 90.107, Florida Statutes, pertaining to limiting instructions) also bear on preservation issues, as does a confused and sometimes contradictory body of ever-evolving case law.

291. 569 So. 2d 1225 (Fla. 1990).

trial court erred by refusing to grant the defendant's cause challenge to a juror named Hendry, an obvious lesson is that, to preserve such an issue for appeal, one should exhaust peremptory challenges, request additional peremptory challenges, and have such a request denied by the trial court.<sup>292</sup>

However, in *Trotter v. State*,<sup>293</sup> when Melvin Trotter's attorney did exactly that in his capital trial, the Florida Supreme Court held that the issue was not preserved for review:

Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.<sup>294</sup>

The purpose of the contemporaneous objection rule is to prevent the defense from raising for the first time on appeal matters that were not presented to the trial court.<sup>295</sup> It would appear that this purpose

292. *Id.* One might say that in *Floyd* the court confused the logically distinct issues of preservation for appellate review and demonstration of prejudice. The court obviously reached the merits of the issue of whether the trial court erred by denying the cause challenge. Strictly speaking, it held that the defense failed to show that it was prejudiced by running out of peremptory challenges because it did not show that an objectionable person remained on the jury. See *Hill*, 477 So. 2d at 556.

293. 576 So. 2d 691 (Fla. 1990).

294. *Id.* at 693.

295. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). In *Castor*, defense counsel did not object to an incomplete re-instruction to the jury on manslaughter. The court wrote:

As a general matter, a reviewing court will not consider points raised for the first time on appeal. *Dorminey v. State*, 314 So. 2d 134 (Fla. 1975). Where the alleged error is giving or failing to give a particular jury instruction, we have invariably required the assertion of a timely objection. *Febre v. State*, 30 So. 2d 367 (1947); see *Williams v. State*, 285 So. 2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

would be satisfied where the trial court directly rules on the merits of the issue that is later advanced on appeal. However, in *Nixon v. State*,<sup>296</sup> the supreme court held unpreserved an issue directly ruled on by the trial court. At the end of the prosecutor's argument to the jury in the guilt phase of his trial, Mr. Nixon's attorney moved for a mistrial arguing that the prosecutor had made an improper "Golden Rule" argument, noting that "at this time to instruct the jury to disregard it would be to no avail."<sup>297</sup> Although defense counsel had made no objection at the time of the challenged remark, the trial court treated the motion as an objection and ruled that the prosecutor's argument was not improper. On appeal, Mr. Nixon argued that his counsel's motion for a mistrial had preserved the issue for appeal under *State v. Cumbie*.<sup>298</sup> Rejecting this argument, the supreme court stated:

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*Id.* at 703.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See *Rivers v. State*, 307 So. 2d 826 (Fla. 1st Dist. Ct. App.), cert. denied, 316 So. 2d 382 (1975); *York v. State*, 232 So. 2d 767 (Fla. 4th Dist. Ct. App. 1969).

296. 572 So. 2d 1336 (Fla. 1990).

297. *Id.* A "Golden Rule" argument is one that invites jurors to imagine themselves in the place of one of the parties (or, in a criminal case, in the place of the victim). *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985) (such argument has been universally condemned by the courts). In *Nixon*, the prosecutor, in a somewhat confused discussion of his role in the litigation and of the emotions generated by the facts of the case, told the jury that he had "an obligation to make you feel just a little bit, just a little bit, of what [the decedent] felt because, otherwise, sometimes I think it's easy to forget that." 572 So. 2d at 1340.

298. 380 So. 2d 1031 (Fla. 1980). In *Cumbie*, the supreme court ruled that a motion for mistrial made after the jury retired to deliberate did not preserve for appeal an issue of improper prosecutorial argument, writing:

*Clark* requires that a motion for mistrial be made "at the time the improper comment is made." In the present case, to have met this requirement, we hold that it would have been sufficient if *Cumbie* had moved for mistrial at some point during closing argument or, at the latest, at the conclusion of the prosecutor's closing argument. To avoid interruption in the continuity of the closing argument and more particularly to afford defendant [sic] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. Here, *Cumbie* objected to the prosecutor's comment, and the trial court sustained the objection and instructed the jury to disregard this remark. If *Cumbie* felt that the judge's admonition was inadequate, he should have informed the judge of

We do not construe *Cumbie* to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. *Castor v. State*, 365 So.2d 701, 703 (Fla.1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in *Cumbie*. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.<sup>299</sup>

The supreme court's reliance on *Castor* is somewhat questionable, since *Castor* merely stands for the proposition that one cannot raise on appeal arguments that one did not make in the trial court. It would seem that one would be in compliance with *Castor* where the trial court rules on the merits of one's objection. In *Nixon*, the trial judge did rule on the merits and found the prosecutor's argument unobjectionable. Given this ruling, there is no likelihood that the trial court would have corrected the matter by giving a curative instruction, so that a request for such an instruction would have been useless under *Simpson v. State*.<sup>300</sup> Thus, the underlying premise of *Nixon* (that the trial court was not afforded the opportunity to remedy the situation) is invalid since the trial court would not have remedied the situation.

Moreover, the court in *Nixon* made no mention of the fact that a

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this fact at the time of his objection or, at the latest, at the end of the prosecutor's closing argument. The judge then may have been able to give additional curative instructions which may have remedied *Cumbie's* objection. The motion for mistrial in the present case, made after jury instructions and retirement of the jury for deliberation, however, came too late to preserve *Cumbie's* objection for appeal.

*Id.* at 1033-34.

299. *Nixon*, 572 So. 2d at 1341.

300. 418 So. 2d 984 (Fla. 1982).

month earlier, in *Occhicone v. State*,<sup>301</sup> it had not found a procedural bar where the trial court had refused to rule on the merits of an issue on the ground of procedural default. At Dominick Occhicone's trial, the state introduced evidence that he had been uncooperative when a deputy had tried to swab his hands for an atomic absorption test.<sup>302</sup> The trial court denied counsel's objection to this testimony as untimely because counsel had not objected at a previous bench conference concerning the deputy's testimony. Defense counsel subsequently objected when the prosecutor referred to the testimony in final argument. Without addressing the apparent procedural bar, the court directly reached the merits and held the prosecutor's argument proper.<sup>303</sup>

#### D. Counsel

From the foregoing, the Florida Supreme Court is not entirely consistent in the application of procedural bars to appellate review. Even if the court applied the bars with absolute consistency, the result would be inconsistent application of the law and hence of the death penalty. Contemporaneous objection rules do not discriminate between meritorious and nonmeritorious claims, but only between good and bad lawyering. It is the defendant with the bad lawyer rather than the defendant with the bad case whose conviction and sentence are affirmed. One obvious solution to this uneven application of the law would be to relax technical bars to appellate review. In *Sochor v. State*,<sup>304</sup> the supreme court specifically refused to do so. Another solution would be to raise the quality of counsel. The history of Florida capital litigation reflects a general inadequacy of counsel in capital cases. Over the years virtually every decision affirming a death sentence has revealed one or more substantial legal issues not preserved for appeal.<sup>305</sup> Yet Florida

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301. 570 So. 2d 902 (Fla. 1990).

302. *Id.*

303. *Id.*

304. 580 So. 2d 595 (Fla. 1991).

305. Most of the decisions affirming a death sentence on direct appeal in 1990 show some major issue not preserved for appeal. *Reed v. State*, 560 So. 2d 203 (Fla. 1990) (*Booth* issue); *Ventura v. State*, 560 So. 2d 217 (Fla. 1990) (neither appellate challenge to death sentence raised in trial court); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990) (failure to move to sever counts); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990) (improper testimony and argument; jury instruction); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990) (jury selection issues and collateral crimes evidence); *Holton v. State*, 573 So. 2d 284 (Fla. 1990) (prosecutorial argument); *Occhicone v. State*, 570 So. 2d 902

has not adopted, and does not seem inclined to adopt, any minimum standards for counsel in capital cases.<sup>306</sup> Nevertheless, two recent cases address questions involving the adequacy of counsel in post-conviction proceedings.

*Remeta v. State*,<sup>307</sup> involved the compensation of counsel in executive clemency proceedings. Section 925.035(4), Florida Statutes provides for the appointment of counsel to represent indigent death row inmates in such proceedings and allows for compensation "not to exceed \$1,000" in attorney's fees and costs. When a circuit court awarded \$3,000 in attorney's fees (based on a rate of \$60 per hour) and \$622.78 in costs to Daniel Remeta's clemency attorney, the state sought certiorari review in the district court of appeal. That court held that the award violated the statute.<sup>308</sup> Mr. Remeta thereafter obtained discretionary review in the supreme court which upheld the original award.<sup>309</sup> The supreme court stated that the statutory right to counsel in clemency proceedings "necessarily carries with it the right to have effective assistance of counsel."<sup>310</sup> Noting that it had previously spotted a "link between compensation and the quality of representation,"<sup>311</sup> the

(Fla. 1990) (jury instruction); *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990) (prosecutorial argument).

306. Guideline 5.1 of the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES sets out minimum qualifications for counsel and co-counsel in capital cases. Lead counsel should have: a minimum of five years of experience in criminal defense; prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought; and familiarity with and experience in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and should have attended and successfully completed, within the past year, a training or educational program focussing on the trial of cases in which the death penalty is sought. Co-counsel should have: at least three years of litigation experience in criminal defense; and prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder, or, alternatively, at least one of the three jury trials was for murder and one was for another felony; and should have within the past year completed at least one training or educational program focussing on the trial of cases in which the death penalty is sought.

307. 559 So. 2d 1132 (Fla. 1990).

308. *Id.* at 1134.

309. *Id.* at 1136.

310. *Id.* at 1135.

311. This "link" was observed in *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987) (holding unconstitutional fee cap for

court wrote that fair compensation of counsel was the "only way to ensure effective representation and give effect to the right to counsel in these death penalty clemency proceedings."<sup>312</sup>

Two weeks after the decision was rendered in *Remeta*, the supreme court addressed a claim of ineffectiveness of post-conviction counsel in *Lambrix v. State*.<sup>313</sup> Cary Lambrix asserted in an unsuccessful motion to vacate his murder conviction and death sentence, that the attorney who had represented him in a prior collateral proceeding had failed to provide effective assistance of counsel.<sup>314</sup> The supreme court affirmed the trial court's denial of the motion to vacate. The court stated that Mr. Lambrix had failed to demonstrate ineffectiveness under the test enunciated in *Strickland v. Washington*.<sup>315</sup> However, it specifically left open the question of whether there is a right to effective assistance of counsel in collateral relief proceedings.

### E. Relief

What relief should the court give if it finds the evidence insufficient as to a particular aggravating circumstance? The Florida Supreme Court has not established any set procedure. To the contrary, it has adopted radically different approaches from case to case.

An example of the court's confused approach was its decision to reverse Thomas Trotter's death sentence on the ground that the sentence of imprisonment circumstance had been improperly applied.<sup>316</sup> In its initial decision, the court ordered a judge resentencing.<sup>317</sup> But on rehearing, the court ordered a jury resentencing, with no explanation for the change in the relief granted.<sup>318</sup>

Two decisions rendered on the same day further muddied the waters. In *Capehart v. State*,<sup>319</sup> the court affirmed Gregory Capehart's death sentence even though the trial court had improperly relied on the premeditation circumstance in justifying the death sentence,<sup>320</sup> writing:

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appointed counsel in capital cases).

312. *Remeta*, 559 So. 2d at 1135.

313. 559 So. 2d 1137 (Fla. 1990).

314. *Id.*

315. *Id.* at 1138 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

316. *See Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

317. *Trotter*, 16 Fla. L. Weekly at S18.

318. 576 So. 2d at 694.

319. 583 So. 2d 1009 (Fla. 1991).

320. In addition to the premeditation circumstance, the trial court found three

Having determined one aggravating circumstance was erroneously considered by the trial judge, we must determine whether this error was harmless. The record before us reflects three valid aggravating circumstances and one nonstatutory mitigating circumstance. Having carefully scrutinized the record in this case, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating circumstances outweighed the mitigating evidence. Thus, the error was harmless beyond a reasonable doubt. *See, e.g., Holton*, 573 So.2d at 293. We therefore affirm the sentence of death.<sup>321</sup>

The supreme court gave no explanation for how it arrived at the conclusion that the trial court would have sentenced Mr. Capehart to death without the premeditation circumstance. Curiouser still is the court's failure to give any consideration to the effect that improper use of the circumstance might have had on the jury. Although the judge rejected most of Mr. Capehart's mitigating evidence, there is no reason to think that the jury did. One additional vote for life would have resulted in a life verdict, which could scarcely be overridden, given the substantial amount of mitigating evidence presented to the jury.

*Capehart* is difficult to reconcile with *Omelus v. State*.<sup>322</sup> At Ulrick Omelus's sentencing proceeding after his conviction for acting as a principal in a contract murder, the state argued three aggravating circumstances: the pecuniary gain, premeditation, and heinousness circumstances. The trial court did not find the heinousness circumstance, but did apply the other two in sentencing Mr. Omelus to death pursuant to the jury's eight-to-four recommendation. The trial court found as a mitigating circumstance that the co-defendant, who actually committed the murder, was sentenced to life imprisonment. The supreme court found that the heinousness circumstance could not apply to Mr. Omelus,<sup>323</sup> and reversed the sentence for a jury resentencing, stating:

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other aggravating circumstances (prior conviction of violent felony, engaged in sexual battery at time of murder, and especially heinous, atrocious, or cruel) and one mitigating circumstance ("Defendant is a poor black man exploding in anger over his frustration due to the ills of a discriminatory society heaped upon him"), rejecting various other nonstatutory mental mitigating evidence. The jury recommended a death sentence by a vote of seven to five.

321. *Id.* at 1015.

322. 584 So. 2d 563 (Fla. 1991).

323. Although the evidence apparently showed that the killing itself would qualify for application of the circumstance, the evidence did not show that Mr. Omelus



Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances. Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in *DiGuilio*.<sup>324</sup>

*Omelus*, on the other hand, is difficult to square with *Herring v. State*.<sup>325</sup> In 1981, Ted Herring was charged with first degree murder of a convenience store clerk. The trial court followed the jury's eight-to-four recommendation of a death sentence, notwithstanding evidence of Mr. Herring's troubled childhood, psychological problems, learning disabilities, and low IQ. There was no evidence that he intended to kill the clerk prior to the robbery, but the trial court used the premeditation circumstance in sentencing him to death,<sup>326</sup> and the supreme court affirmed. Three years later, in *Rogers*,<sup>327</sup> the court specifically disapproved of the use of the circumstance in Mr. Herring's case. Accordingly, Mr. Herring argued on post-conviction that, under *Rogers*, his sentence was illegal. The supreme court rejected his claim:

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intended that the co-defendant inflict a high degree of pain.

324. *Id.* at 567.

325. 580 So. 2d 135 (Fla. 1991).

326. In all, the trial court found four aggravating circumstances and two mitigating circumstances.

327. The court wrote in *Rogers*: "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring v. State* [cit.], to the extent it dealt with this question." 511 So. 2d at 533.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla.1987), *cert. denied*, 485 U.S. 993 (1988).<sup>328</sup>

*Caphart*, *Omelus*, and *Herring* reflect completely different approaches to the issue. Under *Caphart*, the court looked only at the effect of the aggravating circumstance on the judge's sentencing decision, without regard to its possible effect on the jury. In *Omelus*, however, the court did look to the potential effect on the jury, even though the evidence would have been the same without the circumstance. But, in *Herring*, the court held that striking the circumstance could not have affected the verdict where the striking did not affect the evidence.<sup>329</sup>

#### F. *Proportionality*

In *Proffitt*, the Supreme Court emphasized the importance of proportionality review as a means of limiting arbitrary application of the death penalty in Florida. The Florida Supreme Court has not adopted a precise procedure for the conduct of proportionality review, and its cases are sometimes difficult to reconcile with one another, as shown by the cases of Ernest Fitzpatrick and James Ernest Hitchcock.

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328. *Herring*, 580 So. 2d at 138.

329. *See also Jones v. State*, 569 So. 2d 1234 (Fla. 1990) (new jury sentencing ordered where striking of heinousness circumstance would result in exclusion of evidence of sexual abuse on corpse).

In *Fitzpatrick v. State*,<sup>330</sup> the court reversed Mr. Fitzpatrick's death sentence where the trial judge had followed a jury recommendation of death. The court specifically wrote that it was reweighing aggravating and mitigating circumstances and that it was reversing solely because it believed that, in comparison to other cases involving the imposition of the death penalty, capital punishment was unwarranted in this case.<sup>331</sup>

Both cases relied upon in *Fitzpatrick* involved life verdicts. Hence, one would safely assume from *Fitzpatrick* that one could rely on life verdict cases in making a proportionality argument. However, in *Hitchcock v. State*,<sup>332</sup> the supreme court disapproved of reliance on life verdict cases in making a proportionality argument:

We also disagree with Hitchcock's claim that his death sentence is disproportionate. The court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted. The cases Hitchcock relies on are distinguishable, being primarily jury override cases, e.g., *Holsworth v. State*, 522 So.2d 348 (Fla.1988); *Welty v. State*, 402 So.2d 1159 (Fla.1981), cases dealing with domestic disputes, e.g., *Garron v. State*, 528 So.2d 353 (Fla.1988); *Wilson v. State*, 493 So.2d 1019 (Fla.1986), and cases with few valid aggravating circumstances and considerable mitigating evidence, e.g., *Songer v. State*, 544 So.2d 1010 (Fla.1989). On the circumstances of this case, and in comparison with other cases, we find Hitchcock's sentence of death proportionate to his crime. E.g., *Tompkins*; *Doyle*; *Adams*.<sup>333</sup>

## V. FINAL NOTE

As noted in the foregoing discussion, there are many capital crimes issues which will continue to be hotly argued in the years to come. This will be especially true if the Florida Supreme Court continues its frequent pattern of ignoring its own precedents.

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330. 527 So. 2d 809 (Fla. 1988).

331. See *Ferry v. State*, 507 So. 2d 1373 (Fla. 1987); *Amazon v. State*, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914 (1986).

332. 578 So. 2d 685, 693 (Fla. 1990).

333. *Id.*

## *Notes and Comments*

### Crime and Punishment? Judges' Gavels Become the Latest Weapon in the War on Drugs\*

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#### TABLE OF CONTENTS

I.	INTRODUCTION .....	1431
II.	STATISTICS .....	1433
III.	ADDICTION AS A DISEASE .....	1435
IV.	ADDICTION AS A DEFENSE .....	1440
V.	THE DRUG COURT PROGRAM .....	1442
	A. <i>The Need For Change</i> .....	1442
	B. <i>Background</i> .....	1446
	C. <i>Administrative Orders</i> .....	1447
	D. <i>Admission Criteria and Treatment Techniques</i> .....	1449
VI.	PROGRAM RESULTS, COSTS AND FUNDING .....	1454
VII.	HURDLES, PAST, PRESENT AND FUTURE .....	1458
VIII.	CONCLUSION .....	1462

#### I. INTRODUCTION

In 1973 President Richard Nixon declared a "world war" on drugs.<sup>1</sup> This war has resulted in several changes in the criminal justice system which have largely come from the executive and legislative branches.<sup>2</sup> These executive and legislative changes have been predominately concerned with law enforcement and punishment.<sup>3</sup> Recently, however, the judiciary has made some changes of its own.<sup>4</sup>

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\* The author thanks Judge Robert J. Fogan, Michael Rocque, Randi Burger, Judge Stanley Goldstein, and Tim Murray. Special thanks to Stuart MacIver; words can not express my appreciation for everything he has done.

1. Symposium, *The War on Drugs: In Search of A Breakthrough* A-3 (Steven Wisotsky & Robert C. Levine, eds., 1986).

2. *Id.* at A-3-A-12.

3. *Id.*

4. See generally *The Drugging of the Courts: How Sick Is the Patient and What*

The Eleventh<sup>5</sup> and Seventeenth Judicial Circuit Courts<sup>6</sup> of Florida have recently created comprehensive pre-trial intervention programs to provide defendants with an alternative to incarceration.<sup>7</sup> To date, these programs, enacted through what have been named "Drug Courts," have been effective in reducing the large number of cases crowding court dockets and consuming a tremendous amount of resources.<sup>8</sup>

This article outlines and evaluates the Drug Court programs by comparing their reported results with official criminal justice statistics. This article also discusses some of the problems that these programs have encountered and what the future holds. The purpose is to expose an innovative approach to handling drug cases in the courts in a cost efficient and effective way. The analysis includes scientific data concerning addiction as disease as well as the merits of these programs and a conclusion as to why they are vital to criminal law.

Although the Dade and Broward programs are similar, there are some differences. Where possible, this article discusses both of these programs together and explores their differences when necessary.

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*Is the Cure?* 73 JUDICATURE 314 (April-May 1990) ("An edited version of the panel presentation at the mid-year meeting of the [American Judicature Society] in Los Angeles on February 10, 1990") [hereinafter *The Drugging of the Courts*]; Editorial, *The Courts and the "War on Drugs"* 73 JUDICATURE 236 (Feb-March 1990) [hereinafter *The Courts and the War on Drugs*].

5. FLA. STAT. § 26.32 (1991)(Dade County, Florida).

6. *Id.* § 26.362 (Broward County, Florida).

7. *The Drugging of the Courts*, *supra* note 4, at 316-17; *The Courts and the "War on Drugs," supra* note 4, at 288; Eleventh Judicial Circuit, Dade County, Florida & Metro-Dade County Government, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County 1 (unpublished, undated pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Strategies for Action*]; Metro-Dade Department of Human Resources, Office of Rehabilitative Services, Diversion and Treatment Program: An Overview 1-2 (May 25, 1991) (unpublished pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Diversion and Treatment Program: An Overview*]; Seventeenth Judicial Circuit, Broward County, Florida, Drug Court Program, (unpublished, non-paginated pamphlet, on file with Judicial Projects Administrator, Broward County Courthouse) [hereinafter *Drug Court Program*].

8. Herbert M. Klein, Associate Chief Judge, Eleventh Judicial Circuit, Dade County Florida, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County—An Update, June 1990 2-3 (June 1990) (unpublished pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Update 1990*]; Eleventh Judicial Circuit, Dade County, Florida, Drug Court: April 1, 1991 (April 1, 1991) [hereinafter *Drug Court: April 1, 1991*].

## II. STATISTICS

In order to clearly understand the enormous stress placed upon the criminal justice system and, hence, the need for the Drug Court programs, it is necessary to be aware of the growing number of people entering the criminal justice system as drug offenders in Florida and nationally. The figures presented to illuminate the scope of the problem which the courts face in dealing with the war on drugs in the United States.

Sixty percent of the drugs produced throughout the world are consumed in the United States which represents only six percent of the world's population.<sup>9</sup> Throughout the last decade, the United States has moved steadily towards tougher enforcement policies.<sup>10</sup> In the eighties, President Reagan brought several government agencies into the war on drugs, including the IRS, CIA, and United States Navy.<sup>11</sup> By 1989, President Bush had expanded the scope of the drug war by pledging to remove the narcotics consumer to reduce the demand for drugs, thereby making the United States a less desirable market for international drug smugglers.<sup>12</sup>

The Florida criminal justice system felt the immediate impact of President Bush's new policy:<sup>13</sup>

Leading a statewide campaign against small time abusers is Broward County Sheriff Nick Navarro by his use of "sweeps"—massive arrests of dozens, and sometimes hundreds, of people for possession or purchase of small quantities of drugs. Navarro's extreme stance

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9. Sandi R. Murphy, *Drug Diplomacy and the Supply Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1260 n.2 (1990) (citing, *Presidential Certifications Regarding International Narcotics Control: Hearing and Markup Before the Sub-committee on Western Hemisphere Affairs of the Committee on Foreign Affairs*, House of Rep. on H.R. 4162 H.J. Res. 491, 493, 495, 497 and 499, 100th Cong. 2d Sess. 200 (1988) (statement of Rep. Peter H. Kostmayer)).

10. See Symposium, *supra* note 1, at A-4-A12.

11. *Id.* at A-4-A10.

12. Owen Ullman & Ellen Warren, *Bush Vows Billions In Drug War President Targets Demand, Suppliers*, MIAMI HERALD, September 6, 1989, at 1A. This article reviewed a speech delivered by President Bush from the Whitehouse during which he displayed a bag of crack. "Targeting both demand and supply, Bush promised an 'aggressive attack from every angle.'" *Id.* (quoting speech from Oval Office, Sept. 5, 1989).

13. *More Cells, Treatment Programs Needed Along With Drug Arrests*, SUN-SENTINEL, September 15, 1989, at 18A (Editorial)[hereinafter *More Cells, Treatment Programs Needed*].

is putting pressure on other parts of the criminal justice system.<sup>14</sup>

Systemic impact occurred on a national level as well.<sup>15</sup> While drug violation arrests, including sale, manufacture, possession and purchase, were down fourteen percent in 1990, as compared to 1989, the figures indicate that there was a seventy percent increase for such arrests since 1980.<sup>16</sup> During 1990, the majority (68.4 percent) of these arrests were for possession.<sup>17</sup>

The result of the increase in drug arrests has been a strain on both the courts and prisons.<sup>18</sup> "Demand-side policy . . . [has resulted in] a skyrocketing prison population that places a burden on the prison system . . . [because of only] a rhetorical commitment to . . . prevention, education and treatment."<sup>19</sup>

Similar figures exist for the Florida prison system.<sup>20</sup> From July, 1986 to April, 1989, the average monthly admissions to Florida prisons for drug violations increased from 380 to 1122 persons, an increase of 295 percent.<sup>21</sup> Furthermore, between 1980 and 1990 the Florida prison population grew from 19,722 to 42,733.<sup>22</sup> During this period, the percentage of inmates incarcerated for drug violations rose from 8.2 percent in 1980 to 36.1 percent in 1990.<sup>23</sup> Finally, "during this decade of dramatic change"<sup>24</sup> the number of "recidivists"<sup>25</sup> escalated from 22.6

14. *Id.*

15. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORT FOR THE UNITED STATES, 173 (1990).

16. *Id.*

17. *Id.*; see Michael E. Young, *S. Florida Drug War Bogs Down: Dealers Become Shrewd as Prices Take a Tumble*, SUN-SENTINEL, April 12, 1992, at 1B (Figures recently released from the Florida Department of Law Enforcement show that the majority of drug arrests in the State of Florida were also for possession. Of the 72,785 drug arrests for all of Florida in 1991, 52,619 were for possession while only 20,566 were for sale of narcotics).

18. *Courts and the "War on Drugs," supra* note 4, at 236; *More Cells, Treatment Programs Needed*, *supra* note 13, at 18A.

19. Murphy, *supra* note 9, at 1308.

20. See generally FLORIDA DEPARTMENT OF CORRECTIONS, ANNUAL REPORT 1989/1990 (Dec. 15, 1990)[hereinafter ANNUAL REPORT].

21. Bureau of Planning, Research & Statistics, Florida Department of Corrections, Prison Admissions and Release Trends, June 10, 1991 (non-paginated leaflet, on file with Florida Department of Corrections, Bureau of Planning Research and Development).

22. ANNUAL REPORT, *supra* note 20, at 30.

23. *Id.* at 32.

24. *Id.* at 31.

percent of the prison population in 1980 to 42.7 percent by 1990.<sup>26</sup> Simply put, the numbers indicate a drastic increase in prison populations due to drug violations.<sup>27</sup>

Initially, these statistics may suggest that enforcement policies are having a positive effect. However, a negative aspect of increasing prison populations is the cost which is now astronomical.<sup>28</sup> During the time from 1989 to 1990, the Florida Department of Corrections spent an average of \$39.73 per inmate, per day.<sup>29</sup> The result was an average annual cost of over \$14,000 per inmate, per year, for all Florida prisons.<sup>30</sup> A recent update for the fiscal year ending June 30, 1991 shows that the per diem rate had increased to \$40.02 resulting in a total of \$14,607.03 per inmate per year.<sup>31</sup> A significant amount of this money could be saved, if the legislature and the courts would view addicts as victims of a disease.

### III. ADDICTION AS A DISEASE

On March 30, 1981, John W. Hinckley, Jr. attempted to assassinate President Ronald Reagan.<sup>32</sup> At trial, Hinckley admitted he intended to kill the President; nonetheless, because he was suffering from a *disease*, he never spent a single day in prison.<sup>33</sup> Criminal laws protect those who are not responsible for their acts if they do not have the

25. BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (A habitual criminal; a criminal repeater.).

26. ANNUAL REPORT, *supra* note 20, at 32.

27. *Id.*

28. *Id.* at 66.

29. *Id.* Of that figure, \$31.45 was spent on operations (housing, guards, food, etc.), \$7.15 was spent on health services and \$1.12 for education. *Id.* The yearly totals per inmate are \$11,479.25, \$2,609.75 and \$408.08 respectively, for a grand total of \$14,497.08. *Id.*

30. The per diem rate of \$39.73 multiplied by 365 days computes to \$14,500.45 per inmate, per year.

31. Florida Department of Corrections, Summary of Selective Financial Data for the Fiscal Year Ended June 30, 1991 (June 30, 1991) (unpublished, non-paginated leaflet, on file with the Florida Department of Corrections, Bureau of Planning Research and Statistics)[hereinafter Summary of Selective Financial Data].

32. United States v. Hinckley, No. 81-306 (D. D.C., 1982); see PETER W. LOW ET AL., THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 22-30 (1986). There was no question, based on expert testimony, that Hinckley was suffering from a psychological disorder. The focus of the trial, however, was the severity of Hinckley's condition. *Id.*

33. LOW ET AL., *supra* note 32, at 22-30.



ability to control their actions or make "rational choices."<sup>34</sup> People like Hinckley who suffer from certain disorders are "afforded"<sup>35</sup> a recognized defense within the law, because "criminal punishment is inappropriate unless the defendant can be *blamed* for the offense . . . ."<sup>36</sup>

Drug dependency is a psychiatric disorder and is listed in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*.<sup>37</sup> Dependency and abuse disorders are characterized in the *DSM-III-R* by "continued use of . . . psychoactive substance[s] despite . . . [various deleterious effects on one's health, employment and social life and] . . . the development of withdrawal symptoms following cessation of, or a reduction in use . . . ."<sup>38</sup> A psychoactive substance is a mind or mood altering substance (chemical) such as stimulants, depressants, tranquilizers, and anti-depressants.<sup>39</sup> The *DSM-III-R* includes in its list of psychoactive substances cocaine, cannabis and various other controlled substances and narcotics.<sup>40</sup> The drug addict, as a criminal defendant, certainly fits the *DSM-III-R* definition as someone who risks arrest, loss of occupation and societal stigma, just to get high.<sup>41</sup>

Drug and alcohol addiction can come in two forms.<sup>42</sup> An individual may develop a physiological dependence where the body actually incorporates the drug into the person's system creating "tolerance"<sup>43</sup> and eventually, withdrawal-type conditions.<sup>44</sup> There is also a "psychological dependence"<sup>45</sup> which may not involve a physiological addiction. Rather, users develop a habit of using a drug or alcohol on a regular

34. *Id.* at 4. See generally Emily Campbell, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or A Question of Law?* 69 NEB. L. REV. 190 (1990) (discussing the applicability and standards of the insanity defense); WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.1(b) (1986).

35. LOW ET AL., *supra* note 32, at 4.

36. *Id.* at 3 (emphasis in the original).

37. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 165 (3d ed. rev. 1987)[hereinafter *DSM-III-R*].

38. *Id.*

39. ROBERT JEAN CAMPBELL, M.D., PSYCHIATRIC DICTIONARY 498 (5th ed. 1981).

40. *DSM-III-R*, *supra* note 37, at 169.

41. *Id.* at 165; see *supra* text accompanying note 37.

42. HAROLD E. DOWEIKO, CONCEPTS OF CHEMICAL DEPENDENCY 210-12 (1990).

43. *Id.* at 210.

44. *Id.* at 211.

45. *Id.*

basis because they "need"<sup>46</sup> the drug to relax, have fun, or to cope with daily living.<sup>47</sup>

Once a person becomes addicted to a substance, the disease of addiction takes over and the addict begins to live life for the next high.<sup>48</sup> Everything an addict does is in contemplation of when, how and where the drugs can be obtained.<sup>49</sup> "As the disease of addiction progresses; the individual comes to center his or her life around continued use of the chemical . . . . No price is too high, nor is any behavior unthinkable . . . ." <sup>50</sup>

Whether physiological or psychological, experts agree that addiction is a disease. The disease of addiction is characterized by "compulsion."<sup>51</sup> According to Dr. G. Douglas Talbott,<sup>52</sup> "the alcohol and drug addict is a disaster waiting to happen. They only need abuse to trigger the disease."<sup>53</sup> The compulsion begins as a chemical reaction in the brain whereby euphoria producing chemicals (naturally produced by the brain) are released creating an intense, pleasurable sensation.<sup>54</sup> A person then becomes addicted by attempting to recreate this sensation by using successively larger doses.<sup>55</sup> For the addict, there is no control over drug use because the brain chemicals that create the euphoric sensation also control behavior.<sup>56</sup> The presence of these chemicals is an abnormality that is inherited through one's genes.<sup>57</sup> For this reason, drug addiction, as well as alcoholism, is considered "a biochemical-ge-

46. DOWEIKO, *supra* note 42, at 211.

47. *Id.* at 211-12.

48. *Id.* at 167.

49. *Id.* at 166-67 (citing NARCOTICS ANONYMOUS WORLD SERVICE OFFICE, INC., NARCOTICS ANONYMOUS 11 (1982)).

50. DOWEIKO, *supra* note 42, at 167.

51. *Id.* at 167; *see also* EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY: ABORTION, HOMOSEXUALITY AND DRUG ADDICTION 122 (1965).

52. Dr. G. Douglas Talbott, M.D., F.A.C.P.; Program Director, Georgia's Disabled Doctors Program; Director, Ridgeview Institute Alcohol & Drug Program; Clinical Associate Professor, Emory Medical School.

53. G. Douglas Talbott, M.D., F.A.C.P., Alcoholism Is A Disease! 143 (unpublished, undated report on file with NOVA LAW REVIEW). Although this report is primarily about the disease of alcoholism, there are several relevant issues about drug addiction as well.

54. DOWEIKO, *supra* note 42, at 62.

55. *Id.* at 211.

56. Talbott, *supra* note 53, at 143.

57. *Id.*

netic disease."<sup>58</sup> Generally, suffering from this disease will not result in community sympathy.<sup>59</sup>

However, society does tolerate the recreational use of some psychoactive substances such as alcohol.<sup>60</sup> Indeed, being addicted to certain chemicals like caffeine and nicotine is also considered to be "normal."<sup>61</sup> However, society draws the line at addiction when it is a result of illicit substance abuse or the overindulgence of accepted chemicals.<sup>62</sup> Society rebuffs these addicts as non-productive eyesores that litter the "Norman Rockwell" images of our towns and cities.<sup>63</sup> "The very passivity and unproductiveness characteristic of most addicts are strongly disapproved of in the dynamic, work oriented American society."<sup>64</sup>

This perception of the addict is represented in law and public policy as the federal government seeks to wage war on drugs and drug users.<sup>65</sup> This societal attitude of disdain toward addicts is beginning to show in congressional treatment of civil liberties.<sup>66</sup>

In 1990, Congress enacted the Americans With Disabilities Act (ADA) to protect employees from employer discrimination based on an employee's disability or handicap.<sup>67</sup> While the United States Senate included narcotics abuse, drug addiction and alcoholism in the list of protected disabilities,<sup>68</sup> the law expressly excludes those addicted to "controlled substances"<sup>69</sup> such as cocaine unless the employee is enrolled in

58. *Id.*

59. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 143 (1963); SCHUR, *supra* note 51, at 162.

60. *DSM-III-R*, *supra* note 37, at 165.

61. *Id.*

62. *Id.*

63. SCHUR, *supra* note 51, at 162.

64. *Id.*

65. Gaylord Shaw, *Bush Maps New Target In Drug War Plan Targets Demand, Seeks New Aid for NYC*, NEWSDAY, Jan. 23, 1990, at 15; *see infra* text accompanying note 70.

66. *See* Frank Greve & Matthew Purdy, *Even First Time Offenders Would Feel Pinch*, MIAMI HERALD, September 6, 1988; *see infra* text accompanying note 70.

67. The Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).

68. Bruce McLanahan, *Who is "Disabled,"* in COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT: A SATELLITE PROGRAM, 714 PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 33, at 39 (citing S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989)).

69. 42 U.S.C. § 12101 § 101(6)(A) (1990) (substances controlled under 21 U.S.C. § 812 (1990)).

a treatment program and has ceased use of the substance.<sup>70</sup> This is an excellent example of how the addict is received by society.

If one is addicted, but not to illicit narcotics, that addiction is treated by the Federal Government; at a minimum, as a disability for a limited purpose.<sup>71</sup> Although, the ADA's purpose is the protection of the basic civil liberty to be free of discrimination by an employer,<sup>72</sup> the ADA is one example of how public policy rejects the illicit narcotics addict. "They are perceived as failing to use available opportunity for advancement in the various approved runways of society . . . , they represent failures in the motivational schemes of society."<sup>73</sup>

Because the drug addict is, at most, a societal outcast, an undesirable, laws like the ADA and zealous "demand-side" enforcement policies will, under the cover of a national public hysteria (e.g., the drug war), quickly cast civil liberties aside.<sup>74</sup> There are those who call for an "all out" drug war in which "civil liberties must necessarily be diminished . . . ."<sup>75</sup> However, this response is as irrational as it is frightening, for it is born out of a desire to preserve a "small town"<sup>76</sup> image created in delusions of grandeur inspired by Hollywood and Disneyworld.<sup>77</sup>

"Although the United States has a history of commitment to individual liberties, our nation is not immune to incidents of crisis born hysteria which have impacted adversely upon civil liberties."<sup>78</sup> Once an individual is branded with the stigma of drug abuser, the criminal justice system seeks to attach the "scarlet letter of guilt"<sup>79</sup> upon that per-

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70. *Id.* § 101(b).

71. Mclanahan, *supra* note 68, at 35.

72. *Id.*

73. GOFFMAN, *supra* note 59, at 144.

74. See Paul R. Joseph, *Civil Liberties in the Crucible: An Essay On AIDS and the Future of Freedom in America*, 12 NOVA L. REV. 1083, 1096-99 (1988). Professor Joseph expressed that this article was written in such a fashion so as to provide a perspective of the future of civil liberties in general as applicable to all facets of law, not just the dilemma of AIDS. Interview with Paul R. Joseph, Professor of law, Nova University Center for the Study of Law, Fort Lauderdale, Florida (Dec. 17, 1991); see *The Drugging of the Courts*, *supra* note 4, at 314; see *supra* text accompanying note 73.

75. Murphy, *supra* note 9, at 1308.

76. Joseph, *supra* note 74, at 1085.

77. *Id.*

78. *Id.* at 1083; see *supra* text accompanying note 70.

79. LOW ET AL., *supra* note 32, at 3.

son. The "majority"<sup>80</sup> then strips the individual of "the benefits of community membership"<sup>81</sup> rendering the individual a "non-member,"<sup>82</sup> "outcast,"<sup>83</sup> or convict.<sup>84</sup>

Even though these labels exact a high price on the individual, it is the community that pays the price of addiction because incarceration costs are very high.<sup>85</sup> One solution is to have addiction established and accepted by the courts as a disease. The next task is to recognize this disease as a defense to the crimes of possession and purchase of narcotics.

#### IV. ADDICTION AS A DEFENSE

Historically, in spite of the revolution in medical and scientific knowledge, the courts' acceptance of addiction as a disease has been limited, at best.<sup>86</sup> Long before the declared war on drugs, the United States Supreme Court dealt with the issue of addiction in *Robinson v. California*.<sup>87</sup>

In *Robinson*, the Court held that addiction is a disease, and to punish a person for having a disease "in light of contemporary human knowledge . . . would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and

80. Joseph, *supra* note 74, at 1086.

81. *Id.*

82. *Id.*

83. *Id.*

84. See generally, Paul R. Joseph, "Our Town" or "Twin Peaks": *The Dark Side of Community*, VI FOCUS ON LAW STUDIES 5 (1990) (discussing how the community, by influence of majority vote, can easily transform the most inalienable of rights into mere privileges).

85. See *supra* text accompanying notes 28-31.

86. See, e.g. *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1978) (court held that congressional intent in enacting criminal sanctions for drug possession did not exclude addicts). See generally STANTON PEELE, *THE DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL* (1989) (refuting the concept of addiction as a disease).

87. 370 U.S. 660 (1962) (holding a California statute making it a crime to be a drug addict (punishable by incarceration) unconstitutional as it violated the Eighth and Fourteenth Amendments of the U.S. Constitution). California later enacted a comprehensive set of statutes that officially recognized addiction as a disease to the effect that successful completion of rehabilitation program results in the exoneration of the defendant of all possession or purchase crimes. CAL. PENAL CODE §§ 1000-1000.5 (Deering 1991).

Fourteenth Amendments.”<sup>88</sup> In his concurrence, Justice Douglas compared the “disease” of drug addiction to insanity.<sup>89</sup>

However, in 1968 the Court clearly distinguished addiction as a non-offense as opposed to a defense to other crimes.<sup>90</sup> In *Powell v. Texas*, the Court affirmed the conviction of a man for being publicly drunk despite that he was an alcoholic with an uncontrollable urge to drink and get drunk.<sup>91</sup> Today, state courts adhere to the rule in *Powell*, recognizing addiction as a disease and providing treatment for addicts who commit crimes, but refusing to recognize addiction as a defense to criminal activity.<sup>92</sup>

The Florida Fifth District Court of appeal has followed suit in a controversial decision.<sup>93</sup> In *Johnson v. State*, the court upheld the conviction of a woman for delivery of a controlled substance to a minor<sup>94</sup> via the umbilical cord after her baby died following a live birth.<sup>95</sup> In

88. *Robinson*, 370 U.S. at 666. The Court went on to state, “‘of course it is generally conceded that a narcotic addict . . . is in a state of physical and mental illness.’” *Id.* at 667 n.8 (quoting brief for appellee—the State of California); *see also* *Lindner v. United States*, 268 U.S. 5 (1951), where the Court stated that narcotics addicts “are diseased and proper subjects for medical treatment.” *Id.* at 18; Morris Ploscowe, *Methods of Treatment of Drug Addiction*, in *ESSAYS IN CRIMINAL SCIENCE* 357 (Gerhard O.W. Mueller ed., 1961).

89. *Robinson*, 370 U.S. at 668 (Douglas, J., concurring).

90. *Powell v. Texas*, 392 U.S. 514 (1968).

91. *Id.* at 541-44. The Texas statute was not declared unconstitutional and the court distinguished this case from *Robinson* because the Texas law did not make being an alcoholic illegal. *Id.* at 532. The court reasoned that while the defendant may have an “involuntary compulsion” to drink, he did not have such an urge to be drunk in public. *Id.* at 534.

92. *See Santone v. State*, 371 S.E.2d 428 (Ga. Ct. App. 1988) (evidence of cocaine addiction inadmissible in cocaine trafficking case); *Goldsmith v. State*, 252 S.E.2d 657 (Ga. Ct. App. 1979) (defense of involuntary addiction denied for possession of fraudulently obtained prescription drugs); *Franklin v. United States*, 339 A.2d 398 (D.C. Cir. 1975) (defense of lack of capacity due to addiction denied); *Gorham v. United States*, 339 A.2d 401 (D.C. Cir. 1975) (defense of being an automaton as a result of addiction denied); *Smith v. State*, 219 N.W.2d 655 (Iowa 1974) (court distinguished the crime of possession from the status of being an addict and affirmed a possession of heroin conviction); *People v. Davis*, 306 N.E.2d 787 (N.Y. 1973) (sentence for personal possession of heroin and a needle not cruel and unusual punishment); *People v. Bell*, 290 N.E.2d 214 (Ill. 1972) (refusal by trial court to admit expert testimony on addiction was harmless error as it would not exonerate the defendant).

93. *Johnson v. State*, 578 So. 2d 419 (Fla. 5th Dist. Ct. App. 1991).

94. FLA. STAT. § 893.13(1)(c) (1991).

95. *Johnson*, 578 So. 2d 419. *But see State v. Gethers*, 585 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1991) (conviction of mother for child abuse pursuant to section

doing so, the court sent a strong message that drug use is intolerable. The combined message of the Whitehouse, police, prosecutors and the courts to date has been clear. This nation has "zero-tolerance"<sup>96</sup> for drugs and drug offenders whether or not they are addicts.<sup>97</sup>

## V. THE DRUG COURT PROGRAM

### A. *The Need For Change*

Second chances are rarely given to the drug offender.<sup>98</sup> If one is gifted athlete with marketable skill, but also a drug addict, that person may be protected by the same society that otherwise enforces a strict policy against drug use.<sup>99</sup> For those who are not gifted athletically and do not have a monetary value measured in six figures or greater, there is prison.<sup>100</sup> Perhaps, once in prison, the convict may receive drug treatment.<sup>101</sup> However, the chances of receiving treatment are not very good in Florida prisons.<sup>102</sup>

In Florida prisons bed space is limited, sentences don't last long

827.04(1) of the Florida Statutes for poisoning her fetus by ingesting crack-cocaine while pregnant was reversed because the statute did not contemplate fetus abuse). The *Gethers* case is distinguishable on two grounds. First, the infant in *Johnson*, died after being born alive and second, the court in *Gethers* did not find legislative intent to reach the defendant, while in *Johnson*, the court did find such intent. *Id.* at 420.

96. "Zero-tolerance" is a seizure policy begun by the United States in 1988 whereby U.S. Customs, Coast Guard, and other law enforcement agencies seized personal property (yachts, cars etc.) if even minuscule amounts of controlled substances were discovered there-in. See Howard B. Thorsen, *The Coast Guard, Zero Tolerance and the Drug War*, MIAMI HERALD, July 10, 1988, at 6C.

97. See Greve & Purdy, *supra* note 66, at 9A (discussing plan revealed by President Bush in Sept. 5, 1988 speech to attack the "demand" for drugs); see *supra* text accompanying note 91.

98. Jean Dubail, *Prison Crowding Shortens Inmate Drug Treatment*, SUN-SENTINEL, Aug. 22, 1989, at 1A (discussing the case of an individual who begged a Broward County Judge for treatment).

99. See generally SPORTS ILLUSTRATED, *For The Record*, 106 (Jon Scher ed., Dec. 23, 1991). Dexter Manly was banned for life from the National Football League after several infractions of the leagues cocaine policy. *Id.* The lifetime ban only lasted one year after which Manly returned only to violate the rules a fourth time. *Id.* Manly has since retired from football and vows to win his battle with cocaine addiction. *Id.*

100. ANNUAL REPORT, *supra* note 20, at 38 (inmate profiles reveal that approximately 62.4 percent of those in prison were unemployed at the time of their arrest).

101. *Id.* at 18.

102. Dubail, *supra* note 98, at 4A.

enough for treatment to be effective,<sup>103</sup> and “drugs and alcohol are plentiful behind bars. Treatment is not.”<sup>104</sup> Any available treatment is usually ineffective because of the prevalence of drugs in the prisons.<sup>105</sup> The bottom line is “Florida Prisons are a breeding ground for addiction.”<sup>106</sup>

A significant factor in the lack of drug treatment is overcrowding.<sup>107</sup> As offenders get sent to prison in large numbers, a shortage in bed space results.<sup>108</sup> This in turn creates the need for the early release of not just drug offenders, but those charged with more serious crimes.<sup>109</sup> The conflict here is significant and problematic. The community cries out for tougher laws and longer prison sentences for drug offenders, but as soon as those policies go into effect, the system cannot handle the influx of new inmates, which actually results in shorter prison sentences.<sup>110</sup> As a result, those inmates who do get placed into drug treatment are rarely in prison and prison treatment programs long enough for the treatment to be effective.<sup>111</sup> Compounding the problem, is the drug availability in prisons.<sup>112</sup>

Furthermore, increased police enforcement that crowds the prisons also puts a strain on the courts.<sup>113</sup> Between 1980 and 1989, drug cases in the federal courts rose 270 percent.<sup>114</sup> A similar pattern was noted in state criminal courts.<sup>115</sup> The result is that drug cases have begun to

103. *Id.*

104. Patrick May, *Treatment Is A Must if Convicts Are To Shake Drug Habit*, MIAMI HERALD, Oct. 8, 1991, at 1A.

105. *Id.* at 1A-6A.

106. *Id.*; see also Associated Press, *Prisoners Pass Around "Buck,"* MIAMI HERALD, Aug. 14, 1990, at 4B (“Buck” is homemade grain alcohol that is popular among Florida’s incarcerated)[hereinafter *Prisoners Pass Around "Buck"*]; Herald Capital Bureau, *Guards Accused In Drug Case: Probe Uncovers Prison Smuggling*, MIAMI HERALD, Aug. 25, 1990, at 3B (Guards at several prisons and jails throughout Florida were charged with smuggling drugs into the facilities for sale to the inmates)[hereinafter *Guards Accused In Drug Case*].

107. Dubail, *supra* note 98, at 1A, 4A.

108. *Id.*

109. *Id.*

110. *Id.*; see also N. Gary Holten & Roger Handberg, *Florida’s Sentencing Guidelines: Surviving—But Just Barely*, 73 JUDICATURE 259, 263 (Feb.—Mar. 1990).

111. Dubail, *supra* note 98, at 4A.

112. May, *supra* note 104, at 6A; *Prisoners Pass Around "Buck," supra* note 106, at 4B; *Guards Accused In Drug Case, supra* note 106, at 3B.

113. *Courts and the "War on Drugs," supra* note 4, at 236.

114. *Id.*

115. *Id.*



absorb much of the courts' money, resources, and personnel to the detriment of other types of cases.<sup>116</sup>

In response, some states have set up "drug courts,"<sup>117</sup> redirecting court dockets to relieve the system of felony narcotics cases.<sup>118</sup> However, creating a separate courtroom with separate judges is not enough, as this type of system inevitably becomes a convenient docket clearing tool, which results in less attention paid to the defendant and his or her needs.<sup>119</sup> There must be more to the administration of justice than a quick resolution of cases.<sup>120</sup> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."<sup>121</sup> In order to provide an efficient method of handling cases with understanding, it has been suggested that courts should depart from their "traditional passive"<sup>122</sup> method of resolving cases and start "search[ing] for creative ways to alleviate the drug crisis through their social service role."<sup>123</sup>

Florida's Eleventh Judicial Circuit<sup>124</sup> and the Seventeenth Judicial Circuit<sup>125</sup> have endeavored to perform that "social service role" and have begun to attack the demand-side of the drug crisis with "understanding."<sup>126</sup> Dade and Broward County have each begun their own

116. *The Drugging of the Courts*, *supra* note 4, at 316.

117. *Id.* at 314-315 (For example, Indiana, Michigan and New Jersey have reported large numbers of drug cases on their dockets.).

118. *Id.*

119. *Id.* at 315.

120. *The Drugging of the Courts*, *supra* note 4, at 314.

121. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)(holding that evidence obtained through an illegal wire-tap was admissible); *see also Skinner v. Railway Labor Executives' Ass'n et al*, 489 U.S. 602 (1989)(holding that compelling government interest outweighed the employees' privacy rights in upholding the constitutionality of drug testing for rail-road employees). In his dissent, Chief Justice Marshall warned: "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." *Id.* at 635 (Marshall, C.J., dissenting); *see also The Drugging of the Courts*, *supra* note 4, at 314 (quoting Brandeis' opinion in *Olmstead*); On the issue of drug testing, *see generally* Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605 (1987).

122. *Courts and the "War on Drugs"*, *supra* note 4, at 236.

123. *Id.*; *The Drugging of the Courts*, *supra* note 4, at 316.

124. In and for Dade County, Florida, under the supervision of Associate Chief Judge Herbert M. Klein.

125. In and for Broward County, Florida under the supervision of the Criminal Division's Administrative Judge, Mark Speizer.

126. *The Drugging of the Courts*, *supra* note 4, at 316-317; *The Courts and the*

"Drug Court" programs which exist for the benefit of those who come before the bench, as opposed to sending them to prison in mass.<sup>127</sup>

Prison is certainly not the cure for the disease of drug addiction. While several thousand people enter the Florida prison system every year at a tremendous cost per inmate, it is probable that close to half of these people will return to prison unless, by good fortune, they happen to receive and complete treatment programs.<sup>128</sup>

Treatment is available through the Drug Court programs at a much lower cost and a much higher success rate as compared to prison. The Drug Court Programs of Dade and Broward County provide an effective solution. While there may not be a perfect solution or cure to drug addiction, one thing is certain, prison is not the solution. Consider whether society wants to support the notion of jailing the disabled or the diseased. Is there justification, for example, in making the disease of cancer or AIDS illegal?

Granted, being an addict is not illegal in Florida, nor anywhere else for that matter.<sup>129</sup> However, to be in possession of cocaine, if one is an addict, is as involuntary as the disease of addiction itself.<sup>130</sup> It is not logical to concede that addiction is a disease of compulsion but not to concede the compulsion itself. After all, one cannot be an addict if one does not use drugs. Furthermore, one cannot use drugs if one does not purchase and possess them. It is time that we move forward as a society and accept the addict as a sick person and treat him or her with the same compassion that we would have for the victim of any other disease.

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"War on Drugs," *supra* note 4, at 288; Diversion and Treatment Program: An Overview, *supra* note 7, at 1-2; Strategies for Action, *supra* note 7, at 1-3; Drug Court Program, *supra* note 7.

127. Diversion and Treatment Program: An Overview, *supra* note 7; *In re* Creation of A Drug Court Division Within the Criminal Division, ADMINISTRATIVE ORDER NO. III-91-E-1, Seventeenth Judicial Circuit in and for Broward County, Florida (June 27, 1991)[hereinafter ADMINISTRATIVE ORDER NO. III-91-E-1]; *In re* Diversion and Treatment Program; Costs and Assessment, ADMINISTRATIVE ORDER NO. 90-9, Eleventh Judicial Circuit in and for Dade County, Florida, Miami Review (April 27, 1990)[hereinafter ADMINISTRATIVE ORDER NO. 90-9]; *In re* creation of Section CF in the Criminal Division of the Circuit Court and Type of Cases to be Heard, ADMINISTRATIVE ORDER NO. 89-9, Eleventh Judicial Circuit in and for Dade County, Florida, Miami Review (June 15, 1989)[hereinafter ADMINISTRATIVE ORDER NO. 89-9].

128. See *supra* text accompanying notes 22-30.

129. *Robinson v. California*, 370 U.S. 660 (1962); see *supra* text accompanying note 90.

130. See *supra* text accompanying notes 53-56.

The alternative, is to digress and become the ultimate police state in which the government destroys all expectations of privacy in an attempt to eradicate crime.<sup>131</sup> The State of Florida has already prosecuted and convicted one mother for poisoning her fetus via the umbilical cord as a result of drug use during pregnancy.<sup>132</sup> Will we next seek to prosecute people for possession of narcotics simply for testing positive for drug use through blood and urine samples?<sup>133</sup>

## B. Background

In 1988, officials in the Dade County government noted that of the 120,000 people incarcerated in the Dade County Jail system, sixty percent were repeat offenders.<sup>134</sup> These statistics are similar for the Broward County Jail which has experienced a 336 percent increase in population over the past ten years despite a decreasing crime rate.<sup>135</sup> Furthermore, it was discovered that over eighty percent of those arrested for felonies were, at the time of arrest, "under the influence of"<sup>136</sup> or tested positive for drugs "other than alcohol."<sup>137</sup>

Armed with this information, Gerald T. Wetherington, Chief Judge of the Eleventh Circuit and Joaquin G. Avino, Dade County Manager, made a proposal to Justice Raymond Ehrlich, Chief Justice of the Florida Supreme Court.<sup>138</sup> This proposal suggested an "innovative approach to attacking" the run away drug problem.<sup>139</sup> As a result,

131. See *Katz v. United States*, 389 U.S. 347 (1967) (holding that using an electronic listening device to gather incriminating evidence without a warrant was a violation of a privacy expectation). Cf. *Olmstead*, 277 U.S. 438 (1928).

132. *Johnson*, 578 So. 2d 419.

133. I use the pronoun "we" for we ratify such governmental policy through the election process. See *Schmerber v. California*, 384 U.S. 757 (1966) (holding that a warrantless intrusion into the body to get blood samples did not offend the Constitution because the task was routine and performed by a medical professional using standard procedures; also, evidence of the crime of drunk driving was rapidly diminishing as the blood alcohol content lessens over time).

134. *Strategies for Action*, *supra* note 7, at 1.

135. Jonathon King, *Pinning Down A Solution to Crack*, *SUN-SENTINEL, Sunshine Magazine*, Oct. 21, 1991, at 7.

136. *Strategies for Action*, *supra* note 7, at 1.

137. *Id.*; The percentage of inmates in the Florida State Prison system who admitted to illicit drug use was 52.2 percent for the year 1989-90. ANNUAL REPORT, *supra* note 20, at 47; see also May, *supra* note 104, at 6A.

138. *Strategies for Action*, *supra* note 7, at 1.

139. *Id.*

the Florida Supreme Court appointed Judge Herbert M. Klein to develop and coordinate anti-drug abuse programs in Dade County.<sup>140</sup> Thus, in an unprecedented move by Florida's judiciary, the Drug Court was born.<sup>141</sup>

### C. *Administrative Orders*

Pursuant to the Florida State Rules of Court, the chief judge of a judicial circuit may make rulings as to the assignment of judges,<sup>142</sup> the use of courtrooms and docket size,<sup>143</sup> and promulgate "administrative orders"<sup>144</sup> to facilitate any function of the chief judge's office.<sup>145</sup> All administrative orders must be approved by the Florida Supreme Court.<sup>146</sup> By using the authority vested in the chief judge, administrative orders were promulgated creating the Drug Court Programs that now exist in both Dade and Broward County.<sup>147</sup>

Judge Klein concedes that the creation and operation of these programs places judges in a "more activist role."<sup>148</sup> However, under the traditional passive role of the court, the system remains unchanged with the exception that, as statistics show, more people go to prison.<sup>149</sup> As long as people perceive judges as possessing authority, they should use that authority in a constructive manner to achieve positive goals that help the community in which they preside by developing creative solutions to problems, such as drug addiction and high recidivism rates.<sup>150</sup> It was this judicial activism that led to the administrative

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140. Herbert M. Klein, Associate Chief Judge, Eleventh Judicial Circuit, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County—An Update, 1 (June 1990)(unpublished pamphlet, on file with Dade County Office of Substance Abuse)[hereinafter Update 1990].

141. Strategies for Action, *supra* note 7, at "Executive Summary."

142. FLA. R. JUD. ADMIN. NO. 2.050(b)(4).

143. *Id.* 2.050(b)(7).

144. *Id.* 2.020(c) (administrative order defined as a "directive" used to facilitate administrative needs and "court affairs").

145. *Id.* 2.050(b)(2).

146. *Id.* 2.050(e).

147. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

148. *The Drugging of the Courts.*, *supra* note 4, at 316.

149. ANNUAL REPORT, *supra* note 20, at 30; Strategies for Action, *supra* note 7, at 1.

150. *The Drugging of the Courts.*, *supra* note 4, at 316-17.

orders that are the foundation of the Drug Court Program.<sup>151</sup>

Dade County's administrative order became effective on June 19, 1989, and the program has been operating since that date.<sup>152</sup> The Broward County program was established on July 1, 1991 using Dade County's program as a model.<sup>153</sup>

The effect of these administrative orders has been to transfer all first time felony defendants within the respective circuits charged with possession<sup>154</sup> or purchase<sup>155</sup> of cocaine into one courtroom where they have an opportunity to receive drug treatment.<sup>156</sup> More significant, however, is the fact that these orders break with national judicial practice of non-recognition of addiction as a defense to felony purchase and possession of cocaine for first time offenders.<sup>157</sup> In effect, these courts have taken "judicial notice"<sup>158</sup> of drug addiction as a disease with an emphasis on treatment. "There have been no trials in the Drug Court since its inception, as the goal is not to try cases, but to connect defendants with realistic meaningful treatment."<sup>159</sup>

Providing defendants with alternatives to incarceration, such as drug treatment, is consistent with Florida's pretrial intervention (PTI) statute.<sup>160</sup> PTI is available to non-violent felony offenders (third degree felonies) and upon successful completion of a PTI program, a defendant may have the case dismissed "without prejudice"<sup>161</sup> by the state attorney.<sup>162</sup> Furthermore, pursuant to Florida law, the trial judge may refer any defendant to drug treatment "in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any similar

151. *Id.*

152. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127.

153. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

154. FLA. STAT. § 893.13(1)(f) (1991).

155. § 893.13(1)(a)(1).

156. *The Drugging of the Courts*, *supra* note 4, at 317.

157. See ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127 (defendants charged with sale, manufacture, delivery, or distribution are not "qualified" to enter the program).

158. BLACK'S LAW DICTIONARY, (6th ed. 1990) ("[J]udicial notice [is] [t]he act by which a court . . . recognize[s] the existence and truth of certain facts . . ."); see FLA. STAT. §§ 90.202-205 (1991).

159. Drug Court: April 1, 1991, *supra* note 8.

160. FLA. STAT. § 948.08 (1991)(Pretrial intervention program).

161. BLACK'S LAW DICTIONARY 1179 (6th ed. 1990)(dismissal "without prejudice" means the prosecutor does not waive the right to initiate the prosecution at a later date).

162. FLA. STAT. § 948.08 (1991)(Pretrial intervention program).

action.”<sup>163</sup>

By enacting the PTI statute, the legislature expressly intended that those defendants who could avoid prison by being rehabilitated, should be treated as other than criminal.<sup>164</sup> However, the ever increasing numbers of drug offenders sent to Florida prisons indicate that judges do not seem to be exercising this discretionary power very often.<sup>165</sup> Statistics show that drug possession convictions accounted for the second highest number of inmates in Florida prisons by 1990, while those convicted of selling drugs were the highest.<sup>166</sup>

In order to combat this problem, both the Broward County Order and Dade County Order “stress the addictive rather than the criminal nature of the offense . . . .”<sup>167</sup> In fact, on April 27, 1990 Dade County updated its program to include a provision for “client” contributions to rehabilitation cost.<sup>168</sup> In so doing, the court stated that “The Eleventh Judicial Circuit of the State of Florida, in conjunction with the State Attorney and Public Defender, has recognized addiction as a treatable disease . . . .”<sup>169</sup> With these programs, a new era of judicial activism was born.<sup>170</sup>

#### D. Admission Criteria and Treatment Techniques

In order to get into the Drug Court program, a person must be arrested for felony possession or purchase of cocaine.<sup>171</sup> When a de-

163. FLA. STAT. § 397.12 (1991)(reference to drug treatment program).

164. § 397.10 (legislative intent). The statute provides, in relevant part: It is the intent of the Legislature to provide in a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques generally not available in state or federal prison systems . . . . It is further the intent of the Legislature to encourage trial judges to use their discretion to refer persons to a state licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties.

*Id.*

165. ANNUAL REPORT, *supra* note 20, at 31.

166. *Id.*

167. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

168. ADMINISTRATIVE ORDER NO., 90-9 *supra* note 127 (which is also provided for under Florida Law. FLA. STAT. § 948.09 (1991) (Payment for cost of supervision and rehabilitation).

169. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127.

170. *The Drugging of the Courts*, *supra* note 4, at 316.

171. Interview with Michael Rocque, Assistant Public Defender, Seventeenth Ju-

fendant is brought into court and is a first offender, the judge will explain to the person how the program works and gives the defendant a choice of either going to trial on the charges and risking conviction, or entering the program as probation for one year.<sup>172</sup> If the defendant prefers trial, he or she is risking a possible five to fifteen years in prison.<sup>173</sup>

Broward County allows a defendant up to sixty-six days from the date of arrest to make the election to enter the program or go to trial.<sup>174</sup> Upon electing to enter the program, a defendant must enter a plea of guilty or *nolo contendere* to the charges against him or her.<sup>175</sup> At this point, the defendant is released on his or her own recognizance.<sup>176</sup> In order to participate, the defendant must not have a record of any other felony convictions including charges on which adjudication was withheld.<sup>177</sup>

Dade County's program is slightly different in this regard. Defendants coming before Drug Court Judge Stanley Goldstein<sup>178</sup> do not have to enter a plea.<sup>179</sup> Depending upon the circumstances, Judge Goldstein may allow a defendant with a prior felony record to get into the program.<sup>180</sup> This is made possible by an "understanding" that exists between the very cooperative State Attorney, Janet Reno, and Judge Goldstein in which both parties agree to get as many people as possible the help that they need to get away from drugs.<sup>181</sup> Judge Goldstein's

dicial Circuit, Broward County, Florida, in Ft. Lauderdale, Florida (Nov. 12, 1991)(Mr. Rocque is also an adjunct Professor of Law, Nova University Center for the Study of Law); see FLA. STAT. § 893.13(1)(a)(1) (1991)(purchase of cocaine—a second degree felony); FLA. STAT. § 893.13(1)(f) (1991) (possession of cocaine—a third degree felony).

172. Interview with Michael Rocque, *supra* note 171.

173. FLA. STAT. §§ 775.082(c), (d) (1991) (Penalties). According to Rocque, upon conviction usually receives up to twenty-two months in prison under the sentencing guidelines. Interview with Michael Rocque, *supra* note 163; see FLA. STAT. § 921.187(1)(b) (1991) (Disposition and sentencing; alternatives; restitution).

174. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

175. *Id.*

176. Interview with Michael Rocque, *supra*, note 171.

177. *Id.*

178. Judge Goldstein was appointed to preside over the Dade County Drug Court by Judge Klein and Judge Wetherington after a brief tenure in D.U.I Court. Patrick May, *Judge Puts Heart Into Drug Court: 61-Year-Old Jurist is Tough, Tender*, MIAMI HERALD, Oct. 21, 1991, at 2B.

179. Telephone Interview with Judge Stanley Goldstein, Eleventh Judicial Circuit, Dade County, Florida (Nov. 18, 1991).

180. *Id.*

181. *Id.*

only requirement is that the defendant make an effort to "get off" of cocaine.<sup>182</sup> He adds that he "never met an addict yet that didn't want to get off it."<sup>183</sup>

Once a defendant elects to enter the program in either Dade or Broward County, the Probation Department supervises the participant/client along with State licensed treatment programs.<sup>184</sup> Failing to comply with the program rules (or getting re-arrested) will, in the Judge's discretion, result in: a) restarting the program, b) going to the county jail for more intensive "in-house" treatment, or c) a removal from the program completely which results in a transfer to another criminal division for prosecution of the original charges.<sup>185</sup> The program consists of three phases and lasts one year.<sup>186</sup> Since the structure of the Dade and Broward programs is essentially the same,<sup>187</sup> thus, the following discussion of each phase applies to both with various differences highlighted where necessary.

Phase I is the most innovative phase of the program. Participants are assessed as to their amenability to treatment and, at their option and consent, are given acupuncture treatments.<sup>188</sup> The purpose of acupuncture is to relax the addict and curb the desire for drugs.<sup>189</sup> The

182. *Metromagazine: Strategies For Action* (MDTV 34 television broadcast, July 1990, videotape on file with Dade County Office of Substance Abuse Control)[hereinafter *Metromagazine*].

183. *Id.*

184. Drug Court Program, *supra* note 7; see also ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127; Diversion and Treatment Program: An Overview *supra* note 7, at 1.

185. Drug Court Program, *supra* note 7; *Strategies For Action*, *supra* note 7, at 2; see also *A Clean and Sober Look at Drug Court*, COUNTY LINE, Nov./Dec. 1991, at 1; Kathleen Kernicky, *Betting on Pins and Needles: Drug Users Hope Acupuncture Is End For Addiction*, SUN-SENTINEL, Dec. 8, 1991, at 1B, 5B.

186. Drug Court Program, *supra* note 7; *Strategies For Action*, *supra* note 7, at 2; Diversion and Treatment Program: An overview, *supra* note 7, at 1.

187. Telephone Interview with Judge Robert J. Fogan, Drug Court, Seventeenth Judicial Circuit, Broward County, Florida (Nov. 19, 1991).

188. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; *Strategies For Action*, *supra* note 7, at 2; Drug Court Program, *supra* note 7.

189. William F. Moriarty, Jr. & Janet Konefal, Ph.D., C.A., *Innovative Substance Abuse Treatment Options for Criminal Justice Populations That Include Acupuncture Detoxification As A Part of An Overall Treatment Program 3* (presented at American Correctional Congress, San Diego, Cal. Aug. 1990)(unpublished, on file with the Dade County Office of Substance Abuse); Diversion and Treatment Program: An Overview, *supra* note 7, at 1; Kernickey, *supra* note 185, at 5B; see also Patrick May, *Drug Court Specializes in Second Chances*, MIAMI HERALD, Oct. 20, 1990, at 2B;



acupuncture causes a release of chemicals in the brain that calm the client making him or her more amenable to treatment.<sup>190</sup> Acupuncture is also available for those clients who spend time in jail.<sup>191</sup> In fact, "they have become model prisoners where they were once quite a handful."<sup>192</sup>

The idea to use acupuncture came from a field visit to New York.<sup>193</sup> Dr. Michael Smith, Director of New York's Lincoln Center Acupuncture Clinic, has had success for over fifteen years using acupuncture to assist heroin addicts in their attempts at rehabilitation.<sup>194</sup> As a result, both Dade and Broward County have incorporated acupuncture into their programs.<sup>195</sup> In fact, Judge Goldstein credits the success of the Dade County program to the acupuncture treatment technique.<sup>196</sup>

In addition to acupuncture, Phase I also consists of urinalysis on a daily basis as well as several group and individual counseling sessions.<sup>197</sup> Phase I in Dade County usually lasts twelve days while in Broward it lasts three weeks; however, no client moves to Phase II until counselors, probation officers and the judges are satisfied with the client's performance.<sup>198</sup>

Once in Phase II, acupuncture treatments are still required (for those who opted for them), but in decreasing number.<sup>199</sup> This phase concentrates on the more "conventional" methods of drug treatment such as counseling and stress management.<sup>200</sup> Urinalysis takes place

King, *supra* note 135, at 7.

190. Kernickey, *supra* note 185, at 5B.

191. Update 1990, *supra* note 8, at 1-2; Strategies for Action, *supra* note 7, at 2. The jail or "in-house" treatment is more intensive than the probation program with evaluations every thirty days which may result in an early release to the probation program if clients progress so warrants. *Id.*

192. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

193. *Id.*

194. Moriarty & Konefal, *supra* note 189, at 3.

195. Diversion and Treatment Program: An Overview, *supra* note 7, at 1; Update 1990, *supra* note 8, at 3; Drug Court Program, *supra* note 7.

196. May, *supra* note 178, at 2B.

197. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; Drug Court Program, *supra* note 7.

198. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; Drug Court Program, *supra* note 7.

199. Diversion and Treatment Program: An Overview, *supra* note 7, at 8 (Phase II in Dade lasts approximately fourteen weeks); Drug Court Program, *supra* note 7.

200. Diversion and Treatment Program: An Overview, *supra* note 7, at 8; Drug

three times a week, and the client's probation officer is kept informed of the results and the client's attendance at all group sessions and individual counseling appointments.<sup>201</sup> Each participant must make personal appearances before the judge at predetermined dates in order to keep the court informed of the participant's progress.<sup>202</sup> When the judge is satisfied that an individual has successfully completed Phase II, the individual may move into Phase III of the program.<sup>203</sup>

Phase III is the "after care" phase of the program during which acupuncture is available on request, but mandatory urinalysis continues.<sup>204</sup> Once a client begins Phase III, he or she begins to receive vocational training, high school General Equivalency Diploma education, and where possible, job placement.<sup>205</sup>

Along with education and training, this phase emphasizes stress management and "becoming a responsible adult."<sup>206</sup> Clients continue to meet with counselors and attend weekly group meetings which lasts for approximately twenty-six weeks in Broward County.<sup>207</sup> If the judge is satisfied that a client has not broken any the program's rules, has consistently tested negative for drugs, and has a perfect attendance record at all meetings and court appointments, the client may graduate.<sup>208</sup>

Upon graduation from the Dade County program, the charges against the defendant are dropped via *nolle prosequi*<sup>209</sup> by the state attorney.<sup>210</sup> The court will also clear the defendant's arrest record.<sup>211</sup>

Court Program, *supra* note 7.

201. Diversion and Treatment Program: An Overview, *supra* note 7, at 8; Drug Court Program, *supra* note 7.

202. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

203. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Drug Court Program, *supra* note 7.

204. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Drug Court Program, *supra* note 7.

205. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Update 1990, *supra* note 8, at 4, Strategies For Action, *supra* note 7, at 3. Miami Dade Community College has been instrumental in setting up Phase III in Dade County. *Id.*

206. Update 1990, *supra* note 8, at 4.

207. Drug Court Program, *supra* note 7; Diversion and Treatment Program: An Overview, *supra* note 7, at 9 (Phase III in Dade last approximately thirty six weeks).

208. Diversion and Treatment Program: An Overview, *supra* note 7, at 11; Drug Court Program, *supra* note 7.

209. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3(c) (1985)(*nolle prosequi* is a decision made by the prosecutor not to prosecute).

210. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; Drug

Comparatively, graduation from the Broward County Program is not quite as rewarding as graduation from the Dade County Drug Court Program. Upon graduating from the Broward County program, a defendant's arrest records are sealed but the case against him or her is not dismissed.<sup>212</sup> Broward County State Attorney Michael Satz will not *nolle prosequi* the case.<sup>213</sup> Rather, the defendant receives a withheld adjudication status as to the original charges which is not as significant as a dismissal.<sup>214</sup>

## VI. PROGRAM RESULTS, COSTS AND FUNDING

The Drug Court is an example of the judiciary taking an active role in the communities over which it presides. These judicially created<sup>215</sup> programs are helping the victims of drug abuse while at the same time saving money and prison space for those who truly deserve it, such as drug smugglers and dealers. The Dade and Broward County Drug Court Programs are a small but very correct step toward the judiciary becoming active in the community with respect to the administration of justice.

The Broward County program began in July of 1991 and is still in its early stages.<sup>216</sup> As a result, no one has graduated the year long program and a clear determination of success or failure is not yet possible.<sup>217</sup> However, the prognosis is very good according to Judge Fogan, who presides over the Drug Court by appointment.<sup>218</sup> In fact, statistics show that as of September 1991, 181 persons entered into the Broward program while only seven persons dropped out or were removed.<sup>219</sup>

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Court April 1, 1991, *supra* note 8.

211. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; May, *supra* note 184, at 2B; *Metromagazine*, *supra* note 182.

212. Telephone Interview with Robert J. Fogan, *supra* note 187.

213. King, *supra* note 135, at 35.

214. Telephone interview with Judge Robert J. Fogan, *supra* note 187.

215. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

216. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

217. Interview with Michael Rocque, *supra* note 171.

218. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; see ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127 (Judge Fogan was specifically named in the order to preside over the Broward Drug Court).

219. Drug Court Program, *supra* note 7; Updated statistics have been compiled through March, 1992. However, there are new categories which are now measured making it impossible to calculate the success rate of the Broward County program in a

Thus, there currently is a ninety-six percent success rate over the first three months.

In contrast, the Dade County program has been operating for over two years and its success can more accurately be measured.<sup>220</sup> According to a recent update by the Dade County Office of Substance Abuse, over 4000 persons have entered the Dade County program while only ten percent have been re-arrested.<sup>221</sup> In other words, the Dade County program has a success rate of ninety percent.<sup>222</sup> As a result of this success, State Attorney Janet Reno is attempting to establish a similar program for defendants charged with driving under the influence of alcohol.<sup>223</sup>

Funding for the Dade County Drug Court comes from the Dade County General Fund as well as Traffic Court revenues.<sup>224</sup> Most recently, funds have been collected from participants pursuant to the administrative order mentioned above.<sup>225</sup> The Dade County Office of Substance Abuse estimates the cost at approximately \$500 per year, per client which is paid from the sources just mentioned.<sup>226</sup>

The Broward County Drug Court is funded primarily by the Broward County Sheriff's Office which has committed approximately one million dollars from the Sheriff's Forfeiture Fund to the program over the next three years.<sup>227</sup> Moreover, funding for Broward County's

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fashion similar to that of the first three months. It is noted, however, that there have been no probation revocations since the program began in July, 1991. Drug Court Treatment Program (April 13, 1992) (unpublished, non-paginated leaflet on file with the Judicial Projects Administrator, Broward County Courthouse, Broward County, Florida).

220. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127.

221. Drug Court: April 1, 1991, *supra* note 8.

222. *ABC's World News Tonight with Peter Jennings: American Agenda* (ABC Television Broadcast, Mar. 24, 1992) (reporting that the Dade County success rate has improved to 97 percent).

223. Marilyn Adams, *Plan to Keep Drunk Drivers Out of Jail*, MIAMI HERALD, Dec. 16, 1991, at 1B (citing a high repeat offender rate and jail overcrowding, Reno anticipates similar success with the D.U.I. program). Just prior to the publication of this article, plans to create the D.U.I. program in Dade County were dropped due to information from similar pilot programs which indicated that success was not probable. Telephone Interview with Janet Reno, State Attorney, Dade County, Florida (Feb. 6, 1992).

224. Strategies for Action, *supra* note 7, at 5; Update 1990, *supra* note 8, at 2-3.

225. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127 (fees are based on ability to pay via a sliding scale).

226. Drug Court April 1, 1991, *supra* note 8.

227. Drug Court Program, *supra* note 7; Sheriff Navarro fully supports the Drug

program comes from three additional sources: the Broward County General Fund, the Broward County Commission on Substance Abuse and jail population fines.<sup>228</sup> Currently, other sources of funding are being investigated including possible state and federal grants.<sup>229</sup>

Because no one has completed the Broward County program, an accurate yearly cost cannot be determined.<sup>230</sup> However, Judge Fogan is confident that the cost will be similar to the Dade County program's cost and will be cheaper than sending defendants to prison or jail.<sup>231</sup> One estimate puts the Broward County program cost at \$800 per year, per client, as opposed to approximately \$20,000 for a one year sentence in the Broward County Jail<sup>232</sup> or a state prison, which costs over \$14,000 per person, per year.<sup>233</sup> Furthermore, the recidivism rate for prison is almost fifty percent as compared to ten percent for Drug Court which indicates that taxpayers are paying to incarcerate many of the same people time and time again.<sup>234</sup>

This program enables a defendant to stay in the community and "contribute to the tax base instead of deplet[ing] it."<sup>235</sup>

The Florida prison system has its own comprehensive treatment program known as the "Tier Program."<sup>236</sup> The Tier Program is a four

Court program but considers it unfortunate that most people with drug problems get arrested before they get help. Sheriff Nick Navarro, *Phi Alpha Delta International Law Fraternity Speakers' Forum*, Address Before Nova Law Center Student Body (Jan. 29, 1992).

228. Broward County Operating Budget, Dep't Health and Safety, Alcohol and Drug Abuse Division, 7-9 (1992) (on file with Broward Alcohol Rehabilitation Center, Ft. Lauderdale, Florida) (these sources have contributed unequal dollar amounts with the largest coming from the Broward County General Fund). Jail population fines are federal fines charged against the county for exceeding population limitations within the county jail as prescribed by the Eleventh Circuit Court of Appeals. See FLA. STAT. § 951.23 (5)(a) (1991).

229. Drug Court Program, *supra* note 7.

230. Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

231. *Id.*

232. Naftali Bendavid, *New Drug Court Offers Alternative to Prison*, MIAMI HERALD, July 2, 1991, at 2BR.

233. ANNUAL REPORT, *supra* note 20, at 66; Summary of Selected Financial Data, *supra* note 31.

234. *Id.*; Drug Court April 1, 1991, *supra* note 8.

235. *Metromagazine*, *supra* note 182.

236. See G. Abbas Darabi, Substance Abuse Program, Tier Programs Outcome Evaluation: A Recommitment Study (July 1991)(unpublished, on file with Florida Department of Corrections, Bureau of Planning Research and Statistics); see also Dubail, *supra* note 98, at 4A.

phase (tier) drug treatment program that is run by the Florida Department of Corrections and is available to prisoners in various prisons throughout Florida.<sup>237</sup> According to a recent study of the Tier Program's effectiveness, of the inmates who go through the Tier Program, twenty-six percent return to prison after an average of only nine months in the community.<sup>238</sup> The return rate for inmates who did not participate in this program is thirty-six percent after being out of prison for over a year.<sup>239</sup> This study was based on 2646 inmates who left prison after participating in the program.<sup>240</sup> It is important to note the fact that of those inmates who participated, only fifty-six percent completed the program.<sup>241</sup>

Furthermore, statistics also reveal that the average Tier Program participant did not have a high school diploma, yet there is no mention of General Equivalency Diploma training for participants which is available through the Drug Court program.<sup>242</sup> The report suggests that the Tier Program seems to be having an effect on the Florida Prison system's forty-three percent prison recidivism rate.<sup>243</sup> The figures do not compare, however, to the success of the Drug Court Programs.

What the Tier Program statistics do not show is the availability of that program to inmates. Increased enforcement has led to prison overcrowding, early releases and bed shortages.<sup>244</sup> With fewer beds available and more offenders coming in, those in need of treatment will only return again and again.<sup>245</sup> Also, these problems will be aggravated further by recent cuts in Florida's 1992 budget.<sup>246</sup> The result is that those in need of treatment will not be able to get it. Instead, those suffering from the disease of addiction will be branded convicted felons and released to the streets, drug addiction intact, without education, employment or the means to obtain either. The result is re-arrest and

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237. ANNUAL REPORT, *supra* note 20, at 18; Dubail, *supra* note 98, at 4A. See generally Darabi, *supra* note 236.

238. Darabi, *supra* note 236, at 6, 9.

239. *Id.* at 6.

240. *Id.*

241. *Id.*

242. *Id.*

243. Darabi, *supra* note 236, at 13.

244. Dubail, *supra* note 98, at 4A.

245. King, *supra* note 135, at 34; May, *supra* note 104, at 1A, 6A.

246. *What the Legislature Did*, MIAMI HERALD, Dec. 13, 1991, at 33A (Florida Legislature approved a budget cut that reduced the number of proposed prison beds by 75 percent).

another prison sentence. This is cruel, but becoming usual, punishment.

Punishing victims of drug addiction is not justice. Nor is such punishment cheap. For the cost of sending one person to prison for a year, approximately thirty people can enter the Drug Court Program for a year. If those thirty people went to prison, between eight and fourteen of them would return to prison. If those thirty people went through the Drug Court Program, approximately three would return to court.<sup>247</sup>

## VII. HURDLES; PAST, PRESENT AND FUTURE

The only opponent the Dade County Drug Court Program had when it was first proposed was the Dade County Public Defender's Office.<sup>248</sup> Defense attorneys representing their clients' best interests saw a year of intrusive procedures that would be a hassle to go through instead of the usual probation and time served available through a plea bargain.<sup>249</sup> However, Judge Goldstein soon convinced defense attorneys that getting their clients into treatment and out of the criminal justice system was in the best interests of their clients.<sup>250</sup>

Similarly, attorneys resisted the Broward County Drug Court Program as well.<sup>251</sup> As the most significant opponent, there was (and still is) State Attorney Michael Satz.<sup>252</sup> "Mr. Satz does not put cocaine cases on diversion."<sup>253</sup> Although Michael Satz eventually agreed to implement the program, he will not authorize the *nolle prosequere* of cases for the future graduates of the Broward County Drug Court Program as does Dade State Attorney Janet Reno.<sup>254</sup>

The incentive for defendants of having their cases dismissed via *nolle prosequere* is a key element of Dade County's success with the program.<sup>255</sup> "The fact that most now opt for the program tells Goldstein that clearing their records and getting help for their addiction is too

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247. See *supra* text accompanying notes 219-23.

248. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

249. *Id.*; May, *supra* note 189, at 2B; King, *supra* note 135, at 34.

250. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

251. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; King, *supra* note 135, at 35.

252. King, *supra* note 135, at 35.

253. *Id.* Diversion is a term that is used synonymously with pre-trial intervention. Interview with Michael Rocque, *supra* note 171.

254. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Bendavid, *supra* note 232, at 2BR; King, *supra* note 135, at 35.

255. May, *supra* note 189, at 2B.

tempting to pass up."<sup>256</sup> However, Judge Fogan cannot offer the same incentive to defendants in Broward County.<sup>257</sup> A withheld adjudication on a criminal charge in a state court "means the same thing as a conviction to federal government agencies which means people can't serve in the military, get civil service jobs, and are repeat offenders for the purposes of federal sentencing. They are second class citizens to the federal government."<sup>258</sup> Florida's statute permitting a trial judge to withhold adjudication<sup>259</sup> on a criminal charge is considered a conviction by the federal courts for sentencing purposes.<sup>260</sup> "Fogan worries that this [refusal by the State Attorney to dismiss the cases against graduates] will remove a crucial incentive for drug users to sign up for the program because most first time offenders get probation anyway, without the hassle of attending treatment sessions."<sup>261</sup>

Another hurdle that the Broward County Program currently faces involves cases in which defendants are charged with possession or purchase of cocaine within 1000 feet of a school.<sup>262</sup> The sentence for such a crime carries a minimum mandatory sentence of three years in prison without parole.<sup>263</sup> In several cases throughout 1990 and 1991,

256. *Id.*

257. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Bendavid, *supra* note 232, at 2BR; King, *supra* note 135, at 35.

258. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; *see* 10 U.S.C. § 504 (1990)(Persons not qualified) (persons convicted of a felony are disqualified from service with the armed forces); *see also* Department of the Army, Personnel Procurement, *Regular Army and Army Reserve Enlistment Program* 38 ARMY REG. 601-210, Ch. 4 § III subsec. 4-13(c) (1991) (*other adverse disposition*) (previous enrollment in a PTI program or record expungement may disqualify an enlistee as if convicted of a felony).

259. FLA. STAT. § 921.187(b)(1) (1991)(Disposition and sentencing; alternatives; restitution).

260. *See* United States v. Jones, 910 F.2d 760 (11th Cir. 1990)(withheld adjudication in a state court considered conviction for career criminal sentencing purposes); Chong v. Immigration and Naturalization Service, 890 F.2d 284 (11th Cir. 1989)(deportation of Defendant affirmed because withheld adjudication and probation for drug possession considered a conviction); United States v. Grinkiewics, 873 F.2d 253 (11th Cir. 1989)(Defendant considered to be a convicted felon under federal firearms statute even though state court withheld adjudication); United States v. Bruscantini, 761 F.2d 640 (11th Cir. 1985)(withheld adjudication in state court considered conviction even though Defendant plead *nolo contendere*).

261. Bendavid, *supra* note 232, at 2BR.

262. FLA. STAT. § 893.13(e)(1) (1991); Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.

263. FLA. STAT. § 893.13(e)(1) (1991).



Broward County circuit judges have sentenced defendants charged with school zone offenses to probation and treatment, only to have the cases remanded back to the circuit court for resentencing in accordance with the mandatory minimum as a result of appeals by the State Attorney.<sup>264</sup>

Unlike Judge Fogan, Judge Goldstein does not have this problem in Dade County based upon his "agreement" with State Attorney Janet Reno.<sup>265</sup> Judge Goldstein simply places all first offenders in the program and the State does not appeal.<sup>266</sup> Judge Fogan refers to State Attorney Reno as "enlightened."<sup>267</sup>

In Broward County no such agreement with the State Attorney exists.<sup>268</sup> According to Judge Mark Speizer, Administrative Judge of Broward's Criminal Division and Drug Court Program organizer, "the success of the Drug Court requires the cooperation of the D.A."<sup>269</sup> Judge Speizer also points out that the Dade County program is a "true diversion or PTI program" while the Broward program is in effect "merely a condition of probation."<sup>270</sup> In the future, Judge Fogan hopes to have the discretion to dismiss the cases of defendants who successfully complete the Drug Court Program.<sup>271</sup> However, in order for this to occur, the current PTI statute must be amended.<sup>272</sup> That statute gives the state attorney the discretion to go forward with the prosecu-

264. See *State v. Bernadin*, 591 So. 2d 956 (Fla. 4th Dist. Ct. App. 1991); *State v. Kalogeras*, 587 So. 2d 591 (Fla. 4th Dist. Ct. App. 1991); *State v. Greisdorf*, 587 So. 2d 1153 (Fla. 4th Dist. Ct. App. 1991); *State v. Scates*, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991); *State v. Baxter*, 581 So. 2d 937 (Fla. 4th Dist. Ct. App. 1991); see also Tom Davidson, *Man Must Serve Three Year Term*, SUN-SENTINEL, Aug. 22, 1991, at 5B. *But see State v. Regan*, 564 So. 2d 1208 (Fla. 4th Dist. Ct. App. 1990)(court affirmed downward departure to probation due to unreasonable conduct of arresting officer who lured Defendant closer to school). Judge Fogan has recently declared section 893.13(e)(1) unconstitutional. See *State v. Williams*, No. 91-8361CF10A (Fla. 17th Cir. Ct. 1991)(order granting motion to dismiss).

265. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

266. *Id.*

267. Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

268. *Id.*

269. Telephone Interview with Judge Mark Speizer, Administrative Judge, Criminal Division, Seventeenth Judicial Circuit, Broward County, Florida (Nov. 14, 1991).

270. *Id.*

271. Telephone interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.

272. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.

tion or to drop the charges.<sup>273</sup> In order to amend the statute, Judge Fogan has enlisted the aid of various professionals, such as law professors, who have engaged in a letter writing campaign in order to gain support from Florida lawmakers.<sup>274</sup> Clearing this hurdle will give Judge Fogan the discretion he needs to make the Broward County program as successful as the program in Dade County.<sup>275</sup>

The success that Dade County has experienced with the Drug Court Program has lead other cities throughout the nation to try the program as well.<sup>276</sup> However, in the face of this success, the programs in Dade and Broward County are facing what is perhaps the greatest hurdle—survival. Although both Florida Attorney General Robert A. Butterworth and Florida Governor Lawton Chiles have expressed their approval of the programs, there may be trouble ahead.<sup>277</sup> Even though there are current ongoing investigations concerning funding,<sup>278</sup> the

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273. FLA. STAT. § 948.08 (1991).

274. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Letter from Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida to Steven J. Wisotsky, Professor of Law, Nova University Center for the Study of Law (Oct. 24, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Steven Wisotsky, Professor of Law, Nova University Center for the Study of Law to Rep. Bill Clark, Florida House of Representatives (Dec. 26, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Randi Burger, Judicial Projects Administrator, Seventeenth Judicial Circuit, Broward County, Florida to Ms. Susan Bisby, House Criminal Justice Committee, Florida House of Representatives (Oct. 18, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from M. Thomas Adkins, Jr., Criminal Justice Lobbyist to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (Dec. 27, 1991).

275. Telephone Interview with Janet Reno, *supra* note 223; Telephone Interview with Judge Stanley Goldstein; *supra* note 179 (neither Reno, nor Judge Goldstein support the proposed change of the PTI statute because they believe that discretion to *nolle prosequi* a case should rest with the prosecution).

276. May, *supra* note 189, at 2B (comments from officials in Nevada and Ohio who have initiated similar programs); Drug Court April 1, 1991, *supra* note 8.

277. Letter from Lawton Chiles, Governor, Florida State to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (June 18, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Robert A. Butterworth, Attorney General, Florida State to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (July 22, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida).

278. Strategies For Action, *supra* note 7, at 5; Drug Court April 1, 1991, *supra* note 8; Drug Court Program, *supra* note 7.

Drug Court program may come to a swift halt if funding sources cannot be obtained.<sup>279</sup>

### VIII. CONCLUSION

In 1764, it was written that in order to be effective, "there must be a proper proportion between crimes and punishment."<sup>280</sup> In other words, the punishment must fit the crime. Therefore, if one is arrested for the crime of possession of illegal substances as a direct and involuntary result of suffering from the disease of addiction, the best and most fitting "punishment" would be the treatment of the underlying disease as opposed to punishing the possession crime which is merely a symptom.

This question is, perhaps, best left to the courts. It follows that if the courts must make law through precedent, then they must also act in other ways that effect the communities in which they sit. For the criminal defendant, a court may be the only thing that stands between that defendant and liberty (and sometimes life). Given this power, judges should take an active role in their communities.

The crime is possession of narcotics caused by the disease of drug addiction. For too long, the courts have been focusing on the addict instead of the addiction, incarcerating the diseased instead of arresting the disease. To do so, the courts must become active in their communities so that more Drug Court Programs can be set up. In an era when spending too much money makes little sense, the Drug Court is a financial as well as a human remedy.

Drug Court is not a cure for the ills of the world, and it cannot provide an answer to the nation's nightmare with drugs. However, what it can, and does, do is end the nightmare of addiction in a cost effective way for those who are willing to try to make it work. So far, about ninety percent have been so willing.

*Michael E. Coviello*

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279. *Metromagazine*, *supra* note 182.

280. CESARE BECCARIA, ON CRIMES AND PUNISHMENT 62 (Henry Paolucci trans., Bobbs-Merrill Educational Publishing Co.,inc., 1963) (1764).

# *Payne v. Tennessee: The Arbitrary Imposition of the Death Penalty and a Review of Florida Case Law Since Booth v. Maryland*

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1463
II.	<i>PAYNE V. TENNESSEE</i> .....	1465
	A. <i>Facts</i> .....	1465
	B. <i>Procedural Background</i> .....	1466
	C. <i>United States Supreme Court Opinion</i> .....	1469
	1. Majority Opinion .....	1469
	2. Concurring Opinions .....	1473
	3. Dissenting Opinions .....	1477
III.	DISCUSSION AND ANALYSIS .....	1481
	A. <i>Politics of Victims Rights</i> .....	1481
	B. <i>Victim Impact Statements and the Death Penalty</i> .....	1484
	1. Victim Character .....	1484
	2. Extent of Harm .....	1487
	C. <i>Alternative View of Payne v. Tennessee</i> .....	1490
IV.	FLORIDA CASE LAW AND VICTIM IMPACT STATEMENTS .....	1493
	A. <i>Before Booth</i> .....	1493
	B. <i>After Booth</i> .....	1494
	C. <i>Payne and Beyond</i> .....	1497
V.	CONCLUSION .....	1498

## I. INTRODUCTION

In *Booth v. Maryland*,<sup>1</sup> the United States Supreme Court decided that evidence relating to a victim's character and the extent of harm caused to the victim's family and community was inadmissible to deter-

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1. 482 U.S. 496 (1987), *overruled in part by Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (overruling *Booth* as to a victim's character and the extent of harm to the victim's family and community).

mine whether a defendant convicted of a capital crime should be put to death. The majority in *Booth*, while empathizing with the grief of a victim's family, recognized the potential danger such evidence has on a jury to sentence defendants to death based on such arbitrary factors as what kind of person the victim was and the unforeseeable harm the victim's death had on others. The Court held that the Eighth Amendment<sup>2</sup> required a per se rule against victim impact evidence because it could lead to the imposition of death for "arbitrary and capricious" reasons which are not relevant to the defendant's blameworthiness.<sup>3</sup> Subsequently, the Court applied the same reasoning to prevent prosecutors from presenting similar victim impact evidence in *South Carolina v. Gathers*.<sup>4</sup>

However, in *Payne v. Tennessee*,<sup>5</sup> under the lead of Chief Justice Rehnquist, the Court overruled *Gathers* and *Booth*, and determined that victim impact evidence was relevant and necessary to assess the defendant's "moral culpability and blameworthiness."<sup>6</sup> In effect, the Court held that victims' families and prosecutors should be able to tell the jury at sentencing that defendants deserve the death penalty because their victim was "a religious man and registered voter,"<sup>7</sup> or the victim's family "received over one thousand sympathy cards, some from total strangers."<sup>8</sup>

*Payne v. Tennessee* is significant for a number of reasons. First, considering the current conservative judiciary, the return of victim impact statements bodes ill for opponents of capital punishment; the result is the potential for a significant rise in the number of death sentences. Second, *Payne* creates the risk that capital sentencing will turn into "a kind of 'moral postmortem' on the relative worth of the deceased,"<sup>9</sup> and, strategically, defendants may be compelled to wage their own offensive against the presumed good name of the victim, set-

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2. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *Booth*, 482 U.S. at 503.

4. 490 U.S. 805 (1989), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

5. 111 S. Ct. 2597 (1991).

6. *Id.* at 2608.

7. *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988).

8. *Booth*, 482 U.S. at 499, n.3.

9. Mark Hansen, *Limiting Death Row Appeals — Final Justice*, 78 A.B.A. J. 64, 67 (1992) (quoting unnamed experts and death-penalty litigators).

ting the stage for a drawn out mini-trial into the victim's character. Finally, defendants may be sentenced to death over life imprisonment based primarily on the relative social worth and popularity of their victims and juries may be swayed to impose death based on the eloquence of family members' and their testimonials of grief rather than the defendant's character and the circumstances of the crime.

This Comment analyses the arguments of the Court in *Payne* and concludes that the Court decided *Payne* wrongly because evidence relating to a victim's character and the extent of harm to the victim's family is legally irrelevant and creates an impermissible risk of imposing the death sentence in an "arbitrary and capricious" fashion.<sup>10</sup> Furthermore, this Comment explores an alternative view of *Payne* and suggests that the Court could have avoided overruling the sound holdings in *Booth* and *Gathers* by affirming the Tennessee Supreme Court's death sentence based on the relevant evidence directly relating to the "circumstances of the crime"<sup>11</sup> and under harmless error analysis. Additionally, this Comment will review relevant Florida case law developed since *Booth* and *Gathers* and discuss the effect *Payne* has had on Florida's standard of review for use of victim impact statements at a capital trial.

## II. *PAYNE V. TENNESSEE*

### A. *Facts*

On Saturday, June 27, 1987, Pervis Payne ("Payne") visited the upstairs apartment of his girlfriend with the expectation of her return from her mother's home in Arkansas.<sup>12</sup> Finding her not home, Payne returned several times throughout the day, and on one visit left his overnight bag in the hall. In between visits, Payne spent much of the day drinking beer and injecting cocaine with a friend while driving around town.

Later that afternoon, Payne returned to the apartment and, finding his girlfriend not home, went across the hall to the apartment of 28-year-old Charisse Christopher and her two young children, two-year-old daughter Lacie and three-year-old son Nicholas.<sup>13</sup> Desiring

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10. See *Booth*, 482 U.S. at 503.

11. *Id.* at 507 n.10.

12. *Id.* at 2601.

13. *Id.*

sex, Payne became violent after Charisse thwarted his advances, and a struggle ensued. Using a butcher knife from the kitchen, Payne brutally attacked the family and murdered Charisse and Lacie — Charisse died as a result of eighty-four wounds to the abdomen, arms, and hands, while Lacie sustained mortal wounds to the chest, head, abdomen, and back. Miraculously, Nicholas survived despite numerous wounds that penetrated his entire body.

During the struggle, the neighbor in the apartment below called the police after hearing screams from the Christopher apartment.<sup>14</sup> As the first officer arrived, Payne was descending the stairs covered with blood. Payne first stated to the officer that he was the “complainant” and then suddenly struck the officer with his overnight bag and fled. He was arrested a day later hiding in a friend’s attic, claiming: “Man, I ain’t killed no woman.”<sup>15</sup>

### B. Procedural Background

The Tennessee trial court convicted Payne on two counts of first degree murder for Charisse and Lacie, and one count of assault with attempt to commit murder in the first degree for Nicholas.<sup>16</sup> During the sentencing phase of the trial, Payne presented the testimony of four witnesses in an effort to mitigate punishment.<sup>17</sup> Payne’s parents testified that Payne was a “good son” with no prior criminal or arrest record or “history with alcohol or drug abuse”; Payne’s girlfriend testified that she met Payne at church and that he was “a very caring person” who “devoted much time and attention to her three children” and believed he was incapable of having committed such crimes; and Dr. Huston, who testified as an expert in “criminal court evaluation work,” stated that Payne was “‘mentally handicapped’” based on IQ test scores and was “the most polite person he had ever met.”<sup>18</sup>

The State presented the testimony of Charisse’s mother who described how Nicholas had been traumatized by the loss of his mother and sister.<sup>19</sup> During closing argument, the prosecutor, arguing for the

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14. *Id.*

15. *Payne*, 111 S. Ct. at 2602.

16. *Id.* at 2601.

17. *Id.* at 2602. Payne’s mother, father, and girlfriend, and Dr. John T. Huston, a clinical psychologist, all testified on Payne’s behalf. *Id.*

18. *Id.* at 2602-2603.

19. *Payne*, 111 S. Ct. at 2603. Charisse’s mother testified:

[Nicholas] cries for his mom. He doesn’t seem to understand why she

death penalty, spoke of the character of the victims and the continuing effects their murder had on Nicholas and the families involved.<sup>20</sup>

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doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about Lacie.

*Id.*

20. *Id.* During closing argument and rebuttal, the prosecutor stated:

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer . . . .

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives . . . .

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody there to take her to her high school prom. And there won't be anybody there—there won't be his mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that child will carry forever.



The jury sentenced Payne to death on each count of murder.<sup>21</sup> Payne appealed, contending that the grandmother's testimony and the prosecutor's closing argument were constitutionally impermissible and conflicted directly with the Supreme Court's holdings in *Booth*<sup>22</sup> and *Gathers*,<sup>23</sup> respectively. The majority in both cases<sup>24</sup> held that the inclusion of victim impact statements at capital sentencing created an unacceptable risk that the jury may impose the death penalty in an "arbitrary and capricious" manner in violation of the Eighth Amendment's proscription against cruel and unusual punishment.<sup>25</sup>

Nevertheless, the Supreme Court of Tennessee upheld Payne's conviction and death sentence, stating that the grandmother's testimony, while " 'technically irrelevant,' . . . did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt.' "<sup>26</sup> The Tennessee Su-

*Id.*

21. *Id.* at 2601. Payne was sentenced also to 30 years for the assault with attempt to commit murder on Nicholas Christopher. *Id.*

22. The trial court in *Booth* convicted the defendant on two counts of first degree murder and sentenced him to die for the stabbing death of one of his victims. *Booth v. Maryland*, 482 U.S. 496, 501 (1987), *overruled in part by Payne v. Tennessee*, 111 S. Ct. 2597 (1991). The Court held that the Maryland statute requiring a victim impact statement (describing the emotional impact on the victims' family, the character of the victims, and the family members' opinion on the crimes and character of the accused) in a presentence report used by the jury during the sentencing phase of a capital murder trial, violated the defendant's Eighth Amendment rights. *Id.* at 498-509.

23. In *Gathers*, the defendant was convicted of first degree murder and sentenced to death for beating and stabbing a victim to death in a park. *Gathers v. South Carolina*, 490 U.S. 805, 807-808 (1989), *overruled by Payne v. Tennessee*, 111 S. Ct. 2597 (1991). During sentencing, the prosecutor presented no evidence other than comments about the victim's character as " 'a religious man and a registered voter.' " *Id.* at 810 (quoting *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988)). The Court reasoned that statements about a victim's character posed the same risk of arbitrary sentencing whether the source is the victim's family or the prosecutor; therefore, the Court held that evidence of victim character presented by the prosecution during capital sentencing violated the Eighth Amendment. *Id.* at 810-812.

24. In *Booth*, Justice Powell delivered the opinion of the Court, which Justices Brennan, Marshall, Blackmun and Stevens joined. *Booth*, 482 U.S. at 497. In *Gathers*, Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. *Gathers*, 490 U.S. at 805-806. Justice White filed a brief concurring opinion where he stated that unless *Booth* was to be overruled, he would join the majority. *Id.* at 812 (White, J. concurring).

25. *Booth*, 482 U.S. at 503-509; *Gathers*, 490 U.S. at 810-812.

26. *Payne*, 111 S. Ct. at 2604 (quoting *State v. Payne*, 791 S.W.2d 10, 18 (Tenn. 1990)).

preme court reasoned further that the prosecutor's comments concerning the victims' personal characteristics and the emotional harm to the families involved were "'relevant to [Payne's] personal responsibility and moral guilt'" and not prejudicial under harmless error analysis.<sup>27</sup>

### C. *United States Supreme Court Opinion*

#### 1. Majority Opinion

Chief Justice Rehnquist, writing for the majority,<sup>28</sup> began the *Payne* opinion by attacking what the Court believed were the two main premises underlying the holdings in *Booth* and *Gathers*: (1) evidence relating to a victim's character or the effect of the crime on a victim's family does not reflect on a victim's "blameworthiness" and (2) only evidence that is relevant to "blameworthiness" is permissible at the sentencing phase of a capital trial.<sup>29</sup> The Court, nonetheless, claimed that "an assessment of harm caused by a defendant" has always been of relevant concern throughout the history of the criminal law, and although the principles that shape punishments to fit crimes have varied, the sentencing authority has always possessed great latitude in considering relevant evidence.<sup>30</sup> Along these lines, the Court argued that merely because victim impact statements are "of recent origin, this fact hardly renders [them] . . . unconstitutional."<sup>31</sup>

The Court next explained that the *Booth* majority simply misread

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27. *Id.*

28. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Scalia, Kennedy and Souter joined. *Payne*, 111 S. Ct. at 2601. Justice O'Connor filed a concurring opinion, in which Justices White and Kennedy joined. *Id.* at 2611 (O'Connor, J., concurring). Justice Scalia filed a concurring opinion, in part II of which Justices O'Connor and Kennedy joined. *Id.* at 2613 (Scalia, J., dissenting). Justice Souter filed a concurring opinion, in which Justice Kennedy joined. *Id.* at 2614 (Souter, J., concurring). Justice Marshall and Stevens both filed dissenting opinions, in which Justice Blackmun joined. *Payne*, 111 S. Ct. at 2619, 2625 (Marshall, Stevens, and Blackmun, JJ., dissenting).

29. *Id.* at 2605. Evidence about the victim and victim's family were "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," *Booth*, 482 U.S. at 505; therefore, this evidence has no bearing on the "blameworthiness of a particular defendant." *Id.* at 504.

30. *Payne*, 111 S. Ct. at 2605-2606.

31. *Id.* at 2606; *see, e.g.*, *Williams v. Florida*, 399 U.S. 78 (1970) (upholding the constitutionality of a Florida notice-of-alibi rule, similar to recent enactments by at least 15 other states).

the holding in *Woodson v. North Carolina*,<sup>32</sup> the principal case on which the majority relied.<sup>33</sup> The Court asserted that *Woodson* only addressed the issue that mitigating evidence about the defendant's life and character must not be excluded during the sentencing phase of a capital trial<sup>34</sup> because such evidence necessarily shows the defendant as "a uniquely individual human being."<sup>35</sup> "The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received."<sup>36</sup> Therefore, this "misreading of precedent in *Booth* has . . . unfairly weighted the scales in a capital trial"<sup>37</sup> in favor of the defendant and at the expense of the victim, the victim's family, and the community. This argument presumes that a capital trial is a level playing field where each side has equal resources and stakes in the outcome. However, nothing could be further from the truth: the defendant is fighting for his life against the state and all its potentially limitless resources in a criminal prosecution.

The Court also addressed the concerns of the *Booth* majority that admitting evidence of the victim's character during the sentencing phase would create a mini-trial on the victim's character and divert the attention of the jury away from the defendant and the circumstances of

32. 428 U.S. 280 (1976).

33. *Payne*, 111 S. Ct. at 2606-2607.

34. *Id.* at 2607. *Woodson* asserted that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (emphasis added).

35. *Payne*, 111 S. Ct. at 2606-2607 (quoting *Booth*, 482 U.S. at 504 (quoting *Woodson*, 428 U.S. at 304)). The Court in *Woodson* held that a North Carolina mandatory death penalty statute violated the Eighth and Fourteenth Amendments because:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

*Woodson*, 428 U.S. at 304.

36. *Payne*, 111 S. Ct. at 2607 (emphasis original).

37. *Id.*

the crime.<sup>38</sup> In addition, the Court considered the *Booth* majority's argument that juries would dole out the death penalty based on the comparative worth of the individual to the community.<sup>39</sup>

The Court first explained that while risk of a mini-trial exists, such evidence about the victim's character is likely to be before the jury during the guilt phase regardless, and "for tactical reasons, it might not be prudent for the defense to rebut victim impact evidence . . . ." <sup>40</sup> Second, evidence of a victim's character is not offered to show "comparative judgments" of a victim's worth to society,<sup>41</sup> but is "designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."<sup>42</sup> While this reasoning may explain the purpose of victim impact evidence, it fails to address the obvious issue: the effect such evidence has on a jury. Common sense and logic about human nature dictates that a jury would be less inclined to dole out harsh punishment if, for example, the victim was a convicted felon as opposed to a priest.

Due to the Court's inherent criterion in both the *Booth* and *Gathers* decisions, the *Payne* majority expressly overruled the holdings in *Booth* and *Gathers* because the extent of harm to the victim, the victim's family or community is necessary "to assess meaningfully the de-

38. *Id.* The *Booth* majority noted:

[T]he defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.

*Booth*, 482 U.S. at 507.

39. *Payne*, 111 S. Ct. at 2607; *see also id.* at 2620, 2626 (Marshall and Stevens, JJ., dissenting). The *Booth* Court stressed that there exists no "justification for permitting [imposition of the death penalty] . . . to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Booth*, 482 U.S. at 506. In footnote eight, the Court provided: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." *Id.* at 506 n.8.

40. *Payne*, 111 S. Ct. at 2607. The Court borrows the *Booth* majority's opinion that raises the question of "the strategic risks of attacking the victim's character before the jury" during the sentencing phase of the trial. *Booth*, 482 U.S. at 507.

41. *Payne*, 111 S. Ct. at 2607.

42. *Id.* (emphasis in the original).

defendant's moral culpability and blameworthiness."<sup>43</sup> The Court argued that proscribing victim impact statements that relate to the extent of harm to a murdered victim's family and community "deprive[s] the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."<sup>44</sup> Thus, the Court agreed with the Supreme Court of Tennessee that the testimony of Nicholas' grandmother and the closing comments by the prosecutor illustrated the extent of the harm caused by Payne, and "that there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."<sup>45</sup>

The Court further justified the introduction of victim impact evidence by asserting the high deference afforded the states in matters relating to crimes against state law, punishments, and procedures.<sup>46</sup> In spite of the holding in *Booth*, the Court noted, without any justification, that victim impact statements serve a "legitimate purpose" of the states,<sup>47</sup> and do not lead to an arbitrary imposition of the death penalty in violation of the Eighth Amendment.<sup>48</sup>

In explaining its criticism of *Booth* and *Gathers* and enumerating

43. *Id.* at 2608. In a separate footnote, the limitations to the scope of *Payne*'s overruling of *Booth* and *Gathers* states that:

Our holding today is limited to . . . evidence and argument relating to the victim and the impact of the victim's death on the victim's family . . . . *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

*Id.* at 2611 n.2.

44. *Id.* at 2608.

45. *Payne*, 111 S. Ct. at 2609.

46. *Id.* at 2607-2608.

47. *Id.* at 2608; *see also Booth*, 482 U.S. at 517 (White, J., dissenting). Justice White stated:

[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, *see, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982), by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

*Id.*

48. *Payne*, 111 S. Ct. at 2608.

an apparent new standard for *stare decisis*,<sup>49</sup> the Court explained that while *stare decisis* is the “preferred course,”<sup>50</sup> it is less so in “constitutional cases” and in matters “involving procedural and evidentiary rules” where reliance interests are not at their “acme.”<sup>51</sup> The Court intimated that merely because *Booth* and *Gathers* were decided by “the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions,”<sup>52</sup> future 5-4 decisions of the Court are ripe for reconsideration and review. The Court attempted to rebut the dissenters’ arguments about *stare decisis* by citing reference to thirty-three cases overruled in whole or part during the last twenty terms of the Court.<sup>53</sup>

## 2. Concurring Opinions

Justices O’Connor, Scalia and Souter each filed concurring opinions in *Payne*<sup>54</sup> and raised their own distinct arguments in favor of victim impact statements in capital offense trials and for overruling *Booth* and *Gathers*.<sup>55</sup> Specifically, Justice O’Connor argued that the states are

49. See, e.g., David O. Stewart, *Four Spirited Dissenters*, 77 A.B.A. J. 40 (1991).

50. *Payne*, 111 S. Ct. at 2609. “*Stare decisis* . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Id.* (emphasis original).

51. *Id.* at 2610. The Court clarified that *stare decisis* is not “an inexorable command,” especially in constitutional cases where “‘correction through legislative action is practically impossible’” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); furthermore, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . .” *Payne*, 111 S. Ct. at 2610 (emphasis original).

52. *Id.* at 2610-2611.

53. *Id.* at 2610-2611 n.1. However, the Court failed to note that “the average age of the overruled precedents in those cases was 40 years, while *Payne* overruled a 2-year-old precedent.” Stewart, *supra* note 49, at 41.

54. In *Booth*, Justice White filed a dissenting opinion, in which Chief Justice Rehnquist and Justices O’Connor and Scalia joined. *Booth*, 482 U.S. at 515 (White, J., dissenting). Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justices White and O’Connor joined. *Id.* at 519 (Scalia, J. dissenting).

In *Gathers*, Justice O’Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Kennedy joined. *Gathers*, 490 U.S. at 812 (O’Connor, J., dissenting). Justice Scalia filed a separate dissenting opinion. *Id.* at 823 (Scalia, J., dissenting).

55. *Id.* at 2611-2619 (O’Connor, Scalia, and Souter, JJ., concurring).

free to justly determine whether victim impact statements should be allowed as relevant evidence in a sentencing proceeding to show the extent of harm to the victim's family and community.<sup>56</sup> Juries should be allowed to see "a quick glimpse" of the character of victims to remind them of their uniqueness as human beings.<sup>57</sup>

Starting with the premise that victim impact statements are "potentially relevant,"<sup>58</sup> Justice O'Connor asserted that the Eighth Amendment narrowly limits punishments which are "either inherently cruel or which so offend the moral consensus of this society as to be deemed 'cruel and unusual.'"<sup>59</sup> Victim impact statements, therefore, do not implicate Eighth Amendment protection primarily because societal consensus advocates their use, given the recent rise in victim impact legislation.<sup>60</sup>

Also, according to the concurrence, due process under the Fourteenth Amendment affords defendants "appropriate relief" against the threat of arbitrary sentencing.<sup>61</sup> Furthermore, the statements brought before the jury in *Payne* did not violate due process because Charisse's mother's "brief statement did not inflame their passions more than did the facts of the crime,"<sup>62</sup> nor did the prosecutor's comments, as the jury had already seen a videotape of the murder scene.<sup>63</sup>

In contrast, Justice Scalia, in his concurring opinion, reiterated his fundamental opposition to the Court's previous pronouncement that defendants are constitutionally entitled to introduce all relevant mitigating evidence during sentencing for a capital offense.<sup>64</sup> However, Justice Scalia went a step further by stating that even if this precedent did not exist or was overruled,<sup>65</sup> he would still affirm *Payne* because the Eighth

56. *Payne*, 111 S. Ct. at 2611 (O'Connor, J., concurring).

57. *Id.* (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

58. *Id.*

59. *Id.* at 2611-2612 (quoting *South Carolina v. Gathers*; 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

60. *Payne*, 111 S. Ct. at 2612. However, Justice O'Connor pointed out that victim impact statements can be excluded and are subject to appellate review when they reach the level of "unduly inflammable." *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 2613 (Scalia, J., concurring).

65. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 876-877 (1982) (state statute may not preclude the introduction of any relevant mitigating evidence for defendant at capital sentencing).

Amendment provides adequate latitude for society to decide “what is a crime and what constitutes aggravation and mitigation of a crime.”<sup>66</sup> Evidently, Justice Scalia sees no inherent problem in a capital sentencing proceeding where the defendant is prohibited by state law to present mitigating evidence but the state is permitted to introduce victim impact evidence.

Justice Scalia also advanced his own views on *stare decisis*. He began by quoting dissenting Justice Marshall’s own writings on the subject: “[*Stare decisis*] is not ‘an imprisonment of reason.’”<sup>67</sup> By declaring that *Booth* “defied reason” and “harms our criminal justice system and is egregiously wrong,”<sup>68</sup> Justice Scalia concluded his opinion with a claim that *Booth* itself defied the principles underlying *stare decisis*:

A decision of this Court [i.e., *Booth*] which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today’s decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.<sup>69</sup>

Likewise, while not one of the original “spirited” dissenters in *Booth* and *Gathers*,<sup>70</sup> Justice Souter concurred with the majority by arguing that *Booth* and *Gathers* were properly overruled because the Eighth Amendment erects no per se bar against victim impact state-

66. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring). Presumably, Justice Scalia does not put much stock in the majority’s argument that victim impact statements are necessary for a fair and balanced proceeding. See *id.* at 2607 (the exclusion of victim impact evidence has “unfairly weighted the scales in a capital trial”).

67. *Id.* at 2613 (quoting from *Guardians Assn. v. Civil Service Comm’n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)).

68. *Id.*

69. *Id.* at 2614 (emphasis original). The concurrence explained that *stare decisis* “is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well.” *Id.* at 2613-2614 (emphasis original).

70. *South Carolina v. Gathers*, 490 U.S. 805 (1989) (Rehnquist, C.J., Kennedy, O’Connor, and Scalia, JJ., dissenting); *Booth v. Maryland*, 482 U.S. 496, 497 (1987) (Rehnquist, C.J., O’Connor, Scalia, and White, JJ., dissenting).



ments.<sup>71</sup> Justice Souter noted that a victim's uniqueness necessarily includes a group of people close to the victim who are harmed as a result of the murderer's criminal act, and it is that foreseeability that makes their harm morally relevant to punishment.<sup>72</sup> He further echoed the fear of the majority that excluding such evidence would create an unbalanced proceeding, given the defendant's right to present all relevant mitigating evidence.<sup>73</sup>

Justice Souter asserted that *Booth* was decided wrongly not merely on constitutional grounds, but on the basis that it created an "unworkable standard" for admissibility of relevant evidence and undermined "individualized sentencing" for capital defendants.<sup>74</sup> The concurrence explained that evidence relating to a victim's character and the emotional harm to the victim's family, in most cases, will be brought out during the guilt phase of the trial and, consequently, already will be in the minds of the jury during sentencing.<sup>75</sup> In fact, by strictly adhering to *Booth*, courts would be compelled to exclude such evidence as irrelevant and unfairly prejudicial, thereby depriving jurors of "details of context" and requiring states to impanel a new sentencing jury.<sup>76</sup> This result is an impractical evidentiary barrier and an unwarranted imposition on the states.<sup>77</sup> However, this analysis by Justice Souter undermines his argument: if a victim's character and the emotional harm to the victim's family is already in the minds of the jury during sentencing, why does it bear repeating through testimony from the victim's family or the prosecutor? In fact, the repititioned cumulative effect is what creates the impermissible risk of an arbitrary or capricious sentencing.

For Justice Souter, this "unresolved tension between evidentiary standards"<sup>78</sup> at the guilt and sentencing phase provided "'special justification'"<sup>79</sup> to thwart *stare decisis* and overrule precedent: "*Booth* promises more than it can deliver" which is "a sentencing determina-

71. *Payne*, 111 S. Ct. at 2614 (Souter, J., concurring).

72. *Id.* at 2615.

73. *Id.* at 2616; *see also* *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).

74. *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).

75. *Id.* at 2617.

76. *Id.*

77. *Id.*

78. *Id.* at 2618.

79. *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

tion free from the consideration of facts unknown to the defendant and irrelevant to his decision to kill."<sup>80</sup> With contorted logic, Justice Souter concluded by arguing that *Booth*, not *Payne*, "create[s] a risk of arbitrary results."<sup>81</sup>

### 3. Dissenting Opinions

Justice Marshall, in his last opinion as a Supreme Court Justice, dissented from the majority in *Payne* by arguing primarily the principle of stare decisis. Justice Marshall harshly criticized the present Court's "staggering" and "radical" approach to subverting constitutional precedent: "Power, not reason, is the new currency of this Court's decisionmaking."<sup>82</sup> "The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case."<sup>83</sup> By exposing the Court's true motivation behind *Payne*, Justice Marshall stated that *Booth* and *Gathers* were overruled not because of flawed principles, but merely because the Court's membership has changed since they were decided.<sup>84</sup>

Justice Marshall argued that the majority failed to present "the type of extraordinary showing that this court has historically demanded

80. *Id.* at 2618.

81. *Id.*

82. *Id.* at 2619 (Marshall, J., dissenting). Justice Marshall is, of course, referring to the recent changes in the Court's personnel which has resulted in a staunchly conservative Supreme Court with Chief Justice Rehnquist at the helm as its primary driving force. See Marcia Coyle, *Complete Control: In 1990-'91, Rehnquist Was at the Helm of a Solidly Conservative Supreme Court*, NAT'L L.J., Aug. 19, 1991, at S1. The recent appointment of conservative Justice Clarence Thomas to the Supreme Court only accentuates Justice Marshall's concern. *But see* Fred Strasser and Marcia Coyle, *Still Searching for the Real Clarence Thomas*, NAT'L L.J., Sept. 30, 1991, at 26 (Clarence Thomas' endorsement of Justice Marshall's views on *stare decisis* in *Payne* and his comments that: "You simply cannot, because you have the votes, begin to change the rules.").

83. *Payne*, 111 S. Ct. at 2619 (referring to the Supreme Court of Tennessee's blatant rejection of the *Booth* and *Gathers* precedents); see *State v. Payne*, 791 S.W.2d 10, 18-19 (Tenn. 1990).

84. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting). After *Booth* was decided in 1987, Justice Powell resigned from the Court and was replaced by Justice Kennedy. After *Gathers* was decided in 1989, Justice Brennan resigned in 1990 and was replaced by Justice Souter. Since *Payne*, Justice Marshall has resigned and Clarence Thomas has been confirmed as Justice to the United States Supreme Court in 1991.

before overruling one of its precedents."<sup>85</sup> Citing the traditional bases that justify overturning precedent,<sup>86</sup> Justice Marshall concluded that the majority not only failed to provide such bases, but illustrated "its radical assertion that it need not even try."<sup>87</sup>

Justice Marshall ended his dissent by foreshadowing the demise of numerous cases decided by a 5-4 margin,<sup>88</sup> predicting that the Court's "short-sided strategy for effecting change in the constitutional order"<sup>89</sup> "invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course."<sup>90</sup> The result, according to Justice Marshall, undermines the authority and stature of the Court. He closed with the following remarks:

Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decisions is to be taken at face value . . . then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court as a protector of the powerless.<sup>91</sup>

Unwavering in his last stand, Justice Marshall ended his notable and distinguished service with the notion that *Payne* represents a "looking glass" through which the future direction of a predominately conservative United States Supreme Court can be predicted.<sup>92</sup> Only time will reveal whether his dire foreshadowings come true.

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85. *Id.* at 2621.

86. *Id.* at 2621-2622. The traditional bases are: (1) "advent of 'subsequent changes or development in the law' that undermines a decision's rationale" *id.* at 2621 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)); (2) "the need 'to bring [a decision] into agreement with experience and facts newly ascertained,'" *id.* at 2621-2622 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); and (3) "a showing that a particular precedent has become a 'detriment to coherence and consistency in the law.'" *Id.* at 2622 (quoting *Patterson*, 491 U.S. at 173).

87. *Payne*, 111 S. Ct. at 2621 (Marshall, J., dissenting).

88. *Id.* at 2624.

89. *Id.* at 2625.

90. *Id.* at 2624.

91. *Id.* at 2625.

92. Coyle, *supra* note 82, at S1, col. 2.

In contrast, Justice Stevens' five part dissent concentrated less on *stare decisis* than on the majority's flawed reasoning and lack of judicial precedent.<sup>93</sup> First, Justice Stevens traced a line of decisions which supported the holdings of *Booth* and *Gathers*, and inherently discredited the use of victim impact statements in death penalty cases due to the risk of arbitrary sentencing and irrelevance.<sup>94</sup>

Next, Justice Stevens responded to the Court's contention that the liberal introduction of mitigating evidence for the defendant creates a "significantly imbalanced sentencing procedure" by explaining that it is based on an inaccurate conclusion and premise. "This argument is a classic *non sequitur*: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance."<sup>95</sup> The concurrence pointed out that whereas the defendant is allowed to introduce all relevant mitigating evidence during sentencing, the state may rebut that evidence directly, without the introduction of irrelevant evidence, i.e., victim impact statements, and may "designate any relevant conduct to be an aggravating factor."<sup>96</sup> Additionally, Justice Stevens correctly reminds the majority that a criminal prosecution is not premised on an "even-handed balance" between the state and the defendant; the Constitution protects individual rights and limits the disproportionate power of the state,<sup>97</sup> and, accordingly, rules of evidence are more favorable to the defendant.<sup>98</sup>

Also, Justice Stevens pointed to the two fatal flaws with victim impact statements as they pertain to the Eighth Amendment. First, evidence as to a victim's character which is not foreseen by the defendant is irrelevant to "'personal responsibility and moral guilt.'"<sup>99</sup> Second, victim impact statements lead to inconsistent punishments and unbri-

93. See *Payne*, 111 S. Ct. at 2625-2631 (Stevens, J., dissenting).

94. See *id.* at 2625-2627; see, e.g., *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (death penalty punishment requires determination of "character of the individual and circumstances of the crime"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (Eighth Amendment requires consideration of individual defendant's character and circumstances of crime in capital sentencing); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (in a death penalty case, the "punishment must be tailored to . . . [the defendant's] personal responsibility and moral guilt").

95. *Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting) (emphasis original).

96. *Id.* at 2627.

97. *Id.*

98. *Id.*; see, e.g., FED. R. EVID. 404(a).

99. *Payne*, 111 S. Ct. at 2628 (Stevens, J., dissenting) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

dled discretion because the quality and quantity of the evidence can only be ascertained after the crime has been committed.<sup>100</sup>

To justify laws that inherently take into account victim character as a mandatory factor, Justice Stevens distinguished between legislative determinations and judicial sentencing: statutes which take into account victim character act as notice to a defendant,<sup>101</sup> whereas general sentencing cannot foresee the character of every conceivable victim.<sup>102</sup> Additionally, allowing the sentencer to consider a wide range of evidence<sup>103</sup> excludes victim impact evidence because, much like the threat of a mini-trial on the victim's character,<sup>104</sup> it "distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors [which] necessarily prejudices the defendant."<sup>105</sup>

However, while Justice Stevens conceded that much of the victim impact evidence would have been properly admitted during the guilt phase of *Payne*, and that the jury had sufficient evidence to justify a verdict of death, the primary concern of the justices should be in cases where victim impact statements will make a difference in the verdict.<sup>106</sup> In addition, Justice Stevens rebutted the proposition of the majority that victims require evidence to show they are unique human beings; he stated that such a notion is obvious and a jury does not need to be reminded of that fact during a capital sentencing phase.<sup>107</sup> Furthermore, victim impact evidence to show unique character leads to risks of imposition of the death penalty based on the victim's perceived social worth.<sup>108</sup>

100. *Id.*

101. *See id.* (explaining that there exists a rational correlation between moral culpability and foreseeable consequence). For instance, the imposition of the death penalty for assassinating the President or Vice President is consistent with the Eighth Amendment because the statutory provision supplies the criminal with notice, i.e., foreseeability. *Id.* at 2628 n.2.

102. *See id.* at 2628. "[T]he majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis." *Id.* at 2628-2629.

103. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting).

104. *See Booth*, 482 U.S. at 507.

105. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting).

106. *Id.* at 2630.

107. *Id.* at 2631.

108. *Id.* ("Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.")

Obviously disturbed by the Court's lack of judicial restraint, Justice Stevens concluded by pointing out that the majority's decision rests on "the current popularity of capital punishment" and "the political strength of the victims' rights movement,"<sup>109</sup> and that these factors were predominant in the Court's decision to grant certiorari, rather than the Tennessee Supreme Court's rationale.<sup>110</sup>

### III. DISCUSSION AND ANALYSIS

#### A. *Politics of Victims' Rights*

Before analyzing the Court's decision in *Payne*, a brief discussion into the background, evolution and objectives of the victims' rights movement is appropriate. This section will illustrate that the justices who decided to allow the use of victim impact statements at death penalty sentencing failed to concern themselves with these germane issues.

Since the 1960's, the victims' rights movement has grown rapidly, undergoing both numerous changes and shifts of focus. These transformations have ranged from compensation programs concentrating on victim restitution, to a more dynamic role involving direct victim participation in sentencing.<sup>111</sup> A byproduct of the victims' rights movement has been the victim rights statement: a statement outlining the impact of crime on a victim and a victim's family, and which typically is included in a pre-sentencing report that is either statutorily mandated or recommended by the court.<sup>112</sup> Currently, a large majority of the states have enacted some form of victim impact statement legislation.<sup>113</sup> A

109. *Id.*

110. *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting). The Court, thwarted in its earlier attempts to overrule *Booth* in *Gathers* and *Ohio v. Huertas*, 59 U.S.L.W. 1176 (U.S., May 14, 1991), granted certiorari in *Payne*; however, because the petitions did not raise the constitutional issues, the Court ordered the petitioners to brief and argue whether *Booth* and *Gathers* should be overruled. Coyle, *supra* note 82, at S1.

111. See Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 502 (1986).

112. Victim impact statements (oral or written) potentially provide information about the circumstances of the crime, the victim's identity and character, the extent of the harm caused to the victim and the victim's family, and an opinion as to an appropriate punishment for the defendant. Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200-211 (1988).

113. See *id.* As of 1988, thirty-eight states had enacted victim impact statements legislation. *Id.* at 200 n.12.

few states, like Florida, have gone a step further by amending their state constitutions providing a victim's right to be heard under constitutional dimensions.<sup>114</sup>

However, the use of victim impact statements has raised critical concerns. One important criticism has centered on the objectives behind the use of victim impact statements, and whether those objectives are being achieved. Whether the objective is satisfactory victim retribution,<sup>115</sup> enhanced efficiency or effectiveness of the criminal justice system,<sup>116</sup> or successful criminal deterrence, incapacitation or rehabilitation,<sup>117</sup> there exists considerable doubt and lack of consensus among practitioners and scholars as to whether these ends are being achieved. For instance, judges and prosecutors have shown a reluctance to use victim impact statements or direct victim participation — reasons ranging from inconvenience or a belief that victim participation will not be helpful,<sup>118</sup> to fear of liability in a civil action.<sup>119</sup> In addition, legal scholars continue to debate the legal relevance of victim impact state-

114. See *infra* p. 42 and note 172; see also Patrick B. Calcutt, Comment, *The Victims' Rights Act of 1988, The Florida Constitution, and the New Struggle for Victims' Rights*, 16 FLA. ST. U. L. REV. 811 (1988); Debra Cassens Moss, *New Tack for Victims' Rights*, 74 A.B.A.J. 32 (1988) (constitutional amendments have been implemented in Florida, Arizona, Delaware and Rhode Island but not without criticism from defense attorneys and prosecutors).

115. See Talbert, *supra* note 112, at 211 (referring to the Sentencing Reform Act of 1984, codified at 18 U.S.C. § 3553(a)(2) (Supp. IV 1986), where Congress delineated the four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation); see, e.g., Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1306-1309 (1988). Arguably, "the retribution theory of punishment, as properly understood, focuses on what the defendant deserves, not what would benefit society . . . [and] the Supreme Court's decision in *Booth* . . . is completely consistent with and in fact required by the retributivist model of punishment." *Id.*

116. See McLeod, *supra* note 111, at 505. System efficiency means minimal resistance to process a maximum number of criminal cases; system effectiveness refers to a more just sentence if the victim participates. *Id.*

117. See Talbert, *supra* note 112, at 215-219. Deterrence discourages potential criminals from committing crimes and punished criminals from repeating crimes; incapacitation removes criminals from society due to future dangerousness; and rehabilitation reforms criminals and modifies their behavior. *Id.*

118. See McLeod, *supra* note 111, at 507.

119. See Moss, *supra* note 114, at 32. Florida State Rep. Hamilton Upchurch on the impending constitutional amendment for victims' rights in Florida, and the potential that victims could sue prosecutors for infringing their constitutional rights stated: "Can you imagine a prosecutor having to contact and consult with the victim at every juncture?" *Id.*

ments at criminal sentencing,<sup>120</sup> the constitutional issues that are consequently implicated,<sup>121</sup> and the underlying motives behind the victim impact movement.<sup>122</sup> While it is difficult to deny that victims' rights is good politics, it is also equally difficult to prove that victims' rights legislation has achieved its promised goals.<sup>123</sup>

Apparently, the six justices comprising the majority in *Payne* did not feel that this lack of consensus and debate on the utility of victim impact statements bore mentioning, or perhaps they were uninformed on the subject. The majority, while recognizing that victim impact statements are a new phenomenon,<sup>124</sup> avoided the issue of whether they

120. See, e.g., Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial: South Carolina v. Gathers*, 109 S. Ct. 2207 (1989), 80 J. CRIM. L. & CRIMINOLOGY 1236, 1248-1255 (1990) ("We cannot begin to draw lines with regard to appropriate punishment in capital cases based on subjective determinations of the worth of the victim."). But see, e.g., Jackson R. Sharman, III, *Recent Developments—Constitutional Law: Victim Impact Statements and the Eighth Amendment—Booth v. Maryland*, 107 S. Ct. 2529 (1987), 11 HARV. J.L. & PUB. POL'Y 583, 584-86 (1988) (explaining extent of harm is irrelevant during the guilt stage of the trial, but extent of harm and the victim's character is relevant during the sentencing stage to show the gravity of the criminal act).

121. See Jonathan Willmott, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of Booth v. Maryland and South Carolina v. Gathers and a Proposed Standard for The Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045, 1057-1071 (1990) (classifying citizens based on their character to deprive them of life, liberty or property violates the equal protection clause of the Fourteenth Amendment); Note, *supra* note 120, at 1248 (commenting by a prosecutor on a victim's character violates the Eighth Amendment because the jury may impose death based on the victim's character and not the defendant's culpability).

122. Some argue that revenge and retaliation are legitimate and intelligent goals at the root of victims' rights. See, e.g., George Will, *The Value of Punishment*, NEWSWEEK, May 24, 1982, at 92 ("The element of retribution — vengeance, if you will — does not make punishment cruel and unusual, it makes it intelligible."); Murphy, *supra* note 115, at 1333 (utilitarian theories of punishment, such as vengeance to avoid vigilantism and mob violence, while debatable as an appropriate reason for punishment, nonetheless are constitutionally valid). But see Lynn N. Henderson, *The Wrongs of Victim Rights*, 37 STAN. L. REV. 937, 994-995 (1985) (vengeance connotes a level of depravity equal to the criminal act and is "uncivilized").

123. See, e.g., Robert Elias, *The Symbolic Politics of Victim Compensation*, 8 VICTIMOLOGY 213 (1983) (victim compensation has only strengthened police control and has failed to achieve its goals of crime control and improving cooperation with law enforcement).

124. *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991). Given the level of the legal debate over victim impact statements and their effects on juries, an enlightened majority opinion might have addressed some of these concerns by recognizing a need



actually promote any constructive social purpose such as victim satisfaction or participation by victims in the criminal justice process.<sup>125</sup> Justice Scalia charged that the decision in *Booth* “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement,” without commenting on the merits of the movement.<sup>126</sup> Justice O’Connor came closest to recognizing the lack of consensus on the use of victim impact statements by pointing to “considerable confusion in the lower courts” regarding the breadth of the holding in *Booth*.<sup>127</sup> Moreover, the justices who decided to overrule *Booth* and *Gathers* did so without any apparent concern whether victim impact statements accomplished the objectives set out by their proponents.

## B. *Victim Impact Statements and the Death Penalty*

The Court in *Payne* specifically rejected the holdings in *Booth* and *Gathers* that evidence of a victim’s character and the extent of harm suffered by the victim’s family, presented through either direct testimony of the victim’s family or by the prosecutor, is inadmissible at the sentencing phase of a capital trial.<sup>128</sup> This discussion will analyze the issues of admissibility of victim character, and address the relevance and constitutional flaws in the majority’s reasoning.

### 1. Victim Character

The *Payne* decision rested on the principle that evidence of the victim’s character is relevant to the victim’s “‘uniqueness as a human being’”<sup>129</sup> which is necessary to avoid “turning the victim into a ‘face-

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for further empirical studies.

125. Victim impact statements “are simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.” *Id.* at 2608.

126. *Id.* (Scalia, J., concurring). Justice Scalia’s religion, if you will, appears to be the will of the people and justice by the public, irrespective of individual constitutional freedoms.

127. *South Carolina v. Gathers*, 490 S. Ct. 805, 813 (O’Connor, J., dissenting). Justice Marshall criticized the majority’s reliance on Justice O’Connor’s dissent in *Gathers* over the prosecutorial use of the victim’s character by reminding them that the confusion created by *Booth* was the issue that was specifically decided in *Gathers*. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting).

128. *See Payne*, 111 S. Ct. at 2609-2611.

129. *Id.* at 2606-2607 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304

less stranger at the penalty phase of a capital trial'. . . ."<sup>130</sup> The majority argued that just as the defendant is able to present all relevant mitigating evidence of the defendant's character, fairness dictates that the victim be given the same opportunity.<sup>131</sup>

Relevance in evidentiary procedure has been defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."<sup>132</sup> Using this definition, the character of the murdered victim is irrelevant as to the issue of a defendant's guilt — that is, whether he committed the act.<sup>133</sup> But the question raised by *Payne* is whether this same evidence should be relevant to determine whether a defendant, who has already been adjudicated guilty, should be put to death. The *Payne* majority has expanded the scope of relevancy for punishment to include victim character and, in the process, has replaced the stricter concept of legal relevance with a more flexible concept of general relevance. General relevance is open-ended and without practical limitation, and can encompass a wide array of factors without consideration as to their prejudicial effect. Legal relevance, on the other hand, requires more stringent legal reasoning and sufficient probative value, and conditions admissibility of evidence based on relative probative weight verses prejudicial effect.<sup>134</sup> Moreover, the Court's assertions that victim character is relevant to determine the imposition of the death penalty employs the broader concept of relevancy without regard for probative and prejudicial considerations.<sup>135</sup>

The majority's position also raises evidentiary and constitutional dilemmas. First, the introduction of victim character invites the prospect of a mini-trial where the defendant may cross-examine character witnesses for the victim or present extrinsic witnesses to rebut the testimony of the same character witnesses.<sup>136</sup> Consequently, the defendant may also call witnesses to impeach the credibility of the victim's vari-

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(1976)).

130. *Id.* at 2608 (quoting *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting)).

131. *Id.*

132. FED. R. EVID. 401 advisory committee's note.

133. *But see Payne*, 111 S. Ct. at 2628 (Stevens, J., dissenting) (statutory exception for public officials where defendant has been given notice).

134. *See* FED. R. EVID. 401 advisory committee's notes.

135. *See Payne*, 111 S. Ct. at 2628-2630 (Stevens, J., dissenting).

136. *See id.* at 2607. There is nothing in the majority's opinion that indicates the defendant would be prohibited from conducting such a "mini-trial"; the Court merely pointed out that it might not be tactically beneficial to the defendant's case. *Id.*

ous character witnesses.<sup>137</sup> Not only does the prospect of a mini-trial raise concerns of judicial economy,<sup>138</sup> it also shifts the focus of the jury during sentencing from the defendant and the circumstances of the crime, to the victim and his character — neither of which is on trial.<sup>139</sup> While in certain contexts a victim's character is relevant to a defendant's criminal culpability, i.e., when the victim's character is an element of the crime, generally such evidence risks exclusion on grounds of "unfair prejudice, confusion of issues, or misleading the jury."<sup>140</sup>

Second, and more importantly, evidence as to the victim's character admitted during the sentencing phase of a capital trial violates the Eighth Amendment's protection against cruel and unusual punishment because it creates an impermissible risk that the jury might impose the penalty of death for reasons other than the culpability of the offense and the character of the defendant.<sup>141</sup> For instance, family members who testify are frequently upset and highly agitated, and erupt in courtroom outbursts. These displays of emotion by a victim's family and the resulting jury empathy creates the impermissible risk that juries will sentence a defendant to death based on an emotional reaction rather than the character of the defendant and the circumstances of the crime.

Third, admission of victim character evidence permits the sentencer to impose the death penalty based on the comparative social worth of citizens.<sup>142</sup> This disturbing notion that a defendant who murders a sterling member of society as opposed to a reprobate should be more deserving of the death penalty is unwarranted and shocking by implication.<sup>143</sup> Furthermore, this elitist view of social worth is in direct

137. See FED. R. EVID. 608-609, 613.

138. See FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration . . . [and] *elimination of unjustifiable expense and delay* . . .") (emphasis added).

139. See *Payne*, 111 S. Ct. at 2627 (Stevens, J. dissenting).

140. FED. R. EVID. 403 (evidence which is unfairly prejudicial is excluded primarily because it tends to result in improper decisions based on emotion).

141. See *Payne*, 111 S. Ct. at 2627 (Stevens, J., dissenting); U.S. CONST. amend. VIII.

142. See *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) ("Evidence offered to prove . . . [differences in character and reputation] can only be intended to identify some victims as more worthy of protection than others."). The majority replies to Justice Stevens' dissent by stating the empty conclusion that "victim impact evidence is not offered to encourage comparative judgments of this kind." *Id.* at 2607.

143. Justice Stevens points out that if a defendant accused of murdering a store clerk attempted to introduce evidence that the clerk had an immoral character, such

conflict with equality under the law. The equal protection clause of the Fourteenth Amendment requires that the law protect each person equally, regardless of a person's perceived character.<sup>144</sup> Therefore, it is not surprising that the majority left unanswered the methods for quantifying and qualifying the effect to be given victim character evidence.

The majority's attempt to discount fears that evidence of a victim's character does not create the risk that juries are more likely to sentence defendants to death based on the social worth of victims and the loss suffered by the community is sheer sophistry. Quite simply, the Court and the concurring justices failed to give credence to such an obvious risk which common sense, logic, and human experience dictates. One inevitable conclusion can be drawn: the present Supreme Court is blindly motivated by a solidly conservative political agenda which advocates a "tough on crime" stance and espouses victims' rights, irrespective of constitutional liberties.<sup>145</sup>

## 2. Extent of Harm

The majority opinion in *Payne* held that evidence of the extent of harm to the victim and the victim's family is relevant to determine a defendant's moral culpability and blameworthiness, and that states may properly admit such evidence as necessary to determine whether a defendant should be sentenced to death.<sup>146</sup> Accordingly, it would logically follow that an assessment of the extent of harm to the victim's family and the community is a necessary prerequisite to determine the

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evidence would be excluded on the grounds of irrelevance; however, "[e]venhanded justice requires the same constraint be imposed on the advocate of the death penalty." *Payne*, 111 S. Ct. at 2625 (Stevens, J., dissenting).

144. See U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). For example, if a defendant is given a lighter sentence for killing victims with character type A as opposed to victims with character type B, victims with character type A are afforded less protection under the law. See Willmott, *supra* note 121, at 1058 n.60.

145. Similar sentiments have been recently expressed more eloquently by a current prisoner residing on Pennsylvania's Death Row: "Where the issue of the death penalty is concerned, law follows politics, and conservatives won the sociopolitical battles of the 1980's on the basis of an agenda which included a ringing endorsement of capital punishment. The venerated principle of stare decisis meant little in the politically charged judicial arena." Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 999 (1991).

146: *Payne*, 111 S. Ct. at 2608.

proper punishment for a criminal defendant,<sup>147</sup> even when the defendant had no pre-knowledge of the uniqueness of the victim nor contemplated the consequences of his act.<sup>148</sup>

In so holding, the majority in *Payne* failed to make an important distinction between two kinds of harm that may result from a criminal act of a defendant: physical and emotional. Certainly a criminal defendant should be held accountable for all physical and emotional harm that may befall the victim as a result of a criminal act. Also, it is the ultimate harm to that victim — death — for which a murderer may potentially suffer the ultimate penalty — the death sentence. But *Payne* proposes to go a step further by making a criminal defendant accountable for the emotional harm suffered by the family of the victim. In essence, the majority believes that the death sentence may be imposed based on evidence of the infliction of emotional distress to a third party.<sup>149</sup>

Practical and fair limits on culpability, or liability, for emotional

147. *Id.* at 2605.

148. *Id.* at 2615 (Souter, J., concurring). Justice Souter, in an effort to justify allowing extent of harm evidence to be included at sentencing to show the defendant's culpability argued:

[E]very defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death . . . . [T]hey know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.

*Id.* However, as Justice Stevens explained, "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support." *Id.* at 2631 (Stevens, J., dissenting). If a defendant can be saddled with this foreknowledge of the victim's uniqueness as a human being to show the defendant's culpability, certainly a competent jury is capable of the same, that all victims are unique humans.

Additionally, Justice Souter leaves us with more questions than answers. May a friend or dependent of a victim testify as to emotional harm suffered during capital sentencing? May a lover? May a homosexual lover? Are we to assume that all victims have "survivors" that are qualified to testify? What are those qualifications? Who would not be allowed to testify? Could an abused spouse testify at sentencing as to a her husband's (the victim) bad character?

149. See Jeffrey Stoner, Comment, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Murder Trial—Booth v. Maryland*, 107 S. Ct. 2529 (1987); *Another View*, 19 RUTGERS L.J. 1175, 1185 (1988).

harm to third parties have been spelled out in a different but comparable context. Simply put, in a civil context, the Restatement of Torts section 46 recognizes limits on liability for outrageous acts — like murder — that cause severe emotional distress to third parties, even if the third party is a member of the victim's family.<sup>150</sup> The limitations on liability for emotional distress to third parties in tort is analogous to the extent of emotional harm to members of a victim's family in the criminal context; out of "practical necessity" there must be a limit on the number of people who could recover from suffering emotional distress as a result of an outrageous act, even when the act was murder.<sup>151</sup> However, under *Payne*, evidence of third party emotional distress that is insufficient for monetary damages in civil proceedings may be admitted in criminal proceedings to put a person to death. Thus, it seems from the majority's position that any person, however remote, who might conceivably have suffered harm as a result of the murder of a victim, could testify as to the extent of their harm at the capital sentencing of a defendant.

Furthermore, victim impact evidence which relates the extent of emotional harm to the victim's family violates the Eighth Amendment's

150. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); see, e.g., *Koontz v. Keller*, 3 N.E.2d 694 (Ohio Ct. App. 1936) (denying recovery for intentional infliction of emotional distress from defendant upon plaintiff's discovery of sister's murdered body).

For instance, if A murders B, B's family, C, cannot recover for severe emotional distress unless C witnessed the murder, see, e.g., *Calliari v. Sugar*, 435 A.2d 139 (N.J. Super. Ct. Ch. Div. 1980) (denying plaintiff's relief for intentional infliction of emotional distress after buying home from defendant and finding defendant's murdered wife buried in the back yard) or, in some jurisdictions, only if A had knowledge of the presence of C. See, e.g., *Taylor v. Valletunga*, 339 P.2d 910 (Cal. Dist. Ct. App. 1959) (victim's daughter denied recovery after witnessing brutal beating of her father by defendant because the defendant did not know the victim's daughter was witnessing the beating).

151. Compare RESTATEMENT (SECOND) OF TORTS § 46 comment 1 (1965) ("Practical necessity [requires]. . .drawing the line somewhere since the number of persons who may suffer emotional distress at the news of the assassination of a president is virtually unlimited . . .") with interview comments made by the Tennessee Attorney General Charles Burson who argued *Payne* before the Court:

The point of our position is that the death of some person may have a greater societal impact. We used the example of a homeless person and the President — that homeless person's life as a matter of sanctity and worth is worth as much as the President's life, but the harm that is inflicted upon society, it's clear, in dislocation of that society, is much greater.

*Review of 1991 Supreme Court Term*, (C-SPAN television broadcast, July 20, 1991).

proscription against cruel and unusual punishment.<sup>152</sup> This proposition is based on established judicial precedent that the discretion of the jury in imposing the ultimate penalty of death “must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”<sup>153</sup> and must be “an individualized determination based on the character of the individual and the circumstances of the crime.”<sup>154</sup> By introducing evidence of the extent of emotional harm to the victim’s family, the state creates a constitutionally impermissible risk that the jury’s discretion will be unduly swayed by sympathy for the victim’s family and loss to the community. The majority in *Payne*, however, ignored judicial precedent and the inherent risk that victim impact statements leads to arbitrary and capricious sentencing of death.

### C. *Alternative View of Payne v. Tennessee*

Throughout the *Payne* majority opinion and concurring opinions is the notion that *Booth* and *Gathers* went too far in creating a per se Eighth Amendment prohibition against the use of victim impact statements at capital sentencing.<sup>155</sup> This section discusses how *Payne* should have been decided without overruling *Booth* and *Gathers* based on *Booth*’s built-in caveat and harmless error.<sup>156</sup>

The *Booth* majority recognized that there existed cases where the information contained in a victim impact statement would be relevant and permissible in the proper context: “Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime.”<sup>157</sup> While

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152. See *Booth v. Maryland*, 482 U.S. 496, 509 (1987), *overruled in part by Payne v. Tennessee*, 111 S. Ct. 2597 (1991); see also U.S. CONST. amend. VIII.

153. E.g., *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

154. *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

155. *Payne*, 111 S. Ct. at 2608-2609 (misreading of *Woodson* precedent); *id.* at 2612 (O’Connor, J., concurring) (“[P]ossibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence should never be admitted.”); *id.* at 2614 (Scalia, J., concurring) (claiming *Booth* “compromised the fundamental values underlying the doctrine of stare decisis”); *id.* at 2614 (Souter, J., concurring) (lack of legal tradition for excluding a crime’s effects on its victims).

156. See *Booth*, 482 U.S. at 507-508 n.10.

157. *Id.* It was specifically this language that prompted Justices O’Connor and Souter to criticize *Booth* because they believed it caused “considerable confusion in the

there have been numerous writings on the meaning of this footnote in *Booth*,<sup>168</sup> it appears that the facts in *Payne* fall neatly within this built-in caveat exception.

When the defendant, Payne, murdered Charisse and Lacie, and attempted to murder Nicholas, he did so with the knowledge that Lacie and Nicholas were Charisse's children.<sup>169</sup> In addition, Nicholas was an intended victim who miraculously survived.<sup>160</sup> Any evidence as to the extent of physical or emotional harm suffered by Nicholas was relevant and should have been admitted at the sentencing phase under *Booth* because that type of information "relates directly to the circumstances of the crime."<sup>161</sup> Therefore, evidence as to the extent of harm suffered by Nicholas, communicated to the court through his grandmother, was relevant to Payne's moral culpability and blameworthiness. However, even if prejudicial to the defendant, the extent of Nicholas' harm should have been permitted because it directly related to the gruesome facts surrounding the crime. In contrast, the prosecutor's closing comments during sentencing did not pass the *Booth* exception. The prosecutor's closing comments that related to the impact of harm suffered by Charisse's parents and Payne's parents, and statements about the personal character of Charisse and Lacie,<sup>162</sup> were irrelevant and impermissible under *Booth* because they did not directly relate to the circumstances of the crime and Payne had no pre-knowledge of their

lower courts about the precise scope of its holding", *Gathers v. South Carolina*, 490 U.S. 805, 813 (1989) (O'Connor, J., dissenting), and created "an unworkable standard of constitutional relevance . . ." *Payne*, 111 S. Ct. at 2616 (Souter, J., concurring).

158. See, e.g., Willmot, *supra* note 121, at 1071-1076. One can only surmise the kind of case to which the majority in *Booth* was referring, but a classic example would be that of a defendant who murders a victim in the presence of another person for the sole purpose of causing that person severe emotional distress. But this scenario would be the exception rather than the rule.

159. See *State v. Payne*, 791 S.W.2d 10, 14 (Tenn. 1990). Payne testified: "And she [Charisse] was watching my movement in the kitchen, like she—I had saw her. It had been almost a year off and on in the back yard because her kids had played with Bobbie's kids. And I had seen her before." *Id.*

160. *Id.* at 12.

161. *Booth*, 482 U.S. at 507 n.10. For example, Payne had pre-knowledge about the victim's family, namely Nicholas; Payne knew that Nicholas was witnessing his act of violence and any reasonable person would know that to brutally murder a young boy's mother and little sister in his presence would cause extensive harm.

162. See *Payne*, 111 S. Ct. at 2603 (quoting from *State v. Payne*, 791 S.W.2d 10 (1990), "[t]here is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do . . . for Charisse and Lacie Jo.'").



existence.<sup>163</sup>

Additionally, the majority failed to take the opportunity to specify whether harmless error could be applied to the impermissible use of victim impact statements. Harmless error analysis in constitutional issues first requires that the Court determine whether harmless error analysis applies,<sup>164</sup> and then whether the error committed was harmless.<sup>165</sup> The Supreme Court of Tennessee hesitantly applied harmless error analysis in affirming Payne's convictions and sentence of death<sup>166</sup> primarily because *Booth* and *Gathers* failed to specify whether harmless error would apply in capital cases where victim impact statements were introduced. Recognizing this shortcoming in *Booth*, Justice Stevens properly stated what the majority's position in *Payne* should have been:

In the case before us today, much of what might be characterized as victim impact evidence was properly admitted during the guilt phase of the trial and, given the horrible character of this crime, may have been sufficient to justify the Tennessee Supreme Court's conclusion that the error was harmless because the jury would necessarily have imposed the death sentence even absent the error. The fact that a good deal of such evidence is routinely and properly brought to the attention of the jury merely indicates that the rule of *Booth* may not affect the outcome of many cases.<sup>167</sup>

Thus, the majority in *Payne* unnecessarily overruled *Booth* and *Gathers*, by ignoring the exception in *Booth* for evidence directly relating to the circumstances of the crime, and failing to affirm the Tennessee Supreme Court's use of harmless error analysis to victim impact

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163. See *Booth*, 482 U.S. at 507-508 n.10.

164. See *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* rule essentially states that not all constitutional errors in a criminal trial require automatic reversal of a conviction, and it is the responsibility of the United States Supreme Court to determine what constitutional violations should receive harmless error analysis. See *id.* at 20-21 (when constitutional rights are violated "it is our responsibility to protect by fashioning the necessary rule"). To date, the Court has denied harmless error to only two violations: the right to counsel and an impartial judge. *Id.*; see also *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (overruling previous precedent which held that harmless error could never be applied to coerced confessions).

165. The Court must determine whether the evidence obtained by constitutional error was harmless beyond a reasonable doubt. See, e.g., *Chapman*, 386 U.S. at 24.

166. See *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990) (stating "we think" victim impact statements are subject to harmless error analysis).

167. *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting).

statements. Consequently, the *Payne* majority has directly undermined the Court's authority and laid the groundwork for future overruling of the Court's precedents.<sup>168</sup>

#### IV. FLORIDA CASE LAW AND VICTIM IMPACT STATEMENTS

This section will briefly review a chronological sampling of the Florida Supreme Court's treatment of the use of victim impact statements during the sentencing phase of a capital trial before and after the Supreme Court decided *Booth*, and since *Payne*. This section will conclude by speculating how *Payne* might affect future court decisions and constitutional protection afforded defendants facing the death penalty in Florida.

##### A. *Before Booth*

Prior to the Supreme Court's decision in *Booth*, the Florida legislature in 1984 amended its previous victims' rights legislation by allowing the victim's next of kin, during sentencing in a homicide case, to testify as to the extent of harm caused by the victim's death, including social, psychological, or physical harm.<sup>169</sup> Moreover, victim impact statements in pre-sentence reports that described the victim's character, the extent of harm to the victim's family, and the victim's opinion as to an appropriate punishment were routinely utilized by sentencing

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168. See *id.* at 2625 (Marshall, J., dissenting).

169. See FLA. STAT. § 921.143 (1991). The statute states:

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, including a criminal violation of a provision of chapter 316, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin if the victim has died from causes related to the crime, to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

*Id.* (emphasis added).

authorities in capital and non-capital cases.<sup>170</sup> Subsequently, Florida became one of a small number of states<sup>171</sup> to amend its state constitution to elevate the rights of victims to constitutional proportions.<sup>172</sup>

### B. *After Booth*

The first case that came before the Florida Supreme Court, and the first case in the country to vacate a death sentence pursuant to *Booth*, was *Patterson v. State*.<sup>173</sup> The defendant, Patterson, was convicted of first degree murder and sentenced to death.<sup>174</sup> At the sentencing hearing, the victim's niece testified about the effect the murder had on the victim's children and expressed her opinion that the defendant should die.<sup>175</sup> In vacating the death sentence and remanding for a new sentencing hearing on the grounds that *Booth* prohibited such evidence, the Florida Supreme Court appeared uncertain as to the precise limits of *Booth* or whether harmless error analysis was applicable: "Allowing this type of evidence *appears to be* reversible error in view of the United States Supreme Court decision in *Booth* . . . ."<sup>176</sup>

This uncertainty was soon dispelled four months later in the watershed case of *Grossman v. State*.<sup>177</sup> In *Grossman*, the defendant was convicted of murdering a state wildlife officer and sentenced to death.<sup>178</sup> On appeal, the defendant argued that permitting the victim's family members to testify to the judge during sentencing was in violation of *Booth* and reversible error.<sup>179</sup> The Supreme Court of Florida

170. See, e.g., *Howard v. State*, 473 So. 2d 10 (Fla. 3d Dist. Ct. App. 1985).

171. See Moss, *supra* note 114, at 32.

172. The amendment reads:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with constitutional rights of the accused.

FLA. CONST. art. I, § 16(b). The amendment was approved overwhelmingly by the voters of Florida by a 9 to 1 margin. See Comment, *supra* note 114, at 812 n.4.

173. 513 So. 2d 1257 (Fla. 1987); see also Talbert, *supra* note 112, at 227 n.125.

174. *Patterson*, 513 So. 2d at 1258.

175. *Id.* at 1263.

176. *Id.* (emphasis added); see also *Booth*, 482 U.S. at 496.

177. 525 So. 2d 833 (Fla. 1988).

178. *Id.* at 835.

179. *Id.* at 836. The following is an example of the testimony from the father of

affirmed the sentence on the basis that the defendant failed to object to the introduction of the victim impact statement at trial.<sup>180</sup> By narrowly interpreting *Booth*, the court explained that “nothing in the *Booth* opinion . . . suggests that it should be retroactively applied to the cases in which victim impact evidence has been received without objection.”<sup>181</sup> Additionally, the Supreme Court of Florida distinguished the two cases on the basis that the defendant in *Booth* was sentenced by a jury pursuant to Maryland law, whereas in the present case, the defendant was sentenced by a judge pursuant to case law after giving great weight to the jury’s recommendation of death.<sup>182</sup>

*Grossman* illustrates the Florida Supreme Court’s uneasiness with *Booth*’s broad holding. In lengthy dicta, the court ventured into a comprehensive analysis of judicial precedent for harmless error analysis,<sup>183</sup> and concluded that since *Booth* could be read to hold that not all victim impact statements might promote an arbitrary or capricious imposition of death by a jury, impermissible victim impact evidence would in the future be subject to harmless error analysis on a case-by-case basis.<sup>184</sup> The court went on to establish a standard for review of victim impact statements presented during a capital case. First, the defendant must object to the victim impact evidence when introduced during sentencing phase.<sup>185</sup> Second, the jury should not hear victim impact evi-

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the victim:

I think he’s shattered our family. This girl [victim] was kind of the center of our family. It’s like taking my heart out. It will hurt me the rest of my life. We have all seen a psychiatrist or psychologist at least twice including my other two children. My personal feeling is that he should receive the death penalty.

*Id.* at 842-843 n.6.

180. *Id.* at 842.

181. *Id.*

182. *Grossman*, 525 So. 2d at 845. To justify the distinction, the court stated that “[i]f the mere fact that the trial judge (the sentencer in Florida) is exposed to such a victim impact report is sufficient to render the error per se reversible, all death penalties in Florida are potentially subject to automatic reversal.” *Id.* at 842-843 n.6. Additionally, “judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demand of the office to block out information which is not relevant to the matter at hand.” *Id.* at 846 n.9.

183. *See id.* at 842-844.

184. *Id.* at 844-845. In so holding, the Court invalidated the provisions of section 921.143 of the Florida Statutes because it violated *Booth* insofar as it allowed victim impact statements to serve, in effect, as an aggravating factor in death sentencing. *Id.* at 842; *see also* FLA. STAT § 921.143 (1991) (still in effect as unchanged).

185. *Grossman*, 525 So. 2d at 842.

dence at sentencing.<sup>186</sup> And, finally, the appellate review court may apply harmless error analysis on a case-by-case basis.<sup>187</sup>

This new standard for reviewing capital cases where victim impact evidence has been introduced was put to its first test later that same year in two cases. In *Preston v. State*, the Florida Supreme Court refused to vacate a death sentence because the defendant failed to object to the introduction of comments made by the prosecutor during sentencing regarding the character of the victim and her relationship to her family and friends.<sup>188</sup> Next, in *LeCroy v. State*, the Supreme Court of Florida affirmed a death sentence over objections by the defendant that the introduction of victim impact statements by the victim's family unduly influenced the sentencer.<sup>189</sup> The majority pointed out that the jury did not hear the evidence, and the trial judge, who erred in allowing the testimony over objection, did so without the benefit of *Booth* and *Grossman*, and did not use the statements to determine punishment.<sup>190</sup> Therefore, the trial judge committed harmless error.<sup>191</sup>

The following year, the Florida Supreme Court was again confronted with victim impact statements in *Jackson v. Dugger*.<sup>192</sup> In *Jackson*, the defendant, who was convicted for the murder of a police officer and sentenced to death, argued that the testimony of a fellow officer during the penalty phase of the trial was unduly prejudicial and specifically prohibited under *Booth*.<sup>193</sup> The testimony provided the jury, over objection, with information about the slain officer's good character and the impact the officer's death had on the community and the other officers on the force.<sup>194</sup> The court agreed, vacated the sentence, and remanded for a new sentencing proceeding on the grounds that the evidence was not harmless beyond a reasonable doubt.<sup>195</sup>

Since *Jackson*, the Florida Supreme Court has had to rule on the use of victim impact statements in an increasing number of direct and

186. *Id.*

187. *Id.* at 844-845.

188. 531 So. 2d 154, 160 (Fla. 1988).

189. 533 So. 2d 750, 755 (Fla. 1988).

190. *Id.*

191. *Id.*

192. 547 So. 2d 1197 (Fla. 1989).

193. *Id.* at 1198.

194. *Id.*

195. *Id.* at 1198-1199. The court believed that the evidence had been offered expressly to inflame the passions of the jury and "was designed to induce a fear for public safety and to elicit sympathy for the victim." *Id.* at 1199.

postconviction appeals. For example, in *Reed v. State*, the defendant was procedurally precluded from claiming relief for failing to object to the introduction of the statements;<sup>196</sup> and in *Freeman v. State*, the court held that the testimony of a woman, married to a victim murdered by the defendant in a previous conviction, constituted harmless error.<sup>197</sup> Also, in *Jennings v. State*, the Florida Supreme Court denied a defendant's petition for habeas corpus based on statements made by the victim's father and school principal during sentencing that "on the day she was killed the child was going to be narrator at her school play because she had learned to read faster than her classmates."<sup>198</sup> The court stated that the statements were not so prejudicial to require reversal under *Booth*.<sup>199</sup>

### C. *Payne and Beyond*

Since the Court decided *Payne*, the Florida Supreme Court recently has had occasion to restate and apply *Payne's* holding in two capital cases. In *Hodges v. State*, the court recognized *Payne's* recent overruling of *Booth* and *Gathers*, but held that the statements complained of by the defendant were not the type of victim impact evidence that is still prohibited by *Booth*.<sup>200</sup> In *Owen v. State*,<sup>201</sup> the court applied harmless error to statements made by the victim's father, in spite of the court's recognition that *Payne* allowed the use of some types of victim impact evidence.

In light of *Payne*, Florida's victims' rights constitutional amendment<sup>202</sup> and criminal statutes<sup>203</sup> are virtually unrestricted with regard to the use of victim impact statements during the sentencing phase of a capital trial. With the exception of statements expressing an opinion as to an appropriate punishment for the defendant, the victim's family<sup>204</sup>

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196. 560 So. 2d 203, 207 (Fla. 1990) (stating in dicta, even in the event of an objection, the evidence was harmless error).

197. 563 So. 2d 73, 75-76 (Fla. 1990).

198. 16 Fla. L. Weekly S452 (Fla. June 13, 1991).

199. *Id.*

200. 17 Fla. L. Weekly S74 (Fla. Jan. 23, 1992) (allowing testimony about the victim's prosecuting the defendant for indecent exposure, and the victim's sister's breaking down while testifying).

201. 17 Fla. L. Weekly S71 (Fla. Jan. 23, 1992).

202. FLA. CONST. art. I § 16(b).

203. *E.g.*, FLA. STAT. § 921.143 (1991).

204. In addition to the victim's family, apparently anyone who was so closely

is now free to give evidence relating the victim's character and the extent of harm to the victim's family and the community, subject only to due process restrictions. In effect, future cases like *Patterson* and *Jackson* will be affirmed, unless the evidence introduced is so prejudicial and inflammatory that the court decides that the death sentence violated a defendant's due process rights. The result means less protection for the criminal defendant against the imposition of the death penalty in Florida. Also, juries in Florida, in recommending sentencing, potentially will be swayed by sympathy for the emotional loss and suffering of the victim's family, friends, and the loss to the community based on their subjective view of the social worth of the victim.

## V. CONCLUSION

In essence, *Booth* and *Gathers* placed limitations on the use of victim impact statements by creating an exception for death penalty cases under the Eighth Amendment. The majority in both cases strongly believed that consideration of the gravity and finality of the death sentence compelled the conclusion that the use of highly emotional and prejudicial testimony from victim's families and prosecutors about the victim's character and extent of harm to the community created a palpable and impermissible risk that juries would be unduly and unfairly swayed. The *Booth* and *Gathers* majorities based their fears on what common sense and logic tells us about human nature when confronted with the grief and emotional pain of others.

However, the Court in *Payne*, in overruling *Booth* and *Gathers*, ignored this rational and cogent approach by incorrectly reasoning that the victim's character and extent of harm to the victim's family did not create an impermissible risk that the jury might, based on sympathy and emotion for the victim and the victim's family, impose death in an arbitrary and capricious manner. Instead, the Court relied on a faulty concept of evidentiary relevance and a severely narrow view of Eighth Amendment protections against cruel and unusual punishments. In so doing, the *Payne* majority trivialized *stare decisis* by providing no credible justification for overturning judicial precedent. Furthermore, the Court set the stage for drawn out morality plays in which the victim's character takes center stage with the net effect that death sentences

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related to the victim that they suffered harm is entitled to testify as to the extent of that harm. See *Payne*, 111 S. Ct. at 2615 (Souter, J., concurring) ("close associates," "friends," and "dependents").

will be handed down based on the comparative social worth of victims and their popularity in the community.

As of this writing, Florida currently has 325 persons on death row and ranks third among states with death row inmates;<sup>205</sup> *Payne* has the potential to substantially increase that number. Criminal defendants who face the death penalty in our state courts will have their fates decided by arbitrary and irrelevant factors inherent in victim impact statements, instead of the character of the defendant and the circumstances of the crime.

*Michael P. Koller*

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205. Martin E. Marty, *Death Penalty: What story will we tell about it?*, THE MIAMI HERALD, Apr. 19, 1992, at C1.



## *Harmelin v. Michigan*: Effective Application of Anti-Drug Legislation or Cruel and Unusual Punishment?

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### TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1501
II.	HISTORICAL ANALYSIS OF THE EIGHTH AMENDMENT . . . . .	1505
	A. <i>The Scope of Proportionality Under the Eighth Amendment</i> . . . . .	1505
	B. <i>The Evolution of Individualized Sentencing</i> . . . . .	1510
III.	<i>HARMELIN V. MICHIGAN</i> : AN OVERVIEW . . . . .	1511
	A. <i>Facts and Procedural History</i> . . . . .	1511
	B. <i>The Supreme Court's Holding and Rationale</i> . . . . .	1513
IV.	<i>HARMELIN'S MANDATORY LIFE SENTENCE WITHOUT PAROLE</i> : AN ANALYSIS . . . . .	1515
	A. <i>Lack of Individualized Sentencing and Other Flaws in the Michigan Statute</i> . . . . .	1515
	B. <i>Under the Solem Analysis Harmelin's Sentence Disproportionate</i> . . . . .	1519
V.	CONCLUSION . . . . .	1525

### I. INTRODUCTION

The traditional American concept of criminal sentencing is that prisons exist for rehabilitation and release as much as for incarceration.<sup>1</sup> However, in recent years Congress and state legislatures have enacted a series of stringent anti-drug laws, which have largely abandoned the concept of rehabilitating prisoners<sup>2</sup> and instead, focused on keeping inmates locked up for longer periods of time.<sup>3</sup>

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1. Michael A. Kroll, *The Prison Experiment: A Circular History*, S. Exposure, Winter 1978, at 6. See generally Kurt Anderson, *What Are Prisons For?*, TIME, Sept. 13, 1982, at 38.

2. Michael Isikoff and Tracy Thompson, *Getting Too Tough on Drugs; Draconian Sentences Hurt Small Offenders More Than Kingpins*, THE WASHINGTON POST, November 4, 1990, at C1.

3. Brief for Respondent at 2, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Respondent]. Since the complete revision of the federal sentencing system in 1984, sentences are no longer rehabilitative in nature and

Legislatures are reacting to an ever-increasing spiral of drug traffic, drug abuse and drug-related crime<sup>4</sup> by instituting these harsh penalties in an attempt to thwart drug activity.<sup>5</sup> The result of this "war-on-drugs legislation" is an overwhelmed court system and staggering increases in the nation's prison population.<sup>6</sup> Since 1986, average jail time served in federal drug cases is fifty-eight months, an increase of 151 percent.<sup>7</sup>

One weapon used in this war-on-drugs is the mandatory life sentence without opportunity of parole, commonly called "life without parole".<sup>8</sup> A mandatory life sentence without parole is the "penultimate penalty", meaning a convict will spend the rest of his natural life behind bars.<sup>9</sup> The recent development and current prevalence of life without parole is due to the fact that it addresses legislative policies underlying criminal penalties.<sup>10</sup> Legislators mandate these life sentences without parole hoping the penalty will not only prevent the offender from injuring others, but also act as a societal deterrent.<sup>11</sup>

Unfortunately these "life without parole sentences" without parole do not produce the desired results and often lead to injustice. Perhaps the most persuasive argument against mandatory life sentences is one of fairness.<sup>12</sup> While many Americans were unhappy with lenient

parole has been eliminated in favor of determinate sentences. *Id.*

4. Ruth Marcus, *Life in Prison For Cocaine Possession?; High Court Weighing Strict Michigan Law*, THE WASHINGTON POST, November 5, 1990, at A1. Fifty seven percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. National Institute of Justice, 1989 Drug Use Forecasting Annual Report June, 1990. The comparable statistics for assault, robbery and weapons arrests were 55, 73, and 63 percent, respectively. *Id.* In Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2706 (1991) (Kennedy, J., concurring).

5. Brief for Respondent, *supra* note 3, at 7.

6. Isikoff and Thompson, *supra* note 2, at C1.

7. Dennis Cauchon, *The Scales of Justice May be Tipped Unfairly*, USA TODAY, June 24, 1991, at A8.

8. Wright, *Life-Without-Parole: An Alternative To Death Or Not Much Of A Life At All?*, 43 VAND. L. REV. 529 (1990).

9. *Id.*

10. See *People v. Lemble*, 303 N.W.2d 191 (Mich. Ct. App. 1981).

11. *Id.*

12. Concerned that mandatory minimum sentences, which already affect about one-third of federal sentences are unfair, judges in several federal circuits have joined in formal protests against this type of sentencing. See Sturgess, *Mandatory Sentences Draw Increased Fire; Judges, Families Join Fight Against Minimum Guidelines*, THE

judges, mandatory life imprisonment was viewed as the panacea of anti-drug legislation. No longer would the judge's discretion be the sole determinate of a criminal's punishment. Rather each drug offender would receive a harsh, but equal treatment. On the contrary, mandatory life sentences have failed to treat all criminals the same.<sup>13</sup> One reason for this inequity is due to the prosecutors' authority to dictate a criminal's penalty by their choice of charges filed.<sup>14</sup> In Harmelin's case, for instance, had prosecutors filed charges against him in federal court, rather than in state court, he would be facing a much more lenient sentence.

Another inequity in this anti-drug legislation is the frequency by which large-scale drug traffickers evade these mandatory sentences. It is ironic that drug kingpins, the targets of these anti-drug laws, have been given lesser sentences for providing law enforcement with information regarding their drug ring.<sup>15</sup> In 1988, the House Judiciary Subcommittee on Crime learned of a drug kingpin who was released from custody for providing law enforcement with the names of twelve lower-level dealers.<sup>16</sup> All twelve lower-level dealers received mandatory sentences.<sup>17</sup>

In a recent decision, *Harmelin v. Michigan*,<sup>18</sup> the Supreme Court considered the scope of the Eighth Amendment's prohibition on cruel and unusual punishments against the imposition of a mandatory life sentence without parole for a nonviolent first offense of possession of 672 grams of cocaine.<sup>19</sup> The Court held that "mandatory [life] penalties may be cruel, but they are not unusual in the constitutional sense."<sup>20</sup> Accordingly, this decision sharply limits the holding in *Solem v. Helm*,<sup>21</sup> a 1983 Supreme Court case which incorporated the notion that criminal sentences should be proportional to the crime.<sup>22</sup>

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RECORDER, May 7, 1991 at 1.

13. W. John Moore, *Mindless Minimums*, NATIONAL JOURNAL, June 1, 1991 at 1310.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 111 S. Ct. 2680 (1991).

19. *Id.*

20. *Id.* at 2701.

21. 463 U.S. 277 (1983)( holding the defendant's sentence was significantly disproportionate to the crime, and therefore was prohibited by the Eight Amendment).

22. Marcus, *supra* note 4, at A1.

Traditionally, the Eighth Amendment<sup>23</sup> has regulated the mode of punishment, as well as the length of a sentence.<sup>24</sup> This Comment explores whether the Eighth Amendment's prohibition of cruel and unusual punishments limits the authority of legislatures to prescribe these mandatory life sentences without the possibility for parole. The answer to this issue has both social and legal impacts.<sup>25</sup> As a matter of social policy, this issue poses questions about the purpose of our prison system, the role, if any, of rehabilitation and the degree to which individual moral culpability and mitigating circumstances should be taken into account during sentencing.<sup>26</sup> As a question of law, this issue sheds light on the scope of cruel and unusual punishments under the eighth amendment and the meaning of the proportionality principle as defined in *Solem*.<sup>27</sup>

This Comment's central thesis is that *Harmelin* was wrongly decided for three reasons: 1) prior Supreme Court precedent firmly establishes that the power of legislatures to set criminal sentences is subject to an Eighth Amendment proportionality review;<sup>28</sup> 2) mandatory life sentences without parole should be subject to the individualized sentencing prevalent in capital cases,<sup>29</sup> and 3) *Harmelin*'s sentence of life in prison without parole was disproportionate to the crime.<sup>30</sup>

This Comment will be divided into five sections. Following this introduction, section II provides an historical analysis of eighth amendment jurisprudence. Specifically, this section interprets the eighth amendment as incorporating a principle of proportionality of punishments. It then examines the evolution of the individualized sentencing doctrine adopted in capital cases. Next, section III reviews the Supreme Court's recent decision in *Harmelin v. Michigan*.<sup>31</sup> Section IV addresses the flaws in the Michigan statute under which *Harmelin* re-

23. U.S. CONST. amend. VIII provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

24. *Solem*, 463 U.S. at 284.

25. Marcus, *supra*, note 4, at A1.

26. *Id.*

27. *Id.*; *Solem*, 463 U.S. at 277.

28. *E.g.*, *id.*

29. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976) (death penalty does not violate Eighth Amendment's ban on cruel and unusual punishment); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

30. *Harmelin*, 111 S. Ct. at 2719 (White, J., dissenting).

31. 111 S. Ct. 2680 (1991).

ceived life in prison without parole, and applies the *Solem* proportionality factors<sup>32</sup> to the facts in *Harmelin* to demonstrate how the case was wrongly decided. Finally, Section V concludes by stressing the detrimental effects caused by the recent trend of mandatory minimum sentences in anti-drug legislation illustrated by the Michigan statute<sup>33</sup> which was upheld in *Harmelin*.

## II. HISTORICAL ANALYSIS OF THE EIGHTH AMENDMENT

Legislatures have the power to define crimes and to establish punishment.<sup>34</sup> However, no penalty is per se constitutional.<sup>35</sup> Legislative power is subject to judicial review to ensure that the punishment passes constitutional muster.<sup>36</sup> The judicial role of enforcing the cruel and unusual punishment clause of the Eighth Amendment “‘cannot be evaded by invoking the obvious truth that the legislature has the power to prescribe punishments for crimes. That is precisely the reason the clause appears in the Bill of Rights.’”<sup>37</sup> Consequently, in order to pass constitutional muster a punishment must fall within the scope of proportionality which has evolved along with the Eighth Amendment.<sup>38</sup>

### A. *The Scope of Proportionality Under the Eighth Amendment*

The principle that a punishment must be proportionate to the crime has deep roots that stem back as far as the Magna Carta, which established the right against excessive “amercements” or fines.<sup>39</sup> Chapter twenty of the Magna Carta provided that “a free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense.”<sup>40</sup>

The principle of proportionality also appeared in the English Bill

32. *Solem v. Helm*, 463 U.S. 277, 290-93 (1983).

33. MICH. COMP. LAWS ANN. § 333.7403 (West 1980).

34. Brief in Support of Petitioner at 12, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Petitioner].

35. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (noting that a single day in prison may be unconstitutional).

36. *Solem*, 463 U.S. at 290.

37. Brief for Petitioner, *supra* note 34, at 12 (quoting *Furman v. Georgia*, 408 U.S. 238, 268 (1972) (Brennan, J. concurring)).

38. *See, e.g., Solem*, 463 U.S. at 277; *Robinson v. California*, 370 U.S. 660 (1962); *United States v. Weems*, 217 U.S. 349 (1910).

39. *Solem*, 463 U.S. at 284 n.18.

40. A.E. DICK HOWARD, *MAGNA CARTA TEXT AND COMMENTARY* 40 (1964).

of Rights of 1689 as “a longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged”.<sup>41</sup> The framers of the Eighth Amendment repeated nearly verbatim the cruel and unusual punishment clause referenced in the English Bill of Rights of 1689.<sup>42</sup> Thus, as a result, some historians conclude that American colonists sought protection of the same liberties enjoyed by English citizens.<sup>43</sup> The Eighth Amendment ensures that: “Excessive bail shall not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”<sup>44</sup> Despite the fact that the reference to “cruel and unusual” punishment is less specific than the reference to “excessive bail” and “excessive fines”, the Supreme Court has concluded that the amendment was designed to impose “parallel limitations” on bails, fines and other punishments.<sup>45</sup>

The concept of proportionality is well entrenched in this country’s eighth amendment jurisprudence.<sup>46</sup> In *United States v. Weems*,<sup>47</sup> the Supreme Court first articulated the notion that proportionality was “a precept of justice that [the] punishment for crime should be graduated and proportioned to [the] offense.”<sup>48</sup> Applying this principle, the Court held that a fifteen year sentence of hard labor in chains was a dispro-

41. RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (Am Bar Found., 1959). Another historian who believes English law includes disproportionality is Granucci. See Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted’: The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

42. *Solem*, 463 U.S. at 285 n.10.

43. See Perry, *supra* note 41, at 234-38. Following independence, a number of state constitutions adopted the notion that the punishment must fit the crime. See, e.g., PA. CONST. at § 38 (1776) (calling for a review of its penal system to make “punishments in some cases less sanguinary and in general more proportionate to the crime”); S.C. CONST. at § XL (1776) (supporting a reformation to make punishments “more proportionate to the crime”); see Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Michigan in Support of Petitioner at 12, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter ACLU Brief for Petitioner].

44. U.S. CONST. amend. VIII.

45. See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Supreme Court has noted that it would be illogical if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, while the intermediate punishment of imprisonment was not. *Solem v. Helm*, 463 U.S. 277, 289 (1983).

46. Brief of Amici Curiae in Support of Petitioner at 11, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief of Amici Curiae for Petitioner] (citing *Solem v. Helm*, 463 U.S. 277, 285 (1983)).

47. 217 U.S. 349 (1910).

48. *Id.* at 367 n.14.

portionate penalty for falsifying public documents.<sup>49</sup> Part of the Court's concern was unquestionably based on the mode of punishment, which bordered on the torturous<sup>50</sup> as well as the length of the punishment.<sup>51</sup> The Court in *Weems* maintained that even though it had not determined the exact scope of the Eighth Amendment's cruel and unusual punishments clause; the Eighth Amendment did include the requirement that the penalty be proportionate to the crime.<sup>52</sup>

More than fifty years later, the Court reached a similar conclusion in *Robinson v. California*.<sup>53</sup> The defendant in *Robinson* was a drug addict who was convicted under a California statute which classified drug addiction as a misdemeanor.<sup>54</sup> The Court stated that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the crime of having a common cold."<sup>55</sup> The Court reasoned that allowing a sickness to be made a crime and permitting sick people to be punished for being sick would be a violation of the eighth amendment.<sup>56</sup> Accordingly, the *Robinson* Court further incorporated the principle of proportionality into Eighth Amendment jurisprudence.<sup>57</sup>

Following *Robinson*, the question of proportionality arose in a series of Eighth Amendment challenges involving capital punishment.<sup>58</sup> In *Coker v. Georgia*,<sup>59</sup> a plurality of the Court held that the death penalty was an excessive punishment for the crime of rape.<sup>60</sup> Similarly, in *Enmund v. Florida*,<sup>61</sup> the Court held that felony murder does not

49. *Id.* at 367.

50. *Id.*

51. *Id.*

52. *Weems*, 217 U.S. at 380-81.

53. 370 U.S. 660 (1962).

54. *Id.* at 660 n.1.

55. *Id.* at 667.

56. *Id.* at 666.

57. Additionally, *Robinson* established the application of the Eighth Amendment's cruel and unusual punishment clause to the states. *Id.* at 675.

58. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976) (capital punishment imposed for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime); *Furman v. Georgia*, 408 U.S. 238 (1972) (the penalty of death imposed on three defendants, one for murder, and two for rape, violated the eighth amendments' prohibition on cruel and unusual punishment).

59. 433 U.S. 584, 592 (1977).

60. *Id.* at 592 n.4.

61. 458 U.S. 782 (1982).

trigger the death penalty unless the state proves beyond a reasonable doubt that the defendant intended the murder in addition to the underlying felony.<sup>62</sup>

In the past eighty years, the one significant exception to proportionality in sentencing was *Rummel v. Estelle*.<sup>63</sup> The *Rummel* Court rejected the eighth amendment challenge of a Texas recidivist sentenced to life imprisonment for his third felony conviction.<sup>64</sup> The Court, however, did not entirely reject the proportionality principle.<sup>65</sup> To the contrary, the *Rummel* majority averred that "a proportionality principle would . . . come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment."<sup>66</sup>

Undoubtedly, the hypothetical chosen by the *Rummel* majority was intended as an "extreme example".<sup>67</sup> Nevertheless, since the Court maintained that some prison sentences could be constitutionally excessive, it would be illogical to conclude that "the length of the sentence actually imposed [is] purely a matter of legislative prerogative."<sup>68</sup> The critical question, then, is what criteria to use in determining when legislators have exceeded their constitutional limits in mandating prison sentencing guidelines. Unfortunately, *Rummel* offers no such criteria or assistance in the determination of this matter.

Three years later in *Solem v. Helm*, the Supreme Court enumerated objective factors to be considered in reviewing the proportionality of sentences.<sup>69</sup> In *Solem*, the defendant was convicted of attempting to cash a "no account" check, his seventh conviction of a non-violent felony. Under South Dakota law he was treated as a recidivist and sentenced to life imprisonment without parole.<sup>70</sup>

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62. *Id.* at 799. Between the decisions in *Robinson* and *Enmund* a number of Supreme Court decisions referred to the fact that disproportionate punishment violates the Eighth Amendment. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (*per curiam*); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 664, 667 (1976); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

63. 445 U.S. 263 (1980).

64. *Id.*

65. *Id.* at 274, n.11.

66. *Id.*

67. *Id.*

68. *Rummel*, 445 U.S. at 274.

69. *Solem v. Helm*, 463 U.S. 277 (1983).

70. *Id.* at 281-83. The South Dakota recidivist statute provided that when a defendant had been convicted of at least three prior convictions in addition to the principal felony, then the sentence for the principal felony should be enhanced to a maximum



The *Solem* Court distinguished *Rummel* by reasoning that a sentence under the South Dakota statute was significantly different than the sentence upheld in *Rummel* since it precluded all possibility of parole.<sup>71</sup> The Court invoked a comparative test employing objective criteria in determining that the sentence of life without parole was not commensurate with Helm's crimes.<sup>72</sup> The Court's objective criteria included consideration of the gravity of the offense and the harshness of the penalty, the sentence imposed by the same jurisdiction for other crimes, and the sentence imposed by other jurisdictions for the same offense.<sup>73</sup> Because the crimes were nonviolent, and the Court found the punishment to be substantially more severe than would be imposed in nearly all other jurisdictions, it declared the sentence in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>74</sup>

The Court in *Solem* specified that its holding should not mandate appellate review of all prison sentences since courts were obligated to grant substantial deference to legislative judgment and trial court decisions when assessing proportionality.<sup>75</sup> However, such deference should not eliminate judicial scrutiny of those cases where a sentence may be so disproportionate as to raise a valid Eighth Amendment claim.<sup>76</sup> Furthermore, such scrutiny should incorporate the objective factors outlined by the Court to determine whether a punishment is excessive in relation to the crime.<sup>77</sup> Through the use of these objective factors the Court further entrenched the principle of proportionality in Eighth Amendment jurisprudence since this proportionality principle acts as a constitutional limit on the mode and length of criminal sentences.<sup>78</sup> Thus, the criminal penalties assessed by state legislatures cannot be excessive or arbitrarily imposed, but rather, the punishment must comport with this proportionality principle.<sup>79</sup>

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penalty of life imprisonment without the possibility of parole. *Id.* at 281.

71. *Id.* at 302-03.

72. *Id.* at 291-92.

73. *Id.* at 290-92.

74. *Solem*, 463 U.S. at 300.

75. *Id.* at 290 n.16.

76. *Id.* at 290.

77. *Id.* at 291 n.17.

78. *Id.* at 284.

79. *Solem*, 463 U.S. at 284.

## B. *The Evolution of Individualized Sentencing*

Throughout the Supreme Court's holdings in a series of capital cases the Court has established a constitutional doctrine requiring individualized sentencing.<sup>80</sup> This doctrine requires the sentencer to consider relevant mitigating circumstances of the offense and the offender before sentencing a defendant to the death penalty.<sup>81</sup> Although individual sentences have been exclusively applied to capital cases, the reasoning for adopting such a doctrine is applicable to mandatory life sentences without opportunity for parole.<sup>82</sup> Since a defendant could spend the rest of his life in prison without any opportunity for reconsideration, the sentencing authority should be able to consider relevant mitigation circumstances.<sup>83</sup> Thus, an overview of some of the important Supreme Court cases highlights the philosophy that offenders who commit the same crime should not always receive the same punishment, without the consideration of relevant mitigating evidence.

Society distinguishes between those who are culpable while committing a crime and those who are not.<sup>84</sup> In *Lockett v. Ohio*, the defendant faced the death penalty for helping to plan an armed robbery and waiting outside in the car when a store owner was killed.<sup>85</sup> The Supreme Court reversed the death sentence imposed by the Ohio Supreme Court and held that the concept of individualized sentences in criminal cases has long been accepted in America.<sup>86</sup> The Court concluded that in order to pass constitutional muster a death penalty statute must not preclude the consideration of relevant mitigating factors.<sup>87</sup> Therefore, since the Ohio statute did not take into consideration whether the offender intended to cause the death of the victim it was

80. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana* 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

81. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (defendant is entitled to jury instruction which may include mitigating evidence such as mental retardation which the jury may consider when determining whether to impose the death penalty); *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion) (considering defendant's characteristics, his record and circumstances of the offense).

82. Brief of Amici Curiae for Petitioner, *supra* note 46, at 42-43.

83. *Id.*

84. *Lockett*, 438 U.S. at 626.

85. *Id.*

86. *Id.* at 605 n.13. The *Lockett* opinion expressly left open the application of individualized sentencing to mandatory minimum sentences in noncapital cases. *Id.*

87. *Id.*

incompatible with the Eighth Amendment.<sup>88</sup>

Similarly, in *Woodson v. North Carolina*, the defendant faced capital punishment for first-degree murder.<sup>89</sup> The Supreme Court declared the North Carolina statute<sup>90</sup> unconstitutional since it failed to provide for the consideration of relevant aspects of the character and record of the defendant.<sup>91</sup> In support of its holding the Court quoted Justice Black's statement made over twenty-seven years earlier that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."<sup>92</sup>

More than ten years later, in *Sumner v. Shuman*,<sup>93</sup> the Supreme Court faced the question of whether the Eighth Amendment prohibits a statute which sentences an inmate who commits murder while already serving a sentence of life imprisonment without parole to the death penalty.<sup>94</sup> The Court held that, even given these aggravating circumstances, the Eighth Amendment did not allow a departure from the requirement of individualized sentencing.<sup>95</sup> Consequently, this sentencing doctrine requires that the sentencing authority consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense.<sup>96</sup>

### III. *HARME LIN V. MICHIGAN*: AN OVERVIEW

#### A. *Facts and Procedural History*

The issue of whether a mandatory sentence of life imprisonment without parole violates the Eighth Amendment's prohibition of cruel and unusual punishment was recently decided by the Supreme Court in *Harmelin v. Michigan*.<sup>97</sup> In *Harmelin*, the defendant, a forty-two year old man with no prior criminal record was pulled over for failing to

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88. *Id.* at 608.

89. 428 U.S. 280 (1976).

90. N.C. GEN. STAT. § 14-17 (Supp. 1975) (imposing a mandatory death sentence for first degree murder).

91. *Woodson*, 428 U.S. at 303.

92. *Id.* at 296-97 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

93. 482 U.S. 66 (1987).

94. *Id.*

95. *Id.* at 73-76.

96. *Id.* at 70-76.

97. 111 S. Ct. 2680 (1991).

stop at a red light.<sup>98</sup> Harmelin voluntarily revealed to the police officer that he was carrying a gun and produced a permit to carry a concealed weapon. Nevertheless, the police subsequently searched his person and impounded his vehicle.<sup>99</sup> The search of his person revealed marijuana cigarettes, assorted pills, ten small packets of cocaine,<sup>100</sup> three vials of cocaine and a telephone pager. The search of the impounded vehicle revealed a travel bag containing \$2900 in cash, 672.5 grams of cocaine<sup>101</sup> and a coded address book. Harmelin was charged and convicted of possession of 650 or more grams of cocaine,<sup>102</sup> and possession of a firearm during the commission of a felony.<sup>103</sup> He was sentenced by the Oakland County Circuit Court to a mandatory life term of imprisonment without possibly of parole.<sup>104</sup>

On appeal to the Michigan Court of Appeals, Harmelin argued that his mandatory sentence of life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment.<sup>105</sup> Additionally, he claimed the sentence was unconstitutional since the sentencing judge was required to impose it regardless of the particular circumstances of his case.<sup>106</sup> The Michigan Court of Appeals eventually affirmed his conviction<sup>107</sup> and the Michigan Supreme Court

98. *People v. Harmelin*, 440 N.W.2d 75, 77-78 (Mich. Ct. App. 1989).

99. *Id.*

100. *Id.* One such packet was analyzed and found to contain 0.14 grams of a mixture containing cocaine. *Id.*

101. Approximately one and one-half pounds.

102. *Harmelin*, 440 N.W.2d at 75-76; see MICH. COMP. LAWS ANN. § 333.7403(1)(i) (West 1980).

103. *Harmelin*, 440 N.W.2d at 77; see MICH. COMP. LAWS ANN. § 750.227(b) (West 1991).

104. *Harmelin*, 440 N.W.2d at 77; see also MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West 1980)(provides a mandatory sentence of life imprisonment for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance"); MICH. COMP. LAWS ANN. § 333.7214(a)(iv) (West 1980)(defines cocaine as a schedule 2 controlled substance); MICH. COMP. LAWS ANN. § 791.234(4) (West 1982) (allows for eligibility of parole after ten years in prison, except for convictions of first-degree murder or "a major controlled substance offense"); MICH. COMP. LAWS ANN. § 791.233b[1](b) (West 1982) (defines "major controlled substance offense" as a violation of section 333.7403). See generally Brief for the United States as Amicus Curiae Supporting Respondent at 3-4, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272).

105. Brief for Petitioner, *supra* note 34, at 5-6.

106. *Id.*

107. *Harmelin*, 440 N.W.2d at 75. Harmelin also argued on appeal that his conviction must be reversed since the evidence against him was obtained as a result of an

denied leave to appeal.<sup>108</sup> Harmelin subsequently filed a petition for writ of certiorari to the United States Supreme Court which was granted.<sup>109</sup>

### B. *The Supreme Court's Holding and Rationale*

In a five-four decision, the Supreme Court upheld Harmelin's sentence holding that this case did not deserve the individualized sentencing usually reserved for capital cases.<sup>110</sup> The *Harmelin* decision suggests that a mandatory life sentence without parole might be unconstitutional for some crimes, but the Court was split on where it would draw the line beyond where a sentence would violate the Eighth Amendment as cruel and unusual punishment.<sup>111</sup> The *Harmelin* decision sharply limits the holding in *Solem*, which only eight years earlier, had established that the Eighth Amendment required an element of proportionality in criminal sentencing.<sup>112</sup> Justice Scalia, in the only portion of his lead opinion adopted by the majority, stated that only in capital punishment cases has the Court interpreted the Eighth Amendment to require individualized sentencing.<sup>113</sup> The Court held that because of the qualitative differences between death and all other punishments, consideration of the defendant's circumstances and the appropriateness of the penalty should not be extended outside the capital context.<sup>114</sup>

The majority, in affirming the Michigan Court of Appeals decision, conducted an in-depth analysis of the Eighth Amendment's history and cases interpreting the cruel and unusual punishments

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unconstitutional search and that he had been deprived effective assistance of counsel. Brief for Petitioner, *supra* note 34, at 4. The Michigan Court of Appeals agreed and reversed his conviction, stating that the evidence against him was obtained from an unconstitutional search. *Id.* However, in an order dated March 9, 1989, the Michigan Court of Appeals vacated that judgment. *Id.* In an opinion (on reconsideration) dated April 18, 1989, the Michigan Court of Appeals affirmed Harmelin's conviction. *Id.* at 6.

108. Brief for Petitioner, *supra* note 34, at 6.

109. *Harmelin v. Michigan*, 110 S. Ct. 2559 (1990).

110. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

111. *Id.*

112. *Solem v. Helm*, 463 U.S. 277 (1973).

113. *Harmelin*, 111 S. Ct. at 2702; see *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

114. *Harmelin*, 111 S. Ct. at 2702.

clause.<sup>115</sup> The majority concluded that the Eighth Amendment does not provide for judicial inquiry to determine if a noncapital sentence is proportionate to the offense.<sup>116</sup> Rather, the Eighth Amendment was primarily intended as a check on legislators' ability to authorize particular methods of punishment.<sup>117</sup> Furthermore, the majority argued that the length of the sentence, however, is purely a matter of legislative prerogative.<sup>118</sup> Moreover, the majority averred that the proportionality principle is merely an invitation for judges to impose their own subjective values.<sup>119</sup> Contrary to *Solem*, the majority rejected the use of objective criteria to determine whether a penalty is disproportionate and stated that *Solem*, which decreed a "general principle of proportionality",<sup>120</sup> should be overruled.<sup>121</sup>

In a concurring opinion, Justice Kennedy, along with Justices O'Connor and Souter, agreed that individualized sentencing should not be extended to noncapital cases.<sup>122</sup> However, Kennedy insisted on the continued adherence to the narrow proportionality principle, which assures that the punishment fit the crime, identified in *Solem*.<sup>123</sup> The concurrence looked to the first prong of the *Solem* proportionality criteria, the gravity of the offense and the severity of the punishment, and determined that Harmelin's crime was severe enough to justify the penalty of life imprisonment without parole.<sup>124</sup> Kennedy concluded that in light of the severity of Harmelin's crime, his sentence was "within the constitutional boundaries established by our prior decisions."<sup>125</sup> Kennedy asserted that the *Solem* analysis of proportionality need not be further pursued since the Constitution only forbids sentences that are grossly disproportionate to the crime.<sup>126</sup> Consequently, the two other criteria

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115. *Id.* at 2684-96; *see, e.g.*, *Solem v. Helm*, 463 U.S. 277 (1983), *Hutto v. Davis*, 454 U.S. 370 (1982), *Rummel v. Estelle*, 445 U.S. 263 (1980), *Weems v. United States*, 217 U.S. 349 (1910).

116. *Harmelin*, 111 S. Ct. at 2684-96.

117. *Id.*

118. *Id.*

119. *Id.* at 2687.

120. *Solem*, 463 U.S. at 288.

121. *Harmelin*, 111 S. Ct. at 2696-99.

122. *Id.* at 2703 (Kennedy, J., concurring).

123. *Id.* at 2707.

124. *Id.* at 2705, 2706.

125. *Id.* at 2706; *see Solem*, 463 U.S. at 277; *Hutto v. Davis*, 454 U.S. 263 (1980), *Rummel v. Estelle*, 445 U.S. 263, 263 (1980), *Hutto v. Finney* 437 U.S. 678, 685 (1978) (*dicta*).

126. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

listed in *Solem*; the comparison of the punishment to the punishments for other crimes within the same jurisdiction, and the comparison of other jurisdiction's punishment of the same crime, "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."<sup>127</sup>

The dissenting Justices, White, Blackmun, Stevens and Marshall,<sup>128</sup> argued that this approach was nearly as bad as overruling *Solem*.<sup>129</sup> "While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell."<sup>130</sup> The dissent concluded that a comparative analysis, like the one used in *Solem*, is the only way to determine if a sentence is disproportionate to the offense.<sup>131</sup> Applying the *Solem* criteria to the present case, the dissent attacked Harmelin's sentence as too harsh: "Mere possession of drugs — even in such a large quantity — is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole."<sup>132</sup>

#### IV. HARMELIN'S MANDATORY LIFE SENTENCE WITHOUT PAROLE: AN ANALYSIS

##### A. *Lack of Individualized Sentencing and Other Flaws in the Michigan Statute*

Because of the unique nature of the death penalty, the Supreme Court has applied individualized sentences to capital cases.<sup>133</sup> However, like the death penalty, mandatory life imprisonment without parole "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty. . . ." <sup>134</sup>

An analysis of prison sentences frequently involves a comparison

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127. *Id.*

128. *Id.* at 2719 (Marshall, J., dissenting). Justice Marshall filed a separate dissenting opinion arguing that capital punishment is always unconstitutional. *Id.*

129. *Id.* at 2714 (White, J., dissenting).

130. *Id.*

131. *Id.*

132. *Id.* at 2716.

133. *E.g.*, *Enmund v. Florida*, 458 U.S. 782 (1982).

134. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

of factors which because of complex parole and sentence reduction provisions do not lend themselves to an exact quantitative review.<sup>135</sup> However, many sentencing alternatives such as the possibility of parole, which normally interfere with the application of the Eighth Amendment's cruel and unusual punishment clause to routine prison sentences do not exist in *Harmelin*.<sup>136</sup> In fact, a number of the factors used by the Supreme Court to distinguish between capital and noncapital cases -including the availability of probation, parole, and work furloughs- are not available under the Michigan statute by which Harmelin was convicted.<sup>137</sup> Consequently, the individualized sentencing doctrine should be applied not only to capital cases, but also to mandatory life sentences without the opportunity for parole like the one imposed in *Harmelin*.<sup>138</sup>

The Michigan legislature, in an effort to curtail a steady increase in drug related crime and drug abuse in Michigan, passed a bill in 1980 increasing the penalties for possession of certain controlled substances.<sup>139</sup> This Michigan statute under which Harmelin was convicted mandates life imprisonment without parole to everyone convicted of possessing any mixture of 650 grams or more containing cocaine.<sup>140</sup> Life imprisonment is imposed regardless of the circumstances of the offense.<sup>141</sup> This inflexible statute neither distinguishes between varying levels of individual culpability nor does it consider a defendant's prior criminal record.<sup>142</sup> Consequently, a drug kingpin with an extensive criminal record is treated exactly the same as a minor participant who is a first time offender.<sup>143</sup> Additionally, the Michigan statute draws no

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135. Brief of Amici Curiae for Petitioner, *supra* note 46, at 8, (citing *Rummel v. Estelle*, 445 U.S. 263 (1980)).

136. Brief for Petitioner, *supra* note 34, at 24.

137. See *Lockett v. Ohio*, 438 U.S. 586, 605; MICH. COMP. LAWS ANN. § 333.7403(1)(i) (West 1980).

138. Brief of Amicus Curiae for Petitioner, *supra* note 46, at 42-43; see also *United States v. Perez*, 685 F. Supp. 990, 1002 (W.D. Tex. 1988). In *Perez*, the court stated: "[T]hat the defendant's ability to inform the Court of circumstances and factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration." *Id.* at 1002.

139. See MICH. COMP. LAWS ANN. § 333.7403 (WEST 1980).

140. *Id.*

141. Brief of Amici Curiae for Petitioner, *supra* note 46, at 52.

142. Brief for Petitioner, *supra* note 34, at 5.

143. See *People v. Harman*, 333 N.W.2d 591 (Mich. Ct. App. 1983)(Kelly, J., dissenting).



distinction based on the purity of the mixture.<sup>144</sup> Thus, a person convicted of possessing one gram of cocaine mixed with 649 grams of sugar would be subjected to mandatory life without parole.<sup>145</sup>

There is no dispute that many drug dealers and users commit violent crimes.<sup>146</sup> Additionally, many drug users die from overdoses or give birth to drug addicted babies.<sup>147</sup> Indeed, all drug dealers share the responsibility for these atrocities, and should be punished accordingly.<sup>148</sup> But to treat as killers *every* drug dealer and his “mules of transport” is nothing more than mass hysteria.<sup>149</sup> Such reasoning opposes legal principles and a series of Supreme Court Cases restricting the death penalty to those who kill intentionally or by deliberately creating a grave risk to human life.<sup>150</sup>

Drug dealers do not deserve to be punished as severely as murderers, unless they commit violent crimes.<sup>151</sup> “Intentionally killing is worlds apart, in terms of certainty of harm and moral culpability, from acting as one of many suppliers selling drugs in a mass marketplace of buyers, most of whom use drugs with knowledge of the risks.”<sup>152</sup> Furthermore, such harsh penalties for drug activity do not accomplish their goal of ridding the streets of dealers and deterring others from drug involvement.<sup>153</sup>

The Michigan legislature’s attempt to deter drug trafficking by targeting the higher echelon drug dealers has been criticized as unsuccessful.<sup>154</sup> In fact, the people actually being sentenced to life imprisonment are the “mules of transport”.<sup>155</sup> While the real drug kingpins are often given lesser sentences in the federal system for divulging key information to the government, the couriers, who conceivably lack access to valuable information and are unable to offer information end up

144. Brief of Amici Curiae for Petitioner, *supra* note 46, at 9.

145. See *Michigan v. Lemble*, 303 N.W.2d 191 (Mich. 1981).

146. Stuart Taylor Jr., *Don't Throw Away That Key*, LEGAL TIMES, Oct. 22, 1990, at 25.

147. *Id.*

148. *Id.*

149. *Id.*

150. See *Sumner v. Shuman*, 483 U.S. 66 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts(Harry) v. Louisiana*, 431 U.S. 633 (1976).

151. Taylor, *supra* note 146, at 25.

152. *Id.*

153. *Id.* Every year thousands of youths are drawn to the drug trade despite the dangers of being killed by competitors or punished by harsh criminal sanctions. *Id.*

154. Brief for Petitioner, *supra* note 34, at 10.

155. Marcus, *supra* note 4, at A1.

serving mandatory life imprisonment without parole. The Michigan Oakland County Circuit Court, summed up these problems with the Michigan statute:<sup>156</sup>

Having carefully considered this statute, I have come to the conclusion that this law is the product of emotion, not reason. Politicians, known as legislators, in an effort to respond to community pressure and frustration over a very serious drug problem, rushed to a simple formula, in search of a solution - essentially throwing away the key for life for any and all individuals who shall possess more than 650 grams of cocaine. However mindlessly throwing away the key will neither deter such crime, nor promote justice. Quite the opposite, bad laws, such as the one at issue here, promote disrespect

. . . .

Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine, Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor? This is not to say that select drug possessors or dealers should not be sent away for natural life; it is simply to say that it makes no sense to mandate such a sentence for this offense and not to do so for many more dangerous offenders. This law has done nothing to ameliorate the bad conditions that exist in the State of Michigan with respect to the possession and distribution of illegal drugs.<sup>157</sup>

Unlike the rapists, murderers, kidnappers and other violent criminal offenders referenced to by the Oakland County Circuit Court, the Michigan statute requires that upon conviction, sentencing judges and parole authorities are not to consider mitigating circumstances.<sup>158</sup> However, deference to legislative power does not preclude unreasonable sentences from constitutional scrutiny.<sup>159</sup> In fact, the Supreme Court has dictated that the level of judicial scrutiny must intensify as the

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156. Because of the problems with the Michigan statute, Judge Lippitt of the Oakland County Circuit Court disqualified himself from adjudicating, *People v. Martin*, No. 86-74706, slip op. (Oakland Co. Cir. August 20, 1987), a case similar to *Harmelin*. Brief for Petitioner, *supra* note 34, at 11.

157. Brief for Petitioner, *supra* note 34 at 11-12 (quoting *Martin*, No. 86-74706, slip op. at 3, 4).

158. *Id.*

159. Brief of Amici Curiae for Petitioner, *supra* note 46, at 10.

penalty increases and as the discretionary range of sentences narrows.<sup>160</sup> Consequently, an eighth amendment challenge for the penalty of life in prison without parole should focus on whether the mandatory life sentence is proportionate to the crime for which the defendant was convicted.<sup>161</sup>

### B. *Under the Solem Analysis Harmelin's Sentence is Disproportionate*

Contrary to the majority's assertion, the *Solem* analysis has proved eminently workable.<sup>162</sup> The probability that *Solem* would "flood the appellate courts with cases in which . . . arbitrary lines must be drawn" has not resulted.<sup>163</sup> In the eight years since the decision, only a handful of sentences have been declared unconstitutional under the *Solem* standard.<sup>164</sup> In fact many courts have proven that they are "capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."<sup>165</sup> When properly applied, *Solem* is consistent with these principles since it affords deference to legislatures' authority to set punishments for crimes, as well as to judges when sentencing convicted criminals.<sup>166</sup>

The *Solem* Court listed three workable factors for the courts to consider when evaluating the constitutionality of a criminal sentence.<sup>167</sup>

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160. *Id.*; see, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

161. Brief of Amici Curiae for Petitioner, *supra* note 46, at 12.

162. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-97, 2712 (1991) (White, J., dissenting).

163. *Solem v. Helm*, 463 U.S. 277, 315 (1983) (Burger, C.J., dissenting).

164. *Harmelin*, 111 S. Ct. at 2713 n.2. There have been only four cases cited since *Solem* in which sentences have been reversed on the basis of a proportionality review. See *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989) (reaching a similar holding for a defendant who burglarized a home to get four dollars to repay a grocer for food eaten in the store); *Clowers v. State*, 522 So. 2d 762 (Miss. 1988) (trial court had discretion to reduce a fifteen year sentence without parole for a defendant who uttered a forged check); *State v. Gilham*, 549 N.E.2d 555 (Ohio 1988). Additionally, in *Naovarath v. State*, 779 P.2d 944 (Nev. 1989), the court looked to both state and federal constitutions before striking a life sentence without parole imposed on an adolescent who killed and then robbed a person who had repeatedly molested him.

165. *Rummel v. Estelle*, 445 U.S. 263, 306 (1980) (Powell, J., dissenting); see also *Thiess v. State Board*, 387 F. Supp. 1038, 1042 (Md. 1974).

166. *Solem*, 463 U.S. at 290.

167. *Id.* at 290-94.

First, the court should weigh the gravity of the offense and the harshness of the penalty.<sup>168</sup> Second, the court should compare the sentences imposed in the state for other crimes.<sup>169</sup> Third, the court should compare how other states treat the same offense.<sup>170</sup>

Through the incorporation of these objective factors *Solem* invokes an Eighth Amendment review of sentencing that reflects constitutional values and that works well in practice since it gives courts a standard against which to measure punishments.<sup>171</sup> Therefore, there is no need to reexamine these factors or overrule *Solem*.<sup>172</sup> Undoubtedly, *Harmelin* was one of the situations in which the *Solem* standards needed to be applied because the punishment of life imprisonment without parole was too severe given the crime committed and the defendant's lack of a previous record.<sup>173</sup>

Application of the *Solem* factors to the sentence in *Harmelin* reveals that the punishment is unconstitutional under the Eighth Amendment.<sup>174</sup> The first of the *Solem* factors requires a court to review the gravity of the offense and the harshness of the penalty.<sup>175</sup> In an evaluation of the gravity of the offense, a court should consider "the harm caused or threatened to the victim or society," based on such things as the degree of violence involved in the crime as well as "the absolute magnitude of the crime," and "the culpability of the offender".<sup>176</sup> The magnitude of Harmelin's offense includes the consideration of the ever increasing threat of illegal drugs in America.<sup>177</sup> There is no dispute that drugs pose serious societal problems.<sup>178</sup> In fact, President George Bush considers the "war" on drugs America's top priority.<sup>179</sup>

Mere possession of drugs, however, even in such a large quantity

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168. *Id.*

169. *Id.*

170. *Id.*

171. ACLU Brief for Petitioner, *supra* note 43, at 16.

172. *Harmelin*, 111 S. Ct. at 2714 (White, J., dissenting).

173. *Id.*

174. *Id.* at 2719.

175. *Solem*, 463 U.S. at 292.

176. *Id.* at 292-93.

177. Brief for Respondent, *supra* note 3, at 5.

178. *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting).

179. Brief for Respondent, *supra* note 3, at 19-20. The federal government will spend over \$10.6 billion this year in an effort to rid our society of the scourge of illegal drugs. *Id.*

as possessed by Harmelin, should not automatically warrant life imprisonment without parole.<sup>180</sup> Like crimes of violence, such as murder, rape and kidnapping, Harmelin's penalty for a drug offense should be tempered by discretionary and individualized sentencing because factors such as culpability, past criminal record and other mitigating circumstances need to be considered to ensure a fair penalty.<sup>181</sup>

To pass constitutional muster, a punishment should be tailored to a defendant's personal responsibility and moral culpability.<sup>182</sup> American courts consider a defendant's intention, and his moral guilt, to be crucial "to the degree of his criminal culpability."<sup>183</sup> However, in *Harmelin*, the sentencing judge was not allowed to consider that Harmelin had no criminal record; he cooperated with police upon his arrest; he had not displayed any viciousness, and he did not demonstrate an inability to reform.<sup>184</sup> Since Michigan does not have a death penalty, Harmelin's sentence is the most severe punishment Michigan can levy for any offense, including first degree murder.<sup>185</sup> Mr. Harmelin will now spend the rest of his life, and ultimately die, in a Michigan prison.<sup>186</sup> Thus, not to take into account the particular facts of his offense, or his personal history and characteristics, is a gross miscarriage of justice.<sup>187</sup>

Justice Kennedy's argument for the majority that the harsh penalty is appropriate given the subsidiary effects of drug use is without merit.<sup>188</sup> Even though the collateral effects of cocaine are severe, they are similar to those that result from the misuse of other legal substances.<sup>189</sup> It would be inconceivable for a state to sentence a person who possesses large amounts of alcohol to mandatory life imprisonment without parole, because of the tangential effects which might eventually be traced to the alcohol.<sup>190</sup> Likewise, it is ridiculous to uphold Harmelin's sentence because of the collateral effects which might indi-

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180. *Id.*

181. Brief for Petitioner, *supra* note 34, at 16.

182. *See* Edmund v. Florida, 458 U.S. 782, 801 (1982).

183. *E.g.*, Cabana v. Bullock, 474 U.S. 376 (1986), (Stevens, J., dissenting) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

184. Brief for Petitioner, *supra* note 34, at 14.

185. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting).

186. *Id.*

187. *Id.* at 2718-19.

188. *Id.* at 2717.

189. *Id.* at 4856.

190. *Harmelin*, 111 S. Ct. at 2717.

rectly ensue from the drugs he possessed.<sup>191</sup> “‘Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct.’”<sup>192</sup> Amazingly, this is precisely the approach adopted by the Court.<sup>193</sup>

Addressing the second factor of *Solem* requires evaluating the sentences imposed for other crimes in Michigan.<sup>194</sup> Only two other crimes in Michigan carry a mandatory penalty such as the one Harmelin received: the manufacture or sale of more than 650 grams of a Schedule 1 or 2 drug<sup>195</sup> and, first degree murder.<sup>196</sup> Thus, Michigan has equated the severity of first degree murder with the possession or sale of 650 or more grams of cocaine.<sup>197</sup> Of particular interest in the application of the second *Solem* factor is Michigan’s sentencing scheme for murder, since it punishes only cold blooded murderers with a mandatory life sentence in prison without parole.<sup>198</sup> The particular circumstances of the homicide narrow the penalty to those who are the most morally reprehensible.<sup>199</sup>

In Harmelin’s case, however, the Michigan statute required the state to prove only that he knowingly possessed over 650 grams of a substance containing cocaine.<sup>200</sup> The State is not required to prove that Harmelin had an intention to kill,<sup>201</sup> or that a death occurred because of Harmelin’s actions.<sup>202</sup> By contrast, second degree murder, kidnapping, and hostage-taking by prisoners do not carry such a harsh mandatory sentence as the one Harmelin received, although they do

191. *Id.* at 2716.

192. *Id.* at 2717 (quoting *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting)).

193. *Id.*

194. *See Solem v. Helm*, 463 U.S. 277, 291 (1983).

195. MICH. COMP. LAWS ANN. § 333.7401 (West 1980).

196. MICH. COMP. LAWS ANN. § 750.316 (West 1991).

197. Brief of Amici Curiae for Petitioner, *supra* note 46, at 16.

198. Brief for Petitioner, *supra* note 34, at 40; *see also* MICH. COMP. LAWS ANN. § 750.316 (West 1991).

199. Brief for Petitioner, *supra* note 34, at 40. Only first-degree murderers are considered so morally depraved as to have forfeited their right to live in society forever. *Id.*

200. MICH. COMP. LAWS ANN. § 333.7401 (West 1980).

201. Brief for Petitioner, *supra* note 34, at 40.

202. *Id.* Nor is any proof required that Harmelin even had a reckless disregard for human life. *Id.*

provide for the possibility of a life sentence in the exercise of judicial discretion.<sup>203</sup>

This classification for sentencing purposes of Harmelin's offense as equivalent to first-degree murder and more serious than second-degree murder is irrational.<sup>204</sup> The severity of harm associated with a drug possession offense cannot logically be considered, in all cases, to exceed intentional homicides.<sup>205</sup> It is ironic that had Harmelin panicked at the traffic stop, unpremeditatedly shot and killed the police officer, ridded himself of the cocaine, and then been arrested, he could have been subject to a lesser sentence up to life.<sup>206</sup> Such a difference in penalties exemplifies the disproportionate punishment since Harmelin "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."<sup>207</sup>

The third criteria under the *Solem* proportionality test is a comparison of the sentence imposed for commission of the same offense in other jurisdictions.<sup>208</sup> No other jurisdiction imposes so harsh a punishment as Michigan for possession of the amount of drugs in the present case.<sup>209</sup> Only Alabama imposes a similar punishment, and then only when a defendant possesses ten kilograms or more of cocaine.<sup>210</sup> If Harmelin had been convicted in Alabama, he would have been subject to a five year mandatory minimum term of imprisonment for the offense of possession of 500 grams to one kilogram of cocaine.<sup>211</sup>

In fact, in the United States, only Michigan imposes a mandatory life sentence without parole for possession of cocaine, regardless of other relevant mitigating circumstances.<sup>212</sup> Only a few states including Connecticut, Idaho, Kansas, Montana, North Dakota, Nevada,

203. MICH. COMP. LAWS ANN. §§ 750.31, 750.349, 750.349(a) (West 1982). Michigan law allows a prisoner "under sentence for life or for a term of years" to be eligible for parole after ten years. MICH. COMP. LAWS ANN. § 791.234(4) (West 1982).

204. Brief of Amici Curiae for Petitioner, *supra* note 46, at 17.

205. *Id.* at 18.

206. *Id.* On a sentence calling for any term of years Harmelin would be eligible for disciplinary credits which means that the minimum sentence could not exceed his life expectancy. See MICH. COMP. LAWS ANN. § 800.33(5) (West 1982); Brief of Amici Curiae for Petitioner, *supra* note 46, at 18-19.

207. *Solem v. Helm*, 463 U.S. 277, 299 (1983).

208. *Id.* at 291-92.

209. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting).

210. See ALA. CODE § 13A-12-231(2)(d) (Supp. 1990).

211. Brief for Petitioner, *supra* note 34, at 42; see ALA. CODE § 13A-12-231(2)(b) (Supp. 1990).

212. Brief for Petitioner, *supra* note 34, at 25.

Oklahoma, Rhode Island, Tennessee, and Texas authorize a possible life sentence for first offenders.<sup>213</sup> These states, however, do not preclude the possibility of parole, nor the exercise of discretion by the sentencing judge.<sup>214</sup>

Even under federal law, if a first offender possessed the same amount of cocaine as Harmelin, the maximum prison sentence would be a term of not less than five or more than forty years.<sup>215</sup> Under the United States Sentencing Guidelines, with all relevant enhancements, a defendant in a similar situation as Harmelin, would expect to receive a sentence that "would barely exceed ten years."<sup>216</sup> Moreover, under Rule thirty five of the Federal Rules of Criminal Procedure, the government reserves the right to move for a reduction of a defendant's sentence under the mandatory minimum of the Sentencing Guidelines if the defendant has provided substantial assistance to the government.<sup>217</sup> The state of Michigan has no similar provision.<sup>218</sup>

Based on the foregoing, it is obvious that Michigan's mandatory life imprisonment without parole for the possession of 650 grams or more of a substance containing cocaine is out of sync with both federal law and the laws of other states.<sup>219</sup> Therefore, "[i]t appears that [Harmelin] was treated more severely than he would have been in any other State."<sup>220</sup> The fact that no other jurisdiction mandates such a harsh penalty for Harmelin's offense establishes "the degree of national consensus [that the Supreme] Court has previously thought sufficient to label a particular punishment cruel and unusual."<sup>221</sup>

Application of the *Solem* criteria to Harmelin's situation reveals

213. *Id.* at 26.

214. *Id.*

215. Brief of Amicus Curiae in Support of Petitioner, *supra* note 46, at 28-29. Under federal law the only possibility of a mandatory sentence of life without parole is under Title 21 U.S.C. section 848, the Continuing Criminal Enterprise Statute. A conviction under this statute requires a person to be an organizer, supervisor, or manager of five or more people; commit a continuing series of violations; derive substantial resources from the activities; and the organization must have grossed at least ten million dollars per year, or distributed at least 150 kilograms of cocaine. *Id.*

216. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting); *see also* United States Sentencing Commission Guidelines Manual, § 2D1.1 (1990).

217. FED. R. CRIM. P. 35; *see also* Brief for Petitioner, *supra* note 34, at 46.

218. Brief for Petitioner, *supra* note 34, at 46.

219. *Harmelin*, 111 S. Ct. at 2718-19 (White, J., dissenting).

220. *Id.* at 2719.

221. *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989) (plurality opinion).



the Michigan statute is unconstitutional.<sup>222</sup> The statutorily imposed mandatory life sentence without parole for possession of 650 or more grams of cocaine is disproportionate to the offense and thus, violates the Eighth Amendment's prohibition against cruel and unusual punishments.<sup>223</sup>

## V. CONCLUSION

The Supreme Court's decision in *Harmelin* profoundly displays the new boldness of a solidly conservative court which seems determined to subvert individual rights.<sup>224</sup> The Justices' concern over the threat of drugs in society influenced them to uphold a Michigan law imposing a mandatory sentence of life imprisonment without parole for possession of more than 650 grams of cocaine.<sup>225</sup> Consequently, by upholding such an excessive sentence the Court has likened drug possession as the moral equivalent of first-degree murder.<sup>226</sup>

Although stiff anti-drug laws have emotional appeal, they frequently do not produce the results expected by legislators.<sup>227</sup> Practically speaking, harsh sentences for drug offenses send some non-violent drug dealers to prison for longer terms than murderers, rapists and armed robbers.<sup>228</sup> Therefore, if the eighth amendment's prohibition on cruel and unusual punishment is to retain any vitality, such grossly disproportionate treatment must be outlawed.<sup>229</sup>

Unfortunately, the majority in *Harmelin* largely abandoned the ancient notion that the punishment must fit the crime.<sup>230</sup> In doing so, the Court sharply limited the Eighth Amendment's prohibition on cruel and unusual punishments.<sup>231</sup> Thus, the Court incorrectly gave a constitutional stamp of approval to the increasingly popular tactic of impos-

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222. *Harmelin*, 111 S. Ct. at 2719 (White, J., dissenting).

223. *Id.*

224. Savage, *Justices Uphold Victims' Rights, 'Cruel' Penalties*, THE LOS ANGELES TIMES, June 28, 1991, § A at 1.

225. Marcus, *High Court Upholds Life Sentence in Drug Case; Mandatory Michigan Penalty Imposed for Possession of 1½ Pounds of Cocaine*, THE WASHINGTON POST, June 28, 1991, § A at 16.

226. Taylor, *supra* note 146, at 25.

227. *Id.*

228. See Brief for Petitioner, *supra* note 34, at 36.

229. Taylor, *supra* note 146, at 25.

230. *Harmelin*, 111 S. Ct. at 2638.

231. *Id.* at 2714 (White, J., dissenting).

ing mandatory minimum terms of imprisonment for drug offenses without consideration of mitigating circumstances or judicial discretion.<sup>232</sup>

*Louise S. McAlpin*

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232. Marcus, *supra* note 225, at § A at 16.

# Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting—*Chambers v. NASCO, Inc.*

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## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	1527
II. FACTS AND PROCEDURAL HISTORY OF <i>CHAMBERS V. NASCO, INC.</i> . . . . .	1529
III. BACKGROUND LAW: THE AMERICAN RULE AND THE BAD FAITH EXCEPTION . . . . .	1537
IV. THE <i>CHAMBERS</i> COURT'S OPINION . . . . .	1552
A. <i>The Majority Opinion</i> . . . . .	1552
B. <i>The Dissenting Opinion</i> . . . . .	1557
V. CRITIQUE AND IMPLICATIONS . . . . .	1560
VI. CONCLUSION . . . . .	1565

## I. INTRODUCTION

Confronted with the growing problem of crowded dockets, federal courts have enacted and imposed a variety of rules and sanctions designed to discourage abuse of the judicial process.<sup>1</sup> In the interests of justice, federal courts, pursuant to their inherent power,<sup>2</sup> may award attorney's fees to a party when his opponent has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>3</sup> Consequently, the question of who should bear the brunt of those fees is likely to be an issue in every lawsuit, large or small. Litigants would like to shift the costs of their counsel to the opponent if possible, but under the American Rule, ("Rule") this generally cannot be accomplished.<sup>4</sup> The Rule

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1. See generally David W. Pollack, Comment, *Sanctions Imposed by Courts on Attorney's who Abuse the Judicial Process*, 44 U. CHI L. REV. 619 (1977).

2. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973). The inherent power of the federal courts "is part of the original authority of the chancellor to do equity in a particular situation." *Spargue v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939).

3. *Hall*, 412 U.S. at 4-5.

4. See Joan Chipser, Note, *Attorney's fees and the Federal Bad Faith Excep-*

provides that a prevailing party must bear his own attorney's fees and cannot have them taxed against the loser.<sup>5</sup> The Rule precludes a court, without statutory authorization, from engaging in fee shifting as part of the merits of the award.<sup>6</sup> However, a litigant who abuses the judicial process,<sup>7</sup> or acts in "obdurate obstinacy"<sup>8</sup> may be faced with paying for his adversary's attorney's fees.<sup>9</sup> The federal courts have long possessed this inherent power to award attorney's fees as a sanction for bad faith conduct.<sup>10</sup>

Nevertheless, most litigants point to the Federal Rules of Civil Procedure or a statute when the issue of sanctions is raised.<sup>11</sup> However, the authority to impose monetary sanctions pursuant to the inherent power is older, deeper and broader than any other formal doctrine.<sup>12</sup> It has long been accepted that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institutions," powers "which cannot be dispensed with in a court because they are necessary to the exercise of all others."<sup>13</sup> These powers are regulated

*tion*, 29 HASTINGS L.J. 319, 320 (1977). The American Rule states that attorney's fees are not ordinarily recoverable as costs or damages in the absence of a statute authorizing the award of fees or an agreement between the parties providing for fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Compare with the "English Rule," where as early as 1275 the law courts of England were authorized to award counsel fees to a successful plaintiff. Statute of Glouster, 1278, 6 Edw. 1, c. 1 (this statute mentioned only the cost of a writ purchased, but was liberally construed to include attorney's fees).

5. *Alyeska*, 421 U.S. at 247.

6. *Id.* at 260; see also *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2140 (1991) (Scalia, J., dissenting).

7. *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978).

8. *Id.*

9. *F.D. Rich Co. Inc. v. United States ex rel. Indus. Co., Inc.*, 417 U.S. 116, 129 (1974).

10. *Hall*, 412 U.S. at 5; see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986); *Hutto*, 437 U.S. at 689 n.14; *Alyeska*, 421 U.S. at 258-59; *F.D. Rich Co.*, 417 U.S. at 119; *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402 n.4 (1968) (*per curiam*); *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

11. FED. R. CIV. P. 11; Long, *When Winning Isn't Enough: Boards of Contract Appeals and Monetary Sanctions for Frivolous and Bad Faith Conduct in Administrative Litigation*, 27-50-10 ARMY. LAW. 37, 38 (1990).

12. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980); *Alyeska*, 421 U.S. at 258-59 (holding *inter alia*, that federal courts may impose attorney's fees pursuant to their inherent power when an attorney acts in bad faith, even though the American Rule says otherwise).

13. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); see also *Road-*

not by any rules or statutes, but by the inherent authority “vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.”<sup>14</sup> Thus, the inherent power is necessary to permit the courts to function and preserve its authority.<sup>15</sup>

In *Chambers v. NASCO, Inc.*,<sup>16</sup> the United States Supreme Court, during its 1990 term, specifically addressed one issue: Whether a federal court sitting in diversity, can utilize its inherent power to assess attorney’s fees as a sanction for a party’s bad-faith conduct.<sup>17</sup> The Supreme Court held that federal courts sitting in diversity can impose sanctions pursuant to their inherent power despite the existence of federal rules and statutes which prescribe equal sanctions.<sup>18</sup> Such a ruling however, can easily lead to inconsistent results among the federal courts and undermine congress’ goal of uniformity throughout the federal system.

Part two of this Comment reviews the procedural history and facts of *Chambers v. NASCO, Inc.*,<sup>19</sup> part three examines the scope and development of the courts’ inherent power beginning from its inception, to the “American rule” prohibiting substantive fee shifting and the bad faith exception; part four reviews and analyzes the Supreme Court’s holding and reasoning; and part five discusses the possible implications and inconsistent results that *Chambers* might cause.

## II. FACTS AND THE PROCEDURAL HISTORY OF *CHAMBERS V. NASCO, INC.*

On August 9, 1983, Chambers and his corporation, Calcasieu Television and Radio (“CTR”), entered into a purchase agreement to sell KPLC-TV to NASCO, Inc. (“NASCO”).<sup>20</sup> The agreement was never

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way, 447 U.S. at 764 (inherent powers of federal courts are those which are necessary to the exercise of all others (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))).

14. *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962).

15. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 785, 819-820 (Scalia, J., concurring).

16. 111 S. Ct. 2123 (1991).

17. *Id.* at 2128. At the Fifth Circuit, this case was known as *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), *aff’g* *NASCO, Inc. v. Calcasieu Television and Radio*, 124 F.R.D. 120 (W.D. La. 1989); *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F. Supp. 1372 (W.D. La. 1985).

18. *Chambers*, 111 S. Ct. at 2128.

19. *Id.* at 2123.

20. *NASCO*, 623 F. Supp. at 1373. Chambers was the sole shareholder and di-

recorded in the Calcasieu and Jefferson Davis Parishes where the properties were located.<sup>21</sup> However, by late August Chambers had changed his mind and in September, he informed NASCO that he would not file the necessary documents.<sup>22</sup> On Friday, October 14, NASCO's counsel informed counsel for Chambers that it would file suit the following Monday seeking specific performance of the agreement, as well as a temporary restraining order ("TRO") to prevent the alienation or encumbrance of the properties.<sup>23</sup>

On Sunday, October 16, the day before NASCO would file suit, Chambers and his attorney knowingly and deliberately took advantage of the notice given by NASCO, and set in motion an illegal and fraudulent scheme.<sup>24</sup> The pair conspired to deprive NASCO of a judicial determination of its rights by attempting to place the properties at issue beyond the district court's jurisdiction by using the Louisiana Public Records Doctrine.<sup>25</sup> To this end, Chambers and his counsel formed

rector of (CTR) which operated a television station in Lake Charles, Louisiana. *Id.*

21. *Id.* at 1373-74. The failure to record the purchase agreement in the respective counties would later be used by Chambers as a means to deprive the district court of its jurisdiction. *See NASCO, Inc.*, 124 F.R.D. at 125.

22. *NASCO*, 623 F. Supp. at 1373-74. The purchase agreement required NASCO and CTR to use their best efforts in obtaining the requisite approval of the Federal Communications Commission ("FCC") for the transfer of the station's license. *Id.* Furthermore, the Agreement obligated both parties to file the necessary documents with the FCC no later than September 23, 1983. *Id.*

23. *Id.* at 1376. The suit was filed the following Monday in the United States District Court for the Western District of Louisiana. *Id.* at 1375. Notice was given to the defendants Chambers and CTR pursuant to the requirements of Federal Rule of Civil Procedure 65(b) and Rule 11 (now Rule 10) of the local rules of the court which are designed to give a defendant in a temporary restraining order application notice of the hearing and an opportunity to be heard. *Id.* at 1376.

24. *NASCO, Inc.*, 124 F.R.D. at 125.

25. *Id.* The Louisiana Public Records Doctrine states that contracts affecting immovable property must be recorded in order to affect third parties. *Dallas v. Farrington*, 490 So. 2d 265, 269 (La. 1986). The Public Records doctrine is essentially a negative doctrine declaring what is not recorded is not effective, except between the parties, and a third party in purchasing immovable property is entitled to rely on the absence from the public records of any unrecorded interest in the property. *Id.*; *see also Phillips v. Parker*, 483 So. 2d 972 (La. 1986).

Because the purchase agreement had never been recorded, Chambers and his counsel determined that if the properties were sold to a third party, and these deeds were recorded before the issuance of the temporary restraining order, the district court would lack jurisdiction over the properties. *NASCO*, 623 F. Supp. at 1381. Thus, NASCO would be deprived of a judicial determination of its rights to specific performance, and Chambers could maintain possession of his station. *NASCO, Inc.*, 124 F.R.D.

a trust, appointing Chambers' sister as the trustee and naming Chambers' three adult children as the beneficiaries.<sup>26</sup> Despite knowledge that the land on which the television station and the associated properties were located was to be sold to NASCO under the purchase agreement, Chambers directed CTR to execute duplicate warranty deeds to the trustee for consideration of \$1.4 million.<sup>27</sup> The deeds were recorded early Monday morning, before NASCO's counsel appeared in the district court to file the complaint and seek the TRO.<sup>28</sup> Despite the district court's questioning at the TRO hearing concerning the possibility that CTR was negotiating to sell the properties to a third party, Chambers' counsel made no mention of the recordation of the deeds earlier that day.<sup>29</sup> The next morning, after the TRO had been issued, Chambers' attorney notified the District Court of the recordation of the deeds the day before, and admitted to intentionally withholding this information from the court.

The following week the district court granted a preliminary injunction against Chambers and CTR, and entered a second TRO directed against the trustee to prevent her from selling, transferring or in any way encumbering the CTR properties.<sup>30</sup> Within the next week, Chambers' attorneys prepared a leaseback agreement from the trustee to CTR, so that CTR could remain in possession of the properties and continue to operate the station.<sup>31</sup> At the second TRO hearing, the district court was unaware of the leaseback agreement, but warned Chambers and his attorney that their conduct had been unethical and

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at 125.

26. *NASCO*, 623 F. Supp. at 1376.

27. *Id.* Chambers phoned his sister, Baker, and informed her of the creation of the trust and that it was his desire that she act as trustee; however, he did not inform her of the duplicate deeds, which had been executed, or that the trust was undercapitalized. *Id.* In fact, the assets never exceeded \$1,000 which was insufficient to meet the \$17,735 monthly payment by the trust. *Id.* at 1378 Nonetheless, Chambers and his counsel were not concerned since Chambers had absolute control of the trustee. *Id.*

28. *Id.* at 1376. The deeds had not been signed by the trustee, none of the consideration had been paid and CTR continued in undisturbed possession, despite the recordation of the deeds. *Id.*

29. *NASCO, Inc.*, 124 F.R.D. at 126. Also, the district court judge was unaware that Chambers' attorney had tape recorded certain conferences which had been conducted over the phone. *Id.* at 126 n.8.

30. *Id.*

31. *Id.* The trustee had no knowledge of the lease or its terms, did not take part in the negotiations, and simply signed and returned the lease to Chambers. *Id.*

that no such act should be repeated in the future.<sup>32</sup>

Chambers subsequently entered a series of groundless motions, charges and pleadings aimed at delaying the judicial process and depriving NASCO of its rights under the purchase agreement.<sup>33</sup> After the district court found that the motions were all filed "in absolute bad faith;" that the charges were "deliberate untruths and fabrications," plainly "improbable and unrealistic;" and that the pleadings were "simply part of a sordid scheme of deliberate misuse of the judicial process," further warnings were issued.<sup>34</sup> Finally, on the eve of trial, Chambers stipulated that the purchase agreement was valid and enforceable, and that he had breached the agreement by failing to file the necessary documents with the Federal Communications Commission

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32. *NASCO, Inc.*, 124 F.R.D. at 127. Despite this reprimand, Chambers' abuse of the judicial process continued. *Id.* In November 1983, Chambers refused to allow NASCO to inspect CTR's corporate records in direct contravention of the standing preliminary injunction. *Id.* The resulting contempt proceedings, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 583 F. Supp. 115 (W.D. La. 1985), vindicated NASCO's rights, but at the cost of much expense, delay, and waste of resources. This was compounded by Chambers' attorney's prosecution of two separate and independent appeals which were dismissed by the appellate court. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 757 F.2d 157, 157-58 (5th Cir. 1985).

33. *NASCO, Inc.* 124 F.R.D. at 127. Two motions for summary judgment were filed by counsel on behalf of Chambers; a third motion for summary judgment followed by a motion to strike were filed on behalf of the trustee; and, a motion for a protective order and clarification were filed on behalf of Chambers. *Id.* at 127-28. Next, Chambers through his attorney filed baseless charges and counterclaims against NASCO alleging fraud, harassment, interference with TV station operation, spreading of misinformation and public disapproval of the sale. *Id.* Also, alleged were unnamed breaches of the purchase agreement by NASCO and NASCO's disregard for a non-existent oral agreement with Chambers. Pointless new issues were injected: NASCO's conduct of its FCC ascertainment survey; its ability to pay the purchase price; and its plans for the future management and commitment to the community interest. *Id.* Needless depositions of the bank officials, who were to finance the purchase, were noticed by Chambers' counsel and depositions of the NASCO board of directors were taken. The district court noted that throughout the course of the proceedings, Chambers, (CTR) and his counsel sought, and sometimes received, continuances of trial dates, extensions of deadlines and deferment of scheduled discovery. *Id.* at 127-28. Pretrial and status conferences were held where several motions in preparation for a trial on the merits were ruled upon. *NASCO, Inc.*, 124 F.R.D. at 127-28. However, a motion to recuse the trial judge for bias and prejudice by Chambers was denied. A writ of mandamus to compel disqualification of the judge was also filed with the U.S. Court of Appeals for the Fifth Circuit on behalf of Chambers; however, this was also denied. *Id.* Nonetheless, trial on the merits was again delayed.

34. *Id.* at 128.



("FCC").<sup>35</sup> At trial, the only defense presented was the Public Records Doctrine.<sup>36</sup>

Between the trial on the merits and the entry of the district court's judgment against Chambers, he continued to use every ruse possible to evade performance of the purchase agreement.<sup>37</sup> Chambers, without notifying NASCO, sought permission from the FCC to construct a new transmission tower for the station and to relocate the transmission facilities to that site.<sup>38</sup> Only after NASCO threatened further contempt sanctions and informal intervention did Chambers withdraw his application from the FCC. The district court then entered judgment on the merits in NASCO's favor,<sup>39</sup> finding that the trustee did not qualify as a third party purchaser under the Public Records Doctrine.<sup>40</sup>

However, Chambers' adamant tactics did not end here.<sup>41</sup> During the pendency of his appeal, Chambers caused CTR officials to lodge formal opposition with the FCC against its approval of the transfer of the station license.<sup>42</sup> NASCO sought contempt sanctions for a third

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35. *Id.* The district court noted that at this point there was no clearer indication that all of the previously asserted affirmative defenses, counterclaims, pleadings, motions and opposition prosecuted so vehemently by the defendants were untruths and distortions, absolutely devoid of any substantive merit. *Id.*

36. *Id.* The district court stated that in any event, this defense was manufactured as part of the "initial fraud". *Id.*

37. *Id.* at 128-29.

38. *NASCO, Inc.*, 124 F.R.D. at 129. Chambers' goal in relocating the facilities was to render the Purchase Agreement meaningless, since by moving the facilities, the tower sites would no longer be covered by the Purchase Agreement. *Id.*

39. *NASCO, Inc.*, 623 F. Supp. at 1385. The district court found that the transfer of the properties to the trust was a simulated sale, and that the deeds purporting to convey the properties were "null, void, and of no effect." *Id.*

40. *Id.* The court found that at the recordation of the deeds, the trustee had no knowledge of the value, extent, location of the properties, the purchase price, and whether the sale had ever taken place. *Id.* Under Louisiana law, a party interposed by the seller for the sole purpose of raising the Public Records Doctrine as a shield cannot be considered a valid third party purchaser. *See Burns v. Jolley*, 95 So. 648 (La. 1923); *First Nat'l Bank of Ruston v. Mercer*, 448 So. 2d 1369 (La. Ct. App. 1989).

41. *NASCO, Inc.*, 124 F.R.D. at 129. Following judgment on the merits, Chambers moved the district court to stay its judgment pending his contemplated appeal. Having found the purchase agreement legal, valid and enforceable, and the rejection of the Public Records doctrine defense, the district court refused "absolutely" to grant the stay. *Id.* Chambers nonetheless, petitioned the fifth circuit as well as the Supreme Court, to stay the district court's merits; however, this petition was likewise denied. *In re Calcasieu Television & Radio, Inc. and G. Russell Chambers v. NASCO, Inc.*, No. A-611 (U.S. Feb. 18, 1986) (order denying stay of judgment).

42. *NASCO, Inc.*, 124 F.R.D. at 129.

time, until the court intervened and caused the opposition to be withdrawn.<sup>43</sup> Despite the court's judgment on the merits and numerous interventions, Chambers continued his refusal to close the sale of the television station, forcing NASCO to seek judicial assistance once again to correct the abuses.<sup>44</sup>

Following oral argument on Chambers' appeal from the district court's judgment, the Court of Appeals for the Fifth Circuit ruled and found the appeal frivolous.<sup>45</sup> The court imposed appellate sanctions in the form of attorney's fees and double costs, pursuant to Federal Rule of Appellate Procedure 38, and remanded the case to the district court with instructions to determine whether further sanctions should be imposed for the manner in which the litigation had been conducted.<sup>46</sup>

On remand, NASCO moved for appropriate sanctions, invoking the district court's inherent power, Federal Rule of Civil Procedure 11, and 28 U.S.C. section 1927.<sup>47</sup> In considering the sanctions, the district court first considered Rule 11.<sup>48</sup> The district court noted the alleged

43. *Id.*

44. *Id.* During the pendency of the appeal to the fifth circuit, a dispute arose between Chambers and NASCO over the station's equipment to be transferred under the Purchase Agreement. *NASCO Inc. v. Calcasieu Television and Radio*, 894 F.2d 696, 700 (5th Cir. 1990). During the hearing regarding this dispute, Chambers and CTR removed all of the disputed equipment, thereby violating the orders of the district court. *NASCO, Inc.*, 124 F.R.D. at 129. At the hearing, a CTR official testified that the disputed assets were not owned by CTR, but leased from another Chambers corporation. The trial court concluded that the leases were "nothing more than instruments of deception." *Id.*

45. See *NASCO, Inc.*, 124 F.R.D. at 122 n.4.

46. *NASCO, Inc.*, 894 F.2d at 700. Rule 38 states that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages, and single or double costs to the appellee." FED. R. APP. P. 38.

47. *NASCO, Inc.*, 124 F.R.D. at 123.

48. FED. R. CIV. P. 11. As amended in 1983, this rule provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

sanctionable conduct was that Chambers' had: "(1) attempted to deprive this Court of jurisdiction by acts of fraud, nearly of all which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce [NASCO] to exhausted compliance."<sup>49</sup> The court noted that the acts alleged under "(1)" and "(3)" could not be considered under Rule 11 as they did not involve the certification of documents.<sup>50</sup> Similarly, the conduct under "(2)," the falsification of the assertions knowingly and deliberately made by Chambers, did not become apparent until after the trial of the merits.<sup>51</sup> Thus, because there was no evidence in the record establishing the falsity of these allegations, sanctions could not have been assessed at the time the papers were filed.<sup>52</sup> The court, accordingly found sanctioning under Rule 11 to be insufficient.<sup>53</sup> Likewise, 28 U.S.C. section 1927 was deemed inadequate to sanction Chambers' acts since the statute only applied to attorneys.<sup>54</sup> However, the court turned to its inherent power and imposed upon Chambers sanctions amounting to approximately one million dollars in attorney's fees and costs incurred by NASCO.<sup>55</sup> In assessing the sanctions, the district court noted that

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*Id.*

49. *NASCO, Inc.*, 124 F.R.D. at 138.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The court noted that the acts alleged under "(1)" and "(3)" could not be considered under Rule 11 as they did not involve the certification of documents. *Id.* Similarly, the conduct under "(2)," the falsification of the assertions knowingly and deliberately made by Chambers did not become apparent until after the trial of the merits. Thus, because there was no evidence in the record establishing the falsity of these allegations, sanctions could not have been assessed at the time the papers were filed. *Id.*

54. *NASCO, Inc.*, 124 F.R.D. at 139. "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1988).

The district court found the sanctionable conduct, alleged by NASCO, outside the reach of section 1927 for several reasons: (1) only sanctionable acts against attorney's could be considered; (2) the statute is not broad enough to cover acts which degrade the judicial system (referring to the attempt to deprive the court of jurisdiction, fraud, misleading and lying to the court, and surreptitiously taping conversations with the court); and (3) the statute only provides for *excess* costs and expenses and attorney's fees. See *NASCO, Inc.*, 124 F.R.D. at 139.

55. *NASCO, Inc.*, 124 F.R.D. at 139. The court noted that if it finds that fraud

Chambers knew throughout the proceedings that NASCO had a valid contract, that he hired counsel to find a defense and arbitrarily refused to perform, forcing NASCO to bring its suit for specific performance.<sup>56</sup> On appeal, the Court of Appeals for the Fifth Circuit affirmed the district court's sanctions, rejecting Chambers' argument that a federal court sitting in diversity cannot look to the court's inherent power, but must look to state law.<sup>57</sup>

Subsequently, because of the importance of the issues presented, the United States Supreme Court granted certiorari.<sup>58</sup> The Court held that a federal court's inherent power to impose sanctions for bad faith conduct is not displaced by the 28 U.S.C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure, and that even though some of the sanctionable conduct was covered by the statutes and the federal rules, the court could nonetheless rely on its inherent power.<sup>59</sup> Furthermore, federal courts sitting in diversity can assess attorney's fees as a sanction pursuant to their inherent power even though state law does not recognize a bad faith exception to the general rule against fee shifting.<sup>60</sup> The Court reasoned that since the imposition of attorney's fees pursuant to the inherent power solely vindicated the abuses of process, fee shifting was a procedural and not substantive matter.<sup>61</sup> Thus, the Court found that choice of law concerns were not implicated.<sup>62</sup>

Through its broad analysis of the inherent power, the Court partially sanctioned Chambers for his bad faith in the substance of the dispute, something which the Supreme Court has never clearly sanctioned. In doing so, the Court also displaced many other well estab-

has been practiced upon it, or that "the very temple of justice has been defiled," the entire cost of the proceedings could justly be assessed against the guilty party. *Id.*; see *Spargue v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); see also *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944).

56. *NASCO, Inc.*, 124 F.R.D. at 143.

57. *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990). The court likewise found that neither 28 U.S.C. section 1927, nor Federal Rule of Civil Procedure 11 limits a court's inherent power to sanction bad faith conduct "when the parties conduct is not within the reach of the rule or the statute." *Id.* at 702-03.

58. *Chambers v. NASCO, Inc.*, 111 S. Ct. 38 (1990).

59. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

60. *Id.*

61. *Id.* at 2138.

62. *Id.* at 2137-38.

lished congressionally created statutes and rules in favor of a concept which is amorphous and lacks workable standards.

### III. BACKGROUND LAW: THE AMERICAN RULE AND THE BAD FAITH EXCEPTION

It has long been established that courts have an inherent power—a power vested in the courts upon their creation,<sup>63</sup> and not derived from any statute.<sup>64</sup> Inherent powers have repeatedly been used to manage a court's docket, and to regulate the conduct of the members of its bar.<sup>65</sup> Courts have also relied on this power to impose many types of sanctions upon those who abuse the judicial process,<sup>66</sup> including the assessment of attorney's fees.<sup>67</sup> Even though the American Rule prohibits fee shifting in most cases,<sup>68</sup> when a party has acted in bad faith, federal courts may award such fees pursuant to their inherent equitable powers.<sup>69</sup> The inherent powers concept has often been characterized as “nebulous,” and with “shadowy” bounds.<sup>70</sup> Notwithstanding this observation, some federal courts have implemented the inherent powers in three general modes.<sup>71</sup>

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63. See *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

64. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

65. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

66. *Id.*; e.g., *Link*, 370 U.S. at 629-30 (federal courts have the power to dismiss a case for failure to prosecute). Also, some commentators have noted that courts occasionally have disbarred, suspended or reprimanded an attorney for abuse of the judicial process. See e.g., Michael Scott Cooper, Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 856 (1979). Courts have even used their inherent powers to declare attorneys absent from docket call “ready for trial,” even though this could lead to the entry of a default judgment. See e.g., *Williams v. New Orleans Public Serv., Inc.*, 728 F.2d 730, 732 (5th Cir. 1984).

67. *Hall v. Cole*, 412 U.S. 1, 4-5 (1973).

68. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). The American Rule provides that a prevailing party must bear his own attorney's fees and cannot have them taxed against the loser. *Id.* at 247.

69. *Id.* at 258-59; see also *Hall*, 412 U.S. at 5; *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.4 (1968) (*per curiam*).

70. See R. RODES, K. RIPLEY & C. MOONEY, *SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE*, 179 n.466 (1981).

71. *Eash*, 757 F.2d at 562.

The first use of inherent powers springs from the congressional creation of the lower federal courts, which vested these lower courts with the judicial powers pursuant to Article III of the United States Constitution.<sup>72</sup> These inherent powers are grounded in the separation of powers concept, because to deny this power “and yet to conceive of courts is a self-contradiction.”<sup>73</sup> The second use of inherent powers regards those powers which are necessary only in the practical sense of being useful.<sup>74</sup> This use of inherent power contemplates a court’s use of its power to provide it with appropriate instruments required for the performance of its duties.<sup>75</sup> The third use of inherent powers stems from those powers that are sometimes said to arise from powers which are “‘necessary to the exercise of all others.’”<sup>76</sup> These powers have historically been viewed as “essential to the administration of justice,”<sup>77</sup> and “absolutely essential” to the judiciary system.<sup>78</sup> Because this form of inherent power emanates from absolute necessity, the Court has noted that though this authority “may be regulated within limits not precisely defined,” it can “neither be abrogated nor rendered practically inoperative.”<sup>79</sup>

It is this third form of inherent power which grants a federal court the power to control admission to its bar and discipline attorneys who appear before it.<sup>80</sup> Similarly, this is the basis of a court’s power to pun-

72. *Id.* This use of inherent power encompasses a very narrow range of authority involving activities, which are fundamental to a court as a constitutional tribunal; to divest a court of its command within this sphere is equivalent to rendering the terms “court” and “judicial power” meaningless. *Id.*; see U.S. CONST. art. III; Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem of Constitutional Revision*, 107 U. PA. L. REV. 1, 30-32 (1958).

73. *Eash*, 757 F.2d at 565. See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924).

74. *Eash*, 757 F.2d at 563.

75. *Ex parte Peterson*, 253 U.S. 300 (1920). An example of this use of the court’s inherent powers is (where matters are very unfamiliar to the court such as complex business or scientific matters) when the court supplies itself with an auditor to aid in its decision making, or appoints “persons unconnected with the court to aid judges in the performance of specific judicial duties.” *Id.* at 312.

76. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (quoting *Unites States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). In *Roadway*, the Supreme Court termed the contempt sanction “the most prominent” of the inherent powers. *Id.* at 764.

77. *Michaelson*, 266 U.S. at 65.

78. *Levine v. United States*, 362 U.S. 610, 616 (1959).

79. *Michaelson*, 266 U.S. at 66.

80. See *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824).

ish for contempt;<sup>81</sup> the power which allows a federal court to vacate its own judgment upon proof that fraud has been committed upon it,<sup>82</sup> and sanction a litigant for bad faith conduct.<sup>83</sup> However, because of their amorphous nature, inherent powers must be exercised with restraint and discretion.<sup>84</sup> The ability to fashion an appropriate sanction for conduct which abuses the judicial process is a primary aspect of this discretion.<sup>85</sup>

In 1796, the Supreme Court first held that attorney's fees are not recoverable as damages by a prevailing party.<sup>86</sup> This doctrine has come to be known as the "American Rule" because it is considered a unique part of the American legal system.<sup>87</sup> This doctrine has consistently been observed,<sup>88</sup> in spite of the repeated criticism,<sup>89</sup> and is followed in all federal and some state courts.<sup>90</sup>

Although the American Rule is the principal rule of law in the

81. *Robinson*, 86 U.S. (19 Wall.) at 510.

82. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132 (1991); see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1943). The historic equity power to set aside fraudulent judgments is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner. . . involves far more than injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public." *Id.* at 245-46.

83. *Roadway*, 447 U.S. at 765-67; see also *Link*, 370 U.S. at 629-30.

84. *Id.* at 764.

85. *Chambers*, 111 S. Ct. at 2133.

86. *Acrambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

87. See Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U.P.A. L. REV. 636, 637 (1974).

88. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Chambers*, 111 S. Ct. at 2133.

89. See, e.g., Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966). The adoption of the English rule (the English rule generally allows a meritorious litigant to recover attorney's fees from his adversary) in the United States has been advocated because the chance of recovering attorney's fees from a losing opponent can create a strong incentive to take on a meritorious case without considering the client's ability to pay. *Id.* at 798. These advocates also stress that a successful party is never fully compensated because such a party must pay attorney's fees, which may be equal to, or greater, than the total recovery in the suit. See Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75, 84 (1963).

90. See *Alyeska*, 421 U.S. 240; *Fleischmann Distilling Corp. v. Maier Brewing Corp.*, 386 U.S. 714 (1967); *Campbell v. Maze*, 339 So. 2d 202 (Fla. 1976); *Strickland v. Williams*, 218 S.E.2d 8 (Ga. 1975); *Austin Paving Co. v. Cimarron Constr., Inc.*, 511 S.W.2d 417 (Tex. Civ. App. 1974); *Pelican Printing Co. v. Pecot*, 216 So. 2d 153 (La. Ct. App. 1968).

federal courts, numerous exceptions have been created. Congress has provided a vast collection of statutes that provide for fee shifting which are tailored to advance important legislative policies and encourage private litigation.<sup>91</sup> Furthermore, Congress has also provided for the recovery of attorney's fees in the Federal Rules of Civil Procedure.<sup>92</sup> Even though in *Sociate Internacional v. Rogers*,<sup>93</sup> the Supreme Court stated that where misconduct is sanctionable under the federal rules there is no need for the court to invoke its inherent powers,<sup>94</sup> certain abusive behavior is simply not covered by the rules.<sup>95</sup>

The federal courts have used their inherent equitable powers to fashion three accepted exceptions to the American Rule.<sup>96</sup> Of the three

91. See, e.g., Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988 (1976); The Civil Rights Act of 1964 tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); The Clayton Act, 15 U.S.C. § 552(a)(4)(E) (1976); The Equal Access to Justice Act, 28 U.S.C. § 2412 (1976), 5 U.S.C. § 504 (Supp. IV 1980).

92. E.g., FED. R. CIV. P. 37 (failure to make discovery); FED. R. CIV. P. 26(c) (protective orders). Federal Rules of Civil Procedure 11, 26(g), and 37 represent some of the enforcement power to punish discovery and judicial abuses. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 382 (1989). See generally, FED. R. CIV. P. 11, 26(b), (g) advisory committee's notes (1983).

93. 357 U.S. 197 (1958).

94. *Id.* at 207. The Court noted that:

[W]hether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' . . . Reliance upon . . . inherent power can only obscure analysis of the problem before us.

*Id.*

95. See JOSEPH, *supra* note 92, at 383.

96. *Alyeska*, 421 U.S. 240 at 257-259. In addition to the bad faith exception, the court's have recognized two other exceptions:

(a) Under the "common fund" exception attorney's fees are awarded when the claimant has created, increased, or protected a fund or right through their litigation which will directly benefit others; the shifting of fees in this scenario is not punitive as in the bad-faith situation, but designed to prevent unjust enrichment. *Spargue v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939).

(b) Under the "prior litigation" exception a court may assess attorney's fees as a sanction for the willful disobedience of a court order. *Fleischmann*, 386 U.S. at 718. This exception is applied when a person is required, due to the wrongful act of another (i.e., as where a defendant's breach of contract causes plaintiff to breach its contract with a third party) to protect his interests by bringing or defending a lawsuit against a third party. See generally, Joan Chipser, Note, *Attorney's Fees and the*



judicially created exceptions to the American rule, the bad faith exception is considered the most versatile<sup>97</sup> due to its punitive underlying rationale.<sup>98</sup> The essential element in triggering an award of sanctions under the bad faith exception is the existence of bad faith on the offender's behalf.<sup>99</sup> In fact, when an exception to the American Rule is granted, a finding of some blameworthy conduct is necessary to the imposition of inherent power sanctions.<sup>100</sup> The inherent authority to levy fees against a party who has litigated in bad faith emanates from the traditional equitable powers of the courts<sup>101</sup> and has been reaffirmed as an inherent supervisory power on numerous occasions.<sup>102</sup> However, as much as the bad faith exception to the American Rule seems to be purely compensatory,<sup>103</sup> it is not, since the imposition of a sanction does not depend on who prevails, but on how the parties conduct themselves during the litigation.<sup>104</sup>

One cannot deny that all of the exceptions to the American rule serve a compensatory function as they recompense a party for actual

*Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 322 (1977).

97. Jane P. Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 630 (1983).

98. See *Hall*, 412 U.S. at 5; see also *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 180 (1980).

99. *Roadway Express, Inc. v. Piper*, 447 U.S. at 765-66 (1980); *Alyeska*, 421 U.S. at 258-59; *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 455 (7th Cir. (1987)); *Lipsig*, 663 F.2d at 180.

100. *Roadway*, 447 U.S. at 765. See MALLOR, *supra* note 97, at 620 (stating that when the blameworthy conduct consists of some abuse of the judicial process, the exceptions may compensate the individual injured by the abuse, but the interest which is exonerated is the preservation of judicial authority and resources).

101. *Hazel-Atlas*, 322 U.S. at 245. The courts of equity in the United States were created by the Judiciary Act of 1789, and given the power possessed by the English chancery courts at the time the United States Constitution was adopted. Act of September 27, 1789, ch. 20, 1 Stat. 73; *Fountain v. Ravenel*, 58 U.S. (17 Haw.) 369, 384 (1854) (since the equity courts in England possessed discretionary power to award attorney's fees for bad faith conduct, these same powers were seized by the United States federal equity courts upon their creation). See generally *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Included in this equitable authority was the power to deter frivolous litigation, to punish for abuse of the judicial system and to avoid injustice to litigants. See Note, *supra* note 96, at 323-24. As these goals epitomize the underlying rationale of the federal bad faith exception, they are clearly within a court's equity powers. *Hall*, 412 U.S. at 5.

102. E.g., *Roadway*, 447 U.S. at 765; *Alyeska*, 421 U.S. 240, 259.

103. *Hutto v. Finney*, 437 U.S. 678, 691 n.17 (1978).

104. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2132, 2137 (1991).

and out of pocket costs.<sup>105</sup> However, the imposition of sanctions under the bad faith exception actually serves a dual purpose.<sup>106</sup> A fee awarded under the court's inherent power upon a finding of bad faith not only makes the prevailing party whole for expenses caused by his opponent's obstinacy, but also vindicates judicial authority without having to resort to sanctions available for contempt.<sup>107</sup> Therefore, any compensatory effect the bad faith exception results in is subordinate or ancillary to other policies which compensate some litigants but not others for their expenses in bringing lawsuits.<sup>108</sup>

The bad faith exception consists primarily of bad faith which precedes or induces litigation,<sup>109</sup> and bad faith which occurs during litigation.<sup>110</sup> Both instances of bad faith can encompass three varieties of misconduct which amount to abuse of the judicial system: obdurate or obstinate conduct which causes legal action;<sup>111</sup> substantive bad faith in propounding a frivolous claim, counterclaim, or defense;<sup>112</sup> and vexatious conduct during the course of litigation.<sup>113</sup>

Bad faith which precedes or induces litigation arises when a de-

105. See MALLOR, *supra* note 97, at 619-620.

106. *Hutto*, 437 U.S. at 639 n.14.

107. *Id.*

108. *Id.*

109. *Hall*, 412 U.S. at 15. *Heucker v. Milburn*, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976); see also *Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1979).

110. *Hall*, 412 U.S. at 15.

111. *Hutto*, 437 U.S. at 689 n.14; *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Lewis v. Texaco, Inc.*, 418 F. Supp 27 (S.D.N.Y. 1976); *Fairley v. Patterson*, 493 F.2d 598, 606. (5th Cir. 1974).

112. See, e.g., *Roadway*, 447 U.S. 752; *Alyeska*, 421 U.S. 240; *F.D. Rich Co. Inc. v. United States ex rel Indus. Trial Lumber Co.*, 417 U.S. 116 (1974) (supporting the power to sanction for the assertion of a substantive bad faith claim). *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1331-32 (9th Cir. 1981) (frivolous appeal). *But see Nemroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980); *Health-Chem Corp. v. Hyman*, 523 F. Supp. 27, 31 (S.D.N.Y. 1981).

113. *Roadway*, 447 U.S. at 764-66 (this aspect of the bad faith exception protects the orderly administration of the legal process). Many courts which impose sanctions pursuant to their inherent power fail to specify the detail of the power, or use this generic term to describe several distinguishable branches of this power. *Eash*, 757 F.2d at 561-62. Consequently, vigorous litigation in an area of the law, which is unsettled, should not be equated with "obduracy, wantonness, or vexatiousness." *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975). However, such litigation practices in matters which are relatively settled may constitute abuses of the judicial system and add up to the entry of sanctions on a punitive basis. *Id.*

defendant, without any valid justification, refuses to recognize the clear legal right of the plaintiff, and forces the plaintiff to bring a lawsuit to enforce his rights.<sup>114</sup> In this situation fee shifting occurs due to the unfairness imposed on a party, who should have freely enjoyed his rights; but had to pay the cost of litigation to do so.<sup>115</sup> The gravamen of a party's obstinacy is the consumption of private and judicial resources, and as the Supreme Court stated in *Hutto v. Finney*, such an award "vindicates the . . . Court's authority over a recalcitrant litigant," while sending the message that protracted litigation will not be tolerated.<sup>116</sup>

Several cases demonstrate how a party's pre-litigation conduct can lead to the imposition of attorney's fees where an opponent refuses to recognize a valid right. In *Vaughan v. Atkinson*, the Supreme Court awarded attorney's fees in a suit brought by a seaman for his employer's failure to respond to a claim for maintenance and cure.<sup>117</sup> The Court awarded the seaman attorney's fees under the rubric of compensatory damages.<sup>118</sup> However, the Court stressed that the employer's callous attitude in not even making an investigation into the claim forced the seaman to hire counsel to enforce his rights.<sup>119</sup>

Similarly, in *Bell v. School Board*,<sup>120</sup> the defendant school board had not integrated despite the fact that nine years had passed since the Supreme Court's decision in *Brown v. Board of Education*.<sup>121</sup> The school board had resisted the transfer of black students by creating complicated transfer procedures applied only to blacks.<sup>122</sup> In granting injunctive relief, the Fourth Circuit Court of Appeals focused on the long pattern of evasion and obstruction practiced by the school board.<sup>123</sup> The court noted that the award of fees was based on the de-

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114. *Hall v. Cole*, 412 U.S. 1, 15 (1973); see, e.g., *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

115. See Comment, note 87, at 660-61.

116. *Hutto*, 437 U.S. 678, 691 (the defendant's obstinacy was found in their failure to remedy constitutional violations which had been found earlier in the proceedings).

117. 369 U.S. 527, 528 (1967).

118. *Id.* at 530.

119. *Id.* at 530-31; see also *Lewis*, 418 F. Supp. at 28 (the court noted that Texaco's unjustified and unsupported refusal to pay knowing of its obligation "was sheer recalcitrance and an act of bad faith" on its part).

120. 321 F.2d 494 (4th Cir. 1963).

121. 347 U.S. 483 (1954).

122. *Bell*, 321 F.2d at 500.

123. *Id.*

fendant's long continued pattern of evasion, and the defendants refusal to take initiative and by interposing administrative obstacles to thwart the plaintiff's valid rights.<sup>124</sup>

In 1974, *NAACP v. Allen*<sup>125</sup> illustrated another application of the bad faith exception to non-litigation conduct. In *Allen*, a finding of bad faith was based on the fact that in the thirty-seven year existence of the Alabama Trooper organization, not one black had ever been a trooper, but had only been employed by the Department in a non-merit system.<sup>126</sup> The court awarded attorney's fees since it was more than apparent that the Department understood that its acts were unconstitutional, but it continued to maintain a defense in the lawsuit which amounted to unreasonable and obdurate conduct.<sup>127</sup>

Subsequently, in 1975 the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>128</sup> In *Alyeska*, environmental groups sued the Secretary of the Interior in an attempt to prevent the issuance of permits to the Alyeska Pipeline Service Company for the construction of the trans-Alaska oil pipeline.<sup>129</sup> With the merits of the litigation settled,<sup>130</sup> the Court addressed whether Alyeska could be required to pay one-half of the environmental group's award due to the group having performed the functions of a private attorney general.<sup>131</sup> The Supreme Court held that a court, pursuant to its inherent power, may assess attorney's fees as a sanction when "the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.'" <sup>132</sup> However, this language does not necessarily embrace the reasoning of *Bell* or *Allen*.<sup>133</sup> Awarding attorney's fees for bad faith

124. *Id.*

125. 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). Plaintiffs brought suit against the Alabama Department of Public Safety and the Alabama Personnel Department under 42 U.S.C. section 1983, alleging the unconstitutional exclusion of blacks from employment in the Public Safety Department. *Id.* at 705. The court awarded the plaintiffs attorney's fees under the bad faith exception to the American rule. *Id.* at 707-10.

126. *Id.* at 708.

127. *Id.*

128. 421 U.S. 240 (1975).

129. *Id.* at 241.

130. *Id.* at 244-245. Congress had enacted legislation which amended the Mineral Leasing Act allowing the granting of the permits sought by Alyeska. *Id.* at 244.

131. *Id.* at 246.

132. *Id.* at 258-59 (quoting *F.D. Rich Co. v. United States ex rel Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)).

133. *See Bell*, 321 F.2d 494 (4th Cir. 1963); *Allen*, 340 F. Supp. 703; *see also*,

conduct causing the original dispute must be distinguished from an award of fees for bad faith which unjustifiably opposes a clear claim.<sup>134</sup> A fee award in the later instance protects the judicial system against unwarranted expenditures of its resources, whereas an award in the former situation punishes a party for his role in the substance of the dispute.<sup>135</sup> Although such an award falls within a court's equitable powers, this can present a confusing overlap when a party is also awarded punitive damages.<sup>136</sup>

The Supreme Court has not explicitly read the bad faith exception to include bad faith conduct causing the original dispute<sup>137</sup> until the *Chambers* decision.<sup>138</sup> However, Supreme Court cases and other lower federal court cases do suggest that some form of misconduct beyond a determination of fault in the facts that give rise to the cause of action is required for an award of fees under the bad faith exception.<sup>139</sup> Some commentators suggest that such an expansion of the court's inherent powers under the bad faith exception could lead to fee shifting in the ordinary tort or contract case in which the only bad faith is in the cause of action itself.<sup>140</sup>

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MALLOR, *supra* note 97, at 634.

134. See MALLOR, *supra* note 97, at 634-35.

135. *Id.* at 635 (suggesting that such an award is tantamount to an award of punitive damages); see *Straub v. Vaisman & Co.*, 540 F.2d 591, 599-600 (3d Cir. 1976).

136. See Hon. James L. Oakes, *Introduction: A Brief Glance at Attorney's After Alyeska*, 2 W. NEW ENG. L. REV. 169, 175-76 (1979).

137. See *Fleischmann Distilling Corp. v. Maier*, 385 U.S. 714, 719 (1967) (holding that the defendant's deliberate violation of a trademark did not fall within any of the judicially created exceptions of the American Rule); see also *Runyon v. McCrary*, 427 U.S. 160, 183-84 (1976) (rejecting that the mere determination of fact against a party did not prove the threshold of conduct for which a penalty would be justified).

138. See *Chambers v. NASCO, Inc.*, 111 S. Ct. 2132, 2138 (1991) (stating that it did not impose sanctions for Chambers' breach of contract, but for the fraud he perpetrated on the court). However, the dissent believes the Court appears to have disclaimed that its holding does reach this aspect of pre-litigation conduct. *Id.* at 2147 (Kennedy, J., dissenting); see also *id.* at 2138 nn. 16-17.

139. See, e.g., *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (defendant's non-litigation conduct was "intolerable"; however, there was no showing of bad faith in defending the suit); *Straub*, 540 F.2d at 599-60 (reversing an award of attorney's fees in a 10b-5 action when bad faith existed solely in the acts which gave rise to the cause of action).

140. See MALLOR, *supra* note 97, at 636 (suggesting deterrence to such conduct and adequate incentive to sue already exists through the imposition of compensatory and punitive damages).

Another theory under which courts have awarded attorney's fees is when a party's conduct during the course of litigation results in needless expenditures. This corollary of the bad faith exception focuses on a party's abuse of the Federal Rules of Civil Procedure.<sup>141</sup> Because the procedural rules and practices provide an unlimited opportunity for delay and harassment, several reasons have been suggested as to why judges seem more willing to make a finding of bad faith on an objective basis when procedural abuses are alleged.<sup>142</sup> First, judges are in a position to observe a party's procedural moves first hand.<sup>143</sup> Second, as judges are versed in procedural matters, they can easily compare a party's procedural maneuvers to the norm in order to determine if they are propounding needless litigation.<sup>144</sup> Also, since the principles which govern the procedural rules in the federal courts are usually much clearer than in certain areas of substantive law, procedural abuses are monitored easier.<sup>145</sup>

Finally, the "substantive" bad faith exception to the American rule is designed to compensate, punish, and deter the harm done to courts and private parties by the assertion of frivolous claims.<sup>146</sup> Theoretically, this corollary of the bad faith exception was intended to decrease the amount of groundless litigation since a party who asserts a groundless claim, counterclaim, or defense may be accountable for the share of litigation attributable to litigating the bad faith claim,<sup>147</sup> or for the entire cost if bad faith pervades the entire lawsuit.<sup>148</sup> However, some have criticized the American Rule saying it not only fails to deter such litigation, but encourages claims which are not even colorable.<sup>149</sup>

141. *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980); see also *Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088-89 (2d Cir. 1979).

142. See *MALLOR*, *supra* note 97, at 645.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Browning*, 560 F.2d at 1088; see Comment, *Nemroff v. Abelson, Bad Faith, and Awards of Attorney's Fees*, 128 U. PA. L. REV. 468, 481-83 (1979) (application of this branch is similar to the tort of malicious prosecution.); GLENN EUGENE DAVIS, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L.Q. 75, 111 (1982).

147. *Lipsig*, 663 F.2d at 181 n.21; *Browning*, 569 F.2d at 1088-89.

148. See *Ellingson*, 653 F.2d 1327 (awarding attorney's fees for defense of main action and frivolous appeal).

149. See *EHRENZWEIG*, *supra* note 87, at 797. Courts have noted that in order for the imposition of sanctions pursuant to the courts' inherent power, there must be

A review of case law illustrates that although courts apply objective standards for the bad faith exception to a party's pre-litigation conduct, much more is required to establish a party's bad faith assertion of a substantive claim or defense.<sup>150</sup>

In *Ellingson v. Burlington Northern, Inc.*,<sup>151</sup> the plaintiff was found to have abused the judicial process and to have harassed the defendants.<sup>152</sup> The Ninth Circuit Court of Appeals found that the plaintiff's bad faith was based in his filing of a new suit, which was grounded on "sham" pleadings containing false allegations, and which had been resolved against him over twenty years earlier.<sup>153</sup> However, subsequent case law suggests that if a claim was colorable when initiated, it might not be found to have been brought in bad faith.<sup>154</sup> In *Nemroff v. Abelson*,<sup>155</sup> the Second Circuit Court of Appeals overturned an award of attorney's fees imposed on the plaintiff for having filed a lawsuit consisting largely of inadmissible and irrelevant evidence.<sup>156</sup> The court stated that a claim is colorable, for purposes of bad faith, when it has some legal and factual support, considered in light of the reasonable belief of the individual making the claim.<sup>157</sup> Furthermore, the court noted that the test is "whether a reasonable attorney could have concluded that the facts supporting the claim *might be established*, not whether such facts actually *had been established*."<sup>158</sup>

In contrast, the court in *Miracle Mile Associates v. City of Roch-*

clear evidence that the challenged actions were entirely without color and made for reasons of harassment, delay or other improper purposes; *see, e.g., Adams*, 521 F.2d 168.

150. *Browning*, 569 F.2d at 1087-88 (a substantive claim brought in bad faith must be entirely without color, based on an objective bases, and brought with improper purposes, which is a subjective analysis); *see also Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287 (10th Cir. 1986).

151. 653 F.2d 1327 (9th Cir. 1981).

152. *Id.* at 1331-32.

153. *Id.* T court also imposed fees on the plaintiff for his prosecution of a groundless appeal stating that "a frivolous lawsuit does not become meritorious when appealed." *Id.* at 1332.

154. *See, e.g., Lipsig*, 663 F.2d at 181; *Nemroff*, 620 F.2d at 348; *Browning*, 560 F.2d at 1088.

155. 469 F. Supp 630, 640 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 620 F.2d 339 (2d Cir. 1980).

156. *Nemroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

157. *Id.* at 348.

158. *Id.* (emphasis in original).

*ester*<sup>159</sup> awarded attorney's fees to the defendants' based on a finding that the plaintiffs' claim was frivolous and made in bad faith.<sup>160</sup> On appeal, the court reversed the award, rejecting a contention that the plaintiff's bad faith was shown because of the weaker merits of the current case than the merits of previous cases brought under the same theory where recovery was barred.<sup>161</sup>

It follows that the application of the substantive bad faith exception requires an objective determination as to whether a reasonable attorney had any legal or factual support for making the claim.<sup>162</sup> If the claim is found to have support, it could not have been made in bad faith. If the claim lacked support, a court must then determine if the litigant had an improper purpose.<sup>163</sup> In addition, the substantive bad faith exception requires more than a showing that a party did not prevail on the merits of a claim, defense or position.<sup>164</sup>

Because the objective determination is often difficult to establish, the standard usually is exercised in the most extreme circumstances.<sup>165</sup> Some indicia of substantive bad faith recognized by federal courts include claims or defenses advanced which "were meritless, that counsel knew or should have known this . . . and that the motive for filing was for an improper purpose, such as harassment."<sup>166</sup> Furthermore, substantive bad faith can even be inferred from a particular set of facts.<sup>167</sup>

159. 617 F.2d 18 (2d Cir. 1980).

160. *Id.* at 19. The plaintiff, lessees and developers of a proposed shopping area, brought an antitrust action against the city, city officials and a commercial competitor, but these plaintiffs had brought a similar action on the same theory and lost. *Id.* at 20.

161. *Id.* at 21.

162. *Nemroff*, 620 F.2d at 348.

163. *Browning*, 560 F.2d at 1088 (harassment and delay are improper purposes).

164. See JOSEPH, *supra* note 92, at 389.

165. *Health-Chem Corp. v. Hyman*, 523 F. Supp. 27, 32 (S.D.N.Y. 1981).

166. *Smith v. Detroit Fed'n of Teachers Local No. 231*, 829 F.2d 1370, 1375 (6th Cir. 1987).

167. *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987).

Examples of when substantive bad faith has been inferred:

(a) Under the threat of numerous depositions. See *Browning*, 560 F.2d at 1089; *In re Ruben*, 825 F.2d 977, 989 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1108 (1988).

(b) When filing actions plainly barred by *res judicata* or other preclusion doctrines. See *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986); *Di Silvestro v. United States*, 767 F.2d 30, 32 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985).

(c) When allowing a bankruptcy appeal to the district court "to atrophy for more than nine months [after a brief was due], failing to properly respond to a court order [to support their appeal or face dismissal], and then failing to respond to a motion to dismiss." *In re AOV Indus.*, 798 F.2d 491, 498 (D.C. Cir. 1986).



However, the mere length of litigation,<sup>168</sup> and the loss on the merits has been held inadequate to demonstrate sanctionable bad faith conduct.<sup>169</sup>

Not surprisingly, the standard against which a substantive bad faith exception is found is very high.<sup>170</sup> There must be "clear evidence" that the challenged actions are without color and are taken for reasons of harassment or delay or for other improper purposes.<sup>171</sup> Several courts have indicated that this rigorous standard is necessary to ensure that plaintiffs with meritorious or colorable, but novel, claims are not deterred from bringing suit.<sup>172</sup> Without such a standard, those with meritorious claims may be deterred in their access to the judicial system while those who know, because of their improper motives, that a suit is impermissible, continue to abuse the judicial process and its resources.<sup>173</sup>

An increasing number of state statutes and court rules which permit or require fee-shifting in specific instances have essentially done away with the American Rule.<sup>174</sup> This trend questions the ability that a federal court sitting in diversity has to impose a fee award pursuant to its inherent power,<sup>175</sup> since a court may characterize a fee-shifting provision as either substantive or procedural.<sup>176</sup> In *Alyeska*,<sup>177</sup> after the Court discussed the American rule and the bad faith exception, it noted that when a federal court sits in a diversity case, a different situ-

(d) Engaging in dilatory tactics during discovery and courtroom proceedings, failing to meet scheduled deadlines, and misleading the court. *Lipsig*, 663 F.2d at 181-82.

168. *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 250 (1st Cir.), *cert. denied*, 474 U.S. 1021 (1985) (admiralty setting).

169. *Autorama*, 802 F.2d at 1288.

170. *Adams*, 521 F.2d at 170.

171. *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *accord Autorama*, 802 F.2d at 1287-88; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985).

172. *Nemroff*, 620 F.2d at 349-50; *Browning*, 560 F.2d at 1088.

173. See MALLOR, *supra* note 97, at 642.

174. Note, *State Attorney fee shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 323 (1984). The survey revealed 1,974 attorney fee-shifting statutes in the code of 50 states.

175. See JOSEPH, *supra* note 92, at 376.

176. Jeffrey A. Parness, *Choices About Attorney Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393, 414 (1988). Attorney fee-shifting statutes may be classified into two groups: (1) procedural or general litigation statutes which discourage abuse of the judicial process; (2) non-procedural statutes which seek to protect certain parties. *Id.*

177. 421 U.S. 250, 259 n.31 (1975).

ation occurs.<sup>178</sup> In footnote thirty-one, the Court stated that “in an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, . . . state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.”<sup>179</sup>

However, some federal courts in diversity settings have misinterpreted this language and have applied this limitation not only to fee shifting rules that embody a substantive policy of the state, but to procedural fee-shifting laws as well.<sup>180</sup> These courts have held that even though federal courts can use their inherent powers to assess attorney’s fees as a sanction in some cases, they cannot do so in a diversity setting unless applicable state laws recognize a bad faith exception to the American rule prohibiting fee shifting.<sup>181</sup> *Tryforos v. Icarian Dev. Co.*,<sup>182</sup> represents one instance where a federal court sitting as a state court erroneously applied a state procedural fee-shifting law. In this case, the Seventh Circuit Court of Appeals considered section forty-one of the Illinois Civil Practice Act,<sup>183</sup> and denied a request for attorney’s fees.<sup>184</sup> However, the court’s denial was not based on a determination

178. *Id.*

179. *Id.* (quoting 6 J. MOORE, *Federal Practice* ¶ 54.77 [2] pp. 1712-13 (2d ed. 1974)). The Court considered only the situation in which state law might permit attorneys’ fees while a federal court would not and concluded that such an award would be permissible in a diversity action when necessary to effectuate a substantial policy of the state. *Id.*

180. See PARNES, *supra*, note 176. (contending that state laws on attorney’s fees which are procedural in nature are inapplicable in diversity cases). The author notes that lower federal courts which sit as state courts should not utilize footnote thirty-one as authority for applying all state fee shifting laws, but must distinguish between substantive and procedural provisions. *Id.*

181. See *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258, 1265 (7th Cir. 1975), *cert. denied sub nom. Mantana v. Tryforos*. 423 U.S. 1091 (1976); *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 773 (2d Cir. 1980).

182. 518 F.2d 1258.

183. ILL. REV. STAT. CH. 110 § 41 (1973) provided:

Allegations and denials, made without reasonable cause and good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred, by the other party by reason of the untrue pleading, together with a reasonable attorney’s fee, to be summarily taxed by the court at trial.

*Id.*

With recent amendments, the Illinois law now conforms to Rule 11 of the Federal rules of Civil Procedure. See ILL. REV. STAT. CH. 110 § 2-611 (Smith-Hurd Supp. 1987).

184. *Tryforos*, 518 F.2d at 1265-66.

that section forty-one was procedural and therefore inapplicable in federal court. The court drew no distinction between state fee shifting laws which do and do not reflect a substantial policy of the state.<sup>185</sup> Rather, the court held that the lower court's findings did not indicate that the suit was brought in bad faith, and thus the conduct did not fall within the ambit of section forty-one.<sup>186</sup> The court rejected that the lower court's award was nonetheless supportable under the exception to the American Rule, relying on footnote 31 in *Alyeska*.<sup>187</sup> Lower federal courts should not interpret footnote thirty-one as authority for applying procedural fee shifting laws in a diversity context, but should interpret footnote thirty-one as requiring deference only to state substantive law.

As previously discussed, federal courts are interpreting footnote thirty-one as requiring application of all state fee shifting provisions in diversity cases, whether procedural or substantive. Furthermore, federal courts are also excluding the federal procedural common law which allows fee shifting in those rare cases, such as the bad faith exception.<sup>188</sup>

Historically, *Erie* broadly commanded federal courts sitting in diversity cases to apply state substantive law and federal procedural law.<sup>189</sup> After the 1945 case of *Guaranty Trust Company. v. York*,<sup>190</sup> the Supreme Court required federal courts in diversity cases to use state law if application of federal laws would significantly affect the outcome of the litigation.<sup>191</sup> Then, in 1965 the Supreme Court decided *Hanna v. Plumer*<sup>192</sup> and held that where no federal rule controls and choice of law analysis is necessary, the outcome determination test as established in *Guaranty Trust Co.* "cannot be read without reference to the twin aims of the *Erie* rule—discouragement of forum shopping and avoidance of inequitable administration of the laws."<sup>193</sup>

Some federal courts in diversity cases have failed to undertake the necessary *Erie* analysis in determining whether application of a court's inherent power to tax fees for bad faith conduct is a matter of substan-

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185. *Id.* at 1266-67.

186. *Id.*

187. *Id.* at 1256 n.27.

188. See PARNES, *supra* note 176, at 415 n.117.

189. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

190. 326 U.S. 99 (1945).

191. *Id.* at 109.

192. 380 U.S. 460 (1965).

193. *Id.* at 468.

tive or procedural law.<sup>194</sup> Such an analysis requires consideration of the twin aims of *Erie*, as well as thoughtful deliberation on the character of the misconduct for which a court is sanctioning a party. The misreading of footnote thirty-one infringes upon the power of a federal court to regulate procedure in federal courts. Furthermore, relying on footnote thirty-one for the proposition that where a state does not recognize a bad faith exception to the American Rule, federal courts may not invoke a federal common law exception is erroneous. Although federal courts are limited to using state substantive law in diversity settings, use of its inherent powers to vindicate abuses of the judicial system is essentially procedural in nature. Thus, by implication, federal courts using their inherent powers to engage in fee shifting under the bad faith exception can circumvent this limitation. Additionally, in a diversity context, the bad faith exception merely regulates the manner in which substantive rights are enforced in federal courts, and has no outcome determination implications.<sup>195</sup> This necessarily makes fee shifting procedural so that state substantive law cannot prevent fee shifting. Finally, the federal interest in curtailing misconduct in federal courts through sanctions, such as the bad faith exception to the American Rule, does not contravene with the policy of states adhering to a different rule.<sup>196</sup> Thus, federal courts hearing state law claims should only apply state substantive fee-shifting laws, otherwise, federal procedural law controls.

#### IV. THE *CHAMBERS* COURT'S OPINION

##### A. *The Majority Opinion*

The *Chambers*<sup>197</sup> case presented the Supreme Court with the opportunity to continue shaping the scope of federal courts' inherent powers in sanctioning a litigant for bad faith conduct. The court granted certiorari, and Justice White, writing for the five member majority,

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194. See PARNES, *supra* text accompanying note 176.

195. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 705-06 (5th Cir. 1990). Under circumstance where a federal court is assessing fees as a means to vindicate judicial abuses or in an effort to control the litigation, the exercise of inherent power does not encourage forum shopping or inequitable administration of the laws. *Id.*

196. See PARNES, *supra*, note 176 at 415 n.117.

197. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

concluded that the district court acted within its discretion in assessing NASCO's attorney's fees to Chambers for his bad faith conduct.<sup>198</sup>

The Court began its discussion by noting that federal courts have the inherent power to manage and control their own proceedings and the conduct of those who appear before them.<sup>199</sup> Outlining the scope of the inherent power, the Court also noted that this power allows a federal court to vacate its own judgment upon a finding that fraud has been perpetrated on the court.<sup>200</sup> The majority stated that although the American Rule prohibits fee shifting in most cases, federal courts have created exceptions to this in narrowly defined circumstances.<sup>201</sup> The majority's analysis of the exceptions resulted in a determination that when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons, a court may assess attorney's fees against them by use of their inherent powers.<sup>202</sup> The Court reasoned that when a party practices fraud upon the court,<sup>203</sup> or delays or disrupts the litigation or inhibits the enforcement of a court order,<sup>204</sup> the imposition of sanctions serves the dual purposes of vindicating judicial authority and making the prevailing party whole for expenses caused by his opponents' obstinacy.<sup>205</sup>

Chambers' claimed that the sanctioning scheme of the federal statutes and rules displaced the inherent power to sanction a litigant

198. *Id.* at 2128 (Justices Marshall, Blackmun, Stevens, and O'Connor, JJ., joined).

199. *Id.* at 2132 (referring to *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wash R. Co.*, 370 U.S. 626, 630-31 (1962); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

200. *Chambers*, 111 S. Ct. at 2132. A federal court has the power to control admission to its bar and discipline attorneys who appear before it. *See Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824). Also, a federal court has the power to punish for contempt. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987). Quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), the *Chambers* Court noted that this "'historic power of equity to set aside fraudulently begotten judgments is necessary to the integrity of the courts, for tampering with the administration of justice in [this] manner. . . involves far more than an injury to a single litigant. It is a wrong against the institution . . .'" *Chambers*, 111 S. Ct. at 2132.

201. *Chambers*, 111 S. Ct. at 2132-33.

202. *Id.* (citing *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) and *Hall v. Cole*, 412 U.S. 1, 5 (1973)).

203. *Chambers*, 111 S. Ct. at 2133 (citing *Universal Oil Products Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946)).

204. *Id.* at 2133 (citing to *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).

205. *Id.*

for bad faith conduct.<sup>206</sup> In addressing Chambers' claim, the opinion considered five factors in determining whether any basis existed for holding that the inherent powers to sanction for bad faith conduct are displaced by the scheme of the federal statutes and rules.<sup>207</sup>

First, the Court took into account that the inherent power extends to a full range of litigation abuses, whereas the other sanctioning provisions only reaches specific individuals or acts.<sup>208</sup> Thus, the inherent power must continue to fill the gaps of the statutes and rules.<sup>209</sup> Second, the majority considered the different standards under which sanctions may be imposed. The Court noted that the exceptions to the American Rule limit a court's inherent power to engage in fee shifting to instances where a litigant has engaged in bad faith conduct or willful disobedience of a court order.<sup>210</sup> Conversely, many of the other sanctioning schemes allow imposing sanctions for conduct which merely fails to meet a reasonableness standard.<sup>211</sup> Consequently, the majority reasoned risk would be limited when courts invoke their inherent power to deter the advocacy of litigants attempting to vindicate federal rights.<sup>212</sup>

Third, the majority conceded that the exercise of inherent powers could be limited by Congress since the lower federal courts were created by acts of congress.<sup>213</sup> However, the majority refused to acknowledge that Congress intended to depart from so well an established principle,<sup>214</sup> the existence and scope of which has been reaffirmed since the

206. *Id.* at 2134. Chambers argued that 28 U.S.C. section 1927, and the many sanctioning mechanisms in the Federal Rules of Civil Procedure reveals a legislative intent to obviate or foreclose resort to the inherent powers. *Id.* at 2131-32.

207. *Id.* at 2134-35.

208. *Chambers*, 111 S. Ct. at 2134.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 2134 n.11. For example, Rule 11 imposes an objective standard of a reasonable inquiry which does not require any bad faith findings. *Id.* at 2134. Rule 11 was amended in 1983 because its subjective bad faith standard was difficult to establish, and courts were reluctant to invoke it. *See* Advisory committee notes on the 1983 amendment to Rule 11, 28 U.S.C. app. 575-76. Thus, to the extent that the risk in "chill[ing] the advocacy of litigants attempting to vindicate federal rights," exists when invoking the inherent power, this risk occurs no less than when a court invokes Rule 11. *Chambers*, 111 S. Ct. at 2134 n.11.

213. *Chambers*, 111 S. Ct. at 2134.

214. *Id.* (citing *Weinberger v. Romero-Barcello*, 456 U.S. 305, 313 (1982)); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (determining that

most recent amendments to Rule 11 and 28 U.S.C. section 1927.<sup>215</sup> Fourth, the majority considered the Advisory Committee Notes on the 1983 Amendment to Rule 11. These notes stated that the Rule “build[s] upon and expand[s] the equitable doctrine permitting the court to award. . . attorney’s fees to a litigant whose opponent acts in bad faith in instituting or conducting litigation.”<sup>216</sup> Thus, the majority reasoned that Rule 11 does not alter the authority a federal court has to manage abuses under its inherent authority.<sup>217</sup>

Lastly, the majority considered case law involving the federal rules and the inherent powers. In *Link v. Wabash Railroad Company*,<sup>218</sup> the Supreme Court recognized that a federal court has the inherent power to dismiss a case *sue sponte* for failure to prosecute, despite the language of Rule 41(b) appearing to require a motion from a party.<sup>219</sup> In *Roadway Express, Inc. v. Piper*,<sup>220</sup> the Court remanded for consideration of sanctions under both Federal Rule of Civil Procedure 37<sup>221</sup> and the court’s inherent authority after determining that 28 U.S.C. § 1927 would not allow the assessment of fees.<sup>222</sup> Based on these cases, the Court held that the inherent power can still be invoked even if rules exist which sanction the same conduct.<sup>223</sup>

The majority concluded that nothing ratified the presumption that the federal rules and statutes displace or obviate reliance on a court’s inherent power to impose attorney’s fees as a sanction for bad faith

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“Congress ha[d] not repudiated the judicially fashioned exceptions” to fee shifting, which were based in the inherent powers of the courts).

215. *Chambers*, 111 S. Ct. at 2134; see also FED. R. CIV. P. 11 advisory committee’s notes (1983).

216. *Chambers*, 111 S. Ct. at 2134-35.

217. *Id.* at 2135 (citing *Zaldivar v. Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986)).

218. 370 U.S. 626, 630-32 (1962).

219. *Chambers*, 111 S. Ct. at 2135. The Court noted that it would require a much more lucid demonstration of reason than rule 41(b) to accept that it was intended to abrogate the inherent powers of the court (citing *Link*, 370 U.S. at 630-32); see FED. R. CIV. P. 41(b).

220. 447 U.S. 752, 755 (1980).

221. Federal Rule of Civil Procedure 37 provides for an order compelling discovery and the failure to answer, or an evasive answer, to such an order may be grounds for an award of expenses for the motion, and/or ground for sanctions. FED. R. CIV. P. 37.

222. *Roadway*, 447 U.S. at 767.

223. *Chambers*, 111 S. Ct. at 2135.

conduct.<sup>224</sup> However, the Court reasoned that ordinarily when the conduct at issue could be sanctioned under the rules, rather than the inherent power, reliance should be placed in the rules.<sup>225</sup> Thus, "when neither the statutes nor the rules are up to the task, the court may rely on [its] inherent power."<sup>226</sup>

The Court then addressed whether there was any abuse of discretion in resorting to the inherent power. The majority conceded that the district court could have used Rule 11 and some of the other rules to sanction Chambers for his misconduct.<sup>227</sup> Even though much of Chambers' conduct was beyond the reach of Rule 11, section 1927, and many of the other sanctioning provisions, his conduct throughout the suit evinced bad faith; the conduct which the rules covered was intertwined with conduct that only the inherent powers could address.<sup>228</sup> Also, having to resort to the rules for certain violations before applying the inherent power would only have created extensive satellite litigation, which is contrary to the aim of the rules.<sup>229</sup>

After finding no abuse of discretion in relying on the inherent power, the Court examined whether a district court, sitting in diversity, could impose attorney's fees in a state which does not recognize the bad faith exception to the American Rule.<sup>230</sup> The Court referred to footnote thirty-one in *Alyeska*,<sup>231</sup> and interpreted the limitation on federal courts sitting in diversity to apply only to fee shifting laws which embody a substantive state policy and does not limit federal procedural laws.<sup>232</sup> Only where a conflict exists among state and federal substantive laws does the *Erie* problem arise.<sup>233</sup> The Court found neither of the twin aims of *Erie* implicated by sanctioning Chambers for his disobedi-

224. *Id.* The Court's conclusion was in light of the fact that the conduct at issue was not covered by the other sanctioning provisions. *Id.*

225. *Id.*

226. *Id.* at 2136.

227. *Id.*

228. *Chambers*, 111 S. Ct. at 2136.

229. *Id.*; see, e.g., FED. R. CIV. P. 11 advisory committee notes on the amendment to Rule 11 (1983).

230. *Chambers*, 111 S. Ct. at 2136. For example, as a general rule, attorney's fees are not allowed to a successful litigant in Louisiana except where authorized by statute or contract. *Rutherford v. Impson*, 366 So. 2d 944, 947 (La. Ct. App. 1978).

231. *Alyeska*, 421 U.S. at 247.

232. *Chambers*, 111 S. Ct. at 2136. A state statute which permits a prevailing party in certain types of suits to recover attorney's fees may embody a substantive state policy. See *People of Sioux County v. National Surety Co.*, 276 U.S. 238 (1928).

233. *Chambers*, 111 S. Ct. at 2137.



ence of court orders and his attempt to defraud the court.<sup>234</sup> The award of attorney's fees is akin to a remedial fine for civil contempt since it vindicates a courts authority over a recalcitrant litigant. The majority viewed the impositions of attorney's fees as a sanction for Chambers' fraud on the court, and his bad faith toward his adversary and the court throughout the proceedings.<sup>235</sup> Thus, it reasoned the inherent power to tax fees for this conduct could not be subservient to the state's policy without transgressing the limits of *Erie*,<sup>236</sup> *Guarantee Trust Company*,<sup>237</sup> and *Hanna*,<sup>238</sup> since "fee shifting in this instance was matter of vindicating judicial authority," which is procedural, and not a substantive remedy.<sup>239</sup> Thus, the Court agreed with the appellate court that the inherent power to assess fees in response to punishing for abuse of the judicial process was a procedural response well within the powers set forth in *Erie*,<sup>240</sup> and not substantive.

## B. *The Dissenting Opinion*

Justice Scalia, in a separate opinion, dissented primarily because of his disagreement with the majority's characterization of the scope of the inherent powers.<sup>241</sup> Justice Scalia did not agree that the inherent power to sanction a litigant reaches conduct "beyond the court's confines regardless of whether such obedience interfered with the conduct of the trial."<sup>242</sup>

Justice Kennedy's dissent was joined by Justice Souter and Chief Justice Rehnquist.<sup>243</sup> Justice Kennedy and the dissenters accepted that

234. *Id.* The Court noted that the imposition of sanctions under the bad faith exception depends not on which party wins the lawsuit, but on the parties' conduct during the course of the litigation; thus, the Court found that the exception does not lead to forum shopping. *Id.* The Court also found it was not inequitable to apply the exception to citizens and noncitizens, since a party has the ability to determine whether sanctions will be assessed by acting accordingly. *Id.*

235. *Id.* at 2138.

236. 304 U.S. at 64

237. 326 U.S. at 99.

238. 380 U.S. at 468.

239. *Id.* at 2138; see *NASCO, Inc.*, 894 F.2d at 705.

240. 304 U.S. at 64.

241. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2141 (1991) (Scalia, J., dissenting).

242. *Id.* Justice Scalia was referring to what he believed the district court appeared to have sanctioned Chambers for his flagrant bad faith breach of contract. *Id.*

243. *Chambers*, 111 S. Ct. at 2141 (Kennedy, Souter, JJ., and Rehnquist, C.J.,

Chambers engaged in sanctionable conduct. However, they did not agree that the inherent powers could be invoked without first resorting to the federal rules and statutes.<sup>244</sup> Furthermore, they opposed using the inherent power to sanction Chambers for his bad faith breach of contract.<sup>245</sup> Justice Kennedy stated that the American Rule recognizes that Congress has defined and provided more than adequate rules and statutes which enable the federal courts to curtail abuses.<sup>246</sup> It was also argued that by allowing federal courts to exercise their inherent power even when rules exist which sanction the same conduct, the Court is treating the inherent powers as the norm and the legislative basis of authority as the exception.<sup>247</sup> The reasoning of the dissent was that the exercise of inherent power to sanction a bad faith litigant stems from that power which is necessary to permit the courts to function.<sup>248</sup> Thus, the dissents' position was that inherent powers should only be exercised when congressional powers fail to protect the process of the court and that there is no need to use the inherent powers if a rule or statute provides a basis for sanctions.<sup>249</sup>

Justice Kennedy criticized the majority for ignoring prior precedent and misreading others. He noted that in prior cases, federal courts could not invoke their inherent power when a rule existed which covered the same conduct.<sup>250</sup> He argued that the majority's reliance on

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dissenting).

244. *Id.* (Kennedy, J., dissenting).

245. *Id.*

246. *Id.* at 2141-42. For example, a district court can sanction a party and/or his attorney for a baseless discovery request. FED. R. CIV. P. 26(g). A district court can award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith, or for purposes of delay. FED. R. CIV. P. 56(g). A district court can punish contempt of its authority by fine or imprisonment. 18 U.S.C. § 401 (1988). A district court can award costs, expenses, and attorney's fees against attorneys who multiply proceeding vexatiously. 28 U.S.C. § 1927 (1988).

247. *Id.* at 2142-43.

248. *Chambers*, 111 S. Ct. at 2143. Of the three possible bases of inherent power, the dissent is referring to the power necessary to preserve the authority of the court; "[T]hose which are necessary to the exercise of all others." *Id.* (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

249. *Id.* at 2141.

250. *Id.* at 2143. In *Societe Int'l Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), the Court held that the power to dismiss a complaint due to noncompliance with a production order depends solely on Rule 37. In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988), the Court held a federal court could not employ its inherent power to bypass the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).

*Roadway* and *Link* were misplaced.<sup>251</sup> He also observed that in *Roadway*, the decision did not even discuss the relation between Rule 37 and the inherent powers,<sup>252</sup> while in *Link*, the issue centered on the permissive language in Rule 41(b).<sup>253</sup> Consequently, the dissent explained that since Federal Rules 11 and 26(g) are cast in mandatory terms, they require the imposition of sanctions when litigants violate the certification standards.<sup>254</sup> The dissent urged that these standards give a litigant notice of the proscribed conduct and make review for misuse of discretion possible.<sup>255</sup> Furthermore, the dissent stated that the majority's bad faith standard fails to inform litigants as to what is required and therefore violates the mandates of due process.<sup>256</sup>

The dissent observed that by resorting to the inherent power whenever conduct sanctionable under the rules is intertwined with conduct only sanctionable by inherent power, severe consequences would follow.<sup>257</sup> Such consequences are: federal courts would be encouraged to find bad faith conduct and eliminate the need to rely on specific textual provisions; the uncertain development of the meaning and scope of express sanctioning provisions; and the defeat of Congress' goal in the enactment of the Federal Rules— uniformity in the federal courts.<sup>258</sup> Justice Kennedy suggested that the district court could have relied upon many other sources of authority to award attorney's fees for the abuse of its process.<sup>259</sup>

251. *Chambers*, 111 S. Ct. at 2143.

252. *Id.* at 2144. The majority cited *Roadway* for the proposition that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct. *Id.* at 2135 (citing *Roadway*, where the Court remanded for a consideration of sanctions under both Federal Rule of Civil Procedure 37 and the inherent power); *Roadway Express, Inc. v. Piper*, 447 U.S. at 752, 767 (1980).

253. *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting). *Link* held that neither the permissive language of Rule 41(b) nor its policy abrogated the inherent power of a court to dismiss a case *sua sponte*. *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962).

254. *Id.* at 2144-45. Justice Kennedy thereby concluded that the rules themselves dispose of the idea that they may be discarded in the discretion of a court. *Id.*

255. *Id.*

256. *Id.* at 2145.

257. *Id.*

258. *Chambers*, 111 S. Ct. at 2146-47.

259. *Id.* at 2146-47. Justice Kennedy observed that Rule 11 could have been used as a basis for all of the sanctions imposed. *Id.* at 2146. Furthermore, Rule 16(f) could have sanctioned *Chambers* for his intentional pretrial delays which enables a court to award attorney's fees when a party fails to participate in certain pretrial proceedings in good faith; Rule 26(g) could have been used to sanction *Chambers* for his

Finally, the dissent urged that the Court's opinion would result in an expansion of the power of federal courts. Although the majority stated that the district court imposed sanctions for the fraud Chambers perpetrated on the court and his abuse of process, the dissent believed that Chambers was sanctioned in part, for his bad faith breach of contract.<sup>260</sup> The dissent stated that a district court cannot sanction pre-litigation conduct pursuant to its inherent authority,<sup>261</sup> possibly implying that a district court simply has less power here. The Court's inherent powers extend only to rectify abuses of the judicial process, and do not reach awarding damages for violations of substantive law.<sup>262</sup>

The dissent also criticized the majority for not adhering to the tenets of Federalism announced in *Erie*.<sup>263</sup> To the extent Chambers was punished for his breach of contract, the award is one of punitive damages for the breach, which is prohibited by Louisiana.<sup>264</sup> Thus, the dissent concluded that since Louisiana law prohibits such an award, had NASCO brought suit in state court, it would not have received the excess damages for the so-called bad faith breach.<sup>265</sup>

## V. CRITIQUE AND IMPLICATIONS

The *Chambers* decision represents an expansion of the bad faith exception to embrace bad faith inherent in the cause of action itself, something which the Supreme Court has never clearly sanctioned.<sup>266</sup> The majority's affirmance of sanctioning Chambers' pre-litigation conduct, which was related to the enforcement of NASCO's contract rights, is in essence a fee award against Chambers for his bad faith in

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abuse of the discovery abuses; under Rule 56(g) attorney's fees could be awarded for filing affidavits in bad faith in the motion for summary judgment; and 18 U.S.C. section 401 (1988) could have been used to punish Chambers for his contempt of the court and disobedience of its process. *Id.* at 2147.

260. *Id.* The majority made reference to "Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract." *NASCO, Inc. v. Calcasieu*, 124 F.R.D. 120, 136 (W.D. La. 1989); see also *id.*, at 143 (Chambers refused to perform without any legal cause, forcing NASCO to bring its suit for specific performance).

261. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting).

262. *Id.*; see *Marek v. Chesny*, 473 U.S. 1, 35 (1985) (Brennan, J., dissenting).

263. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting).

264. *Id.* at 2147-48.

265. *Id.*

266. See *Fleischmann Distilling, v. Maier Brewing Corp.*, 386 U.S. 714 (1967).

provoking the original dispute.<sup>267</sup> In its understandable desire to achieve the appellate court's ordered relief, the Court may have sent a misleading signal to the federal courts not based on precedent.

While the *Chambers* Court presented a convincing analysis that the sanctioning scheme of the federal rules does not displace the inherent power of a court to impose sanctions, its expansion on that analysis may have well defeated Congress' purpose in enacting the federal rules - uniformity among the federal courts.<sup>268</sup> The majority's reasoning is persuasive in that the federal rules and statutes do not displace the inherent powers to sanction a litigant for their bad faith conduct.<sup>269</sup> Furthermore, the inherent power does serve an extremely important function where the conduct at issue is not covered by one of the congressionally created sanctioning provisions.<sup>270</sup> In this respect, the inherent power is "both broader and narrower" than these other sanctioning provisions, and this power must be used to fill in the gaps which the federal rules and statutes simply do not cover.<sup>271</sup> However, by permitting a federal court to employ its inherent authority to sanction bad faith conduct when that conduct is equally sanctionable under the federal sanctioning scheme, the Court commits several errors.

The first difficulty is with due process requirements. The Court simply stated that when invoking the inherent powers, federal courts must exercise caution in complying with the mandates of due process in determining that the requisite bad faith exists.<sup>272</sup> Due process requires that everyone is entitled to be informed "as to what the state commands or forbids."<sup>273</sup> However, upon a finding of bad faith, since courts may resort to their inherent powers to impose sanctions,<sup>274</sup> parties who litigate before tribunals have no notice as to the standards which are required for them to avoid sanctions, until the litigation proceedings are complete. Imposing sanctions under this rudimentary standard thwarts the requirements of due process since the courts do not require any notice or limiting provisions, as do congressionally created

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267. See MALLOR, *supra* note 97, at 634-36. This is essentially a punishment for Chambers' role in the substance of the dispute; in other words, bad faith inherent in the cause of action itself. *Id.*

268. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

269. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2134 (1991).

270. *Id.* at 2135.

271. *Id.* at 2134.

272. *Id.* at 2136.

273. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

274. *Chambers*, 111 S. Ct. at 2135.

powers.<sup>275</sup> The difficulty is that reasonable federal judges may differ as to what amounts to bad faith conduct. Consequently, a litigant might never know when to curtail vigorous litigation, and one federal court may regard certain conduct as bad faith while another may not.

Aside from due process concerns, the Court failed to adhere to the limits which the inherent power imposes on itself. The authority to apply inherent powers as a sanction for bad faith litigation practices can only be exercised when necessary to preserve the court's authority.<sup>276</sup> However, the majority simply did not address this limitation. Nonetheless, the dissent aptly pointed out that invoking the inherent power is not necessary when congressional rules and statutes exist to sanction the same conduct.<sup>277</sup> Furthermore, the American Rule itself accepts Congress' role in defining the procedural and remedial powers of the federal courts,<sup>278</sup> as Congress has provided the federal courts with an abundance of rules and statutes to protect and preserve its authority.<sup>279</sup> However, by allowing federal courts to ignore such rules and statutes,

275. For example, FED. R. CIV. P. 11 stipulates that the *signature* of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of his or her knowledge, information, and belief, formed after a reasonable inquiry it is well grounded in fact and warranted by existing law. . .and if such a document is signed in violation of the rule, the court may assess attorney's fees. *Id.* This rule puts the signer on notice of the standards which are expected in filing such documents, and the types of sanctions which can be imposed. However, by allowing the standardless exercise of inherent powers, a court can impose sanctions upon a litigant who is unaware that his specific conduct is sanctionable until after he has committed such acts.

276. *Chambers*, 111 S. Ct. at 2132 (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962) for the proposition that inherent powers are those "necessarily vested in courts to manage their own affairs so as to achieve the orderly, expeditious disposition of cases"); see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (inherent powers "are those which are necessary to the exercise of all others"); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987) (Scalia, J., concurring in judgment) (inherent powers are those which are necessary to allow the courts to function); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (inherent powers are those "necessary to the exercise of all others").

277. *Chambers*, 111 S. Ct. at 2143 (Kennedy, J., dissenting).

278. *Sibbach v. Wilson & Co.*, 312 U.S. 2, 9-10 (1941).

279. *E.g.*, 18 U.S.C. § 401 (1988) (allows a federal court to punish contempt of its authority and abuse of process); 28 U.S.C. § 1927 (1988) (requires a federal court to award attorney's fees against an attorney who multiplies proceedings vexatiously); FED. R. CIV. P. 16(f) (allows a court to impose sanctions against a party for failure to follow pretrial orders); FED. R. CIV. P. 11 (allows a court to impose sanctions on a party or attorney for filing groundless pleadings, motions, and other papers); FED. R. APP. P. 38 (grants a federal court power to award costs for a frivolous appeal).

and to permit the exercise of inherent powers “even if procedural rules exist which sanction the same conduct,”<sup>280</sup> inconsistencies are inevitable. With such an amorphous and broad concept as the inherent power, this self imposed limitation must be defined if these inconsistencies in the federal system are to be avoided.

Another problem with the *Chambers* opinion<sup>281</sup> is that, implicitly, it represents an expansion of the bad faith exception to sanction a litigant for pre-litigation conduct.<sup>282</sup> The majority’s application of the bad faith exception to the American Rule is, for the most part, correct. The Supreme Court has held that a court may assess attorney’s when a party has “‘acted in bad faith, vexatiously, wantonly or for oppressive reasons.’”<sup>283</sup> However, the language of this standard has been strictly applied to instances where fraud has been practiced upon the Court,<sup>284</sup> and when litigation practices have delayed or disrupted the judicial process.<sup>285</sup> Along these lines, the majority’s application of this standard to Chambers’ filing of false and frivolous pleadings, and his tactics of delay, oppression and harassment are right on point. Nevertheless, the Court’s affirmance of the district court’s opinion, and its broad analysis of the inherent authority implies that the bad faith exception has been extended beyond litigation tactics and now can explicitly reach a litigant’s pre-litigation conduct.<sup>286</sup>

The district court’s opinion reveals that Chambers was partly sanctioned for his arbitrary and arrogant refusal to honor and perform the contract,<sup>287</sup> and for his role in the breach of contract.<sup>288</sup> A fee

280. *Chambers*, 111 S. Ct. at 2133.

281. *Id.* at 2131.

282. *Id.* at 2141.

283. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (quoting *F.D. Rich Co. Inc. v. United States ex rel. Indus. Co. Inc.*, 417 U.S. 116, 129 (1974)); see also *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402, n.4 (1968) (*per curiam*).

284. *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946).

285. *Hutto v. Finney* 437 U.S. 678, 689 n.14 (1978).

286. *Chambers*, 111 S. Ct. at 2147 (Kennedy J., dissenting). As the dissent points out, the majority insists that the lower court did not sanction Chambers for his role in the breach of contract, but for the fraud and abuse of process practiced on the district. *Id.* at 2138 nn.16-17.

287. *NASCO, Inc.*, 124 F.R.D. at 136 (“Chambers arbitrarily and without legal cause refused to perform forcing NASCO to bring this suit.”).

288. *Id.* at 143 (“There is absolutely no reason why Chambers should not reimburse in full all attorney’s fees and expenses that NASCO, by Chambers’ actions, was forced to pay.”) (emphasis added). The lower court’s opinion is full of statements

award in this respect is essentially a punishment for Chambers' role in the substance of the dispute and his bad faith in the cause of action itself.<sup>289</sup> Consequently, any award of attorney's fees on this ground is actually a substantive remedy and state law should have been applied. Under this line of thought, an award of attorney's fees would have been inconsistent with and undermined those principles espoused in *Erie* and its progeny.

These principles are embedded in the American Rule as it bars federal courts from engaging in fee shifting as part of the merits of the award, but allows fee shifting to the extent necessary to protect the judicial process.<sup>290</sup> By expanding the bad faith exception to a party's role in substance of the dispute, several other concerns immediately surface.

First, although an award on this basis arguably is within the court's equitable authority, a potentially confusing overlap with the law of punitive damages is presented<sup>291</sup> as punitive damages are imposed for a broad range of conduct, ranging from oppression, fraud, or malice on one end to mere caprice on the other.<sup>292</sup> Second, an award of attorney's fees on this basis will run counter to the underlying policy of the American Rule. The American Rule protects a litigant's right in court by vindicating his substantive rights.<sup>293</sup> Since litigation is never clear, no one should be penalized for merely defending or prosecuting a lawsuit.<sup>294</sup> Awarding fees based on a party's bad faith pre-litigation conduct disrupts the American Rule's balance between free access to the federal system and penalties for abuses of it. If substantive fee shifting is permitted, anyone with a novel, disputed, or uncertain claim involv-

which sanction Chambers for his role in the breach of the contract. *Id.* at 125. The district court noted Chambers' "unjustified and arbitrary refusal to file" the FCC application pursuant to the Purchase Agreement was in absolute bad faith. *Id.* The court also stated that the attorney's fees and expenses charged to NASCO was a *direct result and flowed directly from the suit for specific performance.* *Id.* at 142 (emphasis added).

289. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting). Awarding damages for violation of binding contract, is a matter of substantive law. *Marek v. Chesny*, 473 U.S. 1, 35 (1985) (Brennan, J., dissenting).

290. *Chambers*, 111 S. Ct. at 2148 (Kennedy J., dissenting).

291. See *Oakes*, *supra* note 136, at 175.

292. John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 *DRAKE L. REV.* 870, 881 (1976).

293. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting) (construing the majority's application of the bad faith exception to Chambers' pre-litigation conduct).

294. *Fleischmann Distilling Corp. v. Maier Brewing Corp.*, 386 U.S. 714 (1967).



ing a substantial possibility of an adverse judgment will be deterred from bringing suit because of the possibility that he could be taxed with his opponent's fees. Finally, a fee award based on a litigant's bad faith pre-litigation conduct, where a state does not recognize the bad faith exception, destroys the notions of federalism, as it is in essence a substantive and not procedural remedy. *Erie* and its successors guarantee that if a litigant takes his state law cause of action to federal court, and follows the rules of that court, the result in his case will be same as if he had brought it in state court.<sup>295</sup> To the extent that the Court affirmed the imposition of sanctions which was based on Chambers' bad faith pre-litigation conduct, the decision to file suit in federal, rather than state court, expanded the scope of NASCO's remedy.<sup>296</sup>

## VI. CONCLUSION

If uniformity in the federal court system is our goal, courts must exercise great care when invoking their inherent power. The *Chambers* decision exemplifies the present confusion in the application of the federal bad faith exception to the American Rule. The Supreme Court reached a fair result for the wrong reasons. When conduct is not covered by federal rules or statutes, a federal court should use its inherent powers. However, the Court's notion that inherent powers can be invoked to sanction a litigant even when federal rules and statutes exist, which cover the same conduct, is misplaced. The American Rule recognizes that Congress, not the judiciary, controls costs and sanctions. Further, the Court's superficial discussion of the necessity limitation is a contributing factor in its reluctance to adhere to text-based authority. The award of attorney's fees because Chambers acted in "bad faith," rather than his violations of Congressionally mandated rules sends a misleading signal to the federal courts. Likewise, imposing sanctions which are in part based on a litigant's pre-litigation conduct represents for the first time, the Supreme Court's explicit expansion of the bad faith exception, which subverts the American Rule and impinges on the notions of Federalism. If the federal courts are willing to utilize their inherent power as a means to impose sanctions, they must have some guidance as to the circumstances that this undefined and ambiguous

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295. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

296. *Chambers*, 111 S. Ct. at 2149 (Kennedy, J., dissenting).

power can be employed. Perhaps a better solution would be for a legislative mandate to ultimately decide when fees can and cannot be imposed.

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# *Hernandez v. New York*: Applying *Batson* to Peremptory Strikes of Bilinguals—Should Language Ability be a Surrogate for Race?

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1567
II.	THE HISTORY OF <i>HERNANDEZ V. NEW YORK</i> .....	1572
	A. <i>Facts of the Case</i> .....	1572
	B. <i>Procedural History</i> .....	1573
	C. <i>Analysis of the New York Court of Appeals         Decision</i> .....	1574
	1. The Majority Opinion .....	1574
	2. The Concurring Opinion: A Discussion of the Peremptory Challenge System in Light of <i>Batson</i> .....	1577
	3. The Dissenting Opinion .....	1579
III.	THE SUPREME COURT'S ANALYSIS .....	1583
	A. <i>The Majority Opinion</i> .....	1585
	B. <i>The Concurring Opinion</i> .....	1593
	C. <i>The Dissenting Opinion</i> .....	1594
IV.	CONCLUSION .....	1600

## I. INTRODUCTION

Justice White's prophetic statement in *Batson v. Kentucky*<sup>1</sup> that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today . . . ." <sup>2</sup> has been realized. Since the United States Supreme Court's landmark decision in *Batson*,<sup>3</sup> which prohibited the state's use of peremptory challenges to exclude members of the defendant's race from the jury on account of their race, hundreds of cases have come before appellate courts in an effort to clarify the nuances of that holding and obtain answers to sev-

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1. 476 U.S. 79 (1986).

2. *Id.* at 102 (White, J., concurring).

3. 476 U.S. 79.

eral important questions left open by *Batson*.<sup>4</sup> For example, in *Hernandez v. New York*,<sup>5</sup> one of the more recent *Batson* cases to come before the United States Supreme Court,<sup>6</sup> the Court considered how

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4. Brief for Respondent at 46, *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Respondent]; see *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting) ("Judging by the number of *Batson* claims that have made their way even as far as this Court . . . it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous."); see also Bonnie L. Mayfield, *Batson and Groups Other than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377 (1988); Steven W. Fisher, *Racial Discrimination in Jury Selection: A "Batson Update"*, N.Y. L.J., July 17, 1990, at 1, col. 1. For one of the most recent comments on the deluge of *Batson* cases, see David O. Stewart, *Whither Peremptories?*, A.B.A. J., July 1991, at 38, 42 ("[W]ith many more [*Batson* cases] working their way through the lower courts, one state-court judge calls the possibilities for *Batson* claims 'absolutely limitless' . . . . [T]he notable feature of *Batson* is just how many additional issues it keeps spawning.").

The issues on those *Batson* cases working their way through the courts have been varied. See, e.g., Mayfield, *supra* at 379-80 & n.24; see also *Connecticut v. Gonzalez*, 538 A.2d 210 (Conn. 1988); *New York v. Jenkins*, 554 N.E.2d 47 (N.Y. 1990) (stating what factors would be considered in determining whether a prima facie case of discrimination had been made); *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987); *Slappy v. Florida*, 503 So. 2d 350 (Fla. 3d Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18, *cert. denied*, 487 U.S. 1219 (1988) (what would constitute an acceptable race-neutral explanation sufficient to rebut the inference of purposeful discrimination); *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990); *New York v. Blunt*, 561 N.Y.S.2d 90 (App. Div. 1990) (whether *Batson* should be extended beyond racial discrimination to bar gender discrimination); *Powers v. Ohio*, 111 S. Ct. 1364 (1991); *De Gross*, 913 F.2d at 1425; *Blunt*, 561 N.Y.S.2d at 92 (whether a defendant has third party standing to object to a race based peremptory challenge if the defendant is not of the same race as the challenged juror).

*Edmonson*, decided by the Supreme Court on June 3, 1991, presented the issue of whether *Batson* would prohibit parties in a civil case from exercising peremptory challenges to exclude jurors on the basis of race. *Edmonson*, 111 S. Ct. at 2079. It also triggered, indirectly, the question of whether *Batson* would prohibit the defense as well as the prosecution from using peremptory challenges to exclude jurors on the basis of race. *Id.* at 2096 (Scalia, J., predicting in his dissenting opinion that the effect of *Edmonson* will be to prevent defendants from using race-based peremptory strikes, a conclusion already reached by the New York Court of Appeals in *New York v. Kern*, 554 N.E.2d 1235, 1236 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990)). See generally James O. Pearson, Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14 (Supp. 1990).

5. 111 S. Ct. 1859 (1991), *aff'g* 552 N.E.2d 621 (N.Y. 1990), *aff'g* 528 N.Y.S.2d 625 (App. Div. 1988).

6. In the six month period from January to June 1991, three *Batson* cases have been heard by the Supreme Court: *Powers*, 111 S. Ct. at 1364; *Hernandez*, 111 S. Ct.

broadly the concept of race should be defined for equal protection purposes.<sup>7</sup> The defendant, Hernandez, argued that the court should treat proficiency in Spanish as a surrogate for race,<sup>8</sup> in analyzing the question of “[w]hether a prosecutor’s proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable “race neutral” explanation under *Batson v. Kentucky?*”<sup>9</sup> A secondary issue raised by *Hernandez* is the degree of deference owed by reviewing courts to a trial court’s acceptance of the prosecutor’s race neutral explanation.<sup>10</sup>

Justice Kennedy, speaking for the majority in *Hernandez*, held that the prosecutor offered a race-neutral basis for his peremptory strikes, because the prosecutor’s stated reason did not include an intent to exclude Latino or bilingual jurors.<sup>11</sup> Furthermore, the prosecutor’s stated reason for excluding the jurors was not based on stereotypical assumptions about Latinos or bilinguals.<sup>12</sup> Giving great deference to the factual findings of the trial court, the majority held that the trial court did not commit clear error in finding a lack of intent to discriminate and in accepting the prosecutor’s explanation.<sup>13</sup> However, Justice Kennedy, in an attempt to limit the Court’s holding to its facts, cautioned that the Court’s decision “does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases,”<sup>14</sup> and that a prosecutor who strikes all potential jurors who speak a given language, in the absence of any trial related circumstances or individual responses of the jurors, may be found to be in violation of the equal protection clause under *Batson*.<sup>15</sup> In a strongly worded dissent, Justice Stevens, joined by Justices Blackmun and Mar-

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at 1859; and *Edmonson*, 111 S. Ct. 2077.

7. *Hernandez*, 111 S. Ct. at 1872 (Justice Kennedy stating that this decision did not “resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes.”).

8. *Id.* at 1866.

9. Brief for Petitioner at i, *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Petitioner]; see also Brief for Respondent, *supra* note 4, at i.

10. Brief for Petitioner, *supra* note 9, at i; Brief for Respondent, *supra* note 4, at i.

11. *Hernandez*, 111 S. Ct. at 1867.

12. *Id.*

13. *Id.* at 1869-71.

14. *Id.* at 1872.

15. *Id.* at 1873.

shall, set forth three reasons for the view that the prosecutor's explanation was insufficient to rebut the prima facie case of intentional discrimination: first, the disparate impact was evidence of discriminatory intent, rendering the prosecutor's explanation a pretext; second, less drastic means than excluding the bilingual jurors were available to accommodate the prosecutor's stated concern; and third, if the prosecutor's concern was legitimate and capable of being documented, a challenge for cause would have been warranted.<sup>16</sup> The impact on the public was immediately addressed as newspapers around the nation carried the day after the Supreme Court's ruling in *Hernandez*. Headlines in three major newspapers read: "Justices see no bias in trial barring bilingual jurors,"<sup>17</sup> "Supreme Court broadens exclusion of bilingual jurors,"<sup>18</sup> and "High court cites basis to reject bilingual jurors."<sup>19</sup> In all communities the *Hernandez* ruling has great impact, because a bilingual juror with proficiency in the language of the non-English speaking witness or defendant could be excluded on the basis of the explanation that he or she might not accept the official interpretation. But in heavily bilingual communities, such as South Florida, the impact is even greater because the jury pools in bilingual communities are more apt to be heavily bilingual, thus increasing the number of prospective jurors that could be excluded. Also, the probability is greater that a trial will involve one or more individuals who do not speak English and will re-

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16. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

17. BOSTON GLOBE, May 29, 1991, (Nat'l/Foreign), at 10 (city ed.). Although the article as a whole was very objective, the initial impact on readers was the impression that the high court had given its approval to the barring of bilingual jurors. *Id.*

18. SEATTLE TIMES, May 29, 1991, at A2 (final ed.). The article characterized the 6-3 ruling as one which will give prosecutors greater power to "keep bilingual minorities off juries in criminal trials." *Id.*

19. MIAMI HERALD, May 29, 1991, at A1, col. 4 [hereinafter *High Court Cites Basis*]. The article began, "[i]n a ruling that could make it easier to bar bilingual people from juries, the Supreme Court Tuesday upheld a prosecutor's exclusion of Hispanics on grounds that they might not accept official English translations of testimony in Spanish." *Id.* Both the headline and the text carried the message that the increasingly conservative Court had found a legal basis to back its decision to deliver yet another blow to equal protection. *Id.* The article included an excerpt from the official trial transcript of *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981), which the *Hernandez* majority had cited as representing what can go wrong when a juror does not accept the interpreter's official translation. *High Court Cites Basis, supra*, at A1, col. 5. In heavily Latino South Florida, where racial and ethnic tensions already run high, this message was viewed with alarm by some, see *infra* note 20, and with approval by others, e.g., *The Language of Justice*, MIAMI HERALD, May 30, 1991, at A18, col. 1 (Broward ed.) (staff editorial declaring "'Latino' Ruling is Right.>").

quire an interpreter. A ruling which makes it easier to strike those prospective jurors would greatly alter the composition of the resulting jury.<sup>20</sup>

This comment examines the reasoning employed in deciding the *Hernandez* issue. Section II summarizes the facts of the case and the procedural history from the trial court to the New York Appellate Division, to the New York Court of Appeals. This section also discusses the majority, concurring and dissenting opinions of the New York Court of Appeals. Section III focuses on the decision of the Supreme Court of the United States, analyzing the majority, concurring and dissenting opinions, including those inquiries and policy considerations which the court did not address. Section IV concludes that the Court failed to recognize that the prosecutor's explanation was language-based,<sup>21</sup> but that this view was logically necessary to arrive at the Court's ultimate decision—that the prosecutor's explanation did not constitute a per se violation of the equal protection clause.<sup>22</sup> Also, despite the Court's initial error, its ultimate decision was justified for two reasons. First, to have declared the explanation a per se violation would have extended the concept of race to a level which would be overly broad. Second, the decision does not bar a trial court from finding a violation of the equal protection clause on the ground that a prosecutor's explanation was pretextual.<sup>23</sup> Regarding the secondary issue of the degree of deference to be accorded a trial court's finding, Part III concludes that the *Hernandez* decision to accord great deference,<sup>24</sup> even to trial court findings made in the absence of any mandated guidelines, was a failure to recognize the potential for abuse in exercising peremptory challenges against bilingual Latinos.

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20. See *High Court Cites Basis*, *supra* note 19, at A1, col. 4. "Miami defense lawyer Fred Schwartz called the ruling 'a terrible deprivation of a defendant's civil rights. I think that's terrible, particularly in our district, where half our population is Hispanic, and most of our jury pools are one-third or one-half bilingual.'" *Id.* Furthermore, "[l]awyers for Hispanic groups said the ruling could lead to abuses. 'Prosecutors could readily rely on the reason this prosecutor gave to exclude Latinos from many, many juries around the country,' said Kenneth Kimerling, a lawyer for the Puerto Rican Legal Defense and Education Fund in New York City." *Id.*

21. *Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991).

22. *Id.*

23. *Id.* at 1872-73.

24. *Id.* at 1869.

## II. THE HISTORY OF *HERNANDEZ V. NEW YORK*

### A. *Facts of the Case*

In December, 1985, on a Brooklyn street, the defendant, Dionisio Hernandez, fired several shots at his girlfriend<sup>25</sup> and her mother as they left a restaurant.<sup>26</sup> His girlfriend suffered two serious wounds, but the shots missed the mother, hitting instead two men in a nearby restaurant. All the victims survived the shooting. The defendant was criminally charged by the State of New York with two counts of attempted murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.<sup>27</sup>

During jury selection, defense counsel objected to the prosecution's exercise of peremptory challenges to exclude all four potential Latino jurors.<sup>28</sup> The defendant dropped his claim regarding two of the jurors after it was explained that they were excluded because each of them had a brother who had been convicted of a crime. Without waiting for a ruling by the court on whether the defendant had established a prima facie case of racial discrimination regarding the other two jurors, the prosecutor volunteered his explanation. The prosecutor stated that when the potential jurors were asked if they could disregard the Spanish language testimony of witnesses and accept only the interpreter's official English translation, they looked away from the prosecutor and hesitantly said that they would try to follow the interpreter.<sup>29</sup> The prosecutor continued that even though the jurors' final answers were that they could accept the interpreter's official translation, he "just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it."<sup>30</sup> His concern was that if they could not accept the official interpretation, they "would have an undue impact on

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25. The woman was alternately referred to as defendant's fiancée, see Brief for Petitioner, *supra* note 9, at 7, and "young woman friend," see *New York v. Hernandez*, 552 N.E.2d 621, 622 (N.Y. 1990).

26. *New York v. Hernandez*, 552 N.E.2d 621, 622 (N.Y. 1990); *Hernandez v. New York*, 111 S. Ct. 1859, 1864 (1991).

27. *Hernandez*, 111 S. Ct. at 1864; Brief for Respondent, *supra* note 4, at 2, 3; see also Brief for Respondent, *supra* note 4, at 7.

28. *Hernandez*, 552 N.E.2d at 622; *Hernandez*, 111 S. Ct. at 1864.

29. *Hernandez*, 552 N.E.2d at 622; *Hernandez*, 111 S. Ct. at 1864.

30. *Hernandez*, 111 S. Ct. at 1865 n.1.



the jury.”<sup>31</sup> He also explained that no motive existed for him to exclude Latinos from the jury, since all of the parties—defendant, victims, and witnesses—were Latino. After stating that it was just as likely that a bilingual Latino juror would sympathize with the victim as with the defendant, thereby negating a motive for excluding Latinos from the jury, the trial judge denied defense counsel’s motion for a mistrial.<sup>32</sup> The case was tried with no Latinos on the jury, and the defendant was convicted on two counts of attempted murder and two counts of criminal possession of a weapon.<sup>33</sup>

## B. Procedural History

On appeal, the New York Supreme Court, Appellate Division, ruled that the defendant had made out a prima facie case of discrimination under *Batson*, since the prosecutor had challenged the only prospective jurors with Hispanic surnames.<sup>34</sup> However, the court ruled that the prosecutor had satisfied his burden of coming forward with a race neutral explanation sufficient to rebut the inference of intentional discrimination, and therefore unanimously affirmed the trial court’s judgment.<sup>35</sup> The appellate division, although given factfinding power under New York statutes,<sup>36</sup> appeared to have simply accepted the explanation given by the prosecutor as being reasonable in light of the record, noting that it was not necessary for the explanation to rise to the level needed to justify a challenge for cause.<sup>37</sup>

In a four-to-two decision, the judgment of the lower courts was

31. *Id.* at 1865; *Hernandez*, 552 N.E.2d at 622.

32. *Hernandez*, 111 S. Ct. at 1865 n.2.

33. *Id.* at 1864.

34. *New York v. Hernandez*, 528 N.Y.S.2d 625, 626 (App. Div. 1988).

35. *Id.*

36. See Brief for Respondent, *supra* note 4, at 7-8, 41 n.20 (citing N.Y. CRIM. PROC. LAW § 470.15 (McKinney, 1983)).

37. *Hernandez*, 528 N.Y.S.2d at 626. A challenge for cause must be supported by documentation which indicates that a juror holds a particular bias which may prevent him or her from impartially deciding the case, see *New York v. Hernandez*, 552 N.E.2d 621, 622 (N.Y. 1990), or that the juror is unable to follow the court’s instructions regarding the law and the evidence to be considered, see Brief for Respondent, *supra* note 4, at 19. A peremptory challenge, on the other hand, does not require supporting documentation, but can be exercised if the prosecutor merely suspects that the juror may be biased or unable to follow the court’s instructions. *Hernandez*, 552 N.E.2d at 622.

affirmed by New York's high court.<sup>38</sup> The court of appeals held that the prosecutor's explanation for challenging the jurors was facially race neutral.<sup>39</sup> The court of appeals then deferred to the lower courts' factual findings<sup>40</sup> that the prosecutor's facially neutral explanation was not pretextual<sup>41</sup> and was therefore acceptable.<sup>42</sup>

### C. Analysis of the New York Court of Appeals Decision

#### 1. The Majority Opinion

The majority reached its conclusion by applying the three-part test set forth in *Batson v. Kentucky*<sup>43</sup> to determine if the prosecutor had used his peremptory challenges to discriminate against the defendant's ethnic group.<sup>44</sup> The first part of the test, requiring the defendant to make a prima facie showing that peremptory challenges were used to discriminate on the basis of race,<sup>45</sup> was readily handled, since the prosecution did not dispute that a prima facie case of discrimination had been made out by the peremptory strikes of all Latino members of the venire.<sup>46</sup> The second part provides that once a prima facie case of discrimination has been established, the burden shifts to the prosecution to rebut the inference of discrimination by offering a race-neutral explanation for excluding the jurors in question.<sup>47</sup> In the only previous New York Court of Appeals opinion on point, *New York v. Scott*,<sup>48</sup> the court reversed without having to reach the issue of what constitutes a neutral explanation under *Batson*, because the state had never offered an explanation to rebut the defendant's prima facie case of purposeful

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38. *New York v. Hernandez*, 552 N.E.2d 621, 625 (N.Y. 1990).

39. *Id.* at 623.

40. See Brief for Respondent, *supra* note 4, at 41 n.20 (explaining that the New York Constitution and statutes grant jurisdiction to the court of appeals only over questions of law in most criminal cases, and allow the court to review facts only in death penalty cases). This was not a death penalty case and, therefore, the court of appeals was precluded from reviewing the facts as a matter of law. *Id.*

41. *Hernandez*, 552 N.E.2d at 624.

42. *Id.*

43. 476 U.S. 79, 96-98 (1986).

44. *New York v. Hernandez*, 552 N.E.2d 621, 623 (N.Y. 1990).

45. *Batson*, 476 U.S. at 96-97.

46. *Hernandez*, 552 N.E.2d at 623.

47. *Batson*, 476 U.S. at 97-98 (construed in *New York v. Hernandez*, 552 N.E.2d 621, 623 (N.Y. 1990)).

48. 516 N.E.2d 1208 (N.Y. 1987).

discrimination.<sup>49</sup> Thus, this issue in *Hernandez* was a case of first impression for the court.<sup>50</sup>

*Batson* offers little guidance as to what constitutes a neutral explanation, other than to state that:

[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race . . . Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'<sup>51</sup>

Based on this loosely-stated guideline, the conclusion sought by the defendant—that the prosecutor's explanation was not neutral and, therefore, constituted a per se violation—would necessarily require two findings by the court. The court would first have to find that the challenge made by the prosecutor was, in fact, based on Spanish language ability, and would also have to find that Spanish language ability and Latino origin are so closely related that a challenge based on Spanish language ability is tantamount to a challenge based on ethnic

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49. *Id.* at 1211; see also *Hernandez*, 552 N.E.2d at 623, 626. When *Scott* was decided *Batson* had not yet been decided. *Scott*, 516 N.E.2d at 1209. The law governing peremptory challenges for discriminatory purposes at that time was *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* put the burden on the defendant to overcome the presumption that the prosecutor was not peremptorily striking jurors in a discriminatory manner. *Scott*, 516 N.E.2d at 1209-10. The defendant could carry this burden only by establishing that the prosecutor had routinely excluded jurors on the basis of race over a period of time. *Id.* at 1210. Since the defendant in *Scott* was not able to establish a pattern of discrimination over several cases, but could only point to his own case, the presumption carried that the prosecutor did not use his peremptory strikes to discriminate on the basis of race. *Id.* at 1211. Thus, the prosecutor never had to respond to the defendant's objections. While *Scott* was on appeal, *Batson* was decided. *Id.* at 1210. The new judge-made law, which required a showing of discrimination solely in the defendant's case in order to make out a prima facie case, overruled *Swain's* evidentiary burden, and was applied retroactively to *Scott*. *Id.* at 1211. It was held that the defendant had indeed established a prima facie case of discrimination. *Id.* Since the trial judge was no longer in the county and it was impossible to reconstruct a record because of the length of time that had elapsed, the court of appeals simply reversed *Scott's* conviction without the state ever coming forward with a statement to rebut the prima facie case of discrimination. *Id.* at 1211-12.

50. *Hernandez*, 552 N.E.2d at 626.

51. *Batson*, 476 U.S. at 97-98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

grounds.<sup>52</sup> The majority did not deny the language-ethnic connection, but did not accept the proposition that the challenge was made on the basis on language ability.<sup>53</sup> While the court acknowledged that “[t]hese jurors . . . were challenged because they indicated *their knowledge of the Spanish language* might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony,”<sup>54</sup> the majority ultimately elected to decide the case on the basis that “the essence of this case [is] really about a prosecutor’s court-accepted explanation concerning *the ability of these jurors*—or any sworn jurors no matter their race or ethnic similarities—to *decide a case on the official evidence before them . . .*”<sup>55</sup> Having made the decision that the reasons were not grounded in Spanish language ability, the connection to ethnicity or race was moot, and the majority was thus able to conclude that the reasons offered by the prosecutor constituted a race-neutral explanation under *Batson*.<sup>56</sup> Therefore, a per se violation of the equal protection clause did not exist.

If part two of the *Batson* test indicates that the state carried its burden in coming forward with an explanation which was facially race-neutral, then the evaluation must proceed to the third part of the test, which involves a determination by the trial court whether or not the defendant has carried the ultimate burden of proving purposeful discrimination.<sup>57</sup> Essentially in part three, the trial court chooses whether or not to believe the facially race-neutral explanation given by the prosecutor based on the court’s determination as to whether the prosecutor’s explanation was a pretext, or was real and supported by the totality of factors surrounding the voir dire.<sup>58</sup> The majority gave great deference to the factual finding by the trial court that the prosecutor’s explanation was not pretextual and was, therefore, acceptable as a legitimate ground for peremptorily striking the two jurors.<sup>59</sup> Relying on both federal<sup>60</sup> and state sources<sup>61</sup> as authority for deferring to the find-

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52. *Hernandez*, 552 N.E.2d at 623.

53. *Id.*

54. *Id.* at 624 (emphasis added).

55. *Id.* (emphasis added).

56. *Id.*

57. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

58. *Hernandez*, 552 N.E.2d at 623.

59. *Id.* at 623-24.

60. In *Batson*, the Court reiterated that ‘a finding of intentional discrimination is a finding of fact’ entitled to appropriate deference by a reviewing court. Since the trial judge’s findings in

ings of fact of the lower courts, the majority noted that the United States Supreme Court adheres to the view that resolution of issues hinging on credibility is best made by trial courts that are in the best position to observe the parties and judge all the circumstances; appellate courts are best served by deferring to the credibility findings of those courts.<sup>62</sup> The court was careful to point out, however, that its ruling should not be taken to mean that all facially race-neutral explanations will be accepted.<sup>63</sup> Those that are clearly pretextual will, as a matter of law, be rejected as insufficient to overcome a defendant's claim of purposeful discrimination.<sup>64</sup>

The majority, having applied the three-part *Batson* test, thus concluded that the trial court did not err in its finding that the prosecutor's peremptory strikes of two bilingual Latino jurors was not an equal protection violation.<sup>65</sup>

## 2. The Concurring Opinion: A Discussion of the Peremptory Challenge System in Light of *Batson*

The question presented in *Hernandez* afforded Judge Titone the opportunity to discuss his "strongly held beliefs" regarding peremptory challenges in light of *Batson*.<sup>66</sup> The subject of "post-*Batson* peremptory challenges"<sup>67</sup> has been, and will continue to be, debated in an effort to find a balance between the peremptory challenge system and the anti-discrimination policy of the equal protection clause.<sup>68</sup> A challenge is

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the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

*Batson*, 476 U.S. at 98 n.21 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573, 575-76 (1985)) (citations omitted).

61. See *supra* note 40, which explains why the majority stated: "[W]e have no basis in law . . . to conclude that those courts erred in these essentially factual determinations." *Hernandez*, 552 N.E.2d at 624.

62. *Hernandez*, 552 N.E.2d at 623-24.

63. *Id.* at 624.

64. *Id.*

65. *Id.* at 625.

66. *New York v. Hernandez*, 552 N.E.2d 621, 625 (N.Y. 1990) (Titone, J., concurring).

67. *Id.*

68. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring) (commenting on the "pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Pro-

either for cause, requiring an explanation, or is peremptory, requiring no explanation.<sup>69</sup> Conceptually, it is difficult to comprehend how a peremptory challenge can be “somewhat” explained.<sup>70</sup> It “either has to be explained or it does not . . . . [T]o permit inquiry into the basis for a peremptory challenge would force ‘the peremptory challenge [to] collapse into the challenge for cause.’ ”<sup>71</sup> On the other hand, the solution is not to return to a system which permits suspiciously discriminatory peremptory challenges to go unexplained.<sup>72</sup>

The concurring justice recommended that finding a balance between *Batson* and the peremptory challenge system is a task for the courts or the legislatures.<sup>73</sup> Since efforts by the courts to find such a balance will necessarily yield even more “layers of inquiry and complex tests,” Judge Titone calls for the legislatures to review and perhaps

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tection Clause . . . . The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”); *Swain v. Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) (“Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.”); see also Brian J. Serr and Mark Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 7-18 (1988); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 244 (1986). For very recent comments made in light of the deluge of *Batson* cases, see *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting) (“[T]he States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion.”), and Stewart, *supra* note 4, at 38 (“Many have begun to question whether *Batson* sounded the death knell for peremptory challenges in the American courts.”). See also Marcia Coyle, *Not the Last Word on Juries (Not the Court’s Final Judgment on Peremptories)*, NAT’L L.J., June 17, 1991, at 1, col. 4, & 28, col. 4 (discussing the effect of the recent decisions in *Batson* cases, and noting that “the high court’s [sic] new law in this area also affects the long-term viability of peremptory challenges themselves”).

69. *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

70. *Id.*

71. *Id.* (quoting *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984)).

72. *Id.* at 107 (Marshall, J., concurring) (noting “[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds . . .”).

73. *Hernandez*, 552 N.E.2d at 625 (Titone, J., concurring). *But cf.* Stewart, *supra* note 4, at 42 (discussing the views of Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals that “[i]nvariably, whether it takes five years or 15 years, *Batson* has to bring down the peremptory challenge as we know it,” and noting that Justice Marshall had made that prediction in *Batson*).

revamp the existing peremptory system.<sup>74</sup>

### 3. The Dissenting Opinion

The dissent focused on the third stage of the *Batson* inquiry—the determination by the trial court of whether or not the prosecutor’s explanation should be accepted as sufficient to rebut the defendant’s claim of purposeful discrimination.<sup>75</sup> Whereas the majority had deferred to the lower courts’ judgment, the dissent felt that in order to protect the constitutional rights of defendants, the role of the court of appeals should be to articulate the standard by which the trial court makes its finding regarding purposeful discrimination, and then determine, as a matter of law, whether the state has satisfied that standard.<sup>76</sup> To simply defer to the findings of the lower court without an evaluation of whether those findings were made in the context of a clearly defined standard reduces the role of the court of appeals to a “‘rubber stamping’” function.<sup>77</sup> Although the dissent made the language-ethnic connection and went on to classify the prosecutor’s challenge as language-based,<sup>78</sup> it failed to accept the defendant’s argument that since an ethnic-based challenge would have been a per se violation, therefore the language-based challenge must also constitute a per se violation of *Batson*.<sup>79</sup> The dissent did conclude, however, that because of the intimate link between Spanish language and Latino ethnicity, the prosecutor’s language-based challenge had a disparate impact on Latinos, even though it appeared facially race-neutral.<sup>80</sup> This disparate

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74. *Hernandez*, 552 N.E.2d at 626 (Titone, J., concurring).

75. *New York v. Hernandez*, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting).

76. *Id.* at 627.

77. *Id.* Interestingly, a report issued subsequent to the New York Court of Appeals’ review of *Hernandez* strengthened the dissent’s opinion of what the role of the court of appeals ought to be. See *N.Y. Courts ‘Racist’*, NAT’L L.J., June 17, 1991, at 6, col. 2 (quoting from the report issued by the New York State Judicial Commission on Minorities). The seventeen members of the New York State Judicial Commission on Minorities, appointed in 1988 by New York Court of Appeals Chief Judge Sol Wachtler, found the state’s court system to be “infested with racism” and granting “basement justice” to minorities. *Id.* The recently issued report stated that there are “two justice systems at work in the courts of New York State, one for whites, and a very different one for minorities and the poor.” *Id.*

78. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

79. *Id.*

80. *Id.* at 627-28.

impact rendered the prosecutor's neutral explanation "inherently suspect" and as such, the dissent would require that the trial court examine the explanation under a standard of enhanced scrutiny.<sup>81</sup> Under this standard, a reason which appears to be based on an intuitive feeling, rather than on facts discovered during voir dire, should be rejected by the court.<sup>82</sup>

The dissent, referring to the record as quoted in the majority opinion,<sup>83</sup> concluded that the prosecutor's explanation was based on his *intuitive feeling* that the two jurors could not follow the court's instruction to accept only the interpreter's official English translation of Spanish language testimony.<sup>84</sup> Since the record reflected that ultimately both jurors did satisfy the court that they would accept the official court translation, the dissent could discern *no factual basis* for the prosecutor's stated reason.<sup>85</sup>

In addition, under the dissent's enhanced level of scrutiny, the trial court would have found other inconsistencies in the prosecutor's explanation. For example, the prosecutor's concern that the jurors decide the case on the basis of the same evidence could have been addressed by an instruction from the court that Spanish-speaking jurors are to accept only the English interpretation, and are to discreetly bring any discrepancies to the court's attention, but not to the attention of their fellow jurors.<sup>86</sup> Not only would this have been permissible, but it would have more rationally furthered the prosecutor's concern, for the state's interest would be better served by having all the jurors decide the case on the basis of not only the same evidence, but on the basis of the same,

81. *Id.*

82. *Id.*

83. The record reflects the following:

Assistant District Attorney: Your Honor, my reason for rejecting . . . these two is *I feel* very uncertain that they would be able to listen and follow the interpreter . . . *I didn't feel*, when I asked them whether or not they could accept the interpreter's translation of it, *I didn't feel* that they could . . . .

The Court: [H]e [Assistant District Attorney] said the reason that he did in fact remove these jurors is because *even though they said they could listen to what the interpreter said* and not let their own evaluation of what the witness says be the answer that they would utilize, he said [he had] grave doubts . . . .

*Id.* at 622 (some emphasis appears in the opinion, other emphasis added).

84. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

85. *Id.*

86. *Id.* at 629.



*non-erroneous* evidence.<sup>87</sup> The dissent noted that other state courts, in construing their respective state constitutions, have held that a trial court cannot simply accept at face value the explanation offered by the prosecutor, but instead has a duty to examine certain types of evidence when making its determination as to whether or not a prosecutor's facially race-neutral explanation is pretextual or insufficient.<sup>88</sup> Had the

87. *Id.* at 628-29.

88. *Id.* at 627. The dissent specifically cites *Florida v. Slappy*, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). Other state courts with set guidelines have also reached similar conclusions. *See, e.g., Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *California v. Wheeler*, 583 P.2d 748, 760-62, 765 (Cal. 1978); *New Jersey v. Gilmore*, 511 A.2d 1150, 1166 (N.J. 1986). In *Florida v. Slappy*, the Florida Supreme Court decreed that

the presence of one or more of these factors [from the nonexclusive list of five factors] will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror [sic] who were not challenged.

*Slappy*, 522 So. 2d at 22.

Had the trial court in *Hernandez* applied the *Slappy* test, two of the factors would have indicated that the prosecutor's reasons were not supported by the record or were a pretext. Factor number three has significance because it might be expected that if a Latino is asked whether he or she can disregard what is heard in Spanish and accept only the English interpretation, the response will be a slight hesitation. *Hernandez v. New York*, 111 S. Ct. 1859, 1867 (1991). In addition, factor number five is applicable because the record does not show whether the prosecutor questioned non-Latino members of the venire regarding their Spanish language ability. *New York v. Hernandez*, 552 N.E.2d 621, 628 (N.Y. 1990). It is entirely possible that one or more of those individuals was indeed bilingual and therefore no less likely than the excluded jurors to have difficulty in following the court's instruction to disregard the Spanish language testimony. Similarly, in *California v. Wheeler*, the California Supreme Court held that the prosecutor's explanation for excluding a juror would be acceptable only if he could "satisfy the court that he exercised such peremptories . . . for reasons of specific bias . . ." *California v. Wheeler*, 583 P.2d 748, 765 (Cal. 1978). The trial court in *Hernandez* viewed the lack of specific bias as *favorable* to the state's position, reasoning that if the defendant, the victim and the witness were each Latino, then the jurors were just as likely to sympathize with the victims as with the defendant, and hence the prosecutor had no motive to exclude the jurors. *Hernandez*, 111 S. Ct. at 1865 & n.2. But the same set of facts, if analyzed under *Wheeler*, would have been viewed as *unfavorable* to the state's position, since the prosecutor would have no justification for peremptorily challenging a juror who has no specific bias. Brief for Petitioner, *supra* note

dissent prevailed in this case, New York would be added to the list of states which set specific guidelines for trial courts to follow when making findings of fact relating to a prosecutor's use of peremptory challenges.<sup>89</sup> When such guidelines are established, appellate courts have a basis upon which to rule, as a matter of law, whether or not the trial courts clearly erred in making their findings of fact.<sup>90</sup>

Although the dissent did not discuss whether the appellate division erred by failing to apply the proper review power—legal sufficiency and weight of the evidence<sup>91</sup>—this area of inquiry would have provided yet another basis for the dissent to conclude that the court of appeals should have reversed the holding of the appellate division as a matter of law.<sup>92</sup> Since the appellate division's opinion in *Hernandez* manifested only an application of the legal sufficiency standard of review,<sup>93</sup> the New York Court of Appeals would have been justified in reversing and remitting the case to the appellate division for reconsideration of the case, including a weight of the evidence review.<sup>94</sup>

9, at 24-25; *see also Wheeler*, 583 P.2d at 765; *Gilmore*, 511 A.2d at 1166.

89. Florida, Alabama, California and New Jersey are among those states which have set guidelines. *See supra* note 88.

90. *Hernandez*, 552 N.E.2d at 626 (Kaye, J., dissenting) (“[T]he citizens of this State [sic] would be well served by the development of an authoritative body of State [sic] law instead of being held in suspense, case-by-case, over the next decade of litigation . . .”).

91. *See People v. Bleakley*, 508 N.E.2d 672, 673 (N.Y. 1987); *infra* note 92.

92. *Bleakley*, 508 N.E.2d at 673 (court held it reversible error when appellate division “avoids its exclusive statutory authority to review the weight of the evidence in criminal cases”). Under New York law, defendants are entitled to two standards of intermediate appellate review: legal sufficiency, which requires only a determination of whether it was reasonable, based on the record, for the trier of fact to have reached the conclusion at issue, *id.* at 674-75, and weight of the evidence, which requires that where, based on the record, a different finding would not have been unreasonable, the appellate division must weigh the evidence by performing a factual analysis and must make a determination whether the trier of fact accorded the proper weight to the evidence. *Id.* at 675. However, the appellate division must give great weight to the trial court's findings of fact when those findings turned on credibility. *Id.*

93. *People v. Hernandez*, 528 N.Y.S.2d 625, 626 (App. Div. 1988).

94. *Bleakley*, 508 N.E.2d at 675. Had the appellate division been required to apply a weight of the evidence review, a different finding—that the prosecutor's explanation was insufficient to rebut the defendant's prima facie case of intentional discrimination—might have been reached.

### III. THE SUPREME COURT'S ANALYSIS

In its brief to the Supreme Court of the United States, defense counsel contended that the real issue in *Hernandez* is whether bilingual Latinos can ever be jurors in criminal cases in which there may be testimony in Spanish.<sup>95</sup> But the argument can be extended to whether bilinguals of *any* ethnic group can ever be jurors in criminal cases in which there may be testimony in the non-English language of that group.<sup>96</sup> It is logical to conclude that the greater the ethnic population of a given community, the greater the number of persons in that community for whom English is not the language generally spoken. Therefore, the greater the ethnic population of a given community, the greater the probability that a trial involving a member of that population will require the use of an interpreter.<sup>97</sup>

Defense counsel argued that if prosecutors are allowed to peremp-

95. Brief for Petitioner, *supra* note 9, at 10.

96. *Hernandez v. New York*, 111 S. Ct. 1859, 1872 (1991).

97. As of 1975, 42% of all Latinos claimed Spanish as the language they usually speak. Brief for Petitioner, *supra* note 9, at 10 n.2 (citing Leobardo F. Estrada, *The Extent of Spanish/English Bilingualism in the United States*, 15 AZTLAN, INT'L J. CHICANO STUD. RES. at 381 (1984)); *see also* Brief for the Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rico, Department of Puerto Rican Community Affairs in the United States, as Amici Curiae in Support of Petitioner, app. D at 5, *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (No. 89-7645) [hereinafter Brief for Amici Curiae] (citing Estrada, *supra*, as its source). Defense counsel construed this data to mean that, in cases involving Latinos, there is a 42% probability (nationwide) that an interpreter will be used. Brief for Petitioner, *supra* note 9, at 10 n.2.

This is not necessarily a logical conclusion. For example, statewide in Florida, Spanish is the first language of 83% of all Latinos and the language of over 93% of all Cubans. *See* Brief for Amici Curiae, *supra* app. C at 4 (source: U.S. Bureau of the Census (1980, 1983)). This, however, does not necessarily mean that these individuals do not also speak their second language, English, well enough to testify at trial without an interpreter. For example, only 16% of all Latinos living in Florida (and 20% of all Cubans) reported they did not speak or understand English, while 18% of all Latinos (20% of all Cubans) described their ability to speak or understand English as "not well." Brief for Amici Curiae, *supra* app. A at 2 (source: U.S. Bureau of the Census (1980, 1983)). Thus, it is not 83% of Latinos and 93% of Cubans that would require an interpreter, but only 34% of Latinos and 40% of Cubans living in Florida that would require an interpreter if they were to give testimony. A full 66% of all Latinos, and 60% of all Cubans, would not require an interpreter. But the 83% and 93% figures do impact on juror status, since it is logical to conclude that many, who claim Spanish as their first language, are also part of the 66% and 60% who do not require an interpreter, and are therefore bilingual and at risk of exclusion from the jury.

torily challenge bilingual members of an ethnic group because of their ability to understand the testimony expected to be given in the language of their ethnic group, then very few juries will include bilingual ethnic jurors.<sup>98</sup> The impact on communities with large ethnic, bilingual populations with resulting jury pools that are significantly bilingual would be to exclude a large portion of the community from the jury, based on a prosecutor's concern that those jurors might not be able to disregard what they hear firsthand from the testimony.<sup>99</sup> It was defense counsel's strategy to integrally link the ability to speak a foreign language, Spanish, with ethnic background, Latino, so that to challenge for the former would be the equivalent of a challenge for the latter, and thus a per se violation of the equal protection clause, as interpreted in *Batson*.<sup>100</sup> For the defendant to prevail on this "per se" basis, it was

98. Brief for Petitioner, *supra* note 9, at 10-11.

99. *Id.*

100. *Hernandez*, 111 S. Ct. at 1866. In its reply brief, defense counsel conceded that there is one situation in which it would be proper and race-neutral to peremptorily challenge bilingual jurors on the basis of their Spanish language ability: when the substantive issue of the trial concerns conflicting translations of out-of-court statements and the jury's determination must turn on testimony from expert witnesses in the field of Spanish language. See Petitioner's Reply Brief at 15-16, *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (No. 89-7645)[hereinafter Petitioner's Reply Brief]. In such a case, a juror's expertise in the Spanish language might cause him or her to have an undue influence on the jury in persuading its members as to the "correct translation" of the disputed statement. *Id.* But where there is no issue in which Spanish language expertise plays a role, in other words, where knowledge of Spanish language and all its nuances and dialects is not the substantive issue in the case, then a bilingual juror would not have an undue influence on the jury. *Id.*

The state's argument, conceded by the defense as applicable only in the previously mentioned situation, was that just as a doctor might be peremptorily struck from serving as a juror on a medical malpractice case, or a psychiatrist might be peremptorily struck from serving as a juror on a criminal case involving an insanity defense, so might a bilingual juror be struck from serving as a juror on a case involving Spanish language interpretation, because in all cases the juror's special expertise would enable him or her to unduly influence the jury. Brief for Respondent, *supra* note 4, at 18. In support of its argument, the state cited *New Jersey v. Pemberthy*, 540 A.2d 227 (N.J. Super Ct. App. Div.), *cert. denied*, 546 A.2d 547 (1988). In *Pemberthy*, which involved the disputed translation of out-of-court audio-taped conversations in Spanish, all jurors who spoke Spanish were peremptorily challenged. *Id.* at 232. The court found that because the substantive issue involved Spanish language translation, the state's explanation, which *on its face intended to discriminate based on Spanish language*, was race-neutral. *Id.* at 233-34. In contrast, defense counsel distinguished *Hernandez* from *Pemberthy* by noting that *Hernandez* contained no issue which required Spanish language expertise. Petitioner's Reply Brief, *supra* at 16.

critical for the Court to conclude that the prosecutor intentionally discriminated on the basis of language, a conclusion the majority did not reach.<sup>101</sup> Having failed to reach that threshold conclusion, it did not then matter whether or not the Court accepted the second premise that language and ethnicity were one and the same, although there were indications during oral arguments that the Court would not have made that connection.<sup>102</sup> At this point, the defendant's legal argument in support of a *per se* *Batson* violation was doomed, for if the prosecutor's challenge was not made on the basis of language, it did not matter whether language and ethnicity were one and the same, and therefore, the prosecutor's statement, at least on its face, was neutral.

### A. *The Majority Opinion*

The Court rejected the defendant's argument that the jurors had been excluded not because of uniquely individual responses, but because of responses characteristic of *all* bilingual Latinos, in other words, because of a Latino trait—Spanish language ability.<sup>103</sup> Defense counsel reasoned that the jurors had been asked if they could block out and disregard what they would hear in Spanish and accept only the official English from the interpreter.<sup>104</sup> Because of the difficulty, if not the impossibility, of performing such a task<sup>105</sup> *all* bilingual Latinos

101. *Hernandez*, 111 S. Ct. at 1867. See *infra* Part II, Section B, "The Majority Opinion," for the majority's rationale in reaching its conclusion.

102. During oral argument before the Court, Justice Souter questioned whether the correlation between bilingualism and national origin was as strong as had been suggested. See *Arguments Before the Court*, 59 U.S.L.W. 3591, 3592 (U.S. Mar. 5, 1991) (Supreme Court Proceedings).

103. *Hernandez v. New York*, 111 S. Ct. 1859, 1867 (1991).

104. *Id.*

105. Two major reasons exist for the difficulty. The first relates to a phenomenon known as code-switching, which is the alternating use of two languages by Hispanic bilinguals. Brief for Amici Curiae, *supra* note 100, at 11. Often the switch from one language to another is not made consciously. *Id.* at 12. Recent studies show "that when asked to recall the language in which certain information was received, bilinguals have no memory of the input language. They appear to have retained only the information itself. They have not tagged this information in memory according to the language in which it was obtained." *Id.* (citing Magiste, *The Competing Language Systems of the Multilingual: A Developmental Study of Decoding and Encoding Processes*, 18 J. VERBAL LEARNING BEHAVIOR, 79, 79-89 (1979)). "There is no evidence that bilingual individuals of any type have the ability to switch off one of their language systems." *Id.* at 13 (citing M. ALBERT & L. OBLER, *THE BILINGUAL BRAIN* (1975); Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer*, 6 J. MULTILINGUAL MUL-

would reflexively hesitate when asked what these jurors had been asked, even though they were willing to comply.<sup>106</sup> Thus, defense counsel contended that the prosecutor's doubts about the jurors' ability to comply with the court's instructions would have applied to the entire class of bilingual Latinos as a function of its Spanish language ability, since the hesitancy which prompted the prosecutor's doubts was a reflex which all bilingual Latinos would have exhibited.<sup>107</sup> This contention is logical only if one accepts the premise that the prosecutor's question will always be phrased to place bilingual jurors in the impossible position of having to respond that they can block out and disregard what they will hear in Spanish. It is true that if the prosecutor phrases the question in a "yes or no" manner, *most* bilingual Latinos would reflexively hesitate before answering that they could, in fact, comply with the court's instruction to disregard the Spanish language testimony, while *some* would hesitate before answering that they could not comply (and would therefore be excused for cause). But there might be *some*, who would immediately, and *without hesitation*, respond that they could comply with the court's instruction. Further, one does not have to accept defense counsel's premise that the prosecutor will pose the question in a manner which is designed to evoke a hesitant response. It is entirely possible that the prosecutor could ask a prospective juror if he or she will listen to the interpreter and accept the official translation, and further ask that should a discrepancy in the translation be noted, if he or she will discreetly bring it to the court's attention so as not to make the other jurors aware of the problem until it can be resolved by the court. If the question were phrased in this way, then very few, if any, bilingual Latinos would hesitate before answering that, "yes," they could comply. Thus, the responses of the jurors are a function of the way that the question is phrased. Even if

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TICULTURAL DEV., 467, 467-77 (1985)).

The second reason relates to the difficulty all jurors face when asked to follow instructions which require them to disregard evidence they have already heard. *See, e.g., Bruton v. United States*, 391 U.S. 123, 132-33 (1968) (quoting excerpts from Judge Learned Hand's opinions: "[Instructing the jury to disregard evidence is a] recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932); "[I]t is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition." *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (subsequent history omitted)).

106. *Hernandez*, 111 S. Ct. at 1867.

107. *Id.* at 1868.

phrased in the manner most likely to evoke a hesitant response, there might still be some who will not hesitate. Therefore, it is conclusory to state that all bilinguals would react to the prosecutor's question in the same way. Based on defense counsel's contention, however, the defendant sought to have the Court conclude that the prosecutor's explanation for challenging the jurors was not a legitimate, neutral explanation based on difficulty in following the court's instructions, but was instead an explanation which clearly was language/ethnicity based.<sup>108</sup> By electing to accept the state's argument that the prosecutor's reason was based on considerations regarding ability to follow the court's instructions, the Court did not have to reach the question of whether language ability and Latino ethnicity were to be considered as interchangeable for purposes of equal protection analysis.<sup>109</sup> As Justice Kennedy explained,

A neutral explanation . . . here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.<sup>110</sup>

Having found nothing in the prosecutor's statement that indicated an intent to discriminate on the basis of language ability or Latino ethnicity, the majority concluded that, under step two of the *Batson* analysis, the reason offered was race neutral.<sup>111</sup> Thus the majority found no per se violation of the equal protection clause.<sup>112</sup>

For the Court to have declared the prosecutor's statement a per se violation, it would necessarily have had to expand the concept of race to include language ability, so that every challenge based on language would be an "automatic" per se equal protection violation. Such a step would have expanded the concept of race too broadly for any sort of equal protection analysis. The Court did not declare the challenge to be a per se violation because the Court's initial premise, upon which its conclusion was based, was incorrect. The Court failed to recognize that the prosecutor's speculation regarding the bilingual jurors' inability to accept only the official interpretation of Spanish language testimony

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108. *Id.*

109. *Id.* at 1866-67.

110. *Id.* at 1866.

111. *Hernandez*, 111 S. Ct. at 1866-67.

112. *Id.* at 1867.

was, in reality, a language-based reason. The Court did not acknowledge that the prosecutor simply felt uncomfortable with the jurors' Spanish language ability, despite their stated willingness to comply with the court's instructions. Having committed to this incorrect premise, the Court then had no choice but to conclude that if the explanation was not based on language, it could not be a per se violation.<sup>113</sup> Had the Court recognized that, in this case, the challenge was language based, and logically gone on to hold that the challenge was a per se violation, the concept of race would have been expanded too broadly for any future equal protection analysis to be meaningful. It would have meant, for example, that if a prosecutor peremptorily challenged a bilingual *non-Latino* on the basis of his or her language skills, the court would deem the challenge to be language, and hence, race-based, and would declare the challenge a per se equal protection violation, even though the juror may not have been a member of any "cognizable racial group"<sup>114</sup> ordinarily thought to require protection under the equal protection clause. Foreseeing this possibility, perhaps the Court intentionally did not reach the first premise—that the prosecutor's explanation was language-based—in order to avoid reaching the conclusion that the explanation was a per se violation of the equal protection clause. Although language and ethnicity are closely intertwined, it would be overinclusive to declare *every* language-based challenge to be a race-based challenge. With many school districts mandating Spanish language instruction for English-speaking students, it is not uncommon to find bilingual individuals who are not members of an ethnic minority group. Therefore, the Court's ruling was a prudent one.

The Court's decision not to declare the challenge a per se violation is not harsh because it leaves open the possibility that, in part three of the *Batson* analysis, the challenge could still be found unconstitutional on grounds of pretext or insufficiency, in light of "the particular circumstances of the trial or the individual responses of the jurors . . . ."<sup>115</sup>

Under *Batson*, the analysis must continue to part three even if

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113. For the Court to declare the explanation a per se violation, it would have had to conclude first, that the explanation was language-based, and second, that language was a proxy for race/ethnicity. Having failed to reach the first conclusion, it was logically impossible to reach the ultimate conclusion that the explanation was a per se violation.

114. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

115. *Hernandez*, 111 S. Ct. at 1873.



part two yields a finding that no per se violation had occurred.<sup>116</sup> However, unlike part two, where the only consideration is the facial validity of the prosecutor's explanation, in part three of the *Batson* analysis, all factors concerning the voir dire and the proceedings are to be considered by the trial court when determining if the explanation, though facially neutral, is really a pretext for purposeful discrimination.<sup>117</sup> For example, the disparate impact of the prosecutor's criterion on Latinos, though not proof of discriminatory intent, may be used by the court as evidence of such intent.<sup>118</sup> Similarly, the trial court could consider as evidence of discriminatory intent the fact that the prosecutor chose to exclude all bilingual jurors even after a method far less drastic was suggested to him.<sup>119</sup> It was the opinion of the majority that since the trial court had ample opportunity to explore these and other possibilities, and since the trial court was in the best position to observe the parties and make findings regarding their credibility,<sup>120</sup> then on appeal, great deference should be accorded to the trial judge's finding of fact that the prosecutor's explanation was non-pretextual and to be believed.<sup>121</sup> Furthermore, the majority flatly rejected defense counsel's contention that, because a *Batson* claim involves a racial/ethnic classification, review of a trial court's decision in such a case should receive independent appellate review.<sup>122</sup> The Court rested its decision on precedent holding that, unless "exceptional circumstances" existed, the Court would defer to factual findings of state courts, and even if those findings related to a constitutional issue it would not alter the Court's position based on deference.<sup>123</sup> Thus, a reversal of the trial court's finding of fact on the issue of discriminatory intent would be possible only if the Supreme Court was "convinced that the trial court's determination was clearly erroneous."<sup>124</sup>

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116. *Id.* at 1868.

117. *Id.*

118. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

119. *Hernandez*, 111 S. Ct. at 1868. Interestingly, the majority noted that intent to discriminate would only be imputed to the prosecutor if defense counsel had first suggested the less burdensome means. *Id.* Thus, the burden was on the defendant to make such a suggestion.

120. *See Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

121. *Hernandez*, 111 S. Ct. at 1871.

122. *Id.* In support of its position, the Court reiterated the explanation it had given in *Batson*. *See supra* note 60.

123. *Hernandez*, 111 S. Ct. at 1868-69.

124. *Id.* at 1871. "A finding is 'clearly erroneous' when although there is evi-

“[W]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”<sup>125</sup> Here, there was sufficient evidence—the fact that the prosecutor had no motive to discriminate, since the victims, the defendant and the prosecution witnesses were all Latino<sup>126</sup>—for the trial judge to have believed the prosecutor’s explanation.<sup>127</sup> Thus the judge’s view, albeit not the only view that could have been taken, was permissible. Being a permissible view of the evidence, the majority found no clear error in the trial court’s determination that the prosecutor did not intentionally discriminate on the basis of the jurors’ ethnicity.<sup>128</sup>

In considering the degree of deference to be accorded a trial court’s judgment on appeal, the majority seemed at a loss to understand the “nature of the review petitioner would have us conduct.”<sup>129</sup> Defendant had stated that plenary federal review is required whenever “critical constitutional values are at stake that extend beyond the rights of the immediate parties involved . . . .”<sup>130</sup> In essence, because the constitutional rights of all bilingual Latinos were at stake, defense counsel sought some type of heightened scrutiny from the Court.<sup>131</sup>

The use of the term “scrutiny” was unfortunate,<sup>132</sup> for if heightened (strict) scrutiny was sought, it was not applicable in this case. Normally, when a state actor, such as the prosecutor, makes a classification based on race or ethnicity, an equal protection analysis employing strict scrutiny will be performed.<sup>133</sup> Under such an analysis, the classification will be permitted only if the state demonstrates a compelling interest and if the scheme is narrowly tailored and necessary to achieve that compelling state interest.<sup>134</sup> But under *Batson*, this type of equal protection analysis is impossible because the peremptory strike

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dence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948).

125. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

126. *Hernandez*, 111 S. Ct. at 1872, 1865 n.2.

127. *Id.* at 1872.

128. *Id.*

129. *Id.* at 1870.

130. Brief for Petitioner, *supra* note 9, at 34.

131. *Id.* at 41-42.

132. *See infra* note 144.

133. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986).

134. *See id.* at 274; *Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

based on race or ethnicity is *never* allowed to stand, *even if the state's interest is extremely compelling*.<sup>135</sup> It cannot be conceded on the one hand that the prosecutor used a peremptory challenge to exclude a juror based on race or ethnicity, and then be claimed on the other that the peremptory strike withstands strict scrutiny under the equal protection clause because the state had a compelling interest and the means chosen—excluding the juror—were narrowly tailored to achieve that goal.<sup>136</sup>

Additionally, strict scrutiny was not applicable because the prerequisite to this level of scrutiny is the establishment of invidious, intentional discrimination, in other words, the establishment that the classification was made with the intent to discriminate based on race.<sup>137</sup> But in *Batson* type cases, this prerequisite cannot be satisfied prior to the inquiry because the establishment of intentional discrimination is precisely the issue to be decided at the third level of inquiry.<sup>138</sup> Furthermore, under *Batson*, in order to progress to the third level of inquiry—whether the stated reason for the peremptory challenge was a pretext for intentional discrimination—it must have already been established at the second level that, at least facially, the defendant's prima facie case of invidious discrimination had been rebutted.<sup>139</sup> Thus, the most that could exist at the third stage of inquiry was a “suspicion” of intentional discrimination. A mere suspicion of intentional discrimination is insufficient to satisfy the prerequisite establishment of intentional discrimination which is necessary to mandate an inquiry on appeal under strict scrutiny.<sup>140</sup>

135. *Batson*, 476 U.S. at 97-99.

136. *Id.*

137. *Washington*, 426 U.S. at 242.

138. *Batson*, 476 U.S. at 98.

139. *Id.* at 97. The inquiry would never proceed to the third level if a per se violation of the equal protection clause had been found at the second level.

140. *Washington*, 426 U.S. at 242. The term “scrutiny,” as used in constitutional law, is often associated with an equal protection means-ends analysis. If state action is analyzed under strict [a form of heightened] scrutiny, the action will be held violative of the equal protection clause, and therefore unconstitutional, unless the means chosen by the state are *narrowly tailored* to achieve a *compelling state interest* or objective. See *Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 440.

It appears that despite the use of the phrase “heightened [strict] scrutiny” in Petitioner's Brief, Brief for Petitioner, *supra* note 9, at 42, defense counsel was not referring to a means-ends analysis, *i.e.*, level of scrutiny, at all, but was referring to the *level of factual analysis* that he thought should be employed by the appellate courts. *Id.* at 42-46. In order to determine if the trial court's finding of no intentional discrimination

However, if what the defendant sought was independent, de novo factual review, that type of review is not only reasonable when constitutional issues are involved, but is also reconcilable with the majority's view regarding deference to the trial court's factual findings that turn on credibility.<sup>141</sup> If the appellate court determined, after weighing the facts and taking into consideration the deference to be accorded the

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was clearly erroneous, an appellate court's review of how that finding was made can range from a de novo factual analysis all the way to extreme deference. *Id.* at 29. When performing a de novo factual analysis to review for clear error, the appellate court will analyze the method by which the trial court arrived at its decision and ascertain that the facts in the record are sufficient to support that finding. *Id.* at 32. But if, after weighing the evidence, the appellate court disagrees with the finding of the trial court, it will overturn the trial court's finding. *Id.* Under a less stringent level of factual analysis, if the appellate court is satisfied with the method used and the sufficiency of the record, then even if it disagrees with the trial court's factual finding, it will conclude that the trial court reasonably could have found as it did and, therefore, that the finding was not clearly erroneous. *See People v. Bleakley*, 508 N.E.2d 672, 674-75 (N.Y. 1987). However, at the other extreme, the appellate court will not make any inquiry into the method used by the trial court, but will instead simply defer to the trial court's finding, provided there is some shred of support in the record. Brief for Petitioner, *supra* note 9, at 36.

In the present case, defense counsel sought to have the lower court's finding of non-discrimination reviewed under a stringent, de novo factual analysis, whereby the trial court's finding of non-discrimination would be held clearly erroneous unless firmly supported by the record both as to weight and sufficiency. *Id.* at 36-39. In fact, though, the trial record was incomplete, containing neither a voir dire record nor specific factual findings, *see id.* at 47, and thus, could not have supported the trial court's finding under a de novo review for clear error. Therefore, the appellate court would have had to discern clear error.

141. In satisfying both the defendant's request for de novo factual review and the majority's insistence on deference to the trial court, the appellate court would first examine the record to ascertain that the evidence was sufficient to support the trial court's finding. This would be accomplished if a determination was made that it was reasonable, based on the record, for the trial court judge to have made the finding at issue. *See Bleakley*, 508 N.E.2d at 674-75. But then the appellate court would be required to go one step further in performing a weight of the evidence review. *See supra* note 92.

In performing this appellate review, the court would determine if a different factual finding would not have been unreasonable, and then, by a de novo factual analysis, would weigh the facts to determine whether the trial court judge had correctly weighed the facts. *Bleakley*, 508 N.E.2d at 675. However, in weighing the facts, the appellate court must assign great weight to the trial court's findings if those findings turned on credibility. *Id.*

Thus, deference would be accorded those findings, but not to the exclusion of de novo factual review.

trial court, that the finding could not be supported by the weight of the evidence—even after giving great weight to the trial court—then the appellate court must conclude that the trial court's finding was clearly erroneous. Thus, the defendant's request for independent plenary review is entirely consistent with deference to a trial court's findings of fact.

Of course, had the Court formulated specific guidelines by which trial courts are to make findings of intentional discrimination in *Batson* type cases, then the appellate review might be limited to a determination, as a matter of law, whether the trial court had reached its finding by applying those guidelines.

### B. *The Concurring Opinion*

The concurring justices viewed the defendant's case as an argument for establishing intentional discrimination on the basis of disparate impact,<sup>142</sup> clearly an argument which the Court has never accepted.<sup>143</sup> In the view of the concurrence, all that *Batson* requires to dispel the defendant's prima facie case of purposeful discrimination is an explanation other than race.<sup>144</sup> Since the prosecutor's explanation did not make any mention of race, it succeeded in rebutting any inference of purposeful discrimination, and thus the peremptory strike was not a violation of the equal protection clause.<sup>145</sup>

In reaching this conclusion, the concurring justices interpreted *Batson* in a purist light. According to the concurrence, the peremptory strikes "may have acted like strikes based on race, but they were not based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."<sup>146</sup> Under this reasoning, a prosecutor can avoid a per se equal protection violation if he or she is careful to word the explanation in a manner which does not mention race.<sup>147</sup> An analysis of the purist approach

142. *Hernandez v. New York*, 111 S. Ct. 1859, 1873 (1991) (O'Connor, J., concurring).

143. *Washington v. Davis*, 426 U.S. 229, 239-40 (1976); see also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 198 (1973).

144. *Hernandez*, 111 S. Ct. at 1873 (O'Connor, J., concurring).

145. *Id.* at 1874.

146. *Id.*

147. See *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring)

leads one to conclude that it is overly simplistic and invites deception by encouraging prosecutors to play the game so that the "race words" are never mentioned. "[A]ny prosecutor's office could develop a list of 10 or 15 standard reasons for striking a juror; the juror was 'inattentive' or dressed poorly and thus 'did not seem to respect the system of justice.'"<sup>148</sup> Surely, when *Batson* was decided the majority could not have intended that the requirement of a facially race-neutral explanation to rebut a prima facie case of purposeful discrimination be fulfilled by the meaningless recitation of empty words.

The concurrence did state, however, that the trial court retained the right to disbelieve the prosecutor if the court considered disproportionate effect as evidence of intentional discrimination.<sup>149</sup> But if the trial court chooses to believe the explanation, "and that finding is not clearly erroneous, that is the end of the matter."<sup>150</sup> Thus, even though the trial court's findings of fact might have been arbitrary, made without benefit of any clear set of guidelines, the concurrence, like the majority, would have those findings of fact reviewed on appeal for clear error under a standard of extreme deference.<sup>151</sup>

### C. *The Dissenting Opinion*

Justice Stevens wrote the dissenting opinion in which Justice Marshall joined, and Justice Blackmun joined in part. The thrust of their opinion centered on the insufficiency of the prosecutor's explanation to rebut the prima facie case of invidious discrimination.<sup>152</sup> In the dissent's view, the prima facie case made by the defendant could not have been established without a preliminary showing of invidious, purposeful intent to discriminate.<sup>153</sup> Once this is shown, the burden then shifts to the prosecutor to offer an explanation *sufficient to rebut* that prima facie case, and does not mean that *any* facially neutral explanation

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("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

148. Brief for Petitioner, *supra* note 9, at 42 (quoting David O. Stewart, *Court Rules Against Jury Selection Based on Race*, A.B.A. J., July 1986, at 68, 70).

149. *Hernandez*, 111 S. Ct. at 1874-75 (O'Connor, J., concurring).

150. *Id.* at 1875.

151. *Id.*

152. *Hernandez v. New York*, 111 S. Ct. 1859, 1875-77 (1991) (Stevens, J., dissenting).

153. *Id.* at 1875-76; *see supra* note 49.

which is not pretextual is sufficient.<sup>164</sup> It is entirely possible that an explanation which is facially race-neutral and not pretextual could simply be *insufficient* to dispel the defendant's prima facie case of invidious discrimination.<sup>165</sup> In that event, the defendant would have carried his burden of proving that the state peremptorily challenged a juror in a manner which violated the equal protection clause.<sup>166</sup> The dissent felt, therefore, that the majority had erred "in focusing the entire inquiry on the subjective state of mind of the prosecutor" rather than on objective evidence,<sup>167</sup> since discriminatory purpose may exist even if a prosecutor believes his motive to be pure.<sup>168</sup>

In this case, the justification given by the prosecutor, though facially race-neutral, would nonetheless result in the disproportionate exclusion of bilingual Latinos from the jury.<sup>169</sup> Since such disparate impact is evidence of discriminatory purpose,<sup>160</sup> it was the opinion of the dissent that an explanation which leads to evidence of discriminatory purpose would be insufficient to rebut the prima facie case.<sup>161</sup> The dissent would reject the prosecutor's explanation, calling it "a proxy for a discriminatory practice."<sup>162</sup>

The prosecutor's explanation could also be rejected based on precedent indicating that the state cannot use discriminatory means to accommodate its concern when a nondiscriminatory alternative exists.<sup>163</sup>

154. *Id.* at 1876.

155. *Id.*; see *infra* text accompanying notes 159-164, 188-190.

156. *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting).

157. *Id.*

158. It is important to note that the defendant and his counsel did not accuse the prosecutor of being racially motivated or intending to exclude Latinos because of their national origin. Their only contention was that *he intended to exclude bilinguals*. The prosecutor believed his motive to be pure, race-neutral and based on the case at bar. Defense counsel never doubted the prosecutor's good faith, but merely made the point that an intent to discriminate on the basis of language, even though seemingly neutral, is tantamount to an intent to discriminate on the basis of ethnic origin. Brief for Petitioner, *supra* note 9, at 20-22.

159. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

160. *Washington*, 426 U.S. at 242.

161. *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting).

162. *Id.* at 1877.

163. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . efficacy of alternative remedies . . .") (*construed in Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507 (1989), to stand for the proposition that the state cannot make distinctions on the basis of race if there are nondiscriminatory alternatives which are just as effective).

In the present case, if the prosecutor was concerned that the bilingual jurors might hear different evidence than the other jurors and might then have an undue influence upon the other jurors, the problem might easily have been resolved by an instruction to the jury that the official translation, and not the firsthand testimony, shall be evidence.<sup>164</sup> It is interesting that in support of this proposition, the dissent cited *United States v. Perez*,<sup>165</sup> the same case cited by the majority as an “[illustration of] the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony.”<sup>166</sup> In *Perez*, the juror interrupted the proceedings to dispute the interpreter’s translation of a word.<sup>167</sup> The judge advised the juror it was improper for her to question the interpreter directly in the presence of the other jurors, declaring that if she had a question she must phrase it privately to the judge. When the juror persisted, the interpreter responded by defending her qualifications as an interpreter. To this, the juror responded, “it’s an idiom,”<sup>168</sup> which was incorrectly recorded by the court reporter as “you’re an idiot.”<sup>169</sup> It was only after this public interchange that the judge instructed the jurors, apparently for the first time, that they were to rely only upon the official English translation, and that should they have questions they were to bring those questions discreetly to the attention of the judge.<sup>170</sup> The judge then had the interpreter question the witness as to the juror’s doubts, and it was established that the interpreter’s translation had, after all, been what the witness intended, and not what the juror claimed.<sup>171</sup> But based on the juror’s behavior, the judge concluded the juror was angry and opinionated, and the

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The majority opinion indicated that had the defendant suggested such an alternative to the prosecutor, and the prosecutor then refused the alternative, the trial court could have considered the refusal to be evidence of intent to discriminate. *Hernandez*, 111 S. Ct. at 1868. The dissent, however, makes no such requirement that the prosecutor first be apprised by the defendant of such an alternative. *Id.* at 1876 (Stevens, J., dissenting). The fact that the alternative exists and is one of which the prosecutor should be aware, without the urging of the defendant, is sufficient. *Id.*

164. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

165. 658 F.2d 654 (9th Cir. 1981).

166. *Hernandez*, 111 S. Ct. at 1867 n.3. Excerpts from *Perez* appeared on the front page of *The Miami Herald* on May 29, 1991, to emphasize the basis for the Court’s ruling in *Hernandez*. See *supra* note 19.

167. *Perez*, 658 F.2d at 662.

168. *Id.* at 663.

169. *Id.* at 662, 663.

170. *Id.* at 662-63.

171. *Id.* at 663.



judge feared that the juror's attitude might infect the jury.<sup>172</sup> As a result, the judge dismissed her from the jury.<sup>173</sup>

By citing *Perez* as support for their proposal, the dissent in *Hernandez* apparently did not view *Perez* as standing for the proposition which the majority had suggested.<sup>174</sup> The problem in *Perez* was not the juror's failure or inability to accept the translation, but rather the failure of the court to instruct the jury *before* the Spanish language testimony had begun.<sup>175</sup> As the dissent suggests, proper instructions given to the jury prior to the commencement of any Spanish language testimony would avoid any problem relating to how a juror should resolve a translation discrepancy, and the level of confidentiality he or she must maintain with respect to the other jurors.<sup>176</sup>

Not only would this procedure be a non-discriminatory alternative to the practice of excluding all bilingual Latinos, but logic dictates that it would also further the state's interest in promoting fair trials.<sup>177</sup> As the dissenting opinion in the New York Court of Appeals noted, "[s]urely, the majority does not intend to suggest . . . that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed."<sup>178</sup> To the contrary, the state's interest should be to ensure that jurors do not make decisions based on erroneous evidence, a proposition exemplified in *Santana v. New York City Transit Authority*.<sup>179</sup> *Santana* illustrates that justice is best served when bilinguals are seated as jurors in cases involving Spanish language testimony and are permitted to discreetly question the interpreter through the judge.<sup>180</sup> In this case, a juror who spoke Spanish believed that the plaintiff's testimony had not

172. *Perez*, 658 F.2d at 663.

173. *Id.* During the pre-dismissal meeting, the juror admitted to the judge that she had always had a problem "keeping [her] mouth shut." *Id.*

174. *Cf. Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting) (citing *Perez* as a good example of non-discriminatory means which the prosecutor could have taken with *Hernandez*, 111 S. Ct. at 1867 n.3 (citing *Perez* as an illustration of the harm that can result when a bilingual juror has a problem with the official interpretation.)

175. *Perez*, 658 F.2d at 662-63. In addition, the difficulties that arose were attributable to the individual juror's self-admitted emotional problem. *Id.* at 663.

176. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

177. *See New York v. Hernandez*, 552 N.E.2d 621, 628-29 (N.Y. 1990) (Kaye, J., dissenting).

178. *Id.*

179. 505 N.Y.S.2d 775 (Sup. Ct. 1986).

180. *Id.* at 777-78.

been correctly translated by the interpreter.<sup>181</sup> He passed a note to the court officer requesting permission to confer with the judge during a recess. The judge first determined that since no other jurors had been apprised of the matter, the juror would not have an undue influence on the jury.<sup>182</sup> The court then instructed counsel to re-call the witness to the stand, and upon further questioning, it was established that the juror, and not the interpreter, had been correct.<sup>183</sup> Thus, the jurors had the benefit of deliberating and making their determination on the basis of correct evidence.<sup>184</sup>

Ideally, such a discrepancy between jurors and interpreters should not exist, for "[i]f the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish."<sup>185</sup> The fact that this proposition may be only an ideal was recently pointed out by Florida's Racial and Ethnic Bias Study Commission, appointed in 1989 by the Florida Supreme Court.<sup>186</sup> The commission's findings, which were scheduled to be formally disclosed in December 1991, in a report to the Florida Supreme Court, indicate that "trained and certified interpreters are rare, and many judicial circuits have no standards . . . . It's often left to individual judges and court administrators to find capable translators."<sup>187</sup> Given the lack of qualified interpreters in Florida, it would not serve the state's interest in promoting fair trials to exclude bilingual jurors, nor would it serve the state's interest to seat bilingual jurors with a proviso that they totally disregard the witness' testimony in Spanish in favor of the interpreter's translation. Particularly where there is concern over the quality of the interpreters, it is essential to seat bilingual jurors, who will listen to both the witness' testimony and the interpreter's translation, so that discrepancies can be brought to the court's attention in an effort to serve justice by having the jury decide

181. *Id.* at 777.

182. *Id.* at 778.

183. *Id.*

184. *Id.* at 779 ("Inevitably, due to the spontaneity [sic] of an interpreter's translation or the lack of an exact translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury.").

185. *Hernandez*, 552 N.E.2d at 628 (Kaye, J., dissenting).

186. *See Study: Race Bias Pervades Courts*, MIAMI HERALD, Nov. 14, 1991, at A1, col. 5.

187. *Id.* at A25, col. 1.

on the basis of non-erroneous evidence.

The dissent in *Hernandez* also noted a third reason why the prosecutor's statement was insufficient to rebut the prima facie case: if the prosecutor's concern regarding the jurors' ability to follow the court's instructions was valid, a challenge for cause could have been made.<sup>188</sup> The dissent reasoned that since the prosecutor did not make such a challenge, he must have been unable to document his concern.<sup>189</sup> The dissent further reasoned that if the prosecutor's concern could not be documented by the record, it amounted to a "frivolous or illegitimate [justification which] should not suffice to overcome the prima facie case."<sup>190</sup>

The dissent conceded that each reason, considered separately, might not be grounds for rejecting the prosecutor's facially race-neutral explanation as being insufficient.<sup>191</sup> The concession, however, was not due to the lack of strength or validity of each reason, but rather to the dissent's acknowledgement that the positions advanced by its opinion were not acceptable to the majority. For example, on the issue of disparate impact on Latinos, the dissent focused on the objective result, the disparate impact, to conclude that the prosecutor's facially race-neutral explanation was simply "a proxy for a discriminatory practice,"<sup>192</sup> therefore, insufficient to rebut the prima facie case of purposeful discrimination.<sup>193</sup> Although a valid argument, the dissent recognized that the majority would not accept its reasoning, based on the Court's long-standing position that *disparate impact alone is insufficient* to establish a violation of the equal protection clause.<sup>194</sup> Thus, the dissent's first reason, by itself, would not be grounds for rejecting the state's explanation.

Similarly, the dissent conceded its second argument, regarding nondiscriminatory alternatives, because the Court has continued to hold that the availability of nondiscriminatory means is *but one factor* to be taken into account when determining whether or not the state intended to discriminate.<sup>195</sup> The third argument, that if the prosecutor's reason was valid it could have supported a challenge for cause, is gain-

188. *Hernandez*, 111 S. Ct. at 1877 (Stevens, J., dissenting).

189. *Id.*

190. *Id.* at 1876-77.

191. *Id.* at 1877.

192. *Id.*

193. *Id.*

194. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

195. *See supra* note 163.

ing strength in the movement to do away with peremptory challenges in the wake of *Batson*.<sup>196</sup> It is a powerful argument, and perhaps in the final analysis, it will be the solution to the "*Batson* dilemma," for despite the oft-quoted phrase from *Batson* that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause,"<sup>197</sup> most judges and lawyers are still struggling to understand *Batson*'s requirement of a quasi explanation. But for now, as long as the peremptory system still exists, the dissent's third reason cannot prevail, because it directly contradicts the lighter requirements set forth in *Batson* to examine the prosecutor's statement.<sup>198</sup>

Although each of the reasons advanced by the dissent might not, on its own, be grounds for rejecting the prosecutor's explanation, the dissent concluded that the combined weight of the reasons supports a rejection as a matter of law.<sup>199</sup>

#### IV. CONCLUSION

Using the *Batson* analysis, there are two ways in which a peremptory challenge could be declared a violation of the equal protection clause: either the challenge is a per se violation, *i.e.*, *on its face* the prosecutor's explanation is that he or she *intended to discriminate* based on the juror's race or national origin, or it is a violation because it fails, *by way of pretext or insufficiency*, to overcome a prima facie case of purposeful discrimination.<sup>200</sup> The ruling on the per se issue was a thoughtful, sensitive one, which attempted to find a middle ground between equating race with language on one extreme for purposes of equal protection analysis, and on the other extreme, signalling that the Court would condone discrimination based on language.

However, its decision on whether the trial court erred in determining that the explanation was not pretextual, nor insufficient, and was thus not a violation of the equal protection clause under part three of the *Batson* analysis, was questionable. This decision involved a ruling on the other issue in the case—the amount of deference to be accorded the trial court in deciding whether or not it erred in accepting the prosecutor's explanation. The Court's ruling on this issue was not as astute

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196. See *supra* notes 68, 72, and 73.

197. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

198. See *supra* text accompanying note 197.

199. *Hernandez*, 111 S. Ct. at 1877.

200. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986).

as its per se ruling. When the Court ruled that a trial court's finding of fact on the ultimate question of discriminatory intent should be accorded great deference on appeal,<sup>201</sup> it failed to recognize the potential for abuse in exercising peremptory challenges against bilingual Latinos. Had the Court decided this case on the basis of whether or not the trial court took into account all relevant factors, it might have arrived at the conclusion reached by the dissent.

However, the import of this decision is for future cases. Until the United States Supreme Court sets guidelines similar to those set by some states,<sup>202</sup> cases tried in federal district courts and in state courts not having such guidelines will be reviewed on appeal under the clearly erroneous standard, but with very little analysis regarding the trial court's finding of fact as to discrimination in the use of peremptory challenges. The effect will be rulings which are inconsistent because each was a "rubber stamp" given in deference to a trial court which was not obliged to make its findings under any consistent set of guidelines. Worse, by simply deferring, rather than analyzing for clear error according to an authoritative body of law, the Supreme Court or state appellate courts could be setting legal precedent which has no basis in fact or in law.

Fortunately, cases arising in Florida are governed by *Florida v. Slappy*,<sup>203</sup> which gives direction to the trial court and gives the appellate courts a basis upon which to review for clear error. In addition, Justice Kennedy's warning that, in some cases, language proficiency will be treated as a surrogate for race,<sup>204</sup> should serve as notice that the Court by no means gave blanket approval to peremptory challenges of bilinguals in cases involving testimony given through an interpreter.<sup>205</sup>

201. *Hernandez v. New York*, 111 S. Ct. 1859, 1869 (1991).

202. *See, e.g., Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *Florida v. Slappy*, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

203. 522 So. 2d at 22.

204. *Hernandez*, 111 S. Ct. at 1872-73; *see infra* note 205.

205. The Court went to great lengths to emphasize that its holding was limited to the facts of the *Hernandez* case, stating explicitly that each case must be reviewed on its own merits based on all the circumstances of that case. *Hernandez*, 111 S. Ct. at 1873. Justice Kennedy was referring to this case-by-case method when he stated, [o]ur decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases . . . . It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

*Id.* at 1872.

Thus, there are sufficient safeguards in Florida, at least, so that the abuses feared by defense attorneys and Latino groups in the wake of the *Hernandez* decision, will not come to pass.

*Ronnie R. Savar*

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Thus, the ultimate message of the Court was that race would not be expanded to include language proficiency as a general rule, but that if the circumstances of a particular case indicated, *for that case*, that language should be treated as a surrogate for race, then the exclusion of a bilingual juror for a language-based reason would be unconstitutional as a violation of the equal protection clause.

## Cumulative Subject-Title Index to Volumes One Through Sixteen

### ABORTION

*see also:*

#### REPRODUCTIVE RIGHTS

Constitutional Law: The State Cannot Require Spousal or Parental Consent for Abortions During First Trimester of Pregnancy: *Planned Parenthood of Missouri v. Danforth*. D.F. Holmes, vol. 1, p.101 ('77).

The Spousal Notice and Consultation Requirement: A New Approach to State Regulation of Abortion. B.G. Blum, vol. 6, p.457 ('82).

*Scheinberg v. Smith*: Toward Recognition of Minors' Constitutional Right to Privacy in Abortion Decisions. J.L. Weinstein, vol. 6, p.475 ('82).

### ACCOMPLICE LIABILITY

*Pinkerton v. United States* Revisited: A Defense of Accomplice Liability. J. May, vol. 8, p.221 ('83).

### ADMINISTRATIVE LAW

Administrative Law [1991 Survey of Florida Law]. J.C. Burris, vol. 16, p.7 ('91).

Administrative Law [1989 Survey of Florida Law]. J.C. Burris, vol. 14, p.583 ('90).

Administrative Law [1988 Survey of Florida Law]. J.C. Burris, vol. 13, p.727 ('89).

Administrative Law [1987 Survey of Florida Law]. J.C. Burris, vol. 12, p.299 ('88).

### ADMIRALTY

Admiralty [1991 Survey of Florida Law]. R.M. Jarvis, vol. 16, p.127 ('91).

Admiralty [1989 Survey of Florida Law]. R.M. Jarvis, vol. 14, p.995 ('90).

Admiralty Law: Trial of a Treasure Hunter: *Treasurer Salvors, Inc. v. Nuestra Senora de Atocha*. R. Kelley, May, vol. 4, p.237 ('80).

Open Season on Ancient Shipwrecks: Implications of the *Treasure Salvors* Decisions in the Fields of Archaeology, History and Property Law. B. Read, vol. 4, p.213 ('80).

#### ADOPTION

No Deposit No Return: The Adoption Dilemma. K. Bennison, vol. 16, p.909 ('92).

The Florida Statute Prohibiting Adoption by Homosexuals in View of *Seebol v. Farie*: Expressly Unconstitutional. C.L. Worsnop, vol. 16, p.983 ('92).

#### ADVERTISING

*see also:*

##### CONSTITUTIONAL LAW

Advertising, Solicitation and Indication of Specialization: Recent Proposed Rules and Supreme Court Mandate. S.J. Greenwald, vol. 5, p.221 ('81).

Constitutional Law: First Amendment Guarantees Lawyers Limited Right to Advertise Fees: *Bates v. State Bar of Arizona*. G.E. Guy, vol. 2, p.147 ('78).

#### AFFIRMATIVE ACTION

Beyond Reverse Discrimination: The Quest for a Legitimizing Principle. S.J. Wisotsky, vol. 4, p.63 ('80).

#### AIDS

AIDS: A Brief Overview. R.K. Wright, vol. 12, p.973 ('88).

AIDS: A Global View. R.M. Jarvis, vol. 12, p.979 ('88).

AIDS: Discrimination: Its Nature, Meaning and Function. D. Schulman, vol. 12, p.1113 ('88).

AIDS in Perspective. E. Tramont, vol. 12, p.1071 ('88).

AIDS Prevention: Too Little, Too Late. N.R. Schram, vol. 12, p.1253 ('88).

AIDS, Race and the Law: The Social Construction of Disease. N. Nickens, vol. 12, p.1179 ('88).

Children with AIDS: A Need for a Clear Policy and Procedure for Public Education. L.F. Rothstein, vol. 12, p.1259 ('88).

Civil Liberties in the Crucible: An Essay on AIDS and the Future



of Freedom in America. P.R. Joesph, vol. 12, p.1083 ('88).

Emerging Issues of AIDS and Insurance. A.H. Terl, vol. 12, p.1291 ('88).

Forward: The Legal Challenge of AIDS. A.S. Leonard, vol. 12, p.961 ('88).

Local Public Health Perspectives on the Acquired Immune Deficiency Syndrome (AIDS) Epidemic. C. Konigsberg, Jr., M.F. Barerra, vol. 12, p.1141 ('88).

Meeting the AIDS Epidemic in the Courtroom: Practical Suggestions in Litigating Your First AIDS Case. W.L. Earl, J. Kavanaugh, vol. 12, p.1203 ('88).

The AIDS Agenda. R.I. Abrams, vol. 12, p.969 ('88).

## ALIENS

*see also:*

### IMMIGRATION

Hard Decisions: Asylum Protection as Applied to Aliens Opposing Population Control Policies. S.Y. Slaton, vol. 16, p.955 ('92).

Equal Protection for Aliens—The Sliding Scale of Judicial Review: *Foley v. Connelie*. D.A. Blankman, vol. 3, p.249 ('70).

The PRUCOL Provision in Public Benefits Law: Alien Eligibility for Public Benefits. S.F. Carton, vol. 14, p.1033 ('90).

## ALIMONY AND MAINTENANCE

Alimony Modification: Awards Based on Ability to Pay Without Showing Increased Need. H.R. Cohen, vol. 16, p.543 ('91).

Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life. E.J. Langbein, vol. 12, p.787 ('88).

## ANTITRUST LIABILITY

Apparent Authority and Antitrust Liability: An Incompatible Combination? *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*. J.R. Palmer, vol. 7, p.641 ('83).

## APPELLATE PRACTICE AND PROCEDURE

Appellate Practice [1989 Survey of Florida Law]. H.T. Wihnyk, vol. 14, p.655 ('90).

Appellate Review of Class Standing Orders in Florida. J. Seamon,

vol. 6, p.593 ('82).

The District Court of Appeal—After the 1980 Jurisdictional Amendment: A New Obligation Toward Decisional Harmony. V. Lance, vol. 6, p.115 ('81).

#### APPORTIONMENT

New Techniques for Apportioning Based on Deviation From the Median. D.C. Smith, III, H.K. McGinnis, vol. 12, p.861 ('88).

#### ARBITRATION

Arbitration [1990 Survey of Florida Law]. R.M. Jarvis, vol. 15, p.923 ('91).

Medical Mediation—A Judicially Supervised Social Hour. E. Winitz, vol. 3, p.165 ('79).

The Efficient Delivery of Arbitration Services Through Use of the Arbitration Firm. R.I. Abrams, D.R. Nolan, vol. 11, p.45 ('86).

#### ARTS AND THE LAW

*see* LAW AND THE ARTS

#### ASBESTOS LITIGATION

Asbestos Litigation: Balancing the Interests of Insurance Companies, Manufacturers, and Victims. R.E. Mehr, vol. 6, p.573 ('82).

#### ASSUMPTION OF RISK

The Reemergence of Implied Assumption of Risk in Florida. S.S. Faerber, vol. 10, p.1343 ('86).

#### ATTORNEYS

*see also:*

ADVERTISING

ATTORNEYS' FEES

CONSTITUTIONAL LAW

PUBLIC LEGAL SERVICE

LEGAL ETHICS

A Visionary Opinion. A.J. England Jr., vol. 4, p.343 (Supp. '80).

An Attorney's Liability to Third Parties: The Expanding Field of Malpractice. M.J. Emas, H.A. Nussbaum, vol. 2, p.75 ('78).

#### ATTORNEY FEES

Attorney's Fees: Florida Statute 57.105. B.P. Sanchez, vol. 5, p.89 ('80).

Attorney's Fees: Under Florida Statute 57.105: Caselaw Development. P.H. Snaith, vol. 10, p.155 ('85).

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*. M. Liroff, vol. 3, p.299 ('79).

The Search for a Section 1983 Right Under the Dormant Commerce Clause. H.H. Russell, vol. 15, p.263 ('91).

#### AVIATION

The Pan American World Airways—National Airlines Merger and the Airline Deregulation Act of 1978: A History and Analysis. S.A. Stinson, vol. 6, p.37 ('81).

#### BANKING

Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward a Level Playing Field. S.W. Dunlap, vol. 9, p.1 ('84).

#### BANKRUPTCY

Bankruptcy [1990 Survey of Florida Law]. L. Kalevitch, vol. 15, p.933 ('91).

Exceptions to Discharge: The Supreme Court Adopts a Preponderance of the Evidence Standard of Proof in Section 523 Proceedings. A. Kessler, vol. 15, p.1411 ('91).

#### BOOK REVIEWS

A Wake-Up Call for American Society or Have "The Chickens Just Come Home to Roost?"—Essay Review of Charles Patrick Ewing's *When Children Kill: The Dynamics of Juvenile Homicide*. R.W. Howe, vol. 16, p.847 ('92).

Behind the Scenes: The Politics of a Constitutional Convention. Rev. by R.B. Brown, vol. 10, p.249 ('85).

Book Review: Ministries of Terror. A. Chase, vol. 15, p.771 ('91).

Denning, L., The Discipline of Law. Rev. by G.F. Powell, Vol 5, p.527 ('81).

Courts: A Comparative and Political Analysis. Rev. by A.S. Miller, vol. 6, p.553 ('82).

Higginbotham: In the Matter of Color: Race and the American Legal Process, the Colonial Period. Rev. by M.L. Richmond, vol. 3, p.339 ('79).

In the Interest of Children: Advocacy, Law Reform and Public Policy. Rev. by L.M. Hyde, Jr., vol. 10, p.245 ('85).

Law's Empire. Rev. by F.L. Rush, Jr., vol. 11, p.271 ('86).

Loftus, E., Eyewitness Testimony. Rev. by M.M. Dobson, vol. 5, p.515 ('81).

Rohan: Zoning and Land Use Controls; Webber & Wright: Land Use in a Nutshell. Rev. by R.B. Brown, vol. 3, p.335 ('79).

Reproductive Laws for the 1990s. Rev. by A. Allen, vol. 13, p.625 ('89).

Sirica, John J.: To Set the Record Straight. Rev. by R.B. Brown, vol. 4, p.335 ('80).

The Constitution in the Supreme Court: The First Hundred Years 1789-1888. Rev. by J.C. Burris, vol. 11, p.251 ('86).

The Court Years, 1939-1975: The Autobiography of William O. Douglas. Rev. by M.M. Burns, vol. 5, p.311 ('81).

The Peer and the Precedent: A Review Essay of Denning, L.: The Discipline of Law. Rev. by M.L. Richmond, vol. 4, p.327 ('80).

## CHILD ABUSE AND NEGLECT

Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause. J.A. Bulkley, vol. 16, p.687 ('92).

Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case. N. Schleifer, vol. 16, p.783 ('92).

Constitutional Law: The Element of Scienter Saves the Florida Simple Child Abuse Statute from Being Unconstitutionally Vague: *State v. Joyce*, *State v. Hutcheson*. E.J. Culhan, Jr., vol. 3, p.313 ('79).

Dealing With Child Abuse and Neglect: A Prosecutor's Viewpoint. J. Reno, J. Smart, vol. 8, p.271 ('84).

Florida's Dependent Child: The Continuing Search for Realistic Standards. C.A. Zawisza, M.K. Williams, vol. 8, p.299 ('84).

Prospective Abuse and Neglect—The Termination of Parental Rights. L.S. Weiss, vol. 14, p.1171 ('90).

“Shrinking” the Clergy Exemption to Florida's Mandatory Child Abuse Reporting Statute. P. Coleman, vol. 12, p.115 ('87).

The Federal and State Response to the Problem of Child Maltreatment in America: A Survey of the Reporting Statutes. W.C. Redden, vol. 2, p.13 ('78).

The Use of Videotape in Child Abuse Cases. D.A. Haas, vol. 8, p.373 ('84).

## CHILD CUSTODY

Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's *Painter v. Bannister* Jurisprudence. J. Batt, vol. 16, p.621 ('92).

The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent. J.L. Richards, vol. 16, p.733 ('92).

Shared Parental Responsibility: Florida Statutes Section 61.13. R. Goldenberg, vol. 7, p.277 ('83).

Interstate Child Custody Disputes: Ensuring the Legality of Florida Child Custody Orders. E.J. Taylor, B.R. Taylor, vol. 14, p.1063 ('90).

## CHILDREN'S RIGHTS

Different Lenses: Psycho-Legal Perspectives on Children's Rights. G.P. Koocher, vol. 16, p.711 ('92).

Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility. A. Schepard, J. Atwood, S.W. Schlissel, vol. 16, p.767 ('92).

## CHILD SUPPORT

Congress Demands Stricter Child-Support Enforcement: Florida Requires Major Reforms to Comply. M. Gallen, vol. 10, p.1371 ('86).

## CHILD TORT IMMUNITY

Time to Abolish Parent-Child Tort Immunity: A Call to Repudi-

ate Mississippi's Gift to the American Family. J. Berman, vol. 4, p.25 ('80).

## CIVIL PROCEDURE

*see also:*

### APPELLATE PRACTICE AND PROCEDURE

A Practitioner's Guide to Dismissals for Failure to Prosecute under Florida Rule of Civil Procedure 1.420(e). D.V. Seropian, vol. 11, p.873 ('87).

Civil Procedure [1990 Survey of Florida Law]. W. VanDercreek, vol. 15, p.993 ('91).

Civil Procedure [1988 Survey of Florida Law]. S.R. Armstrong, vol. 13, p.791 ('89).

Civil Procedure [1987 Survey of Florida Law]. W. VanDercreek, vol. 12, p.421 ('88).

Civil Procedure [1985 Survey of Florida Law]. W. VanDercreek, K. King, vol. 10, p.895 ('86).

Jurisdiction Over the Person—the Progeny of *Pennoyer* and the Future of *Asahi*. W. VanDercreek, vol. 13, p.1287 ('89).

Personal Jurisdiction in Florida: Some Problems and Proposals. M. Rohr, vol. 5, p.365 ('81).

Work Product: The Anticipation of Litigation Requirement Under Florida Rule of Civil Procedure 1.280(b)(2). M. del Carmen Dantes, vol. 10, p.1297 ('86).

## CLASS ACTIONS

Justice, Discrete and Insular Minorities, and Safety Valves: The Supreme Court Refines Our Sense of Justiciability. T.J. Ginger, vol. 10, p.29 ('85).

## COMMERCIAL LAW

Comparative Analysis: Agents' Personal Liability on Negotiable Instruments. C. Cox, vol. 9, p.49 ('84).

Forged Restrictive Endorsements: Does the Drawer of a Check Have a Cause of Action Against the Depository Bank? *Underpinning and Foundation Constructors, Inc. v. The Chase Manhattan Bank*. G. Gore, vol. 4, p.285 ('80).

The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor? E.J. Keeler,

vol. 8, p.175 ('83).

## CONDOMINIUMS

Amendments to the Florida Condominium Act: A Proposal. J.G. Mac'Kie, III, vol. 10, p.89 ('85).

The Florida Condominium Act. G.A. Poliakoff, vol. 16, p.471 ('91).

## CONFLICT OF LAWS

Demise of *Lex Loci Delicti*: *Bishop v. Florida Specialty Paint Co.* D. Ohman-Zimet, vol. 5, p.299 ('81).

## CONSORTIUM

Recovery for Lost Parental Consortium: Nightmare or Break-through? R.G. Romano, vol. 9, p.183 ('84).

## CONSTITUTIONAL LAW

*see also:*

DISCRIMINATION

FREEDOM OF THE PRESS

MUSIC AND OBSCENITY

RIGHT TO PRIVACY

Broadcasters' First Amendment Rights through the Courts with "The Seven Dirty Words:" *FCC v. Pacifica Foundation*. F.A. Arnold, C.E. Cameron, vol. 3, p.261 ('79).

Constitutional Considerations Pertaining to Florida's Citrus Freeze Embargo: Are Due Process and Delegation of Power Problems Frustrating the Purposes of the Citrus Code? N.P. Spyke, vol. 9, p.115 ('84).

Constitutional Law: Expectation of Privacy Invokes Fourth Amendment Warrant Clause Protection for Search of Sealed Footlocker: *United States v. Chadwick*. R.K. Williams, vol. 2, p.159 ('78).

Constitutional Law: First Amendment Guarantees Lawyers' Limited Right to Advertise Fees: *Bates v. State Bar of Arizona*. G.E. Guy, vol. 2, p.147 ('78).

Constitutional Law: Freedom of Speech Versus an Attorney's Criticism of the Bench: A Proposal for Parity between Lawyer's and Layperson's Right to Free Speech. C. Zerlin, vol. 1, p.83 ('77).

Constitutional Law: Freedom to Observe Religion Must Yield to Collective-Bargaining Contract's Seniority Systems: *Trans World Airlines, Inc. v. Hardison*. M.R. Schwartz, vol. 2, p.127 ('78).

Constitutional Law: Privilege Against Self-Incrimination: Conviction of a Non-Tax Related Offense Secured Through Use of Federal Tax Returns. *Garner v. United States*. D.F. Vedder, vol. 1, p.145 ('77).

Constitutional Law: The Element of Scienter Saves the Florida Simple Child Abuse Statute from Being Constitutionality Vague: *State v. Joyce, State v. Hutcheson*. E.J. Culhan, Jr., vol. 3, p.313 ('79).

Constitutional Law: The State Cannot Require Spousal or Parental Consent for Abortions during the First Trimester of Pregnancy: *Planned Parenthood of Missouri v. Danforth*. D.F. Holmes, vol. 1, p.101 ('77).

Equal Protection for Aliens: The Sliding Scale of Judicial Review: *Foley v. Connelie*. D.A. Blankman, vol. 3, p.249 ('79).

Fourth Amendment: A Second-Class Constitutional Right for the Purpose of Federal Habeas Corpus: *Stone v. Powell*. M.W. Ullman, vol. 1, p.123 ('77).

Freedom of Religion: State Aid to Religiously Affiliated College Can Co-Exist with the First Amendment's Establishment of Religion Clause: *Roemer v. Board of Public Works of Maryland*. G.L. Sweet, vol. 1, p.111 ('77).

How Long Can We Cope? W.E. Burger, vol. 3, p.1 ('79).

If It Moves, Search It: *California v Carney* Applies the Automobile Exception to Motor Homes. D.C. Hawkins, vol. 10, p.1245 ('86).

Limiting Contributions to Referendum Political Committees: Taking Out the First Amendment Slide Rule and Going Back to the Supreme Court's Drawing Board. C.R. Eisen, vol. 5, p.421 ('81).

Praying for Direction: The Establishment Clause and the Supreme Court. D.A. Bruschi, vol. 10, p.217 ('85).

Retreat of the Rehabilitation Act of 1973. *Southeastern Community College v. Davis*. C.M. Collins, Jr., vol. 4, p.309 ('80).

The Constitutionality of Imposing Death on a Felony-Murder Accomplice. R.E. Tardif, Jr., vol. 12, p.1299 ('88).

The End of a Four Hundred-Year Boom: The Need for Major Constitutional Change. A.S. Miller, vol. 8, p.1 ('83).

## CONTEMPT

The Use of Contempt of Court to Enforce Florida Divorce Decrees. J.F. Thomas, vol. 6, p.313 ('82).



## CONTRACTS

Contracts [1989 Survey of Florida Law]. L. Kalevitch, vol. 14, p.663 ('90).

Contracts [1986 Survey of Florida Law]. K.M. O'Dempsey, vol. 11, p.1161 ('87).

Contracts [1985 Survey of Florida Law]. K.M. O'Dempsey, vol. 10, p.953 ('86).

## CORPORATIONS

Corporate Golden Parachutes: An Executive Bailout from Fiduciary Duty? L.A. Epstein, vol. 9, p.447 ('85).

Corporations: Majority Power and Shareholder Arrangements for Control. R.A. Kessler, vol. 4, p.1 ('80).

Indemnification of Corporate Officers and Directors. R.L. Jennings, K.A. Horky, vol. 15, p.1357 ('91).

Limited Liability Corporations [1989 Survey of Florida Law]. E.A. Seemann, vol. 14, p.901 ('90).

The Financial Provisions of Florida's New Business Corporation Act—The Model Act with Anti-Takeover Twists. D.S. Felman, vol. 15, p.1319 ('91).

The Personal Liability of Directors in Florida: Whose Corporation is it Anyway? R.R. Seuradge, vol. 15, p.1389 ('91).

*Zapata Corp.v. Maldonado*: "Steering a Middle Course" May Spell Deep Water for Business Judgment Application in Shareholder Derivative Suits. K.A. Rubin, vol. 6, p.191 ('81).

## CRIMINAL LAW

Capital Jury Selection in Florida and Texas—A Quantitative Distinction Without a Legally Qualitative Difference? J.D. Hayes, vol. 12, p.743 ('88).

Criminal Law [1991 Survey of Florida Law]. H.L. Koerner, vol. 16, p.229 ('91).

Criminal Law [1990 Survey of Florida Law]. P.C. Bell, vol. 15, p.1037 ('91).

Criminal Law [1989 Survey of Florida Law]. P.C. Bell, vol. 14, p.681 ('90).

Criminal Law [1988 Survey of Florida Law]. W.R. Eleazer, vol. 13, p.835 ('89).

Criminal Law [1986 Survey of Florida Law]. M.R. Brown, vol.

11, p.1217 ('87).

Criminal Law [1985 Survey of Florida Law]. W.R. Eleazer, vol. 10, p.973 ('86).

Eleventh Circuit Rejects Claim of Florida Death Row Inmates: *Ford v. Strickland*. V. Shea, vol. 7, p.415 ('83).

Florida's Legal Comedy of Errors. L.K. Hennessey, vol. 13, p.1355 ('89).

Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems. M. Dobson, vol. 7, p.179 ('83).

Incarceration as a Condition of Probation: New Limitations. *Vilery v. Florida Parole & Probation Commission*. J.E. Morgan III, vol. 6, p.635 ('82).

*M'Naghten*: Right or Wrong for Florida in the 1980s? It Flunks the Test. J.R. Dawson, vol. 6, p.125 ('81).

Prosecutorial Misconduct in Closing Argument. J.A. DeFoor, II, vol. 7, p.443 ('83).

## CRIMINAL PROCEDURE

*see also:*

EVIDENCE

CRIMINAL LAW

SENTENCING

RIGHT TO COUNSEL

Admissability of Refusal to Submit to Blood Alcohol Test. J.C. Hauser, vol. 6, p.209 ('82).

Criminal Law: Drug Courier Profiles: *United States v. Mendenhall*. M.A. Duggan, vol. 5, p.141 ('80).

Criminal Law: Exclusionary Rule. *United States v. Williams*. J.R. Dawson, vol. 5, p.131 ('80).

Criminal Law: "Prepare for Boarding:" Coast Guard Authority on the High Seas: *United States v. Williams*. D.M. McIntosh, J.C. Sawran, vol. 5, p.113 ('80).

Criminal Law: Weighing the Need for Procedural Safeguards in Plea Bargaining: *Bordenkircher v. Hayes*. R.J. Crowe, vol. 3, p.285 ('79).

Criminal Procedure [1985 Survey of Florida Law]. B.A. Zimet, vol. 10, p.1001 ('86).

Criminal Procedure [1988 Survey of Florida Law]. G.T. Bennett, vol. 13, p.849 ('89).

Criminal Procedure [1986 Survey of Florida Law]. G.T. Bennett,

vol. 11, p.1245 ('87).

Death Penalty [1988 Survey of Florida Law]. C. Barnard, vol. 13, p.905 ('89).

Denial of Bail to Drug Felons: Florida Statute 903.133. J.P. McLane, vol. 5, p.81 ('80).

*Florida v. Bostick*: Voluntary Encounter or the Power of Police Intimidation? M.F. Montalvo, vol. 15, p.1435 ('91).

Prospective Search Warrants in Florida: You Had Better Not Send Your Drugs Home in the Mail. D.M. Paulus, vol. 13, p.701 ('89).

The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures? J.P. D'Ambrosio, vol. 12, p.273 ('87).

The Fourth Amendment and Surgical Searches: Invasion of the Bullet Snatchers. R.S. Richards, vol. 9, p.331 ('85).

The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida. J.T. Miller, vol. 11, p.97 ('86).

The Shrinking of the Fourth Amendment Umbrella: *Oliver v. United States*. V.P. Kligerman, vol. 9, p.231 ('84).

## DISCRIMINATION

*see also:*

EMPLOYER AND EMPLOYEE

HOUSING DISCRIMINATION

Anti Sex Discrimination Laws: A Mandate for the Redistribution of Social Resources Based upon the Emerging Constitutional and Statutory Equality of the Sexes. B. Wolf, vol. 1, p.4 ('77).

Beyond Reverse Discrimination: The Quest for a Legitimizing Principle. S. Wisotsky, vol. 4, p.63 ('80).

Equal Protection for Aliens—The Sliding Scale of Judicial Review: *Foley v. Connelie*. D.A. Blankman, vol. 3, p.249 ('79).

Retreat of the Rehabilitation Act of 1973. *Southeastern Community College v. Davis*. C.M. Collins, Jr., vol. 4, p.309 ('80).

Towards the Elimination of Gender Bias in the Florida Courts. S. Karlan, vol. 11, p.1569 ('87).

Voir Dire Examinations: Minority Defendants are Not Always Entitled to Have Specific Questions Asked of Potential Jurors Regarding Possible Racial Prejudice: *Ristaino v. Ross*. J. Plasner, vol. 1, p.135 ('77).

## DIVORCE

see CHILD CUSTODY; ALIMONY AND MAINTENANCE

## DRUG TESTING

Behind Open Doors: Constitutional Implications of Government Employee Drug Testing. P.T. Bookspan, vol. 11, p.307 ('87).

Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance. C. Palefsky, vol. 11, p.669 ('87).

Drug Hysteria Causing Use of Useless Urine Tests. K.B. Zeese, vol. 11, p.815 ('87).

Drug Testing as an Element of the Everlasting Drug War. E.C. Shaw, R.T. Fleming, vol. 11, p.693 ('87).

Drug Testing From the Arbitrator's Perspective. T.S. Deneberg, R.V. Deneberg, vol. 11, p.371 ('87).

Drug Testing in the Federal Government. P. Schroeder, A.L. Nelson, vol. 11, p.685 ('87).

Drug Tests: Issues Raised in the Defense of a "Positive" Result. M.L. Waple, vol. 11, p.751 ('87).

Drug-Use Testing: Scientific Perspectives. K.M. Dubowski, vol. 11, p.415 ('87).

Efficient Drug Testing: Addressing the Basic Issues. A.J. McBay, vol. 11, p.647 ('87).

Employee Assistance and Drug Testing Fairness and Injustice in the Workplace. W.J. Sonnenstuhl, H.M. Trice, W.J. Staudenmeir, Jr., P. Steele, vol. 11, p.709 ('87).

Fourth Amendment Implications of Public Sector Workplace Drug Testing. P.R. Joseph, vol. 11, p.605 ('87).

Governmental Drug-Testing and the Sense of Community. G. Anastaplo, vol. 11, p.295 ('87).

Implementation of Drug and Alcohol Testing in the Unionized Workplace. D.J. Morkawa, P.J. Hurtgen, T.G. Connor, J.J. Costello, vol. 11, p.653 ('87).

Mass Round-up Urinalysis and Original Intent. R.L. Stone, vol. 11, p.733 ('87).

Major League Baseball and Drugs: Fight the Problem or the Player? G.M. Wong, R.J. Ensor, vol. 11, p.779 ('87).

Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing. E.J. Imwinkelried, vol. 11, p.563 ('87).

The Ideology of Drug Testing. S.J. Wisotsky, vol. 11, p.763 ('87).  
Toward a New Federal Right to Privacy. L. Siegel, vol. 11, p.703 ('87).

Urine Testing for Drugs. K. Hudner, vol. 11, p.553 ('87).

Wishful Thinking and Public Policy. R.I. Abrams, vol. 11, p.291 ('87).

## DRUG USE

A Proposal for Regulation and Taxation of Drugs. L. Grinspoon, vol. 11, p.927 ('87).

Breaking the Impasse in the War on Drugs: A Search for New Directions. N.E. Zinberg, vol. 11, p.901 ('87).

Introduction: In Search of a Breakthrough in the War on Drugs. S. Wisotsky, vol. 11, p.891 ('87).

The National Strategy—An Overview. L. Kellner, vol. 11, p.933 ('87).

Symposium Proceedings: Roundtable Discussion. vol. 11, p.939 ('87).

Coda: What Impasse? A Skeptical View. P.Reuter, vol. 11, p.1025 ('87).

The War on Drugs: Predicting the Status Quo. J. Kaplan, vol. 11, p.931 ('87).

Towards New Perspectives on Drug Control: A Negotiated Settlement to the War on Drugs. D.A.J. Richards, vol. 11, p.909 ('87).

Vice Policy in a Liberal Society: An Analysis of the Impasse in the War on Drugs. M.A.R. Kleiman, vol. 11, p.919 ('87).

Why the Drug War is Unstoppable. T. Szasz, vol. 11, p.915 ('87).

## DUTY TO WARN

A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products. D. D'Amico, vol. 11, p.1611 ('87).

## EDUCATION

Alternatives to Public School: Florida's Compulsory Education Dilemma. G.E. Sherman, vol. 6, p.269 ('82).

## ELDER LAW

Elder Law [1991 Survey of Florida Law]. J. Sanchez, vol. 16, p.265 ('91).

## EMPLOYEE RIGHTS AND TECHNOLOGY

A Challenge to Workers' Rights. A. Chase, vol. 8, p.671 ('84).

Communications Revolutions and Legal Revolutions: The New Media and the Future of Law. M.E. Katsh, vol. 8, p.631 ('84).

Keeping Capital and Jobs at Home. D.G. Olson, vol. 8, p.583 ('84).

New Technology: A Catalyst for Crises in Collective Bargaining, Industrial Discipline, and Labor Law. S. Weir, vol. 8, p.597 ('84).

Technology, Labor Interests and the Law: Some Fundamental Points and Problems. W.J. Samuels, A.A. Schmid, J.D. Shaffer, R.A. Solo, S.A. Woodbury, vol. 8, p.487 ('84).

Technology, Unemployment, and Genocide. R.L. Rubenstein, vol. 8, p.537 ('84).

The Case of the Burnside Foundry. M. Gibson, vol. 8, p.547 ('84).

Were the Luddites Necessarily Wrong?: A Note on the Constitutionality of the "New Technology Bill of Rights". A.S. Miller, vol. 8, p.515 ('84).

## EMPLOYER AND EMPLOYEE

Burdens of Proof Under Title VII in the 90's: *Wards Cove* vs. The Civil Rights Act of 1990. K.F. Judd, vol. 15, p.67 ('91).

EEOC's New Sexual Harassment Guidelines: Civility in the Workplace. R. Martin, vol. 5, p.405 ('81).

The Cost of Scruples: A Call for Common Law Protection for the Professional Whistleblower. T.A. Halbert, vol. 10, p.1 ('85).

## ENERGY CONSERVATION

Cogeneration and Small Power Production: Florida's Approach to Decentralized Generation. J. Fuller, vol. 9, p.25 ('84).

## ENTRAPMENT

Entrapment: A Review of the Principles of Law Governing This Defense as Applied by The Eleventh Circuit Court of Appeals. vol. 7,

p.611 ('83).

## EVIDENCE

Evidence [1991 Survey of Florida Law]. D.A. Bruschi, vol. 16, p.297 ('91).

Evidence [1990 Survey of Florida Law]. D.A. Bruschi, vol. 15, p.1131 ('91).

Evidence [1988 Survey of Florida Law]. M.M. Dobson, S.I. Friedland, vol. 13, p.1011 ('89).

Evidence [1987 Survey of Florida Law]. M.M. Dobson, vol. 12, p.463 ('88).

Evidence [1986 Survey of Florida Law]. M.M. Dobson, vol. 11, p.1291 ('87).

Evidence [1985 Survey of Florida Law]. M.M. Dobson, R. Braccialarghe, vol. 10, p.1021 ('86).

Scientific Evidence [1990 Survey of Florida Law]. C.H. Garcia, vol. 15, p.1253 ('91).

Videotape as a Tool in the Florida Legal Process. R. Dee, vol. 5, p.243 ('81).

Videotaped Trial Court Proceedings: The Potential Effect on Appellate Review of Credibility Determinations. C.M. Salamone, vol. 11, p.1585 ('87).

## FAMILY LAW

*see also:*

CHILD CUSTODY

CHILD ABUSE AND NEGLECT

DIVORCE

A Survey of Family Law in Florida. M.B. Frumkes, C.L. Greene, vol. 13, p.205 ('88).

## FEDERAL JURISDICTION

Federal Pre-Emption Time to Reestablish an Old Doctrine. E.L. Stettin, vol. 12, p.1331 ('88).

Is the Supreme Court Creating Unknown And Unknowable Law? The Insubstantial Federal Question Dismissal. O.C. Lewis, vol. 5, p.11 ('80).

## FLORIDA CONSTITUTIONAL LAW

Constitutional Law [1991 Survey of Florida Law]. D.C. Hawkins, vol. 16, p.167 ('91).

Constitutional Law [1990 Survey of Florida Law]. D.C. Hawkins, vol. 15, p.1049 ('91).

Florida Constitutional Law: Decade Survey. D.C. Hawkins, vol. 14, p.693 ('90).

## FORFEITURE

Forfeiture of a Vehicle: Search for a Nexus *Griffis v. State*. V.S. Sigler, vol. 4, p.271 ('80).

## FOSTER CARE

*see also:*

### ADOPTION

No Tears for Corey Greer: A Review of Foster Care in Florida. Is it Time to Ask the Court for Relief? M. Beach, vol. 12, p.881 ('88).

## FRAUDULENT CONVEYANCES

Taking Out the Old and Bringing in the New: The Effect of the Uniform Fraudulent Transfer Act on Florida Fraudulent Conveyance Law. P.M. Lund, vol. 12, p.915 ('88).

## FREEDOM OF SPEECH

*Schutz v. Schutz*: More Than a Mere "Incidental" Burden of First Amendment Rights. D.L. Ferguson, vol. 16, p.937 ('92).

## FREEDOM OF THE PRESS

Broadcasters' First Amendment Rights Through the Courts with "The Seven Dirty Words:" *FCC v. Pacifica Foundation*. F.A. Arnold, C.E. Cameron, vol. 3, p.261 ('79).

Fair Trial-Free Press: The Camera in the Courtroom Dilemma Continues. M.S. Smith, M.R. Powell, vol. 3, p.11 ('79).

When If Ever, Should Trials Be Held Behind Closed Doors? J.A. Boyd, Jr., P.A. Lehrman, vol. 5, p.1 ('80).



## GOVERNMENT REGULATION

*see also:*

### ADMINISTRATIVE LAW

David Copperfield and FIFRA's Labelling Misadventures. M.T. Olexa, vol. 4, p.107 ('80).

Government Regulation of In Vitro Fertilization, Recombinant DNA and Cloning Biotechnologies: Where Powers End and Rights Begin. A.C. Porte, vol. 3, p.65 ('79).

Local Government [1991 Survey of Florida Law]. J.A. Mintz, vol. 16, p.375 ('91).

Local Government [1989 Survey of Florida Law]. J.A. Mintz, vol. 14, p.919 ('90).

Pesticide Regulation. Why Not Preventive Legislation? J.P. Wilkes, vol. 2, p.93 ('78).

## HANDICAPPED AND DISABLED

Retreat of the Rehabilitation Act of 1973: *Southeastern Community College v. Davis*. C.M. Collins, Jr., vol. 4, p.309 ('80).

## HOMOSEXUALITY AND LESBIANISM

HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages. M.L. Closen, C.R. Heise, vol. 16, p.809 ('92).

The Florida Statute Prohibiting Adoption by Homosexuals in View of *Seebol v. Farie*: Expressly Unconstitutional. C.L. Worsnop, vol. 16, p.983 ('92).

Lessons Learned: A Reflection Upon *Bowers v. Hardwick*. A.R. Rubenfeld, vol. 11, p.59 ('87).

## HOUSING DISCRIMINATION

The Fair Housing Act and "Discriminatory Effect": A New Perspective. F.S. Schwartz, vol. 11, p.71 ('86).

## IMMIGRATION

*see also:*

### ALIENS

Hard Decisions: Asylum Protection as Applied to Aliens Opposing

Population Control Policies. S.Y. Slaton, vol. 16, p.955 ('92).

A Primer on Adjustment of Status in the United States. J.M. Bracete, vol. 13, p.165 ('88).

*Immigration and Naturalization Service v. Chadha*: A Legislative "House of Cards" Tumbles. F.L. Rush, Jr., vol. 8, p.451 ('84).

The Five Year Residence Requirement for Naturalization: Its Operation and Employment-Related Exceptions and Amelioration. J.M. Bracete, vol. 11, p.1065 ('87).

## IMPACT FEES

Impact Fees: National Perspective to Florida Practice. P. Gougelman, vol. 4, p.137 ('80).

*St. Johns County v. Northeast Florida Builders Association* and Florida School Impact Fees: An Exercise in Semantics. J.L. Parisi, vol. 16, p.569 ('91).

## INSURANCE

Collateral Source Rule: Florida Statute § 627.7372. L.M. Lapin, vol. 5, p.261 ('81).

Florida No-Fault Insurance: Ten Years of Judicial Interpretation. P.V. Russo, vol. 6, p.241 ('83).

Florida Statutes Section 627.727: Is the Statutory Right to Reject Uninsured Motorist Coverage Really a "Right" at All? K.E. Roselli, vol. 8, p.145 ('83).

Legislative Overview: Florida Automobile Reparations Act, 1972-1978: A Review of the Modifications in the Tort Threshold. T.T. O'Malley, vol. 3, p.179 ('79).

Should an Intentional Discrimination Be Insured? D.A. Silverstone, vol. 13, p.671 ('89).

The Availability of Excess Damages in First-Party Bad Faith Cases: A Distinction Without a Difference. M.S. Buschman, vol. 15, p.297 ('91).

The Insurer's Liability for Judgments in Excess of Policy Limits and the Movement Toward Strict Liability: An Assessment. D.A. Orlousky, vol. 1, p.31 ('77).

Will the Real Party in Interest Please Stand Up? Florida Statutes Section 627.7262 as Amended. I.D. Napp, vol. 7, p.587 ('83).

## INTELLECTUAL PROPERTY

Copyright, Fair Use and Photocopying: A Stone Conundrum. B. Anderson, vol. 3, p.187 ('79).

Is Home Videotaping Fair Use of Copyright Programs? *Universal City Studios, Inc. v. Sony Corporation of America*. H.S. Toland, vol. 6, p.663 ('82).

The Current State of Computer Software Protection: A Survey and Bibliography of Copyright, Trade Secret and Patent Alternatives. B.R. Inofuentes, vol. 8, p.107 ('83).

The Protection of Useful Articles and the Elusive Concept of Conceptual Separability: *Brandir International Inc. v. Cascade Pacific Lumber Co.* G. Coleman, vol. 13, p.1417 ('89).

## INTERNATIONAL CRIMINAL LAW

A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality. M.C. Bassiouni, vol. 15, p.353 ('91).

An International Criminal Court—An Emerging Idea. J.B. Anderson, vol. 15, p.433 ('91).

Apprehending and Prosecuting Nazi War Criminals in the United States. J.N. Mausner, vol. 15, p.747 ('91).

Crime: The UN Agenda on International Cooperation in the Criminal Process. R.S. Clark, vol. 15, p.475 ('91).

Draft Statute: International Criminal Tribunal. M.C. Bassiouni, vol. 15, p.373 ('91).

Extraterritorial Jurisdiction: Its Use, Its Roots and Its Viability. R.D. Gregorie, vol. 15, p.625 ('91).

International Cooperation in a World Marketplace: Preventing & Prosecuting Commodity Futures Fraud & Abuses. L.L. Davis, B. Zagaris, vol. 15, p.507 ('91).

International Criminal Law and the Macro-Micro Problem. A. D'Amato, vol. 15, p.343 ('91).

Protecting the Rule of Law from Assault in the War Against Drugs and Narco-Terrorism. B. Zagaris, vol. 15, p.703 ('91).

The Development, Objectives and Planned Activities of the International Criminal Law Center of Fordham University School of Law. A. Abramovsky, J. Frank, vol. 15, p.501 ('91).

The Double Criminality Rule and Extradition: A Comparative Analysis. S.A. Williams, vol. 15, p.581 ('91).

The Torture Convention and the Reception of International Crimi-

nal Law Within the United States. D.P. Stewart, vol. 15, p.449 ('91).

United States International Drug Control-Policy, Extradition, and the Rule of Law in Colombia. M.A. Sherman, vol. 15, p.661 ('91).

## INTERNATIONAL LAW

*see also:*

### CONFLICT OF LAWS

International Law [1988 Survey of Florida Law]. R.M. Jarvis, vol. 13, p.1105 ('89).

International Law [1987 Survey of Florida Law]. R.M. Jarvis, vol. 12, p.547 ('88).

The Judicial System of Postrevolutionary Cuba. L. Sala, vol. 8, p.43 ('83).

## INVERSE CONDEMNATION

Florida Inverse Condemnation Law: A Primer For The Litigator. R.D. Schwenke, D.E. Hemke, vol. 5, p.167 ('81).

## JOINT AND SEVERAL LIABILITY

Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk? S.A. Kraft, vol. 10, p.165 ('86).

## JUDICIARY

Response. L.A. Graglia, vol. 14, p.53 ('89).

A Response to Professor Graglia. M. Rohr, vol. 14, p.73 ('89).

A Sword for a Scabbard: Reflections on the Making of the Judiciary Act of 1789. S.I. Kutler, vol. 14, p.10 ('89).

An Appreciation of Justice William J. Brennan, Jr. W.A. Fletcher, vol. 15, p.15 ('91).

An Argument Against Judicial Immunity for Employment Decisions. R.S. Glazier, vol. 11, p.1127 ('87).

An Assessment of G. Edward White's "Coterminous Power Theory". S. Horn, vol. 14, p.195 ('89).

An Introduction to Courts in American Society: A Symposium on the Bicentennial of the Federal Judiciary Act of 1789. J.C. Burris, vol. 14, p.154 ('89).

Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary. J. Tiedemann, vol. 10, p.139 ('86).

*Breakstone v. MacKenzie*: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There are No Clear Winners. P. Cooke, vol. 15, p.323 ('91).

Dear Boss: A Law Clerk's Tribute to Justice Brennan. E.J. Rosenkranz, vol. 15, p.23 ('91).

Eighteen Years in the Judicial Catbird Seat. J.C. Adkins, L.R. Sammuels, P.H. Crockett, vol. 10, p.1 ('86).

Federal Judges' Absolute Immunity from Criminal Prosecution Prior to Impeachment: *U.S. v. Hastings*. V.Santoro, vol. 7, p.623 ('83).

Judicial Impartiality and the Judiciary Act of 1789. J.T. Noonan, Jr., vol. 14, p.123 ('89).

Judicial Review and the Supreme Court: An Accelerating Curve. R. Handberg, vol. 2, p.1 ('78).

Justice Harry A. Blackmun. B.S. Rogow, vol. 14, p.201 ('89).

Keynote Address [1991 Survey of Florida Law]. G. Kogan, vol. 16, p.1 ('91).

Looking Back on Eighteen Years as a Justice of the Supreme Court of Florida. J.A. Boyd, Jr., vol. 10, p.25 ('86).

Panel Discussion [Judicial Impartiality and the Judiciary Act of 1789]. M. Burns, J. Flackett, J. Munn, vol. 14, p.143 ('89).

Panel Discussion [Making of the Judiciary Act of 1789]. D. Hurley, W. Hoeveler, M. May, vol. 14, p.111 ('89).

Panel Discussion [The Judiciary Act of 1789]. B. Rogow, J. Sale, T. Van Vliet, vol. 14, p.111 ('89).

Panel Discussion [The Separation Doctrine]. S. Wisotsky, S. Mager, J. Sessions II, vol. 14, p.241 ('89).

Pathways for Future Justice. B.F. Overton, vol. 1, p.1 ('77).

Recovering Coterminous Power Theory. G.E. White, vol. 14, p.155 ('89).

Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law-Proposal for Reform. L.D. D'Agostino, vol. 10, p.201 ('86).

Reflections About the United States Supreme Court. A.J. Goldberg, vol. 5, p.159 ('81).

Reply to G. Edward White's "Coterminous Power Theory". O.C. Lewis, vol. 14, p.195 ('89).

Roundtable Discussion [Symposium on the Bicentennial of the Federal Judiciary Act of 1789]. R.I. Abrams, J.B. Anderson, L.A. Graglia, S.I. Kutler, J.T. Noonan, Jr., G.E. White, vol. 14, p.43 ('89).

Shelter from the Storm. A. Chase, vol. 14, p.183 ('89).

Some Brief Observations on G. Edward White's Rediscovery of

the Coterminous Power Theory. J.C. Burris, vol. 14, p.215 ('89).

Stripping Away the Fictions: Interview with Mr. Justice Arthur J. Goldberg. Vol. 6, p.553 ('82).

The Federal Courts in the 21st Century. M. Rosenberg, vol. 15, p.105 ('91).

The First Amendment and Its Religion Clauses: Where Are We? Where Are We Going? H.A. Blackmun, vol. 14, p.29 ('89).

The Growth of National Judicial Power Replies. L.A. Graglia, vol. 14, p.53 ('89).

The Judiciary Act of 1789: Some Personal Reflections. E. Holtzman, vol. 14, p.253 ('89).

The Separation Doctrine—Prescription for Conflict or Cause for Creative Constitutionalism? J.B. Anderson, vol. 14, p.227 ('89).

The Supreme Court in a New Role: From Negative Naysayer to Affirmative Commander. A.S. Miller, vol. 6, p.1 ('81).

The Worldwide Influence of the United States Constitution as a Charter of Human Rights. W.J. Brennan, Jr., vol. 15, p.1 ('91).

Through the Looking Glass with Lino Graglia. P.R. Joseph, vol. 14, p.75 ('89).

Tribute to Justice William J. Brennan, Jr. D.J. O'Hern, vol. 15, p.11 ('91).

## JUVENILE JUSTICE

Juvenile Crime: The Implications and Effects on Juveniles in Florida. R.C. Mahler, vol. 13, p.1317 ('89).

Juvenile Justice In Florida: Bringing Rehabilitation Back Into Style. J. Levine, vol. 8, p.255 ('84).

Juvenile Law [1991 Survey of Florida Law]. M.J. Dale, vol. 16, p.333 ('91).

Juvenile Law [1990 Survey of Florida Law]. M.J. Dale, vol. 15, p.1169 ('91).

Juvenile Law [1989 Survey of Florida Law]. M.J. Dale, vol. 14, p.859 ('90).

Juvenile Law [1988 Survey of Florida Law]. M.J. Dale, vol. 13, p.1159 ('89).

Prosecutorial Waiver of Juveniles into Adult Criminal Court: The Ends of Justice . . . or the End of Justice? *State v. Cain*. Vol. 5, p.487 ('81).

Speedy Trial Rights for Florida's Juveniles: A Survey of Recent Interpretations by Florida Courts. B.D. Stull, vol. 6, p.437 ('82).

## LABOR LAW

*see also:*

EMPLOYEE RIGHTS AND TECHNOLOGY

EMPLOYER AND EMPLOYEE

A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990. E.J. Kemp, Jr., C.G. Bell, vol. 15, p.31 ('91).

Employment and Labor Law [1988 Survey of Florida Law]. J. Sanchez, vol. 13, p.981 ('88).

## LANDLORD AND TENANT

Landlord Liability to Tenants for Crimes of a Third Party: The Status in Florida. T.M.B. Van Vliet, vol. 6, p.145 ('81).

## LAW AND THE ARTS

Art and Censorship. R. Serra, vol. 14, p.323 ('90).

Art and First Amendment Protection in Light of *Texas v. Johnson*. J.N. Schwartz, vol. 14, p.487 ('90).

Art and Income Taxes—The Changing Scene. R.E. Lerner, vol. 14, p.533 ('90).

Art Forgery: The Art Market and Legal Considerations. P.B. Skolnik, vol. 7, p.315 ('83).

Art Funding: The Fight Over Sex, Money and Power. N. Fox, vol. 14, p.369 ('90).

Art, Obscenity and the First Amendment. J. Bresler, vol. 14, p.357 ('90).

A Critique of the Visual Artists Rights Act of 1989. E.J. Damich, vol. 14, p.407 ('90).

Avant-Garde, Kitsch and Law. A. Chase, vol. 14, p.605 ('90).

Drafting "Work For Hire" Agreements After *Community for Creative Non-Violence v. Reid*. J.S. Perwin, vol. 14, p.459 ('90).

Federal Moral Rights Legislation: The Need for Caution. R.A. Gorman, vol. 14, p.421 ('90).

Florida's Art Consignment Statute: A Trap for the Unwary Artist? C.M. Heise, vol. 14, p.473 ('90).

Moral Rights: The Long and Winding Road Toward Recognition. J.A. Cline, vol. 14, p.435 ('90).

One If By Land, Two If By Sea. A.I. Jacobs, vol. 14, p.343 ('90).

Reauthorizing the National Endowment for the Arts. B. Fein, vol. 14, p.333 ('90).

Tax-Paid Obscenity. J. Helms, vol. 14, p.317 ('90).

The General Practice of Art Law. I.M. Lowe, P.A. Mahon, vol. 14, p.225 ('90).

The Lawyer as an Artist. R.I. Abrams, vol. 14, p.573 ('90).

The Role of Creativity in Social and Political Processes. G. Harrow, vol. 14, p.545 ('90).

"Tilted Arc" Destroyed. R. Serra, vol. 14, p.531 ('90).

Where Are We Now? Some Thoughts on "Art Law". S.D. Biederman, vol. 14, p.313 ('90).

## LAW AND LITERATURE

Coming of Age Some More: "Law and Literature" Beyond the Cradle. R. Weisberg, vol. 13, p.107 ('88).

## LEGAL EDUCATION

A Dream: On Discovering the Significance of Fear. C.R. Lawrence, vol. 10, p.627 ('86).

A Federal Litigation Program: For Students, Inmates and the Legal Profession. Vol. 4, p.377 ('80).

A Foolish Consistency: The Law School Exam. J.I. Motley, vol. 10, p.723 ('86).

A Law School With A Bent for Public Service. D.H. Pollitt, vol. 10, p.779 ('86).

A Neglected Minority—Women In Law School. F. Seidenberg, vol. 10, p.853 ('86).

A New Direction In Legal Education: The CUNY Law School at Queens College. C.R. Halpern, vol. 10, p.549 ('86).

Application of The "Tipping Point" Principle to Law Faculty Hiring Policies. D.A. Bell, Jr., vol. 10, p.319 ('86).

A Second Chance: Learning What Law School Never Taught Me. Vol. 10, p.289 ('86).

A Semi-Modest Proposal: Is a Little Business Sense Too Much to Ask? M.M. Holmes, vol. 10, p.599 ('86).

Congestion and Beyond: Change and Continuity In Modern Fresh Legal Education—A Design for U.S. Law Schools. D. Applebaum, vol. 10, p.297 ('86).

CUNY Law School: Outside Perspectives and Reflections. J. Kleinberg, M. Barnes, vol. 12, p.1 ('87).

Economics of Mind: A Collaborative Reflection. D. Khosla, P.



Williams, vol. 10, p.619 ('86).

Enlarging Legal Education: Berkeley's Jurisprudence and Social Policy Program. S.L. Messinger, P. Selznick, vol. 10, p.691 ('86).

Finding Peace Law and Teaching It. A.F. Ginger, vol. 10, p.521 ('86).

How Women Betray Themselves. V. Wilson, vol. 10, p.889 ('86).

Ideas, Affirmative Action and The Ideal University. K.E. Parker, vol. 10, p.761 ('86).

Law School Clinical Education in Florida. A.L. Spitzer, vol. 12, p.797 ('88).

Law Schools: Where the Elite Meet To Teach. J.A. Glickstein, vol. 10, p.541 ('86).

Lawyering in the Classroom: An Address to First Year Students. A.G. Anderson, vol. 10, p.271 ('86).

Lawyers Above the Law. G. Harrow, vol. 10, p.575 ('86).

Legal Education and the English Language. S.A. Weigel, vol. 10, p.887 ('86).

Legal Education: The Last Academic Bastion of Sex Bias? Vol. 10, p.457 ('86).

Legal Externships: Can They Be Valuable Clinical Experiences for Law Students? H. Rose, vol. 12, p.95 ('87).

Liberal Values in Legal Education. D.M. Kennedy, vol. 10, p.603 ('86).

Of Law, the River and Legal Education. G. Minda, vol. 10, p.705 ('86).

Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law. A. Chase, vol. 5, p.323 ('81).

Preparation of Lawyers In England and the United States: A Comparative Glimpse. R.C. Crampton, vol. 10, p.445 ('86).

Reminiscence. P. Rauch, vol. 10, p.793 ('86).

Reteaching Criminal Procedure: A Public Interest Model for the Defense of Criminal Cases. P. Savoy, vol. 10, p.801 ('86).

Reworking the Latent Agenda of Legal Education. C.F. Epstein, vol. 10, p.449 ('86).

Robert Hutchings' Question Defining the Purpose of Legal Education—Then Doing Something About It. F.C. Tausend, vol. 10, p.851 ('86).

Ruminations On Legal Education In The Next Decade. D.W. Llewellyn, R.C. Turkington, vol. 10, p.647 ('86).

Staying Alive. L.S. McGough, vol. 19, p.671 ('86).

Teaching and Writing: Curriculum Reform as an Exercise In Critical Education. G. Torres, vol. 10, p.867 ('86).

Teaching First-Year Students: The Inevitability of a Political Agenda. L. Letwin, vol. 10, p.645 ('86).

The City University of New York Law School: An Insider's Report. V. Merton, vol. 12, p.\*\*\* ('87).

The Habit of Success. H.C. Anawalt, vol. 10, p.255 ('86).

Studies of Legal Education: A Review of Recent Reports. R.S. Redmount, T.L. Shaffer, vol. 1, p.9 ('77).

The Integration of Responsibility and Values: Legal Education In an Alternative Consciousness of Lawyering and Law. J. Lesnick, vol. 10, p.633 ('86).

The Law School and the Profession: A Need for Bridges. F.M. Coffin, vol. 11, p.1053 ('87).

The Law School as a Model For Community. M.M. Burns, vol. 10, p.329 ('86).

The New Nova Curriculum: Training Lawyers for the Twenty-First Century. R.I. Abrams, M.R. Masinter, vol. 12, p.77 ('87).

The Pedagogy of Community: Trust and Responsibility at CUNY Law School. J. Farago, vol. 10, p.465 ('86).

The Play's the Thing . . . . J.B. Chase, vol. 10, p.425 ('86).

The Politics of Meeting. P. Gabel, vol. 10, p.517 ('86).

The Reality of Law School. A.B. Tross, vol. 10, p.879 ('86).

The Tunnel Vision of Legal Training. J.R. Grodin, vol. 10, p.547 ('86).

The Use of Appellate Case Report Analysis In Modern Legal Education: How Much Is Too Much? Vol. 10, p.496 ('86).

Too Important to Leave to the Lawyers: Undergraduate Legal Studies and its Challenge to Professional Legal Education. D.E. Arzt, vol. 12, p.\*\*\* ('88).

Training Lawyers for the Powerless: What Law Schools Should Do to Develop Public Interest Lawyers. J.C. Costello, vol. 10, p.431 ('86).

What Should a Law Teacher Believe? Vol. 10, p.403 ('86).

Who Needs Information When You're Working Underground? Legal Education, Social Context, and the Public Interest. A. Chase, vol. 12, p.55 ('87).

## LEGAL ETHICS

Client Perjury: The Law in Florida. R. Braccialarghe, vol. 12,

p.707 ('88).

Ethics [1991 Survey of Florida Law]. J.P. Needelman, vol. 16, p.281 ('91).

Legal Ethics [1986 Survey of Florida Law]. H.R. Messing, vol. 11, p.1435 ('87).

Professional Responsibility [1985 Survey of Florida Law]. H.R. Messing, vol. 10, p.1107 ('86).

Professional Responsibility [1988 Survey of Florida Law]. P.J. Allen, vol. 13, p.1195 ('89).

The Corporation's Attorney-Client Gamble: Privileged Communications or Discovery Prone Disclosures. Vol. 6, p.79 ('82).

## LEGAL PROFESSION

Bringing It All Back Home: Toward a Closer Rapport Between Lawyer and Layperson. M.L. Richmond, vol. 6, p.97 ('81).

Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question. A. Morrison, vol. 4, p.363 ('80).

Private Homosexual Activity and Fitness to Practice Law: Florida Board of Bar Examiners, *In re N.R.S.* L.J. Roberts, vol. 6, p.519 ('82).

## LEGAL REFORM

"A Task of No Common Magnitude"; The Founding of the American Law Institute. W.P. LaPiana, vol. 11, p.1085 ('87).

## LEGAL SCHOLARSHIP

A Cure for Scholarship Schizophrenia: A Manifesto For Sane Productivity and Productive Sanity. R.B. Brown, vol. 12, p.39 ('88).

Advice to the Untenured. G.L. Richmond, vol. 13, p.79 ('88).

A Law School for the Consumer. M. Rohr, vol. 13, p.101 ('88).

How Many Catz Can Stand on the Head of a Pin, or Andrew Lloyd Webber, Where Are You Now That We Need You? C.A. Wright, vol. 13, p.1 ('88).

Legal Scholarship, Legal Realism, and the Law Teacher's Intellectual Schizophrenia. C. Byse, vol. 13, p.9 ('88).

The Cultural Milieu of Law. M.L. Richmond, vol. 13, p.89 ('88).

The Legal Scholar as Producer. A. Chase, vol. 13, p.57 ('88).

This Is Not an Article, Or Scholarship: The Greek Salad. R.I. Abrams, vol. 13, p.33 ('88).

Why Law Professors Should Not be Hessian-Trainers. R.M. Jarvis, vol. 13, p.69 ('88).

## LEGISLATION

Florida Nonsmokers Need Legislative Action to "Clear the Air". C.R. Cowan, vol. 8, p.389 ('84).

The War Powers Resolution of 1973: An Attempt to Regulate War Powers Proves Inadequate. P.D. Novack, vol. 8, p.427 ('84).

When Open-Meeting Laws Confront State Legislatures: How Privacy Survives in the Capitol. J. Peterson, vol. 10, p.107 ('85).

## LEGISLATORS AND ADMINISTRATORS—CHILDREN

Accreditation of Florida's Child Welfare Services: An Idea Whose time Has Come. M.B.O. Walsh, vol. 8, p.349 ('84).

For the Sake of Our Children: Selected Legislative Needs of Florida's Children. E.I. Hoffenberg, vol. 8, p.223 ('84).

Funding the Most Costly Alternative: A Legislative Paradox. W.W. Jenkins, vol. 8, p.331 ('84).

HRS and the Health and Welfare of Florida's Children. W.W. Ausbon, vol. 8, p.359 ('84).

The Governor's Constituency for Children: Concerned Adults Unite in Lobbying Efforts. M. Kempel, vol. 8, p.383 ('84).

## MARITAL PROPERTY

Property Distribution Upon Dissolution of Marriage: Florida's Need for an Equitable Distribution Statute. M.S. Gentile, vol. 8, p.71 ('83).

## MEDIATION

Mediation [1990 Survey of Florida Law]. G.L. Waxman, S. Press, vol. 15, p.1211 ('91).

Mediation [1989 Survey of Florida Law]. G.L. Waxman, vol. 14, p.238 ('90).

Medical Mediation—A Judicially Supervised Social Hours. E. Winitz, vol. 3, p.165 ('79).

## MEDICAL JURISPRUDENCE

*see also:*

MEDICAL MALPRACTICE

Toward a Legally and Medically Acceptable Definition of Death.

Vol. 5, p.471 ('81).

### MEDICAL MALPRACTICE

Discoverability of Hospital Incident Reports and Taxing Expert Witness Fees in Medical Malpractice Litigation in Florida: Plaintiff's Perspective. M. Flynn, vol. 13, p.189 ('88).

Hospital Liability in View of *Insinga v. LaBella*: No Relief In Sight. L.H. Friedland, vol. 14, p.1115 ('90).

### MENTAL HEALTH

A Proposal for Changing Florida's Civil Commitment System. W.C. Schmidt, vol. 6, p.385 ('82).

### MUNICIPAL CORPORATIONS

Protecting Municipalities Against Unnecessary State Infringement: the Unrealized Wake of the Municipal Home Rule Powers Act, and *Temple Terrace*. C.R. Eisen, vol. 3, p.119 ('79).

### MUSIC AND OBSCENITY

Essay: Too Live a Crew. B. Rogow, vol. 15, p.241 ('91).

Obscenity, Music and the First Amendment: Was the Crew 2 Lively? E. Campbell, vol. 15, p.159 ('91).

Race, Rap and the Community Standards Test of Obscenity: The Community of Culture. S.I. Friedland, vol. 15, p.119 ('91).

### NEGLIGENT ENTRUSTMENT

Who's Driving, Anyway?: The Status of Negligent Entrustment in Florida After *Horne v. Potamkin Chevrolet, Inc.* D.S. Whitebook, vol. 12, p.939 ('88).

### NUCLEAR WEAPONS

A Grenville Clark Hypothetical. G.T. Dunne, vol. 7, p.165 ('82).

A Prelude to the Constitutional Debate. O. Lewis, vol. 7, p.56 ('82).

Admirable Ends—Ineffective Means. I. Jenkins, vol. 7, p.127 ('82).

In Brief Rejoinderf. A.S. Miller, vol. 7, p.171 ('82).

International Law as Law of the Land. M. Feinrider, vol. 7, p.103 ('82).

Lawyers Can Contribute to Nuclear Weapons Debate. L.H. Levinson, vol. 7, p.137 ('82).

Letter From the Government. W.H. Taft, IV, vol. 7, p.141 ('82).

Nuclear War: The End of Law. M. Ball, vol. 7, p.53 ('82).

Nuclear Weapons and Constitutional Law. A.S. Miller, vol. 7, p.21 ('82).

Nuclear Weapons Policy: The Ultimate Tyranny. E.L. Meyrowitz, vol. 7, p.93 ('82).

Nuclear Weapons: Unconstitutional or Just Unjust. G.L. McDowell, vol. 7, p.143 ('82).

Protective Posterity. A. Soifer, vol. 7, p.39 ('82).

The Constitution and Nuclear Defense. A.A. Morris, vol. 7, p.149 ('82).

The Frail Constitution of Good Intentions. S.C. Brubaker, vol. 7, p.65 ('82).

Wisdom, Constitutionality and Nuclear Weapons Policy. D. Alfange, Jr., vol. 7, p.75 ('82).

## NURSING

Nurse Practitioners: Here Today. . .Gone Tomorrow? S. Havens, vol. 6, p.365 ('82).

## PARENT AND CHILD

*see also:*

ADOPTION

CHILD ABUSE AND NEGLECT

CHILD CUSTODY

CHILD TORT IMMUNITY

PARENT LIABILITY

SUPPORT OF DEPENDANTS

Parental Consortium in Florida: Our Children Have No Place to Turn. K. Metcalf, vol. 13, p.295 ('88).

## PARENT LIABILITY

Parental Liability for the Torts of their Minor Children: Limits, Logic and Legality. R.C. Levine, vol. 9, p.205 ('84).

## PARTNERSHIPS

Limited Partnership Act [1986 Survey of Florida Law]. R.R. Thames, vol. 11, p.1405 ('87).

## PENSION PLANS

Conflicts of Interest Arising under ERISA's Fiduciary Standards: Can the Trustee Ever Be Prudent, As Long As He Faces Dual Loyalties? D.I. Weiss, vol. 9, p.413 ('85).

## POLICE

Complaint Review Boards for Florida's Police Officers: Who's Complaining? A.J. Carriuolo, vol. 7, p.353 ('83).

## PREMISES LIABILITY

Liability of Commercial Premise Owners to Injured Invitees: *Estate of Starling v. Fisherman's Pier*. R. Kushner, vol. 6, p.535 ('82).

Premises Liability in Florida After *Holiday Inns, Inc. v. Shelburne*: Will Florida Extend a Landowner's Duty of Care Beyond the Physical Boundaries of His Property? B.G. Warner, vol. 16, p.597 ('91).

Premises Liability in Florida in Light of *Walt Disney World Co. v. Goode*: Confusing Legal Remedies with Good Samaritan Impulses. S.G. Kravirtz, vol. 12, p.247 ('87).

## PRODUCTS LIABILITY

Products Liability Statute of Repose—A Florida Perspective. L.D. Caldwell, vol. 11, p.849 ('87).

The Products Liability Statute of Repose in Florida: A Trap for the Unwary. W.M. Tuttle, vol. 7, p.563 ('83).

The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products. F.J. Cavico, Jr., vol. 12, p.213 ('87).

## PUBLIC LEGAL SERVICE

Introduction to Nova Conference on Public Interest Practice in Florida. B. Rogow, vol. 4, p.341 ('80).

Pathways for Future Justice. B. Overton, vol. 1, p.1 ('77).

The Old Lawyer Said: "I Look Out for My Paying Clients," The Young Lawyer Responded: "But Good Lawyers Must Also Do Some Public Service." C. Smith, vol. 4, p.349 ('80).

The Private Bar and the Public Lawyer: An Essential Partnership. D.J. Bradley, vol. 4, p.357 ('80).

## RAPE

Problems of Convicting a Husband for the Rape of His Wife. S. Ruby, vol. 9, p.351 ('85).

## REAL PROPERTY

*see also:*

LANDLORD AND TENANT

PREMISES LIABILITY

ZONING

Florida's Land Trust Act: An Overview. M.A. Sherman, vol. 6, p.489 ('82).

Florida's Property Appraisers. D.M. Hudson, vol. 7, p.477 ('83).

*Johnson v. Davis*: New Liability for Fraudulent Nondisclosure in Real Property Transactions. R.D. Braeunig, vol. 11, p.145 ('86).

Mandatory Titles: The Legality of Land Development Linkage. F.P. Bosselman, N.E. Stroud, vol. 9, p.381 ('85).

Property [1991 Survey of Florida Law]. R.B. Brown, vol. 16, p.399 ('91).

Real Property [1990 Survey of Florida Law]. R.B. Brown, vol. 15, p.1227 ('91).

Property [1989 Survey of Florida Law]. R.B. Brown, vol. 14, p.939 ('90).

Real Property [1988 Survey of Florida Law]. W.P. Sklar, vol. 13, p.1221 ('89).

Property [1987 Survey of Florida Law]. J.J. Brown, vol. 12, p.617 ('88).

Property [1986 Survey of Florida Law]. J.M. Grohman, vol. 11, p.1467 ('87).

Real Estate Broker Liability in Florida: Is Mandatory Housing Inspection in Florida's Future? Vol. 11, p.825 ('87).

Real Estate Purchase Options. R.B. Brown, vol. 12, p.147 ('87).

Solar Access Rights in Florida: Is There a Right to Sunlight in the Sunshine State? K.J. Potis, vol. 10, p.125 ('85).



The Preservation of Florida's Public Trust Doctrine. I.J. Schacter, vol. 10, p.227 ('86).

## RELIGION

Religious Deprogramming: A Solution Through Judicially Approved Guardians. I.J. Schacter, vol. 7, p.383 ('83).

## REPRODUCTIVE RIGHTS

Forward—Symposium on Reproductive Rights. N. Taub, vol. 13, p.319 ('89).

Introduction—Symposium on Reproductive Rights. Working Group of the Project on Reproductive Laws for the 19902. Vol. 13, p.321 ('89).

Motherhood: Beyond Patriarchy. B.K. Rothman, vol. 13, p.481 ('89).

Normative Regulation of Reproductive Technology in Israel. A. Shapira, vol. 13, p.609 ('89).

Perspective on Surrogacy: Risks, Rewards, and Personal Choices. N. Keane, vol. 13, p.487 ('89).

Predicting the Future of Privacy in Pregnancy: How Medical Technology Affects the Legal Rights of Pregnant Women. G. Anna, vol. 13, p.329 ('89).

Reproduction and Medical Interventionism: An Historical Comment. C. Spillenger, vol. 13, p.385 ('89).

Should Mom be Constrained in the Best Interests of the Fetus? P. King, vol. 13, p.393 ('89).

Uniform Status of Children of Assisted Conception Act: A View From the Drafting committee. R.C. Robinson, P.M. Kurtz, vol. 13, p.491 ('89).

Weaving "Birth" Technology into the "Value and Policy Web" of Medicine, Ethics and Law: Should Policies on "Conception" Be Consistent? M.A. Somerville, vol. 13, p.515 ('89).

Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women. S. Stefan, vol. 13, p. 405 ('89).

Will *Roe v. Wade* Survive the Rehnquist Court? D. Johnsen, M. Wilder, vol. 13, p.457 ('89).

Women, Abortion and Civil Disobedience. L. Paltrow, vol. 13, p.471 ('89).

Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law. M. Ashe, vol. 13, p.355 ('89).

#### RIGHT TO COUNSEL

Does the Constitution Guarantee Court-Appointed Counsel When the Pleas Is "Don't Take My Baby Away"? *Lassiter v. Department of Social Services*. R.S. Ehrlich, vol. 6, p.289 ('82).

Right to Appointed Counsel: the Outer Limits: *Davis v. Page*. L.C. Brown, vol. 5, p.285 ('81).

#### RIGHT TO DIE

Death with Dignity and the Terminally Ill: The Need for Legislative Action: *Satz v. Perlmutter*. J. Hand, F. Chapman, vol. 4, p.257 ('80).

In Re Living Will. Vol. 5, p.445 ('81).

#### RIGHT TO PRIVACY

*Bowers v. Hardwick*: The Extension of the Right to Privacy to Private Consensual Homosexual Conduct. R. Glazier, vol. 10, p. 175 ('85).

*In re A.C.*: A Court-Ordered Cesarean on a Terminally Ill Patient—A Precedent for Nonconsensual Organ Harvesting. R.H. Sturges, vol. 13, p.649 ('89).

#### RIGHT TO VOTE

Electoral Graffiti: The Right to Write-In. R. Batey, vol. 5, p.201 ('81).

#### SECURITIES

Blue Sky Laws [1990 Survey of Florida Law]. M.T. Murtaugh, vol. 15, p.953 ('91).

Blue Sky Laws [1986 Survey of Florida Law]. M.B. Cane, vol. 11, p.1179 ('87).

*Lowe v. Securities and Exchange Commission*: The Deterioration of Financial Newsletter Regulation. L.D. Coffman, vol. 11, p.1267 ('86).

*Shearson/American Express v. McMahon*: The Expanding Scope

of Securities Arbitration. Vol. 12, p.1375 ('88).

## SENTENCING

An Examination of Issues in the Florida Sentencing Guidelines. R.J. Spitzmiller, vol. 8, p.687 ('84).

A Proposal to Fix Florida's Broken System of Post-Conviction Relief from Illegal Sentences. R. Rivas, vol. 14, p.1147 ('90).

Harmless or Reversible Error? Rule 3.390(a). R.S. Kaib, vol. 6, p.355 ('82).

Preservation of Issues Under the Sentencing Guidelines. M.E. Raiden, vol. 13, p.271 ('88).

Sentencing: A Discretionary Judicial Function. G.L. Seet, vol. 3, p.105 ('79).

## SOVEREIGN LIABILITY

Constitutionality of Florida's Statute Limiting Tort Recovery Against Municipalities: *Cauley v. City of Jacksonville*. M.A. Bobko, vol. 6, p.335 ('82).

911: The Call That No One Answered. D.L. Bates, vol. 10, p.1319 ('86).

## SUPPORT OF DEFENDANTS

Post-Majority Support in Florida: An Idea Whose Time Has Come. B.B. Wagner, vol. 5, p.271 ('81).

## TAXATION

Constitutional Law: Privilege Against Self-Incrimination: Conviction of a Non-Tax Related Offense Secured Through Use of Federal Tax Returns. *Garner v. United States*. Vol. 1, p.145 ('77).

*Container Corporation of America v. Franchise Tax Board*: Florida Imports the Unitary Tax. S. Simpson, vol. 8, p.723 ('84).

Hurricane Losses: Mandatory Practice and Taxpayer Options. G. Ritter, vol. 6, p.175 ('81).

IRC Section 2518 and the Law of Disclaimers. Vol. 4, p.187 ('80).

I.R.C. Section 2518 and The Law of Disclaimers—An Update. D.J. Jaret, vol. 7, p.243 ('83).

Joint Tenancies and the Tax Reform Act of 1976. vol. 3, p.213 ('79).

Tax [1987 Survey of Florida Law]. I.R. Gershon, vol. 12, p.651 ('88).

Tax [1986 Survey of Florida Law]. I.R. Gershon, vol. 11, p.1501 ('87).

Tax [1985 Survey of Florida Law]. I.R. Gershon, vol. 10, p.1153 ('86).

Tax-Free Fringe Benefits and Social Security: Is It Time to Change the Rules? G.L. Richmond, vol. 6, p.83 ('81).

The Impact of FIRPTA and ERTA on Florida Real Estate Investment By a Netherlands Antilles Corporation. M. Patrick, vol. 6, p.163 ('81).

The Marriage Penalty: Restructuring Federal Law to Remedy Tax Burdens on Married Couples. G.L. Richmond, vol. 5, p.31 ('80).

## TORTS

Torts [1991 Survey of Florida Law]. E.D. Schuster, vol. 16, p.421 ('91).

Torts [1990 Survey of Florida Law]. M.L. Richmond, vol. 15, p.1285 ('91).

Torts [1989 Survey of Florida Law]. M.L. Richmond, vol. 14, p.965 ('90).

Torts [1988 Survey of Florida Law]. M.L. Richmond, vol. 13, p.1245 ('88).

Torts [1987 Survey of Florida Law]. M.L. Richmond, vol. 12, p.665 ('88).

Torts [1986 Survey of Florida Law]. M.L. Richmond, vol. 11, p.1519 ('87).

Torts [1985 Survey of Florida Law]. P.R. Joseph, vol. 10, p.1167 ('86).

## WATER

The Warren S. Henderson Wetlands Protection Act of 1984: Enough Protection? V.D. Hilley, vol. 9, p.141 ('84).

Water Transfer: Shall We Sink or Swim Together? G.S. Betensky, vol. 7, p.523 ('83).

## WILLS AND TRUSTS

The Fate of a Non-Resident Personal Representative: *In Re Estate of Greenberg*. Vol. 5, p.497 ('81).

Up From *Carpenter*: Undue Influence In Will Contests. J.E. Fennelly, vol. 16, p.515 ('91).

#### WORKER'S COMPENSATION

Legislative Overview: The Florida Worker's Compensation. B. Abberger, vol. 4, p.91 ('80).

Worker's Compensation and the Employee's Right to Maintain a Tort Action Against the Parent Corporation: *Wilkerson v. Gulfstream Land and Development Corporation*. Vol. 6, p.29 ('82).

Workers' Compensation [1991 Survey of Florida Law]. J.F. Robinson, vol. 16, p.443 ('91).

Workmen's Compensation: What If the Employer Gets the Employee Drunk? Vol. 3, p.239 ('79).

#### WRONGFUL DEATH

Wrongful Death: Florida Still Requires "Live Birth" as a Prerequisite to Recovery: *Duncan v. Flynn*. Vol. 3, p.325 ('79).

#### ZONING

*see also:*

##### IMPACT FEES

Municipal Regulation of "Adult Entertainment"—The Game Without Rules? F.F. Knox, R.D. Klausner, vol. 3, p.131 ('79).

Transferable Development Rights: An Innovative Concept Faces an Uncertain Future In South Florida. R.B. Ressler, vol. 8, p.201 ('83).