

# *Nova Law Review*

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*Volume 1, Issue 1*

1977

*Article 1*

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## Nova Law Review Full Issue Volume 1

VOLUME 1  
SPRING 1977



**NOVA LAW JOURNAL**

Pathways for Future Justice  
*The Honorable Ben F. Overton*

Studies of Legal Education: A Review of Recent Reports  
*Robert S. Redmount and Thomas L. Shaffer*

The Insurer's Liability for Judgments in Excess of Policy Limits  
and the Movement toward Strict Liability: An Assessment  
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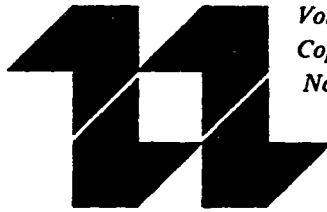
Anti-Sex Discrimination Laws: A Mandate for the Redistribution  
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Constitutional Law: Freedom of Speech Versus an Attorney's  
Criticism of the Bench: A Proposal for Parity between Lawyer's  
and Layperson's Right to Free Speech

# **NOVA LAW JOURNAL**

**Volume 1**

**1977**



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## Pathways for Future Justice\*

**THE HONORABLE BEN F. OVERTON**

*Chief Justice*

*The Supreme Court of Florida*

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Our judicial system is said to be in a state of crisis. Courts across the entire United States are being asked to absorb increased court work; the judiciary is losing its attractiveness for outstanding lawyers; and the public continues to be uninformed about the legal system. On the one hand, many are turning to the courts as the only branch of government available to solve many new types of actions, a number of which could be resolved by either the legislative or the executive branches of our government. On the other hand, "we hear . . . [that the courts are really not properly resolving the matters brought to them, they] protect only the rich and the powerful, that justice is on the side of the best lawyer, and that delays and technicalities make the fair administration of justice impossible."<sup>1</sup> It is exceedingly important that we develop ways to overcome this explosion in legal proceedings and current lack of confidence in our system.

There are three major problems facing our judicial system: first, the inability of the courts to resolve all the disputes that are being submitted to them; second, the problem of the future quality of the judiciary; and third, the individual citizen's lack of familiarity with our judicial system.

### NEW PROBLEMS FOR OUR COURTS

A new era has begun in our judicial system. It is a time when the courts are being asked to resolve more and more disputes and to accept many types of new matters for resolution. In Florida, for example, the Supreme Court and the District Courts of Appeal disposed of as many cases in the first six months of 1976 as they did in the entire year of 1972 (see Table 1).

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\*This article was adapted from an address delivered before the League of Women Voters, Tampa, December 2, 1976.

1. Heflin, *Can the Rule of Law Survive?* 58 J. AM. JUD. Soc'y 368 (1975).

**Table 1. COMPARISON OF 1972 AND 1976 CASE LOADS, SUPREME COURT OF FLORIDA AND DISTRICT COURTS OF APPEAL**

	1972		1976 (first half)	
	New Cases	Disposed of Cases	New Cases	Disposed of Cases
Supreme Court	1,288	1,229	1,141	1,363
First District Court of Appeal	994	922	959	1,101
Second District Court of Appeal	1,063	895	1,063	928
Third District Court of Appeal	1,523	1,521	1,238	1,056
Fourth District Court of Appeal	1,233	1,068	1,372	1,105

Source: Administrative Records of the Supreme Court of Florida, Office of the Clerk.

There are many reasons for the multiplying case loads of Florida's courts. Population growth has certainly contributed to the increase. It should be noted, however, that the courts in areas of the country with relatively stable population have also experienced these increases. The factors largely responsible for this increase include the following: (1) new theories in the law evolving from consumer and environmental actions; (2) the expanded use of old theories, such as in malpractice and other tort actions; (3) a substantial increase in new legislation both by Congress and state legislatures, which places the burden of construction on the courts; (4) new regulatory legislation, which requires a review within at least the appellate courts; and (5) the increase in crime and the changes in criminal procedural requirements which have joined to increase the criminal case load.

This increase in legal proceedings, however, is just beginning. In the future, citizens will make even greater use of lawyers and the courts. Prepaid and group legal services will be the principal reason.<sup>2</sup> These programs, which are a kind of Blue Cross-Blue Shield for legal services,

2. See generally Cornish & Cornish, *Group Legal Services Today*, 14 WASHBURN L.J. 31 (1975); Wilcox & Schneider, *Prepaid Legal Services and the Code of Professional Responsibility*, 36 OHIO ST. L.J. 761 (1975); Young, *Group Legal Services and Canon II*, 34 MD. L. REV. 541 (1974).

gained momentum in 1973 when Congress amended the Taft-Hartley Act to allow unions to negotiate for employer contributions to fund legal services for employees.<sup>3</sup> Labor unions, however, are not the only prepaid legal service groups now operating. Other organizations now establishing such groups include credit unions and other cooperative-type associations. At present, prepaid legal service groups have been formed in Dade, Orange, and Escambia counties,<sup>4</sup> and nationwide there are four thousand such groups.<sup>5</sup> Within the next ten years, a substantial number of family units in the United States should be covered by some form of prepaid or group legal services.

The question of how the court system can absorb additional work resulting from increased availability of legal services is now timely. Priorities must be set to determine how additional court proceedings can be handled. The courts must be responsive to the needs of both the public in general and the individual litigant in particular.

Courts are attempting to cope with increased case loads by more efficiently resolving the cases now before them and by developing methods to resolve certain matters outside the court system without judicial labor. Florida is a leader in this area. At present, Florida has adopted four innovative approaches to relieve the case loads of our courts in certain problem areas. First, traffic offenses have been decriminalized;<sup>6</sup> this has reduced our judicial labor in traffic court cases by at least 66 per cent.<sup>7</sup> Second, pilot programs have been established for Citizens Dispute Councils in Broward, Dade, and Duval counties. This program allows minor criminal offenses to be resolved without invoking all the requirements of the criminal justice system. Third, a pretrial diversion program has been organized in most circuits of this state.<sup>8</sup> This program allows prosecutors the discretion to approve a conditional probation at

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3. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 186(c) (1973).

4. Florida Integration Rule, art. XIX, as amended on April 30, 1976, to allow attorney participation in Bar-approved group legal services. Nine new plans for such services have been submitted to the Bar for approval.

5. Murphy, *A Vision of the Future*, 11 TRIAL 12, 13 (1975).

6. Florida Uniform Disposition of Traffic Infractions Act, Ch. 318, Fla. Stat. (1975).

7. Judicial Council of Florida, Twenty-First Annual Report, Schedule E, at 53 (approximately 66 per cent of the traffic infractions disposed of between January and June of 1975 required no hearing at all). The informal assessments reported to me by the chief judges of circuit courts support this estimate of the reduction in the judicial workload.

8. § 944.025, Fla. Stat. (1975).



an initial stage in the criminal justice proceedings, thereby eliminating labors ordinarily expended by prosecutors, public defenders, and judicial officers in carrying a defendant, who would eventually be put on probation anyway, completely through the criminal justice system. Fourth, some circuits in this state have appointed an administrator to attempt conciliation of child support disputes, thereby avoiding unnecessary judicial hearings.<sup>9</sup>

These programs are a good start, but much remains to be done. For example, there must be improved communications between lawyers to ensure that judicial time is not wasted and that the court's calendar is not used as a trial tactic. There must be improvements in summary claims proceedings to make them more usable by the individual citizen without his having to resort to more formal legal proceedings and representation by an attorney. The State must also improve its appellate structure. A new proposal to that end seeks to solve the troublesome problem of multiple appeals in the same case.<sup>10</sup> The "unified appeal" doctrine would require a full appeal in every criminal case, but would foreclose any collateral attack by post-conviction relief proceedings.

Although the courts of Florida are now disposing of more cases than ever before, they must continue to seek and find new methods to improve our judicial system. The flexibility of the state constitutional provisions<sup>11</sup> on the organization of the judiciary has greatly assisted this state in meeting these new challenges. It is important that everyone, both within and without the judiciary, share the concern for the quality of a much-expanded system of justice. It will take work, cooperation, and funding to solve the problems now facing the courts.

## THE JUDICIARY OF THE FUTURE

I am concerned about the future quality of the judiciary. The State of Florida is now losing outstanding judges with twelve to twenty years of experience. In less than three years, numerous judicial officers, including the chief judges of three metropolitan circuits, and the chief judge and the immediate past chief judge of the Fourth District Court of Appeal, have resigned their posts. These judges did not reach retire-

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9. Pursuant to § 61.181, Fla. Stat. (1975), the Fourth, Tenth, and Thirteenth Judicial Circuits have appointed administrators.

10. See generally P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *JUSTICE ON APPEAL*, 110-14 (1976).

11. Art. V, Fla. Const.

ment age. They resigned to re-enter the private practice of law. Florida cannot afford to lose these people and others of their caliber. They are necessary for a strong, independent judiciary of the future.

The judiciary places special restrictions on its officers. A judge is not like a legislator or an executive officer. He cannot be an advocate. Those who come before a judge entrust to him their liberty and property. They demand and deserve dispassionate justice. In doing so, a judge must decide issues in a way which will retain the respect of both sides. It is recognized that judges must have integrity, intelligence, and judicial temperament. Just as important is the need for those seeking judicial positions to be interested in making the judiciary a twenty- or thirty-year career. The judiciary must never be a stepping-stone to a better law practice or a political office in the legislative or executive branches, nor should it be a position of retirement.

Outstanding attorneys will be difficult to obtain for the judiciary in the future because of a loss in the prestige of the office caused by the proliferation of the office and the misconduct of a few. The reduction of prestige is also linked to a judicial officer's compensation.<sup>12</sup> The circuit judge was once the highest paid public official in the community. Now state, county, and municipal funds pay more to law professors, county and assistant county attorneys, city and county managers, superintendents of public instruction, and, in some instances, court clerks. About ten years ago, the compensation of a judge was within reasonable range of that of a good trial lawyer. This is no longer true in many areas of the state. This lack of parity in compensation, when coupled with investment restrictions that are much greater than for other public officials, may well limit the persons who will seek judicial office. Last, but not least, an individual contemplating a judicial career may be concerned about the political uncertainty of the office even though he has been diligent and industrious.

These problems are not insoluble. Obviously, the State cannot compensate judges for the amount many of them could earn practicing law. But compensation on a par with that of other public officials in the community, together with the security of a fully funded retirement plan which offsets investment restrictions, will solve this problem. With reference to specific compensation for the judiciary, it is suggested that a cost-of-living increase or decrease formula be established and thereby

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12. The Legislative Committee of the Florida Bar is preparing a report on the inadequacy of judicial salaries.

avoid annual legislative requests for pay increases.<sup>13</sup>

Finally, the merit retention plan, approved by Florida voters on November 2, 1976, will substantially aid restoration of much of the prestige of the office.<sup>14</sup> There are many who are concerned about merit retention and believe that it removes the judge from the people of his community. Merit retention is, in fact, a compromise between the politically elected judge and the judge who is appointed for life. It is a device that takes the judge out of the political sphere but still requires that periodically he be accountable to the people. It is interesting to note that fourteen states<sup>15</sup> now have a merit retention process for at least their court of last resort, and at least ten have no election process whatever.<sup>16</sup> The fact that a judicial officer will be selected on merit and retained on merit will substantially enhance the prestige of the office in the eyes of those who may seek the office as well as in the eyes of the public.

### CITIZEN EDUCATION

To most Americans, the law is a strange realm shrouded in mystery, presided over by awesome figures speaking in an arcane language, unintelligible to the average person. Knowledge of how our government, and particularly our judicial system, work is extremely important to our self-government. If a person does not understand the system of justice, it is difficult for him to respect it. But ignorance of the judicial system and its place in our society costs us more than just the loss of a citizen's respect. The system is effective only to the extent that people intelligently use it to their advantage and voluntarily comply with its restrictions. Those acting on misconceived notions of the law brought about

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13. California increases the salaries of its justices in proportion to increases in the California price index. CAL. GOV'T. CODE § 68203 (West).

14. See generally AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION AND TENURE: SELECTED READINGS (G. Winters ed. 1967). See also Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection*, 5 TEX. TECH. L. REV. 1 (1973); FLORIDA BAR, MERIT RETENTION OF JUDGES HANDBOOK (1976).

15. These states include the following: Alaska, Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, Pennsylvania, Utah, Vermont, and Wyoming. See generally FLORIDA BAR, MERIT RETENTION OF JUDGES HANDBOOK (1976).

16. These states include the following: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. In New Hampshire, judges are initially elected, but serve during good behavior. In Vermont, there is constitutional merit retention for all judges, but it is the legislature that passes on the judges, not the electorate.

by their ignorance become discontent; as a result, their potential contribution to our society is lost.

The legal profession has done little to convey to the ordinary citizen an understanding of how the judicial system operates and how it can help the individual. That responsibility has been left to anyone who will take it. No one really has. A social studies textbook used in Florida public schools, for example, contains less than ten pages about our judicial system. Is it surprising then, in light of their lack of knowledge, that our youth are cynical about the law and distrust those who administer it?

Today's student is restless and independent and wants to be involved with real problems relevant to his world. Why not teach him how the judicial system deals with those problems? A high school graduate should know his obligations under the law, how to legally protect himself when he buys a house or car, what to do when there is a death in the family, what is required of him as a witness or a juror, what his rights are if he is charged with a criminal offense, and when to seek legal assistance.

A number of states are attempting to educate students and the public about how our system of justice operates.<sup>17</sup> I recently requested the Young Lawyers Section of the Florida Bar to develop, in cooperation with the Supreme Court and the Department of Education, written educational materials on this subject. The Section accepted this responsibility. This, however, is only a first step. We need the participation of the entire legal profession, not only in the development of these educational materials, but in aiding teachers in instructing students and conveying the same information to the community itself. Increased knowledge will come with increased understanding and respect for the law. It also should produce knowledgeable citizen support to improve and fund a system of justice that can properly absorb all new matters and dispose of them with high quality judicial officers. These are some of the problems our judiciary faces now and in the near future. To solve them, there

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17. In its booklet entitled *Law*, the Law in American Society Foundation-National Center for Law-Focused Education (33 North LaSalle Street, Chicago, Illinois 60602) reports ongoing projects in Alabama, Arizona, Colorado, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Washington, and the District of Columbia. The materials produced by the Foundation include the *Justice in America*, *Justice in Urban America*, and *Trailmarks of Liberty* series. Also, the Conference of California Judges has produced a public information and education program called *Project Benchmark*, and the Wisconsin Bar Foundation has developed an educational program for high school students called *Inquiry*.

**must be full recognition of the existence of our problems and active participation and interest by both the legal profession and the individual citizen.**

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## Studies of Legal Education: A Review of Recent Reports

**ROBERT S. REDMOUNT\***  
**THOMAS L. SHAFFER†**

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Early in 1972, the Carnegie Commission on Higher Education published its report on legal education.<sup>1</sup> It is the most prominent study of legal education in the last decade, and typical of discourse in and about law schools—urbane, speculative, unempirical, conceptual, rarely student-centered. The authors of the Carnegie report were articulate law teachers. They wrote with their feet up and their pipes lit, without attention to facts which did not come from their considerable experience. The value of such reports is the thoughtfulness of the people who write them, and their predictive accuracy is due to the fact that people who are powerful in legal education deal in self-fulfilling prophecy. Reports on legal education are therefore characteristically thin on new information, well informed about yesterday, incisive on tomorrow, and weak about today.

A less prominent, less urbane movement in the organized Bar is particularly noticeable in and around the American Bar Association, in which lawyers and judges report on legal education. The American Bar Association Section on Legal Education, a diffuse, voluntary

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This is a modified version of the third chapter in the authors' forthcoming book, *LAWYERS, LAW STUDENTS, AND PEOPLE*. Research for the book was sponsored by the Spencer Foundation. The authors acknowledge also the valuable assistance of Ms. Karen Bulger of the Wisconsin Bar and Mr. Craig Boyd of the Pennsylvania Bar—both members of the Notre Dame Law School class of 1974—and of Mr. Tyson Dines of the University of Virginia School of Law.

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1. The law-school report was written by the late Professor Herbert L. Packer and Dean Thomas Ehrlich, both of the Stanford University Law School. It incorporated as an appendix a global study on law-school curricula which had been prepared a year earlier by the Association of American Law Schools; the curriculum effort was the work of a committee of law teachers headed by Professor Paul D. Carrington of the University of Michigan Law School.

group of professors, lawyers, judges, and officials of government, for example, controls law-school accreditation. The Section's governing Council chooses committee members for Section activities, including the Committee on Law School Accreditation. National movements and concerns about legal education often find their way into the discussions, resolutions, and activities of the Section on Legal Education, and the Section usually defends the interests of law professors in the broader debates which go on in the American Bar Association and in the national legal profession. Recent examples include a 1975 resolution brought in the American Bar Association's House of Delegates by lawyers from Idaho, to remove from accreditation rules the requirement that law schools provide tenure to professors. Another continuing argument arranges itself around rules of state supreme courts which impose curricula on law schools.<sup>2</sup> Movements of this sort generate reports and discussions. The reports and discussions are rarely empirical, usually conceptual, and more than occasionally anti-intellectual. Printed aggregations of testimony and documents on the imposed-course rule of the Indiana Supreme Court are an example of all three features and are of significant concern to the schools we studied.

The concern expressed in studies of this sort is concern about the availability and quality of legal services. Students, when they are considered at all, are treated as malleable. They are the raw material with which public need is to be met. Student feelings are beside the point, a neglect which is probably advertent. The implication of these studies is that students can be "taught" almost anything, good or bad. The implication when translated means that lawyers can be made to behave in whatever way the public interest requires, and the anvil on which lawyer behavior is shaped is the law school. Studies of legal education tend, therefore, to talk about training for public service, training for specialties in the practice of law, training for specific skills (especially courtroom skills), and training for moral behavior ("professional responsibility").

The Carrington Report was built around a list of educational goals, and around an elective three-tiered curriculum. Goals covered five lawyer functions—counseling, specialized practice, interdisciplinary research, allied professions, and grounding for other disciplines. The curriculum, given reader tolerance for new titles, was almost typical of

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2. See Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEGAL EDUC. 449 (1974).

what law schools teach now, and was therefore a generally acceptable list. But lists (and most studies of curricula) tend, as the broader studies do, to assume student malleability and to neglect what is, in our view, the heart of professionalization. If the strongest sources of lawyer behavior are in law school at all—and we doubt that they are—the sources rest more in environmental factors—climate, teaching style, etc.—than in curricular factors; more in the way people treat one another than in syllabuses for courses. Even taken on their own terms, discussions of the Packer-Ehrlich and Carrington sort tend, because they are unempirical, to assume more uniformity in legal education than we believe to be there. Methods and devices in teaching, for example, are more diverse, in numerous instances, than the report suggests. This diversity is a product of the fact that law professors are the *prima donnas* of higher education. They are free to be eccentric and many try idiosyncratic forms of teaching more often than the reports indicate. Professors in law school are, it appears, relatively uninterested in methods of teaching other than their own; they innovate, by and large, only on their own terms; they tend to be uninformed about the psychological effect of their methods on students, and their effect as teachers turns less on what they say than on the fact that a law classroom, operating at its traditional best, builds a personal connection between teacher and student.

A second report on legal education, the Packer-Ehrlich report, urged (1) that law schools collaborate with social science, (2) that they mount more programs of clinical education, and (3) that they revise the terminal end of the law-school program toward less boredom. The last point is usually stated in terms of student boredom, but not documented by any measures of boredom. We suspect one of the real problems, in any case, is professor boredom. Our research findings, and our general impression about legal education, are that collaboration with social science is talked about, but not practiced. The facts that studies of legal education are pervasively unempirical, and what empirical studies there are—in unpublished dissertations, for example—are ignored, tend to verify the impression.

“Clinical legal education,” in the typical conceptual report on legal education, means one or more of three distinct forms of educational experience. First, the term may be used to describe a classroom device in which students learn by doing, rather than by absorption or imitation. This might better be called *experience-based learning* and made to describe everything from encounter groups, used to teach counseling skills, to practice-court programs in which students try suppositious cases to mock courts and juries. It removes the teacher as model, tends to make him a companion, or, even, a mildly quaint, academic consultant.



Second, "clinical legal education" is used to mean student involvement in legal programs for poor and disadvantaged clients. Most "clinical programs" in law schools are, in our observation, of this second sort. Their principal successes have been a contribution toward redressing the legal profession's neglect of the poor, an exposure of students to the "real world" of law practice, and the provision of free or low-cost personnel to courts and law offices. Their dynamic is a simple, inexpensive one in which students spend what they regard as educational time in the practice of law. Such programs are regarded with ambivalence by legal educators, which ambivalence reflects concern at loss of control over law students, skepticism about the educational value of the programs, and concern over the quality of legal service which is provided by untutored, usually unsupervised law students. The growth of these programs has been stimulated by court rules which permit students to represent clients in litigation.<sup>3</sup>

Finally, "clinical legal education" may mean one of the rare course programs in which students and teacher join in collaborative law practice. These programs are rare because they are expensive. They reduce student-teacher ratios from the typical 1:25 to 1:10 or lower. The comparison illustrates the fact that law schools have never partaken of the financing which graduate education in social science or the humanities enjoys. They are inevitably less expensive than graduate education in the health sciences. Most law schools have made money for their universities. Clinical collaborative practice tends to duplicate the experience students and young lawyers have with practitioners. A few of the programs have produced a sub-profession within law teaching—the "clinical professor," who, more practicing lawyer than academic, is the functional equivalent of the older lawyer in an apprenticeship system.

In our view such programs, where they exist, are financed by short-term grants from outside agencies, rather than from budgets of the law schools which develop them. Their survival, we suspect, depends on the continuation of this outside funding.

The most remarkable suggestion coming out of these recent studies was that the third year of law school be abolished. It was presented, in a public hearing, mounted by the Section on Legal Education of the American Bar Association, to the deans of approved law schools, at the American Bar Association's mid-winter meeting in New Orleans early

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3. See COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY (C.L.E.P.R.), STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW (2d ed. 1973).

in 1973. The law deans literally shouted it down.<sup>4</sup> The fact that the suggestion was made in the first place was remarkable for two reasons. First, it was politically unrealistic. Law schools at that time were the only segment of higher education which was enjoying prosperity, and the two-year-law-school idea invited law schools to forfeit a third of this bonanza. Second, it implied that legal education was substantively ineffective. If, as everyone conceded, the law becomes more complex daily, the natural response, if legal education were effective, would be to make law school longer. The two-year suggestion and its fate in the law-school market place were, we think, empirically indicative of the fact that thoughtful legal educators are not confident of the value of law-school education.

Other studies about legal education can be described, more summarily, under a number of broad headings, such as studies about law students, complaints about legal education, studies on methodology, and studies about curriculum.

## 1. LAW STUDENTS

In 1972, a first-year law student at Harvard killed himself. Some of his schoolmates reacted by inviting a number of their fellows from Columbia to join them in a conversation about student feelings in law school. Some of their interaction was recorded and published in *The Journal of Legal Education*,<sup>5</sup> a relatively recondite periodical which is overseen by law professors in the Association of American Law Schools, and is printed and distributed to law teachers, free of charge, by the largest American publisher of law books. "One conclusion was evident," the article said: "Law students are disillusioned about the nature of legal education, and they are confused about the role of a lawyer in society. Perhaps more important they are distressed by what becoming an attorney does to their chosen profession." One student was reported to have said: "You really become obnoxious to anyone who is not a lawyer."

That episode reveals a number of things about the subject matter of this article: lawyers rather than the law, and law students more than either lawyers or legal education.

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4. See Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973).

5. See Mohr & Rogers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403 (1973).

A. *There is a general impression throughout the enterprise that no one knows anything about how students feel.* The impression is probably no more accurate of legal education than it would be if said about clerks in the Department of Agriculture or welders at General Motors, but the impression has not been met by studies which are both available and regarded as useful. One reason is that almost everything written about law students is admonitory. It either admonishes them to do something or their teachers to do something to them.

A principal source of admonition since about 1960 has been the observation of psychiatrists who teach in law schools. These are not, for the most part, "clinical" observations. That is, they are not the product, or by-product, of psychotherapy as practiced on law students. (Dr. Andrew Watson occasionally writes a paragraph or two which is clinical, but that is exceptional, even in his work.)<sup>6</sup> These studies may fairly be seen as sophisticated, even in some cases informed, speculation about law-student behavior. They usually *assume* that the law student is in a behavioral or emotional dilemma, and then characterize the dilemma as involving both anxiety and ignorance. Perhaps one reason law professors seem not to react to this literature is because it evokes in them a "so what" response. They know their students are anxious and ignorant. In fact, they depend on it.

Davis' article<sup>7</sup> on law students in first-year criminal law classes is an example. Davis said he noticed too few students who were interested in criminal law (dilemma), and that this circumstance was caused by anxiety created in the student himself by the study of criminal law and the antipathy he builds as a defense to that anxiety, and by the laying of blame on the criminal defendants and lack of understanding of the social problems which cause their criminality (ignorance).<sup>8</sup> Davis wrote that law students could be made more interested in crime and criminals through a process of self-discovery which psychiatry, not law, is able to make available to them. Much of Dr. Watson's extensive labor in legal

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6. See A. WATSON, *PSYCHIATRY FOR LAWYERS* (1968); Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441 (1974); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968); Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963); Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL EDUC. 73 (1958).

7. See Davis, *Psychological Functions in the Teaching of Criminal Law*, 44 MISS. L.J. 647 (1973).

8. *Id.*

education is of this sort, and much of it, we think, is accurate and useful. Psychiatric comment does not, though, so far as we can tell, result in changing the conditions which these psychiatrists see as the source of student difficulty. It is perhaps typical of concern and change among legal educators that, in 1963, Dr. Watson called attention to the psychological difficulty of professional identity among law students.<sup>9</sup> He focused on the fact that law schools cannot seem to teach legal ethics. So far as we know, his essay did not produce a change in method or curriculum. However, in 1974-75, there was widespread ferment and change in the teaching of ethics to lawyers, ferment which has caused the American Bar Association to require instruction in professional responsibility.<sup>10</sup> The ferment resulted from the efforts, not of Dr. Watson, but of Richard Nixon and the erstwhile lawyers who gathered around Mr. Nixon when he returned to Washington in 1968.

Watson is also critical (as we are) of the "Socratic method" in law teaching. He sees authoritarian law teaching (however called) as abusive, demeaning, destructive of creativity, and wrenching (if not worse) to personalities. Because of it, he writes, students avoid close personal relationships with one another, or with their teachers, and become dysfunctionally competitive. Psychiatrists recommend more personal approachability among law teachers, less emphasis on grade competition, less study of abstract "case" materials and more of personal experience, and increased opportunities for supervised student practice.

Maru<sup>11</sup> summarizes several studies on the social and economic background of law students. Most of these do not correlate attitudes with background, or trace the effect of background on the choice either of professional employment or student experience in law school.<sup>12</sup> These background studies are exhaustive, though their principal disadvantage seems to be that they do not agree with one another. Warkov and Zelan,<sup>13</sup> working for the National Opinion Research Council, for example, reported that the strongest indicator of a college student's choos-

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9. See Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, *supra* note 6.

10. See ABA STANDARDS AND RULES OF PROCEDURE, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, No. 302(a)(iii) (1973).

11. O. MARU, *RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE* (1972).

12. Although somewhat dated and addressed to a limited professional experience, a notable exception is J. CARLIN, *LAWYERS ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966).

13. See WARKOV & ZELAN, *LAWYERS IN THE MAKING* (1965).

ing to study law was the fact that one of his parents was a lawyer. This they found to be the essential element in socio-economic status as a predictor. Other studies which Maru summarizes found socio-economic status the highest predictor (in other words, legal careers are normally launched from positions of advantage) and found also that high status is strengthened and increased in and through law school. Young lawyers from the best families end up in the best firms; those from poor ethnic minorities go to small offices, and to a less aesthetic professional practice. Both studies agreed that law is more attractive to Jews than Christians, and more attractive to Catholics than Protestants.

*B. The enterprise expresses shock when the charge is made that law school is destructive.* Otherwise, we take it, there would have been nothing remarkable about the student conversation at Harvard, certainly nothing remarkable enough to commend itself to the law-professor editors of *The Journal of Legal Education*. Dominant forces in legal education recognize that the study of law is hard work, often boring hard work, but they have not recognized that it does anybody harm. Data to the contrary fly in the face of what is seen as experience and first-hand knowledge, and are therefore resisted, which in turn provokes strong language from the other side. Savoy's turbulent tour de force<sup>14</sup> is an example of anger in the face of resistance to the charge that law school is harmful. But Savoy brought no data to the enterprise, other than his own observations as a young law teacher. Other data hinted that law students come to legal education with habits and attitudes which law school could improve, but does not. A study by Eron and Redmount,<sup>15</sup> for example, indicated that beginning law students have more cynicism than beginning medical students, but that law school has little effect on cynical attitudes, while medical school increases them. Theilens<sup>16</sup> found that medical students know more about medicine than law students know about law, and that both medical and law students believe medicine to have higher prestige. Personality studies summarized by Maru<sup>17</sup> indicate that law students are high in cyni-

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14. See Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

15. See Eron & Redmount, *The Effect of Legal Education on Attitudes*, 9 J. LEGAL EDUC. 431 (1957).

16. See Theilens, *The Socialization of Law Students: A Case Study in Three Parts* (1965) (Ph.D. dissertation, Columbia University).

17. These studies describe the students as hard to entertain; legal educators know about their boredom, have in fact written about it at boring length, and about their ambition, competitiveness, and resistance to socialization. Early studies of emotional

cism, have an untypically high interest in manipulating other people, and hence a high demand for creative, well-paying, prestigious, and independent professional lives.

C. *Uncertainty is to be expected.* Geoffrey Hazard, a law professor who is uncommonly outspoken about behavioral studies by and about lawyers, who was once director of the American Bar Foundation, reviewed four studies of lawyer feelings and found them all wanting: Weyrauch because his social science was bad; Smigel and Carlin because their social science was inadequate; and O'Gorman, whose social science was good, because he did not understand that the word "lawyer" doesn't mean anything:

The term "lawyer" refers less to a social function than to a type of training, a type which in fact is shared by people doing a bewildering variety of tasks. . . . To consider the study of lawyers as the study of one of "the professions" is to assume that the most distinctive feature of "lawyers" is that they are lawyers, and this assumes the answer to probably the most interesting question about "lawyers."<sup>18</sup>

Watson, commenting on "Watergate,"<sup>19</sup> said that its cause lay in the fact that the "lawyers" involved lost their consciences (in law school, apparently), and that a principal reason for that result is that law students come seeking certainty and find more uncertainty than they are able to cope with. Donnell,<sup>20</sup> a social scientist, reports that lawyers in corporations relish the ambiguity in their lives. Strickland,<sup>21</sup> a legal historian, thinks it would be dishonest to provide certainty, which can only be an illusion, and that the business of legal education is rigorous thought and the ability to change with changing circumstances.

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attitudes among law students at Stanford, Chicago, and Columbia, readings taken before and during law school, indicate that law students choose law as a career later than medical students; that they understand well enough not to be damaged by uncertainty as to what will be expected of them as lawyers; and that they experience little emotional movement while they are studying law. See O. MARU, *supra* note 11.

18. See Hazard, *Reflections on Four Studies of the Legal Profession, Law and Society, A Supplement to Social Problems* (summer 1965), reprinted in 1 AM. B. FOUNDATION (pamphlet, 1967).

19. See Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, *supra* note 6.

20. See DONNELL, *THE CORPORATE COUNSEL* (1970).

21. See Strickland, *Continuity and Change in Legal Education*, 10 TULSA L.J. 225 (1974).

*D. Law students always demand something different.* They are restless, bright, pushy people. One school of response<sup>22</sup> has it that law students' demands are inevitable, unwise, and to be resisted. This school tends to cite the traditional strengths of the legal profession, especially in England and the United States, and to attribute those to the fact that legal educators resist demands for change.<sup>23</sup> Oliver Cromwell said the key to his success was that he knew how to deny petitions; there is similar Puritan gravity in those who defend traditional legal education. Another result of the demand, and one which produces a significant amount of oblique and impressionistic literature on law students, is the sporadic experimental educational venture in law schools.<sup>24</sup>

In terms of what can be learned about law students from these studies, one may conjecture that it is not exposure to substantive law which makes students demand change, but rather something in the atti-

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22. See Fuller, *On Teaching Law*, 3 STAN. L. REV. 35 (1950); Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189 (1948); Griswold, *In Praise of Bar Examinations*, N.Y. ST. B.J. 485 (1974); Griswold, *Teaching Alone is Not Enough*, 25 J. LEGAL EDUC. 251 (1973); Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199 (1956).

23. See Strickland, *supra* note 21.

24. See, e.g., Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234 (1974); Dutile, *Criminal Law and Procedure—Bringing It Home*, 26 J. LEGAL EDUC. 106 (1973) (use of informal, extracurricular, voluntary seminars for first-year students toward increasing the vitality of class discussion); Grismer & Shaffer, *Experience-Based Teaching Methods in Legal Counseling*, 19 CLEV. ST. L. REV. 448 (1970) (use of law student encounter groups); Katsch, *Preventing Future Shock: Games and Legal Education*, 25 J. LEGAL EDUC. 484 (1973) (advocates use of games and roleplaying); Miller, *A Report of Modest Success with a Variation of the Problem Method*, 23 J. LEGAL EDUC. 344 (1971); O'Meara, *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 A.B.A.J. 614 (1957); O'Meara, *Legal Education at Notre Dame*, 28 NOTRE DAME LAW. 447 (1953) (reported success with problem-centered adaptations of the case method); Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316 (1959) (use of "human relations" methods). All of these teachers report enthusiastic student response; skeptical researchers might conjecture that this result was more because of change than because of creative methodology. These teachers also reported that their new approaches require additional effort and time on the part of the teacher.

A related body of experimentation involves teaching law to non-law-students. See, e.g., Gibson, *Law Students: A Valued Resource for Law Related Education Programs*, 25 J. LEGAL EDUC. 215 (1973) (advocates use of law students as teachers); Sbarboro, *Introducing Young Students to Law*, 59 A.B.A.J. 1171 (1973) (report based on pretesting and post-testing of 40,000 elementary and secondary students in Chicago that students leave such programs with heightened appreciation for the law and an improved—i.e., less cynical—attitude about it).

tudes they bring to law school, or something in the methodology and climate they find there, or both.

*E. Success in law school requires conformity and effort, more than it requires personality change, but demands for conformity and effort are heavy, and some students react to them with the fear that personalities are being changed for the worse.* Patton<sup>25</sup> describes an experimental study among first-year students at Yale Law School, the results of which indicate that first-year law students are capable of working as hard as the system demands. This is an important point, since it means that competitive strategies are not necessary for the task at hand, but are employed by law students, and provoked by law teachers, for other purposes.<sup>26</sup> The best performers, Patton says, are those who: (a) are systematic and well organized; (b) do not resist law-school teaching methodology (Patton says they believe that it does in fact teach them to "think like a lawyer"); and (c) admire and heed their teachers. Those who do not do well: (a) believe the management of the material is largely a matter of memorization; (b) feel misled and let down; (c) question their own competence; and (d) tend to dislike their teachers. If one compares these experimental results with other conversations of students,<sup>27</sup> it is possible to conclude that those who do not conform (and these may be most students or relatively few, depending on the times and on local climate) are unhappy in law school. It is they who feel that it is best not to volunteer answers in law classes; they who find other law students unattractive people; they who tend to form associations with other law students who share their level of achievement and their ambitions for professional employment;<sup>28</sup> and they who find non-legal subjects, and the cross-disciplinary aspects of law courses, to be more interesting than the study of "hard law." Patton found that the personal characteristics a student brings to law school play a dominant part in his ability to maintain self-esteem as he studies law and to obtain satisfaction from the system of legal education. He concluded that a belief in one's self as a capable and self-reliant person is necessary for constructive adaptation to law school. That sort of person is least likely to be touched deeply by his educational experiences; he knows how to

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25. See Patton, *The Student, the Situation, and Performance During the First Year of Law School*, 21 J. LEGAL EDUC. 10 (1968).

26. See, e.g., Silver, *Anxiety and the First Semester of Law School*, 1968 Wisc. L. REV. 1201.

27. See Mohr & Rodgers, *supra* note 5; Silver, *supra* note 26.

28. See Shultz, *Law Schools and the Differentiation of Recruits to Firm, Solo, Government and Business Careers* (1969) (Ph.D. dissertation, University of Chicago).



“manage them,” which means that he can keep them at psychological arm’s length.<sup>29</sup>

It is on this point, probably, that the researchers and the complainers and defenders might converge in their commentary on the lives of law students. It is an anxious experience for those who will not or cannot conform to it enough to maintain self-esteem. It is, for most students, particularly today, not a deeply touching experience, and this is why strident complaint, such as that evidenced by the Harvard conversation or by Savoy’s iconoclasm,<sup>30</sup> tends to provoke resistance. Law-student experience does not comport with the experience of those responsible for legal education, and, maybe because they are typically without evidence, reports about law students do not challenge and do not produce change.

The point is perhaps summarized in Harvard Professor Lon Fuller’s assessment of American legal education as it entered upon its present incarnation.<sup>31</sup> He recognized that law schools are supposed to provide training in skills, and some knowledge, but he saw the principal mission of law schools as exposure to “great” minds and to the processes in which lawyers participate. He emphasized processes over either skills or people. He said that lawyers participate in processes; he did not say they participated in the lives of their clients. The trouble with the study of skills, he said, is that “it converts what ought to be a disinterested exploration of issues into an exercise in self-improvement.”<sup>32</sup> He left no doubt about his preference for issues rather than human beings: “Skills and techniques,” he said, “should be the by-product of an educational system that concentrates on problems rather than men.”<sup>33</sup>

## 2. COMPLAINTS

Those who charge that the profession of law does more harm than good to human beings, along with those who charge that law schools are harmful to students, invite incredulous resistance. That is not true of those who complain about legal education in more abstract terms. The law-school world is, after all, a vast enterprise, uncertain enough

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29. See Patton, *supra* note 25.

30. See Savoy, *supra* note 14.

31. See Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, *supra* note 22.

32. *Id.* at 191.

33. *Id.*

to provide something unpleasant for everyone. Most of the complaints are unempirical, but the lack of empiricism may be insignificant when compared with the realities of politics. Many complaints about legal education, most particularly the complaint that it provides too little experience and exposure to the realities of the practice of law, have been effective without evidence. There have been changes in legal education since Fuller's defensive essay of 1948. One can trace them even in essays written by Fuller's Harvard colleagues. Erwin Griswold,<sup>34</sup> former Harvard law dean and former Solicitor General (and a prestigious defender of the traditional in legal education), wrote in 1956 that the principal failure of the case method in legal education was that it had tried to teach too much. He had noticed that complaints about traditional methods were that they were too narrow, neglected recent development, and were inhumane and amoral.

By 1973, Moore,<sup>35</sup> writing in an intramural Harvard publication, was able to say that Harvard emphasized individuality in instruction, a remarkable change from the 1948-56 observations of Fuller and Griswold. Moore instanced clinical education, programmed learning, advocacy skills, and, most of all, experimentation. He quoted a point often made about his, the mother of all American law schools—a point which, in the nineteen-seventies, could be made of many other law schools, and which may prove too much: Harvard law students are so able that they would become good lawyers without even coming to law school. "As Professor Warren Seavey used to say, 'Our people are good enough so that nothing we did to them could spoil them.'" Professor Bok, then dean of the law school and now president of the university, implied the same spirit of change when he wrote, in 1969, that law students found the "Socratic method" unsatisfying;<sup>36</sup> he recommended a two-year program and advanced study (on a graduate school model) for those who propose to teach law.<sup>37</sup> Five years earlier, Professor Paul Freund<sup>38</sup> hoped that law schools would be able to keep alive a spirit of intellectual

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34. See Griswold, *Law Schools and Human Relations*, *supra* note 22.

35. See Moore, *Legal Education: The H.L.S. Community Speaks Out*, HARV. L. SCH. BULL. 12 (April 1973).

36. See Bok, *A Different Way of Looking at the World*, HARV. L. SCH. BULL. 2 (March & April 1969).

37. Dean Albert Sacks, successor of Professor Bok, led the charge against these recommendations in 1973. See Stolz, *supra* note 4. Compare Shapira, *Changing Patterns in Legal Education in Israel*, 24 AD. L. REV. 233 (1972) with Bok, *supra* note 36.

38. See Freund, *Dedication Address: The Mission of the Law School*, 9 UTAH L. REV. 45 (1964).

inquiry, systematization, and community leadership. The former attorney general, Edward Levi, a law professor, law dean, and university president, expressed the same hope in 1972.<sup>39</sup>

More specific complaints about legal education, from a broader variety of law-school observation and experience, have emphasized these points:

*A. It is an elite system.*<sup>40</sup> This complaint is focused most clearly, and most typically, on the processes of student selection and the almost universal tendency among admissions committees to rely heavily on undergraduate grades and scores on the Law School Admission Test. The result is an intellectually elite national law student body. The complaint is that young lawyers are, as a result, narrow, bookish, and intolerant of the mundane elements of daily practice. Complainers<sup>41</sup> suggest a lottery system for admissions, emphasis on psychological qualities other than academic ability, and open-gates admission followed by high academic attrition. The commentators emphasize the emotional (and social) aloofness of the law school learning community, a circumstance which makes Hessians of law teachers and resentful conformists of students.<sup>42</sup> They find in their own experience that the educational atmosphere is hostile and oppressive, and they tend to argue, sometimes by implication, for greater attention to what we call humanistic climate.

*B. It is an inflexible system.* Stolz<sup>43</sup> blames this on accreditation rules. Complainers of the future<sup>44</sup> may make the same criticism of state-supreme-court rules. State supreme courts affect law-school programs by setting minimum requirements for admission to practice; national accreditation becomes significant because state supreme courts require law degrees from nationally accredited law schools. Accreditation is, for the most part, handled by the Section on Legal Education of the American Bar Association. A few courts recognize the Associa-

39. See Levi, *The Place of Professional Education in the Life of the University*, U. CHI. L. SCH. REC. 3 (Winter 1972).

40. See, e.g., Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968); Frierson, *And the C Students Make Money*, 59 A.B.A.J. 61 (1973); Kennedy, *How the Law School Fails: A Polemic*, 1970 YALE REV. L. & SOC. ACT. 71; Smith, *Academic Aloofness: Stimulant or Depressant to Legal Education?*, 21 J. LEGAL EDUC. 89 (1968).

41. See Frierson, *supra* note 40.

42. See Bergin; Kennedy; Smith, *supra* note 40. Compare Bergin, *supra* note 40, with Savoy, *supra* note 14, and McDowell, *The Dilemma of a Law Teacher*, 52 B.U.L. REV. 247 (1972).

43. See Stolz, *supra* note 37.

44. See Beytagh, *supra* note 2.

tion of American Law Schools as an accreditor. Griswold defends the accreditation system; York finds logic in it.<sup>45</sup>

*C. It is not diverse.* There will soon be 200 accredited American law schools. A frequent complaint about legal education is that they all tend to be the same.<sup>46</sup>

*D. It does not produce ethical sensitivity.* Some of the literature focuses narrowly on the Code of Professional Responsibility and on other professional concerns; some of it might more properly be called "moral." Manning<sup>47</sup> addresses both aspects in terms of what he believes to be decay in the moral fiber of American lawyers. He argues for interdisciplinary study of ethics and morals, and a spirit of public service, but he implies that neither attitude is currently available in legal education. Starrs<sup>48</sup> reviews the debate between the "pervasive" teaching of legal ethics and the provision of courses; he and Manning favor the latter.

Manning's studies,<sup>49</sup> like several other studies of the morals of lawyers, are speculative and accidental. These often succeed, to the extent they do, because their authors have a poetic insight which tends to operate independent of their data. Hazard, complaining about Weyrauch's readable observations on the disenchantment of European lawyers, sounds a typical and accurate theme for the poetic insight and its limitations:

[M]ost people in the law are idealists who at any early age in their profession have had the searing experience of realizing that the world can be remade only by narrow degrees, no matter how brilliant and dedicated its would-be law-givers. It is in my view a capital problem of the sociology of the legal profession that underneath most lawyers are boy scouts.<sup>50</sup>

*E. Legal education is too vocational.* Brown, who is identified

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45. See Griswold, *In Praise of Bar Examinations*, *supra* note 22; York, *The Law School Curriculum Twenty Years Hence*, 15 J. LEGAL EDUC. 160 (1963).

46. Stevens and Omrod conducted a debate on diversity, focused on English legal education. Much of their data is about American law schools. See Omrod, *Reforming Legal Education in England*, 57 A.B.A.J. 676 (1971); Stevens, *American Legal Education: Reflections in Light of Omrod*, 35 MOD. L. REV. 242 (1972).

47. See Manning, *A Socio-Ethical Foundation for Meeting the Obligations of the Legal Profession*, 5 CUM.-SAM. L. REV. 237 (1964).

48. See Starrs, *Crossing a Pedagogical Hellespont Via the Pervasive System*, 17 J. LEGAL EDUC. 356 (1965).

49. See Manning, *supra* note 47.

50. See Hazard, *supra* note 18.

with legal education at a Roman Catholic institution, argues that legal education does not meet the needs of those who wish to study law as a humanity and who may not wish to practice law. He emphasizes "scientific" analysis, jurisprudence, legal history, and unspecialized subject matter—noting a number of trends, such as clinical programs, and summer study to shorten the time needed for a law degree, which evidence a vocational bias.<sup>51</sup> Gellhorn sees vocationalism as the source of a return to the lecture in law classes.<sup>52</sup> He argues, as Griswold did, that the "Socratic method" fails when law schools teach too much.<sup>53</sup> Brown tends, as defenders of the traditional often do, to favor an intensification of the intellectual aspects of legal education.<sup>54</sup>

*F. Legal education is not vocational enough.* Every volume of *The American Bar Association Journal*, which reaches more American lawyers than any other professional publication, echoes this complaint. Hervey (who was a legal educator, a law dean, and a leader in legal education) represented the mood—as do movements for the detailed, stringent imposition of curricula on law schools. The common assumption in this part of the literature is that lawyers are made in law school. For example: "The practicing profession is . . . but the mirror that reflects the schools in which the lawyers were trained. If the bench and the bar give back distorted images of justice, it is only because the schools have failed to inspire devotion to high ideals and have not shown the paths of true nobility, intellectual greatness, and real culture."<sup>55</sup> On these formidable premises, Dean Hervey lamented the decline in traditional teaching methods. A questionnaire research among practicing lawyers indicates that most of them would agree with Hervey.<sup>56</sup>

51. See Brown, *Recent Trends in U.S. Legal Education*, 26 J. LEGAL EDUC. 283 (1974).

52. See Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1 (1964). See also Richardson, *Does Anyone Care for More Hemlock*, 25 J. LEGAL EDUC. 427 (1973).

53. See Griswold, *supra* note 34.

54. See Brown, *supra* note 51. Goodhart and Robertson, both of whom compare English and American legal education, echo Brown; Goodhart from the perspective of an English university legal educator. In England, university legal education is an undergraduate subject and is conducted somewhat the same way a rigorous American undergraduate program in history or literature is conducted. See Robertson, *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL EDUC. 278 (1968).

55. See Beytagh, *supra* note 2; Hervey, *What's Wrong with Modern Legal Education*, 6 CLEV.-MAR. L. REV. 381 (1957).

56. See Dunn, *Legal Education and the Attitudes of Practicing Attorneys*, 22 J. LEGAL EDUC. 220 (1969).

It is useful, in discussing both the too-vocational and not-vocational-enough schools of complaint, to review Hazard's criticism of O'Gorman, particularly Hazard's point that the word "lawyer" describes a body of training more than either a social function or a professional career.<sup>57</sup> Hazard points to three realities:

(1) Lawyering as a social function, rather than a professional function, is impossibly broad in American culture. It is never embodied (and therefore is not studiable) in a single lawyer's life and work.

(2) Lawyering as ministering to people is similar to other one-on-one, ministering professions and therefore studiable, as Donnell demonstrated,<sup>58</sup> with the tools of the sociology of professions (role theory, etc.); and

(3) Lawyering is a convenient focus for the study of power relationships—something which has been developed in a number of political science studies of lawyers in positions of power.<sup>59</sup>

Hazard's urbane criticism illustrates an important fact about studies in legal education: Studies of lawyers and law students, as distinguished from studies about curriculum and method (teaching professionalism), or studies about lawyer's law (legal professionalism) tend to fall into broad categories, ripe for condemnation, when they come to their natural reading publics, lawyers and law teachers.<sup>60</sup>

### 3. METHOD

Those who discuss method build their arguments on their experi-

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57. See Hazard, *supra* note 18. But see O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* (1963).

58. See DONNELL, *THE CORPORATE COUNSEL: A ROLE STUDY* (1970).

59. See O. MARU, *supra* note 17; Dertke & Wills, *Investigation of the Use of Programmed Material in Legal Education*, 15 J. LEGAL EDUC. 444 (1963); Schlesinger, *Lawyers and American Politics: A Clarified View*, 1 MIDW. J. POL. SCI. 26 (1957). The readable explorations of W. DOMHOFF, *WHO RULES AMERICA?* (1967) into the "ruling class" in America affords both instruction and methodology.

60. See J. CARLIN, *supra* note 12 (interviews with Chicago "solo" practitioners), and E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964) (a study of the large New York City law firms), for two famous studies of lawyer conduct that are criticized by lawyers who dabble in behavioral science, and by behavioral scientists, as methodologically inadequate, or as obvious, or as both inadequate and obvious. Studies which are more carefully controlled (see, e.g., O'GORMAN, *supra* note 57, a study of New York City matrimonial lawyers) are criticized as too narrow and technical. Both bodies are to some extent warranted; our present point is that they are also inevitable.

ence as students and teachers. There is rarely any indication in the literature that the writer observed classrooms other than those he has occupied as participant. Much of what is said about teaching method is either speculative or built upon generalizations from personal experience. This limited observation should be taken into account in assessing the continuing, bookish debate over traditional law-school methods.

Patterson<sup>61</sup> provided a useful analysis for the advantages and disadvantages of the case method, noting that it was pedagogically attractive (because problem oriented), pragmatic, and sensitive to history; that it conformed to the thought patterns of judges and lawyers, required self-synthesis of doctrinal material, stimulated thought, provided contextual introduction to terminology, and kept law teachers on their toes. He reported, though, that many teachers find students cannot synthesize, that the method wastes time. Llewellyn<sup>62</sup> reviewed criticisms of the case method and Frank<sup>63</sup> condemned it. Llewellyn said he found the study of cases to be too answer-oriented; that it focused too much on subject matter and not enough on skill, and that, as literature, it provided too little information. He felt, though, that creative use of appellate opinions would be sufficient reform. More recent and less academic sources of complaint focus less on these intellectual deficiencies than on the fact that appellate opinions do not speak to the interests of human beings who come into law offices.<sup>64</sup>

Austin's 1965 essay<sup>65</sup> is a valuable description of the case method, dynamically and historically. He noted, as seems clearly to be the case, that aggregations of study material for law courses have begun to include vast amounts of non-case material, including non-legal material. He said he found the traditional method, meaning both cases and question-and-answer discussion, inadequate for the raising of consciousness for law practice, too impractical, too time-consuming, boring, and

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61. See Patterson, *Legal Services and Legal Education*, 4 U. TOL. L. REV. 457 (1973).

62. See LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1951).

63. See Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Frank, *Why Not a Clinical Lawyer-School?* 81 U. PA. L. REV. 907 (1933).

64. See, e.g., Redmount, *A Clinical View of Law Teaching*, 48 S. CAL. L. REV. 705 (1975); Redmount, *Transactional Emphasis in Legal Education*, 26 J. LEGAL EDUC. 253 (1974); Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969); Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201 (1968).

65. See Austin, *Is the Casebook Method Obsolete?* 6 WM. & MARY L. REV. 157 (1965).

confusing, and inappropriate to the large law classes which had begun, even in 1965, to appear in many theretofore small law schools. He recommended, as compromisers have in law faculties, that the traditional method be retained in first-year (required) courses and otherwise dropped. Second-year courses would then tend to text-book and lecture, and third-year courses to seminar discussion.

There are a number of movements to replace case-method classes; the literature on these tends to be descriptive of experiments. As long as the writer is a teacher and is describing what he does in his own classes, he feels little need to convince others of the value of his methods.<sup>66</sup>

It is implicit in case-method teaching that the reality of the legal order has been divided into subject-matter compartments. Boyack and Flynn<sup>67</sup> argue that its classification system, more than the case method itself, produces the excessive conceptualization which is often found in case-method teaching. They describe (but do not report results on) a federally-funded experiment in which classes are organized around groups of learners, rather than around subject matter.

One can classify these suggestions toward a number of objectives which might, in some utopian law school of the future, be seen as a convenient way to organize instruction. Some of them<sup>68</sup> argue for training in the ministering aspects of law practice; some<sup>69</sup> for skills training in advocacy; and some<sup>70</sup> for deeper training in social leadership. All of

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66. See, e.g., authorities cited, *supra* note 24; Casper, *Two Models of Legal Education*, 41 TENN. L. REV. 13 (1973); Dauer, *Expanding Clinical Teaching Methods into the Commercial Law Curriculum*, 25 J. LEGAL EDUC. 76 (1973); Hayes & Hayes, *Towards Objective Assessment of Class Participation*, 12 J. SOC. PUB. TCHRS. L. 323 (1973); Moulton, *Clinical Education: As Much Theory as Practice*, HARV. L. SCH. BULL. 11 (October 1972); Spring, *Realism Revisited: Clinical Education and Conflict of Goals in Legal Education*, 13 WASHBURN L.J. 421 (1975). Dauer argues for client-based methods in teaching commercial law; Moulton and Spring describe and defend clinical methods for teaching legal procedure; Sacks's (*supra* note 24) is a classical argument for human relations training; Hayes & Hayes observes that classroom discussion in law school depends on intimidation more than on rewards, since few law teachers base grades on discussion; and Casper compares the pedagogical effects of deductive and inductive reasoning.

67. See Boyack & Flynn, *Conceptual Approach to Legal Education*, 6 SW. U.L. REV. 592 (1974).

68. See, e.g., Dauer, *supra* note 66; Grismer & Shaffer, *supra* note 24; Sacks, *supra* note 66; Redmount, *supra* note 64.

69. See Casper; Hayes & Hayes; Moulton; Spring, *supra* note 66; Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974).

70. See, e.g., Boyack & Flynn, *supra* note 67.



them point, again, to Hazard's observations about the diverse functions lawyers in American are thought to perform, and many lead to the hope that Moore's description of a system in which students choose is accurate and is some sort of harbinger for a more satisfying, more human future.

#### 4. CURRICULUM

Method is an individual matter; every law teacher, within very broad limits, is free to choose his own. Curriculum is a corporate matter; it is, typically, determined in a political process characterized by conflicting ideology, student pressure, limited resources, and the log-rolling which is familiar in the allocation of time and money by those who make decisions. Discussions of curriculum tend, therefore, to be more global and strident than discussions of method. They tend also to be diverse.<sup>71</sup> What tends to happen, in our observation, is that proponents who propose to teach new courses are accommodated (often, depending on the density of political log-rolling involved, at an inconvenient time or in a limited format) and that those who are proposing that someone else teach the new courses are ignored. Subject-matter areas which are compelled by social and legal changes (labor law, international trade, etc.) are, of course, another matter, but, by and large, curriculum reform has tended to be either an extension of the comity which tolerates eccentric changes in methodology, or a matter for fruitless advocacy and conversation at professional meetings.

There are, for all of this, some persisting trends in the demands for curricular change, and some of this persistence may finally have an effect. One is the demand for "humanistic" legal education. Professor Reich's short essay on this subject<sup>72</sup> has been passed around more than law-review articles usually are, and many of his points are congruent with the essay (and experimental report) of Sacks<sup>73</sup> on human-relations training. Reich's argument was that students should be able to pursue their interests in greater detail and should be offered broader

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71. A casual sampling of suggestions in the literature for new law courses for new retooled traditional courses illustrates this diversity: behavioral science, the daily life of the law, drafting, group dynamics, humanities, interdisciplinary study, interviewing and counseling, judicial process, legal history, legal methodology, legal techniques, legislation, mediation and negotiation, problem solving, process, professional relations, public law, and social research.

72. Reich, *Toward the Humanistic Study*, 74 YALE L.J. 1402 (1965).

73. See Sacks, *supra* note 68.

consideration of behavioral science, art, and natural science, as part of their consideration of law (which, he said, should be pursued as a single subject). He argued for deeper training of law teachers and for more attention in law school to social leadership.<sup>74</sup> Sacks' article was in large part the report of an experiment, the results of which he found encouraging, in training law students in self-discovery and in human-relations skills.<sup>75</sup> Somewhat related to this are a number of essays which urge greater attention to interpersonal morality and to ethical sophistication.<sup>76</sup>

Another body of literature on curriculum<sup>77</sup> argues for experimentation among legal educators and for diversity among law schools; this genre sometimes even suggests a return to undergraduate legal education.<sup>78</sup> There are, of course, a number of essays in defense of the traditional curriculum.<sup>79</sup>

The classical attack on traditional methodology and curriculum remains the "plea for lawyer schools" of the late judge and educator, Jerome Frank.<sup>80</sup> Frank's argument for more "actual observation" of

74. See also Black, *Some Notes on Law Schools in the President Day*, 79 YALE L.J. 505 (1970); Peden, *Goals for Legal Education*, 24 J. LEGAL EDUC. 379 (1972); Strong, *Pedagogic Thinking of a Law Faculty*, 25 J. LEGAL EDUC. 226 (1973); Minsky, *Learning as an Acquired Skill*, SEMINAR REP., May 14, 1975.

75. See also Grismer & Shaffer, *supra* note 24.

76. See, e.g., Christenson, *In Pursuit of the Art of Law*, 21 AM. U.L. REV. 629 (1972); Kionka, *Education for Professional Responsibility: The Buck Stops Here*, 50 DEN. L.J. 439 (1974).

77. See Levi, *supra* note 39; Meyers, *Education of Present and Future Lawyers* (an unpublished paper for the American Assembly, June 1975).

78. See, e.g., Holton, *Outline for an Integrated Law Curriculum*, 24 J. LEGAL EDUC. 195 (1972).

79. See, e.g., Goda, *Curriculum Changes: Philosophy and the Behavioral Sciences Versus a Devil's Advocate*, 22 J. LEGAL EDUC. 206 (1969); Griswold, *supra* note 34.

80. It is mildly tempting to reformers such as ourselves to note whether Frank has had any effect. His argument of restricting appointment of new law teachers to lawyers who have had at least five years of professional experience seems to have been heeded in a few quarters; it is our impression (without data) that the employment of new law teachers from professional university programs, without professional experience, has increased; that the practice of employing teachers directly from first-degree law programs has declined somewhat; and that the practice of employing experience practitioners has, if anything, declined. His argument to make the case system "relevant" encompasses most of the change which has occurred. This is obvious in the decline of appellate material in law books, and is heralded in reports of experiments and other indications that traditional teaching methods are used less than they were in 1947. Frank's argument for more "actual observation" of legal operations and for the estab-

legal operations and for the establishment, in every law school, of a legal clinic appears to have been widely adopted.

## 5. CONCLUSION

A review of the Packer-Ehrlich report<sup>81</sup> identifies the principal intellectual difficulty with most proposals for the reform of legal education—they are purely speculative. They proceed without evidence and offer suggestions which are seen as obvious, commonplace, trivial, or unproved. We are left, after surveying the literature, with the impression that it has had no effect, except, possibly, the advancement of professors who wrote it, because writing is part of a professor's life. Most of what is said is no more (or less) than good shop talk. Some of it speaks to individual teachers in a compelling way. Some of it reports on episodes and experiments which may have unseen effect in the eccentric academic world where choices are made for law students.

The moods we find most compelling in the literature are those which offer, or promise, and even seek, information for reform based on more than personal speculation and singular experience; those which open legal education to information from behavioral science, particularly from educational psychology and learning theory; and those which speak prophetically about the sinful neglect of the feelings and needs of the students who pay for the enterprise and who come to it hoping for formation in ministry, in leadership, and in professional fraternity.

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ishment, in every law school, of a legal clinic appears to have been widely adopted. *See* Grossman, *supra* note 69.

81. Soberman, *The Future of Legal Education*, 24 U. TORONTO L.J. 96 (1974).

## The Insurer's Liability for Judgments in Excess of Policy Limits and the Movement toward Strict Liability: An Assessment\*

DONALD A. ORLOVSKY†

Standard liability insurance policies typically contain a clause vesting in the insurer the right to "make such investigation, negotiation and settlement of any claim or suit as it deems expedient."<sup>1</sup> While this clause gives the insurer complete control over the settlement of claims arising under the policy, it also forms the basis of the insured's right to recover damages for liability in excess of policy limits incurred as a result of the insurer's wrongful refusal to settle claims within those limits.<sup>2</sup> It is to be noted at the outset that this right of the insured presupposes the existence of several variables, since it is, at best, questionable whether an insurer must accept every settlement offer or be liable for the excess.

The scope of the insurer's liability for failure to settle claims within policy limits is a controversial issue in the law of insurance, replete with an extensive bibliography.<sup>3</sup> The purpose of this article is not merely to

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\* The author would like to thank Professor Malcolm D. Talbott of the Rutgers University School of Law for his assistance, guidance, and encouragement in the preparation of this article.

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1. See, e.g., R. Keeton, *Insurance Law—Basic Text* 658, Appendix G (1971), where the clause states:

[T]he company shall have the right and duty to defend any suit against the insured seeking damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. . . .

2. See Note, *Insurer's Liability to Judgment Creditor of Insured for Wrongful Refusal to Settle a Claim*, 52 CORNELL L.Q. 778 (1967).

3. See generally Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954), for a most expansive but somewhat dated analysis of the conduct of an insurer regarding settlement and the rights and duties arising therefrom. See also Annot., 39 A.L.R.3d 739 (1971); Appleman, *Circumstances Creating Excess Liability*, 1960 INSURANCE L.J. 553; Appleman, *Duty of Liability Insurer to Compromise Litigation*, 26 KY. L.J. 100 (1938); Arnall, *Excess Liability Suits—The Mounting Need for Strict Liability*, 13 ST. LOUIS U.L.J. 292 (1968); Cochran, *The Obligation to Settle within Policy Limits*, 1970 INSURANCE L.J. 583; Annot., 68

delineate the metes and bounds of the insurer's liability for its wrongful refusal to settle within policy limits, but also to explore the considerations underlying the growing demand that an insurer be absolutely liable for any judgment in excess of policy limits following its refusal to settle a claim. The best point at which to begin is with *Crisci v. Security Insurance Co.*,<sup>4</sup> the first modern case to give serious consideration to the strict liability approach.

The facts in *Crisci* are substantially as follows: The plaintiff, a seventy-year-old widow, purchased a \$10,000 general liability policy to protect herself against any liability she might incur as a result of injuries sustained on the premises of her apartment building. As in most liability policies, Mrs. Crisci's policy contained a clause authorizing her insurer to conduct her defense and to negotiate any settlement which the insurer might deem expedient. June DiMare, one of the plaintiff's tenants, sustained serious injuries as a result of falling through the stairs in plaintiff's building. Consequently, an action was filed by the tenant against Mrs. Crisci claiming damages of \$400,000.<sup>5</sup>

Pursuant to this defense clause contained in Mrs. Crisci's policy, Security Insurance Company assumed the defense against the claim, and twice rejected offers of settlement within the policy limits, even in the face of several factors indicating that a verdict substantially in excess of the policy limits was highly probable. The insurer's counsel and claims adjuster, in fact, believed that a verdict of at least \$100,000 would

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A.L.R.2d 892 (1959); Comment, *Crisci's Dicta of Strict Liability for Insurer's Failure to Settle: A Move toward Rational Settlement Behavior*, 43 WASH. L. REV. 799 (1968); Erstgaard, *Liability beyond Insurance Policy Limits*, 1958 INSURANCE L.J. 404; Annot., 40 A.L.R.2d 168 (1955); Comment, *Insurer's Liability for Failure to Settle*, 9 MD. L. REV. 349 (1948); Note, 13 U. CHI. L. REV. 105 (1945); Evans, *The Practical Handling by Defense Counsel of Lawsuits in Excess of Policy Limits*, 1960 INSURANCE L.J. 565; Note, 60 YALE L.J. 1037 (1951); Comment, *Insurer's Liability for Judgments Exceeding Policy Limits*, 38 TEX. L. REV. 233 (1960); Note, 32 SO. CAL. L. REV. 314 (1959); Comment, *Liability of an Insurer for Failure to Settle Claims*, 6 U.C.L.A. L. REV. 124 (1959); Note, 10 HASTINGS L.J. 198 (1958); Levit, *The Crisci Case—Something Old, Something New*, 1968 INSURANCE L.J. 12; Note, *Direct Action by Injured Judgment Creditor against Insurer for Excess of Policy Limits*, 14 N.Y.L.F. 629 (1968); Luvaas, *Excess Judgments—Defense Counsel's Liability*, 18 DEFENSE L.J. 259 (1968); Comment, 43 N.Y.U.L. REV. 199 (1968); Comment, 28 MD. L. REV. 166 (1968); Note, 27 PITT. L. REV. 726 (1967); Note, 46 TEX. L. REV. 113 (1967); Note, *Insurer's Liability to Judgment Creditor of Insured for Wrongful Refusal to Settle a Claim*, 52 CORNELL L.Q. 778 (1967); Note, *Excess Liability: Reconsideration of California's Bad Faith Negligence Rule*, 18 STAN. L. REV. 475 (1966).

4. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

5. DiMare v. Cresci, 58 Cal. 2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962).

be returned if the jury believed the claimant's persuasive evidence that the injuries resulting from her fall proximately caused the development of her psychosis. Notwithstanding the insurer's inability to produce evidence which would impeach the claimant's allegations, the insurer continued to reject offers for settlement within policy limits.<sup>6</sup>

As a result, the injured tenant recovered judgment for \$101,000, and Mrs. Crisci, through her efforts to meet the \$91,000 balance, became indigent. In addition, Mrs. Crisci suffered a decline in her mental and physical well being and attempted on several occasions to commit suicide.

Mrs. Crisci brought suit against her liability insurer for wrongfully refusing to settle the claim within the limits of her policy. At trial, the court found that Security Insurance breached its duty to settle the claim in good faith, and awarded plaintiff the amount of the excess judgment plus interest accrued since the day judgment was entered against her. In addition, the court awarded the plaintiff \$25,000 for the mental suffering which she endured as a result of being forced to dispose of her property to satisfy the judgment.<sup>7</sup>

The California Supreme Court upheld Crisci's recovery against the insurer, holding, *inter alia*, that Security Insurance had breached its implied covenant of good faith and fair dealing.<sup>8</sup> What is of greater significance, however, is the California Court's willingness to find "more than a small amount of elementary justice"<sup>9</sup> in the suggestion made by *amicus curiae* that an insurer be held absolutely liable when an excess judgment follows an insurer's refusal to settle within policy limits.<sup>10</sup> The adoption of a strict liability standard for insurers would, no doubt, mark a drastic turning point in this area of insurance law.<sup>11</sup>

6. See 28 MD. L. REV. 166 n.1 (1968).

7. 66 Cal. 2d 425, 428-29, 426 P.2d 173, 175, 58 Cal. Rptr. 13, 15.

8. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16. The implied covenant of good faith and fair dealing as applied in the *Crisci* case requires that the parties to the insurance policy conduct themselves so as not to impair the rights of the other party to receive benefits under the contract. Among the benefits inuring to the insured is peace of mind and security. The court also reasoned that the settlement of claims without litigation is another benefit owed by the insurer to its insured and, *a fortiori*, a duty is imposed upon the insurer to accept reasonable settlement offers as if the policy in question were without limits.

9. *Id.* at 432, 426 P.2d at 177, 58 Cal. Rptr. at 17.

10. *Id.* at 431, 426 P.2d at 177, 58 Cal. Rptr. at 17.

11. See Annot., 40 A.L.R.2d 168, 177-78 (1955), indicating that such an approach has not been successfully contended. *But see, e.g.*, Arnall, *Excess Liability Suits—The Mounting Need for Strict Liability*, 13 St. Louis U.L.J. 292 (1968); Note, *Excess*

## I. THE EXISTING STANDARDS

It is often stated that a claimant's offer to settle a claim against an insurer for an amount within the limits of a policy nearly always creates a conflict of interest between the liability insurer and its insured.<sup>12</sup> The insurer's interest is often best served by accepting only the lowest possible settlement offer, since, in normal cases, the insurer's potential liability is fixed by the limits of the policy. Hoping to further limit his liability through litigation, the insurer may also reject, in toto, an offer of settlement. The interest of the insured, on the other hand, is cast in a different mold, since it would distinctly be to his advantage to have all claims settled within policy limits so as to foreclose forever the risk of excess liability. The temptation would seem great, then, for the unconscionable insurer to gamble with the money of its insureds by rejecting all settlement offers, proceeding to litigation, and virtually saying to the insured, "heads I win, tails you lose."<sup>13</sup>

Since insurers, in drafting policy provisions, have reserved for themselves the right to negotiate the settlement of claims, the courts have responded by imposing a duty upon the insurer to consider the interests of the insured when negotiating settlement.<sup>14</sup> The question remaining, however, is how much weight is to be given to these conflicting interests in reaching the decision to settle a given case.

Early decisions indicate that an insurer is not bound to consider the interest of an insured to the prejudice of its own interest when conflicts arise during the negotiation of a settlement.<sup>15</sup> Opinions of other courts

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*Liability; Reconsideration of California's Bad Faith Negligence Rule*, 18 STAN. L. REV. 475, 482-85 (1968); Note, 60 YALE L.J. 1037, 1041-42 (1951)—all calling for the adoption of a strict liability standard.

12. See *Rova Farms Resort, Inc., v. Investors Ins. Co. of Am.*, 65 N.J. 474, 323 A.2d 495 (1974). See generally Note, 52 CORNELL L.Q. 778, 780 (1967); Annot., 40 A.L.R.2d 168, 170 (1955); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1142 (1954).

13. See *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 293, 170 S.E. 346, 348 (1933). In an age of mounting consumerism, it is highly questionable whether the insurance industry would risk a substantial loss of its business by outwardly manifesting such an attitude.

14. See *Fidelity & Cas. Co. v. Gault*, 196 F.2d 329 (5th Cir. 1952); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950). Cf. Annot., 40 A.L.R.2d 168, 170-71 (1955); Keeton, *Liability Insurance and Responsibility for Settlement*, *supra* note 3, at 1138.

15. *Neuberger v. Preferred Acc. Ins. Co.*, 18 Ala. App. 72, 89 So. 90, *cert. denied*, 206 Ala. 700, 89 So. 924 (1921); *Abrams v. Factory Mut. Liab. Ins. Co.*, 298 Mass. 141, 10 N.E.2d 82 (1937); *McDonald v. Royal Indem. Ins. Co.*, 109 N.J.L. 308, 162

have varied as to the relative weight to be accorded the interests of the insured. Some courts have held that the insurer may give paramount consideration to its own interests,<sup>16</sup> while others firmly insist that it is the insured's interest which must be the primary concern.<sup>17</sup> What seems to be the most widely accepted standard is that the insurer give equal consideration,<sup>18</sup> or at least as great consideration,<sup>19</sup> to the interest of the insured, although, compared to the more extreme positions, this is the most difficult standard to administer.<sup>20</sup>

The duty imposed upon the insurer to consider the interests of the insured in negotiating settlement offers has taken on different dimensions in its construction by the courts. One standard upon which the courts have predicated a finding of the insurer's liability for not consid-

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A. 620 (1932); *Schmidt & Sons Brewing Co. v. Travelers Ins. Co.*, 244 Pa. 286, 90 A. 653 (1914). It is interesting to note that New York has been one of the few jurisdictions which strongly supports this view. *See Brochstein v. Nationwide Mut. Ins. Co.*, 266 F. Supp. 223 (1967); *Best Bldg. Co. v. Employers Liab. Assur. Corp.*, 247 N.Y. 451, 160 N.E. 911 (1928); *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923); *Brunswick Rlty. Co. v. Frankfort Ins. Co.*, 99 Misc. 639, 166 N.Y.S. 36 (Sup. Ct. 1917).

16. *See, e.g., Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930); *City of Wakefield v. Globe Indem. Co.*, 246 Mich. 645, 651-53, 225 N.W. 643, 645 (1929).

17. *National Mut. Cas. Co. v. Britt*, 203 Okla. 175, 200 P.2d 407 (1948); *but see Keeton, Liability Insurance and Responsibility for Settlement*, *supra* note 3, at 1141 n.1, for a brief discussion of the uncertainties of the Oklahoma rule. *See also Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 292, 170 S.E. 346, 348 (1933).

18. *See, e.g., Farmers Ins. Exch. v. Henderson*, 82 Ariz. 335, 340, 313 P.2d 404, 407 (1957), where the court stated:

By refusing the \$4,000 plus property damage and submitting to trial, the limit of the company's hazard under the policy limits was an additional \$1,200. Admittedly the property damage could not exceed \$1,500. The jury might infer under the conditions that a plaintiff's verdict was strongly probable; that the insured's loss hazard was much greater than that of the company. After the case was submitted but before verdict, the insurer, by not settling for \$6,000 incurred a \$500 loss hazard and . . . [the insured] a great deal more. The jury could conclude that the company in turning down the opportunities to terminate this litigation was guided principally by its own risk and ignored or at least did not give equal consideration to the risk which it compelled [the insured] to incur. The jury therefore was entitled to conclude that the company did not act in good faith.

19. *See Douglas v. U.S. Fidelity & Guar. Co.*, 81 N.H. 371, 127 A. 708 (1924); *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *see also Keeton, Liability Insurance and Responsibility for Settlement*, *supra* note 3, at 1145 n.23.

20. *See Keeton, Liability Insurance and Responsibility for Settlement*, *supra* note 3, at 1146.



ering the interest of his insured is the negligence standard.<sup>21</sup> In applying this, courts must determine whether an ordinarily prudent person in business would have rejected or accepted a particular settlement offer.<sup>22</sup> This test, however, is subject to variation<sup>23</sup> when framed in terms of what action an ordinarily prudent insurance company would take in reaching a determination on a particular offer if the policy were without limits.<sup>24</sup>

Apparently the basis of the negligence formulation is twofold. First, since the insured has divested himself of the right to control the defense and settlement of claims, he is entitled to expect reasonable care and circumspection in the insurer's conduct.<sup>25</sup> Secondly, "when one knows or has reason to anticipate that the person, property, or rights of another are so situated . . . that they may be injured through his conduct, it becomes his duty to so govern his actions as not negligently to injure the person, property, or rights of another."<sup>26</sup> Thus, it would seem that an insurer's honest mistake in judgment would not, under the negligence formulation, render it liable for refusing to settle a claim within policy limits.<sup>27</sup> The negligence test has found success when applied in situations where the insurer fails to consider the extent of the plaintiff's injuries,<sup>28</sup> refuses to act upon the advice of counsel,<sup>29</sup> or has

21. See Annot., 40 A.L.R.2d 168, 186-90 (1955), and the cases cited therein, along with additional cases cited in the updated supplement to the annotation, for a detailed analysis of the negligence standard.

22. See, e.g., *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947), wherein the insurer refused an opportunity to settle the claim for \$1,000 less than the policy limit, whereupon a subsequent judgment was entered against the insured for an amount in excess of his policy limit. The court found that, in light of the claimant's expenses and the permanence of her injuries, a prudent businessman would have accepted the settlement offer. *Accord*, *Douglas v. U.S. Fidelity & Guar. Co.*, 81 N.H. 371, 127 A. 708 (1924).

23. See note 21, *supra*, at 186-90.

24. See, e.g., *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947), where the court used the negligence test interchangeably with the test of the ordinarily prudent businessman.

25. *Boling v. New Amsterdam Cas. Co.*, 173 Okla. 160, 46 P.2d 916 (1935).

26. *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947).

27. *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*, 215 S.W.2d 904 (Tex. Civ. App. 1947).

28. *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Com. App. 1929).

29. *Royal Transit, Inc. v. Central Sur. & Ins. Corp.*, 168 F.2d 345 (7th Cir. 1948), *cert. denied*, 335 U.S. 844 (1948); *accord*, *Lanferman v. Maryland Cas. Co.*, 222 Wis. 406, 267 N.W. 300 (1936).

acted upon the advice of misinformed counsel.<sup>30</sup> Moreover, the negligence standard is frequently employed to hold insurers liable for failing to properly investigate a claim.<sup>31</sup>

Another widely adopted standard used for evaluating an insurer's liability is that of good faith, which, unlike the negligence standard, requires a showing of an intentional disregard of the financial interests of the insured.<sup>32</sup> It may be said that the good faith rule requires convincing evidence that the company rejected a settlement offer which, in fact, it considered to be reasonable.<sup>33</sup> One writer suggests that the distinction between the good faith and negligence tests is less marked than those terms, on their face, would suggest.<sup>34</sup> Perhaps the major flaw of the good faith standard is the difficult, if not impossible task of proving an intentional disregard of the insured's interests. In theory, all that an insurer need show under this standard is some rational basis to support its decision to litigate rather than settle a claim.<sup>35</sup> Examples of conduct construed to be acts of bad faith have been found in an insurer's inducing an insured to contribute to the amount needed to settle a claim within policy limits;<sup>36</sup> advising an insured to place his property beyond the reach of an anticipated judgment;<sup>37</sup> failing to investigate a claim so as to ascertain adequate evidence on the issues of liability and the amount of anticipated damages;<sup>38</sup> setting up a reserve of funds to cover possible liability to the policyholder;<sup>39</sup> refusing to accept settlement offers recommended by the adjuster or counsel;<sup>40</sup> fail-

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30. *Douglas v. U.S. Fid. & Guar. Co.*, 81 N.H. 371, 127 A. 708 (1924).

31. *See, e.g., Southern Farm Bureau Cas. Ins. Co. v. Mitchell*, 312 F.2d 485 (8th Cir. 1963).

32. *Johnson v. Hardware Mut. Cas. Co.*, 109 Vt. 481, 1 A.2d 817 (1938). *See generally Keeton, Liability Insurance and Responsibility for Settlement, supra* note 3, at 1139 n.6.

33. *See, e.g., Georgia Cas. Co. v. Mann*, 242 Ky. 447, 46 S.W.2d 777 (1932).

34. *See Keeton, Liability Insurance and Responsibility for Settlement, supra* note 3, at 1140.

35. *See Note, Insurer's Refusal to Settle—A Proposal for Imposition of Liability above Policy Limits*, 60 YALE L.J. 1037, 1040, n.13 (1951).

36. *Boling v. New Amsterdam Cas. Co.*, 173 Okla. 160, 46 P.2d 916 (1935).

37. *Noshey v. American Auto Ins. Co.*, 68 F.2d 808 (6th Cir. 1934).

38. *Maryland Cas. Co. v. Elmira Coal Co.*, 69 F.2d 616 (8th Cir. 1934); *accord, Southern Farm Bureau Cas. Ins. Co. v. Mitchell*, 312 F.2d 485 (8th Cir. 1963).

39. *Lanferman v. Maryland Cas. Co.*, 222 Wis. 406, 267 N.W. 300 (1936).

40. *State Farm Mut. Auto Ins. Co. v. Jackson*, 346 F.2d 484 (8th Cir. 1965); *see also Maryland Cas. Co. v. Elmira Coal Co.*, 69 F.2d 616 (8th Cir. 1934); *American Mut. Liab. Ins. Co. v. Cooper*, 61 F.2d 446 (5th Cir. 1932), *cert. denied*, 289 U.S. 736 (1933);

ing to settle when the chances of prevailing at court are extremely doubtful and the accumulated expenses of the case have already exceeded policy limits;<sup>41</sup> and delaying unnecessarily the negotiation of a settlement offer.<sup>42</sup>

It matters little what terminology is used to describe the standard by which the conduct of the insurer in negotiating settlements will ultimately be judged, for the standard, as applied, is neither good faith nor negligence but rather a curious blending of the two, designed to meet the exigencies of a given case.

Before returning to the strict liability analysis suggested in *Crisci*, brief mention should be made of the legal underpinnings of an insurer's duty regarding settlement.

It has often been thought that an action against an insurer for the wrongful refusal to settle a claim within policy limits sounds in tort;<sup>43</sup> however, it is to be noted that aggrieved insureds have also successfully based their claims in contract.<sup>44</sup> Generally, the measure of damages will depend upon the theory utilized by the plaintiff in framing his complaint. In contract actions, damages are frequently recoverable for breach of contract only to the extent that they were within the contemplation of the parties at the time of the making of the contract, whereas in tort, the doctrines of foreseeability and proximate cause are determinative of the amount of compensation.<sup>45</sup> As Professor Robert Keeton suggests, however, the theoretical characterization is rarely critical, except perhaps in cases involving differing statutes of limitation.<sup>46</sup>

Whether one will ultimately view the obligation of an insurer to settle a claim as a tort or contract obligation depends upon whether the duty is deemed to arise from the insurer's implied covenant of good

*Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill. App. 649, 60 N.E.2d 869 (App. Ct. 1945).

41. *City of Wakefield v. Globe Indem. Co.*, 246 Mich. 645, 225 N.W. 643 (1929).

42. *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

43. R. KEETON, *INSURANCE LAW—BASIC TEXT* § 7.8 (a), 509 n. 3 (1971).

44. *See, e.g., Crisci v. Security Ins. Co.*, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

45. *See Note*, 43 N.Y.U.L. REV. 199 (1968) for more detailed coverage on this point.

46. *See R. KEETON, INSURANCE LAW—BASIC TEXT*, § 7.8 (a), 509 (1971), where the author states:

There are a few situations, though only a few, in which the classification is critical. For example, characterizing the cause of action as one sounding in contract may result in the application of a longer period of limitation and tends to favor assignability of the chose in action. On the other hand, characterizing the cause of action as one sounding in tort may broaden the measure of damages.

faith, or from the nature of the relationship existing between the liability insurer and its insured. A contract action is proper if the duty to settle is deemed to have arisen out of the insurer's covenant of good faith. Although no rigid formula exists for determining when an insurance contract will give rise to a relationship of such independent significance that a breach of duty arising therefrom will be deemed a tort, it is safe to say that this will occur in situations where one party contractually limits himself to such an extent that he is dependent upon the other party for that protection which he would otherwise be able to provide for himself.<sup>47</sup> The California cases are particularly interesting in this regard, since an injured plaintiff may bring his action in either tort or contract.<sup>48</sup>

## 2. THE *CRISCI* ANALYSIS—TOWARD STRICT LIABILITY

Though it refused to pass on the merits of the strict liability claim, the court in *Crisci*<sup>49</sup> did regard as meritorious the suggestion that insurers be held absolutely liable for their conduct regarding a claim settlement.<sup>50</sup> The court based its findings on four factors: First, the court recognized that it is within the reasonable expectation of the insured that his policy coverage will protect him against any claim which may be settled within policy limits. Second, the court reasoned that, given the conflict between the interests of the insurer and its insured, and since only the insurer stands to benefit by refusing a settlement offer and proceeding to trial, the insurer should be the party to bear the risk of an adverse judgment. Third, the court stated that since the insurer requires the insured to divest himself of the valuable right to settle claims,

47. *Eads v. Marks*, 39 Cal. 2d 807, 249 P.2d 257 (1952); *cf.* *Ritchie v. Anchor Cas. Co.*, 135 Cal. App. 2d 245, 286 P.2d 1000 (1955).

48. *See, e.g., Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

49. *Id.*

50. *Id.* at 432, 426 P.2d at 177, 58 Cal. Rptr. at 17, where the court states:

[T]he duty of the insurer to consider the insured's interest . . . arises from an implied covenant in the contract, and ordinarily contract duties are strictly enforced and not subject to a standard of reasonableness. . . . [T]he rejection of a settlement within the limits where there is any danger of a judgment in excess of the limits can be justified, if at all, only on the basis of the interests of the insurer, and, in light of the common knowledge that settlement is one of the usual methods by which an insured receives protection under a liability policy, it may not be unreasonable for an insured . . . to believe that a sum of money equal to the limits is available.

the contractual duties of the insurer should be strictly enforced. Finally, the court based its recognition of strict liability as a viable theory on considerations of "elementary justice."

At first glance, the arguments favoring the adoption of a strict liability standard appear persuasive and certainly merit discussion. It is only in light of the potentially deleterious results of such a standard that the nonfeasibility of this approach becomes apparent. To this, the court in *Crisci* did not address itself.

The strict liability approach to excess recovery would provide a larger measure of clarity and certainty than the frequently uncertain and often arbitrarily applied standards of reasonableness and good faith.<sup>51</sup> Its adoption could eliminate the insurer's difficult task of evaluating whether a jury will make the determination, based upon a given set of facts, that a reasonably prudent insurer, in the exercise of good faith, would have settled the claim within policy limits if the policy were unlimited. Too often, the only evidence against the insurer is its refusal to settle within policy limits which, without more, is neither negligence nor bad faith.<sup>52</sup> Moreover, it is argued that, in a private law suit, an individual who rejects a settlement believing he can benefit through litigation will be obligated to pay the entire judgment in the event that he loses. An insurer, more skilled in evaluating risks and better able to distribute losses, should be treated no more favorably.<sup>53</sup>

Strict liability would also shift the burden of loss to the insurer, and create a conclusive presumption of unreasonableness against the insurer who refuses to settle a claim within policy limits.<sup>54</sup> Under the existing formulations, it is not the clearly culpable insured who suffers, but rather those defendants whose fault is not as clearly established. In the case of the clearly culpable defendant, it may be said with some confidence that the insurer would be eager to settle for the lowest possible amount within the policy limits.

The strict liability approach would further serve to undercut the temptation of liability insurers to adopt a "no settlement" or "selective

51. See Note, 43 N.Y.U. L. REV. 199, 202 (1968).

52. See, e.g., *Farm Mut. Ins. Co. v. Viclana*, 123 F.2d 692 (2nd Cir. 1942), cert. denied, 316 U.S. 672 (1942); *Georgia Cas. Co. v. Mann*, 242 Ky. 447, 46 S.W.2d 777 (1932).

53. See generally *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 288, 41 Cal. Rptr. 401 (3rd Dist. 1964). See also *Excess Liability: Reconsideration of California's Bad Faith Negligence Rule*, 18 STAN. L. REV. 475, 484 (1966).

54. See *Radio Taxi Serv. Inc. v. Lincoln Mut. Ins. Co.*, 31 N.J. 299, 304-06, 157 A.2d 319, 323 (1960).

settlement" policy. In essence, the insurer would be prevented from using the court system, at the expense of its insured, to establish favorable economic policies. Absolute liability would demand responsible decision-making. Strict liability would operate to force insurers to police their own conduct or suffer harsh consequences.

Finally, by holding the liability insurer strictly liable for judgments in excess of policy limits, the public policy consideration of compensating injured claimants would be better served, since a judgment-proof insured is not likely to be able to pay an excess judgment. Thus, the protection that would be afforded through the adoption of strict liability would run not only to the insured but to the injured claimant as well.

Advocates of the strict liability approach agree that the insurer should be held to the standard of a fiduciary in light of the valuable right of settlement foregone by the insured under the policy.<sup>55</sup> Certainly, it cannot be doubted that an insurer should be held to something stricter than the morals of the marketplace,<sup>56</sup> yet strict liability, even though it offers several advantages, is not the answer. Perhaps a fairer and more conscientious application of the good faith and reasonableness standard

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55. *See* *Rova Farms Resort Inc. v. Investors Ins. Co.*, 65 N.J. 474, 323 A.2d 495 (1974), where the court stated:

We, too, hold that an insurer, having contractually restricted the independent negotiating power of its insured, has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage. Any doubt as to the existence of an opportunity to settle within the face amount of the coverage or as to the ability and willingness of the insured to pay any excess required for settlement must be resolved in favor of the insured unless the insurer, by some affirmative evidence, demonstrates there was not only no realistic possibility of settlement within policy limits, but also that the insured would not have contributed to whatever settlement figure above that sum might have been available.

*Id.* at 490, 323 A.2d at 507. *See also* Annot., 40 A.L.R.2d 168, 173 n.8 (1955).

56. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), where Chief Judge Cardozo said of the fiduciary:

[Fiduciaries] owe to one another . . . the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrated erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

*Id.* at 461, 164 N.E. at 546.

by the courts would be better suited to cope with the problem of excess liability.

Although the arguments supporting strict liability appear attractive, the adoption of such an approach would serve only to create more serious problems which, in the long run, would work to the detriment not only of the insurance industry, but, more importantly, of the insured public as well. Oversimplified and specious, the arguments supporting strict liability appear to propose solutions, but in truth they create new problems.

Strict liability has the undesirable potential of creating new moral hazards in the field of liability insurance. First, it would allow insureds to receive what in essence amounts to excess liability coverage without properly paying for it. No matter how high an insured's liability coverage is, it is always possible that some unfortunate event could take place which would expose the insured to liability in excess of his policy limits. If the claims asserted against the insured are unreasonable, it seems neither fair nor consistent with elementary justice to force an insurer to settle such a claim. Strict liability has this effect; it precludes the liability insurer from protecting its financial interest. The insured, on the other hand, may well gain "blanket coverage" arising from the insurer's simple refusal to settle—a situation that neither he nor his insurer contemplated at the time of making the policy. It would seem that "elementary justice" should be applicable not only to the insured's interests but to those of the insurer as well. When an insured purchases a policy with established limits, he assumes the risk that a judgment could be entered in excess of those limits. When an action is filed against an insured for an amount in excess of the policy limits, the threat of excess judgment should be heavily considered by the insurer in negotiating a settlement, but it should not be controlling.

On its face, the absolute liability standard would seem the easiest to apply, since the issues are narrowly confined to whether a good faith offer of settlement was made, communicated to the insurer, and rejected. But, in fact, judicial administration becomes a more onerous task in light of the greater likelihood of collusion between the insured and the claimant which would undoubtedly accompany the implementation of strict liability. Since the insured would be free from the threat of excess liability once a settlement offer were made within policy limits, it would be to the insured's advantage to urge the claimant to make a settlement offer. If the claimant is assured of receiving the excess judgment from the insurance company, the two might easily conspire to mislead the insurer to believe that the chance of recovery is slight. Once an offer of settlement is made and rejected, the insured would find

himself with excess coverage, and the insurer would incur the additional expense.<sup>57</sup> Perhaps such collusion would be rare, but strict liability is, at the least, encouragement for claimants to pursue the insurer instead of the wrongdoer. The risk seems hardly worthwhile.

A further consideration arises when an insured is subject to multiple claims stemming from a single occurrence, particularly when the totality of the claims substantially exceeds the policy limit. In this situation, strict liability provides a strong incentive for the insurer to settle a single claim within the stated obligations of the policy. In so doing, the insurer is discharged from further liability with respect to the other claims.<sup>58</sup> Such situations are potentially harmful. Frequently the insured's interests are best protected by litigating the multiple claims to avoid excess recovery. Strict liability would not only cause an insurer to act with circumspection and restraint, but also would deter the insurer from pursuing litigation when litigation might, in the long run, be the best course of action.

In addition, the strict liability approach not only encourages the insurer to settle specious claims, but also provides a better bargaining position for a claimant's so-called nuisance value claims.<sup>59</sup> Certainly, strict liability would provide a climate conducive to an increase in the number of such claims.

The ultimate detriment of the strict liability formulation would run not to the insurer, as intended by its proponents, but to the insuring public who will find the effects of this policy reflected in higher premium rates. Strict liability would further encourage insurers to raise the minimum coverage of liability policies so as to minimize excess recoveries. As a result of such risk-spreading, those of moderate income could be forced either to forego liability coverage altogether or pay a substantially higher premium.<sup>60</sup>

### 3. THE OTHER SIDE OF THE COIN

There are a series of cases, though few in number, which refuse to

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57. See Note, *An Insurance Company's Duty to Settle: Qualified or Absolute*, 41 SO. CAL. L. REV. 120, 139-42 (1968).

58. Note, 43 N.Y.U. L. REV. 199, 203 (1968).

59. *Id.* at 203, 204, where the author states: "To a certain extent, such a development seems unavoidable; at least, nuisance plaintiffs would obtain a stronger bargaining position."

60. See, e.g., *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, 65 N.J. 474, 323 A.2d 495 (1974).



hold an insurer liable for failing to settle claims within the limits of the policy. The most recent noteworthy case is *Brochstein v. Nationwide Mutual Insurance Co.*,<sup>61</sup> in which the court decided that an action could not be predicated on an insurer's wholly self-interested refusal to settle within policy limits. The court explicitly rejected the suggestion propounded by Professor Keeton that an insurer must, in good faith, approach settlement negotiations as if the policy had no limit.<sup>62</sup> Such a view is not without support.

In *Rumford Falls Paper Co. v. Fidelity Casualty Co.*,<sup>63</sup> an insured employer brought an action against Fidelity for the amount of the judgment in excess of policy limits on the ground that the insurer's refusal to settle an employee's claim within policy limits created a contractual obligation on the part of the insurer to pay the excess judgment. Although the court did recognize that the insured could be placed in a position of substantial economic danger by the insurer, the court rejected the plaintiff's reasoning, holding that the alternative of compelling an insurer to settle all cases or be liable for any excess would leave the insured free to disregard "those rules of prudence and vigilance which are indispensable for the reasonable protection of the laborers engaged in [the insured's] service."<sup>64</sup> The court ultimately found that the settlement clause contained in the policy evidenced the intention of the contracting parties to vest in the insurer absolute discretion regarding decisions to settle claims.<sup>65</sup> The court clearly recognized that giving an insured the power to control the settlement of his own case encourages the settlement of claims which may well prove unfounded if litigated.

In *Auerbach v. Maryland Casualty Co.*,<sup>66</sup> both the insurer and its insured agreed that the claim in question should be settled rather than litigated. Disagreement resulted when the parties failed to agree upon their respective contributions, the insurer insisting that it would contribute only 70% of the policy limit, the insured demanding the entire policy limit.<sup>67</sup> Consequently, no settlement was reached, and the claimant recovered judgment for an amount substantially in excess of the policy limit. The court reasoned that an insurance policy, like other contracts,

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61. 266 F. Supp. 223 (E.D.N.Y. 1967).

62. *Id.* at 226.

63. 92 Me. 574, 43 A. 503 (1899).

64. *Id.* at 587, 43 A. at 506.

65. *Id.* at 580, 43 A. at 504.

66. 236 N.Y. 247, 140 N.E. 577 (1923).

67. *Id.* at 253, 140 N.E. at 579.

should be construed according to the sense and meaning of the terms used by the parties. Since the insurance contract unambiguously gave the insurer complete control over settlement, the insurer was free from liability for the excess.<sup>68</sup> Subsequent cases have adopted this approach,<sup>69</sup> which, simply stated, indicates that, for an insurer to be liable, fraud or misrepresentation amounting to concealment of relevant facts from the insured must be shown.<sup>70</sup>

In a similar case, *Best Building Co. v. Employer's Liability Insurance Co.*,<sup>71</sup> the injured claimant offered to settle at an amount equal to 85% of the insured's policy limit. The insurer, however, refused to settle for more than 65%. Based on an excess judgment of 160% of the policy limit, the insured brought suit, alleging that if the insurer had advised him of the claimant's settlement offer, he would have contributed the difference to avoid excess liability. Adhering to past New York decisions, the court reaffirmed the reasoning that without a clear showing of negligence or bad faith, the insurer will not be liable. A further holding was that an insurer is under no duty to settle claims.

In *Brochstein*, the claim against the insurer was based upon the insurer's failure to accept an offer to settle the case at 80% of the policy limit. The verdict returned against the insured amounted to 212% of the policy.<sup>72</sup> The insurer had offered to settle for 70% of the policy limit. The claimant refused to settle for less than 90%. The insurer, unable to reach an amenable settlement figure, apprised the insured that it would be in his best interest to hire independent counsel, and further warned the insured of the possibility of an excess verdict. The insured, however, chose to take no action, relying solely upon the insurer to handle the case. The court found that there was no mismanagement of the insurer's investigation or of the court proceedings, and further found that there was neither a breach of contract nor any other wrong on the insurer's part.<sup>73</sup> As a result of the factual finding, the court dismissed the action on the merits, holding that a liability insurer is under no duty to settle

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68. *Id.*

69. *See, e.g., Streat Coal Co. v. Frankfort Gen. Ins. Co.*, 237 N.Y. 60, 142 N.E. 352 (1923).

70. *Id.*

71. 247 N.Y. 451, 160 N.E. 911 (1928).

72. 266 F. Supp. at 224. It should be noted, however, that the actual judgment was for an amount equal to 190% of the policy limit. Costs and interest brought the total figure to 212% of the policy limit.

73. *Id.* at 224.

within policy limits;<sup>74</sup> that bad faith is not shown by refusal to settle or by other acts suggesting that the insurer pursued its own interest;<sup>75</sup> and that a liability insurer is not liable for any implicit negligence or lack of due diligence if neither fraud nor bad faith is proven.<sup>76</sup>

At least one writer criticized the *Brochstein* opinion for not considering New York precedents which would have favored the insured. Realistically viewed, however, the *Brochstein* case is merely a fair application of the good faith rule. When one examines the many cases involving the issue of an insurer's liability for refusing to settle claims within policy limits, it becomes apparent that almost all of the cases are decided in favor of the insured. Could it be that over the years liability insurers have grown to adhere to a standard of wholly self-interested, bad faith conduct? It is possible that many jurists and legal scholars have become missionaries for insureds in many cases where the insurer acts in good faith and with reasonable care. *Brochstein* comes at an appropriate time, for it reveals the court's willingness to hold an insurer liable for judgments in excess of policy limits, but only if fraud or bad faith conduct is clearly shown. Such a practice, it is urged, will best serve the principles of "elementary justice" by protecting the rights of both parties, as opposed to the harsh standard of strict liability which will leave the insurer and the insuring public without the right to protect their own interests.

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74. *Id.* at 226.

75. *Id.* at 225.

76. *Id.* at 226.

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## **Anti-Sex Discrimination Laws: A Mandate for the Redistribution of Social Resources Based upon the Emerging Constitutional and Statutory Equality of the Sexes**

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Not since the era when feminists such as Susan B. Anthony and Elizabeth Cady Stanton fought for women to attain the right to vote, receive an education, and own property has the women's movement achieved its present potentiality for revolutionizing the basic tenets of our social structure. Historically, women's entrance into the hierarchial spheres of our social, economic, and political institutions has been precluded by our society's strict adherence to traditional sex roles. However, American society is presently undergoing a consequential transitional period during which both female and male sex roles are being redefined and expanded. It is axiomatic that legal change is often necessary to initiate progressive change in society's mores, as well as to implement and institutionalize such change.<sup>1</sup> The legal ramifications necessary to implement a potential sex-role equalitarianism are that women's rights and responsibilities be recognized as equal to those of men for the first time in our American constitutional history.

Accordingly, the contemporary emergence of the women's movement is asserting that dysfunctional social institutions and laws based upon outmoded sex-based stereotypes be modified to reflect the profound historical transformations that have occurred during the past two hundred years within our political, economic, and educational institutions. This article will describe the legal and political change which has occurred and is presently occurring in response to women's evolving historical role, and the movement which bears the burden of reforming the underlying legal principles which have been molded by ubiquitous traditions that have restricted women's roles in the past.

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1. CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, *Introduction, IMPACT ERA, LIMITATIONS AND POSSIBILITIES* 3 (1st ed. 1976).

## 1. THE PROBLEM

The unfortunate history of sex discrimination was acknowledged by the United States Supreme Court in 1973 in *Frontiero v. Richardson*,<sup>2</sup> in which the Court held unconstitutional medical and housing benefit statutes that allowed a serviceman to claim his wife as a dependent without showing her actual dependency, but required a servicewoman who claimed her husband as a dependent to show his actual dependency. Exemplifying the "unfortunate history"<sup>3</sup> of sex discrimination that was recognized by the Supreme Court in this opinion is a decision a century earlier in which the Supreme Court denied a woman the right to practice law solely because of her sex.<sup>4</sup> In a 1948 decision, the Supreme Court continued to accept the traditional social classification of a "woman's place" when it upheld a state statute which barred women from becoming bartenders, on the theory that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."<sup>5</sup> However, twenty-five years later, the Supreme Court dramatically reversed its former philosophical view and unequivocally took judicial notice of the issue of "shifting social standards" in relation to women's changing role:

No longer is the female destined solely for the home and the rearing of the family and only the male for the market place and the world of ideas. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life, where education is a desirable, if not always necessary antecedent, is apparent and a proper subject of judicial notice.<sup>6</sup>

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2. 411 U.S. 677 (1973). In the plurality opinion, Justices Brennan, Douglas, White, and Marshall concluded that classifications based upon sex were inherently suspect and must be subjected to strict judicial scrutiny in order to afford women equal protection under the First and Fourteenth Amendments of the United States Constitution. In a concurring opinion, Chief Justice Powell and Justice Blackmun found pending passage of the Equal Rights Amendment a compelling reason to defer designation of sex classifications as suspect so as not to preempt current legislative action on a major political decision.

3. *Id.* at 684.

4. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

5. *Goesart v. Cleary*, 335 U.S. 464 (1948). In this case, the United States Supreme Court upheld a Michigan statute that limited the employment of women as bartenders to establishments owned by the father or husband of the female employee.

6. *Stanton v. Stanton*, 95 S. Ct. 1373 at 1378 (1975). The Utah Supreme Court decision was reversed by the U.S. Supreme Court which held that a Utah statute was

The women's movement has been a primary stimulus in effecting such change of opinion in the United States Supreme Court and in implementing recent successful enforcement activity of existing anti-discrimination legislation. Because the burden of change is upon those who want change, women's advocates have had to continually ". . . challenge their adversaries' claims with argumentation and documentation, to monitor law enforcement, to prod the bureaucracy, to pressure the legislators and, at the same time, to extend their support and enlarge their resources"<sup>7</sup> to their constituents.

## 2. THE STATISTICS

Abundant evidence of a demand for change to eliminate the sex-stereotyping replete in our social institutions is apparent from an assessment of women's actual roles during the past twenty-five years in contrast to their "mythological" roles. Such contrast is clearly evidenced by that statistical figure which gainsays the myth of "women's place in the home," by revealing that the number of women working in the labor force nearly doubled during this period, while the number of working men increased by only one-fourth.<sup>8</sup> Challenging the myth of motherhood is the statistic which shows that fertility rates for the century dropped from near record highs in the 1950's to record lows in the 1970's.<sup>9</sup> The myth of marriage as woman's primary career is belied by those statistics which indicate that college enrollments for women rose far more rapidly than those for men;<sup>10</sup> that the rocketing entrance of women into professional schools is historically unprecedented;<sup>11</sup> and

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unconstitutional as a violation of equal protection which declared that girls attained majority at age eighteen, but boys did not attain majority until they reached twenty-one years of age.

7. Cowan, *Legal Barriers to Social Change: The Case of Higher Education*, in *IMPACT ERA*, *supra* note 1, at 179-80.

8. UNITED STATES DEP'T OF COMMERCE, BUREAU OF CENSUS, *A Statistical Report of Women in the United States*, VI *Women Today* 66 (May 10, 1976).

9. *Id.* See Sicherman, *American History*, 1 No. 2 SIGNS, *JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 472 (Winter 1975).

10. *A Statistical Report*, *supra* note 8, See also DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *School Enrollment in the United States: 1972*, CURRENT POPULATION REPORTS, from I. MURPHY, *PUBLIC POLICY ON THE STATUS OF WOMEN*, 111 n. 18 (2d ed. 1973).

11. U.S. DEP'T OF LABOR, 1975 *MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN* 66 (1975).

that the rate of women remaining single has risen rapidly.<sup>12</sup> The myth that women work merely for spending money is gainsaid by the statistic that in 1975 women comprised 40% of the total labor force, although 60% of these women worked because of pressing economic need.<sup>13</sup> In 1975, the number of families headed by women rose to an historic high of 13%, but 45% of all families below the poverty level were headed by women.<sup>14</sup> Challenging the myth of equal opportunity are those statistics which reveal in 1974 that women earned only 40%-70% of what men earned with comparable education and training,<sup>15</sup> despite the passage of fair employment laws as early as 1963. The myth of egalitarian marriage is belied by the harsh reality of women's financial rights in those forty-three separate property states which makes the earnings of each spouse after marriage the property of the earning spouse alone, regardless of the other's domestic services or child care,<sup>16</sup> and by the realization that upon divorce only 10% of women in this country receive the law's guaranteed support, and that most divorced mothers do not receive court-ordered child support.<sup>17</sup> An understanding of such changes and the proposed solutions to cope with such problems are critical to an understanding of a major social and economic phenomenon of our time.

### 3. THE HISTORY

During the past two hundred years, those conditions which caused the exclusive stereotypical picture of women as wife, housewife, and mother to become obsolete were: (1) the amount of time women spent in actual mothering being reduced to an historical low;<sup>18</sup> (2) women's

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12. *A Statistical Report*, *supra* note 8. See also J. FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 29 (1975). Since 1970, the number of households in which a person lived alone or with non-relatives had risen in 1976 by 41%. *Rise in Number of Women-Headed Households Is Reported by Census Bureau*, VI *WOMEN TODAY* 131 (Sept. 27, 1976).

13. Women's Bureau, U.S. Dep't of Labor Employment Standards Ad., *Women Workers Today* 1 (Oct. 1976), *TWENTY FACTS ON WOMEN WORKERS* ¶ 2 (June 1975).

14. *TWENTY FACTS*, *supra* note 13, at ¶ 13-14. See U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, *U.S. WORKING WOMEN, A CHARTBOOK*, chart 31 (1975).

15. *U.S. WORKING WOMEN*, *supra* note 14, at chart 34.

16. Bingaman, *The Impact of the ERA on Marital Economics*, in *IMPACT ERA*, *supra* note 1, at 116-17.

17. Weitzman, *Legal Equality in Marriage and Divorce: The ERA's Mandate*, in *IMPACT ERA*, *supra* note 1, at 201.

18. In 1800, the average white woman surviving menopause bore seven children, 50% of whom survived to adulthood. Sicherman, *American History*, *supra* note 9, at

lack of physical strength no longer being a determining factor in their ability to compete in a technological society; (3) women no longer being regarded as productive economic contributors within their own homes;<sup>19</sup> (4) women's aspirations and expectations being raised enormously when they were educated to expect the personal application of the democratic ideals of equal opportunity and equal justice under the law;<sup>20</sup> (5) women controlling their reproductive lives by determining the number of children they wished to bear and rear. Even a cursory assessment of the *de facto* opportunities available to women since the Industrial Revolution through the present reveals that while the "reasons" for class distinctions based solely on sex existed no more, those distinctions and corresponding restrictive stereotypes were as firmly entrenched as ever throughout our institutions and laws.<sup>21</sup>

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472. Komarovsky, *Women's Role in American Society: Retrospect and Prospect*, in *WOMEN'S ROLE IN CONTEMPORARY SOCIETY* 63-64 (1972). In 1975, her counterpart lived 30 years longer, bore one to two children, 95% of whom survived to adulthood. *Fertility, A STATISTICAL PORTRAIT OF WOMEN IN THE U.S.*, in 1 J. OF REPRINTS OF DOCUMENTS AFFECTING WOMEN 175 (July 1976).

19. The Industrial Revolution was a major cause of job segregation which has been repeatedly cited as a primary means by which men have maintained a superior position in a capitalistic society. Sociologist Jean Lipman-Blumen notes that patriarchy and capitalism allowed men to control a disproportionate amount of resources, such as power, status, money, land, political influence, legal power, education, occupational resources, aggression, strength, competitiveness, and leadership, as contrasted with women's resources of sexuality, youth, beauty, promise of paternity, and domestic and clerical services. Lipman-Blumen, *Toward a Homosocial Theory of Sex Roles: An Explanation of the Sex Segregation of Social Institutions*, in 1 No. 3 Pt. 2 SIGNS, A JOURNAL OF WOMEN IN CULTURE AND SOCIETY 17 (Spring 1976).

20. Women obtained little formal education in America until after the American Revolution, when education for women was thought desirable so that they, as mothers, could intelligently educate future citizens of a new republic. However, women met considerable resistance when they began to enter the non-traditional domains of public power during their participation in the abolitionist and suffragette movements before the Civil War. See *In re Lockwood*, 154 U.S. 116 (1894) (women not entitled to vote under the Fourteenth Amendment), and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (women not entitled to practice law under the Fourteenth Amendment). See also Castle, *Susan B. Anthony, Reformer*, 59 A.B.A. J. 526 (1973).

21. During the nineteenth century, women seeking paid employment could readily enter the fields of teaching, nursing, librarianship, and clerical positions, since these areas were seen as proper extensions of their domestic and homemaking roles. However, these roles were also characterized by lower pay, infrequent advancement, and lowering of the status of the profession in the long run. During World War I and World War II, women provided a readily manipulative source of labor and filled 80% of the war-related jobs after being given only brief training. These experiences of successfully performing "male-only" jobs that had been excluded from them during peace time, coupled with



The spark which ignited the Commission on the Status of Women to action in 1966, the forerunner of the present women's movement, was the arrogant non-enforcement posture of the Equal Employment Opportunity Commission toward women's economic equality as stipulated under Title VII of the 1964 Civil Rights Act.<sup>22</sup> After the Conference of the Commission on the Status of Women, which was headed by a male, refused to bring a resolution to the floor from the Commission on the Status of Women on June 30, 1966<sup>23</sup> that would have urged the Equal Employment Opportunity Commission to treat sex discrimination as seriously as it had treated racial discrimination, twenty-eight women who had supported the ignored resolution formed the National Organization of Women, organized "to bring women into full participation in the mainstream of American society now, assuming all of the privileges and responsibilities in truly equal partnership with men."<sup>24</sup>

#### 4. THE OBSTACLES

Anti-discrimination laws on the books have not effectively realized sexual equality because they simply have not been enforced. The cause of sex discrimination's most visible manifestation, economic discrimination in the labor force, is directly attributable to those varied attitudes which affirm the inferior position of women. One such attitude perceives sex discrimination as the last "socially acceptable" prejudice, but invari-

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their increasing educational attainment, made many women aware that they possessed capabilities far greater than they were allowed to exhibit in their traditional female roles. During the postwar periods, women suffered hostility and discrimination in entering male professional and business worlds, and in attempting to enter male labor unions, which had traditionally insisted on contracts with segregated job categories, seniority lists, and pay scales for men and women. Women hence began to appreciate the implications of the 1,000 laws, institutions, and practices that have relegated women to an inferior status. MacDougal, Lasswell, Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT. L. 497 at 502 (July 1975).

22. FREEMAN, *supra* note 12, at 53-54. An appalling lack of enforcement activity against sex discrimination was notarized by such pervasive departmental attitudes as that of the first Equal Employment Opportunity Commission director, who publicly stated that the provision of "sex" added to Title VII was a "fluke . . . conceived out of wedlock," and that "men were entitled to female secretaries." Ironically, the "sex" provision was added to Title VII by one of its strongest opponents, Rep. Smith of Virginia, as a joke in an attempt to make the employment section of the bill look silly and fail to pass. 110 CONG. REC. 2577 (1964).

23. FREEMAN, *supra* note 12, at 54 n. 27.

24. *Id.* at 55.

ably "more subtle, more sophisticated and more acceptable" than other forms of discrimination.<sup>25</sup> Abundant studies confirm that sex discrimination has become institutionalized in the labor force due to (1) uninformed and prejudicial attitudes of employers,<sup>26</sup> (2) the traditional domestic, dependent, and non-career orientation of women,<sup>27</sup> and (3) the dual role of women as both wife-housewife-mother and employee.<sup>28</sup> The

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25. Former U.S. Labor Dep't attorney Thomas Murphy noted that "the acceptance of lower wages for females doing work equal to that of their male colleagues has been widespread and tacitly accepted among those who have displayed indignation toward similar racial inequity." Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act of 1963-1970*, 39 U. CIN. L. REV. 615 (Fall 1970).

26. A recent study revealed that most administrators of job training and employment programs, as well as the employees themselves, were either misinformed or unfamiliar with job discrimination laws and practices. NEWS FROM THE U.S. LABOR DEP'T, WOMEN AND WORK 3 (Jan. 1975). In addition, employers sometimes argue that job discrimination is justified because women get pregnant, cannot do heavy work, and are absent from work more often than men. However, it is often pointed out that, in reality, pregnancy is a short-term disability, and that choices to do work requiring weightlifting abilities or hazardous conditions should depend upon individual inclinations and ability, for women as they do for men. Further, it is statistically evident that women's absentee rates do not differ from those of men. *Rights of Working Women: International Perspective*, 14 VA. J. INTERN. L. 729 at 740 (1974).

27. Researchers have found that subtle mechanisms of social control such as the marriage structure and traditional female roles have channelled women away from male occupational fields and toward roles which society finds necessary for its maintenance and continuity. *Hearings 805 of H.R. 16098 Before Special Subcommittee on Education, House Committee on Education and Labor*, 91st Congress, 2d Sess. 624 (1970) at 274. See U.S. DEP'T OF LABOR, 1975 MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN at 60. See also REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT, EXPLOITATION FROM 9 TO 5, *Employer Attitudes and Practices* (1975).

Numerous studies have concluded that a girl early in life discovers that her expectations and opportunities have been restricted, that her rights and freedoms have been limited, and that her femaleness has been defined as a caste-like attribute which sets her apart from men. Freeman, *Legal Basis of the Sexual Caste System*, 5 VALPARAISO U. L. REV. 213 (1971). See also *Dick and Jane as Victims: Sex Stereotyping in Children's Readers*, WOMEN ON WORDS AND IMAGES (1972), and *Sex Discrimination: The Textbook Case*, 62 CALIF. L. REV. 1312 (1974). Many researchers have pointed out that boys have been encouraged to develop "masculine" traits which are common attributes found in most professional and occupational roles such as ingenuity, creativity, bravery, perseverance, achievement, adventurousness, curiosity, autonomy, and self-respect, while girls have been discouraged from developing these traits as "unfeminine" and sex-inappropriate behavior for girls. See E. MACOBY, *THE DEVELOPMENT OF SEX DIFFERENCES* (1966).

28. As long as quality child day care is lacking, most commentators point out that employers will be reluctant to hire women, place them in positions of responsibility, or

simplest principles of equal opportunity are frequently resisted either consciously or subconsciously by employers who continue to assume that the higher status, responsibility, and paycheck of the working man and the correlatively lower status, responsibility, and paycheck of the working woman are somehow naturally ordained and "normal."<sup>29</sup>

Weakness in the enforcement of anti-discrimination laws has further been attributed to a lack of executive leadership,<sup>30</sup> and to a lack of proper legislative drafting, resulting in insufficient staffing, inherent bureaucratic delay and discretion, and weak management and enforcement authority written into the enabling machinery and legislation itself.<sup>31</sup> A further non-supportive posture on equal rights for women has come from the judiciary, as indicated by various law review articles.<sup>32</sup> One such analysis written by two law professors who describe themselves as "middle-aged, white males who had never been radicalized, brutalized, politicized or otherwise leaned on by the Establishment," concluded:

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provide them with extensive job training. However, despite a consensus of studies which have concluded that maternal deprivation is not a result of working mothers, widespread opposition to group child care for middle class families exists. This opposition is evidenced by the attitudes of board members in public and private child and family agencies, local businessmen, and labor leaders, as well as by President Nixon's veto of the 1970 Child Development Bill and President Ford's veto of the 1976 Day Care and Child Services Act. The United States Senate on May 6, 1976, failed to override President Ford's veto of the Day Care and Child Services Act (H.R. 9803) that would have funded federal staffing standards for day care centers. *Day Care Override in Senate Fails*, VI WOMEN TODAY 65 (May 10, 1976). However, the Senate Finance Committee approved a compromise day care bill (H.R. 12455) on May 11, 1976, that prevented many centers from being forced to shut down. *Senate Finance Committee Passes Compromise Day Care Bill*, VI WOMEN TODAY 72 (May 24, 1976). Current day care facilities provide for only 18% of the need and are inadequate for most women to utilize because they are either too expensive or subsidized only for the very poor. TWENTY FACTS, *supra* note 13, at ¶ 10. See also MURPHY, *supra* note 87, at 58-59, and TASK FORCE, *supra* note 27, at 173-85.

29. Gates, *Occupational Segregation and the Law*, in 1 No. 3 Pt. 2 SIGNS, JOURNAL OF WOMEN IN CULTURE AND SOCIETY at 68 (Spring 1976). See also Miner, *The Lesson of Affirmative Action for the Equal Rights Amendment*, in IMPACT ERA, *supra* note 1, at 90.

30. During President Nixon's first term, the Citizens Advisory Council on the Status of Women was provided with a paid staff of only two. I. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN at 21, 42-43 (2d ed. 1973).

31. *Id.* at 39. FREEMAN, *supra* note 12, at 179-80, 182-83. Murphy, *Sex Discrimination in Employment—Can We Legislate a Solution?*, 17 N.Y.L.F. 436 at 450-51 (1971).

32. Sangerman, *A Look at the Equal Pay Act in Practice*, 22 No. 5 LAB. L.J. 259 (1971).

[t]hat by and large the performance of American judges in the areas of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection, critical analysis which have served them so well with respect to other sensitive social issues . . . [S]exism, the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences, is . . . easily discernible in contemporary judicial opinions. . . .<sup>33</sup>

## 5. THE LAWS

### A. Equal Pay Act

The Equal Pay Act was adopted in 1963 as an amendment to the Fair Labor Standards Act of 1938.<sup>34</sup> Directed only to the hourly worker, it requires the same pay for men and women doing equal work which demands equal skill, effort, responsibility, and is performed under similar working conditions in the same establishment.<sup>35</sup> The Act, which is enforced by the Labor Department's Wage and Hour Division, permits wage differentials based on a bona fide seniority or merit system, or on a system that measures earnings by quantity or quality or production or by "any other factor other than sex."

On July 1, 1972, the Act was extended to cover executive, administrative, and professional employees and outside sales personnel.<sup>36</sup> On May 1, 1974, the Act was further extended to cover seven million employees of the federal, state, and local governments.<sup>37</sup> Still unprotected are employees in small retail or service establishments.

The Equal Pay Act has been the most effectively enforced of all anti-discrimination legislation, primarily because of the power of the

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33. Johnstone and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 at 676 (1971).

34. 29 U.S.C. § 206 (d)(1) (1964). An equal rights platform had been adopted by both political parties in every national convention since 1944, and some form of equal pay legislation had been introduced yearly in Congress since 1945. *Equal Pay Act of 1963—Problems in Upholding Standard for Female Employees*, 5 ST. MARY'S L.J. 409 (1973).

35. 29 U.S.C. § 206 (d)(1) (1964). 109 CONG. REC. 8702 (daily ed. May 23, 1963).

36. Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375, 29 C.F.R. § 3541 (1973), 38 Fed. Reg. 11390 (1973).

37. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., *EQUAL PAY UNDER THE FAIR LABOR STANDARDS ACT 1* (June 1974).

Wage and Hour Division in the Labor Department, which has authority to investigate complaints, assist employers with compliance, and file lawsuits. By 1974, the Department had further increased its compliance measures to include intensified enforcement, public education, employer training programs, ongoing research and review, evaluation of progress, and cooperative sharing of data between state and local governments.

A judicial statement of the purpose of the Equal Pay Act is found in *Schultz v. Wheaton Glass*:<sup>38</sup>

The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.

Paradoxically, women's wages were higher before the Act went into effect than after.<sup>39</sup> This trend had stabilized, however, between 1969 and 1973, when the average annual discrepancy between the mean incomes of women and men had remained unchanged, but the number of wage discrimination complaints had doubled.<sup>40</sup>

The most frequently litigated exception to the Equal Pay Act has been the broad exception that permits wage differentials to be based on "any other factor other than sex." Several law review articles have noted that the Labor Department lost most of its early Equal Pay cases because of a misapplication of this statute.<sup>41</sup> One such case was *Hodgson*

38. 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied* 398 U.S. 905 (1970).

39. In 1955, women's median salary income as a proportion of men's was 64%. In 1959 it fell to 61%, and in 1973 to 57%. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., THE EARNINGS GAP Table I (March 1975). The reason for the Equal Pay Act's not budging the median pay rate of women for over an eight-year period may be explained by the fact that, until the 1972 Amendment to the Equal Pay Act, more than 40% of women in the work force were not covered by the Act. In addition, economist Barbara Bergmann attributes the decline in female wages to the vast overflowing of the secretarial labor market after World War II, causing a consequent lowering of women's wages in this category. Bergmann, *The Economics of Women's Liberation*, 208 ANNALS OF THE N.Y. ACAD. SCI. 155 (March 15, 1973). In 1974, the median pay rate for female clerical workers was 67% of that for male clerical workers. *Building the Movement: The New Working Women's Organizations*, 6 THE SPOKESWOMAN 5 (Feb. 15, 1976).

40. U.S. DEP'T OF LABOR, 1975 MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN at 63.

41. 29 U.S.C. § 206 (d)(1)(iv). See *Labor Law—Equal Pay Act—Economic Benefit to Employer is Justification for Wage Differential Between Male & Female*

*v. Robert Hall Clothes*,<sup>42</sup> a highly criticized decision in which the court held that an economic benefit to an employer was "a factor other than sex," thus finding justification for paying salesmen higher wages than saleswomen who had performed equal work. The court rationalized that the segregation of salespeople by sex in men's and women's clothing departments had been justified by reasons of business necessity, and that the sale of more expensive clothing in the men's department resulting in a higher dollar volume in gross sales for the men's department had justified the salary differential.<sup>43</sup>

Since this questionable decision, courts have attempted to look at actual performance and requirements of a job, so that traditional justifications for paying men more than women doing substantially equal work are no longer likely to be approved by the judiciary.<sup>44</sup> Congress has found the following not allowable as a basis for wage differentials on "any other factor other than sex": that an employee is head of a household;<sup>45</sup> that a woman costs more to employ;<sup>46</sup> or that legal restrictions in the state or other laws limit the number of hours, weightlifting, and rest periods for women.<sup>47</sup> The courts, in addition, have found the following not justifiable as "any other factor other than sex" by which to justify wage differentials where male and female employees perform substantially equal work: the flexibility of male employees;<sup>48</sup> a vague and largely illusory training program for males;<sup>49</sup> an arbitrary job classification of "heavy" work for males and "light" work for females;<sup>50</sup> and an illusory compensation rate paid for night work because men refused to work during the day due to the low wages paid to women.<sup>51</sup> To offset past wage discrimination, a court has recently held that a salary equalization formula could be implemented to bring the salaries of female

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*Employees*, 44 Miss. L.J. 1028 at 1031 (Nov. 1973). See generally Sangerman, *supra* note 32.

42. 473 F.2d 589 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973). See Note *Hodgson v. Robert Hall Clothes, Inc.: Concealed Sex Discrimination & the E.P.A.*, 122 U. PA. L. REV. 1033 (1973).

43. 473 F.2d at 597.

44. *Labor Law—Equal Pay Act*, *supra* note 41, at 1031-32.

45. 29 C.F.R. § 800.149 (1972).

46. 29 C.F.R. § 800.151 (1972).

47. 29 C.F.R. § 800.163 (1972).

48. *Schultz v. Wheaton Glass*, 421 F.2d 259 (3d Cir. 1970), *cert. denied* 398 U.S. 905 (1970).

49. *Schultz v. First Victoria Bk.*, 420 F.2d 648 (5th Cir. 1969).

50. *Hodgson v. Daisy Mfg. Co.*, 445 F.2d 823 (8th Cir. 1971).

51. *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973).

faculty members and administrative employees more in line with those of male employees, provided that the minimum salary required under the formula was also applied to the opposite sex.<sup>52</sup>

Since its inception, the Equal Pay Act findings involving sex discrimination as of December 10, 1975, revealed that 900 cases had been filed; 219,925 employees had been underpaid; \$122 million had been found due in back pay; \$23 million of actual income had been restored to 60,000 employees; and a complaint backlog existed numbering 1,790.<sup>53</sup> During the first quarter of 1976 more than 6,000 employees—most of them women—were found underpaid by \$4.5 million in violation of the Equal Pay Act. These figures represent a 31% increase over the same period during the previous year.<sup>54</sup>

#### **B. Title VII of the Civil Rights Act of 1964**

Title VII of the Civil Rights Act of 1964, as amended, prohibits job discrimination because of race, color, religion, sex, or national origin. The Act prohibits discrimination in hiring or firing, wages, fringe benefits, classifying, promoting employees, extending or assigning the use of facilities, training, apprenticeships, and any other terms, conditions, or privileges of employment.<sup>55</sup> Before the 1972 Amendment, the Act was severely hampered by lack of an active, powerful, well-financed agency; by complicated procedural requirements and time limitations that produced a bulk of decisional law;<sup>56</sup> by its lack of authority to issue cease and desist orders to enforce the law; and by the Justice Department's refusal to bring legal action based on sex discrimination.<sup>57</sup> Before the 1972 Amendment, the Equal Employment Opportunity

52. Board of Regents of Univ. of Neb. v. Dawes, 522 F.2d 380 (8th Cir. 1975).

53. Not included in these figures was a \$13 million back pay award which was paid to 13,000 employees by American Telephone & Telegraph Co. This amount was not included in the Wage & Hour Dept. Compliance action statistics because, although the violative practice was originally disclosed by Wage & Hour investigators, it was resolved through the Solicitor's Office, and was not based on individual complaint actions. U.S. DEP'T OF LABOR, EQUAL PAY FINDINGS (Dec. 10, 1975).

54. U.S. DEP'T OF LABOR, NEWS, WOMEN AND WORK (Nov. 1975).

55. 42 U.S.C. §§ 2000(e)(2)-(e)(3)(1970).

56. 42 U.S.C. § 2000(e)(5)(1970), discussed in Murphy, *supra* note 31, at 451 n. 106.

57. Indicative of the Justice Department's lack of political sensitivity to sex discrimination was the remark of one departmental spokesman in the fall of 1969: "The fact that women have not gone into the streets is indicative that they do not take employment discrimination seriously." FREEMAN, *supra* note 12, at 79.

Commission established by Title VII was limited to investigating charges of violations of Title VII, to bringing about compliance through "informal methods of conference, conciliation and persuasion," and to merely recommending that the attorney general prosecute the most serious cases.<sup>58</sup>

An example of the compromising posture which the early Equal Employment Opportunity Commission exhibited was its 1965 Guidelines on Discrimination Because of Sex, which requested that the various states merely update discriminatory provisions of their protective labor laws, thereby postponing the more difficult question of whether such laws would be a basis for the application of the "bona fide occupational qualification" exception to Title VII. For nearly three years following the adoption of the 1965 Guidelines, the E.E.O.C. did not declare that any of the protective labor laws held by 46 states were pre-empted.<sup>59</sup> The 1972 E.E.O.C. Guidelines, however, stated that protective labor laws were superseded by Title VII and could not be used as a reason

58. Act of July 2, 1964, Pub. L. No. 88-352, § 706, 78 Stat. 259.

59. 30 Fed. Reg. 14, 926-27 (1965). Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 138-39 n. 17 (1973). Female protective labor legislation, which had been sponsored by the Women's Bureau, feminists labor unions, and social reformers, was enacted during the first half of the century by many states to shield the growing number of women entering the work force from employment hazards and potential abuse by employers. Although originally believed to be desirable social legislation that primarily limited hours worked and weights lifted by women (see *Muller v. Oregon*, 208 U.S. 412 (1908)), these laws have been increasingly challenged as "emanating from Victorian notions of woman's role in society and as proliferating incidents of employer discrimination." Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 133-34. The courts have consistently found these laws to be exclusionary, since they fail to consider individually qualified women for certain jobs. *Id.* at 140.

A bulk of decisional law and law review articles have pointed out that protective labor legislation is opposed to the underlying philosophy of Title VII, and many have suggested that "most of the so-called protective legislation has really been to protect men's rights in better paying jobs." 110 CONG. REC. 2580 (1964) (remarks of Rep. Martha Griffiths). Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 134 n. 3.

In 1964, forty states and the District of Columbia had laws or regulations governing in some way the hours which women were permitted to work. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., *STATE LABOR LAWS IN TRANSITION: FROM PROTECTION TO EQUAL STATUS FOR WOMEN* 12 (1976). The *Muller v. Oregon* decision of 1908 upheld protective labor legislation until 1971 when the Ninth Circuit Court, in *Mengelkock v. Industrial Welfare Com.*, 442 F.2d 1119 (9th Cir. 1971), struck down a state hours law on equal protection grounds.



for refusing to employ women.<sup>60</sup> By 1975, all states except Nevada had repealed their maximum hours laws for women.<sup>61</sup>

The 1972 Amendment to the Equal Employment Opportunity Act broadened the jurisdictional and enforcement authority of Title VII so that the E.E.O.C. could file lawsuits in federal district courts against private employers, employment agencies, and unions when conciliation failed. It expanded jurisdiction over public and private educational institutions, and state and local governments. It also extended coverage to include employers or unions with 15 or more persons, and transferred authority to file "pattern or practice" suits from the United States Department of Justice to the E.E.O.C.<sup>62</sup> The 1972 Revised Guidelines on Discrimination Because of Sex illustrated the widened policy coverage of the E.E.O.C., which barred hiring based on stereotyped characterizations of the sexes and barred classifications of "men's" and "women's" jobs by advertising under "male" and "female" help-wanted advertisements in the newspapers.<sup>63</sup> The Guidelines further stated that the bona fide occupation qualification would be construed narrowly,<sup>64</sup> so that it would be relevant only where sex was needed for authenticity, as for an actress; for privacy, as for a matron; or for a physiological function, as for a sperm-donor.<sup>65</sup> Concepts of male and female customer preferences, based on reputed psychological needs of customers, have been rejected by the courts, where the essential job functions could be performed by either a male or female, so that males may now enter non-traditional fields such as that of airline steward,<sup>66</sup> and females may now

60. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., BRIEF HIGHLIGHTS OF MAJOR FEDERAL LAWS AND ORDER ON SEX DISCRIMINATION 2 (June 1974).

61. Only two states, Illinois and Ohio, by 1975, enforced maximum hours laws for women for employers of 14 or fewer workers who were not covered by Title VII of the Civil Rights Act of 1964. STATE LABOR LAWS IN TRANSITION, *supra* note 59, at 12.

62. 42 U.S.C. § 2000(e)(1970), as amended by EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, Pub. L. No. 92-261, §§ 701(b), 702, 718, 83 Stat. 103.

63. 29 C.F.R. § 1604.4 (Supp., 1971). Because of public pressure generated by the National Organization of Women on August 14, 1968, the Equal Employment Opportunity Commission ruled that separate want ads for "male" and "female" headings were a violation of Title VII and ordered newspapers to desegregate their want ads. FREEMAN, *supra* note 12, at 77. See *Pittsburgh Press Co. v. Pittsburgh Com. of Human Relations*, 413 U.S. 376 (1973).

64. 29 C.F.R. § 1604.1 (Supp., 1971).

65. 29 C.F.R. § 1604 (a)(2) (Supp., 1971).

66. 29 C.F.R. § 1604.1 (Supp., 1970). *Diaz v. Pan America World Airways, Inc.*, 311 F. Supp. 559 (S.D. Fla. 1970) *rev'd and remanded*, 3 BNA FEP Cas. 337 (5th Cir.

enter non-traditional fields such as that of baseball umpire<sup>67</sup> or railroad switchperson.<sup>68</sup>

The impact of the 1972 Amendment undoubtedly further extended to influence government funding of employment programs for women in non-traditional fields. Such recent training and recruitment programs funded by the Department of Labor as the Work Incentive Program, the Job Corps, and the Apprenticeship Outreach Program for Women have trained and placed women in many occupations hitherto restricted to men, such as carpentry, auto mechanics, painting, bricklaying, plastering, welding, shipfitting, railway yard clerks, operators of heavy equipment, pickup truck drivers, electrical, radio and machine workers, tool and die makers, and meatcutters.<sup>69</sup>

Certain of the 1972 Guideline provisions are currently being challenged by employers in the courts,<sup>70</sup> particularly those which provide that disabilities contributed by pregnancy, miscarriage, abortion, childbirth, and recovery are to be treated as temporary disabilities under health insurance or sick leave plans in connection with employment. The E.E.O.C. and the courts have labeled as discriminatory restrictive employment practices that are applied only to one sex, the so-called "sex-

1971). (An argument that female stewardesses were necessary to fill the psychological needs of air passengers was rejected.)

67. *New York State Div. of Human Rts. v. New York-Pennsylvania Professional Baseball League*, 36 App. Div.2d 364, 320 N.Y.S.2d 788 (Sup. Ct. 1971).

68. *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

69. In 1974, 99% of the nation's registered apprentices were men; however, during the 1964 to 1974 decade, women in apprenticeship programs grew from 400 in 1964 to 3,700 in training in 1974. *What Constitutes "Making Headway" in Apprenticeship Participation?* VI WOMEN TODAY 61 (April 26, 1976). Advocates for Women state that women will be included in affirmative action apprenticeship programs in California, the first state in the nation to recruit affirmative action goals and timetables for women in apprentice job opportunities. *Women Will Be Included in Apprenticeships in California, Women's Group Says*, VI WOMEN TODAY 69 (May 10, 1976).

Yet after undergoing training programs, many women continue to meet obstacles in getting hired, despite their equal on-the-job performance to men. Women Working in Construction and Wider Opportunities for Women filed suit against the United States Dep't of Labor on March 29, 1976, charging the Dep't of Labor with ignoring women workers under federal affirmative action hiring plans. The plaintiffs claim they have been refused jobs because of their sex, and charge the District of Columbia Apprenticeship Council with violation of federal law for the past five years because of "its failure to force apprenticeship sponsors to submit affirmative action plans." *Labor Dep't Charged with Ignoring Women in Construction Trades*, VI WOMEN TODAY 53 (April 12, 1976).

70. See note 145 *infra*.

plus" factor that includes sex plus an additional factor of status, such as motherhood or marriage.<sup>71</sup> Though almost all "sex-plus" restrictions have been declared illegal, two federal court decisions currently conflict as to whether the "sex-plus" status discrimination is justified under the bona fide occupational qualification exception to Title VII.<sup>72</sup>

The 1972 Guidelines and the court's interpretation of Title VII have emphasized that the traditional stereotypes about women as a class should not be applied to individual members of the class, but that each woman should have the right to an individualized appraisal of her abilities and capabilities, and should have the right to choose to do that which society has historically considered unsuitable for women. A judicial expression of this philosophy of Title VII is found in *Weeks v. So. Bell Telephone and Telegraph Co.*,<sup>73</sup> a suit brought by the National Organization of Women:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.<sup>74</sup>

The Equal Employment Opportunity Commission's enforcement of Title VII is still beset with inadequate funding and a shortage of staff with which to meet an ever-increasing backlog of pending cases numbering 120,000 as of 1976, with a two- to seven-year waiting period for processing.<sup>75</sup> However, over the last few years, there has been a growing feeling that the E.E.O.C. has become at least as active on sex discrimination as on racial discrimination.<sup>76</sup>

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71. 29 C.F.R. § 1604.3(a)(Supp., 1971).

72. Epstein, *Sex Discrimination in Hiring Practices of Private Employers: Recent Legal Developments*, 48 TULANE L. REV. 125, 142-43 (1973). *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), cert. den., 404 U.S. 991 (1971), *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

73. 408 F.2d 228 (5th Cir. 1969).

74. *Id.* at 236.

75. *EEOC Under Fire*, 6 THE SPOKESWOMAN 5 (June 15, 1976).

76. J. FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 188 (1975) notes that the growing acceptance of sex discrimination as a legitimate concern was due partially to the impact of the cases themselves, to the impact of the women's liberation movement, and to the more receptive attitudes of many young attorneys hired.

Part of this change in attitude within the E.E.O.C. came from its decision in 1973 to go after the single largest private employer of women in the United States—American Telegraph and Telephone Co. The E.E.O.C. presented 30,000 pages of testimony and documents to show that the Bell system systematically discriminated against minorities and women, and to show that sex discrimination alone accounted for a difference of \$500 million per year in wages. The suit was settled when American Telegraph and Telephone Co. agreed to pay \$38 million in back wages which, although far short of the \$3.5 billion that was due, still represented a greater monetary gain for more people than the sum total of all the E.E.O.C.'s efforts since the Commission was created.<sup>77</sup> The task force director coordinating this case stated that the E.E.O.C. had espoused the feminist view of N.O.W., that is, their view of institutionalized sex discrimination in society: "We wanted to present the whole sociology and psychology of sexual stereotypes as it was inculcated into the Bell System structure."<sup>78</sup> A further successful E.E.O.C. settlement was a 1974 settlement decree involving nine of the largest steel companies in America and the United States Steel Workers of the American A.F.L.-C.I.O., that resulted in court approved decrees providing \$31 million in back pay for 40,000 minority and women employees.<sup>79</sup>

Recent statistics pointing to the rising enforcement power of the E.E.O.C. reveal that in 1974 there were almost 40,000 recommended actionable charges, although the success rate of attempted conciliation was only 50%.<sup>80</sup> However, although courts have upheld the E.E.O.C.'s broadened enforcement power, data tabulated during 1975 showed that among public employers female workers were still concentrated in low paying, low prestige jobs.<sup>81</sup> In 1975, the E.E.O.C. filed 180 direct suits as compared with 86 in 1974, and achieved 90 court settlements or consent decrees in 1975 as compared with 27 in 1974.<sup>82</sup> Most of the

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77. *Id.* at 188-90. *E.E.O.C. v. Am. Tel. and Tel. Co.*, 365 F.Supp. 1105 (E.D.Pa. 1975).

78. Shapiro, *Women on the Line, Men at the Switchboard: Equal Employment Opportunity Comes to the Bell System*, N.Y. Times, May 20, 1973 (Magazine), at 27, in FREEMAN, *supra* note 76, at 189 n. 53.

79. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC 9TH ANNUAL REP'T 1 (1975).

80. *Id.* at 1, 39.

81. *Id.* at 13-14.

82. U.S. EQUAL EMPLOY. OPPORTUNITY COM., NEWS, FY 1975—RECORD YEAR FOR EEOC COURT ACTIONS 1 (Oct. 1975).

charges brought against companies and unions in 1975 were based on discrimination in job classifications, hiring and discharge policies, and conditions of employment such as pay, and maternity and disability benefits.<sup>83</sup> The court settlement cases in 1975 achieved a combination of injunctive relief, periodic progress reports, back pay awards, affirmative action in recruiting, hiring, advertising and promoting, the setting of goals and timetables, the elimination of job classifications, the treatment of maternity leave as other temporary disabilities, and increased vocational training for women. Many of the cases brought by women workers under E.E.O.C. regulations were directed at unions, where courts in several instances had found collusion between unions and management in efforts to keep women segregated in lower paying jobs.<sup>84</sup>

83. *Id.* at 1-33.

84. MURPHY, *supra* note 30, at 50. See Note, *Labor Law—Civil Rights—Invidious Discrimination by Employer Does not Per Se Violate N.L.R.A.*, 4 N. MEX. L. REV. 261 (May, 1974).

Sociologist Gunnar Myrdal has explained the dilemma between the clash of interest of the working man and the working woman: "All over the world men have used the trade unions to keep women out of competition. Women's competition has . . . been particularly obnoxious and dreaded by men because of the low wages women, with their few earnings outlets, are prepared to work for." Note, *Labor Law—Sex Discrimination—Employer Sex Discrimination and Labor Management Relations Act*, 5 RUTGERS-CAMDEN L.J. 585 at 596 (1974). See *Jubilee Mfg. Co. v. United Steel-Workers*, 202 NLRB No. 2, 82 LRRM 1482 (1973), for its holding that sex discrimination was not in violation of the National Labor Relations Act, and see 82 LRRM at 1487, for J. Jenkins dissent. See 5 RUTGERS-CAMDEN L.J. at 602, for the contention that the National Labor Relations Board is still the most efficient forum for a discriminated employee to process a grievance, because of the backlog of cases under the Equal Pay Act and Title VII.

Indicative of their feeling that union membership would not promote their interests, only 12% of women workers were members of a union in 1971. *Hearings on H.R. Res. 35, H.R. Res. 208, H.R. Res. 961, etc. Before the Subcomm. No. 4 of House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 2 at 256 (1971). In March 1974, however, the Coalition of Labor Union Women was formed and had grown to a membership of 5,400 in forty-five local chapters by 1976. The union has been formally endorsed by seventeen international unions and has declared support of the Equal Rights Amendment as a major goal. *Building the Movement: The Coalition of Labor Union Women*, 6 THE SPOKESWOMAN 5 (March 15, 1976).

A 1975 United States Commission of Civil Rights report concluded, however, that despite the adoption of anti-discrimination laws "there is no generally available, effective means of correcting discriminatory practices in referral unions." *U.S. Com. on Civil Rights Issues Report on Bias in Referral Unions*, VI WOMEN TODAY 72 (May 24, 1976). Such unions predominate in the building trades and refer workers directly to employers through hiring halls, select members, and screen apprentices. Among the factors cited by the Commission as limiting apprenticeship entry into building trades

The trend of cases and consent decrees during 1976 indicates a "ripple" effect calling for broadened enforcement power across the country of Title VII and related equal employment acts. For example, settlements won under Title VII in 1976 included: a \$1 million back pay consent decree settlement from United Airlines Corp.;<sup>85</sup> a decision declaring sexual harassment a form of sex discrimination;<sup>86</sup> the establishment of quotas for job offers made by a New York law firm to women lawyers;<sup>87</sup> a \$1.9 million back pay consent decree and a \$1.3 million future recruitment program for women and minorities from Merrill Lynch, Pierce, Fenner and Smith, Inc.;<sup>88</sup> a \$935,000 back pay settlement agreement awarded to women and minorities from a Gulf Oil Company refinery in Texas;<sup>89</sup> and a \$1 million settlement order awarded to Seattle women from Safeco Insurance Company.<sup>90</sup> A recent Supreme Court decision<sup>91</sup> is likely to be favorable to minorities and women on the "last hired, first fired" issue because of its holding that seniority and entitlement to benefits must be granted from the date workers applied for work, but were refused employment because of sex or racial discrimination, rather than from the date of actual employment. Failure to comply with equal opportunity employment requirements for policewomen had caused federal funds to be withheld from Chicago police departments,<sup>92</sup>

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for women are maximum age limits, experience requirements, and oral interviews, which are described as being frequently non-job related and often insulting. *Id.*

85. *EEOC and United Airlines Sign Consent Decree*, VI WOMEN TODAY 67 (May 10, 1976).

86. *Williams v. Saxbe*, 413 F. Supp. 654 (D.C. 1976) held that retaliatory actions taken by a male Justice Dep't supervisor against a female employee who had rejected his sexual advances were illegal and constituted sex discrimination under Title VII.

87. A New York law firm agreed to use only job-related criteria in hiring and not to use sex as a basis for determining conditions of employment, assignment, salary, or promotion. The firm also agreed to pay \$40,000 in legal fees claimed in the suit to Columbia University. *Law Firm Agrees to Hiring Quota*, 6 THE SPOKESWOMAN 4 (March 15, 1976).

88. *O'Bannon and EEOC v. Merrill Lynch*, Civil Action No. 73-905 (D. Pa. July 9, 1976).

89. *Women and Minorities Get \$935,000 in Back Pay from Gulf Oil Co.*, VI WOMEN TODAY 123 (Sept. 13, 1976).

90. Equal Employment Opportunity Commission, *Bronkhorst v. Safeco Corp.*, No. 554-72C2 (D.Wash. Sept., 1976).

91. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976):

92. Payments to the Chicago Police Dep't of funds administered under the Crime Control Act of 1973 were deferred in the fall of 1974. A further \$38 million due to be paid Chicago under the General Revenue Sharing Act was also withheld under court order. *Gates*, *supra* note 29, at 72.

and had threatened nonrenewal of licenses to Massachusetts television stations.<sup>93</sup> A new federal statute, signed into law on October 2, 1976, further imposed criminal penalties for sex discrimination in federally-funded public works and relief projects employment and will subject violators to one year's imprisonment or a \$10,000 fine.<sup>94</sup>

Women's advocates groups have begun to educate women about the existence of fair employment laws and to provide psychological and, at times, financial support so that working women are now more willing to challenge discriminatory practices by pursuing legal action. A current target of increasing litigation is the insurance industry which, according to thorough documentation of government reports, has ". . . practiced pervasive discrimination against women in coverage, availability, underwriting practices, and rating,"<sup>95</sup> thereby intensifying the discrimination women face in other areas such as employment, credit, domestic relations, and marital property. Recent settlement successes for working women's organizations include a \$500,000 back pay award won for employees at CHA, a major insurance firm by Women Employed (W.E.) in Chicago.<sup>96</sup> In addition, W.E. has placed pressure on the Department of Labor which has brought substantial back pay awards in the banking industry, and has persuaded the State Insurance Department of Illinois to take steps to outlaw the sale of discriminatory insurance policies. Boston's working women's organization, 9 to 5, recently won a significant "first" in state regulation of company employment practices, including affirmative action, benefit policies, arbitrary work

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93. Springfield Tel. Broadcasting Corp., licensee of WWLP-TV in Springfield and WRLP-TV in Greenfield, Mass. *Two Massachusetts TV Stations Ordered to "Show Cause" by FCC*, VI WOMEN TODAY 69 (May 10, 1976).

94. Act of Oct. 2, 1976, Pub. L. No. 94-453, § 246, 90 Stat. 1517.

95. Brown & Freedman, *The Impact of the ERA on Financial Individual Rights: Sex Averaging in Insurance*, in IMPACT ERA, *supra* note 1, at 127. The authors point out that basic assumptions about women in the work force underlie current insurance practices: (1) that women are only marginally connected to the labor force, will retire earlier, and therefore will utilize more insurance than men; (2) that childbirth and pregnancy are not temporary disabilities but are voluntary; (3) that pregnancy is acceptable only for married women; hence, coverage for pregnancy, childbirth, sterilization, and abortion are available only at a prohibitive family rate based on two adults and two children; (4) that only work outside the home in career-type jobs is valuable enough to insure, not domestic work; (5) that unmarried, separated, and divorced women are considered unstable. *Id.* at 128. See also Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 U. CIN. L. REV. 57 (1975).

96. *Building the Movement: The New Working Women's Organizations*, 6 THE SPOKESWOMAN 5 (Feb. 15, 1976).

rules, and employee qualifications. The group successfully confronted political and corporate utilities lobbyists in an effort to establish greater maternity benefits for working women. In addition, 9 to 5 filed suit against four Boston-based publishing companies alleging sex discrimination in hiring, pay, and promotion policies.<sup>97</sup> San Francisco's Women's Organization for Employment compelled one of the city's employers, Fireman's Fund Insurance, to produce its first affirmative action plans for women and has "joined in a suit to insure court-monitored compliance with the plan." The group has also put pressure on state agencies to enforce regulations banning discriminatory practices such as sex-segregated job order files.<sup>98</sup>

### **C. Title IX of the Educational Amendments of 1972**

Title IX of the Educational Amendments of 1972 will open for judicial review numerous aspects of sex discrimination existing throughout our educational institutions. Congress noted the correlation between equal education and equal opportunity in its drafting of Title IX when it stated that one of the avowed purposes of Title IX was to improve the quality of the American workforce.<sup>99</sup>

With certain exceptions, Title IX prohibits sex discrimination in any academic, extracurricular, research, occupational training, or other educational program from the pre-school to postgraduate level that is operated by an organization or agency which receives or benefits from federal aid.<sup>100</sup> However, the notorious lack of compliance with the Act's requirements by 1976 demonstrated that most schools reacted as if Title IX had never been enacted. The Project on Equal Education Rights (P.E.E.R.) sponsored by N.O.W.'s Legal Defense and Education Fund had filed charges in ten regional offices of the United States Department of Health, Education, and Welfare's Office for Civil Rights in 1976 against 40 states and the District of Columbia, alleging violation of Title IX of the Education Amendment of 1972. Failure to obey the law by those 41 agencies could lead to a \$3.4 billion loss of federal education aid. P.E.E.R.'s charges are based on a recent survey of progress under Title IX that found 41 state departments of education in violation of at least one of the Act's five requirements, and 33 states in multiple viola-

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97. *Id.*

98. *Id.*

99. 117 CONG. REC. 39,248-49, 39,260 (1971).

100. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86.



tions.<sup>101</sup> Women's advocate groups, however, continue to provide substantial leadership in attempting to remove sex-stereotyping conditions from the classroom.<sup>102</sup>

The lack of H.E.W.'s enforcement of Title IX had caused five groups, including the National Education Association, the National Organization of Women, and Women's Equity Action League, to file suit against H.E.W. in 1974 charging the governmental agency with non-enforcement of Title IX.<sup>103</sup> Early in 1976, a coalition of 57 civil rights and women's groups urged H.E.W. to end its toleration of discrimination in federally funded programs which violate Constitutional and Federal law<sup>104</sup> and its "hands-off" policy of high prestige colleges and universities.<sup>105</sup> Two months after this censure, H.E.W. publicly reversed its previous stance of discretionary enforcement, and instead

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101. *Peer Files Charges After Survey Shows Violations Under Title IX*, VI WOMEN TODAY 75-76 (May 24, 1976). See generally *Sex Discrimination in Vocational Education: Title IX & Other Remedies*, 62 CAL. L. REV. 1121 (1974). Women students who now comprise over half the enrollees in vocational educational programs are still confined to women's fields which often lead to low-paying, dead-end jobs. In 1973, girls formed the vast majority of those taking business and commercial courses (79% female) and health courses (95% female), while boys were still highly concentrated in technical, industrial, and trade subjects (98% male). *Supra* note 11, at 66. A House bill (H.R. 12835) passed on May 11, 1976, included two provisions that are aimed at reducing sex discrimination and sex stereotyping in vocational educational programs. *Vocational Education Bill Includes Anti-Discriminatory and Stereotyping Clauses*, VI Women Today 71 (May 24, 1976).

102. The Project on Equal Education Rights (PEER) has been established to monitor and publicize federal legislation banning sex discrimination in education, primarily through enforcement of Title IX at the elementary and secondary school level. PROJECT ON THE STATUS AND EDUCATION OF WOMEN, 11 ON CAMPUS WITH WOMEN, PEER TO WATCH SCHOOLS 6 (May 1975). The Council on Interracial Books, Inc., has sponsored workshops for parents, teachers, textbook publishers, and librarians to eliminate sexist and racist stereotyping in textbooks and curricular materials used in schools. PROJECT ON THE STATUS AND EDUCATION OF WOMEN, 11 ON CAMPUS WITH WOMEN, ELIMINATING STEREOTYPING IN CURRICULAR MATERIALS at 6. The subject of the National Educational Association conference held in Washington, D.C. in February 1976 was "Women's Rights: A Force for Educational Equity," which considered how schools sort students by developing different expectations and offering different options for males and females. *NEA Conference on Women's Rights Set for Feb. 19-22 in DC*, VI WOMEN TODAY 28 (Feb. 16, 1976).

103. PROJECT ON EQUAL EDUCATION RIGHTS, 1 PEER PERSPECTIVE, HEW UNIT STALLS ON SEX BIAS CASES 1-2 (Dec. 1975).

104. *Fifty-Seven Groups Cite Deficiencies in HEW Compliance Program*, VI WOMEN TODAY 16 (Feb. 2, 1976).

105. Cowan, *Legal Barriers to Social Change: The Case of Higher Education*, in IMPACT ERA, *supra* note 1, at 173.

resolved to seek a timely resolution of every complaint it received and to urge staff and budget increases.<sup>106</sup>

Since a school is, in some degree, a microcosm reflecting social stratification, prestige, and occupational choices, it is likely that many of the obstacles resisting equality in the outside society will also be encountered in our educational institutions. For example, one study of Title IX's enforcement progress noted that the recent furor over Title IX's demand that equal amounts of money be expended on female and male athletic activities in educational institutions was indicative of the guarding of athletics throughout our society as a predominantly male domain.<sup>107</sup> Exemplifying such resistance met in the struggle to obtain equal athletic opportunity for women was the National Organization of Women's court battle against Little League Baseball in 1974 which ultimately won for girls the opportunity and right to play Little League baseball.<sup>108</sup> Adequate enforcement of Title IX should preclude a repetition of those court decisions which, in the very recent past, have denied girls the opportunity to compete in state school athletic events. In one such decision which prohibited a girl from competing in a state cross-country track event, the court cited chivalrous and protective reasons to justify a denial of equal athletic opportunity and concluded: "athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow."<sup>109</sup> The recent defeat of the Casey Amendment in the United States Congress<sup>110</sup> that would have limited the power of Title IX in prohibiting honorary societies and single-sex physical education classes exemplifies the ongoing monitoring activity that women's action groups must pursue in order to avoid a watering-down of existing laws.

Academic discrimination based on sex permeates all levels of education. In February 1976, the United States Office of Education re-

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106. *H.E.W. Reverses Position on Enforcement of Discrimination Complaints*, VI WOMEN TODAY 52-53 (April 12, 1976).

107. Lipman-Blumen, *supra* note 19, at 23-24.

108. *N.O.W. v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. Ct. 1974). The court, after hearing expert testimony on anatomy, physiology, reaction time, and maturation rate, made a finding of fact that girls between eight and twelve were not, as a class, subject to materially greater hazards of injury while playing baseball than boys of the same age group. On Dec. 26, 1974, Congress amended the national Little League federal charter to open the League to girls. Act of Dec. 26, 1974, Pub. L. No. 93-551.

109. *Hollander v. the Connecticut Interscholastic Athletic Conf.*, 164 Ct. 654 (1971), *appeal dismissed* 295 A.2d 671 (1972).

110. Lipman-Blumen, *supra* note 19, at 21 n. 16.

leased a report showing that women academics had actually lost ground in salary level and number of positions during 1975, despite the passage of Title IX.<sup>111</sup> Dr. Bernice Sandler, an officer of Women's Equity Action League, confirmed that the position of women in higher education had worsened over the past 100 years, and that the so-called shortage of qualified women on campus is an academic myth.<sup>112</sup> A strategy of inaction rather than one of voluntary compliance critical to effective law enforcement has been forthcoming from the halls of higher education.<sup>113</sup> A course of opposition to enforcement of anti-discrimination laws at the university level has appeared through petitions circulated, articles and letters written, and committees formed by university professors, by the use of substantial resources at their disposal, and sometimes by the favors of political patronage. Delay inherent in the bureaucratic process itself; the sheer number and complexity of the institutions covered; and inherent discretion and decentralized power, making accountability difficult in institutionalized bureaucracies, add to the problematic enforcement of Title IX.<sup>114</sup>

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111. The report stated that "the average salaries of men continue to exceed the average salaries of women at every academic rank and at every institutional level, in both publicly and privately controlled institutions." *Feds Release New EEO Plan for Higher Education*, 6 THE SPOKESWOMAN 2 (March 15, 1976). Overall, women's salaries increased 5.8%, while men's salaries increased 6.3%, from 1974 to 1975. The percentage of women declined at the ranks of professor, associate professor, and instructor, while it increased at the ranks of assistant professor, lecturer, and undesignated rank. *National Center for Education Statistics Releases Preliminary Data on Instructional Faculty in Colleges*, VI WOMEN TODAY 57 (April 12, 1976).

In 1975, while women made up 24% of all full-time faculty in this country, they comprised only 10% of full professors, 17% of associate professors, and 40% of lower echelon instructors and lecturers. Patterson, *Another School with Scandal*, Miami Herald, June 5, 1976, § D, at 1, col. 2.

112. In 1870, women comprised one-third of faculty positions, but in 1975 they held less than one-fourth of faculty positions at the college and university level. *National Center for Education Statistics Releases Preliminary Data on Instructional Faculty in Colleges*, *supra* note 111, V WOMEN TODAY at 57. Sandler, *Patterns of Discrimination and Discouragement in Higher Education*, in WOMEN'S ROLE IN CONTEMPORARY SOCIETY, *supra* note 18, at 568, 570. Dr. Sandler contends that a higher percentage of women with doctorates are available for college teaching than are men with doctorates. She notes that exemplars of the widespread attitude on college campuses toward women being qualified to earn doctoral degrees but not qualified to teach on those campuses was the situation at Columbia University in 1970, at which time the University had granted 36% of its doctorates to women in psychology, but could find no women qualified to teach in psychology. *Id.* at 570.

113. *Cowan*, *supra* note 105, at 174.

114. *Id.* at 170, 173.

A 1975 lawsuit<sup>115</sup> in which a New York college was found guilty of sex discrimination against a woman faculty member has been cited by the New York City Commission on Human Rights as having important implications for women seeking to prove sex discrimination in employment. The court stated in this case:

[W]hat Dr. Winsey did to cause her termination would have not been considered "troublesome" if she had not been a woman. It often happens that those who are not not supine and fight for their rights will be regarded as troublesome and those disturbed by the struggle would wish that the troublesome one "would just go away." To terminate Dr. Winsey's employment for this reason . . . is to have unlawfully discriminated against her.<sup>116</sup>

A pending 1976 University of Pittsburgh Medical School sex discrimination suit, brought by the National Organization of Women, could have important implications for a drastic tenure procedure revision at almost every college and university in the nation. A successful decision could significantly ease the entry of women into higher academic ranks by forcing predominantly male deans and faculties, who now may judge tenure candidates on abstract standards, to judge such candidates on objective criteria instead, such as merit, scholarly achievements, and ability to teach.<sup>117</sup>

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115. *Pace College v. Comm'n on Human Rights*, 38 N.Y.2d 28, 339 N.E. 880, 377 N.Y.S.2d 471 (1975). *Pace College* in New York was ordered to reinstate Dr. Winsey as Assistant Professor, and to pay her \$22,650 in back pay plus retroactive increments and \$15,000 damages for mental pain and humiliation.

116. *Id.* at 34, 38 N.Y.S.2d at 480, 339 N.E. at 886.

117. Dr. Sharon Johnson, Assistant Professor of biochemistry at the Univ. of Pittsburgh Medical School, contended that her denial of tenure in 1973 was a result of sex discrimination. Between 1967 and 1972, Dr. Johnson was awarded four grants from the National Institute for Health and the National Science Foundation, totaling \$256,000, had published seven articles and one review, and was elected to the Society. The department chairman told her these qualifications would satisfy her tenure requirements. However, when that chairman left in 1971, the new chairman denied her tenure, stated that the faculty deemed her research "irrelevant to the goals of the department," and that she was "too chemical." A member of the President's Advisory Council for Equity in the Education of Women stated that women such as Dr. Johnson often fall victims of tenure criteria because the existing system works to perpetuate an "old boy" club in which tenure criteria change to accommodate somebody's protege, a role women seldom are in. Since the suit was filed, Dr. Johnson's costs have exceeded \$50,000, much of which has been raised through the N.O.W. Legal Defense and Education Fund. *Another School with Scandal*, *supra* note 111, at 2, col. 1-2.

#### D. Executive Order 11246

Executive Order 11246, issued in 1965 and amended in 1967, prohibits employment discrimination based upon sex, race, color, religion, or national origin by federal contractors employed in \$50,000 contracts, and contractors who perform under federally assisted construction contracts exceeding \$10,000.<sup>118</sup> One of N.O.W.'s first actions after its formation was to induce President Johnson to amend Executive Order 11246 in 1967 to add the provision of "sex" to its protected minority groups.<sup>119</sup> Under the Order, contractors are required to take affirmative action in recruitment, advertising, hiring, transfer, layoff, rates of pay, and selection for training and apprenticeship, and may face termination or suspension of government contracts if sex discrimination is found. The potential this Executive Order has for achieving equal employment opportunity in the United States is apparent when one realizes that about one-third of the nation's total civilian workforce are employed by federal contractors. The Executive Order is enforced by the Department of Labor's Office of Federal Contract Compliance Programs through administrative regulations known as Revised Order 4, issued in May 1968. This Order requires the government to take the initiative to determine whether contractors are in compliance and to otherwise invoke economic sanctions, rather than to depend upon the filing of complaints, as is required for enforcement of Title VII by the E.E.O.C.<sup>120</sup> The Sex Discrimination Guidelines issued by the Department of Labor in 1970 require that contractors not advertise under male or female classifications, base seniority on sex, deny jobs because of state protective labor laws, distinguish between married and unmarried persons of one sex only, or penalize women because they require leave for childbearing.<sup>121</sup>

However, the predictable lack of enforcement of this executive order arises from the same subtle and obvious sources of sex discrimination that resisted enforcement of the aforementioned laws. A recent report released by the General Accounting Office indicated that a major obstacle to compliance is the government's refusal to use the sanctions it has available:

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118. 41 C.F.R. §§ 60-1.1 et seq. (1974).

119. FREEMAN, *supra* note 12, at 75. Exec. Order No. 11375, amending Exec. Order No. 11246, took effect on Oct. 13, 1968. 32 Fed. Reg. 14,303 (Oct. 17, 1967). See generally TASK FORCE, *supra* note 27, at 103-8.

120. *Labor Moves to Gut Enforcement Rules*, 7 THE SPOKESWOMAN 1 (Oct. 15, 1976).

121. TASK FORCE, *supra* note 27, at 105.

Some contractors are not even being asked to run affirmative-action programs, many are not being asked for a copy of affirmative-action plans, and some are not giving women equal employment opportunities. Less than half of the back pay that the Labor Department has found to be owed to women because of violation of the Equal Pay Act has actually been paid. The Office of Federal Contract Compliance, the agency responsible for implementing Executive Order 11246, has never terminated a federal contract because of sex discrimination.<sup>122</sup>

In addition, the United States Department of Labor had proposed new enforcement regulations, published in the Federal Register on September 17, 1976, that would seriously weaken existing enforcement mechanisms.<sup>123</sup>

The supervision of Executive Order 11246 relating to educational institutions was delegated to the United States Department of Health, Education, and Welfare. Although the Order has been in effect since 1968, H.E.W. had not officially issued guidelines to the academic community until October 4, 1972.<sup>124</sup> Dr. Sandler, who implemented the first use of the Executive Order by women at universities, pointed out that it was not enforced with regard to sex by federal agencies until the Women's Equity Action League had filed 250 charges in 1970 with H.E.W. on behalf of women employed at professional and staff levels in educational institutions.<sup>125</sup> Although the pressure of the Women's Equity Action League and the National Organization of Women to enforce Executive Order 11246 at colleges and universities has not yet resulted in increased numbers of jobs or promotions for women, its increased public support<sup>126</sup> may strengthen the power of this law as well as its enforcement effect.

## 6. THE PROGRESS

By 1972, three-fourths of the 1966 demands of the National Organization of Women had been achieved, including Congressional passage

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122. Griffiths, *Can We Still Afford Occupational Segregation? Some Remarks*, in SIGNS, JOURNAL OF WOMEN IN CULTURE AND SOCIETY, *supra* note 19, at 111.

123. 17 Fed. Reg. 40,339 (1976). *See supra* note 120.

124. MURPHY, *supra* note 30, at 37.

125. *Id.*

126. 1500 citizens signed a full-page petition addressed to President Ford in the New York Times on April 6, 1975, urging the President to enforce Executive Order 11246 with regard to sex discrimination on academic campuses. *Ford Urged to Enforce E.O. 11246*, 12 ON CAMPUS WITH WOMEN 1 (Nov. 1975).

of the still-pending Equal Rights Amendment.<sup>127</sup> and the 1973 landmark decision of the United States Supreme Court, *Roe v. Wade*, which supported a woman's right to have a legal abortion.<sup>128</sup> In the Ninety-second Congress, more legislation had been passed to further the cause of equal rights for women than in all previous Congresses combined, largely attributable to women's rights advocates' active lobbying in Washington. One recent legislative success was the passage of the Equal Credit Opportunity Act,<sup>129</sup> effective on October 28, 1975, which pro-

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127. The proposed Equal Rights Amendment passed by Congress on March 22, 1972 (H.R.J. Res. 208, 92d Cong., 2d Sess.) in January 1977 required the ratification of three more state legislatures before it could become our Twenty-Seventh Constitutional Amendment. The Equal Rights Amendment is based on the principle that sex should not be a determining factor by which government affects the legal rights of its citizens. The text of the proposed amendment reads: Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification.

128. 410 U.S. 113 (1973). The effect of this decision was prevented from being overturned in May 1976 by a final Senate defeat (vote 47 to 40) of the proposed Helm's Amendment to the U.S. Constitution, which would have barred the right to obtain an abortion. *Senate Votes Against Anti-Abortion Amendment, Thwarting "Right to Lifers."* VI WOMEN TODAY 65 (May 10, 1976). A class action suit was filed on Oct. 1, 1976, by the National Abortion Rights Action League (N.A.R.A.L.) and four leading gynecologists alleging that the anti-abortion amendment to the Labor-H.E.W. appropriations bill which prohibits payment of Medicaid money for abortion, and which became law Oct. 1, 1976, is unconstitutional and blatantly discriminatory against poor women. *N.A.R.A.L. Files Suit Against Anti-Abortion Amendment*, VI WOMEN TODAY 139 (Oct. 11, 1976). See also *Planned Parenthood of Cent. Missouri v. Danforth*, 96 S. Ct. 2831 (1976), that held, inter alia, that a spousal consent provision and a blanket parental consent requirement for minors were unconstitutional in a Missouri abortion statute, and that the provision requiring a physician to exercise professional care to preserve a fetus' life and health on pain of criminal and civil liability was also unconstitutional.

In the fall of 1976, the U.S. Supreme Court agreed to rule on various abortion issues, such as whether indigent women can obtain a nontherapeutic abortion at state expense, in *Mahon v. Roe*, U.S. 75-1440. In this case, a Conn. attorney general is appealing a New Haven, Conn. Dist. Ct. ruling that required the state to pay for abortions requested by women on welfare. The Court will also review a Missouri case, *Poelker v. Doe*, U.S. 75-442, after the Eighth U.S. Cir. Ct. of Appeals ruled that the city of St. Louis, Mo., must provide physicians at city hospitals who are able to ethically perform abortions. In *Beal v. Doe*, U.S. 75-554, the Court will review the Third U.S. Cir. Ct. of Appeal's decision which held that the Federal Social Security Act compels states participating in Medicaid to provide abortion funds.

129. 12 C.F.R. § 202, Reg. B (1976). This Act prohibits a creditor from discriminating against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction. It is one of three bills introduced by Congresswoman Bella

vided the legal mechanisms by which to correct numerous existing discriminatory lending practices throughout banking and credit institutions, such as ignoring a wife's earned income regardless of its actual monetary value. By March 1976, 32 bills aimed at women's rights had been introduced into the Ninety-fourth Congress on such diversified issues as child care, civil rights, education, employment, health, the media, social security, and income tax revision.<sup>130</sup>

A pending innovative bill, exemplary of the legislature's recognition of the sociological changes in women's role, is aimed at providing an opportunity for expanded retirement security for housewives which would extend the 1974 Individual Retirement Account law to permit a spouse to contribute the same amount for the other spouse. This bill,<sup>131</sup> directed primarily at the housewife, recognizes that although the housewife "does work valued at between \$5,000 and \$15,000 per year" she has "little or no retirement protection and security." A further innovative bill entitled "Equity in Social Security for Individuals and Families" would eliminate the concept of dependency for the non-salaried spouse and would base social security coverage for married persons on the

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Abzug in the Ninety-third Congress aimed at corrective legislation against the existence of separate credit standards for men and women.

On April 20, 1976, the Justice Dep't filed its first suits to enforce prohibitions against sex discrimination in lending as provided for in the 1974 Amendments to the Fair Housing Act of 1968 against a New Jersey mortgage corporation and a Utah loan association. Various loan associations were charged with discriminatory practices against women and their families such as using sex as the criteria to determine the conditions of loans, requiring women loan applicants, but not men, to submit written assurances of their intention to continue working during the entire term of the loan, and discounting all or part of a wife's income in determining qualifications for loans. *United States v. Prudential Savings & Loan Ass'n, et al.*, Civil Action No. C-76124 (DCA Utah Apr. 20, 1976); *United States v. Jefferson Mtfg. Corp.*, Civil Action No. 76-0694 (DCA N.J. Apr. 20, 1976).

A coalition of ten civil rights groups and housing and civic organizations filed suit in May 1976 in a Washington U.S. District Court against four federal agencies which regulate the nation's home mortgage lending institutions: the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Depository Insurance Corp., and the Federal Home Loan Bank Board. Among the more than thirty types of discriminatory conduct cited in the complaint were loan criteria that had a discriminatory impact on women and minorities such as disregarding a wife's income. *10-Group Coalition Files Suit Against Four Federal Agencies Charging Bias*, VI WOMEN TODAY 67 (May 10, 1976).

130. *Status of Legislation Affecting Women*, 5 WOMEN'S EQUITY ACTION LEAGUE WASHINGTON REPORT 2-3 (May 1976).

131. S. 2732, 94th Cong., 2d Sess. (1976). *Retirement Accounts for Housewives Proposed*, 6 THE SPOKESWOMAN 2 (June 15, 1976).



assumption that they are equal entities in an economic partnership.<sup>132</sup> Social Security benefits and coverage, whether based on one salary or two, would annually be divided equally between married partners and credited to their separate accounts.

Two bills introduced into the Ninety-fourth Congress aimed at ameliorating the transitional ills that would accompany a redistribution of women's economic opportunity in our society are the Equal Opportunity and Full Employment Act and the Displaced Homemakers Act. The Equal Opportunity and Full Employment Act<sup>133</sup> would attempt to provide jobs for all people seeking both full and part-time employment, and would provide such services as adequate day-care facilities, thus recognizing the need for special remedies for those suffering the effects of past and present discrimination. The Displaced Homemaker Act<sup>134</sup> is directed at providing multi-service programs, job training and counseling, health and educational services, and financial management assistance for those three to six million "displaced homemakers" who are unable to function independently in today's society because of widowhood or divorce.

The National Women's Political Caucus and similar politically oriented women's advocates groups have urged women to realize that if they want political, economic, and social change they must assume responsibility for effecting the mandatory preliminary legal changes themselves. The National Women's Political Caucus and the Women's Campaign Fund have encouraged women to enter political careers<sup>135</sup>

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132. *Equity for Wives Under Social Security*, 5 WOMEN'S EQUITY ACTION LEAGUE WASHINGTON REPORT 1 (July 1976).

133. H.R. 50,1609, 1610, 2209, Equal Opportunity and Full Employment Act, *as amended* by Subcomm. Print, March 20, 1975.

134. H.R. 7003, S. 2541, 94th Cong., 2d Sess. (1976). A "displaced homemaker" is defined as one who has provided unpaid household services for other family members for most of her adult life, whose dependent source of income has been terminated through divorce or widowhood, and who lacks marketable skills to thereafter enable her to support herself. Under present laws, these homemakers are ineligible for unemployment benefits because their labor in the home has been unpaid and they often do not qualify for old age benefits under existing social security laws. U.S. DEP'T OF LABOR, WOMEN AND WORK, LEGISLATION TO AID DISPLACED HOMEMAKERS INTRODUCED IN BOTH HOUSES OF CONGRESS (Nov. 1975).

135. In 1976, women held less than 5% of all elected offices in the United States, according to a study conducted by the Center for American Women and Politics at Rutgers University. In 1974, 1,800 women ran for national and statewide offices, and 765 of them were elected. In 1976, the National Women's Political Caucus estimated that 2,300 women would run for such offices. *Currents*, 6 THE SPOKESWOMAN 7 (March

through such campaigns as that to "re-integrate the United States Senate" in 1976. More women legislators are likely to lead to more elected and appointed women administrators, which is likely to lead male political leaders to compete for women's increasingly powerful vote and thereby to recruit more women to hold office.<sup>136</sup> Indicative of the Executive Department's increasing responsiveness to women's efforts to determine their political future was President Ford's acceptance in July 1976 of a 115-point report of the National Commission on the Observance of International Women's Year, aimed at ending much of the "sexism still so rampant throughout our country."<sup>137</sup> The President's acceptance was implemented by his issuance of Executive Order 11832, the purpose of which is to fulfill the points raised by the National Commission. As part of his commitment to the 115-point program, President Ford had directed a review of the United States Code by the Attorney General and all affected federal agencies to determine the need for revision of unjustified sex-based provisions. Such review was to be conducted in coordination with a similar review proposed by the President to be initiated by the Governors of all the states.

Further evidence of the responsive posture of the executive and federal judicial branches toward women's rights is their endorsement of the entrance of women into traditionally male-dominated governmental sectors. For example, in 1972 women were appointed for the first time in history as F.B.I. agents, postal inspectors, sky marshalls, secret service agents, and narcotics agents. Not only have the Army, Navy, and Air Force resolved to double and triple their ranks of women and give women jobs previously reserved for men, such as pilot training, but a 1975 law<sup>138</sup> passed and given overwhelming support by the House and Senate directed that women be admitted to armed service academies beginning in the fall of 1976. More than 800 women had received Congressional nominations to the Naval, Army, and Air Force Academies to compete for 300 first-year places allotted to females.<sup>139</sup> The advent

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15, 1976). No women have ever been appointed to the United States Supreme Court. In 1975, there were no women senators, and women held only 19 of the 435 seats in the United States House of Representatives. NAT. COM'M ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, TO FORM A MORE PERFECT UNION 341 (1976).

136. Freeman, *The Political Impact of the ERA*, in *IMPACT ERA*, *supra* note 1, at 67.

137. *Nat. IWY Com'm Submits Report; President Ford Accepts It*, VI WOMEN TODAY 100-1 (July 19, 1976).

138. Pub. L. No. 94-106, § 8 (Oct. 7, 1975).

139. *More than 800 Women Get Congressional Nominations to Military*

of women into the military service is likely ultimately to present for judicial review the issue of the laws and traditions behind male-only combat.<sup>140</sup> As one legal analysis concluded, “[l]ike other laws apparently written to protect women as a class, these statutes have had a profound adverse impact on opportunities for women in the military services.”<sup>141</sup> For example, in 1975, *Schlesinger v. Ballard*<sup>142</sup> upheld a military statute in favor of allowing women more time than men in which to achieve advancement before discharge. However, Justice Brennan pointed out that the majority chose to pass over the issue of whether the discriminatory pattern chosen by Congress that was beneficial to women was itself constitutional. Indicative of an increasing approval of women’s equality in the armed forces was the overwhelming House passage of a bill<sup>143</sup> on September 13, 1976, which would abolish the offices of Director of Lady Marines and Director of the Waves, and disband the Women’s Army Corps. A House committee report stated that having a separate corps was a “. . . vestige of the time when women were not treated equally,” and that “[e]ach female officer in the future, like each male officer, will be a member of some functional corps of the service.”<sup>144</sup>

Recent judicial decisions indicate a growing commitment by the courts to apply greater objectivity to their rulings on women’s rights issues. For example, such decisions have demonstrated that sex discrim-

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*Academies*, VI WOMEN TODAY 53 (April 12, 1976).

140. Specific laws have survived in the military services, not covered by any of the laws prohibiting sex discrimination in employment, which forbid service of women on combat ships whether or not in combat (10 U.S.C. § 6015 (1970)) and on planes in combat (10 U.S.C. § 8549 (1970)). Gates, *supra* note 29, at 64. Four women in the U.S. Navy are challenging, as unconstitutional, the law prohibiting women from serving aboard U.S. Navy vessels in a class action suit filed in the U.S. Dist. Ct. in Washington in December 1976. *Four Navy Women File Class Action Suit to be Assigned Sea Duty*, VI WOMEN TODAY 163 (Dec. 27, 1976).

141. Gates, *supra* note 29, at 64. See also *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C. 1974). The court granted summary judgment to the Air Force Academy and Naval Academy when the exclusion of women therein was challenged on equal protection grounds. The court upheld the reasoning that the exclusion of women from the Academies is rationally related to a legitimate government interest because the purpose of the Academies is to train officers for combat, and women are barred from combat.

142. 419 U.S. 498, 511-12 n. 1 (1975) (Brennan, J., dissenting). Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U. CAL. L.A. L. REV. 235 at 244 n.50 (1975).

143. H.R. 13958, 94th Cong., 2d Sess. (1976).

144. *House Passes Measure Abandoning Wacs, Waves and Lady Marines*, VI WOMEN TODAY 129 (Sept. 27, 1976).

ination based on maternity conditions and such requirements as mandatory maternity leaves or blanket denials of unemployment benefits for periods preceding and following child-birth will be found to be an unconstitutional denial of due process and equal protection.<sup>145</sup> A recent New York District Court of Appeals decision found that pregnant Marines were not permanently unfit for duty and therein declared a 1970 Marine Corps regulation which so stipulated<sup>146</sup> to be a violation of due process and equal protection. In the fall of 1976, the Supreme Court is to decide the issue of whether or not a divorced woman under age sixty-two will have the same right to receive social security benefits for her dependent children as does a married woman with dependent children.<sup>147</sup>

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145. *Turner v. Dep't of Employment Sec. etc.*, 0423 U.S. 44 (1975). The Court's decision on Utah law is expected to have great impact on twenty other state unemployment insurance laws with special provisions relating to pregnancy which existed as of July 1975. Most of these laws deny pregnant women benefits regardless of their individual ability to work, availability for work, or efforts to find a job. The International Women's Year supplement report to the Unemployment Insurance Service Benefit Series indicates that, despite guidelines issued under Title VII, employers are still unwilling to hire pregnant women and often classify them as unfit for employment. *Blanket Denial of Jobless Pay During Pregnancy is Unlawful*, VI WOMEN TODAY 24 (Feb. 16, 1976).

In *Gilbert v. General Elec.*, 375 F. Supp. 367 (1975) *cert. granted*, Oct. 6, 1975, *reargued* Oct. 13, 1976, exclusion of pregnancy disability from sickness and accident benefits was found to violate equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964. The International Union of Electrical, Radio, and Machine Workers had shown how General Electric pays benefits for various other kinds of disabilities, including football knees and hair transplants, while denying payments only in pregnancy-related areas. On Dec. 7, 1976, however, the Supreme Court, in a 6-3 decision, ruled such exclusion of maternity benefits from private employer sickness and accident disability insurance plans was not in violation of Title VII. *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976). Women's rights advocates have since indicated they will seek legislative remedies to preclude the effect of the Supreme Court decision, such as supporting a Congressional amendment to Title VII or a separate bill which would make exclusion of such coverage illegal under Title VII. *Women's Rights Activists to Fight Maternity Ruling*, Miami Herald, Dec. 9, 1976, § C, at 1, col. 1-2.

*Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974) *aff'd* 511 F. 2d 199 (3d Cir. 1975). A woman employee successfully challenged under Title VII the company exclusion of pregnancy benefits from its employee income protection plan and the requirement that female employees return to work within three months of childbirth or face termination.

146. *Crawford v. Cushman, Jr.*, 531 F.2d 114 (1976). Marine Corps Reg. MCO P1900.16, MCO 500.12 (7-16-75), etc.

147. *Mathews, Sec. of H.E.W. v. Helen de Castro* (No. 75-1197), cited in *Mother's Rights Cases Come Before Supreme Court*, VI WOMEN TODAY 65 (May 19, 1976).

Further issues before the 1976-1977 Supreme Court term include the role of the state in providing abortions, the question of whether pregnancy may be excluded from the list of disabilities covered by a disability benefits plan for employees, the constitutionality of the "male only" membership policy of the Veterans of Foreign Wars, and the question of whether widowers, but not widows, must prove they received one half of their support from their spouse at the time of the spouse's death.<sup>148</sup> The Supreme Court recently bypassed making a decision upon the issue of whether female school teachers and staff members may be discharged for bearing illegitimate children, awaiting the outcome of a pending H.E.W. regulation on this issue.<sup>149</sup>

## 7. THE FUTURE

Repeated studies and polls indicate that the American public is becoming increasingly receptive to the idea that women and men should share equally the privileges and responsibilities of our society.<sup>150</sup> It is likely that widening employment opportunities, lawsuits to raise wages and collect damages for past discrimination, affirmative action programs, and new training programs in untraditional fields will create higher income for female workers ultimately,<sup>151</sup> as well as create more subtle changes in such economic structures as the present 36-hour work week. For example, economist Barbara Bergmann predicts that an influx of women into the labor force equal to that of men could be absorbed by having a 31-hour work week for both women and men.<sup>152</sup> In addition, such influx could be absorbed by utilizing innovative concepts such as flexible work-hours or job-sharing programs.<sup>153</sup>

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148. *Supreme Court Cases Include Several that Are of Interest to Women*, VI WOMEN TODAY 136-37 (Oct. 11, 1976).

149. *Drew Municipal Separate School District v. Andrews* (No. 74-1318), cited in *Mother's Rights Cases Come Before Supreme Court*, VI WOMEN TODAY 65 (May 19, 1976).

150. MURPHY, *supra* note 30, at 73-79.

151. Bell, *Economic Realities Anticipated*, in *IMPACT ERA*, *supra* note 1, at 82.

152. Bergmann, *supra* note 39, at 158-59.

153. The United States Labor Dep't stated that flexible work hour schedules and removal of barriers for part-time employment are currently subjects of collective bargaining and proposed legislation. In 1976, thirty organizations in the federal government representing more than 28,000 employees were engaged in flexible hours programs. *Senate Hearings Held on Alternative Work Patterns*, VI WOMEN TODAY 59 (April 26, 1976). On May 6, 1976, the House passed H.R. 9043, which created a three-year experimental program of four-day work weeks and flexible working hours for federal

Further subtle changes likely to occur within related institutions are modifications of the existing legal marriage contract. Required under each of its present unwritten but rigid provisions rooted in the common law are inflexible and outmoded roles for husbands and wives which continue to be legally enforced,<sup>154</sup> despite the advent of more egalitarian family patterns. New laws emerging in surrounding areas point to a need for a flexible legal marriage model more suited to the diverse roles husbands and wives assume in a modern nuclear family unit. A flexible legal model would ultimately reflect the growing acceptance of women in the labor force along with their greater financial and social independence, an extended range of domestic responsibilities shared between husbands and wives, and a modification of parenthood as a joint enterprise to be enjoyed and shared by both husband and wife.<sup>155</sup>

Whether equality under the laws will approach reality is, in the opinion of many legal analysts, dependent upon the existence of a firm Constitutional foundation for equal treatment. In the judgment of Constitutional commentators, the government now in fact possesses the "unquestioned authority" to assure such equality.<sup>156</sup> However, as stated in the words of Chief Justice Burger, "[i]n the absence of a firm Constitutional foundation for equal treatment for men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles."<sup>157</sup> Passage of the Equal Rights Amendment, as reputed by its advocates, would provide such a Constitutional foundation.<sup>158</sup> Its proponents urge that its passage would create awareness of sex discrimination, make legal recourse a realistic solu-

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employees in order to ascertain more fully the advantages and disadvantages of flexible working hours for future use. *House Passes Legislation Setting Up an Experimental Flex-Work Program*, VI WOMEN TODAY 74 (May 24, 1976). Currently some cities and industries across the nation are experimenting with the concept of job sharing, by which two people share one fulltime job and divide it between them according to time worked or tasks performed. One Mass. study found that two part-time workers were more efficient than one worker doing the same job. Curtis, *Can Two Work as Cheaply As One?*, Miami Herald, March 21, 1976, § F, at 1, col. 1-2, 4-5.

154. Weitzman, *supra* note 17, at 185. See also *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 116 (1974), and Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U. CAL. L.A. L. REV. at 264 n. 134.

155. Weitzman, *supra* note 17, at 196-97.

156. Cowan, *supra* note 105, at 176.

157. K. DAVIDSON, R. GINSBURG, H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* 63 (1st ed. 1974), Introduction to Appellant's Brief in U.S. Sup. Ct. in *Reed v. Reed*, 404 U.S. 71 (1971).

158. Cowan, *supra* note 105, at 176-77.

tion, and justify self-respect.<sup>159</sup> Its predicted impact would be to provide a Constitutional safeguard against rescission of existing nondiscrimination laws and executive orders, particularly during periods of economic recession; to abolish restraints on women by enabling them to earn a better living; and to abolish restraints on men by freeing them from bearing the sole financial responsibility for the lifetime support of others.<sup>160</sup> Clearly such a profound impact would enhance enormously the career choices, lifestyles, and work patterns for both men and women.

Institutional, political, and ethical shifts are presently occurring which will affect the very framework of social behavior. Customs, such as our ways of living and bringing up children and the consideration of what is appropriate to and conventional in today's society, are likely to be redefined during our generation and over future generations.<sup>161</sup> Regardless of its final manifestation, a strong plurality of indicators suggests the question remaining is not whether sexual equality under the law will be realized, but in what passage of time that realization will take place.

## 8. CONCLUSION

The myths of woman's place, motherhood, equal opportunity, woman's power, and egalitarian marriages are anachronisms amid contemporary social realities. In point of fact, women are participating in the labor force and in myriad untraditional roles in historically unprecedented numbers. There is much to indicate that if women continue their pressing commitment for change, they will be increasingly successful in their efforts to end legislative and judicial discrimination. As they become more politically sophisticated, skillful, and resourceful, their demands for equality will intensify, their dissatisfactions will increase, and their aspirations will rise. Constitutional and statutory equality would then provide the necessary framework by which women could achieve social, political, and economic equality for the ultimate benefit of both sexes.

*Barbara Wolf*

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159. *IMPACT ERA*, *supra* note 1, at 4.

160. Chafetz, *The ERA and Redefinitions of Work: Toward Utopia*, in *IMPACT ERA*, *supra* note 1, at 111-12.

161. Bell, *supra* note 151, at 76.

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## 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

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The American Bar Association's Code of Professional Responsibility stringently limits an attorney's out-of-court verbal and written criticism of judges and courts. It purports to do so in an effort to preserve the public's respect and confidence in our judicial system. However, it appears from the Code and applicable case law that the attorney's right to freedom of speech under the First Amendment has been either ignored or considered inferior to his professional responsibilities to the legal system.

This article will examine the constitutionality, under the First Amendment, of these codified limitations, and will contrast them to the limitations imposed by law upon a layperson's freedom of expression. Amendments to the Code of Professional Responsibility will also be presented in an effort to harmonize these often conflicting rights and limitations.

Under these amendments, an attorney's right to free speech need not be inferior to his duties and responsibilities to his profession. Only by allowing a lawyer to speak his mind freely can the American judicial system ever be expected to improve. As active participants in the courts, lawyers have the education and experience to assume a position as critics and commentators on the performance and attitudes of judges.

### 1. THE CODE OF PROFESSIONAL RESPONSIBILITY AND ITS RESTRAINTS

The Code of Professional Responsibility serves both as an inspirational guide to members of the legal profession and as a source for disciplinary action. It is composed of three interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.<sup>1</sup>

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1. The reason for including the Ethical Considerations and Disciplinary Rules in the Code was to "forestall or answer an attack against the Disciplinary Rules on the ground that they are arbitrary, and therefore unconstitutional . . ." *Wright, The Code*



The Canons are "statements of axiomatic norms. . . . They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived."<sup>2</sup> The Ethical Considerations ". . . represent the objectives toward which every member of the [legal] profession should strive,"<sup>3</sup> and thus provide a body of principles to guide lawyers in regulating their professional conduct. The Disciplinary Rules are mandatory and ". . . state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."<sup>4</sup> The Code further notes that "an enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations."<sup>5</sup>

This interrelation among the sections allows the Canons and Ethical Considerations to be filtered through the Disciplinary Rules and thus serve as a basis for disciplinary action.<sup>6</sup> Therefore, to determine the Code's effect on a lawyer's freedom of expression, it should be considered in its totality.

For example, it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."<sup>7</sup> Because the language of this Disciplinary Rule does not define the specific conduct sought to be regulated, the following Ethical Considerations operate to define and limit its scope.

A lawyer "should be temperate and dignified" in his dealings.<sup>8</sup> When purporting to act on behalf of the public in seeking change, "he should espouse only those changes which he conscientiously believes to be in the public interest."<sup>9</sup> When commenting on judges or other adjudicatory officials, he should always be "certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in

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*of Professional Responsibility: Its History and Objectives*, 24 *ARK. L. REV.* 1, 11 (1970).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement [hereinafter cited as ABA CODE].

3. *Id.*

4. *Id.*

5. *Id.*

6. See *Justices of the App. Div., First Dept. v. Erdman*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S. 441 (1973), where a dissenting judge indicated that Ethical Considerations alone could be the basis for disciplinary action.

7. ABA CODE, DR 1-102 (A)(5).

8. ABA CODE, EC 1-5.

9. ABA CODE, EC 8-4.

our legal system."<sup>10</sup> This last Ethical Consideration, in particular, echoes the traditional fear of the Bar that criticism of the legal system will lessen confidence in the courts, causing laypersons to resort to self-help rather than to the judicial process.

Because of this fear, a statement by an attorney that would make the legal system appear corrupt or incompetent, or a statement that could be construed to reduce public confidence in the legal system, could be subject to disciplinary action as conduct "prejudicial to the administration of justice." Thus, the term "conduct," as used in Disciplinary Rule 1-102 (A) (5),<sup>11</sup> and as defined by the Ethical Considerations, encompasses a broad area of speech including statements made in a lawyer's official capacity, in his private capacity, or on behalf of the public.

The Code explicitly recognizes that a lawyer, by virtue of his understanding of the law and his direct involvement with the courts, has both a right and duty to speak out for needed change in the legal system.<sup>12</sup> However, this apparent recognition of an attorney's right to freedom of expression is curbed by the restrictions of the Ethical Considerations and the Disciplinary Rules. The confusing case law, combined with the vagueness of the Code itself, presents a lawyer with an ironic situation. By trying to comply with the spirit of the Code and his own sense of professional responsibility, the outspoken lawyer could find himself disciplined by the Bar and possibly expelled from the same system he was trying to improve.

## 2. JUDICIAL INTERPRETATION OF RESTRAINTS

In *Bradley v. Fisher*,<sup>13</sup> the United States Supreme Court first emphasized the obligation of attorneys to adhere to high standards of honor and propriety. This case involved an appeal from an order disbarring an attorney who defended John H. Suratt in his trial for the murder of Abraham Lincoln.

The presiding judge summarily disbarred the attorney because he allegedly had accosted the judge in a "rude and insulting manner," and

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10. ABA CODE, EC 8-6.

11. "A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice."

12. ABA CODE, EC 8-1. "By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."

13. 80 U.S. (13 Wall.) 335 (1871).

had charged the judge with making insulting comments from the bench. The judge further alleged that he had been threatened with personal chastisement.<sup>14</sup>

The Supreme Court, in its opinion, upheld the disbarment and proceeded to state the words which, to this day, echo in disbarment proceedings:

The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the Bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.<sup>15</sup>

The Court further indicated that a threat to a judge of personal chastisement, when made by an attorney out of court, would constitute valid grounds for disbarment.<sup>16</sup>

The Court did not, however, weigh the professional obligations of an attorney against his First Amendment right of free speech. By failing to do so, it established the practice of treating a lawyer's right of free speech more strictly than that of a layman. For example, in *Bradley*, the facts indicate that the communication from the lawyer to the judge was not heard by anyone in the courtroom.<sup>17</sup> Therefore, if the attorney had been a layperson, an action for slander would have been groundless.<sup>18</sup>

The standards of *Bradley* were incorporated into the Canons of Professional Ethics, which were adopted by the American Bar Association in 1908.<sup>19</sup> These Canons tend to ignore a lawyer's freedom of speech by expressly prohibiting public criticism of judges or other lawyers in

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14. *Id.* at 337.

15. *Id.* at 355.

16. *Id.* at 356.

17. *Id.* at 338.

18. Since the interest protected is that of reputation, it is essential to tort liability for either libel or slander that the defamation be communicated to someone other than the person defamed. Where there is no communication to anyone but the plaintiff, there may be criminal responsibility, or a possible action for the intentional infliction of mental suffering, but no tort action can be maintained upon the theory of defamation. W. PROSSER, *LAW OF TORTS*, 766 (4th ed. 1971) [hereinafter cited as *LAW OF TORTS*].

19. ABA CANONS OF PROFESSIONAL ETHICS NO. 24.

other than the "proper tribunals."<sup>20</sup> The judicial system is thus encased in a sphere of immunity from criticism by lawyers, for the purpose of maintaining the necessary public confidence in our courts. This imposed silence has, for the most part, been enforced by the courts, to the detriment of First Amendment rights.

Typical of the cases resulting in attorney disbarment for criticism of judges or the judicial system are *Cobb v. United States*<sup>21</sup> and *Wilhelm's Case*.<sup>22</sup> In *Cobb*, a letter from an attorney, published in a newspaper, accused a "judge of being under the sinister influence of a gang which [had] paralyzed [the judge] for two years."<sup>23</sup> The court stated that "a published communication reflecting upon the character or integrity of a judge . . . is conduct unbecoming an attorney for which he may be summarily disbarred."<sup>24</sup> There was some indication in the opinion, however, that if the charges were proven true, no disciplinary action would lie. This heavy burden of proof, however, was placed on the attorney.

In *Wilhelm*, while a proceeding to disbar a fellow attorney was pending, Wilhelm made an impassioned speech on behalf of his colleague, saying that "they were trying to crucify him [and] referred to the disbarment proceedings against [his colleague] as a conspiracy."<sup>25</sup> The court, in upholding disbarment, held that the speech was intended to incite popular feelings against the judge and interfere with a fair and impartial consideration of the case. The court made no mention of the attorney's right to freedom of speech, nor did it apply the clear and present danger test,<sup>26</sup> which is used to determine whether spoken words

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20. *Id.* No. 29.

21. 172 F. 641 (9th Cir. 1909).

22. 269 Pa. 416, 112 A. 560 (1921).

23. 172 F. 641, 645.

24. *Id.* at 644.

25. 112 A. 560, 561.

26. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941). In *Bridges*, the Court quoted language from earlier cases to the effect "that there must be a determination of whether or not the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." *Id.* at 261. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263. For other decisions upholding attorney disbarment without application of the "clear and present danger test," *see In re Doss*, 367 Ill. 570, 12 N.E.2d 659 (1937) (disbarment for critical comments in newspaper stories which appeared after the trial in which the attorney and judge were involved); *In re Knight*, 264 App. Div. 106, 34 N.Y.S.2d 810 (1942) (disbar-

are protected by the First Amendment.

Some courts, in applying the *Bradley* standard,<sup>27</sup> have held the First Amendment inapplicable. Because of a lawyer's oath of admission to the Bar and the Code of Professional Responsibility, the courts seem to have created a double standard which distinguishes a lawyer's right to free speech from that of a layman.<sup>28</sup> In effect, these courts have held that a person gives up his right to criticize the judicial system when he becomes a lawyer. A lawyer is considered an officer of the court at all times, and must bear his yoke of discipline in exchange for his membership in the Bar.<sup>29</sup>

A case highlighting the different standards imposed on attorneys and laypersons is *In re Woodward*,<sup>30</sup> where the court, in upholding a three-year suspension of an attorney, said:

A layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel and slander, or into some infraction of our statutory law. A member of the Bar can, and will, be stopped at the point where he infringes our Canon of Ethics.<sup>31</sup>

A fairly recent case illustrating the same point is *In re Raggio*,<sup>32</sup> where the district attorney of Washoe County, Nevada, criticized a ruling of the state supreme court during a television interview.

The court held that free speech does not give a lawyer the right to publicly denigrate the court,<sup>33</sup> and that the statements by the district attorney caused the court to become a center of controversy, which resulted in the erosion of "public confidence in our system of adminis-

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ment for critical comments contained in written statements circulated by an attorney to state and Bar officials).

27. See text accompanying note 15, *supra*.

28. See, e.g., *In re Troy*, 43 R.I. 279, 111 A. 723 (1920); *State Bar Com. ex rel. Williams v. Sullivan*, 35 Okla. 745, 131 P. 703 (1912); *In re Thatcher*, 80 Ohio St. 492, 89 N.E. 39 (1909).

29. See *Karlin v. Culklin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) for a discussion by Judge Cardozo of the duties of an attorney as an "officer of the court."

30. 300 S.W.2d 385 (Mo. 1957).

31. *Id.* at 393-94.

32. 87 Nev. 369, 487 P.2d 499 (1971). The district attorney had characterized the court's opinion as "most shocking, certainly to this office. . . . I feel that it's an example of judicial legislation at its worst. In my opinion, this is the most shocking and outrageous decision in the history of the supreme court of this state. It's unexplainable, and in my opinion totally uncalled for." *Id.* at 500.

33. *Id.*

tering justice."<sup>34</sup> Without considering the motive behind his statements, the court reprimanded him, saying:

We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the Bar, however, stands in different position by reason of his oath of office and the standards of conduct which he is so sworn to uphold. Conformity with those standards has proven essential to the administration of justice in our courts.<sup>35</sup>

It is clear that these cases which have applied the *Bradley* standard have firmly established a rule that an attorney's right to free speech is curtailed in deference to the Bar's deeply entrenched fear that a critical comment by a lawyer will reduce respect for the legal system.<sup>36</sup>

However, *In re Sawyer*<sup>37</sup> marked a turning point in the application of the rigid *Bradley* standard. In *Sawyer*, an attorney, while defending certain persons accused of violating the Smith Act,<sup>38</sup> made a public speech in which she referred to the "horrible and shocking things at trial; the necessity, if the Government's case were to be proved, of scrapping the rules of evidence; and the creation of new crimes unless the trial were stopped at once."<sup>39</sup>

The U.S. Supreme Court, in opposing her disbarment, said:

We conclude that there is no support for any further factual inference that the petitioner was voicing strong criticism of Smith Act cases and the Government's manner of proving them, and that her references to the happenings at the Honolulu trial were illustrative of this, and not a reflection in any way upon Judge Wiig personally or his conduct of the trial.<sup>40</sup>

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34. *Id.*

35. *Id.* at 500-501. The court did not say in what way these standards has proven essential.

36. A few cases standing alone in this area of precedent refused to let the *Bradley* standard infringe on a lawyer's constitutional rights. *See, e.g.*, *In re Hickey*, 149 Tenn. 344, 258 S.W. 417 (1924); *State ex rel. Atty. Gen. v. Circuit Ct.*, 97 Wis. 1, 72 N.W. 193 (1897).

37. 360 U.S. 622 (1959).

38. 18 U.S.C. § 2385 (1950). The Smith Act makes it unlawful for any person to advocate the overthrow of any government of the United States by force or violence or the organization of any group for that purpose.

39. 360 U.S. 622, 630.

40. *Id.* at 628.

Justice Brennan, speaking for the majority, further stated: "We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice,"<sup>41</sup> and added that ". . . lawyers are free to criticize the state of law."<sup>42</sup>

This case illustrated three different judicial opinions about review of an attorney's freedom of speech. Both Justice Brennan's and Justice Frankfurter's tests were conspicuously liberal in comparison to Stewart's adherence to the traditional *Bradley* standard.<sup>43</sup> Both would allow criticism of the legal system. Justice Brennan would look to the *effect* of the speech and restrict it only if it tended to interfere with the administration of justice. Justice Frankfurter would examine the motives behind the speech and restrict only those speakers who attempt to prejudice a *pending* case. It is significant that eight Supreme Court Justices indicated that a lawyer can criticize the legal system, and thus refused to accept the traditional *Bradley* standard. Although *Sawyer* did not authoritatively determine the extent of an attorney's protection from imposition of discipline by the Bar,<sup>44</sup> several courts have expanded constitutional protection for an attorney's speech.

For example, Justice Brennan's test was applied in *Polk v. State Bar of Texas*,<sup>45</sup> where a lawyer, who was also a defendant in a criminal action, sought to enjoin the State Bar of Texas from issuing a public reprimand.<sup>46</sup> The state court had found that a press release by the defendant, criticizing the judge and prosecutor, was in violation of the Code of Professional Responsibility. The press release stated: "I consider this

41. *Id.* at 636.

42. *Id.* at 631.

43. Stewart, J., in his concurring opinion, asserted the traditional standard formulated in *Bradley* that an attorney must conform to ". . . inherited standards of propriety and honor" as a condition to his right to practice law. He joined the majority only because he felt there were not enough facts to warrant discipline under *Bradley*. *Id.* at 646, 647.

Frankfurter, J., in his dissent, recognized the right of lawyers to criticize the courts. "Indeed, they are under a special responsibility to exercise fearlessness in doing so," he said. His opinion stated, however, that a court must balance an attorney's freedom of speech against the need for high standards in the legal profession and that conduct of the kind found in *Sawyer* could not be deemed to be protected by the Constitution. *Id.* at 668-69.

44. See *State Bar v. Semann*, 508 S.W.2d 429, 433 (Tex. Civ. App. 1974).

45. 374 F. Supp. 784 (1974).

46. Polk was able to attack the decision on First Amendment grounds in federal court, since that issue had never been raised in the state court. *Id.* at 787.

one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial.”<sup>47</sup> Polk alleged that a public reprimand would violate his right to free speech under the First and Fourteenth Amendments, and that since he acted in his capacity as a private citizen and not as an attorney, the state had no legitimate interest in regulating his speech. The Federal District Court reversed and stated:

It cannot be seriously asserted that a private citizen surrenders his right to freedom of expression when he becomes a licensed attorney in this state . . . . [O]nly in those instances where misconduct threatens a significant state interest can a state restrict an attorney's exercise of his rights under the Constitution.<sup>48</sup>

Because there was no showing by the State Bar that Polk's statements interfered with the orderly administration of justice, the court held that “the state [had] no more interest to punish Polk for his conduct as a private citizen than it [did] to punish a mechanic, businessman or other nonlawyers for the same conduct.”<sup>49</sup> If a reprimand were to be issued here, the court said, it would have a chilling effect on any future speech

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47. *Id.* at 786.

48. *Id.* at 787. The court defined two instances when the State would have the requisite significant interest. The first was where an attorney's conduct “shows his inability to represent clients competently and honestly,” and second, where his conduct “interferes with the process of the administration of justice, such as bribery of jurors, subornation of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial process.” Unless the lawyer's conduct clearly falls into one of these two categories, “a state may not regulate an attorney's exercise of his right to free speech under the guise of prohibiting professional misconduct.” *Id.* at 788.

49. *Id.* The court also rejected

the contention . . . that in order to maintain the general esteem of the public in the legal profession both professional and non-professional conduct of an attorney in all matters must be above and beyond that conduct of non lawyers. While this elitist conception may be applicable in non-First Amendment circumstances, the interest of the State in maintaining the public esteem of the legal profession does not rationally justify disciplinary action for speech which is protected and is outside the scope of an attorney's professional and official conduct. Where the protection of the Constitution conflicts with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform.

*Id.* See also *Jackson v. State*, 21 Tex. 668 (1858), where an attorney's abusive criticism of a judge was held not to be misconduct, since it was made outside the scope of his official conduct as an attorney.



protected under the First Amendment.<sup>50</sup> *Polk* is significant in its complete rejection not only of the *Bradley* standard, but also of the traditional fear that critical comment would harm the legal system.

A case equating a lawyer's right to free speech to that of a layman's is *State Bar v. Semann*,<sup>51</sup> which indicated that an attorney's out-of-court statements about public officials, including judges, were subject to the libel standard of *New York Times v. Sullivan*.<sup>52</sup>

*Semann* involved a consolidation of two appeals which grew out of the same set of facts. In response to a newspaper editorial criticizing a district judge, Semann wrote a letter to the editor in which he expressed his agreement with the editorial and compared the judge unfavorably with three other criminal court judges, saying: "Standing beside these men [the judge] is a midget among giants."<sup>53</sup> Another attorney wrote a letter in reply, highly praising the judge and saying that Semann's criticism of him was based on the fact that, when the judge was an assistant district attorney, he "had fought Mr. Semann . . . toe-to-toe and blow-by-blow . . . in the courtroom."<sup>54</sup> Semann replied to this letter with still another published letter in which he first belittled his adversary as an attorney, and then denied the statement regarding his motive for criticizing the judge. The Grievance Committee found that the three letters violated Disciplinary Rule 1-102 (A)(5)<sup>55</sup> and Disciplinary Rule 2-101(A)<sup>56</sup> of the Code of Professional Responsibility and ordered formal reprimands.<sup>57</sup>

The court set aside both formal reprimands, and said:

It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowl-

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50. 374 F. Supp. 784, 788-89. See also *Justices of App. Div., First Dept. v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S. 441 (1973), where the court avoided making a constitutional ruling, but nevertheless reversed an order to censure for an attorney's critical comments which appeared in *Life* magazine.

51. 508 S.W.2d 429 (Tex. Civ. App. 1974).

52. 376 U.S. 254 (1964).

53. 508 S.W.2d 429, 431.

54. *Id.*

55. See note 11, *supra*.

56. "A lawyer shall not prepare, cause to be prepared, use or participate in the use of any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients."

57. 508 S.W.2d 429, 431.

edge that it is false or with reckless disregard of whether it is false or not. Such protection . . . extends on the same terms to lawyers, at least for utterances made outside the course of judicial proceedings.<sup>58</sup>

The court could find nothing in the Code specifically relating to criticism of fellow attorneys but recognized that such action, when conducted in a public forum, could, in extreme situations, be prejudicial to the administration of justice. "However it cannot be said that isolated incidents of the nature contained in [the last two letters] raise a fact issue of professional misconduct as prohibited by Disciplinary Rule 1-102."<sup>59</sup>

These cases indicate the confusing situation confronting an attorney. Urged by the Code to participate in improving the legal system,<sup>60</sup> he faces the possibility of imposition of discipline because of that same Code's concentration on the maintenance of respect for the legal system.<sup>61</sup> Although the First Amendment recognizes an attorney's right to free speech, conduct that could reduce respect for the legal system can still be punished, as it was under *Bradley*, as "conduct that is prejudicial to the administration of justice."<sup>62</sup> This confusion is compounded by courts' tendencies to hold lawyers' expressions to a higher standard of propriety than that of a layperson.

### 3. RESTRAINTS ON LAYPERSONS

#### A. Contempt Powers

Paralleling the cases in which disciplinary action was taken against lawyers for conduct prejudicial to the administration of justice are cases in which contempt powers of the court were used to punish laypersons for interference with the administration of justice. The standard of constitutional protection of the layperson's speech, however, compared with that of a lawyer's, is much greater.

An important case which dealt with a layperson's freedom of speech was *Bridges v. California*.<sup>63</sup> In that case, a union official caused the publication of a telegram that was sent to the Secretary of Labor.

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58. *Id.* at 432-33.

59. *Id.* at 433.

60. ABA CODE, EC 8-1, 8-2.

61. ABA CODE, Preamble, EC 1-5, 8-6.

62. ABA CODE, DR 1-102(A)(5).

63. 314 U.S. 252 (1941).

The telegram stated the union's intention not to allow the state courts to override the majority vote of the union in choosing its officers and representatives. The Court, in reversing the contempt conviction, held that contempt sanctions for out-of-court publications were to be governed by the "clear and present danger" standard. Under this standard, sanctions can be imposed if the substantive evil of the speech is extremely serious and the degree of imminence extremely high.<sup>64</sup>

There is also language in one Supreme Court case, *Craig v. Harney*,<sup>65</sup> expressing the position that judges may not invoke their contempt powers merely to shelter themselves from criticism. In that case, a newspaper editor had been held in contempt for news reports and editorials which criticized the judge's handling of a private law suit. The editorial called the judge's behavior "high handed" and a "travesty on justice." Justice Douglas' majority opinion stated: "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude able to thrive in a hearty climate."<sup>66</sup>

In *Wood v. Georgia*,<sup>67</sup> the Court applied the "clear and present danger" test in determining whether a judge could hold the local sheriff in contempt for having "issued to the local press a written statement" critical of the judge's political motives and his handling of the local grand jury.<sup>68</sup>

In reversing the contempt conviction, Mr. Chief Justice Warren said:

Men are entitled to speak as they please on matters vital to them; errors in judgment or substantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. . . . Hence, in the absence of some other showing of a substantive evil *actually designed to impede* the course of justice in justification of the exercise of the contempt

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64. *Id.* at 263. See also *Pennekamp v. Florida*, 328 U.S. 331 (1946), where the Supreme Court applied the clear and present danger standard and reversed a contempt citation against a newspaper editor for his critical editorials and cartoons aimed at local judges.

65. 331 U.S. 367 (1947).

66. *Id.* at 376.

67. 370 U.S. 375 (1962).

68. The judge had given special instructions to the grand jury to investigate charges of election law violations in the county. He was also accused of racial prejudice, since the investigation was to concentrate on the phenomenon of negro block voting.

power to silence the petitioner, his utterances are entitled to be [constitutionally] protected.<sup>69</sup>

The above cases indicate that the clear and present danger standard protects a layperson's out-of-court conduct against the imposition of contempt penalties unless it is shown to pose an imminent threat to the administration of justice. Thus, without more, comments concerning a judge's fitness or actions taken in his official capacity would seem to be protected under the First Amendment. If this type of conduct by a layman does not pose a danger to the administration of justice, then, *a fortiori*, the same conduct by a lawyer should be protected by the First Amendment.

## B. Libel and Slander

In addition to the contempt powers of the court, a layperson's right to speak freely is also subject to a possible suit for libel or slander. However, a public official such as a judge would probably have a difficult time sustaining such an action against a layperson because of the lenient test imposed by the Supreme Court in *New York Times v. Sullivan*.<sup>70</sup> In *Sullivan*, the Court created a constitutional privilege for statements concerning the official conduct of a public official. For damages to be awarded, the defamation must have been made with "actual malice." That is, the plaintiff must show either that the defendant knew the statement was false at the time it was made, or that the statement was made with reckless disregard of the truth.<sup>71</sup> The term public official refers to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."<sup>72</sup>

In *Gertz v. Welch*,<sup>73</sup> the New York Times rule was extended to

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69. 370 U.S. 375, 389 (emphasis added). Looking at the record in light of the clear and present danger test, the Court said: "[I]n the absence of any showing of an *actual interference* with the undertakings of the grand jury, this record lacks persuasion in illustrating the serious degree of harm to the administration of law necessary to justify exercise of the contempt power." *Id.* at 393 (emphasis added). The Court also rejected the argument that because the petitioner was a sheriff, he owed a special duty and responsibility to the court and its judges, and that therefore his right to freedom of expression must be more severely curtailed than that of a private person. *Id.* at 394.

70. 376 U.S. 254 (1964).

71. See LAW OF TORTS, 821.

72. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

73. 418 U.S. 323 (1974).

include statements concerning public figures. A person is deemed a "public figure" if he achieves general fame or notoriety for a limited range of issues into which he has voluntarily or involuntarily become involved.<sup>74</sup> A judge appointed to the bench would thus be a public figure, and an elected judge would be a public official. In both cases, critical comment by a layperson of a judge's official conduct would seem to be constitutionally protected so long as it was not made with actual malice.

Recognizing that this liberal standard is not applied in Bar disciplinary proceedings against attorneys, it is necessary to determine if the stricter standard applicable to attorneys is justified. The Bar appears to base its regulatory interest upon the fear that critical comment will reduce public confidence in the legal system and respect for the law, thereby interfering with the administration of justice. To determine if there is a need for this higher standard, it is necessary to explore whether, in actuality, this fear is justified.

#### 4. MAINTAINING RESPECT FOR THE LEGAL SYSTEM

Mr. Justice Black, in *Bridges v. California*,<sup>75</sup> stated:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongfully appraises the character of the American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.<sup>76</sup>

The framers of the Constitution envisioned the First Amendment as a means of promoting robust debate in a free market place of ideas. That Amendment has also been held to protect statements made outside the courtroom unless the statements constituted a clear and present danger to the administration of justice.<sup>77</sup>

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74. See LAW OF TORTS, 823.

75. 314 U.S. 252 (1941).

76. *Id.* at 270-71.

77. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Another consideration weighed heavily by the framers and the Supreme Court is the need of the public for information about certain areas of public concern. The Court, in *Sullivan*, held that speech critical of a public official's conduct would be protected under the First Amendment unless the statement was shown to have been made with "actual malice." Neither factual error nor injury to official reputation suffices to remove the constitutional shield from criticism of official conduct.<sup>78</sup>

The Court in *Sullivan* also talked about the chilling effect of requiring someone to prove the truth of his statement, or face liability for it.<sup>79</sup> This situation closely parallels the requirements of Ethical Consideration 8-6 that a lawyer be certain of the merit of his complaint. The difficulty of proving the "certainty" of his complaint exerts a "chilling effect" upon an attorney's enjoyment of his constitutional rights.<sup>80</sup> In addition, this requirement disregards the need for constructive criticism of judges, especially where that judge is an elected official, and the need to point out deficiencies and suggest needed improvements in the system. This chilling effect is especially pronounced when the attorney's statement is general, and the truth of that statement is, by its very nature, hard to prove.

For an attorney to suffer additional restraints on his First Amendment rights, the courts should require a showing of a clear and present danger that his speech will hinder and obstruct the administration of justice. As an attorney, his statements are presumed to interfere with the administration of justice. The Code seems to base its regulation of an attorney's out-of-court speech on an irrebuttable presumption that the speech will interfere with the administration of justice. This fact is not necessarily and universally true. It is the content of the speech, and not the occupation of the speaker, that should determine the danger to the legal system. If this distinction is noted, it becomes evident that this presumption has no basis in fact. An attorney, by virtue of his understanding of the law and his direct involvement with the courts, is best able to articulate those areas of the system needing improvements. A statement made by an attorney should carry no more weight than the same statement uttered by a mayor, governor, or senator, and should

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78. 376 U.S. 254, 279-83.

79. *Id.* at 279.

80. *See, e.g., Okla. Bar Assoc. v. Grimes*, 436 P.2d 40 (1967), where the disbarment of an attorney for accusing justices of a state court of accepting bribes was ordered withdrawn when, after the disbarment, some members of the court were found to have been guilty of corruption.

not be any more restricted. Statements by an attorney, critical of the legal system, do not present a clear and present danger to the administration of justice. The injury to the legal system that the traditional fear embodies has no basis in fact.

## 5. PROPOSED REVISIONS TO THE CODE

Recognizing this unequal treatment of lawyers, the American Bar Association should take steps to assure that a lawyer's criticism of his profession can be more compatible with his First Amendment rights. The Bar should recognize that this lack of constitutional protection exerts a chilling effect on a lawyer's free speech, since an expensive and lengthy appeal must be taken before any infringed rights can be vindicated. Therefore, the Code should be amended in light of the First Amendment. This would remove the chilling effect that exists under the present Code.

### *Disciplinary Rule 1-102 (A) (5) (amended)*

**A LAWYER SHALL NOT ENGAGE IN CONDUCT THAT IS LIKELY TO PRESENT A CLEAR AND PRESENT DANGER TO THE ADMINISTRATION OF JUSTICE IN A PENDING CASE.<sup>81</sup>**

This Disciplinary Rule, by virtue of the amendment to Ethical Consideration 8-6 (below), would not apply to speech by an attorney, spoken as a private citizen, unless that speech can be shown to present a clear and present danger to the administration of justice.

The addition of the words "in a pending case" would restrict an attorney's statements made in his legal capacity to those instances where a case has not been concluded and there is a danger that comments could directly prejudice the trial. The word "pending" here refers to a case that has not reached a final judgment and would include cases pending on appeal.

### *Ethical Consideration 8-6 (amended)*

Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive support of the Bar against unjust criticism. *Where a lawyer is speaking in his official capacity, or on behalf of a client, he should be certain of the merit of his complaint, use appropriate lan-*

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81. Disciplinary Rule 1-102 (A)(5) now reads: "A lawyer shall not engage in conduct that is prejudicial to the administration of justice."

guage, and avoid petty criticisms, for unrestrained and intemperate statements, *in this capacity* motivated by reasons other than a desire to improve the legal system, are not justified. *A lawyer, as a private citizen, has the right to criticize such officials publicly. His statements in this capacity are constitutionally protected unless it is shown that the statements present a clear and present danger to the administration of justice. Because the lawyer's capacity will be determined from the circumstances of his conduct, he should make clear in what capacity he speaks.*<sup>82</sup>

This amendment reflects the necessity of a lawyer, when speaking in his official capacity, to consider carefully the merits of his complaint because, in this capacity, his statements could have a disproportionate effect on the administration of justice.

Where a lawyer is speaking as a private citizen, the state has a greatly diminished interest in regulating his speech. A lawyer is speaking as a private citizen when he is not speaking on behalf of a client or as attorney of record, and he is stating his *own* opinion or an opinion he personally shares with a segment of the public.

The above amendments should have the effect of splitting the Disciplinary Rules applicable to a lawyer's speech. Disciplinary Rule 1-102 (A) (5) (amended) would apply to speech by an attorney in his official capacity. Disciplinary Rule 8-102 states:

(A) A lawyer shall not *knowingly* make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not *knowingly* make false accusations against a judge or other adjudicatory officer.

This rule would apply to an attorney's speech as a private citizen and would hold him to the same standard as a layperson. In a grievance committee hearing it would thus be necessary for the Bar first to determine *in what capacity* the attorney's comments were made. If the committee found that the statement was made in the capacity of a private citizen, the Bar could discipline the Attorney under Disciplinary Rule

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82. Ethical Consideration 8-6 now reads:

Adjudicatory officials, not being wholly free to defend themselves are entitled to receive the support of the Bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.



8-102 only if it were shown that the attorney made the statement with knowledge of its falsity or with reckless disregard for its truth. The burden of proving this would be placed on the Bar rather than on the attorney. If the Bar determined that the conduct of the attorney was directed toward producing *imminent* lawless action, and was likely to incite or produce such action, disciplinary action would be proper under Rule 1-102 (A) (5) (amended).

## 6. APPLICATION

*Wilhelm's Case*,<sup>83</sup> where the attorney made an impassioned speech on behalf of his colleague who was the subject of a disbarment proceeding, provides an interesting example of how the Bar would have to proceed under these amended rules. Under these new standards, the Bar would first have to determine in what capacity the speech was made. Here, because the speech was made to a public gathering and not in a courtroom or other judicial assembly, and because Wilhelm was speaking on his own behalf, the statement would be classified as coming from a private citizen. For action to lie under Disciplinary Rule 8-102, the burden of proof would then be on the Bar to show that he *knew* the statements were false when he made them. However, since the case *was pending* at the time the speech was made, if the Bar could show that the speech was *likely* to incite or produce *imminent* lawless action, discipline would lie under Disciplinary Rule 1-102 (A) (5) (amended).

In *Polk v. State Bar of Texas*,<sup>84</sup> Polk's statement in his press release was made about a pending case in which he was the defendant. It therefore could only have been made in his capacity as a private citizen. To apply the standard of Disciplinary Rule 8-102, the Bar would have to show that Polk knew his statement to be false at the time he made it. Since Polk was commenting on the way his own case was progressing, it is doubtful that knowledge of its falsity could be shown. Nor would discipline succeed under Disciplinary Rule 1-102 (A) (5) (amended), since the opinion of the case clearly indicates that the Bar did not show that Polk's statement interfered with the administration of justice. Thus, the application of the standard suggested here would preclude disciplinary action on the grievance committee level, and would remove the chilling effect of the unamended rules, since no appeal would have to be taken for the attorney's First Amendment rights to be considered.

*Chet Zerlin*

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83. 269 Pa. 416, 112 A. 560 (1921).

84. 374 F. Supp. 784 (1974).

## Constitutional Law: The State Cannot Require Spousal or Parental Consent for Abortions during the First Trimester of Pregnancy: *Planned Parenthood of Missouri v. Danforth*

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Plaintiffs brought a class action on behalf of all licensed physicians performing abortions or wishing to perform abortions, and on behalf of their patients desiring the termination of pregnancy,<sup>1</sup> to have declared unconstitutional House Bill 1211 of the Missouri General Assembly,<sup>2</sup> and seeking an injunction against its enforcement.

Plaintiffs challenged Section 3(2),<sup>3</sup> which required the patient, prior to submitting to an abortion during the first trimester (twelve weeks) of pregnancy, to certify in writing her free and informed consent to the operation;<sup>4</sup> Section 3(3),<sup>5</sup> which required, during the first trimester of pregnancy, the written consent of the woman's spouse, unless the abortion was deemed necessary by a licensed physician to preserve the life of the mother;<sup>6</sup> and Section 3(4),<sup>7</sup> which required written consent of one parent or person in *loco parentis* of the woman if she was unmarried and under eighteen, unless the abortion was certified by a licensed physician as necessary to preserve the life of the mother.<sup>8</sup> A three-judge

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1. 96 S.Ct. 2831 (1976).

2. H.R. 1211, 77th Missouri General Assembly (1974). *Later codified as Mo. ANN. STAT. §§ 188.010 et seq.; 188.015; 188.020; 188.035; 188.050; 188.060* (1974).

3. *Id.* § 3 (2). *Later codified as Mo. ANN. STAT. § 188.020* (2) (1974).

4. 96 S.Ct. at 2836.

5. § 3(3) H.B. No. 1211, 77th Missouri General Assembly (1974). *Later codified as Mo. ANN. STAT. § 188.020*(3) (1974).

6. 96 S.Ct. at 2836.

7. § 3(4) H.B. No. 1211, 77th Missouri General Assembly (1974). *Later codified as Mo. ANN. STAT. § 188.020*(4).

8. 96 S.Ct. at 2836. Although not relevant to the point of this article, plaintiffs also challenged Mo. ANN. STAT. § 188.015(2) (1974), defining viability; § 188.035(1), requiring physicians to exercise reasonable care to protect the fetus' life and health; §§ 188.010 *et seq.*, § 188.040, declaring an infant who survives an abortion, which was not performed to preserve the health of the mother, a ward of the state; § 188.050, prohibiting saline amniocentesis as deleterious to maternal health; §§ 188.050, 188.060, establishing record-keeping requirements to preserve maternal health. Plaintiffs attacked these provisions on the grounds (among others) that they violated "the right to privacy

federal district court<sup>9</sup> upheld the statute<sup>10</sup> and denied injunctive relief against its enforcement.<sup>11</sup> On appeal, the United States Supreme Court<sup>12</sup> reversed,<sup>13</sup> and HELD, the State may not require the consent of a spouse<sup>14</sup> or parent<sup>15</sup> as a condition to an abortion during the first twelve weeks of pregnancy.

Historically, one of the earliest cases establishing one's right to privacy of his physical being was *Union Pacific Railway Co. v. Botsford*.<sup>16</sup> There it was noted by the Court:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.<sup>17</sup>

The Court termed this the right "to be let alone."<sup>18</sup>

In early fundamental rights cases, the courts applied the "rational

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in the physician-patient relationship"; the female patient's right to determine whether to bear children; the physician's right to due process of law under the Fourteenth Amendment by requiring him to make decisions "beset . . . with inherent possibilities of bias and conflict of interest."

9. 28 U.S.C. § 2281 (1970) provides for a three-judge district court to determine questions of the constitutionality of state statutes where, as here, a permanent injunction restraining the operation of such a statute is sought.

10. *Planned Phd. of Cent. Mo. v. Danforth*, 392 F.Supp. 1362 (E.D. Mo. 1975).

11. However, the court did find the first sentence of MO. ANN. STAT. § 188.035(1) (1974) unconstitutional because it failed to exclude the stage of pregnancy prior to viability, and as such was overbroad. *Id.* at 1371.

12. 28 U.S.C. § 1253 (1970) authorizes direct appeal to the Supreme Court from the order of a three-judge panel in a federal district court.

13. The Supreme Court upheld § 188.015(2), defining viability, 96 S.Ct. at 2838. The Court also upheld § 188.020(2), requiring free and informed consent by the patient, *id.* at 2840; § 188.050, 188.060, pertaining to making and keeping of records of all abortions performed, *id.* at 2847. The Supreme Court declared § 188.050, proscribing saline amniocentesis as a method of abortion, unconstitutional as an "unreasonable or arbitrary regulation designed to inhibit . . . the vast majority of abortions after the first twelve weeks." *Id.* at 2845.

14. *Id.* at 2842 (White, J., Berger, C.J., Rehnquist, J., dissenting).

15. *Id.* at 2844 (White, J., Berger, C.J., Rehnquist, J., dissenting).

16. 141 U.S. 250 (1891). In this case, the Court upheld the refusal to require Mrs. Botsford to submit to surgical diagnosis as a result of her suit for personal injuries against the Union Pacific Railway for damage sustained when an upper berth in a sleeping car fell on her head.

17. *Id.* at 251.

18. *Id.*

relationship test"<sup>19</sup> as the standard to determine whether exercises of state police powers were proper. Under this test, the states were allowed broad discretion in exercising their police power, but were required to maintain a reasonable connection between a statute's effect and a state's interest in restricting rights of its citizens.<sup>20</sup>

More recent fundamental rights cases have held that a compelling governmental interest is required where the state seeks to restrict an individual's fundamental rights.<sup>21</sup> In addition to the enumerated rights, such as the right of free speech, the right to a jury trial, and the right of freedom from self-incrimination, the Supreme Court, in *Griswold v. Connecticut*,<sup>22</sup> established that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help

19. See Comment, *Equal Protection of the Laws: Education Is Not a Fundamental Right*, 26 U. FLA. L. R. 155 (1973) (hereinafter cited as *Education Is Not a Fundamental Right*). See also *Constitutional Law—Abortion Parental and Spousal Consent Requirements Violate Right to Privacy in Abortion Decision*, 24 KAN. L. REV. 446, note 17 at 448 (1976).

20. *Id.* An example of the rational relationship test arose in the 1923 Supreme Court case *Meyer v. Nebraska*, 262 U.S. 390 (1923). In this case, a man was convicted for violating a Nebraska statute prohibiting the teaching of any subject in any language other than English, and the teaching of any foreign language to any student before the eighth grade. In overturning the conviction, the Supreme Court relied on the Fourteenth Amendment, noting:

Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . to marry, establish a home and bring up children and generally to enjoy those privileges long recognized at common law as the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or *without reasonable relation to some purpose within the competency of the State to effect* (emphasis added). *Id.*

21. "It is basic that no showing merely of a reasonable relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses endangering paramount interest give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406, citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See *Education is Not a Fundamental Right*, note 19 *supra*, citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) as the first case to distinguish between strict judicial scrutiny and a "reasonable relationship" standard.

22. 381 U.S. 479 (1965). In *Griswold*, appellants gave information, instruction, and medical advice to a married couple for the prevention of conception. Upon examination, appellant prescribed, to the wife, the best means suited to her. As a result, appellant was arrested and convicted for violating a Connecticut statute prohibiting the use of, or assisting in the use of, any drug or device to prevent conception. The Supreme Court reversed the conviction and found the statute to be unconstitutional as a violation of the right of privacy. *Id.* at 485.

give them life and substance. Various guarantees create zones of privacy."<sup>23</sup> In *Griswold*, appellant, a licensed physician, was convicted for giving information, instruction, and medical advice to married persons concerning the means of preventing conception.<sup>24</sup> The Court reversed the conviction and established the right to privacy as fundamental, noting that it was "no less important than any other right carefully and particularly reserved to the people."<sup>25</sup>

Faced with the question of the right to an abortion, the Supreme Court, in *Roe v. Wade*,<sup>26</sup> established that a woman's decision to terminate her pregnancy lies within the "zone of privacy,"<sup>27</sup> and as a result, regulation of abortions must be narrowly drafted to express only legitimate state interests.<sup>28</sup> While *Roe v. Wade* established the right to an abortion as fundamental, it was silent as to whether requirements of spousal or parental consent were within the scope of compelling state interests.<sup>29</sup>

These questions were first answered by the Fifth Circuit Court of Appeals in *Poe v. Gerstein*,<sup>30</sup> wherein the court was faced with the question of the constitutionality of a Florida statute<sup>31</sup> requiring parental consent for a minor to obtain an abortion and spousal consent for a married woman to obtain an abortion. The court acknowledged that a state has broader authority over children's activities than over the similar activities of adults.<sup>32</sup> However, the court found fundamental privacy rights established under *Roe* to apply also to minors,<sup>33</sup> and found the interests set forth by the state in *Poe* insufficient to establish a compel-

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23. *Id.* at 484.

24. *Id.* at 480.

25. *Id.* at 485.

26. 410 U.S. 113, 153 (1973).

27. *Id.* at 153.

28. *Id.* at 155.

29. *Id.* at 165 note 67.

30. 517 F.2d 787 (5th Cir. 1975).

31. § 458.22(3), FLA. STAT. (1975). This statute provides in part: "One of the following shall be obtained by the physician prior to terminating a pregnancy: (a) [I]f she [the pregnant woman] is married, the written consent of her husband unless the husband is voluntarily living apart from the wife, or (b) If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the written consent of the custodian or legal guardian must be obtained."

32. *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975). The court cited as an example "the power of state to prohibit children from viewing material to which an adult would have a constitutional right." *Id. citing Mckeiver v. Pennsylvania*, 403 U.S. 528 (1971).

33. *Id.* at 791.

ling state interest in requiring parental consent.<sup>34</sup> As a result, the court found the statute unconstitutional.<sup>35</sup>

The court, in *Poe*, also struck down a portion of the statute which inquired consent of the spouse for a married woman to obtain an abortion.<sup>36</sup> The court held the state's interest in protecting the rights of the husband,<sup>37</sup> or in maintaining the stability of society,<sup>38</sup> insufficient in light of the fundamental rights of the woman.

The present case was the first opportunity<sup>39</sup> for the Supreme Court to resolve the issue concerning the legitimacy of state interests in requiring consent, either spousal or parental.<sup>40</sup> While the Court did not specifically say that the state's interests in protecting the husband's rights were not legitimate, it did find that these interests were not sufficiently "compelling" to warrant restriction of the woman's fundamental personal right of privacy.<sup>41</sup>

The Court noted its awareness of the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."<sup>42</sup> However, the Court expressed the opinion that the strength of a marriage or family will not be benefited by providing the husband the power of ultimate decision over his wife's actions with regard to abortions.<sup>43</sup> Balancing the interests of the wife and husband, the Supreme Court held that the wife's interest is greater, noting: "Since it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."<sup>44</sup> Since the rights of the state are not sufficient to merit

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34. *Id.* at 792-94. The interests deemed as sufficient by the state to justify restricting the minor's right were: preventing illicit sexual conduct among minors; protecting minors from their own improvidence; fostering parental control; and supporting the family as a social unit.

35. *Poe v. Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975).

36. § 458.22(3)(a) FLA. STAT. (1975).

37. *Poe v. Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975).

38. *Id.*

39. See text accompanying note 27 *supra*.

40. The issue was a very real one in light of the fact that *Poe v. Gerstein* had held Florida's consent requirements invalid, while the three-judge district court upheld those of Missouri in the instant case. See text accompanying notes 6 and 7 *supra*.

41. 96 S.Ct. at 2842.

42. *Id.* at 2841.

43. *Id.* at 2842. "It seems manifest that ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband."

44. *Id.*

unreasonable restrictions of the woman's privacy, at least in the first trimester, the Court held that the state could not give authority to the husband which the state itself did not have.<sup>45</sup>

The Supreme Court, by its decision in the present case, affirms the conclusion reached by the United States Court of Appeals, Fifth Circuit, in *Poe v. Gerstein*.<sup>46</sup> In *Poe*, the court discussed various interests which the father may have in the fetus, and analyzed these rights as they exist throughout the term of the pregnancy. The court also analyzed a state's interest in protecting the father's rights.<sup>47</sup> By citing *Griswold v. Connecticut*,<sup>48</sup> the Fifth Circuit disposed of the state's assertion of an interest in the stability of society and the well-being of its citizens and concluded that no case has "sanctioned state determination of intrafamilial decision making process with regard to child bearing decisions."<sup>49</sup>

While the Court refused to sanction state interference with family decisions, it did hold the state's interest in protecting the husband's rights regarding the fetus to be more substantial, noting that his interest "would most logically emanate from his paternity of the fetus, and thus appear analytically as a precursor of the father's relational interest in his child."<sup>50</sup> The Court noted, however, that "since a fetus is not a person," as established in *Roe v. Wade*,<sup>51</sup> "neither is it a child."<sup>52</sup> The logic of paternal interest was further weakened by the fact that the statute did not require the husband to be the father of the potential child in order to give him the power of consent.<sup>53</sup>

The findings by the district court in the present case are contradictory to those of the Fifth Circuit in *Poe*.<sup>54</sup> While the court did not directly address the issue of paternal rights, the court did analyze the state's interest in protecting the marriage and familial relationship. The

45. *Id.*

46. *Poe v. Gerstein*, 517 F.2d 787, 794-96 (5th Cir. 1975).

47. *Id.* at 795. The Court noted two interests which the father might have that would be endangered by his wife's abortion. First, an interest in the fetus with which his wife is currently pregnant; and, secondly, an interest in the procreation potential of the marriage.

48. 381 U.S. 479 (1965).

49. *Poe v. Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975).

50. *Id.*

51. 410 U.S. 113, 156-58 (1973).

52. *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975).

53. *Id.* at 796.

54. *Planned Phd. of Cent. Mo. v. Danforth*, 392 F.Supp. 1362 (E.D. Mo. 1975). However, Webster, J., in the dissent finds agreement with *Poe* and supports its conclusions. *Id.* at 1374.

district court held that the only state interests involved in *Roe*<sup>55</sup> were the protection of maternal health and the protection of the fetus.<sup>56</sup>

In upholding the Missouri consent statutes, the district court relied on a series of cases which regard marriage as an institution,<sup>57</sup> and establish the right of procreation as fundamental to a marriage.<sup>58</sup> The court stated: "The interest of the state in protecting the mutuality of decisions vital to the marriage relationship is compelling at all times during the marriage."<sup>59</sup>

As noted previously,<sup>60</sup> the Supreme Court in the instant case was in accord with the reasoning of *Poe*.<sup>61</sup> However, the Court did not find the spouse to be without an interest in the abortion decision. The Court simply found that any interest of the spouse was not sufficiently compelling for the state to restrict the woman's right to privacy.<sup>62</sup> The Court noted that the decision to have an abortion should be made jointly by the husband and wife, noting: "No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue."<sup>63</sup> While supporting a mutual decision by the parties, the Court concluded that this mutuality would not be enhanced "by giving the husband a veto power exercisable for any reason, or for no reason at all."<sup>64</sup> When disagreement exists it should be the woman who determines the outcome, since she physically bears the burden of carrying the child.<sup>65</sup>

The decision reached in the present case resolves but a few of the many questions arising from the abortion issue. For instance, how

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55. *Roe v. Wade*, 410 U.S. 113 (1973).

56. *Planned Phd. of Cent. Mo. v. Danforth*, 392 F.Supp. 1362, 1369 (E.D. Mo. 1975).

57. *See Reynolds v. United States*, 98 U.S. 145, 165 (1878), finding marriage to be a social contract usually regulated by law, with which government is necessarily required to deal. *Maynard v. Hill*, 135 U.S. 190 (1888), noting marriage as creating the most important relation in life, and as having always been subject to the control of the legislature.

58. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), holding procreation to be a fundamental aspect of marriage.

59. *Planned Phd. of Cent. Mo. v. Danforth*, 392 F.Supp. 1362, 1370 (E.D. Mo. 1975).

60. *See* text accompanying note 46 *supra*.

61. 96 S.Ct. 2831.

62. *Id.* at 2842.

63. *Id.*

64. *Id.*

65. *Id.*



broadly does the right of privacy extend in preventing the necessity of parental consent for medical treatment requested by a minor? Florida Attorney General Robert Shevin has pointed out that the instant decision is "limited strictly to abortions and only because of the right of privacy issue . . . you can't say that in terms of an operation or any other surgical procedure."<sup>66</sup> Still, consent provisions appear valid for some operations.<sup>67</sup>

While it is clear that the present decision is based on the private nature of abortion, it would seem illogical to assume that control over certain parts of the body is within the realm of the right of privacy while control over other parts, such as the ears, face, or even the genitals,<sup>68</sup> is not.

A second issue arising is that, in being provided the right to obtain an abortion without spousal consent, the wife now has the ability to determine whether procreation will take place within the marriage. In a discussion of *Doe v. Doe*<sup>69</sup> it was noted that "the assertion of a legal right by the wife, by obtaining an abortion may establish new ground for divorce."<sup>70</sup> If the denial of procreation were not allowed as the basis for a divorce action, then assertion of the wife's right would control any potential right of procreation which the husband might have, since adultery generally is illegal<sup>71</sup> and socially disfavored.<sup>72</sup>

A third result of the present decision is the potential power of extortion given to a pregnant woman. If an unmarried woman becomes pregnant, for example, she has the option of giving birth to the child and forcing the father to provide for its support or of having an abortion and freeing the father from any obligation to support. To extend this a step further, the woman could bargain with the father for a certain sum as consideration for her undergoing an abortion. Since the "compensation" would be hers, with no cost of maintaining the child

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66. Miami Herald, July 16, 1976, Sec. AA at 1.

67. *Id.* For example, a person under eighteen years of age who chooses to have his or her ears pierced must produce a consent form signed by his or her parent.

68. *Id.* The article points out that sterilization of a boy or girl under eighteen still requires the consent of a parent.

69. *Doe v. Doe*, 314 N.E. 2d 128 (1974).

70. Comment 11 *NEW ENGLAND L. REV.*, 205, 222 (1975). This proposition is based on the notion that procreation is fundamental to marriage.

71. *Id.* at 222. See § 798.01 *FLA. STAT.* (1975), and § 798.03 *FLA. STAT.* (1975), proscribing adultery.

72. *Id.*

(since there would not be a birth, and the father could pay a large amount and still not incur the expense of supporting a child for the period of minority), this could become a lucrative proposition on the part of the mother. This "bartering" for an abortion would enable potential parents to circumvent the holding in *Shinall v. Pergeorelis*,<sup>73</sup> that "a release executed by a mother is invalid to the extent that it purports to affect the rights of the child."<sup>74</sup> This enables the mother to bargain away any rights the fetus might have if it were to become a child.

To carry the implication of the present case to a logical extreme, it might be argued that since the choice of bringing the child into the world is ultimately that of the mother, she should bear full responsibility for, and have full control over, the child. This argument could be made in the following manner: The decision of *Roe* held that a fetus is not a person during the first trimester of pregnancy. As a result, the woman has total determinative power over whether the fetus becomes a child.<sup>75</sup> Since the father only helped to set in motion the biological functions which created the fetus, his responsibility (and liability) should extend only that far. He should be responsible only for damages incurred because of his actions up to and including the abortion. Any decision to proceed beyond the fetal stage of pregnancy is that of the mother, and she should therefore accept responsibility for the birth of the child and its support.

Four basic problem areas have been presented which result from the decisions reached by the Court in *Planned Parenthood*: the scope of the consent requirement for minors; the power of the wife to determine the occurrence of procreation in the marriage; the potential extortionary power given to the pregnant woman; and the argument for the mother's liability for a child after the first trimester of pregnancy. These four areas illustrate some of the critical issues to be dealt with in the

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73. *Shinall v. Pergeorelis*, 325 So.2d 431 (Fla. 1st DCA 1975). In this case, a single woman who had become pregnant initiated an action against the putative father. As a result of pre-trial negotiations, the mother executed a release to the putative father, in return for \$500 and a signed admission that the child was the father's. Soon thereafter, the mother again instituted paternity proceedings against the father. The court held that the release was invalid on the principle that an illegitimate child's right to support from its putative father cannot be contracted away by its mother.

74. *Id.* at 433, citing *Walker v. Walker*, 266 So. 2d 385 (Fla. 1st DCA 1973).

75. Based on the present holding that the abortion decision is ultimately that of the mother. 96 S.Ct. 2381.

**complex framework of abortion. The burden is now placed on the individual states to provide the constitutional protection to which the mother is entitled, as well as protection for the potential father and child.**

*David F. Holmes*

## 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*

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Plaintiffs, four individual Maryland citizens and taxpayers, brought this action challenging the constitutionality of a Maryland statute<sup>1</sup> granting general state aid to private institutions of higher learning. Because the defendants who received aid were religious colleges,<sup>2</sup> plaintiffs alleged that the statute violated the Establishment Clause of the First Amendment of the United States Constitution<sup>3</sup> by fostering government sup-

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1. MD. EDUC. CODE ANN., art. 77A, § 65-69 (1975) authorizes the payment of state funds to any private institution of higher learning that meets certain minimum criteria, and refrains from awarding "only seminarian or theological degrees." The aid is in the form of an annual fiscal year subsidy to qualifying colleges and universities, based upon the number of students, excluding those in seminarian or theological academic programs. The grants are not disbursed for any particular purpose, but, under a provision added in 1972 (§ 68-A), they cannot be used for "sectarian purposes." The program is administered by the Maryland Council for Higher Education, which assures that recipient institutions (1) do not award primarily theological or seminary degrees, and (2) do not use the funds for "sectarian purposes." At the end of the year, the recipient institution must make a report and separately specify the nonsectarian expenditures.

2. In addition to the responsible state officials, plaintiffs-appellants joined as defendants five colleges they claimed were constitutionally ineligible for this form of aid. Four were affiliated with the Roman Catholic Church, and one with the Methodist Church. The Methodist affiliate, however, was dismissed as a defendant-appellee, and the Supreme Court dealt only with the four Roman Catholic affiliates. *Roemer v. Board of Pub. Works*, 96 S.Ct. 2337, 2343-44 (1976).

3. "Congress shall make no law respecting an establishment of religion. . . ." The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

port of religion. A three-judge federal district court<sup>4</sup> upheld the statute as not violating the Establishment Clause.<sup>5</sup> On appeal, the United States Supreme Court<sup>6</sup> affirmed and HELD, the Maryland statute does not foster state support of religion in contravention of the Establishment Clause.<sup>7</sup>

In examining the issue of separation of church and state, the Supreme Court has not expected a "hermetic separation of the two, [recognizing that such a pure distinction] is an impossibility."<sup>8</sup> The Court has further described the line of separation as a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>9</sup> The Court has, however, expected and insisted upon State neutrality toward religion.<sup>10</sup>

To preserve this guarded neutrality,<sup>11</sup> a three-pronged test is ap-

participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (Black, J.).

4. 28 U.S.C. § 2281 (1970) (repealed 1976) and 28 U.S.C. 2284 (1970) (amended 1974) provided for a three-judge district court to hear all cases in which an injunction was sought to restrain the enforcement, operation, or execution of any state statute on the grounds of that statute's unconstitutionality.

5. Roemer v. Board of Pub. Works, 387 F. Supp. 1282 (D. Md. 1974), *aff'd*, 96 S.Ct. 2337 (1976).

6. 28 U.S.C. § 1253 (1970) allows for direct appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any case required "by any Act of Congress to be heard and determined by a district court of three judges."

7. 96 S.Ct. at 2337 (Brennan, Marshall, Stevens, and Stewart, JJ., dissenting).

8. *Id.* at 2344.

9. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Reflecting this indistinct separation, the Supreme Court has sustained public aid to a hospital staffed by an order of Catholic nuns. Bradfield v. Roberts, 175 U.S. 291 (1899). It has allowed state reimbursement to parents for fares paid for transportation by public carriers of children attending public and Catholic schools. Everson v. Board of Educ., 330 U.S. 1 (1947). It has also approved the lending of secular textbooks to parochial school students. Board of Educ. v. Allen, 392 U.S. 236 (1968). The Court has also rejected the argument that no state aid to religious institutions is permissible because it frees the institution's resources to be put to sectarian ends. 96 S.Ct. at 2345.

10. 96 S.Ct. at 2345.

11. The history of governmentally established religion both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon

plied in cases involving Establishment Clause issues.<sup>12</sup> The test first scrutinizes the statute in question to see that it has the necessary, secular legislative purpose. Next, it tests the statute to determine if it has the impermissible primary effect of advancing or inhibiting religion. Finally, it examines the operation of the statute to assure that it does not weave excessive government entanglement with religion.<sup>13</sup> *Lemon v. Kurtzman*,<sup>14</sup> which itself crystallized the three-pronged test, and a subsequent case, *Hunt v. McNair*,<sup>15</sup> have offered refinements to the basic test.

In *Lemon*, the Supreme Court dealt with statutes from two states. One awarded a salary supplement to teachers in private schools, if those teachers agreed only to teach the same courses and use the same materials as those in the public schools, and if they agreed not to teach courses in religion. The other statute authorized state education officials to "purchase" secular educational services from private schools, and to reimburse participating schools for teachers' salaries, textbooks, and materials.

The Court struck down the salary supplement program because it would cause "[the] kind of state inspection and evaluation of the religious content of a religious organization [that] is fraught with the sort of entanglement that the Constitution forbids."<sup>16</sup> The Court struck down the other program because it would foster the same kind of relationship.<sup>17</sup> While applying the third, or excessive government entanglement prong, the Court designated three additional factors for consideration. They include: (1) the character and purpose of the benefited institution, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority.<sup>18</sup>

*Hunt*, which upheld a state law providing for state participation in

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the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

*Engel v. Vitale*, 370 U.S. 421, 431-32 (1962).

12. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

13. *Id.* at 612-13.

14. 403 U.S. 602.

15. 413 U.S. 734 (1973).

16. 403 U.S. 602, 620.

17. *Id.* at 621.

18. *Id.* at 615.

the issuance of revenue bonds for the benefit of a Baptist College,<sup>19</sup> refined the second, or "primary effect" prong. In its opinion, the Court said:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.<sup>20</sup>

A third case which heavily influenced the Court in *Roemer* was *Tilton v. Richardson*.<sup>21</sup> It involved a federal plan for grants and loans to institutions of higher learning for the construction of academic facilities: The act was drafted to insure that the subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. In upholding this plan, the Court relied on the more mature, sophisticated, and academic atmosphere of a college as opposed to that of an elementary or high school. The Court also favorably considered the non-ideological nature of the aid; that the aid is a one-time single purpose grant, and that cumulatively this would lead to very little potential for political divisiveness.

Applying *Lemon's* basic test and its complex refinements, the Supreme Court has been able to look at Establishment Clause cases with a focus on all relevant factors. Utilizing such a view, the Court has upheld state aid in cases such as *Hunt*, *Tilton*, and now *Roemer*, where the aid did not appear to further a sectarian mission. However, this cumulative viewpoint has also allowed the Court to strike down aid tainted with the appearance of furthering an institution's sectarian mission.<sup>22</sup>

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19. The act excluded any aid to "any facility used or to be used for sectarian instruction or as a place of religious worship [or to] any facility . . . used primarily in connection with any part of the program of a school or department of divinity. . . ." The program was upheld because the Court found the aid not to have a "primary effect" of advancing religion because the institution was not "pervasively sectarian." 413 U.S. at 743, 745 (quoting S.C. CODE § 22-41.2(b) (Supp. 1971).

20. *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

21. 403 U.S. 672 (1971).

22. See *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), where the Court struck down aid to elementary and secondary schools which were found to conform to a profile of a substantially religious school, as opposed to the schools involved in *Tilton* and *Hunt*. The aid involved (1) direct subsidies for repair of buildings, (2) reimbursement of parents for a percentage of tuition paid, and (3) tax

In considering the present case, the Court acknowledged:

The slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.<sup>23</sup>

The Supreme Court, in its analysis of *Roemer*, immediately invoked the use of *Lemon's* three-prong test. The first prong, the purpose of the statute, was briefly discussed and dismissed as not being in issue. The Maryland statute was conceded to have the secular purpose "of supporting private higher education generally, as an economic alternative to a wholly public system."<sup>24</sup>

Applying the second, or "primary effect" question, the Court described it as the "substantive [question] of what private educational activities, by whatever procedure, may be supported by state funds."<sup>25</sup> Recognizing the "primary effect" refinements of *Hunt*,<sup>26</sup> the Court concluded, "(1) that no state aid at all [can] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded."<sup>27</sup>

In applying this test to the Maryland statute,<sup>28</sup> the Court relied heavily upon the findings of the federal district court. The lower federal court had found the appellee colleges to be "not 'pervasively sectarian,'" and supported that conclusion "with a number of subsidiary findings concerning the role of religion on these campuses."<sup>29</sup> These

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breaks for parents. All three were found to have an impermissible "primary effect" of advancing religion. *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973), also struck down a system of aid to elementary and secondary schools that provided for reimbursements for the school's testing and record keeping expenses. It did so because the schools met the same sectarian profile as the schools in *Nyquist*, and there was a "substantial risk" that religious instruction might be included on examinations supported by the state, or that state-funded tests would "be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Id.* at 480.

23. 96 S.Ct. at 2348.

24. *Id.* at 2348-49.

25. *Id.* at 2349.

26. See text accompanying note 20, *supra*.

27. 96 S.Ct. at 2349.

28. *Md. Educ. Code Ann.*, art. 77A, §§ 65-69 (1975).

29. 96 S.Ct. at 2349.



subsidiary findings produced several salient features about the schools, the more important ones being: the existence of “institutional autonomy” from the Roman Catholic Church;<sup>30</sup> the absence of religious indoctrination as a substantive purpose of any defendant;<sup>31</sup> the existence of “an atmosphere of intellectual freedom [free from] religious pressures”;<sup>32</sup> the classification of classroom prayer as “peripheral to the subject of religious permeation”;<sup>33</sup> and a system of faculty hiring and student acceptance not determined on a religious basis.<sup>34</sup> Hinting to the critical issue of the case,<sup>35</sup> the Court acknowledged that the district court’s findings had described religious institutions similar in almost all respects to those considered in *Tilton* and *Hunt*.<sup>36</sup> The Court found no difference between the institutions, thereby holding that the Catholic colleges were not pervasively sectarian.<sup>37</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2349, 2350.

34. *Id.* at 2350.

35. In analyzing the third-prong of *Lemon’s* test (excessive entanglement), the Court revealed that it considers the character of the aided institution as more important than the nature of the aid itself. Therefore it found this case more closely aligned with *Tilton* and *Hunt* than with *Lemon*, *Nyquist*, or *Levitt*. 96 S.Ct. at 2353. In its analysis, the Court relied heavily on descriptive profiles of the schools in question. The profile of the *Lemon*, *Nyquist*, and *Levitt* schools revealed institutions that:

(a) [impose] religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

*Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68. The profile of the *Tilton*, *Hunt* schools, however, proved that:

[N]on-Catholics were admitted as students and given faculty appointments. Not one . . . require[d] its students to attend religious services. . . . [theology courses] are not limited to courses about the Roman Catholic religion. The schools . . . made no attempt to indoctrinate students or to proselytize. Finally . . . these four schools subscribe to a well-established set of principles of academic freedom. . . .

*Tilton v. Richardson*, 403 U.S. 672, 686-87 (1971). The Court, once convinced that the colleges affected by the Maryland statute fit the profile of *Tilton*, began to move toward a holding consistent with that case. 96 S.Ct. at 2354.

36. 96 S.Ct. at 2350-51.

37. *Id.* at 2351.

Continuing with the requirements of *Hunt*, the Court next considered whether aid was in fact only extended to the "secular side."<sup>38</sup> The Court again agreed with the finding of the district court that the extension of aid only to the secular side was assured "by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition through the [Maryland] Council for Higher Education."<sup>39</sup> As if to urge and assure compliance with the statutory safeguards, the Court said it would expect the Council and the colleges to avoid any "specifically religious activity," and minimize any constitutional questions."<sup>40</sup>

Having examined the purpose of the statute and its primary effect, the Supreme Court next considered the difficult question of "excessive entanglement."<sup>41</sup> If the "primary effect" question was termed to be substantive, this was described as a procedural one. Did the operation of the statute, by its requirements of school application and Council approval, report submission and administrative review of expenditures, entwine the religious institutions into an excessive entanglement with government? In this analysis of the entanglement test, the additional three factors mentioned in *Lemon* were given significant emphasis.<sup>42</sup> Since the schools were found to be not "pervasively sectarian" under the second prong of the test, the Court felt that the "character of the aided institutions" was such that the "secular activities could be taken at face value. . . . The need for close surveillance of purportedly secular activities is correspondingly reduced."<sup>43</sup>

The second factor in *Lemon's* refinement of the entanglement test, namely, the "form of the aid," was passed over and included in the third factor, the "resulting relationship" of secular and religious authority.<sup>44</sup> Initially, the Court disposed of what might be considered a very entan-

38. See text accompanying note 27, *supra*.

39. 96 S.Ct. at 2351. "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." MD. EDUC. CODE ANN. art. 77A, § 68A.

40. 96 S.Ct. at 2351.

41. *Id.* at 2352.

42. See text accompanying note 18, *supra*.

43. In looking at this "character-of-institution" factor, the Court used its profile analysis already determined in the consideration of whether or not the colleges were "pervasively sectarian." See text accompanying notes 30-34 *supra*. The colleges were found to perform "essentially secular educational functions . . . that are distinct and separable from religious activity." 96 S.Ct. at 2352.

44. *Id.*

gling element of the aid: that it was to be granted on an annual basis. The annual nature of the aid was not considered fatal to the program,<sup>45</sup> “in . . . light of the character of the aided institutions, and the resulting absence of any need ‘to investigate the conduct of particular classes.’”<sup>46</sup>

After dealing with this superficial flaw in the Maryland program, the Supreme Court indicated what it considered to be the essential reason for upholding the aid in question. Although a “one-time, single-purpose” construction grant, as in *Tilton*, was preferable over the type created by the Maryland program,<sup>47</sup> *Tilton* was considered to be controlling, even though the form of the aid was readily distinguishable.<sup>48</sup>

The Court narrowed its analysis of the aid program before it to one fundamental question: Is it distinguishable from *Tilton* by the form-of-aid, or by the character-of-institution? It held the difference to be form-of-aid only and of questionable importance.<sup>49</sup> This case’s character-of-institution difference with *Lemon*, however, was held to be “most impressive.”<sup>50</sup> In contrast to the factual situation in *Lemon*,<sup>51</sup> where pervasively sectarian elementary and secondary schools were involved, the Maryland Council for Higher Education could supervise the program without entanglement because the “secular and sectarian activities of the college are easily separated.”<sup>52</sup> Any contacts between the Council and the colleges were “not likely to be any more entangling than the inspections and audits incident to the normal process of the college’s

45. *Id.* at 2352, 2353.

46. *Id.* at 2352 (quoting language from the district court).

47. *Id.* at 2353.

48. *Id.*

49. *Id.*

50. *Id.* Since *Nyquist* and *Levitt* fell in line with *Lemon*, this case’s difference with *Lemon* automatically prevented it from falling in line with *Nyquist* and *Levitt*, as appellants urged. 96 S.Ct. at 2354.

51. Repeating the elements of its important “profile,” the Court looked at the characteristics of the schools in *Lemon*. Elementary and secondary schooling comes at an impressionable age; the schools were supervised by the Catholic diocese; each had a local Catholic parish that assumed

ultimate financial responsibility for it; principals were appointed by religious authorities; religion pervaded the school system, and teachers were instructed that religious formation is neither confined to formal courses nor restricted to a simple subject area. These things made impossible what is crucial to a non-entangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes.

96 S.Ct. at 2353 (quoting the opinion from *Lemon v. Kurtzman*, 403 U.S. at 617, 618).

52. *Id.*

accreditation by the State.”<sup>53</sup> Such inspections could not be done so innocuously with the schools in *Lemon*.

A concern voiced in *Lemon* that government-religion entanglement could lead to “political divisiveness”<sup>54</sup> was also dismissed by the Court on the grounds that the student population of a college, unlike the parents of elementary or secondary school students, is diverse and widely dispersed, thus creating no local political power base from which to lobby and seek more aid for their respective institutions.

The Court admitted the obvious when it said: “There is no exact science in gauging the entanglement of church and state.”<sup>55</sup> The only hint offered was that all relevant factors identified by the three-pronged test of *Lemon* and its refinements must be considered “‘cumulatively’ in judging the degree of entanglement.”<sup>56</sup> The Court did, however, specifically agree with the importance given by the district court “to the character of the aided institutions,” and with the lower court’s findings that the colleges “are capable of separating secular and religious functions.”<sup>57</sup> In so affirming, the Supreme Court upheld its commitment not to refine further the existing test of *Lemon* and its probing factors,<sup>58</sup> but it did give valuable insight into how the test is to be applied, and which factual matters it considered critical.

Few would argue that government cannot be kept antiseptically free from religion.<sup>59</sup> Fewer still would want such a situation. Even Justice Douglas, who ardently supported a clean separation of church and state,<sup>60</sup> acknowledged that it would be undesirable to insist on such total separation that government became hostile to religion:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make

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53. *Id.*

54. *Id.* at 2353, 2354. In *Lemon* the Court said that annual subsidies would create a relationship of dependence between the state and the institutions, and that increased demand and dependence for state funds would create a danger of political fragmentation along religious lines. 403 U.S. at 623.

55. 96 S.Ct. at 2354.

56. *Id.*

57. *Id.*

58. *Id.* at 2348.

59. See text accompanying notes 8-9, *supra*.

60. 403 U.S. at 697 (Douglas, J., dissenting): “I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.” (The majority had upheld federal construction grants to institutions of higher learning).

room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.<sup>61</sup>

Falling in line with some of Douglas' language are cases which have allowed aid on the grounds that government cannot refrain from making available to religious institutions what it makes available to all.<sup>62</sup> In fact, in *Walz v. Tax Commission*,<sup>63</sup> aid in the form of property tax exemptions was extended to church properties in order to assure that government and religion could minimize their frictional contacts.

Where then does *Roemer* fit in balancing these solemn interests—the integrity of the “Establishment Clause” and the necessity that government not discriminate against religion? *Roemer's* holding has been described as a “hairline crack in the wall between church and state.”<sup>64</sup> This reaction fails to note, however, that the wall was never

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61. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). In this case, Douglas joined in affirming a New York program which allowed public schools to release students, during school hours, on written requests of their parents, so that they may leave the school buildings and grounds and go to religious centers for religious instruction or devotional exercises. *Contra McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

62. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975). In *Meek*, a textbook program was upheld on the authority of *Allen*. Two other forms of aid, however, involving (1) instructional material and equipment, and (2) a supply of professional staff, were struck down as having an impermissible primary effect of establishing religion because of the predominately religious character of the schools. A discussion of *Meek* is noted in *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 104 (1975).

63. 397 U.S. 664 (1970).

64. Miami Herald, June 23, 1976 (Editorial) at 6, *High Court Ruling Shakes*

absolute.<sup>65</sup> Confined by its facts,<sup>66</sup> *Roemer* serves to lucidly guide state legislatures in drafting legislation that refrains from “quarantining religious institutions,”<sup>67</sup> and, at the same time, refrains from unconstitutionally supporting them.

Noting the importance of the differing character-of-institutions profiles between the schools in *Roemer*, *Tilton*, and *Hunt*, and those in *Lemon*, *Nyquist*, and *Levitt*, it seems that aid to religious elementary and secondary schools will have a difficult time passing constitutional scrutiny. It is likely that these schools will be found to be “pervasively sectarian,” which necessarily will create “entanglement” problems, as the state seeks to monitor the aid and insure that it is put only to secular uses.<sup>68</sup>

For institutions fitting the profile of *Roemer*, however, aid to their secular functions should not fall on constitutional grounds.<sup>69</sup> As long as the aid originates from a statute having a secular legislative purpose, and the state is financing a separable secular function of overriding importance, it should stand.<sup>70</sup> The holding in *Roemer* assures religious institutions that they will not be denied secular aid simply because it

#### *Separation of Church, State.*

65. “Judicial caveats against entanglement must recognize that the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” 403 U.S. at 614.

66. Clearly, *Roemer’s* holding applies only to religious institutions engaging in the art of educating, and educating in a secular manner within an atmosphere of intellectual freedom. Also, it is concerned only with state aid to those institutions. *Roemer* does not deal with issues such as prayer in public schools or Sunday closing laws.

67. 96 S.Ct. at 2344.

68. This does not, however, totally discount “the form of the aid” consideration. See *Meek v. Pittenger*, 421 U.S. 349 (1975). There the court upheld aid to elementary and parochial schools in the form of a textbook loan program. Although these schools were considered religion-pervasive, the textbook program was upheld because the secular content of a textbook could be readily ascertained, whereas what a teacher teaches cannot be.

69. *But see* *Hunt v. McNair*, 413 U.S. at 753 (Brennan, J., dissenting):

I do not see any significant difference . . . in telling the sectarian university not to teach any nonsecular subjects in a certain building, and . . . telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university.

70. 96 S.Ct. at 2355 (White, J., with Rehnquist, J., concurring). Brennan, J., in his dissent, said that “the Establishment Clause . . . forbids the government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution.” *Id.* at 2356.

incidentally aids them in their sectarian functions. It also assures them, however, that state aid will not be available to further their efforts in proselytizing, or pursuing their sectarian mission. The “blurry and indistinct” wall separating government from religion before *Roemer* stands intact after *Roemer*. It remains up to the states, if they value private education as an economic alternative to a wholly public system, to draft legislation with a careful eye on the character of the recipient institution in mind. For it seems that once the institution fits the profile of *Tilton*, *Hunt*, and *Roemer*, the other judicial requirements are easily met.

*Gary L. Sweet*

## Fourth Amendment: A Second-Class Constitutional Right for the Purpose of Federal Habeas Corpus: *Stone v. Powell*

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On February 17, 1968, Lloyd Powell and three persons entered a liquor store in California. Powell became involved in an altercation with the store manager and, in the scuffle, shot and killed the manager's wife. Some ten hours later, an officer of the Henderson, Nevada, police department arrested Powell for violation of the Henderson vagrancy ordinance.<sup>1</sup> The search incident to Powell's arrest produced a thirty-eight caliber revolver with six expended cartridges in the cylinder. Powell was extradited to California and convicted of second-degree murder in the Superior Court of San Bernadino County. On a motion to suppress, the trial court rejected Powell's argument that the evidence should be excluded because of its discovery pursuant to arrest under an unconstitutional vagrancy ordinance. On appeal to the California District Court of Appeals, the conviction was affirmed. The court concluded that the error in admitting the seized evidence was harmless beyond a reasonable doubt.<sup>2</sup> Habeas corpus relief was denied by the California Supreme Court.

In August 1971, Powell filed a petition for habeas corpus relief in the United States District Court for the Northern District of California. He argued that he had been unlawfully arrested because the vagrancy ordinance was unconstitutionally vague and, therefore, that the evidence which led to his conviction should have been excluded. The district court held, however, that even if the statute was unconstitutional, the deterrent purpose of the exclusionary rule did not require the exclusion from

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1. The ordinance provides: "Every person is a vagrant who: (1) Loiters or wanders upon the streets or from place to place without apparent reason or business; and (2) who refuses to identify himself and to account for his presence when asked by any police officer to do so; (3) if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

2. The court of appeals relied on the harmless error rule of *Chapman v. California*, 386 U.S. 18, 22 (1967): "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."



evidence of the fruits of a search incident to an otherwise valid arrest.<sup>3</sup>

The Court of Appeals for the Ninth Circuit reversed.<sup>4</sup> The court concluded: "the exclusion of the evidence would deter legislators from enacting unconstitutional statutes."<sup>5</sup> The United States Supreme Court reversed and held: "where the State had provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search-and-seizure was introduced at his trial."<sup>6</sup>

## 1. SCOPE OF FEDERAL HABEAS CORPUS

The Supreme Court in *Powell* noted: "the authority of the federal courts to issue the writ of habeas corpus was established by the Judiciary Act of 1789."<sup>7</sup> The scope of the "Great Writ" was limited to inquiries into the jurisdiction of tribunals passing sentence over prisoners in custody of the United States.<sup>8</sup> In 1867, the writ's scope was expanded to include state prisoners.<sup>9</sup> With this expansion, the federal courts became authorized to give relief where a state or federal prisoner was restrained of liberty in violation of the Constitution, a treaty, or a law of the United States. However, the limitation as to the jurisdiction of the sentencing court persisted;<sup>10</sup> "[a]nd, although the concept of 'jurisdiction' was subjected to considerable strain as the substantive scope of

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3. See *Powell v. Stone*, 507 F.2d 93, 94 (9th Cir. 1974) (discussing the California Court of Appeals holding).

4. See *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974).

5. *Id.* at 98.

6. *Stone v. Powell*, 96 S.Ct. 3037, 3052 (1976). *Stone v. Powell* was considered with *Warden v. Rice* on certiorari to the United States Court of Appeals for the Eighth Circuit. *Warden* concerned respondent's allegation of an unconstitutional ordinance; however, both are of identical issue.

7. *Id.* at 3042.

8. *Id.*

9. Act of Feb. 5, 1867, c.28, § 1, 14 STAT. 385 (1867).

10. See *In re Wood*, 140 U.S. 278 (1891) (no federal habeas corpus review of an adverse decision if all possible state appeals have not been made); *In re Rahrer*, 140 U.S. 545 (1891) (habeas corpus only allowed for determination of jurisdiction of the state court regarding police powers); *Andrews v. Swartz*, 156 U.S. 272 (1895) (mere error in the conduct of a trial cannot be made the basis of jurisdiction in a court of the United States to review proceedings upon writ of habeas corpus); *Pettibone v. Nichols*, 203 U.S. 192 (1906) (state prisoners held in custody of the state, charged with state criminal laws, will be left to stand trial there and may not be discharged by way of habeas corpus).

the writ was expanded, this expansion was limited to only a few classes of cases."<sup>11</sup>

This jurisdictional limitation was relaxed when the Court held in *Frank v. Mangum*<sup>12</sup> that if a habeas corpus court found that the State had failed to provide an adequate corrective process for a full and fair litigation of federal claims, the court could determine whether the detention was lawful, whether or not jurisdictional.

*Brown v. Allen*<sup>13</sup> and *Daniels v. Allen*<sup>14</sup> expanded the scope of the writ still further. These cases involved state prisoners who applied for federal habeas corpus relief, claiming that the trial courts incorrectly denied motions to quash their indictments because of alleged discrimination in the selection of grand jurors. The claimants were found to be entitled to a full reconsideration of the constitutional issues including a hearing in the federal district court, although the state supreme court had rejected these claims.

A final barrier to the broad collateral re-examination of state criminal convictions in federal habeas corpus proceedings was removed in *Fay v. Noia*.<sup>15</sup> *Fay* removed the barrier created by *Daniels*, in which habeas relief was refused because papers were not timely filed. *Fay* narrowly restricted the circumstances in which a federal court may refuse to consider the merits of federal constitutional claims. The Court noted that "[d]iscretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require.'"<sup>16</sup>

The question arising after *Fay* was whether there should be collateral re-examination of state criminal convictions by way of habeas corpus for all alleged constitutional violations.

In *Kaufman v. United States*,<sup>17</sup> the Court held that a claim of an unconstitutional search-and-seizure was cognizable in a 28 U.S.C. § 2255 proceeding or modern post-conviction procedure.<sup>18</sup> In the

11. 96 S.Ct. at 3042. The expansion occurred primarily with regard to convictions based on assertedly unconstitutional statutes or detentions based upon an allegedly illegal sentence. *Id.* n. 8.

12. 237 U.S. 309 (1915).

13. 344 U.S. 443 (1953).

14. 344 U.S. 443 (1953) (a companion case to *Brown v. Allen*).

15. 372 U.S. 391 (1963).

16. *Id.* at 438.

17. 394 U.S. 217, 231 (1969).

18. This procedure is commonly equated with habeas corpus relief. 28 U.S.C. § 2255 (1970).

Federal custody: remedies on motion attacking sentence. A prisoner in custody

*Kaufman* case, the Supreme Court for the first time suggested that the scope of federal collateral review included state convictions involving Fourth Amendment violations. However, the instant case rejected the holding and dictum of *Kaufman* concerning the applicability of the exclusionary rule in federal habeas corpus review of the state court decisions pursuant to 28 U.S.C. § 2254 proceedings.<sup>19</sup>

The Supreme Court's reasons for rejecting *Kaufman* are two-fold. First, the Court noted that a substantial majority of the federal courts of appeal, prior to *Kaufman*, had concluded that collateral review of search-and-seizure claims was inappropriate on motions filed by federal prisoners under the modern post-conviction procedure.<sup>20</sup> The primary rationale in support of this contention was that Fourth Amendment violations are different in kind from denials of Fifth and Sixth Amendment rights in that "claims of illegal search-and-seizure do not impugn the integrity of the fact finding process or challenge evidence as inherently unreliable."<sup>21</sup> Therefore, the Court concluded that because Fourth Amendment violations differ from Fifth and Sixth Amendment violations there should be a re-examination of the scope of federal habeas corpus jurisdiction, and that such review should be permitted only when the petitioner was not accorded a full and fair opportunity to raise and adjudicate the constitutional issue in state court. Second, the Court re-

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under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the U.S., or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the U.S. attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, *or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack* [emphasis added], the court shall set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

19. 96 S.Ct. at 3045, n. 16. Federal statutory habeas corpus proceedings as it applies to state prisoners is described in 28 U.S.C. § 2254.

20. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

21. *Kaufman v. United States*, 394 U.S. at 224 (1969).

evaluated the exclusionary rule, and questioned whether its justification (deterrence of police misconduct) requires collateral review of Fourth Amendment claims.<sup>22</sup>

## 2. HISTORY AND SCOPE OF THE EXCLUSIONARY RULE

The Fourth Amendment assures the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."<sup>23</sup>

In an attempt to implement this guarantee, the judicial system created the exclusionary rule.<sup>24</sup> Prior to *Weeks v. United States*,<sup>25</sup> there existed no real barrier to the introduction of evidence obtained in violation of the Fourth Amendment in criminal proceedings.<sup>26</sup> *Weeks* established that a defendant could petition before trial for the return of property secured through an illegal search and seizure conducted by federal authorities.

The next step in the evolution of the exclusionary rule was the exclusion of illegally seized evidence and its fruits from state judicial proceedings.<sup>27</sup> *Wolf v. Colorado*<sup>28</sup> applied the Fourth Amendment to the states by interpreting it as "implicit in the concept of ordered liberty and as such enforceable against the states through the Fourteenth Amendment Due Process Clause." But the Court refused to impose the rule as a mandatory method of enforcement by state courts, and left them free to adopt or reject it. Finally, the exclusionary rule was held applicable to the states in *Mapp v. Ohio*.<sup>29</sup>

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22. *Stone v. Powell*, 96 S.Ct. at 3047.

23. U.S. CONST. amend. IV.

24. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 648 (1961). "It meant [the exclusionary rule], quite simply, that conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . and that such evidence shall not be used at all."

25. 232 U.S. 383 (1914).

26. 96 S.Ct. at 3046. *See also Adams v. New York*, 192 U.S. 585 (1904). "The fact that papers . . . may have been illegally taken . . . is not a valid objection to their admissibility."; *Weeks v. United States*, 232 U.S. 383 (1914).

27. *See Gouled v. United States*, 255 U.S. 298 (1921) (an unconstitutional seizure of papers of the accused creates a duty on the trial court to entertain objection to their admission); *cf. Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (the Fourth Amendment protects corporations and its officers from compulsory production of corporate books and papers when the information which formed the basis of the warrant was obtained through an unconstitutional search and seizure).

28. 338 U.S. 25, 27 (1949).

29. 367 U.S. 643 (1961).

### 3. WHETHER THE EXCLUSIONARY RULE REQUIRES FEDERAL HABEAS CORPUS RELIEF

Over the years, courts have formulated three justifications for the exclusionary rule. One justification utilized by the courts was that the accused, through the Fourth Amendment, possessed a constitutional right to exclude evidence obtained as a result of unlawful searches and seizures.<sup>30</sup> The second justification was based upon the so-called "judicial integrity theory." This theory required the courts to exclude evidence obtained by the government's "unclean hands" in order that the courts not be a party to a constitutional violation.<sup>31</sup> The third rationale is the deterrence theory, which was designed to remove the incentive for unlawful police searches by excluding evidence from use at trial. As stated in *United States v. Calandra*:

[The exclusionary rule] . . . is *not* calculated to redress the injury to the privacy of the victim of the search or seizure, for any reparation comes too late. The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.<sup>32</sup>

*Powell* demonstrated that the courts have limited the justification of the exclusionary rule solely to the police deterrence theory.<sup>33</sup> The Court then proceeded to impose further limitations on the rule, stating that the exclusionary rule has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or for the benefit of all persons.<sup>34</sup> It has not been held applicable to grand jury proceedings, nor has it been applied to evidence impeaching the credibil-

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30. Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. LAW REV., 507, 508 (1975). Cf. *United States v. Calandra*, 414 U.S. 338, 355-67 (1974). "[M]y dissent rejected the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded from all use by the government. . . ."

31. *Olmstead v. United States*, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting).

32. 414 U.S. at 348 (1974).

33. 96 S.Ct. at 3055.

34. See, e.g., *Brown v. United States*, 411 U.S. 223 (1973) (no standing to contest admission of evidence seized under defective warrant since there was no legitimate expectation of privacy in the premises searched or the goods seized); *Alderman v. United States*, 394 U.S. 165 (1969) (Fourth Amendment violation may only be urged by those whose rights were violated by the search itself, and not those aggrieved solely by the introduction of damaging evidence).

ity of a defendant who has testified in his own defense.<sup>35</sup> A further limitation has been the requirement of standing.<sup>36</sup>

After delineating the exclusionary rule's historical limitations, the Court applied a cost/benefit analysis and concluded that the costs of the rule were not outweighed by its benefits.<sup>37</sup> In its analysis, the Court considered the rule's present justification—police deterrence—and ignored the theories of personal private right and judicial integrity.

The so-called costs or disadvantages of the exclusionary rule which the Court noted are:

[F]ocus of the trial and attention of the participants therein is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. . . . [t]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant; and . . . if applied indiscriminately, it may well have the opposite effect of generating disrespect for the law and administration of justice.<sup>38</sup>

After stating what the Court believed to be the exclusionary rule's severe costs, the Court discussed its possible advantages and deemed them relatively insignificant:

There is no reason to believe, however, that the educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas review of state convictions. Nor is there any reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.<sup>39</sup>

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35. *Wong Sun v. United States*, 371 U.S. 471, 491-93 (1963).

36. *See, e.g., Jones v. United States*, 362 U.S. 257, 261 (1960) (standing has been found to exist only when the government attempts to use illegally obtained evidence to incriminate the victim of the illegal search, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search directed at someone else).

37. 96 S.Ct. at 3051.

38. *Id.* at 3049-50.

39. *Id.* at 3051. The majority also discussed the disadvantages of granting habeas corpus: (1) intrusions on values important to our system of government, such as utilization of limited judicial resources; (2) the necessity of finality in criminal trials; and (3) the minimization of friction between federal and state systems of justice.

According to the Court, therefore, the costs outweighed any benefits derived through collateral review of alleged Fourth Amendment violations.

#### 4. RAMIFICATIONS OF THE DECISION

There are a few areas of uncertainty created by the Court's opinion. Though the Court has limited its opportunity to hear Fourth Amendment claims by state prisoners in federal collateral proceedings, it has not relinquished its right to do so. In explaining the distinction, the Court claimed: "Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both a showing [of a denial of opportunity for full and fair litigation] and a Fourth Amendment violation."<sup>40</sup>

In light of the Supreme Court's intention to retain jurisdiction over such claims, an ambiguity arises. What does a "full and fair opportunity to litigate" mean, and how will the Court interpret it?

The Court in *Powell* cited the case of *Townsend v. Sain*.<sup>41</sup> In *Townsend*, the Court described six criteria which would require a federal district court to hold a separate evidentiary hearing in the case of collateral review of a state or federal conviction. It held:

[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.<sup>42</sup>

The Court continued:

[T]here cannot be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant.<sup>43</sup>

40. *Id.* at 3052, n. 37.

41. 372 U.S. 293 (1963).

42. *Id.* at 313.

43. *Id.* at 313-14.

Therefore, *Townsend* seemed to set forth the general guidelines which determine whether a federal district court should hold a hearing on habeas corpus review for want of a proper hearing on the merits at the state level. However, even in *Townsend*, which was decided in 1963, the Court noted: "if the prior state hearing occurred in the original trial—for example, on a motion to suppress allegedly unlawful evidence—it will usually be proper to assume that the claim was rejected on the merits."<sup>44</sup>

Thus, the two requisites for collateral review under *Powell* are: (1) the showing of a denial of a full and fair opportunity to litigate, which the Court in *Townsend* assumed will be decided on the merits in a motion to suppress; and (2) a Fourth Amendment violation. It therefore appears likely that there will be little future occasion for collateral review of Fourth Amendment violations involving state prisoners, so long as the state courts rule on the defendant's motion to suppress.

Justice Brennan, in his lengthy dissent, recognized the costs and benefits derived from the exclusionary rule and its abolishment which the majority of the Court did not figure into their original equation.<sup>45</sup>

First, Brennan stated: "The denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect."<sup>46</sup> To do away with federal habeas relief by using the exclusionary rule's supposed sole justification, police deterrence, and then merely weighing costs versus benefits, such as the majority of the Court has done, defeats important constitutional safeguards.

Second, "[c]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the

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44. *Id.* at 314.

45. 96 S.Ct. at 3071-72, where White, J., in his dissenting opinion, pointed out: Two confederates in crime, Smith and Jones, are tried separately for a state crime and convicted on the very same evidence, including evidence seized incident to their arrest allegedly made without probable cause. . . . Their convictions are affirmed by the State's highest court. Smith does not petition for certiorari [but Jones does and is granted it. His conviction is reversed]. . . . Smith then files for petition for federal habeas corpus. He makes no claim that he did not have a full and fair hearing in the state courts, but asserts his Fourth Amendment claim had been erroneously decided and that he is being held in violation of the Federal Constitution. . . . Smith's petition would be dismissed, and he would spend his life in prison while his colleague is a free man.

46. *Id.* at 3065.



fullest opportunity for plenary federal review."<sup>47</sup>

Third, he emphasized "the need for federal review of federal constitutional claims because of the Supremacy Clause of the Constitution."<sup>48</sup>

Fourth, judicial integrity, a rationale which the majority de-emphasized as a justification for the exclusionary rule, should be considered a primary rationale, according to Brennan. Citing Justice Holmes, Brennan said: "It is . . . a less evil that some criminals should escape than that the government should play an ignoble part."<sup>49</sup> Moreover, Brennan cited *Brown v. Allen*,<sup>50</sup> which noted: "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon state power and may be invoked by those morally unworthy."

Fifth, Brennan dealt with the majority's concern with comity and friction between federal and state tribunals. He pointed out that in the interest of comity, to lessen federal-state friction, collateral review requires exhaustion of state remedies and not lack of power.<sup>51</sup> Therefore, collateral review dictates that federal habeas corpus review be delayed pending initial state court determination. But the Court noted: "[D]elay only was the price, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent."<sup>52</sup>

Finally, Brennan demonstrated how the majority's opinion lacks a constitutional basis for denying federal habeas corpus relief to state prisoners when Fourth Amendment violations are involved. He writes:

The Court adheres to the holding of *Mapp* that the Constitution required exclusion of the evidence admitted at respondents' trials. However, the Court holds that the Constitution does not require that respondents be accorded habeas relief if they were accorded an opportunity for full and fair litigation of the Fourth Amendment claims in state courts. Yet once the Constitution was interpreted by *Mapp* to require exclusion of certain evidence at trial, the Constitution became irrelevant to the manner in which the constitutional right was to be enforced in the federal

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47. *Stone v. Powell*, 96 S.Ct. at 3063, citing *Fay v. Noia*, 372 U.S. 391, 424 (1963).

48. 96 S.Ct. at 3067.

49. *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

50. 344 U.S. 443 (1953); cf. *Fay v. Noia*, 372 U.S. at 432; *England v. Medical Examiners*, 375 U.S. 411, 415-17 (1964).

51. 96 S.Ct. at 3060.

52. 96 S.Ct. at 3060, n. 10; *Fay v. Noia*, 372 U.S. 391, 420 (1963).

courts; that inquiry is only a matter of respecting Congress' allocation of federal judicial power between this Court's appellate jurisdiction and a federal district court's habeas jurisdiction. Indeed, by conceding that today's decision does not mean that the federal district court lacks jurisdiction over respondents' claims, the Court admits that respondents have sufficiently alleged that they are in custody in violation of the Constitution within the meaning of § 2254 and that there is no constitutional rationale for today's holding.<sup>53</sup>

Justice Brennan concluded by stating:

[A]s a practical matter the only result of today's holding will be that denials by the state prisoners of violations of their Fourth Amendment rights will go unreviewed by a federal tribunal. I fear that the same treatment ultimately will be accorded state prisoners' claims of violations of other constitutional rights; thus, the potential ramifications of this case for federal habeas jurisdiction generally are ominous.<sup>54</sup>

## 5. CONCLUSION

The holding presented in *Stone v. Powell* can either become as frightening as Justice Brennan perceives or as merely procedural as Justice Powell portrays.<sup>55</sup> Whether personal rights and liberties are to be curtailed in the future or whether state courts will sufficiently uphold Fourth Amendment constitutional rights will be determined only in future court decisions.

*Michael Wayne Ullman*

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53. 96 S.Ct. at 3084.

54. 96 S.Ct. at 3071 (Brennan, J., dissenting).

55. "In sum, we hold *only* that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review . . . we emphasize the minimal utility of the rule." 96 S.Ct. at 3052, n. 37.

## Voir Dire Examination: Minority Defendants Are Not Always Entitled to Have Specific Questions Asked of Potential Jurors Regarding Possible Racial Prejudice: *Ristaino v. Ross*

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Defendant Ross was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to commit murder. Ross was black; the victim, a security guard at Boston University, was white.

At trial, Ross's counsel asked the judge to question the prospective jurors about any possible racial prejudices they might have against the defendant. The trial judge refused to ask specific questions but asked the prospective jurors general questions concerning bias or prejudice.<sup>1</sup>

On appeal to the Supreme Judicial Court of Massachusetts,<sup>2</sup> Ross's convictions were upheld. The United States Supreme Court granted certiorari,<sup>3</sup> vacated the judgment, and remanded the case for reconsideration. The Court based its decision upon the results reached in *Ham v. South Carolina*.<sup>4</sup> In *Ham*, the Court held that the defendant was constitutionally entitled to have questions asked of prospective jurors about potential racial bias.<sup>5</sup> The Supreme Court of Massachusetts reconsidered *Ross* and again affirmed,<sup>6</sup> holding that *Ham* did not affect the result reached in its earlier deliberation because *Ham* involved "special circumstances";<sup>7</sup> *Ham* had claimed he was arrested as a result of

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1. *Commonwealth v. Ross*, 361 Mass. 665, 282 N.E.2d 70 (1973).

2. *Id.*

3. *Ross v. Massachusetts*, 410 U.S. 901 (1973).

4. 409 U.S. 524 (1973). In *Ham*, defendant was convicted of possession of marijuana and sentenced to 18 months confinement. Certiorari was granted by the United States Supreme Court to determine if the trial judge's refusal to examine jurors on voir dire about possible prejudice violates defendant's federal constitutional rights. *Ham* was a young bearded Black who was well known locally for his work in civil rights activities. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

5. *Id.*

6. *Commonwealth v. Ross*, 363 Mass. 665, 296 N.E.2d 810, 816 (1973).

7. "Special circumstances" have been interpreted to exist when a defendant is arrested allegedly because of his race or minority status. *Ristaino v. Ross*, 424 U.S. 589 (1976).

his civil rights activities. In contrast, the defendant in *Ross* did not present any special circumstances resulting in his arrest, but was an ordinary black person accused of a crime against a white person.

Ross's second petition for certiorari to the United States Supreme Court was denied.<sup>8</sup> Following this denial, Ross filed a petition in the United States District Court of Massachusetts seeking a writ of habeas corpus.<sup>9</sup> In granting the writ, the district court held that the petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of prospective jurors on voir dire examination.<sup>10</sup>

The State appealed this decision to the United States Court of Appeals for the First Circuit, which affirmed the granting of the writ.<sup>11</sup> However, the United States Supreme Court reversed<sup>12</sup> the lower court and HELD that the need to question jurors specifically about racial prejudice did not rise to constitutional dimensions without the presence of "special circumstances."<sup>13</sup>

The first case to deal with the issue of questioning racial bias at voir dire examination was *Aldridge v. United States*,<sup>14</sup> in which a black man was tried and convicted for the murder of a white police officer. During the voir dire examination, the judge did not ask the prospective jurors any questions specifically relating to racial prejudice, although such questions were requested by defense counsel. Based on this infirmity, the United States Supreme Court reversed,<sup>15</sup> holding that it is better to question prospective jurors about racial prejudice than to allow the possibility that a juror might sit on a case with a disqualifying state of mind.<sup>16</sup>

8. *Ross v. Massachusetts*, 414 U.S. 1080 (1973) (three justices dissenting).

9. *Ross v. Ristaino*, 388 F. Supp. 99 (D. Mass. 1974). In a recently decided case, *Stone v. Powell*, 96 S.Ct. 3037 (1976), the Supreme Court put an end to this type of habeas corpus action, noting: "[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at the trial." The Court noted that it would "deny federal habeas jurisdiction (as sought by *Ross*) over claims of Fourth Amendment brought by state prisoners." *Id.* at 3052.

10. *Ross v. Ristaino*, 388 F.Supp. 99 (D. Mass. 1974).

11. *Ross v. Ristaino*, 508 F.2d 754 (1st Cir. 1974).

12. *Ristaino v. Ross*, 424 U.S. 589 (1976).

13. *Id.* at 597.

14. 283 U.S. 308 (1931).

15. *Id.*

16. *Id.* at 315. The Court noted: "If in fact, sharing the general sentiment, they

Many courts have since relied on *Aldridge* in upholding a minority defendant's right to question jurors on voir dire about potential racial prejudice. These courts have held that refusal to ask the questions when propounded by the defense constitutes reversible error.<sup>17</sup> In one such case, a black man was convicted of raping a white woman.<sup>18</sup> In this case, questions designed to reveal racial prejudice were not allowed to be asked of prospective jurors. The Supreme Court of Connecticut reversed, stating:

It appears from the remarks made by the [trial] court that its ruling was based upon the ground that in a court of justice no distinction should be made between Negro and white persons and that, therefore, the very thought that it was possible for a juror to be so prejudiced against Negroes that he would be less apt to believe their testimony . . . should be carefully kept from the minds of prospective jurors. . . .

We cannot be blind to the fact that there may still be some who are biased against the Negro race and would be more easily convinced of a Negro's guilt than of a white man's guilt. . . .

So long as race prejudice exists, even in a relatively few persons, there is substantial chance that one of those few will appear in court as a venireman.<sup>19</sup>

Until 1973, when *Ham* was decided, *Aldridge* was steadily interpreted as setting a broad rule that a minority defendant has a right to have prospective jurors questioned about racial prejudice. In *United States v. Robinson*,<sup>20</sup> the United States Court of Appeals for the Third Circuit noted unequivocally: "[A]ny doubts as to the mandatory requirements of the *Aldridge* rule were dispelled by . . . *Ham*. . . ."<sup>21</sup>

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[the jurors] were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314.

17. See, e.g., *King v. United States*, 362 F.2d 968 (D.C. Cir. 1969); *United States v. Robinson*, 466 F.2d 780 (7th Cir. 1973); *United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973); *People v. Powers*, 482 F.2d 941 (8th Cir. 1973); *People v. Wray*, 49 Mich. App. 344, 212 N.W.2d 78 (Ct. App. 1973); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1950).

18. *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956).

19. *Id.* at 154. The court also cited *Aldridge* as holding that the exclusion of questions designed to reveal a prospective juror's prejudice against the Negro race was reversible error.

20. 485 F.2d 1157 (3d Cir. 1973).

21. *Id.* at 1159.

A Michigan case, *People v. Wray*,<sup>22</sup> also dealt with *Ham* and considered it solid support for a defendant's right to ask questions concerning possible racial bias of jurors. In its opinion, the Court of Appeals noted:

The outcome of the instant appeal is squarely controlled by a recent decision of the United States Supreme Court [*Ham v. South Carolina*. . . . [I]n reversing the defendant's conviction, the Supreme Court [in *Ham*] unanimously held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment imposed a duty upon the trial court to question jurors on the subject of racial prejudice.<sup>23</sup>

The only factual similarities between *Ham* and *Wray* were that both defendants were black; both were denied requests to question prospective jurors about racial bias; and both defendants' counsel did not object to the trial court's refusal. The defense in *Wray* did not establish "special circumstances," as had been established in *Ham*.

*Robinson* and *Wray* interpreted *Ham* as indicating that a black defendant is entitled to propound questions about racial prejudice to prospective jurors without establishing "special circumstances." However, *Ristaino v. Ross*<sup>24</sup> greatly narrowed the interpretation of *Ham* by confining its constitutional holding to situations where "racial issues . . . were inextricably bound up with the conduct of the trial."<sup>25</sup>

In *Commonwealth v. Ross*,<sup>26</sup> the Supreme Court of Massachusetts held that the factual circumstances of *Ross*, in contrast to the special circumstances of *Ham*, did not give rise to constitutional scrutiny. In *Ristaino v. Ross*,<sup>27</sup> the Supreme Court determined *Ham* to be controlling. However, this produced an internal inconsistency, since *Ham* was based on *Aldridge*, and *Aldridge* was a much broader ruling, giving defendants an unconditional constitutional right to question potential jurors about racial bias. Noting this, the Court concluded: "In light of

22. 49 Mich. App. 344, 212 N.W.2d 78 (Ct. App. 1973).

23. *Id.* at 345, 212 N.W.2d at 79.

24. 424 U.S. 589. The Court noted that *Ham* did not require universal applicability, but required assessment as to the "likelihood that absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne. . . .'" *Id.* at 596. The Court found that the circumstances of questions of *Ham*'s being a civil rights activist were sufficient to include specific questions regarding racial prejudice. *Id.* at 598.

25. *Id.* at 597.

26. *Commonwealth v. Ross*, 363 Mass. 665, 296 N.E.2d 810 (1973).

27. 424 U.S. 589.

our holding today, the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over the federal courts."<sup>28</sup>

The similar facts of *Aldridge*, *Ham*, and *Ristaino* cannot be reconciled with their inconsistent holdings. In *Ham*, the defendant was a black civil rights worker, who claimed that his civil rights work was the cause of his arrest for possession of marijuana. In *Ristaino*, the defendant was black, and the victim was a white security guard. The Supreme Court's opinion in this case seemed to indicate that a black man arrested for possession of marijuana is entitled to have jurors specifically questioned as to racial prejudice, but a black man arrested for crimes of violence against a white security officer is not entitled to the same rights. This distinction seems to hinge on the nature of the special circumstances of *Ham*—specifically, the sensitive issue of civil rights work. The defendant in *Ristaino* faced a harsher sentence than the defendant in *Ham*. However, he appears to have been given less constitutional protection, owing to the application of the "special circumstances" principle.

Another apparent inconsistency in the holdings is that the circumstances of the crime in *Aldridge* and *Ross* are very similar. In *Aldridge*,<sup>29</sup> a black man was convicted of the murder of a white policeman. In *Ross*,<sup>30</sup> the defendant, also a black man, was convicted of the commission of violent crimes against a white security officer.

Attempting to reconcile the differences between *Ross* and *Ham*, the Court of Appeals for the First Circuit stated, in *Ross v. Ristaino*:<sup>31</sup>

In *Ham*, the defendant was a civil rights leader, while in this case the black defendant is for the purpose of this inquiry an ordinary black citizen. But in this case, the charges against the defendant involved violence against a white, not a victimless crime like possession of marijuana. Moreover the white victim, a security officer at Boston University, had a status close to that of a police officer. In addition, the eyewitness testimony of a white gas station attendant, was a major part of the state's case against Ross. . . . On these facts the District Court was not in error

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28. *Id.* at 598, n. 10. *Aldridge* originated in a federal court because the defendant was a federal prisoner, whereas *Ristaino*, which involved a state prisoner, originated in a state court. Therefore, to clarify an apparently inconsistent decision, the Court in *Ristaino* interpreted its *Aldridge* holding as an exercise of its supervisory power over the federal courts rather than as a broad constitutional requirement.

29. 283 U.S. 308 (1931).

30. 362 Mass. 665, 282 N.E.2d 70 (1973).

31. 508 F.2d 754 (1st Cir. 1974).

in concluding that the likelihood of infection of the verdict [by racial prejudice] was at least as great as it was in *Ham*. In effect, the [District] Court held that a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice."<sup>32</sup>

The Supreme Court in *Ristaino v. Ross*<sup>33</sup> rejected the court of appeals treatment of the case by highlighting the factual distinction between *Ristaino* and *Ham*, and by finding a crucial absence of special circumstances. The Court felt that the lower court read *Ham* "too broadly" by finding the facts to require special questioning about racial prejudice.<sup>34</sup>

Before *Commonwealth v. Ross*<sup>35</sup> was decided, *Ham* was not interpreted narrowly. As previously mentioned,<sup>36</sup> *United States v. Robinson*<sup>37</sup> and *People v. Wray*<sup>38</sup> discussed, interpreted, and applied *Ham*. However, neither indicated that *Ham* was a limiting ruling, especially since these cases, which followed *Ham*, involved ordinary circumstances and not the special circumstances which are now required. The narrow, limiting effect of *Commonwealth v. Ross*<sup>39</sup> has been applied in recent cases.<sup>40</sup> The Supreme Court of Massachusetts has consistently followed its holding in *Ross* by not allowing "ordinary" black defendants to question prospective jurors about potential racial bias.<sup>41</sup>

Regretfully, it appears that *Ristaino v. Ross*<sup>42</sup> will have a severe impact on the effectiveness of the voir dire examination by inhibiting the defense counsel's ability to determine if any jurors are prejudiced against his or her client. Amendment VI of the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an *impartial jury* of the State and district

32. *Id.* at 756.

33. 424 U.S. 589.

34. *Id.* at 594.

35. 363 Mass. 665, 296 N.E.2d 810 (1973).

36. See text accompanying notes 20 and 22, *supra*.

37. 485 F.2d 1157 (3d Cir. 1973).

38. 49 Mich. App. 334, 212 N.W.2d 78 (Ct. App. 1973).

39. 363 Mass. 665, 296 N.E.2d 810 (1973).

40. *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975); *United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1976).

41. See, e.g., *Commonwealth v. Ryles*, 363 Mass. 674, 296 N.E.2d 816 (1973); *Commonwealth v. Rodriguez*, 364 Mass. 87, 300 N.E.2d 192 (1973); *Commonwealth v. Bumpus*, 309 N.E.2d 491 (1974).

42. 424 U.S. 589.



wherein the crime shall have been committed. . . ."<sup>43</sup> The holding in *Ristaino v. Ross*<sup>44</sup> will make the constitutional right to an impartial jury a truly uncertain and theoretical one. By so limiting the scope of the voir dire examination, it is highly possible that a strongly biased individual could sit as juror in a criminal case with no chance of being discovered. It is not likely that any harm would result from questioning prospective jurors about possible racial bias. However, there is no doubt that great harm could occur from not asking these questions. Voir dire examination is a vital part of the jury selection process, and it should be exercised to its fullest potential.

In *Aldridge*, the Supreme Court looked to the value of an effective voir dire examination and said:

If in fact, sharing the general sentiment, [the jurors] were found to be impartial, no harm would be done in permitting the question [as to racial bias]; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit.<sup>45</sup>

The *Ristaino* Court made a seemingly inconsistent comment in a footnote stating:

Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. The states also are free to allow or require questions not demanded by the constitution. . . .<sup>46</sup>

Thus, even though the Supreme Court believed it might have been wiser to have asked the requested questions, the Court refused to find that this right had constitutional dimensions. The Court's reasoning is

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43. U.S. CONST. amend. VI.

44. 424 U.S. 589.

45. 283 U.S. 308, at 314 (1931). The Court went on to say:

We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

*Id.* at 315.

46. 424 U.S. 589, 597 n. 9 (citations omitted).

not clear. This lack of clarity is magnified by the Court's statement that "under our supervisory power we would have required as much of a federal court faced with the circumstances here."<sup>47</sup> In effect, this means a defendant in a federal court might, under the Supreme Court's supervisory power, be entitled to have questions about racial bias asked of a potential venireman, but a defendant in a state court would have no such right, and would have to rely solely on the discretion of the particular judge.

By basing their analysis on the existence or absence of "special circumstances," the Court has missed a crucial point in determining whether a defendant is entitled to question potential veniremen about racial bias. The Court makes it appear that the only time one is subjected to racial prejudice is when his or her race has been a cause of the arrest.<sup>48</sup>

Three Supreme Court Justices disagreed with the majority's treatment of *Ross v. Massachusetts*.<sup>49</sup> Justice Marshall's dissent, in which Justice Douglas and Justice Brennan joined, pointed out that the *Aldridge* Court was not concerned with the popularity of the defendant "but rather with the potential racial bias of the particular jurors who are to try the accused."<sup>50</sup> The dissent further pointed out: "The principle that fairness demands such [voir dire] inquiry is, if anything, far more pervasive today than it was when *Aldridge* was decided, in both federal and state courts."<sup>51</sup> A defendant runs the risk of facing biased jurors regardless of the specific crime for which he is being tried. A juror does not have to hear facts of a case intertwined with racial overtones to have biased views toward certain minorities.

The dissenting justices ended their opinion by stating:

To deny this petition for certiorari is to see our decision in *Ham v. South Carolina* stillborn at birth and to write an epitaph for those "essential

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47. *Id.*

48. *Id.*

49. 363 Mass. 665, 296 N.E.2d 810 (1973) *cert. denied*, 414 U.S. 1080 (1973) (Marshall, J., Brennan, J., Douglas, J., dissenting).

50. 414 U.S. 1080, 1083 (1973).

51. *Id.* at 1084. The dissent noted:

[T]o say that petitioner [Ross] is not a potential target of racial prejudice would be to ignore as judges what we must all know as men . . . where, as here and in the strikingly similar circumstances of the *Aldridge* case, a Negro is being accused of an attack on a white policeman, it would be disingenuous at best to assert that he is not apt to be a particular target of racial prejudice.

*Id.* at 1085.

demands of fairness" recognized by this Court forty years ago in *Aldridge*. I fear that we "bring the processes of justice into disrepute" not only by sanctioning the denial of a right required by "essential demands of fairness" but also in failing to compel compliance by the court below with a precedent of this Court [*Ham*] barely a year since decided.<sup>52</sup>

It appears that, as a result of the decision in *Ristaino v. Ross*,<sup>53</sup> the future of the impartiality of state juries will depend solely upon the trial judge's discretion. As *Ristaino* illustrates, the Supreme Court has chosen to narrow its review of state cases involving a defendant's right to have specific questions asked of prospective jurors. Viewing the instant case along with *Stone v. Powell*,<sup>54</sup> it appears that the Supreme Court has initiated a trend toward narrowly limiting its review of claims made by state defendants of violations of their constitutional rights. One cannot help wondering why the Supreme Court is abdicating its role as the protector of a state prisoner's constitutional rights.

*Jacquelyn Plasner*

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52. *Id.* Justices Marshall and Brennan dissented from the decision in the instant case for the same reasons stated in *Ross v. Massachusetts*, 414 U.S. 1080 (1973) (dissenting opinion).

53. 424 U.S. 589 (1976).

54. 96 S.Ct. 3137 (1976).

## Constitutional Law: Privilege against Self-Incrimination: Conviction of a Non-Tax-Related Offense Secured through the Use of Federal Tax Returns: *Garner v. United States*

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Roy Garner candidly reported substantial income from illicit wagering in his 1965, 1966, and 1967 federal income tax returns.<sup>1</sup> He reported his occupation as a "professional gambler" in the 1965 return.<sup>2</sup> Garner was subsequently prosecuted for conspiring to violate various federal gambling statutes.<sup>3</sup> At trial,<sup>4</sup> the government introduced into evidence the returns in question. Garner objected to the admission of the returns, asserting a violation of his Fifth Amendment privilege against compulsory self-incrimination.<sup>5</sup> The returns were admitted over Garner's objections, and the jury found him guilty of conspiring to violate the gambling statutes.

Garner's conviction was reversed in 1972 by the Court of Appeals for the Ninth Circuit.<sup>6</sup> Circuit Judge Koelsch, for the majority, held that the disclosures Garner made in his returns were statutorily compelled by Internal Revenue Code § 7203,<sup>7</sup> which makes it a crime to willfully

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1. A taxpayer is required to report and pay tax on his illegally derived income. See note 16, *infra*. I.R.C. § 7203 makes it a crime for a taxpayer, who is required to make a return or pay a tax, to fail to do so. See note 7, *infra*.

2. *Garner v. United States*, 424 U.S. 648 at 649-50 (1976).

3. Garner's conspiracy indictment was under 18 U.S.C. § 224 (bribery in sporting contests effectuated through use of an interstate communication facility); § 371 (conspiracy to commit any offense against the United States); § 1084 (interstate transmission of wagering information by one engaged in the business of wagering); and § 1052 (use of an interstate facility to distribute proceeds of an unlawful activity). He was also indicted for the substantive offense of aiding and abetting the violation of § 1084, but he was acquitted on this count at the close of the government's case. 424 U.S. at 694 n.1.

4. Garner was tried by a jury in the District Court for the Central District of California.

5. U.S. CONST. amend. V provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

6. 501 F.2d 228 (9th Cir. 1972).

7. I.R.C. § 7203 reads, in pertinent part: "Any person required under this title to pay any . . . tax . . . to make a return . . . keep any records, or supply any informa-

fail to supply required information.<sup>8</sup> Such compelled disclosures were held to be inadmissible as evidence in a subsequent prosecution of gambling law violations because of Garner's privilege against self-incrimination.

On rehearing en banc two years later, the Court of Appeals reversed itself.<sup>9</sup> Circuit Judge Wallace, a dissenter in the 1972 opinion, now writing for the majority, concluded that the privilege could not be invoked at trial to protect one from disclosures voluntarily made in previously filed tax returns.<sup>10</sup> Thus, if Garner had wanted the protection of the privilege, he should have asserted it when the incriminating information was required to be filed.<sup>11</sup>

On certiorari,<sup>12</sup> the Supreme Court of the United States unanimously affirmed the en banc determination of the Court of Appeals,<sup>13</sup> and held that since Garner made the disclosures in his tax returns instead of claiming the privilege therein, they were not compelled and, therefore, not protected by the privilege.<sup>14</sup>

## 1. COMPULSION TO FILE A RETURN

It has been established since 1927, when the Supreme Court decided *United States v. Sullivan*,<sup>15</sup> that the Fifth Amendment privilege does not give a taxpayer the right to refuse to file a return because he has an illegal source of income.<sup>16</sup> In *Sullivan*, the defendant had been

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tion, who willfully fails to pay such . . . tax, make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor. . . ."

8. 501 F.2d at 232.

9. 501 F.2d 236 (9th Cir. 1974). Circuit Judge Wallace wrote the opinion for the majority, with Circuit Judge Koelsch dissenting.

10. *Id.* at 240.

11. *Id.*

12. Certiorari was granted at 420 U.S. 923 (1975).

13. Justice Powell wrote the opinion for the majority. Justices Brennan and Marshall concurred. Justice Stevens took no part in this case.

14. 424 U.S. at 665.

15. 274 U.S. 259 (1927).

16. The Internal Revenue Code of 1954 provides that a taxpayer must report and pay tax on illegally derived income. § 61(a) provides, in part, that "gross income means all income from whatever source derived. . . ." The Supreme Court has interpreted this section broadly, by including as gross income all income, whether legally or illegally derived. *See, e.g., James v. United States*, 366 U.S. 213 (1961) (gross income includes embezzled funds); *Rutkin v. United States*, 343 U.S. 130 (1952) (extorted funds); *United States v. Johnson*, 319 U.S. 503 (1943) (gambling receipts); *United States v. Sullivan*, 274 U.S. 259 (1927) (income from illicit traffic in liquor).

engaged in an illicit liquor business in violation of the National Prohibition Act.<sup>17</sup> He was convicted of willful failure to file a federal tax return as required by the Revenue Act of 1921,<sup>18</sup> over his objection that, because of the illegal nature of his business, he would be compelled to incriminate himself if he were required to file a return. The Court held that the privilege did not protect him from the requirement of filing a return.<sup>19</sup> The Fifth Amendment might have protected him from answering incriminating questions asked in the return, but it did not give him the right to fail completely to file a return.<sup>20</sup> Although not presented with the question, the Court suggested that a taxpayer who wants the protection of the privilege should raise it in the return: "If the form of the return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."<sup>21</sup>

In *Garner*,<sup>22</sup> the Court cited *Sullivan* as establishing that a taxpayer is compelled to file a return. Concluding that Garner was compelled to file a return did not, however, end the Fifth Amendment inquiry. The Court still had to determine whether Garner was compelled to incriminate himself when he could have claimed the privilege on the tax returns in lieu of disclosing the incriminating information.<sup>23</sup> In holding that he had not been compelled to incriminate himself, the Court established what had been suggested in *Sullivan*: Garner's failure to assert the privilege in the returns rendered the incriminating disclosures non-compulsory and, as such, not within the protection afforded by the Fifth Amendment.<sup>24</sup>

## 2. DISCLOSURE IN LIEU OF ASSERTION OF THE PRIVILEGE

The Court cited *United States v. Kordel*<sup>25</sup> as a holding squarely supporting its conclusion that Garner lost the benefit of the privilege by

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17. Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.

18. Act of Nov. 23, 1921, ch. 136, §§ 223(a), 253; 42 Stat. 227, 250, 268.

19. 274 U.S. at 263.

20. *Id.*

21. *Id.*

22. 424 U.S. at 652.

23. *Id.* at 653.

24. *Id.* at 665.

25. 397 U.S. 1 (1970).

revealing the incriminating information, and five other cases<sup>26</sup> as supporting this principle in dicta.<sup>27</sup> The Court determined that these cases stood for the proposition that "if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not 'compelled' him to incriminate himself."<sup>28</sup>

In *Kordel* the defendants, who were officers of a food corporation, were prosecuted for a violation of the Federal Food, Drug and Cosmetic Act.<sup>29</sup> Prior to the commencement of this prosecution, an *in rem* action had been filed against several of the defendants' corporate products. Pursuant to this civil action, extensive interrogatories were served on the corporation. During the *in rem* action, the defendants were informed by the government that it was contemplating a criminal prosecution against them for violations of the Act. Rather than claiming his privilege at this point, one of the defendants answered the interrogatories served by the government. In the later criminal prosecution the government introduced into evidence information obtained by the interrogatories. The defendants objected to the admission of this evidence and argued that the answers to the interrogatories had been compelled, and that their use would violate the defendants' privilege against self-incrimination. The Court held that the use of these answers did not violate the defendants' privilege, since they had been notified of the contemplated criminal prosecution and had disclosed the information instead of claiming the privilege. The Court, in *Garner*,<sup>30</sup> read *Kordel* as establishing the general rule that by volunteering information rather than asserting the privilege, one has not been compelled to answer.

In *United States v. Monia*<sup>31</sup> the defendants were charged with conspiring to fix prices in violation of the Sherman Act.<sup>32</sup> Each defendant appeared as a witness before the grand jury, giving testimony substantially connected with the transaction covered by the indictment

26. *Maness v. Meyers*, 419 U.S. 449, 466 (1975); *Rogers v. United States*, 340 U.S. 367, 370-71 (1951); *Smith v. United States*, 337 U.S. 137 (1949); *United States v. Monia*, 317 U.S. 424, 427 (1943); *Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 112-13 (1927), construed in *Garner*, *supra* note 2, at 653-54.

27. 424 U.S. at 653-54.

28. *Id.* at 654 (footnote omitted).

29. 21 U.S.C. §§ 301-92 (1938), construed in *Kordel*, *supra* note 25, at 2.

30. 424 U.S. at 654.

31. 317 U.S. 424 (1943). The Court cites *Monia* as supporting in dictum its holding in *Garner*. See *supra* note 26.

32. 15 U.S.C. 32 (1903), as amended by 15 U.S.C. 33 (1906), construed in *United States v. Monia*, *supra* note 26, at 425-426.

without claiming his privilege against self-incrimination or the immunity conferred by the Act.<sup>33</sup> The Court held that because of the immunity conferred by the Act, the defendants could not be prosecuted, regardless of whether they had claimed the privilege or the immunity.<sup>34</sup> Although the decision was based upon statutory immunity, the Court, in *Garner*, quoted dictum from *Monia* to support its conclusion that Garner was not compelled to incriminate himself:

The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.<sup>35</sup>

The Court pointed out in *Garner*<sup>36</sup> that *Kordel* and the older witness cases,<sup>37</sup> which require that the privilege be asserted, accommodate the competing interests of the individual's right to remain silent on the one hand, and the government's right to everyone's testimony on the other hand. Since the witness is the only one who knows whether the government is compelling him to make incriminating disclosures, the burden is properly on him to make a timely assertion of the privilege:<sup>38</sup> "If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled."<sup>39</sup>

### 3. CIRCUIT JUDGE KOELSCH AND "IMPLIED WAIVER"

Circuit Judge Koelsch, in his majority opinion following the first hearing in *Garner* by the Ninth Circuit, rejected the premise that the

33. The immunity from prosecution for witnesses testifying under the Sherman Act was conferred by the Act of Feb. 25, 1903, ch. 775, § 1, 32 Stat. 904, which reads, in part: "[N]o person shall be prosecuted or be subjected to any penalty of forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under [the Sherman Act]."

34. 317 U.S. at 430.

35. 424 U.S. at 654-55 (citation omitted).

36. *Id.* at 655.

37. See *Mason v. United States*, 244 U.S. 362, 364-65 (1917); *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); *Kastigar v. United States*, 406 U.S. 441, 443-45 (1972).

38. 424 U.S. at 655.

39. *Id.*



privilege was "impliedly waived" by Garner because he failed to assert it in the returns.<sup>40</sup> At the first hearing, the government relied on *Stillman v. United States*.<sup>41</sup> In that case Hyman Stillman and his partner, who were in the wholesale meat business, were convicted of violating the Emergency Price Control Act of 1942.<sup>42</sup> At their trial the government had introduced, over their Fifth Amendment objections, their individual and partnership income tax returns. The Court stated:

If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income. The disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record.<sup>43</sup>

Circuit Judge Koelsch interpreted the *Stillman* decision as based on an "implied waiver" of the privilege.<sup>44</sup> He cited *Marchetti v. United States*<sup>45</sup> as a "recent constitutional development" which had "eliminated the doctrinal keystone" of the *Stillman* decision.<sup>46</sup> In *Marchetti* the petitioner was convicted of failure to register as a gambler with the Internal Revenue Service, as required by I.R.C. § 4412,<sup>47</sup> and of conspiracy to evade payment of a gambler's occupational tax as required by I.R.C. § 4411.<sup>48</sup> He contended that these statutory requirements violated his privilege against self-incrimination, since his wagering activities were

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40. The Supreme Court in the *Garner* opinion makes it clear that the term "waiver" should be limited to those cases where "one affirmatively renounces the protection of the privilege." While rejecting the concept of waiver in name, the Court, by its holding in *Garner*, extends the implied waiver reasoning to incriminating disclosures made in tax returns. 424 U.S. at 654 n.9.

41. 177 F.2d 607 (9th Cir. 1949).

42. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

43. 177 F.2d at 618.

44. 501 F.2d at 231.

45. 390 U.S. 39 (1968).

46. 501 F.2d at 231.

47. I.R.C. § 4412 provides that: "Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district . . . his name and place of residence. . . ."

48. I.R.C. § 4411 reads, in part: "There shall be imposed a special tax of \$50 per year to be paid by each person who is liable [to pay the excise tax on wagers as provided by § 4401]" (fine increased to \$500 per year, *as amended* by Pub.L. No. 93-499, § 3(b), 88 Stat. 1550. *See* note 65, *infra*).

in violation of state and federal law. The Court held that the petitioner did not lose the protection of the privilege by his failure to assert it when the tax payments were due, and that he properly invoked the privilege at trial.<sup>49</sup> Circuit Judge Koelsch was apparently saying that *Marchetti* so eroded the concept of implied waiver of the privilege that *Stillman*, which he concluded was based on implied waiver, was no longer effective law. Since *Stillman* and implied waiver were no longer viable, he concluded that Garner did not lose the benefit of the privilege by disclosing the incriminating information.

In his opinion, Circuit Judge Koelsch overlooked two important aspects of the relation of *Marchetti* to the *Stillman* case and Garner's situation. First, the Court in *Marchetti* made clear that the status of the group with which the petitioner was identified was a major factor in the holding that the privilege was not waived by failure to invoke it. The Court found that "wagering is an area permeated with criminal statutes, and those engaged in wagering are a group inherently suspect of criminal activities."<sup>50</sup> Because petitioner, as a gambler, was a member of a "suspect group," any response he might make pursuant to I.R.C. §§ 4411 and 4412 would be self-incriminating. The Court distinguished the situation of the taxpayer, who is required to file tax returns, from that of a gambler, who is required to register, by concluding that "[u]nlike the income tax return . . . every portion of [the section 4411 and 4412] requirements had the direct and unmistakable consequence of incriminating petitioner. . . ."<sup>51</sup> The reasoning used in *Marchetti* to preclude an implied waiver of the privilege by gamblers does not apply to non-suspect groups such as taxpayers. So Circuit Judge Koelsch's reliance on *Marchetti* as eroding the doctrinal keystone of *Stillman*, viz., implied waiver, seems misplaced.

Second, in *Marchetti* the petitioner did not disclose any incriminating information, as did Garner and *Stillman*. Indeed, the holding of *Stillman* is based upon the fact that the information in question was disclosed in lieu of claiming the privilege. If *Stillman* had withheld the information, as did *Marchetti*, he might not have lost the benefit of the privilege.<sup>52</sup> This basic difference between the two fact patterns prevents

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49. 390 U.S. at 50-51.

50. *Id.* at 47 (citation omitted).

51. *Id.* at 48-49.

52. *Stillman*, however, would have exposed himself to an I.R.C. § 7203 prosecution if he had failed to file a return or had withheld information. *Marchetti*, on the other hand, was allowed to exercise his privilege by simply failing to file, since he was the member of a group "inherently suspect of criminal activities."

*Marchetti* from supporting the conclusion that implied waiver has no place where the Fifth Amendment privilege is involved.

Circuit Judge Koelsch concluded by holding that I.R.C. § 7203<sup>53</sup> compelled Garner to make the disclosures in question, and that by submitting to such statutory compulsion, Garner did not waive his right to assert his privilege at trial.<sup>54</sup>

#### 4. GARNER'S THREE ARGUMENTS

Garner resisted the application of the general rule that witnesses must claim the privilege, arguing that in the tax return context incriminating disclosures made in returns are "compelled."<sup>55</sup> He relied on three situations in which incriminating disclosures had been considered compelled despite a failure to claim the privilege.<sup>56</sup>

##### A. Coerced Confession Cases: Knowing and Intelligent Waiver

First, Garner argued that for one to lose the benefit of the privilege there must be a knowing and intelligent waiver, even though one did not claim the privilege prior to disclosure.<sup>57</sup> He relied on coerced confession cases, e.g., *Miranda v. Arizona*.<sup>58</sup> In *Miranda*, the defendant was taken into custody in connection with a kidnapping and rape. Without being informed of his Fifth Amendment privilege, Miranda was interrogated by the police for two hours in a special interrogation room. He signed a written confession which was admitted as evidence at his trial, and he was subsequently convicted. The Supreme Court reversed the conviction, holding that Miranda had not been effectively apprised of his privilege against self-incrimination, nor had he knowingly and intelligently waived it.

The Court, in *Garner*,<sup>59</sup> refused to extend the *Miranda* holding to disclosures made in tax returns. *Miranda* dealt with custodial interrogation, a situation necessarily fraught with compulsion to disclose incriminating information. These dangers are not present in the tax return

53. See *supra* note 7.

54. 501 F.2d at 232-33.

55. 424 U.S. at 656.

56. *Id.*

57. *Id.* at 657.

58. 384 U.S. 436 (1966).

59. 424 U.S. at 657-58.

context, and the extraordinary safeguard of requiring a knowing and intelligent waiver was not adopted. The Court stated:

[N]othing in this case suggests the need for a similar presumption that a taxpayer makes disclosures on his return rather than claims the privilege because his will is overborne. In fact, a taxpayer, who can complete his return at leisure and with legal assistance, is even less subject to the psychological pressures at issue in *Miranda* than a witness who has been called to testify in judicial proceedings.<sup>60</sup>

### B. Garner Argued Mackey v. United States

Second, Garner relied on *Mackey v. United States*,<sup>61</sup> *Marchetti v. United States*,<sup>62</sup> and *Grosso v. United States*.<sup>63</sup> In *Mackey*, the defendant was convicted in 1964 of evading payment of income taxes for the years 1956 through 1960.<sup>64</sup> At his trial the government introduced into evidence sixty wagering excise tax returns which he had filed pursuant to I.R.C. § 4401,<sup>65</sup> to prove that this was his actual income which he had reported during the years in question. Subsequent to Mackey's conviction the Supreme Court held, in *Marchetti* and *Grosso*, that the Fifth Amendment privilege was a valid defense for failure to comply with §§ 4401, 4411, and 4412,<sup>66</sup> which require a gambler to register and pay an occupational and excise tax. After *Marchetti* and *Grosso* were decided, Mackey filed a motion to set aside his conviction. The Court in *Mackey*<sup>67</sup> refused to apply *Marchetti* and *Grosso* retroactively to overturn Mackey's conviction. Garner argued that if Mackey had made the incriminating disclosures after the *Marchetti* and *Grosso* decisions, such disclosures could not have been used against him.<sup>68</sup> Garner further argued that since Mackey would have been privileged to file no return,

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60. *Id.*

61. 401 U.S. 667 (1971).

62. 390 U.S. 39 (1968).

63. 390 U.S. 62 (1968).

64. Mackey was convicted of violating I.R.C. § 7201, which reads, in part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ."

65. I.R.C. § 4401 reads, in pertinent part: "There shall be imposed on wagers . . . an excise tax equal to 10 percent of the amount thereof."

66. See *supra* notes 47, 48, and 65.

67. 401 U.S. at 674.

68. 424 U.S. at 659.

any disclosures made would have also been privileged.<sup>69</sup> He concluded that *Mackey* stood for the proposition that “an objection at trial always suffices to preserve the privilege even if disclosures have been made previously.”<sup>70</sup> The Court did not find this reasoning compelling, and stated: “[I]t does not follow necessarily that a taxpayer would be immunized against use of disclosures made on gambling tax returns when the Fifth Amendment would have justified a failure to file at all.”<sup>71</sup>

The Court did not find *Garner* in a situation similar to *Marchetti* and *Grosso*, even though all were gamblers required to file tax returns.<sup>72</sup> I.R.C. §§ 4401, 4411, and 4412 required *Marchetti* and *Grosso* to file tax returns which were for gamblers only. Since gamblers were members of a group “inherently suspect of criminal activities” any response by them would be self-incriminating.<sup>73</sup> The Court distinguished *Garner*’s situation by pointing out that federal income tax returns are not directed at suspect groups.<sup>74</sup> The Court cited *Albertson v. Subversive Activities Control Board*<sup>75</sup> as authority for distinguishing federal income tax taxpayers from gamblers required to file tax returns under I.R.C. §§ 4401, 4411, and 4412. In *Albertson*, the petitioners, who were members of the Communist Party, were ordered by the Subversive Activities Control Board to register with the Attorney General, as required by the Subversive Activities Control Act of 1950.<sup>76</sup> Upon review of these orders, the Court held that, because petitioners were members of a “highly selective group inherently suspect of criminal activities” and were involved in an “area permeated with criminal statutes,” any response they might make pursuant to the statute would be self-incriminating, and in violation of their privilege.<sup>77</sup> The Court, in *Albertson*, distinguished federal income tax returns from the Communist registration requirement by holding that tax returns are “neutral on their face and directed at the public at large.”<sup>78</sup> The *Garner* Court used this reasoning to distinguish the gambler’s tax return from income tax returns.<sup>79</sup> The Court concluded:

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69. *Id.*

70. *Id.*

71. *Id.* n. 13.

72. *Id.* at 660.

73. *Id.*

74. *Id.*

75. 382 U.S. 70 (1965).

76. Acts of Sept. 23, 1950, ch. 1024, § 7, 64 Stat. 993; July 29, 1954, ch. 646, 68 Stat. 586, amending 50 U.S.C. § 786 (d).

77. 382 U.S. at 79.

78. *Id.*

79. 424 U.S. at 660-61.

“[T]he great majority of persons who file income tax returns do not incriminate themselves by disclosing their occupation. The requirement that such returns be completed and filed simply does not involve the compulsion considered in *Mackey*.”<sup>80</sup>

### C. Section 7203: Compulsion to Incriminate

Finally, Garner argued that a taxpayer who claims the privilege on his return is threatened with prosecution under I.R.C. § 7203 for failure to make a return or supply information,<sup>81</sup> and that this possibility of prosecution compelled him to make incriminating disclosures rather than claim the privilege.<sup>82</sup> To support his argument Garner relied on *Garrity v. New Jersey*,<sup>83</sup> in which the appellants, who were police officers, were questioned in connection with a state investigation of alleged traffic ticket fixing. Each was warned before questioning that if he refused to answer he would be subject to removal from office pursuant to a state statute.<sup>84</sup> The police officers answered the questions, and their answers were used against them in a subsequent prosecution for conspiring to obstruct the administration of traffic laws. The appellants objected to the use of their incriminating answers, claiming that they had been compelled to answer. The Court concluded that the appellants had been forced to choose between “self-incrimination or job forfeiture”<sup>85</sup> and held that statements coerced by threat of removal from office could not be used against the officers in a subsequent criminal proceeding.<sup>86</sup> Garner argued that the threat of an I.R.C. § 7203 prosecution, like the threat of removal from office in *Garrity*, compelled him to make incriminating disclosures instead of claiming the privilege.<sup>87</sup> But the Court distinguished *Garrity*, pointing out that *Garrity* was threatened with reprisal for a valid exercise of the privilege, while Garner was not so

80. *Id.* at 661 (footnote omitted).

81. *See supra* note 7.

82. 424 U.S. at 661.

83. 385 U.S. 493 (1967).

84. N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965) provides, in part: “Any person holding . . . public office, position or employment . . . who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding . . . upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself . . . shall be removed therefrom. . . .”

85. 385 U.S. at 496.

86. *Id.* at 500.

87. 424 U.S. at 661.

threatened, since "a § 7203 conviction cannot be based on a valid exercise of the privilege."<sup>88</sup> The Court expanded this holding in a footnote: "[B]ecause § 7203 proscribes 'willful' failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith."<sup>89</sup>

The Court cited *United States v. Murdock*<sup>90</sup> (*Murdock I*) as establishing that a taxpayer, prosecuted for willful failure to supply information, is not entitled to a preliminary ruling on the validity of his claim of privilege,<sup>91</sup> and *United States v. Murdock*<sup>92</sup> (*Murdock II*) as supporting the conclusion that an erroneous, good faith claim of the privilege is a defense to a § 7203 prosecution.<sup>93</sup> In *Murdock I* the appellee claimed deductions for money paid to others in his 1927 and 1928 income tax returns. The Internal Revenue Service requested information concerning these deductions. Murdock refused to answer, claiming his privilege against self-incrimination. He was thereafter prosecuted for willful failure to supply information under the predecessor to § 7203.<sup>94</sup> The Court held that Murdock could be prosecuted for willful failure to supply information without prior determination as to whether his claim of privilege was valid.<sup>95</sup> Murdock was subsequently convicted for withholding information. In *Murdock II* the Court reversed the conviction, holding that a good faith misunderstanding<sup>96</sup> as to the applicability of

88. *Id.* at 662.

89. *Id.* at 663 n. 18. The Court's holding was apparently that a *valid* exercise of the privilege was a defense to a § 7203 prosecution. This would seem to imply that an *invalid* exercise of the privilege would not be a defense. But in n. 18 the Court pointed out, without so holding, the government's concession, that an invalid, *good faith* claim of privilege would preclude a § 7203 conviction. In a concurring opinion, discussed below, Justice Marshall argues that to satisfy the Fifth Amendment an erroneous, good faith claim of the privilege must be allowed as a defense.

90. 284 U.S. 141 (1931).

91. 424 U.S. at 664-65.

92. 290 U.S. 389 (1933).

93. 424 U.S. at 662-63 and n. 18.

94. Act of Feb. 26, 1926, ch. 27, § 1114(a), 44 Stat. 116. This section is essentially the same as § 7203. It provides, in pertinent part: "Any person required under this Act to pay any tax . . . to make a return, keep any records, or supply any information . . . who willfully fails to pay such tax, make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor."

95. 284 U.S. at 148.

96. Murdock erroneously believed that the Fifth Amendment privilege protected him from making disclosures incriminating under state law when pressed for information in a federal forum. It was not established until *Murdock I*, that one being ques-

the privilege could not be the basis of a conviction for willfully failing to supply information.<sup>97</sup>

In *Garner*, the Court reaffirmed the decision of *Murdock II*, holding that a taxpayer cannot be convicted of a § 7203 violation if he makes a good faith, though erroneous, claim of privilege.<sup>98</sup> It also reaffirmed the holding of *Murdock I*,<sup>99</sup> stating: "a § 7203 prosecution . . . may be brought without a preliminary judicial ruling on a claim of privilege that would allow a taxpayer to reconsider."<sup>100</sup>

Justice Marshall, troubled by the Court's reasoning, filed a concurring opinion, in which Justice Brennan joined. The majority had stated: "[S]ince a valid claim of privilege cannot be the basis for a § 7203 conviction, Garner can prevail only if the possibility that a claim made on the return will be tested in a criminal prosecution suffices in itself deny him freedom to claim the privilege."<sup>101</sup> The Court concluded:

As long as a *valid* and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim.<sup>102</sup>

The concurring Justices interpreted the majority opinion as holding that a valid claim of privileged defense, without more, satisfies the Constitution.<sup>103</sup> The Justices were adamant in their belief that only if a good faith, invalid assertion of the privilege entitles a taxpayer to acquittal under § 7203, then a threat of prosecution could not compel incriminating disclosures in violation of the Fifth Amendment.<sup>104</sup>

Although the concurring justices accepted the majority's holding that a preliminary ruling is not a prerequisite to a § 7203 prosecution, they believed that the absence of a preliminary ruling was important in determining whether Garner had been compelled.<sup>105</sup> They felt that a

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tioned in a federal forum could not refuse to answer because of possible incrimination under state law. The Court disapproved of this holding in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

97. 290 U.S. at 396.

98. 424 U.S. at 662-63 and n. 18.

99. *Id.* at 664-65.

100. *Id.* at 664.

101. *Id.* at 663.

102. *Id.* at 665 (emphasis added).

103. *Id.* at 666-67.

104. *Id.* at 666.

105. *Id.* at 667.



taxpayer must either be given a preliminary ruling or be allowed a defense of good faith assertion of the privilege. If the taxpayer was not afforded at least one of these safeguards, he would be denied the free choice to claim the privilege. Marshall concluded: "[O]nly because a good faith erroneous claim of privilege entitles a taxpayer to acquittal under § 7203 can I conclude that [Garner's] disclosures are admissible against him."<sup>106</sup>

## 5. CONCLUSION

*Garner v. United States* reaffirmed the rule of *Sullivan*, that a taxpayer must file a return, even though his income is derived from illegal activities. *Garner* reasserted the holding of *Marchetti*, that one who is the member of a group inherently suspect of criminal activities need not comply with a statutory requirement to disclose information relating to those activities. A federal income tax taxpayer is not in a suspect group and must file a return. If a question in the return requires an incriminating answer, the taxpayer must withhold the information and assert his privilege in the return to obtain its protection. If the taxpayer discloses the information instead of claiming the privilege, he has not been compelled to incriminate himself and the incriminating information may be used against him in a subsequent criminal prosecution of a non-tax-related offense. If the taxpayer asserts the privilege instead of disclosing the information, he can be prosecuted under I.R.C. § 7203 for failure to supply required information, and he will not be entitled to a preliminary ruling on whether his claim is valid. If the taxpayer's claim of privilege is asserted in good faith, it will be a defense to a § 7203 prosecution, even if his claim is invalid.

In *Garner*, the Supreme Court has moved toward allowing a penalty to be extracted for the exercising of one's privilege against self-incrimination. Under the *Garner* decision a taxpayer can be prosecuted for withholding incriminating information without a preliminary hearing on whether his claim of privilege is valid. A criminal prosecution for asserting one's privilege would seem to be the kind of reprisal condemned in *Garrity*. The trend of the Court is toward allowing the assertion of the privilege in a tax return context to become more perilous, in order to allow the government to proceed in its endless quest for more information concerning its citizens.

*David F. Vedder*

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106. *Id.* at 668.

*The cases commented upon are in italic type.*

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