ARTICLES

A City Guide to Developing, Using, and Regulating Regional Telecommunications Networks Under the Telecommunications Act of 1996.......................................................... Andrea L. Johnson

On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom.......................................................... Diane Heckman

Piercing the Corporate Veil in Florida: Defining Improper Conduct .......................................................... Marilyn Blumberg Cane

Robert Burnett

NOTES AND COMMENTS

Bennis v. Michigan: Does the Innocent Owner Have a Defense to Civil Forfeiture? .......................................................... Brooke D. Davis

Jaffe v. Redmond: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers .......................................................... Jason L. Gunter

Confronting Indecent Cable Television Programming: Balancing the Interests of Children and the Exercise of Free Speech in Denver Area Educational Telecommunications Consortium, Inc. v. FCC.......................................................... Christopher D. Ritchie

VOLUME 21 WINTER 1997 NUMBER 2
# TABLE OF CONTENTS

## ARTICLES

- A City Guide to Developing, Using, and Regulating Regional Telecommunications Networks Under the Telecommunications Act of 1996
  - Andrea L. Johnson 515
- On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom
  - Diane Heckman 545
- Piercing the Corporate Veil in Florida: Defining Improper Conduct
  - Marilyn Blumberg Cane 663
  - Robert Burnett

## NOTES AND COMMENTS

- *Bennis v. Michigan*: Does the Innocent Owner Have a Defense to Civil Forfeiture?
  - Brooke D. Davis 685
- *Jaffee v. Redmond*: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers
  - Jason L. Gunter 719
- Confronting Indecent Cable Television Programming: Balancing the Interests of Children and the Exercise of Free Speech in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*
  - Christopher D. Ritchie 741
A City Guide to Developing, Using, and Regulating Regional Telecommunication Networks Under the Telecommunications Act of 1996

Andrea L. Johnson

TABLE OF CONTENTS

I. INTRODUCTION .............................................................................. 516

II. IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT .............. 518
    A. Fostering Competition ........................................................ 518
    B. Delegation of Authority ....................................................... 521
    C. State Reaction .................................................................... 521
    D. Industry Reaction Since Passage of the Act ....................... 523

III. CITY INITIATIVES AS PROVIDERS OF RTNs .................................. 525
    A. Critical Issues in Developing RTNs .................................... 526
    B. Municipal Initiatives for Strategic Partnerships ................ 529
    C. Regulation of Municipal RTNs Under the Act .................... 530

IV. CITY INITIATIVES AS USERS OF RTNs ........................................ 533
    A. Leveraging City User Needs for Favorable Rates .............. 533
    B. Universal Service ............................................................. 534

V. IMPACT OF ACT ON CITY INITIATIVES AS REGULATORS OF
   RTNs ............................................................................................. 536
    A. Franchise Fee Obligations on Video Providers ................. 537
    B. Just Compensation for Use of Rights-of-Way .................... 538
    C. Franchise Fee Obligations on Public Utilities ................... 539

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I. INTRODUCTION

Cities are pursuing various initiatives to implement President Clinton's National Information Agenda ("NII").¹ The NII encourages public/private partnerships to build an advanced telecommunications infrastructure known as the Information Highway. These initiatives include upgrading cities' internal government networks or Private Virtual Networks ("PVNs")² and expanding Municipal Utilities³ into, or developing new, Regional Telecommunication Networks ("RTNs"). This article will focus on city initiatives as developers, regulators, and users of RTNs and will highlight California's efforts in these areas. RTNs are region wide, open, switched digital broadband networks with the capability to provide voice, data, cable, and videoconferencing services at a reasonable cost to homes, businesses, and public buildings.⁴ RTNs compete with existing and other providers for telecommunication services and are regulated by the Telecommunications Act of 1996 ("Act").⁵

Cities have a vested interest in RTNs for several reasons: 1) to protect the public safety and welfare; 2) to enhance internal operations and the administration of services to the public; 3) to foster economic development; and 4) to

² Private Virtual Networks are networks which service a city's internal or regional needs for government operations and administration. Examples would include communication and data networks for libraries, schools, fire, police, and public works. See San Diego Data Processing Corporation Request for Proposals to Provide Telecommunications Infrastructure 7 (1995) [hereinafter San Diego RFP].
³ "Municipal Utilities" are municipally owned public utilities that can provide telephony or other communications and other public works, such as electric, gas, water, sewer and/or other utility services to residents. See, e.g., CAL. PUB. UTIL. CODE § 12801 (Deering 1990) (regarding Municipal Utility District Act).
⁴ See San Diego RFP, supra note 2, at 1; August E. Grant & Lon Berquist, Exploring the Emerging Municipal Information Infrastructure (visited Dec. 11, 1996) <http://ksgwww.harvard.edu/iip/grant.html>; City of Seattle Request for Proposals for an Information Highway 1 (1994) [hereinafter Seattle RFP].
ensure universal access to telecommunication services at affordable prices. In addition, many cities rely on revenue generated from telecommunication providers through franchise fees, compensation for use of public rights-of-way, and utility user taxes.

Spurred by recent passage of the Act, cities struggle to pursue strategies as regulators, users, and/or providers of telecommunication networks and services. As municipal providers and users, the Act establishes a framework for open competition to all telecommunications services by lifting restrictions imposed on telephone companies and cable companies and creating a new class of provider called "telecommunication carriers." Telecommunication carriers can provide telecommunication services by constructing their own facilities or reselling services of existing providers. By lifting the restrictions, new entrants are allowed to compete in city and regional markets. As regulators, the Act restricts local franchise authority to regulate telecommunication carriers but may provide compensation to cities for use of their rights-of-way. These restrictions threaten to reduce cities' revenue base as the variety of telecommunication services available is increasing and the transactional costs for businesses are decreasing.

As cities compete to retain current and attract new businesses, some believe that cities must build RTNs to ensure that residents and businesses have equal and universal access to new services at affordable prices. However,

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7. Utility user taxes are imposed on users of utilities which include electric, telephone, cable, gas, and water. The common thread is that they all use public rights-of-way to provide service.
9. "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Telecommunications Act § 3(a)(48).
10. "Telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Id. § 3(a)(51).
11. A "telecommunications carrier" includes any provider of information services on a common carrier basis, for a fee directly or indirectly to the public, without regard to the facilities used. See id. § 3(a)(49), (51).
12. Id. § 253(a).
13. Id. § 253(c).
financial constraints, uncertainty in technological standards, lack of technical expertise, and actions by existing telecommunication providers to thwart competition, challenge cities to remain competitive.  

The first section of this article will examine how the Act fosters competition and delegates authority to regulate telecommunication providers and the reaction from state Public Utility Commissions ("PUCs") and industry. The second section will discuss critical issues that must be resolved by cities as providers of RTNs. The third section will discuss how cities seek to leverage their role as users to get favorable rates and ensure universal access. The fourth section will discuss the impact of the Act on city initiatives as regulators of RTNs and suggests alternate revenue sources.

II. IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT

The Act provides a general framework for how competition of interstate, or interLATA,¹⁵ and intrastate, or intraLATA,¹⁶ telecommunications services will be achieved and the delegation of authority at the federal, state, and local levels. This framework enables cities to participate as providers of RTNs to compete for telecommunication services and as users to leverage favorable terms with telecommunication providers. Implementation of the Act has been delegated to the Federal Communications Commission ("FCC") and state PUCs.

A. Fostering Competition

The Act fosters competition for telecommunications services in several ways. First, state restrictions and antitrust decrees limiting competition in local exchange and long distance markets have been lifted, thereby allowing both to expand their offerings.¹⁷ This means that long distance companies¹⁸

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¹⁴. Grant & Berquist, supra note 4, at 9–11.
¹⁵. A LATA, meaning Local Access and Transport Areas, is a geographical boundary that was established as part of the divestiture of AT&T under Judge Harold Greene's Consent Decree in 1981. InterLATA telephone services are services, revenues, and functions of long distance carriers that begin in one LATA and terminate in another. United States v. AT&T, 552 F. Supp. 131 (1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). Most LATAs are defined by local telephone exchanges or area codes, which are usually within 16 miles from the exchange.
¹⁶. IntraLATA services are services, revenues, and functions provided by the local exchange carriers within a single LATA.
¹⁷. Telecommunications Act § 601(a).
¹⁸. 
can provide local exchange services, and local exchange carriers ("LECs")\(^\text{19}\) can provide long distance services.\(^\text{20}\) However, there are restrictions imposed upon LECs, such as Pacific Bell, before they can provide interLATA services originating within their service market.\(^\text{21}\) Such services can only be provided in partnership with separate or independent affiliates\(^\text{22}\) of LECs and would be provided on a negotiated basis.\(^\text{23}\)

Second, cross ownership restrictions for cable\(^\text{24}\) and LECs\(^\text{25}\) have been eliminated,\(^\text{26}\) although they are subject to a ten percent cap on financial interest and ownership\(^\text{27}\) in their service area. As a result, cable companies can now provide telephony, and telephone companies can provide cable or open video services.\(^\text{28}\)

Third, LECs must provide interconnection to their facilities,\(^\text{29}\) including physical or virtual collocation of equipment,\(^\text{30}\) and network access to private

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18. Long distance companies include AT&T, MCI, Sprint, and Competitive Access Providers.
19. Local exchange carriers are the seven Regional Bell Operating Companies: 1) Ameritech; 2) Bell Atlantic; 3) Bell South; 4) Nynex; 5) Pacific Telesis; 6) Southwestern Bell; and 7) U.S. West.
21. In effect, the FCC regulations require that the LEC satisfy a "14-point checklist" of provisions before the FCC will allow them to enter long distance markets. Essentially the FCC must find that local markets have been opened up to competition. Id. § 271(c)(2)(B).
22. Section 274 of the Act also prohibits a LEC from providing electronic publishing using its own or an affiliate's basic telephone facilities, or from forming a joint venture for electronic publishing, except through a separate and independent affiliate. The Act does, however, allow: 1) joint telemarketing or referral services on a nondiscriminatory basis; 2) teaming arrangements for electronic publishing so long as BOC provides only the facilities, services and basic telephone service and does not own the arrangement; and 3) nonexclusive joint ventures for electronic publishing where the BOC has no more than 50% equity interest or royalty interest. Id. § 274(c)(2).
23. See generally id. §§ 272–274.
24. The Act relaxes the rules governing cable television systems under the 1992 Cable Act. Id. § 301. By March 31, 1999, all rate regulations on all cable services except the "basic tier" that includes over-the-air channels and public and educational channels are to be removed. Telecommunications Act § 301(b).
25. Id. § 301(b).
26. See id. § 651(a).
27. Id. § 652(a). This ownership interest can be larger (up to 35%) in rural areas. Id. § 652(d)(1).
29. Section 251(b) imposes on all LECs obligations to provide resale, access to rights-of-way, and to establish reciprocal compensation arrangements for transportation and termination of traffic. Id. § 251(b)(1), (4)–(5).
30. Id. § 251(c)(6).
rights-of-way, utility poles, and conduits on a nondiscriminating basis.\textsuperscript{31} In addition, LECs are prevented from discriminating in charges and practicing unfair competitive tactics,\textsuperscript{32} which means LECs must provide network access and interconnection at just and reasonable rates.\textsuperscript{33} The terms of interconnection are determined by negotiation between LECs and other telecommunications providers,\textsuperscript{34} subject to approval by state PUCs.\textsuperscript{35} State PUCs have the authority to arbitrate complaints among providers,\textsuperscript{36} and the FCC has the authority to resolve jurisdictional issues. Federal courts provide judicial review of FCC decisions.

Fourth, the Act preempts the states and cities from promulgating any rules or taking any actions which will be unreasonable and have the effect of creating market barriers to entry in interstate or intrastate markets.\textsuperscript{37} The FCC also has the authority under the Act to preempt city authority where it is found to violate the Act or state PUC rules, such as prohibiting market entry.\textsuperscript{38}

\textsuperscript{31} Id. § 251(b)(4), (c)(2)(D). The Act requires interconnection to telecommunication carriers at any feasible point at least equal in quality to what is provided by LECs to their affiliates. \textit{Id.}

\textsuperscript{32} 47 U.S.C. § 202 (1994). This section provides that it is illegal for common carriers to:

[M]ake any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

\textit{Id.} § 202(a). This regulation allows the FCC, as a federal agency, to fine violators with a $6,000 penalty. \textit{Id.} § 202(c).

\textsuperscript{33} Rates must be tariffed or not higher than the per unit basis charged to others. Telecommunications Act § 274(c)(2)(D).

\textsuperscript{34} \textit{Id.} § 252(a)(1).

\textsuperscript{35} \textit{Id.} § 252(e). Such agreements shall be approved so long as they do not discriminate against a telecommunications carrier not a party to the agreement and are not inconsistent with the public interest, convenience, and necessity. \textit{Id.} § 252(e)(1)–(2).

\textsuperscript{36} \textit{Id.} § 252(b). In the first instance, the state PUC would be the arbiter of disputes between telecommunications carriers and LECs regarding interconnection and charges. Telecommunications Act § 252(b). Moreover, there is some suggestion that the state PUC would also address access to rights-of-way and regulatory or negotiated fees imposed by a city, with appeal rights to the FCC. \textit{Id.} See generally \textit{Id.} §§ 252, 703.

\textsuperscript{37} \textit{Id.} § 253(a). The Act states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." \textit{Id.}

\textsuperscript{38} Telecommunications Act § 253(d).
B. Delegation of Authority

The FCC is empowered to establish procedures for network planning and can participate in developing network interconnectivity standards. The FCC has also created an alternative dispute resolution committee to resolve any conflicts regarding industry-wide standards. The state PUCs are empowered under the Act to establish baseline rates for interconnection, services, and network elements. Local authorities retain jurisdiction over access to their rights-of-way; however, city franchise authority has been restricted for telecommunications services, regardless of the provider.

The FCC has recently adopted a series of rules to implement the Act, although final adoption is likely to be delayed by legal challenges from industry and state PUCs. Several state PUCs and LECs have challenged the FCC's interpretation that the Act confers to it a specific grant of intrastate pricing authority. The FCC rules require discounts of between 17% and 25% off of their retail phone rates and discounts of between 50% and 60% off the retail rate of network equipment. If new competitors enter a carrier's market at wholesale rates, the FCC intended that they could resell telecommunications services at below market rates because they are willing to accept lower profit margins. LECs feel, however, that the discounts represent illegal confiscation of their property.

C. State Reaction

State reaction to passage of the Act has been varied. Some state PUCs view the FCC rules in part as a way to neutralize the playing field to enable new entrants to compete for telecommunications services. The FCC plan

40. Telecommunications Act § 256(b).
41. Id. § 252(d).
43. The Act expressly requires the FCC to refrain from enacting, applying, or enforcing unnecessary regulations related to charges, practices, and classifications. Telecommunications Act § 401.
reflects a concern that state PUCs enjoy a long-standing relationship with LECs which may cause them to favor LECs.\footnote{46} However, it seems that many states have taken heed of the FCC plan. For example, Texas regulators have approved a plan for AT&T competition with SBC Communications with a resale discount of 21.5%, within the range proposed by the FCC.\footnote{47} State regulators from Iowa, Illinois, Michigan, and Pennsylvania have followed suit, approving a twenty-two percent discount for reseller services.\footnote{48}

It is clear that those states that are serious about facilitating competition are moving forward notwithstanding legal challenges to the Act. There are more than 180 pending state arbitrations on interconnection agreements among LECs and other local companies.\footnote{49} The Washington Utility and Telecommunications Commission (“WUTC”), for example, has already conducted seven arbitration proceedings under the Act.\footnote{50} The WUTC is proceeding on generic costing and pricing rules.\footnote{51} The arbitrations are leading to interim rates, while the generic pricing rules will determine long-term pricing.\footnote{52}

Unfortunately, these efforts are not necessarily the norm. Other state PUCs feel that the Act and current litigation surrounding FCC interconnection rules will delay or hinder their efforts to promote intrastate competition.\footnote{53} This is not necessarily due to inaction by state PUCs but rather to efforts by industry advocates to lobby the FCC and states to accept various interpretations of the Act.\footnote{54} For example, Brooks Fiber Communications of Grand Rapids, Michigan was haggling for more than a year over an interconnection pact with Ameritech. The talks were halted after passage of the Act. In addition, in late 1995 prior to passage of the Act, WUTC issued a benchmark decision requir-

\begin{itemize}
\item \textit{Cauley & Gruley, supra} note 44, at B1.
\item \textit{Id.}
\item \textit{Id. AT&T requested a higher rate of 35%, and SBC only wanted to offer only 13%.}
\item \textit{Id.}
\item \textit{Interview with Tom Wilson, supra} note 50.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
ing local interconnection for U.S. West and GTE. Since passage of the Act, however, they have started the interconnection contract process all over again.

D. Industry Reaction Since Passage of the Act

The goal for all providers is to be full service providers, bundling such existing and new services as local, long distance, and wireless services. Since the passage of the Act, providers have pursued various strategies to diversify into other areas, while protecting existing markets. One direct by-product of the Act is a flurry of mergers. There have also been notices of new offerings with subsequent scaling back of plans, no price reductions, but proposed price increases. Whether the net effect of these efforts will result in competition remains to be seen.

Long distance companies and LECs have already begun fierce competition for the $70 billion long distance market and the $100 billion local service market. Long distance companies, anxious to get into local telephone markets, have filed for local certification in all fifty states. In a move to compete for local exchange service, AT&T is proposing to offer preemptive discount pricing to new customers in several local markets. Under this plan, AT&T would expand pricing discounts to areas such as Illinois, to compete with Ameritech, by offering three months of free, unlimited “local toll”

56. Interview with Tom Wilson, supra note 50.
57. Regulators have approved a merger between Bell Atlantic and Nynex and between Time-Warner and Turner Broadcasting. SBC has bought Pacific Telesis, pending approval from regulators. LDDS/World Com has bought UUNET, an Internet Provider. World Com then bought MFS to make the fourth largest telecommunication vendor in the United States. British Telecom has bought MCI, to be called Concert. This merger, subject to approval by the FCC and the Department of Justice, will result in the second largest global carrier after AT&T. See Charles Stein, For New Year, State Will be Ringing in Much of the Old; Same Boring Trends Should Mean Good News, B. GLOBE, Jan. 5, 1997, at D6.
61. Id.
These discounts are designed to counter efforts by the LECs, in areas such as Connecticut, to steal market share for long distance service.

Ameritech, Bell Atlantic, and Pacific Telesis have opted to sidestep regulators to compete for long distance and local telephone service by setting up separate affiliate local phone companies through long-distance subsidiaries. Such companies are unregulated as a result of a loophole created in the Act. This arrangement would permit these LECs to resell local service while they await approval to compete for long distance service. Essentially, these LECs would resell local service to these companies. Many fear, however, that they will offer better interconnection agreements, thereby undercutting competition from long distance providers. Moreover, critics argue that creating separate facilities does not eliminate LEC monopolies in local markets. While under the LECs’ new scheme the name and logo would be modified, such as Bell Atlantic Communications and Bell Atlantic or Pacific Bell Communications and Pacific Bell, it is likely that customers will be confused about where one company ends and the other begins.

Notwithstanding these efforts, many existing LECs, long distance, and cable providers are going to great lengths to protect their own turfs to forestall competition. Among LECs, Ameritech has persuaded customers to “freeze” their accounts, which makes it harder for customers to move to new rivals. In addition, U.S. West has asked regulators to withdraw its Centrex office phone service to prevent newcomers from reselling Centrex service by its rivals. By halting Centrex service, U.S. West is effectively undermining competition. Moreover, American Communications Services (“ACSs”) has filed a complaint against BellSouth for charges for network changes. Bell South charges ACSs only $152 if they alter their network, but charges $17,000 if they move...
to a competitor. Long distance carriers such as AT&T are pushing regulators to bar the LECs from sharing customer data or marketing. Cable companies have followed suit. Time-Warner's HBO network refuses to provide its programming to Ameritech for Bell's new cable systems. In addition, exclusive contracts with Continental Cablevision, Inc. block it from selling to Ameritech.

Whether these current trends will continue remains to be seen. What is beginning to seem clear is that competition will likely take longer and grow on a smaller scale than what was initially presumed.

III. CITY INITIATIVES AS PROVIDERS OF RTNs

Most governments either own municipal utilities or have contracts with existing telecommunication providers to develop and/or maintain government information and communications systems. City initiatives involve municipal utilities who are upgrading or expanding their PVNs, or who have accepted the challenge to upgrade or build municipal RTNs. As PVNs are not regulated by the Act, this discussion will focus on municipal RTNs. RTNs are subject to regulation under the Act to the extent they provide telecommunication services to the public indiscriminately, or act as public switched networks.

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71. Id.
72. Id.
73. The Constitution of the State of California, for example, permits a municipal corporation to own or operate public works to provide communications services to the municipality. CAL. CONST., art. XI, § 9(a). Division 5-6 of the California Public Utilities Code ("CPUC") pertains to the Municipal Utility District Act. See CAL. PUB. UTIL. CODE §§ 11501-14403.5 (West 1994). Moreover, a district may construct or own works for supplying the district with telephone services or other means of communications. Id. § 12801.
74. PVNs do not compete with existing providers for public services and are therefore exempt from regulation under the Telecommunications Act. There is some indication that at the point the PVN links to the public switched network it would be subject to state PUC jurisdiction under the Act. See Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, No. 93-08-026, 1993 Cal. PUC LEXIS 525, at *5 (Aug. 4, 1993).
75. These cities include: Glasgow, Kentucky; Holland, Michigan; Orangeburg, South Carolina; Austin, Texas; Denton, Texas; Manassas, Virginia; Seattle, Washington; Anaheim, California; and Cedar Falls, Iowa. See Grant & Berquist, supra note 4, at 5.
76. See Telecommunications Act § 202(49).
There are approximately 100 municipal RTN programs underway throughout the country, most of which were initiated before the Act. These programs reflect a "bottom-up" approach to infrastructure development where cities, instead of the state, pursue RTNs. A "bottom-up" approach has been used in California, for example, where the cities' needs are too diverse to be effectively addressed by a statewide initiative. As a result, California cities undertake infrastructure development on their own, or in partnership with other cities or counties. California cities such as Anaheim, Santa Clara, San Jose, and Palo Alto are upgrading existing municipally-owned utilities for residential telecommunications services. The City of Anaheim, for example, has a municipally run electric utility and internal telephone system. It has chosen to compete with existing providers by building a Universal Telecommunications System connecting the City’s businesses, schools, residents, and government buildings. The Anaheim system will utilize fifty miles of the Public Utility Department existing fiber optic infrastructure. The issues confronting these cities are: 1) how to leverage their role to develop strategic partnerships with other cities and/or private providers to build RTNs; 2) extract favorable rates and terms to resell from existing and new providers; or 3) some combination of the above.

A. Critical Issues in Developing RTNs

Cities must resolve three critical issues in deciding whether to pursue RTNs. First, cities must decide what type of network architecture will be employed. There are a variety of network configurations that can be employed, such as fiber in the loop, hybrid fiber/coax systems employed by

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77. Grant & Berquist, supra note 4, at 2 (citation omitted).
78. Id. at 1 (citation omitted).
79. See Johnson, supra note 8, at 491-92.
80. Grant & Berquist, supra note 4, at 11.
81. Id.
82. Id. at 10.
83. This is an all fiber configuration where fiber is laid up to a node, be it a subscriber’s curb, a building, or a service area. This technology employs a fiber-fed node with dedicated drops from that node to the subscriber. See also Hamid H. Lalani, The First Hundred Feet: The Local Access Network Perspective (visited Dec. 11, 1996) <http://ksgwww.harvard.edu/iip/lalani.html>.
84. Cable companies traditionally used a tree and branch configuration. To take full advantage of fiber's greater bandwidth, cable companies have converted to a fiber-to-the-feeder ("FTTF") or star-star-bus ("SSB") architecture. The hybrid fiber-coaxial configuration send digital video via fiber to hubs within the community and then utilize existing coaxial lines into subscribers' homes. See Grant & Berquist, supra note 4, at 4.
cable companies, or hybrid fiber/copper or twisted pair systems employed by telephone and electric companies. Each type of system has its advantages and limitations. However, as technology continues to develop, what is state of the art today could well be outdated by the time the network is completed. Some cities are taking a gamble and selecting one standard over another. Most cities, however, are ill equipped to gamble on one or another inasmuch as many cities currently utilize multiple architectures. For this reason, there is some advantage for cities to maintain a degree of flexibility in designing a hybrid system which can be upgradable in five to ten years.

Second, cities must decide the nature and extent of equity participation, and whether they want to compete with existing providers. Cities often seek equity participation to ensure openness and universal access. The level of equity participation that can be negotiated, however, often depends upon a city's contribution to the partnership and the extent to which it is willing to be "at risk" for the debt obligations of the project. Cities typically have public facilities, property, and rights-of-way including poles, which can be contributed, as well as having the authority to waive fees and taxes as incentives for equity participation. In Anaheim, California, for example, the City is to receive a one-time payment of $6 million and annual revenues of $1 million or five percent of gross revenues (whichever is greater) for its rights-of-way and

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85. This configuration enables broadband, passive transmissions, generally required for video delivery systems. Id. at 3. It is not, however, very effective with switched or interactive services such as telephony.

86. Telephone companies use a circuit-switched star configuration, which remains unchanged by introducing fiber. What has changed by using fiber is the conversion from analog to digital and the need for advanced digital switching equipment, as well as fiber transmitters, receivers, and amplifiers. While this configuration has worked well for switched voice, telephone companies have introduced other standards to facilitate better video quality such as ATM, asynchronous transfer mode, or SONET, synchronous optical network. Id. at 3-4.

87. Id. at 9.

88. The City of Austin, Texas, which operates a municipal utility, decided to look for a strategic partner to build an advanced telecommunications network. After two years and 34 respondents, Austin selected Central & South West communications to build a hybrid fiber/coax network to interconnect all homes, businesses, and institutions. Id. at 5-9.

89. See also Lalani, supra note 83, at 1.

90. See also Grant & Berquist, supra note 4, at 4, 10.

91. Id. at 9

92. Id.

93. Id.

94. See sources cited supra note 4.
existing fiber optic infrastructure.\(^95\) Anaheim is still in negotiations with its strategic partner, SpectraNet International, and the system has not been built.\(^96\) Whether the city of Anaheim will realize this revenue remains to be seen.

The possibility of equity participation must be offset by the associated risks of being obligated on the debt. In Austin, Texas, for example, regulators concluded that voters would not approve tax free municipal bond financing for constructing their RTN, so they had to accept less equity participation.\(^97\) Austin’s proposal required a high bond debt of nearly one half of one billion dollars, almost equal to their biggest municipal project, an airport.\(^98\) This factor contributed significantly in their selection process for a provider.

It is important to note that in both the Anaheim and Austin scenarios, their strategic partners are Competitive Access Providers ("CAPs"). CAPs and some long distance carriers seem willing to give cities equity interests because such partnerships give them entry into new markets and assure them a substantial customer to support their investment. Unfortunately, their proposals often include associated risks—risks that all areas will not be serviced or self funded, which many cities are unwilling to accept.\(^99\) Such proposals for equity participation, however, do not seem forthcoming from existing providers. In San Diego, for example, neither of the existing providers proposed equity participation for the City, notwithstanding that it was an important evaluation criteria and goal for the City.\(^100\)

Finally, cities must contemplate how they will finance the project. Financing plans in which a city is not at risk are highly speculative. Anaheim, California is using project financing to develop its network at a cost of $50 million to $60 million.\(^101\) This means that financing for subsequent phases will be contingent upon revenue generated from completed phases. Phase one will connect commercial, industrial, and government buildings with fiber optic cable. Phase two of the plan will extend the telecommunications system to residential areas.\(^102\) However, if there is insufficient revenue from phase one of the project, phase two may never be built.

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96. Grant & Berquist, supra note 4, at 11.
97. Id. at 8.
98. Id.
99. Id.
100. Id. at 11.
101. Grant & Berquist, supra note 4, at 11.
102. Id.
In some instances, the financial risks are such that existing plans must be modified or abandoned. The cities of San Diego, California and Seattle, Washington, for example, abandoned plans to build RTNs or expand their existing public utility after passage of the Act, citing financing risks and technology concerns. Both cities have opted, instead, to upgrade their existing PVNs.

B. Municipal Initiatives for Strategic Partnerships

There is no prohibition against cities forming strategic partners with existing providers or CAPs. However, as suggested earlier, existing providers seem to have little incentive to develop strategic partnerships with cities or with each other. This may be due to a variety of factors.

First, existing providers are already making the capital investment to compete for existing and new telecommunications services. It is generally private industry, not local governments, that has the financial and technical means to develop the infrastructure. As a result, there seems to be little value added in having the government as an equity partner. Moreover, the government could pose a threat to existing providers as a competitor for these services. It is unclear, however, whether the marketplace in most metropolitan areas can support competition by telephone and cable companies, CAPs, and local governments. In addition, some critics question whether this is an appropriate role for cities.

Second, partnerships among providers to create seamless, ubiquitous RTNs are unlikely. Interconnectivity among providers is impractical because telephone companies, cable companies, and CAPs employ different, competing, and oftentimes incompatible technologies to provide the same services. Consequently, from the government's perspective, it may be more prudent to maintain existing relations with multiple providers until the industry becomes more mature.

Third, in many areas, local governments are already contracting with one or more providers for a variety of telecommunication and video services. This dependency would not be eliminated by cities developing a new RTN. Assuming that financing is available, it would still take years before a RTN was developed. The Austin, Texas project, for example, is projected to take six years to complete after a final franchise agreement is completed.

103. Id.
104. Id.
105. See discussion supra pp. 526–27.
106. Grant & Berquist, supra note 4, at 9.
Anaheim, phase one is expected to be completed within two years, while building phase two of their RTN will be done over five years thereafter.\textsuperscript{107}

In the interim, these governments would presumably still have to contract with existing providers or resellers to ensure that government operations continue to function effectively. This will likely result in redundant networks being maintained. In addition, this problem is not eliminated by dealing with CAPs or resellers. Resellers and CAPs must still negotiate interconnectivity with existing providers, which has been found in many instances to be very difficult.

Fourth, building a RTN from the bottom up without a partner is often-times not fiscally possible. The capital costs are significant and there is great uncertainty about the applications and services which are needed to generate the revenue to support such a network. There are also recurring management and administrative costs, which often cannot be met from existing revenue sources. Many cities lack the in-house technical support to perform these tasks, which means those services must be contracted to outside vendors. Existing providers and resellers have a competitive advantage here because they have the benefits of economies of scale achieved by restructuring their services using shared resources. This gives them existing revenue streams to offset the capital costs of upgrading their systems. Existing providers are being conservative in their expansion plans by upgrading their systems in stages to ensure that revenue from new applications and services will justify their investment. Consequently, it is doubtful that a city could offer more competitive rates and services in the short term than would be available from existing providers.

C. Regulation of Municipal RTNs Under the Act

There are two ways a municipal RTN can provide telecommunication services to the public. The first is as a facilities-based carrier, where a city would own, control, operate, and/or maintain.\textsuperscript{108} The second is as a reseller, where a city would not construct any facility but would purchase unbundled network elements from the LEC or resell an incumbent's retail service.\textsuperscript{109}

As a facilities-based carrier, a municipal RTN can sell or lease their facilities, lines, or conduits to any person.\textsuperscript{110} A municipal RTN would be

\textsuperscript{107} Id. at 11.
\textsuperscript{109} Id.
\textsuperscript{110} See CAL. PUB. UTIL. CODE §§ 12804–12808 (Deering 1990).
required to file tariffs with the state PUC for telecommunications services, as would other telecommunication carriers. In addition, a facilities-based carrier must also make its services available for resale to other telecommunication carriers on a nondiscriminatory basis.\footnote{Id. \$\,1001. Decisions granting Certificates of Public Convenience and Necessity for all facilities-based carriers are further required to provide services for the Deaf and Disabled (they can be the resale of LEC services) and 611 repair service. Finally, redlining is prohibited and subject to strong action by the FCC. Id. \$\,4.}

In California, for example, municipal facilities-based carriers must provide service to any customer who requests it and is located within 300 feet of their transmission facilities.\footnote{See id. at app. E.} They are not required to build out facilities further than 300 feet, although it could readily service such customers through the use of unbundled wireline or wireless local loops obtained from a LEC. Additionally, such carriers must submit a Proponent's Environmental Assessment for any construction project that will withstand review under the California Environmental Quality Act.\footnote{See California Public Utilities Commission Decision 95-12-056, app. C, at 9 \$\,F (Dec. 20, 1995).}

Cities can also be resellers of LECs such as Pacific Bell or GTE for local and intralATA services, as well as for interLATA services from any other certificated provider. As a reseller, a city would not be limited to providing services within the city or the surrounding region, but could apply for statewide authority.\footnote{See California Public Utilities Commission Decision 95-12-056, app. C (Dec. 20, 1995).}

As any other telecommunications carrier, a city RTN would be required to serve all customers requesting service within its designated territory on a nondiscriminatory basis.\footnote{Id. \$\,The city would be required to provide 1+ presubscription or 10xxx equal access to any interexchange carrier which subscribes to its switched access services. Id. \$\,F(5).} The service area map must be filed with the state PUC. The bulk of certification requirements pertain to financial qualifications that a city should be able to meet.\footnote{See California Public Utilities Commission Decision 95-12-056, app. C (Dec. 20, 1995).}

RTN providers will likely qualify for a Certificate of Public Convenience and Necessity ("CPCN") for local, intralATA, and interlATA telecommunications services within the state. The certification requirements are not onerous and are easier for resellers, who do not have to construct facilities,
than for facilities-based services.\textsuperscript{117} Many facilities-based providers are also authorized resellers.

If a municipal RTN uses any type of satellite services, the FCC has the authority to regulate such services.\textsuperscript{118} The FCC has the exclusive jurisdiction over Direct Broadcast Satellite services and can preempt tariff and rate regulation of competitive telecommunications companies without market power.\textsuperscript{119} As a result, cities cannot impose any taxes or fees on satellite services providing direct-to-home programming,\textsuperscript{120} nor can they impose any assessment or tax for the privilege of doing business, regulating, or raising revenue.\textsuperscript{121}

Municipal RTN services provided through radio bands or microwave technologies would require an FCC license,\textsuperscript{122} if they have not already obtained such authority.\textsuperscript{123} Many municipally-owned public utilities are set up as cooperatives and are therefore exempt from regulation governing utilities, rights-of-way, or pole attachments.\textsuperscript{124} As a result, municipal utilities would have broad discretion in their service offerings and operations.

While the Act generally permits a reasonable rate of return on interconnection fees of a LEC or a facilities-based provider, cities such as San Diego, California generally are precluded from making a profit on business enterprises absent specific authorization.\textsuperscript{125} Municipal utilities, generally, may set rates and charges for their services which will allow them to be self-supporting.\textsuperscript{126} However, they are restricted in being able to charge for large expenditures and the interest thereon for future needs.\textsuperscript{127} As a result, municipal RTNs could not include a profit charge for access or fees.

\textsuperscript{117} Neither certification process is particularly difficult, and many state PUCs try to expedite the processing of all such applications.
\textsuperscript{118} Telecommunications Act § 205(b).
\textsuperscript{119} Id.
\textsuperscript{120} Id. § 602(a).
\textsuperscript{121} Id. § 602(b)(5).
\textsuperscript{122} The FCC maintains statutory authority to grant licenses to the communications industry. T. Barton Carter et al., Mass Communication Law 328 (West Publishing, 4th ed. 1994).
\textsuperscript{127} Id.
IV. CITY INITIATIVES AS USERS OF RTNs

As users of a RTN, cities have two primary goals: 1) to ensure favorable rates for city government services and 2) to ensure that all city residents have universal access to telecommunication services at affordable prices. In some ways, these two goals seem at odds with each other. The need for reasonable access and interconnection rates from providers must be reconciled with universal access which must be subsidized by providers. While universal service will likely be achieved through federal and state regulation, it is included as a "user need" because cities can sometimes leverage their role as users to obtain favorable disposition for their residents.

A. Leveraging City User Needs for Favorable Rates

Cities who choose not to build RTNs may instead opt to upgrade their existing PVNs and rely upon competition from private providers to address city concerns. Sunnyvale, California chose not to compete as a gateway with private providers. Instead, the City has formed a strategic partnership with nine other Santa Clara counties to aggregate their purchasing power with existing providers. This partnership is negotiating with Pacific Bell to rebuild its county infrastructure to enable video and data services in addition to voice services. To meet internal needs, the City has designed, administered, managed, and maintained its own PVN. The PVN provides interconnectivity to other government sites using a FDDI fiber backbone with inter and intranet nodes and wired remotes sites using ISDN lines. The school districts operate autonomously but will have access to the City's network.

The City of San Diego has joined with San Diego County to develop a Private Virtual Network to service their internal and regional needs. The PVN will be composed of San Diego's existing networks called SanNet,
which serve the city government, city and county libraries, and several regional justices within the San Diego LATA. This network includes a private, switched, integrated PBX telephone network and a broadband data network linking Local Area Networks.\textsuperscript{136} It is proposed that this network will be upgraded and expanded with fiber nodes.

Where cities or regions have decided to aggregate their collective user needs, they have been able to negotiate favorable terms, such as postalized rates, for access from existing providers. Postalized rates are flat rate charges that are not based on distance.\textsuperscript{137} The State of Ohio, for example, has been able to obtain favorable postalized rates for government and institutional users negotiating directly with existing carriers, Ameritech and LCI.\textsuperscript{138} While such rates do not include commercial or resell use, it does seem to indicate that existing providers are amiable to providing some discounts for aggregated services.

B. Universal Service

The challenge for universal access is to design a market system that will drive subsidy levels down over time.\textsuperscript{139} Traditionally, "universal service" has meant access to basic telephone service.\textsuperscript{140} Under the Act, "universal service" will mean affordable telecommunications services for everyone, including

\begin{itemize}
  \item \textsuperscript{136} \textit{Id.} at 7.
  \item \textsuperscript{137} Postalized rates are generally divided into interLATA and intraLATA rates but not based upon a per mile distance. In some instances, these rates can also include flat rates not tied to per minute or per usage units, typically found in switched lines. Interview with Fredric Goldberg, Senior Network Architect, NASA Lewis Research Center (Dec. 27, 1996).
  \item \textsuperscript{138} Interview with Paul Karas, Contractor for the Department of Administrative Services, State of Ohio (July 1996). Ohio originally proposed to build a $180 million statewide broadband fiber optic network known as State of Ohio Multi-Agency Communications System ("SOMACS") to connect state buildings, local governments, schools, libraries, and universities. Telecommunications Subcommittee Report, Prepared for Inter-Agency Telecommunications Committee, State of Ohio, 10-14 (1993). The State rationalized that it was not cost effective or reliable for the government to manage, maintain, and service the network, even though the State was interested in some equity participation. As a result, the State concluded that it was better to contract with existing carriers to service its needs on their networks. These carriers were selected over other existing providers in part because of their superior pricing schedule and willingness to postalize the rates. The SOMACS system is restricted to state functions including government and institutional operations. \textit{Id.}
  \item \textsuperscript{139} Statement of Reed E. Hundt, \textit{supra} note 54, at 7.
every classroom, library, and health care facility. When and how this will be achieved has been delegated to a new joint State-Federal Board (the "Board") established under the Act. It is noteworthy that city participation has been conspicuously excluded from the Board. This is a fundamental flaw in implementing universal service because all communications efforts begin and end with the local loop. Until this is remedied, the cities' only leverage to ensure universal access is through their role as a user or contractor in negotiating agreements with existing providers.

What is known is that the universal service pool will require subsidies of approximately $12 billion. The largest piece will be for residential rate assistance. One proposal is to fund the pool using a nondiscriminatory compensation structure that includes a variety of payment forms: "cash, capacity, service and cooperative local infrastructure development."

The Act requires the Board to make recommendations to the FCC, which is authorized to establish and conduct periodic reviews of rules to define and promote universal service and access. The Act provides certain concessions for municipal institutions, subject to some restrictions. Rates

141. See Statement of Reed E. Hundt, supra note 54, at 7. The Board recently redefined universal service to reflect "evolving" levels of services including access to advanced services that change as technology improves.

142. Section 254(b) establishes the following principles for ensuring universal access: 1) to provide quality services at just, reasonable, and affordable rates; 2) to furnish all regions of the Nation with advanced telecommunications and information services; 3) to provide all consumers with access to similar service; and 4) to try to nondiscriminatory preserve and advance universal service. Telecommunications Act § 254(b).

143. Trainor, supra note 140, at 5.
144. Statement of Reed E. Hundt, supra note 54, at 7.
145. Id.
146. Trainor, supra note 140, at 4.
147. See Telecommunications Act § 402(a).
148. Id. § 254(c)(3). This definition currently includes special services provided to schools, libraries, and health care providers.
149. Id. § 254(c).
150. Id. § 254(h)(5)(C).
151. The city would be specifically precluded from reselling any services provided to the schools, health care providers, or libraries for compensation. Id. § 254(h)(3). Providers cannot, for example, resell Internet access to third parties if it was provided under this program. The city would, however, be eligible for favorable cost treatment for any schools with an endowment of less than $50,000,000 or libraries that participate in state-based funds under Title III of the Library Services and Construction Act. Telecommunications Act § 254(h)(4).
provided by "eligible telecommunications carriers"\textsuperscript{152} for service to public schools and libraries for educational purposes shall be discounted by an amount determined by the FCC and the state PUC to ensure affordable access.\textsuperscript{153} The FCC is also required to establish "competitively neutral" rules to enhance advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries. Moreover, a telecommunications carrier would not be able to cross subsidize non-competitive services with competitive services.\textsuperscript{154} This means that the pricing of government-based services would be independent of pricing for educational related services. What is unclear is whether these provisions will ensure more favorable rates than if cities, by aggregating their needs, negotiated with ineligible carriers.

Another option for cities is to provide incentives to providers for access to public rights-of-way in exchange for universal service. Sunnyvale, California, for example, advocates that providers be required to maintain open networks through their common carrier obligations.\textsuperscript{155} The City wants to allow private investors access to public rights-of-way for no or low cost as compensation in lieu of full or partial encroachment fees.\textsuperscript{156} By leveraging municipal resources and facilities, cities may be able to ensure that residents get affordable access to telecommunication services such as Internet access.

\section*{V. Impact of Act on City Initiatives as Regulators of RTNs}

Cities regulate RTNs under the Act through control over access to public rights-of-way\textsuperscript{157} and in exercise of their franchise authority.\textsuperscript{158} The major issue for cities as regulators is the extent to which they can impose recurring or annual fees or other charges on telecommunication providers pursuant to their

\textsuperscript{152} Eligible telecommunications carriers are common carriers or entities designated as such by the state PUC as eligible to receive Federal Universal Service Support for health, education, and library services. 47 U.S.C. § 214 (1994). This section was amended by section 102(e)(1) of the Telecommunications Act.

\textsuperscript{153} Telecommunications Act § 254(h)(1)(B).

\textsuperscript{154} Id. § 254(k).

\textsuperscript{155} Sunnyvale Telecommunications Policy, \textit{supra} note 6, at 20.

\textsuperscript{156} Id.

\textsuperscript{157} See, e.g., Saathoff v. City of San Diego, 41 Cal. Rptr. 2d 352, 354 (Cal. Ct. App. 1995). Section 105 of the San Diego City Charter vests control in the City over the use of the streets and other public places.

\textsuperscript{158} See, e.g. \textsc{San Diego City Charter} ch. 44 (1993), § 103 Franchises; § 103.1 Regulation of Public Utilities; § 104 Term and Plan of Purchase; and § 105 Right of Regulation (granting San Diego the power to grant franchises to any person, firm, or corporation).
franchise authority. A franchise is "created when a governmental agency authorizes private companies to set up their infrastructures on public property in order to provide public utilities to the public."160

A. Franchise Fee Obligations on Video Providers

Cities exercise local franchise authority over cable companies and other video providers by granting nonexclusive franchises.161 These franchises are adopted by city ordinance through a negotiated franchise agreement. The grant of a franchise neither precludes cities from building their own video delivery system162 nor prevents cities from granting other franchises.163 Under cable franchise agreements, entities are generally required to pay annual franchise fees tied to a percentage of their gross revenues. In addition, cities may negotiate other concessions, such as public access channels.164

In Sunnyvale, California, for example, the City currently has franchise agreements for wireless communications with MetroCom and for cable TV services with TCI.165 Under these agreements, the franchisee pays five percent of gross revenues to the City which are deposited in the general fund.166

Notwithstanding local franchise authority, cities are expressly preempted from imposing franchise obligations on cable companies providing telecom-

159. In San Diego, for example, the City Council is empowered to: 1) provide reasonable terms and conditions of operation; 2) certify franchises for specific terms in accordance with the laws of the State; 3) terminate the franchise where the welfare of the City necessitates; 4) vest in the City plenary control over all primary and secondary uses of the City's streets and public places; and 5) grant franchises as prescribed by ordinance with the franchisee paying compensation to the City in the amount set forth in such ordinance. Id. § 105.

160. Saathoff, 41 Cal. Rptr. 2d at 356.

161. In San Diego, for example, the City Council granted a nonexclusive franchise to American Television and Communications Corporation. San Diego, Cal., Ordinance 0-15213 (Mar. 10, 1980). This franchise covers all areas in the corporate limits of the City of San Diego and automatically terminates in the year 2010 with the provisions of the ordinance renegotiable every fifth year. Id. § 6.

162. A franchisee does not have a cause of action for diminished value should the city build a RTN which focuses on video program services. In Helena Water Works Co. v. Helena, 195 U.S. 383, 388 (1904), the Supreme Court clearly stated that "the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted" to the franchise holder.


165. Telephone Interview with Shawn Hernadez, supra note 133.

166. Sunnyvale Telecommunications Policy, supra note 6, at 12–13.
communications services under the Act.\textsuperscript{167} This means that while cities could grant competing franchises for cable television services,\textsuperscript{168} they could arguably not extract additional concessions from existing franchisees seeking to provide telecommunications services.\textsuperscript{169} Moreover, they could not condition the grant of any franchise or renewal on providing telecommunications services.\textsuperscript{170} In the event of a sale, however, this would not preclude cities from negotiating favorable concessions from a cable company. The City of Seattle, Washington for example, following a sale of the cable franchise by Viacom to TCI, is leveraging its position to negotiate with TCI for favorable residential high speed Internet access.\textsuperscript{171}

Cities may also impose fees on LECs that provide video programming under “open video systems.”\textsuperscript{172} These fees are tied to the gross revenue in lieu of franchise fees in cities subject to statewide franchises. The only caveat is that the rates cannot exceed the fees imposed on cable operators.\textsuperscript{173}

B. \textit{Just Compensation for Use of Rights-of-Way}

Cities are specifically authorized by the Act\textsuperscript{174} and the state PUCs\textsuperscript{175} to receive “just and reasonable” compensation for use of their rights-of-way, as well as for roof rights for wireless service proceeding. Moreover, these rights may not be unnecessarily withheld. Cities are permitted to establish such fees

\textsuperscript{167} Telecommunications Act § 303(a)(3)(C).

\textsuperscript{168} A “cable television system” is defined as a system of antennas, cables, wires, lines, towers, waves guides, or any other conductors, converters, equipment, or facilities designed and constructed for the purpose of producing, receiving, amplifying, and distributing, audio, video, and other forms of electronic or electrical signals. \textit{Id.}

\textsuperscript{169} \textit{Id.} § 303(a)(3)(D).

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} Grant & Berquist, \textit{supra} note 4, at 11.

\textsuperscript{172} Telecommunications Act § 653.

\textsuperscript{173} \textit{Id.} § 653(c)(2)(B).

\textsuperscript{174} Section 253(c) provides in pertinent part: “Nothing in this section affects the authority of a . . . local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, . . . if the compensation required is publicly disclosed by such government.” \textit{Id.} § 253(c).

\textsuperscript{175} The CPUC provides in part:

It is therefore the intent of the Legislature that public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights-of-way and easements for the installation of fiber optic cable, and that . . . publicly owned utilities have the ability, if they so desire, to negotiate a purchase, lease, or rent of access to those fiber optic cables for their own use.

\textbf{CAL. PUB. UTIL. CODE} § 767.7(b) (Deering 1990).
by negotiated contracts on a nondiscriminatory, competitively neutral basis.\textsuperscript{176} Once the fees have been established, they must be filed with the state PUC.\textsuperscript{177} The FCC and state PUCs have jurisdiction to review such fees following a complaint that they are unreasonable.

Some argue that any fees imposed must be tied to actual or incremental costs, or some related cost formula versus a revenue based formula.\textsuperscript{178} Moreover, while there is no specific language that fees may be charged on an on going basis, reliance on the pole attachment provisions suggest that cities may be able to charge annual fees if they own and operate RTNs, or own their conduits or poles. The problem confronting many cities like San Diego is that they do not own existing utilities or facilities.

The Act preempts cities from taking any action that would be construed as imposing a market barrier.\textsuperscript{179} Whether cities have violated this restriction is left to the states,\textsuperscript{180} which generally are sympathetic to existing providers to protect their interests and to foster competition.\textsuperscript{181} Neither the FCC, nor most state PUCs, have addressed city entitlements to compensation for private use of public rights-of-way. As a result, city authority to regulate RTNs is limited, and the scope of their ability to receive compensation remains unclear. This is particularly problematic for some cities in states like California.

**C. Franchise Fee Obligations on Public Utilities**

Franchise requirements are generally imposed on any public utility, which include the entities supplying inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication.\textsuperscript{182} Telephone companies\textsuperscript{183} in states like California, however, have a statewide franchise which limits a city's ability to collect annual fees.\textsuperscript{184} This statewide

\textsuperscript{176.} Id.
\textsuperscript{177.} See Telecommunications Act § 252(h).
\textsuperscript{178.} See id. § 252(d); see also CAL. PUB. UTIL. CODE § 767.5 (Deering 1990).
\textsuperscript{179.} Section § 253(a) provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Telecommunications Act §253(a).
\textsuperscript{180.} See id. §§ 252(b)(1), 703 (regarding arbitration and pole attachments).
\textsuperscript{181.} Grant & Berquist, supra note 4, at 9.
\textsuperscript{182.} See, e.g., SAN DIEGO CITY CHARTER ch. 44, § 105 (1993).
\textsuperscript{183.} The California Public Utilities Code defines telephone corporation as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State." CAL. PUB. UTIL. CODE § 234 (Deering 1990).
\textsuperscript{184} Section 7901 states that a "telephone corporation may construct lines... along and upon any public road..." CAL. PUB. UTIL. CODE § 7901 (West 1996).
franchise applies to all telephone companies operating within the state, even if they also provide video and data services.\footnote{185} This restriction does not apply, however, to other public utilities like electric companies, nor does it preclude cities from imposing utility user taxes.

Sunnyvale, California for example, proposes to create an advanced digital, broadband, telecommunications infrastructure.\footnote{186} Pacific Bell, as the LEC, and alternative service providers are exempt from local franchising requirements including franchise fees, but must obtain encroachment permits for underground construction.\footnote{187} The City also has an indefinite franchise agreement with Pacific Gas & Electric for gas and electric service, under which it pays a franchise fee of one percent of gross revenues. PG&E has unrestricted access to rights-of-way, although it also must obtain an encroachment permit, but it is not subject to the customer service standards imposed on TCI as its cable provider.

While state PUCs like the California Public Utilities Commission preclude cities from collecting franchise fees from telephone companies, PUCs do allow annual, recurring fees\footnote{188} to be assessed by telephone companies and other public utilities. This is in addition to an “annual cost of ownership”\footnote{189} for access to private utility poles and supporting structures.\footnote{190} This disparity in the ability to collect compensation for public and private rights-of-way is unjustifiable. In essence, these cities cannot collect annual franchise fees from telephone companies for use of public streets even though these same companies can charge others for access to their privately owned conduits.\footnote{191} This

\footnote{185} Id. § 7901(3).
\footnote{186} Sunnyvale Telecommunications Policy, supra note 6, at 6.
\footnote{187} Id. at 7.
\footnote{188} In California, for example, the annual fee for pole attachment shall be $2.50 in the first year. Thereafter, the annual fee shall be $2.50 or 7.4\% of the public utility’s annual cost of ownership for the pole and supporting anchor. CAL. PUB. UTIL. CODE § 767.5 (c)(2)(A) (Deering 1990).
\footnote{189} “Annual cost of ownership” means the sum of the annual capital costs and annual operation costs of the support structure[s] . . . owned by the public utility. The basis for computation of annual capital costs shall be historical capital costs less depreciation.” Id. § 767.5(a)(9).
\footnote{190} “Supporting structure” includes a duct or conduit, manhole, or handhole. Id. § 767.5(a)(2).
\footnote{191} The Telecommunications Act imposes on all LECs obligations to provide resale, access to rights-of-way, and establish reciprocal compensation arrangements for transport and termination of traffic. Telecommunications Act § 251(b).
means that these cities arguably will not receive franchise fees from resellers of LEC telecommunication services or others who interconnect with LECs. 192

Cities do have the right to impose permit fees, such as the encroachment fees previously discussed. 193 Such fees are fixed, one time costs that are nominal and would not account for on going maintenance of public rights-of-way.

D. Alternatives for Non-Municipal Utility Cities

There are two possible alternative sources of revenue that may be available to cities who do not own municipal utility facilities, such as poles or conduits, and/or who are subject to statewide franchise restrictions. The first is for cities to build municipally-owned conduits for public and private access. The second is imposing utility user taxes on telecommunication providers.

Under the first option, cities would continue to process permit applications of existing carriers for access to existing private conduits or poles, until they reach capacity. Cities could then require that all new installation of lines or networks be through conduits that the city would install and/or maintain. 194 This action would presumably be pursuant to a telecommunication policy that recognized the city’s role as a facilitator or regulator to coordinate access and use of public rights-of-way.

It is ill-advised to apply this requirement to existing conduits because such action would likely constitute a taking, requiring compensation by the government. A phased-in approach, however, allows existing facilities to continue to operate while addressing the likely proliferation of new telecommunications carriers, and, therefore, the increased need in access to infrastructure conduits.

Such an approach could be justified on four grounds. First, cities have the authority pursuant to their police powers to coordinate among access providers.

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192. It is noteworthy that section 7901 of the CPUC is outdated and needs to be revised to account for new technology such as fiber optics and the convergence of services which allow cable to provide telephony over its coaxial lines. Instead, it focuses upon the method of transmission as a point of distinction for application of statewide franchise rules. CAL. PUB. UTIL. CODE § 7901.

193. See SAN DIEGO MUNICIPAL CODE § 62.0102 (1992) (governing city rights-of-way). The Code also allows the City Council to establish a schedule of fees for permits to improve or encroach within rights of way. Such fees may include fixed charges to cover the City costs. Id. § 62.0109.

194. It is possible that this may be subject to legal challenge as a market entry barrier to the extent it precluded a carrier from engineering its network in the most efficient manner from a technical and economic perspective.
and establish a process for gaining access to city rights-of-way. If all new cables, lines, etc. were passed through city owned conduits, it would minimize the likely disruption to streets which cause congestion and a potential public hazard. In this way, cities would be leasing space in their conduits, which is consistent with their rights as municipal utilities or telecommunication carriers.

Second, the Act clearly contemplates that interconnection for telecommunications services be implemented through a coordinated planning process. Establishing a process through city ordinance would effect the purpose to minimize redundancy, maximize planning and coordination, and facilitate interconnectivity. Third, as long as the rates were competitively neutral, nondiscriminatory, reasonable, and did not prohibit any telecommunications carrier from entering the market, there likely would be no basis for state or federal preemption.

Finally, the LECs and cable companies still would be able to utilize their existing conduits for internal expansion, or lease space on their poles and conduits to third parties until they reach capacity. As new providers would have a choice in who to lease capacity from, this approach would not likely be construed as anticompetitive.

Cities could also consider imposing utility user taxes on users of utility services which include public utilities, cable and telephone companies, and arguably telecommunications carriers. The City of Sunnyvale imposes a utility user tax of two percent on all utilities, including PG&E and Pacific Bell. In many instances, utilities collect the tax from users to give to the state. States then distribute to cities on a proportional basis. Such taxes are authorized generally by federal statute but also must be specifically author-

195. Section 62.0105(c) provides:

A permittee shall notify all public utilities of his request to construct improvements or encroachments with the rights-of-way and shall coordinate with the public utilities in order that any necessary relocations of existing facilities may be done in an orderly fashion without interrupting the continuity of service or endangering life or property.

SAN DIEGO MUNICIPAL CODE § 62.0105(c).

196. Section 256(a)(1) of the Act established procedures used when there is an oversight by the Commission regarding coordinated network planning and design by telecommunications carriers and other providers for interconnectivity. Telecommunications Act § 256(a)(1).


198. The City of Sunnyvale imposes the utility user tax on alternative access providers. Sunnyvale Telecommunications Policy, supra note 6, at 12.

199. Id.

200. The Internal Revenue Code permits the imposition of a 3% tax on local telephone service, toll, and teletype service. I.R.C. § 4223 (1997). This tax does not apply to private
ized in each state's constitution and under city charter or authority. Utility user taxes are not specifically addressed by the Act.

It is important to note that while such taxes may not be viewed as a market barrier, taxes generally are perceived by industries as disincentives to economic development in an area. San Diego, for example, uses the fact that it does not impose user taxes as an attraction for new businesses to the area. Consequently, imposing a utility user tax is recommended only as a last alternative and where there are other incentives that can offset any adverse perception.

VI. CONCLUSION

There is no question that RTNs will be developed and that cities will play critical roles. The exact nature of that role will undoubtedly depend upon a variety of factors. Chief among them will be a city's existing resources, such as whether it owns its own utility; the level of risk it is willing to assume; and the level of interest from existing and new providers to form strategic partnerships. It is this author's opinion that cities should focus attention on developing strategic partnerships among themselves and other institutional users which can be leveraged in negotiating favorable terms from existing providers. In many ways the uncertainty associated with technology may warrant that cities use a combination of technologies until network systems become ubiquitous. It is likely that the revenue generator for cities will be applications and services it chooses to provide, rather than revenue from owning the pipeline. What is important is that cities move forward in some direction now. The information highway is being built, and cities need to have access to some infrastructure that enables them to compete on it.

systems or enhanced services, defined as communication services furnished to a subscriber that gives subscriber exclusive or priority use of channel or to intercommunication systems for the subscriber's station regardless of whether connected through switching network. Id.

201. See Johnson, supra note 8, at 521–22. Taxes should be distinguished from fees in that taxes are a public burden imposed on citizens for government purposes without reference to particular individual or property. They are generally imposed to raise money for the government. An assessment or fee is imposed for improvements and is beneficial to particular individual and imposed in relation to benefit. See also Fenton v. City of Delano, 208 Cal. Rptr. 486 (Cal. Ct. App. 1984).
On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom

Diane Heckman

TABLE OF CONTENTS

I. INTRODUCTION: TITLE IX ............................................................. 546

II. PROCEDURALLY ........................................................................... 550

III. EDUCATION .............................................................................. 552

   A. Generally .............................................................................. 552
   B. Public Military Schools ................................................................ 555
   C. Prison Education ...................................................................... 558

IV. EQUAL OPPORTUNITY ON BEHALF OF STUDENTS ................... 562

   A. Cross-Over Cases .................................................................... 563
   B. Female Student Athletes ............................................................ 565
      1. Intercollegiate Level ............................................................... 565
         a. Cases Commenced Pre-1994 Seeking Reinstitution of Varsity Teams .................................................................. 565
         b. Cases Commenced Pre-1994 Seeking Elevation of Club Teams ................................................................................. 579
         c. Cases Commenced During 1994–96 Seeking Elevation of Club Teams ................................................................. 579
         d. Other Cases Commenced During 1994–96 ......................... 585
      2. Interscholastic Level ............................................................... 585
   C. Male Student Athletes .............................................................. 587

V. EQUAL OPPORTUNITY IN ATHLETIC EMPLOYMENT .............. 592

   A. Hiring ................................................................................... 595
   B. Equal Pay ............................................................................... 596
   C. Termination ............................................................................. 600
      1. Cases Commenced Pre-1994 ..................................................... 600
      2. Cases Commenced During 1994–96 ........................................ 607
   D. Retaliation ............................................................................... 612

Today, education is perhaps the most important function of state and local governments. . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

—Chief Justice Earl Warren

I. INTRODUCTION: TITLE IX

On February 26, 1992, the United States Supreme Court, in Franklin v. Gwinnett County Public Schools, announced that "[i]n sum, we conclude that a damages remedy is available for an action brought to enforce Title IX." This decision has ushered in the post-modern era of Title IX activity. June 23, 1997 will mark the silver anniversary of the passage of Title IX.
This article examines the representative issues and battles being fought in the educational forum concerning sex discrimination in academics and athletics. The years 1994 and 1995 represented a mixed bag for Title IX of the Education Amendments of 1972 ("Title IX"). The year 1996 resulted in an avalanche of major decisions in this area, which will also be explored. The Title IX statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." This article focuses on Title IX as it pertains to interscholastic and intercollegiate athletic programs and activities. Due to the influx of decisions concerning Title IX generally, all of the Title IX decisions rendered since 1994 will be probed. There were no changes to the Title IX statute itself, though Congress enacted a truth-in-advertising type of statute, entitled the "Equity in Intercollegiate Athletics Act," and the Office for Civil Rights ("OCR") implemented regulations. The new Act concerns compiling and making available financial information relating to intercollegiate athletic departments which receive federal funds, either directly or indirectly, through their universities.

The Title IX regulations were enacted in 1975. To date, no changes have been made. The 1979 Health Education & Welfare ("HEW") Policy Interpretation addressing intercollegiate athletics also remains unchanged. The United States Department of Education, through the OCR, is the main entity responsible for enforcement and compliance with Title IX. During April 1990, the OCR unveiled a new Title IX Athletics Investigators Manual. No changes were made to the Manual despite the meetings that were held during this period to review it. The OCR's actual budget for fiscal year 1995

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toted the incredulous amount of $58,236,000. Congressional hearings were held on Title IX during May 1995. As a result, during September 1995, the OCR delivered a draft policy clarification entitled “Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test.” During January 1996, the OCR issued the official “Clarification of Intercollegiate Athletics Policy Guidance.” The states directed few bills to the issue of gender equity in academic athletic programs and activities.

The major issues raised in this time period are: 1) should the “effective accommodation” test be used in analyzing whether a school is satisfying the interests and abilities of students of each sex when separate athletic programs and activities are provided; 2) whether a Title IX cause of action exists for an employee of an educational institution based on sex discrimination, as opposed to merely a Title VII of the Civil Rights Act (“Title VII”) cause of action; 3) assuming arguendo that Title IX allows a private cause of action for athletic department employees of educational institutions, then what protection does Title IX provide where the coach of the women’s athletic team is paid less than the coach of the men’s team, coaching the same sport, primarily due to the sex of the athletes involved; 4) what standard applies to analyze a Title IX sexual harassment action; and does the standard differ based on whether the sexual harassment concerns a student versus an educational employee, or when the offending party is another student (peer sexual harassment), or another individual; 5) procedurally,
which statute of limitations should be used for a Title IX cause of action, and; 6) does Title IX foreclose a cause of action under 42 U.S.C. § 1983, and vice versa.13 Is Title IX really an enigma?

The overwhelming number of cases commenced, subject to court decisions, or settled concerned female employees of athletic departments—coaches, athletic directors, or trainers—were predicated on claims of sexual discrimination or retaliation pursuant to three possible federal statutes: Title IX, Title VII, or the Equal Pay Act of 1963 ("Equal Pay Act").14 There continues to be an absence of a uniform judicial standard concerning these cases from a Title IX perspective.15 There was a lot of activity concerning female collegiate students seeking to enforce gender equity. A handful of cases were brought by male collegiate students, all seeking to forestall internment of their varsity sports teams. The courts turned back all their attempts. The first co-ed gender equity claims relating to athletics were commenced during the time period. Surprisingly, there was scant legal action instituted concerning interscholastic athletic programs, which continues the trend of 1992–93. Interestingly, the courts rendered the first of a handful of decisions concerning educational programs and activities afforded female prisoners in this country, which underscored their second-class status in this institution.

Collectively, the decisions rendered during 1994–95, with a few exceptions, have a meandering quality about them. Conversely, the decisions handed down during 1996 were being delivered at a staccato pace, with the effect of a volcanic eruption.16 Part Two reviews decisions involving

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procedural aspects of Title IX. Part Three examines cases dealing with education generally, including separate programs for men and women at public military schools and at prisons (federal and state). Part Four switches to athletic departments, programs, and activities, and monitors decisions involving student athletes and prospective student athletes on the interscholastic and intercollegiate level. Part Five showcases decisions concerning athletic department employees or former employees—brought pursuant to Title IX, but frequently pursuing other federal statutes—in four areas: hiring; equal pay and benefits or comparable pay; termination claims predicated on sex discrimination; and retaliation claims. Part Six focuses on educational employment termination or retaliation generally. Part Seven details the implosion of Title IX case law pertaining to sexual harassment of students or educational employees. This area is subdivided into six categories depending on the status of the individual who allegedly engaged in the harassing actions and the status of the individual allegedly harassed, and includes: coach/student athlete; teacher/student; supervisor/student; other/student; student/student (peer sexual harassment); and educational employment sexual harassment. Part Eight monitors the congressional and federal regulatory action of the United States Department of Education and the OCR.

II. PROCEDURALLY

In Egerdahl v. Hibbing Community College, the Eighth Circuit utilized the Minnesota six-year statute of limitations utilized for personal injury actions for a Title IX claim, eschewing a one-year statute of limitations pertinent to the state civil rights actions (Minnesota Human Rights

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Likewise, the Sixth Circuit, in *Lillard v. Shelby County Board of Education*, applied the Tennessee personal injury statute of limitations, rejecting the 180-day period used for filing Title VI administrative complaints. Moreover, during 1994, the district court in *Linville v. Hawaii* concluded that the statute of limitations for filing a Title IX claim is separate and distinct from the statute of limitations imposed for Title VII claims, even if the underlying facts triggering both claims are the same.

In *Topol v. Trustees of University of Pennsylvania*, the plaintiff was allowed to add a claim of retaliation under Title IX. The district court in *Mann v. University of Cincinnati* held that the Title IX scheme is comprehensive enough to subsume 42 U.S.C. § 1983 claims based on other constitutional guarantees, while the Sixth Circuit resolutely came to the opposite conclusion during 1996 in *Lillard*. During 1994, the district court in *Stern v. Milford Board of Education* resolved that an elementary student could pursue a Title IX claim for sexual harassment against the school board due to peer sexual harassment, even though a state claim had been filed. The Seventh Circuit, in *Waid v. Merrill Area Public Schools*, determined that a state claim did not prevent a female employee from pursuing a Title IX claim against the school district.

There is a growing judicial consensus that the parents of a student are not proper party plaintiffs in Title IX actions. However, whether individ-
nal coaches and teachers are proper party defendants, pursuant to Title IX, has resulted in opposite conclusions. Nonetheless, it would behoove the plaintiffs' practitioner to continue to include such individuals in the lawsuits since other causes of action alleged may necessitate such inclusion.

III. EDUCATION

A. Generally

In Clemes v. Del Norte Country Unified School District, the district court found that a former teacher, a white male, supervising an Independent Studies Program, which had an enrollment of Native Americans, the majority of which were females, had standing under Title IX to pursue a claim of retaliation, allegedly attributed to his actions in seeking to protect the rights of the aforementioned. 29


29. Id. at 590.
A male nursing student challenged his expulsion from the nursing program in *Andriakos v. University of Southern Indiana*,\(^{30}\) claiming sex discrimination in violation of Title IX. The Seventh Circuit upheld the lower court's determination that the expulsion was based on his failure to satisfy safe and professional nursing skills.\(^{31}\)

A New York state trial court in *Starishevsky v. Hofstra University*\(^{32}\) determined that recipients of federal funds are required to adopt and publish grievance procedures, which is in accordance with the directive of the specific Title IX regulations.\(^{33}\) In another case, a male student at Vassar College received two messages on tape which contained abusive language and threats of physical violence directed at him due to his homosexuality. A male student was charged with having violated the college's sexual harassment policy. He brought suit in *Fraad-Wolff v. Vassar College*,\(^{34}\) alleging that the school violated a New York state law in not following prescribed procedures in the investigation and adjudication of this matter. On July 12, 1996, the district court disposed of the lawsuit by granting summary judgment to the college stating that "nothing in the student handbook or in the Panel's rules required defendant to declare plaintiff innocent if the Panel was unable to reach a decision."\(^{35}\)

The female plaintiff in *Ivan v. Kent State University*\(^{36}\) was enrolled in a joint masters/doctorate program at the University, which required her to complete a master's thesis within two years and maintain a 3.3 grade point minimum. Subsequently, the plaintiff requested permission to skip a fall semester (during which time she gave birth to her child) and forego employment as a graduate assistant for that semester and the following semester. When she returned for the Spring semester, she received an "IP" (in progress) grade for her clinical practicum class. She claimed discrimination in
receiving that grade based on her gender and her pregnancy condition. On September 14, 1995, the federal district court granted the University’s motion for summary judgment on both the Title VII and Title IX claims. The district court applied the McDonnell Douglas burden-shifting standard used in Title VII cases to the Title IX argument, finding that the defendant’s articulated legitimate reasons for the IP grade were not rebuffed by the plaintiff as being pretextual. The court focused solely on the employment aspect. Parenthetically, the First Circuit, in Cohen v. Brown University, left open the question of whether the burden-shifting standard should be used in Title IX employment cases.

A female dental student failed to complete ten of her twenty-eight courses and was notified by the college that she was required to repeat her second year in Murray v. New York University College of Dentistry. She alleged Title IX sexual discrimination based on a hostile environment created by the actions of one of the patients involved in the school’s dental clinic and retaliation in having to repeat the aforementioned school year, after she had allegedly complained about the harassment.

On June 16, 1995, the Second Circuit stated:

We have noted that in order to make out a Title IX claim based on an educational institution’s allegedly discriminatory motivation in taking disciplinary action against a student, the complaint must set forth a “particularized allegation relating to a causal connection between the flawed outcome and gender bias” and must point to “particular circumstances” supporting an inference of gender bias, such as “statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.” No lesser showing is necessary when the educational institution’s challenged

37. Ivan, 863 F. Supp. at 584.
38. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). McDonnell Douglas provides that after a plaintiff establishes a prima facie case of discrimination, including being a member of the protected class, the burden shifts to the employer to advance some legitimate reason for the adverse action. Id. at 802. Then if the employer has advanced a non-discriminatory reason for the action, the plaintiff must establish that such reason was pretextual. Id. at 804. See also St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981).
40. 57 F.3d 243 (2d Cir. 1995) (discussed infra p. 638).
41. Id. (discussing the hostile environment claim).
action is not disciplinary but is rather an enforcement of its facially neutral academic standards.\textsuperscript{42}

On March 22, 1996, the district court, in \textit{Hall v. Lee College},\textsuperscript{43} determined there was no Title IX violation where a female student was suspended from a private college for allegedly engaging in premarital sex in contradiction of a school policy. The court determined that the plaintiff failed to advance any evidence that the policy would not have been equally applied to male students and thus there was no intentional discrimination on the basis of sex.

\section*{B. Public Military Schools}

The right of females to attend all-male public military schools was examined in \textit{Faulkner v. Jones}\textsuperscript{44} and \textit{United States v. Virginia}.\textsuperscript{45} Title IX excludes these schools from coverage.\textsuperscript{46} On July 22, 1994, the district court in \textit{Faulkner} ruled that The Citadel, a public all-male military college, had to admit Shannon Faulkner into the Corps of Cadets.\textsuperscript{47} Three weeks later, the

\begin{itemize}
  \item \textsuperscript{42} \textit{Id. at 251 (citation omitted).}
  \item \textsuperscript{43} 932 F. Supp. 1027 (E.D. Tenn. 1996).
  \item \textsuperscript{45} 852 F. Supp. 471 (W.D. Va. 1994) (applying the intermediate scrutiny test, the district court refused to require Virginia Military Academy ("VMI") to admit women), \textit{aff'd}, 44 F.3d 1229 (4th Cir. 1995), \textit{rev'd}, 116 S. Ct. 2264 (1996). However, it had to provide a comparable program at an all-female state college. The female program was not required to be a mirror-image of VMI or to adopt the same or similar methodology used at VMI. \textit{See also} United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991), \textit{vacated and remanded}, 976 F.2d 890 (4th Cir. 1994), \textit{cert. denied}, 116 S. Ct. 2264 (1996). The district court entered judgment for the defendant, Commonwealth of Virginia, and directed the University to undertake one of the following actions: 1) admit women to VMI; 2) establish a parallel institution or programs; or 3) abandon state support. \textit{Id.}
  \item \textsuperscript{46} Section 901(a)(5) of the Education Amendments directs that "in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5). Another subdivision, section 901(a)(4), provides that "this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine." \textit{See} 20 U.S.C. § 1681(a)(4). However, the federal military service academies have admitted women since 1976.
\end{itemize}
Fourth Circuit granted the school's stay pending the appeal.48 During August 1995, Faulkner entered The Citadel, in Charleston, South Carolina, becoming the first female cadet.49 Faulkner withdrew within the first week indicating that to stay would only risk her health. On October 16, 1995, the United States Supreme Court ruled that her action was moot and denied Nancy Mellette's motion to intervene or add a party.50

In United States v. Virginia,51 a female student challenged Virginia Military Institute's ("VMI") decision refusing her admittance to the all male military school. In this case predicated on violation of the Equal Protection Clause of the Fourteenth Amendment, the Fourth Circuit affirmed and remanded the case, holding that Virginia could maintain single gender college programs as long as comparable programs were offered to both men and women.52 A strong dissent was registered as to the two component arrangement and whether the particular separate-but-equal arrangement proposed by the Commonwealth and adopted by the district court could survive intermediate equal protection scrutiny.53 The United States Supreme Court agreed to hear this appeal.54

On June 26, 1996, the Court, in a 7-1 decision,55 held that such an all-male military college education violates the Fourteenth Amendment Equal Protection Clause.56 Justice Ruth Bader Ginsberg, writing for the majority, stated that "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less. . . ."57 The Court framed the issue as "[n]ot whether 'women—or men—should be forced to attend VMI;' rather, the question is whether the state can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."58 The Court explained:

48. Faulkner, 51 F.3d at 450.
50. Faulkner, 116 S. Ct. at 352.
51. 44 F.3d 1229 (4th Cir. 1995).
52. Id. at 1242.
53. Id. at 1250 (Phillips, J., dissenting).
55. United States v. Virginia, 116 S. Ct. 2264 (1996). Justice Clarence Thomas did not participate, as he has a son enrolled at the Virginia Military Institute. Id. at 2287.
56. Id. at 2269.
57. Id. at 2287.
58. Id. at 2280. One commentary noted:

Because the Constitution does not regulate private conduct, the VMI ruling does not apply to private women's colleges, as the 26 private women's colleges who
Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. . . . Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. . . . The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. 59

The Court further cautioned that

such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. 60

In reviewing the "parallel" program for women offered at VMI, while excluding all females from VMI's programs and activities, the Court commented, "[h]owever 'liberally' this plan serves the state's sons, it makes no provision whatever for her daughters. That is not equal protection." 61

Justice Rehnquist filed a concurring opinion, predicated on his disagreement with utilizing the "exceedingly persuasive justification" standard, but agreeing with the result of the majority. 62 Justice Antonin Scalia authored a dissent in which he commented that "[t]oday the court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. I do not

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59. Virginia, 116 S. Ct. at 2274–75.
60. Id. at 2276 (citations omitted).
61. Id. at 2279.
62. Id. at 2288 (Rehnquist, J., concurring).

think any of us, women included, will be better off for its destruction.\textsuperscript{63} The decision will affect The Citadel.\textsuperscript{64} VMI did not vote to admit women until September 21, 1996, and thus, the first class with women would not be until 1997.\textsuperscript{65} The Citadel ushered in four female cadets during August 1996.

C. Prison Education

\textit{Jeldness v. Pearce}\textsuperscript{66} represents the first in a series of decisions brought by female prisoners challenging educational programs. Female inmates in Oregon state prisons asserted that differing educational programs and procedures provided to them violated Title IX.\textsuperscript{67} Unlike men, women prisoners were searched in order to travel between prisons and often arrived late for classes. There was no apprenticeship program at women's medium security prisons, and women could not participate in the mechanical trade apprenticeship programs. Male prisoners were entitled to merit pay for participating in vocational training courses, unlike the female prisoners.

The Ninth Circuit held that Title IX does not provide an exemption for educational programs provided at state prisons, which are recipients of federal funds.\textsuperscript{68} Further, the appellate court disregarded the Equal Protection

\begin{itemize}
\item \textsuperscript{64} \textit{See Associated Press, Judge Calls Recess in Citadel Case, }\textit{NEWSDAY,} Aug. 13, 1996, at A13 (reporting that attorneys for the United States Department of Justice, on behalf of the three women who plan to attend The Citadel during the 1996–97 academic year, and the school's counsel, were working out details to accommodate the females' attendance at the formerly all-male military college). \textit{See also Douglas Lederman, Judge Orders Virginia to Report on Progress in Enrolling Women at VMI, }\textit{CHRON. HIGHER EDUC.,} Dec. 13, 1996, at A34 (relating that the Fourth Circuit "ordered Virginia to 'formulate, adopt, and implement a plan' for enrolling female students."). Fourteen of the 355 applications for the next academic year are from women.
\item \textsuperscript{65} \textit{See Mike Allen, Defiant V.M.I. to Admit Women But Will Not Ease Rules for Them, }\textit{N.Y. TIMES,} Sept. 22, 1996, at 1, 36. VMI and The Citadel expended approximately $10 million and $7 million, respectively, in legal costs. \textit{Id.} at 36.
\item \textsuperscript{67} \textit{Jeldness,} 30 F.3d at 1222.
\item \textsuperscript{68} \textit{Id.} at 1225. Title IX defines "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ." 20 U.S.C. § 1681(c).
\end{itemize}
Clause "parity" level in favor of the Title IX "equality" standard.\footnote{69. \textit{Jeldness}, 30 F.3d at 1226. "Research has disclosed no opinion holding that Title IX is coextensive with the Equal Protection Clause." \textit{Id.} at 1228.} The court stated that "Title IX and its regulations do not require gender-integrated classes in prisons."\footnote{70. \textit{Id.}} Furthermore,

\begin{quote}
[s]trict one-for-one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs. . . . And facilities such as labs, classrooms, and workshops must be comparable to each other.\footnote{71. \textit{Id.} at 1229. The "regulations provide that institutions may administer scholarships provided by foreign institutions or wills that are restricted by sex, as long as they make 'available reasonable opportunities for similar studies for members of the other sex.'" \textit{Id.} at 1228 (quoting 45 C.F.R. § 86.31(c)). \textit{See also} Glover v. Johnson, 931 F. Supp. 1360 (E.D. Mich. 1996) (regarding educational opportunities available to female prisoners in Michigan; the action asserted no Title IX cause of action).}
\end{quote}

The court stressed, "[a]nd the inmates must be aware of the opportunity for participation in various programs before their interests can be assessed."\footnote{72. \textit{Jeldness}, 30 F.3d at 1228 (emphasis added).} The most important aspect of the Ninth Circuit's opinion was its statement that "the absence of discriminatory motive does not transform a policy which discriminates on its face into a neutral policy with only a discriminatory effect. . . . This constitutes disparate treatment, not merely disparate impact. . . . Such disparate treatment is clearly forbidden by Title IX and its regulations."\footnote{73. \textit{Id.} at 1231 (citing 45 C.F.R. §§ 86.31, .51 (1993)).}

In \textit{Women Prisoners of District of Columbia Department of Corrections v. District of Columbia},\footnote{74. 877 F. Supp. 634 (D.D.C. 1994), vacated in part and modified in part, 899 F. Supp. 659 (D.D.C. 1995), rev'd in part, 93 F.3d 910 (D.D.C. 1996).} the women prisoners were allegedly subjected to sexual assaults by the prison guards. The male prisoners attended full-time adult basic education ("ABE") and General Education Development ("GED") classes, while the women had one teacher, who taught one three-hour ABE class and one three-hour GED class. The female residents also did not receive comparable recreational (exercise) facilities. On December
13, 1994, the district court highlighted that "[t]he denial of access to course offerings on the basis of sex is forbidden." Therefore, the

number of classes offered should at least be proportionate, not just to the total number of inmates, but to the number of inmates desiring to take educational programs. In addition, a desire to preserve the state's limited resources cannot be used to justify an allocation of those resources which unfairly denies women equal access to programs routinely available to men.

Query, whether the court's proportionate directive is the appropriate one, rather than offering equivalent classes for the female prisoners? The court also elaborated on the aspect of discriminatory intent and stated that "[d]iscriminatory intent, however, is only an issue in cases involving facially neutral policies. ... When a classification is expressly defined in terms of gender, an inquiry into intent is unnecessary. Defendant's policy of segregating male and female prisoners is just such a gender-based policy."

On August 14, 1995, the district court found that Title IX reaches the prison industries, recreation, work details, and work training. However, on August 30, 1996, the District of Columbia Circuit had reservations over certain of the district court's findings, specifically that "Title IX and equal protection principles are not applicable here because the male and female prisoners whom the district court compared were not similarly situated." The majority noted that "[t]he threshold inquiry in evaluating an equal protection claim is, therefore, 'to determine whether a person is similarly

75. Id. at 674.

76. Id. (emphasis added) (citations omitted). The money excuse has been discounted by the courts in the Title IX athletic equal opportunity cases. See, e.g., Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 583 (W.D. Pa.), aff'd, 7 F.3d 332 (3d Cir. 1993); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (discussed infra p. 585).

77. Women Prisoners, 877 F. Supp. at 675 (citations omitted).

78. Id. at 659. See Klinger v. Nebraska Dep't of Correctional Svcs., 824 F. Supp. 1374 (D. Neb. 1993) (finding that the failure of the state of Nebraska to provide regularly scheduled pre-release programs for female prisoners, where such programs were provided for the male prisoners violated Title IX, as the pre-release programs were deemed educational), rev'd, 31 F.3d 727 (8th Cir. 1994), cert. denied, 115 S. Ct. 1177 (1995).

79. Women's Prisoners of the D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996). The appellants did not challenge the provisions that related to educational (academic and vocational) programs. However, they objected to ones that required "them to upgrade the work, recreational, and religious programs available to female inmates, and that relate to law library hours, group events, and transportation to job interviews." Id. at 924.
situated to those persons who allegedly received favorable treatment.'... We believe the same principle should apply in Title IX cases."\(^8\) Thus, the court in comparing the population size of the prison, security level, types of crimes, length of sentences, and special characteristics, rendered the prisoners dissimilarly situated.\(^8\) The appellate court stated that

an inmate has no constitutional right to work and educational opportunities. But even though we do not address the scope of Title IX in the prison context, we admit to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned.\(^8\)

Judge Rogers, who issued an opinion concurring in part and dissenting in part, took exception to the majority's determination on the equal protection analysis, stating that "[e]ven assuming the government may constitutionally provide separate programs for the sexes, the programs must be substantially equivalent."\(^8\) Thus, "[e]ven if the District may properly segregate prisoners by sex, it does not follow that it may segregate them by sex into unequal facilities."\(^8\) This opinion recognized the heightened scrutiny test mandated by the Court in Virginia.\(^8\) It argued that "[t]he District may not treat men and women dissimilarly and then rely on the very dissimilarity it has created to justify discrimination in the provision of benefits."\(^8\) While this equal protection analysis seems more persuasive than the majority approach, the issue would then be a question of fact pursuant to Title IX as to whether certain of the claimed inequities the women prisoners allegedly suffered from came under "educational programs and activities."

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80. Id. (quoting United States v. Whiton, 48 F.3d 356, 358 (8th Cir. 1995).
81. Id. at 925. The court continued "[w]e do not suggest that these mechanical ratios are a test of comparability; merely that, standing alone, the difference in the number of programs provided by prisons having vastly different numbers of inmates can not be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection. More than that is required." Id.
82. Women's Prisoners, 93 F.3d at 927.
83. Id. at 955 (Rogers, J., concurring in part and dissenting in part).
84. Id. at 951.
85. Id.
86. Id.
In the third action, the Eastern District of Kentucky, in *Archer v. Reno*, determined that there was no violation of Title IX where female prisoners were prevented from completing educational courses to become certified dental technicians. On January 5, 1996, the court ruled that Title IX applies to educational programs or activities conducted by state or local governments. "The statute is silent as to the United States and its agencies. . . . [Thus] the Court concludes that Title IX is not applicable to the national apprenticeship program offered to federal inmates through the dental lab at [the Federal Medical Center in Lexington, Kentucky]." Therefore, the plaintiffs failed to state a Title IX claim of action.

### IV. EQUAL OPPORTUNITY ON BEHALF OF STUDENTS

The most significant aspect of the Title IX regulations that pertain to athletic programs or activities is the requirement of equal opportunity for members of both sexes. Specifically, it states that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." The regulations then go on to list ten specific, non-exclusive program areas to be analyzed to determine whether equal opportunity has been satisfied. The first program area, and the one which has been at the core of the intercollegiate athletics litigation battles during the 1990s, evaluates "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." The 1979 Policy Interpretation provides that the effective accommodation of student interests and abilities will be assessed in any of the following ways:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the

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88. *Id.* at 379. Title IX states that "[f]or the purposes of this chapter, the term 'program or activity' and 'program' mean all of the operations of (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity to which the assistance is extended, in the case of assistance to a State or local government." 20 U.S.C. § 1687.
89. 34 C.F.R. § 106.41(c) (emphasis added).
90. *Id.* § 106.41(c)(1).
members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by their present program. 91

A. Cross-Over Cases

The Title IX regulations permit qualified separate teams for members of each sex "where the selection for such teams is based upon competitive skill or the activity involved is a contact sport." 92 There were no cross-over cases (cases brought by members of one sex seeking to participate on established teams of the other sex, generally pursued on the interscholastic level by female athletes seeking participation on established all-male teams) on either

92. Section 106.41(b) provides:

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.


Michigan state law defines baseball as a "non-contact" sport for interscholastic athletic activities. See Mich. Comp. Laws Ann. § 380.1289(3) (West 1988), which provides that

[f]emale pupils shall be permitted to participate in all noncontact interscholastic athletic activities, including archery, badminton, baseball, bowling, fencing, golf, gymnastics, riflery, shuffleboard, skiing, swimming, diving, table tennis, track and field, and tennis. If a school has a girls' team in a noncontact interscholastic athletic activity, a female shall be permitted to compete for a position on any other team for that activity. This subsection shall not be construed to prevent or interfere with the selection of competing teams solely on the basis of athletic ability.
the interscholastic or intercollegiate levels instituted or reviewed during 1994–95, except for the Supreme Court denying certiorari in *Williams v. School District of Bethlehem.* Although not covered by Title IX, this scenario would also apply to the Olympic and professional levels. However, on February 2, 1996, the district court in *Adams v. Baker* ruled that a school district policy which prohibited a female high school student from competing on the boys wrestling team, designated a “contact” sport, would violate her rights under the Equal Protection Clause of the Fourteenth Amendment and granted the plaintiff a preliminary injunction. The court recognized that “wrestling is, not surprisingly, defined as a contact sport” under the Title IX scheme. The court nonetheless continued that “[a]lthough Congress may specify remedies available for a violation of a federally protected right, Congress can not thereby substantively limit constitutional rights.” The court also disregarded the school district’s argument that participation by a female could lead to sexual harassment charges. The court emphasized that wrestling was an athletic activity and not a sexual activity. The case was settled during the spring, whereby the plaintiff was allowed to tryout for the wrestling team. The agreement is partially confidential. In light of the Supreme Court decision in *United States v. Virginia,* a real concern emerges as to whether the ostensible demarcation of

93. 998 F.2d 168 (3d Cir. 1993) (discussing male student who wanted to participate on the all-female interscholastic field hockey team where no team was provided for the boys).

94. 919 F. Supp. 1496, 1500 (D. Kan. 1996) (“Evidence was presented that there are over 800 girls competing in wrestling in the United States.”).

95. See Leffel v. Wisconsin Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1123 (E.D. Wis. 1978) (announcing that “[i]t is declared that the defendants’ exclusion of the [female] plaintiffs and the class they represent from participation in a varsity interscholastic athletic program in a particular program where such a program is provided for male students violates the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment.”). But see Kelley v. Board of Trustees of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S. Ct. 938 (1995). See also discussion infra p. 589.


97. Id.

98. Id. at 1504.

99. Id.

100. Telephone Interview with Charles O’Hara, counsel for plaintiff (August 22, 1996). Interestingly, in deciding whether to permit the female student to participate on the wrestling team or disband the team, the three female members of the School Board voted to eliminate the team, while the four male members of the board agreed to allow a co-ed wrestling team, according to plaintiff’s counsel. Id.

certain sports for men only, under the "contact sport" classification, would withstand equal protection scrutiny.

B. Female Student Athletes

1. Intercollegiate Level

a. Cases Commenced Pre-1994 Seeking Reinstitution of Varsity Teams

(i) Cohen v. Brown University: The Trial

On September 26, 1994, the federal trial commenced in Cohen v. Brown University,102 in which the plaintiff was seeking a permanent injunction to restore two women's teams to varsity status. The case was partially settled on September 28, 1994, which ensured comparable treatment for men's and women's varsity programs.103 The agreement indicated:

The University maintains the right to distribute University funds as it sees fit, provided that such distribution does not disproportionately affect one gender in comparison to the other, provided further, however that this . . . be construed to require comparison on a team by team or overall gender basis of actual money expenditures. Comparability shall be determined by the nature of the programs, not the cost. It is understood and agreed that comparability does not imply or mean that every team will be provided identical funding or any other item provided to any other team. Further, different teams may receive different levels of support.104

The issue of the effective accommodation of the interests and abilities of the students at the Ivy League University, raised in 34 C.F.R. § 106.41(c)(1), remained viable.


103. Cohen v. Brown Univ., No. 92-0197-P (D.R.I. 1995), Settlement Agreement and Stipulation of dismissal in Regard to Equality of Treatment [hereinafter Agreement]. The Agreement "settles claims in this matter concerning the relative support provided to men and women student athletes and potential student athletes at Brown . . . and shall remain in effect for a period of three years from the date of its execution by the parties." Id. at 1, 3. See also Oscar Dixon, Title IX Suit Settled in Part by Brown, USA TODAY, Sept. 29, 1994, at C13.

104. Agreement, supra note 103, at 4–5.
On March 29, 1995, the district court in Cohen\(^{105}\) ruled the defendant University violated Title IX in not accommodating the interests and abilities of the female students.\(^{106}\) In a sixty-nine page decision, the court painstakingly explicated the “effective accommodation” test under the directive of the First Circuit’s 1993 decision.\(^{107}\) Again, the court stressed that “an institution complies with the three prong test if it meets prong one of the analysis and no other.”\(^{108}\)

The trial judge specifically elaborated on the first prong which requires “substantial proportionality” between the percentage of students and student athletes.\(^{109}\) The court adopted a plain meaning approach, in that the number of female and male athletes would be based on the number of participation opportunities as manifested by the NCAA squad lists, which was a tangible and easily identifiable number.\(^{110}\) The court noted that “[t]he Policy Interpretation’s three prong test does not mandate statistical balancing. In fact, the test is designed to avoid an absolute requirement of numerical equality.”\(^{111}\) The court ruled that “[a]n institution satisfies prong one provided that the gender balance of its intercollegiate athletic program substantially mirrors the gender balance of its student enrollment.”\(^{112}\)

“First, prong one compliance is assessed by comparing the gender ratio of the entire intercollegiate athletic program.”\(^{113}\) The court highlighted that when “significant numerical changes did occur in the intercollegiate athletic

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\(^{105}\) Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995), aff’d in part and rev’d in part, 101 F.3d 155 (1st Cir. 1996). The decision cited Heckman, supra note 15. Id. at 188. See Walter B. Connolly, Jr. & Jeffrey D. Adelman, A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios, 71 U. Det. Mercy L. Rev. 845 (1994) (Mr. Connolly is one of the attorneys for Brown University in this lawsuit). See Walter B. Connolly, Jr. & Jeffrey D. Adelman, How a University Can Best Comply with Title IX and Win a Lawsuit: Practical Suggestions, (undated eight-page handout distributed at an April 1996 Title IX forum sponsored by the National Collegiate Athletic Association (“NCAA”)) (on file with the Nova Law Review); Walter B. Connolly, Jr., “University In-House Audit of Employment Related Issues to Determine Compliance with Title VII and Title IX and Other Related Issues” (undated) (104 page handout distributed at an April 1996 Title IX forum sponsored by the NCAA) (on file with the Nova Law Review).

\(^{106}\) Cohen, 879 F. Supp. at 211 (citing 34 C.F.R. § 106.41(c)(1)).

\(^{107}\) Id. at 194.

\(^{108}\) Id. at 200.

\(^{109}\) Id. at 201–02.

\(^{110}\) Id. at 202.

\(^{111}\) Cohen, 879 F. Supp. at 199

\(^{112}\) Id. at 200 (emphasis added).

\(^{113}\) Id. at 202.
program as a whole, these changes were within the control of the university.\textsuperscript{114} For example, the University controls the recruiting of student athletes.\textsuperscript{115} During the 1993–94 academic year, the percentage of students comprised 48.86% men and 51.4% women, with 61.87% male athletes and 38.13% female athletes.\textsuperscript{116} This accounted for a 13% differential between female students and female student athletes. The court also identified “that the ‘participation opportunities’ offered by an institution are measured by counting the \textit{actual} participants on intercollegiate teams,” rather than counting teams’ filled and unfilled athletic slots, as the defendant argued.\textsuperscript{117} Thus, the 13% disparity did not satisfy the first prong of the effective accommodation test.

The court examined the University’s unique two-tiered system. The University characterized its varsity athletic offerings as varsity intercollegiate teams (“university-funded” teams), on the one hand, and donor-funded varsity teams (also known as “club varsities” or “intercollegiate club” teams).\textsuperscript{118} The court determined that “university-funded” varsity teams were not comparable to “donor-funded” varsity teams.\textsuperscript{119} “During the 1994/95 seasons Brown guaranteed the volleyball team university-funded varsity status for the next five years.”\textsuperscript{120} Furthermore, “[g]ymnastics is currently supported as a university-funded team as required by court order. However, in the absence of this order, Brown has acknowledged that it would demote gymnastics to donor-funded status.”\textsuperscript{121}

Second, the University did not satisfy the second prong of a continuing practice of intercollegiate program for women, the underrepresented sex. Rather, the court emphasized that “[s]ince the 1970s, the percentage of women participating in Brown’s varsity athletic program has remained remarkably steady.”\textsuperscript{122} Finally, the court concluded Brown did not currently \textit{fully} and effectively accommodate the interests and abilities, specifically with regard to “maintaining women’s water polo at club status and by demoting women’s gymnastics where these teams have demonstrated the

\begin{thebibliography}{9}
\item[114.] Id.
\item[115.] Id.
\item[116.] Cohen, 879 F. Supp. at 192.
\item[117.] Id. at 202.
\item[118.] Id. at 189.
\item[119.] Id. at 212.
\item[120.] Id. at 192 n.17.
\item[121.] Cohen, 879 F. Supp. at 192 n.18.
\item[122.] Id. at 211.
\end{thebibliography}
interest and ability to operate as varsity teams." The court also rejected Brown's argument "that it may accommodate less than all of the interested and able women if, on a proportionate basis, it accommodates less than all of the interested and able men." 

In conclusion, the court required Brown University to submit a compliance action plan within 120 days, but stayed this directive pending an appeal. During April 1995, the University filed an appeal. On May 4, 1995, Judge Pettine modified his March 29, 1995, judgment, truncating the time for the University to submit its Title IX compliance plan from 120 to 60 days and the court eliminated the stay of the provision requiring the University to submit the plan pending the outcome of an appeal.

On August 17, 1995, the trial court rejected the University's proposed compliance plan, filed on July 7, 1995, which concentrated on adding junior varsity teams for female student athletes, rather than adding new women's varsity teams and cutting men's sports, and crafted its own plan requiring the University to upgrade the women's varsity teams. The court, in terse language responding to the University's proposed plan, stated:

> The proposed plan artificially boosts women's varsity numbers by adding junior varsity positions on four women's teams. . . . Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.

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123. Id. at 212.
124. Id. at 208.
125. Id. at 214.
128. Order at 6, Cohen v. Brown Univ., No. 92-197-P (D.R.I. Aug. 16, 1995). The court further stated that "[a]n institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons." Id. at 8.
(ii) First Circuit Affirms that Brown University Violated Title IX

On November 21, 1996, the First Circuit, in a 2-1 decision comprising forty-four pages, affirmed the district court’s determination in Cohen v. Brown University that the University violated Title IX in not effectively accommodating the interests and abilities of its female student athletes.\(^{129}\) The First Circuit found

no error in the district court’s factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court’s analysis and rulings on the issue of liability. We do, however, find error in the district court’s award of specific relief and therefore remand the case to the district court for reconsideration of the remedy in light of this opinion.\(^{130}\)

First, the appellate court summarized in detail the relevant determinations of the district court, concluding that “[t]he district court did not find that full and effective accommodation of the athletics interests and abilities of Brown’s female students would disadvantage Brown’s male students.”\(^{131}\) Second, the First Circuit summarized the Title IX predicates and made the first judicial reference to the OCR “Clarification Memorandum,” issued on January 16, 1996,\(^{132}\) “which does not change the existing standards for compliance, but which does provide further information and guidelines for assessing compliance under the three-part test.”\(^{133}\) Third, Senior Circuit Judge Bownes underscored that “[i]n Cohen II, a panel of this court squarely rejected Brown’s constitutional and statutory challenges to the Policy Interpretation’s three-part test, upholding the district court’s interpretation of the Title IX framework applicable to intercollegiate athletics . . . .”\(^{134}\) Then, in addressing the University’s argument, which was in essence to begin to

\(^{129}\) 101 F.3d 155 (1st Cir. 1996).
\(^{130}\) Id. at 162.
\(^{131}\) Id. at 164.
\(^{133}\) Cohen, 101 F.3d at 167. The court continued, explaining that “[t]he Clarification Memorandum contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX.” Id.
\(^{134}\) Id.
decide ab initio the question of Title IX liability, the court pondered the issue of the “law of the case doctrine”135 and concluded that “[t]he precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit.”136 Fourth, the court found that Title IX complies with the Fifth Amendment.137 An intervening Supreme Court decision in Adarand Constructors, Inc. v. Pena138 does not change the disposition in Cohen.139 The First Circuit articulated that the intermediate standard of scrutiny applies to gender-based classifications,140 underscoring that, “[a]s explained previously, Title IX . . . is distinct from other anti-discrimination regimes in that it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind.”141 Fifth, any excluded evidence was deemed harmless.142

The University’s three most charismatic and dispositive Title IX substantive attacks were: 1) Title IX is an affirmative action or quota statute;143 2) Title IX should adopt the “relative interest” of the student athletes to determine compliance;144 and 3) the Title VII standard should have been applied.145

135. Id. at 168. “For the reasons that follow, we conclude that no exception to the law of the case doctrine applies here and, therefore, that Cohen II’s rulings of law control the disposition of this appeal.” Id. at 169.
137. Id. at 182.
138. 115 S. Ct. 2097 (1995) (remanding for a determination of whether a federal statute which awarded minorities contracts of less than 5% of the total value of contracts per year served a compelling government interest).
139. Cohen, 101 F.3d at 155.
140. Id. at 182. “Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives. . . . Applying the test, it is clear that the district court’s remedial order passes constitutional muster.” Id. at 183–84. Amy Cohen, the named plaintiff in Cohen, expressed that “[t]here are little girls out there who need women athletes to look up to. And if you take away their opportunity to have women’s sports, you take away their interest.” Rachanee Srisavasdi, Athlete Who Sued Brown is Happy With Outcome, CHRON. HIGHER EDUC., Dec. 6, 1996, at A61.
141. Cohen, 101 F.3d at 184.
142. Id. at 185.
143. Id. at 170.
144. Id. at 174.
145. Id. at 176.
(iii) First Circuit Disposes of Quota-Affirmative Action Argument

Brown argued that the district court misconstrued and misapplied the three-part effective accommodation test and that such prior determination "effectively renders Title IX an 'affirmative action statute' that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics." The court recognized:

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. Like other anti-discrimination statutory schemes, the Title IX regime permits affirmative action. In addition, Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination.

Furthermore, the three-part effective accommodation test applied was proper. The court stated that "[w]e reject Brown's kitchen-sink characterization of the Policy Interpretation and its challenge to the substantial deference accorded that document by the district court." Thus, "[w]e hold that the district court did not err in the degree of deference it accorded the regulation and the relevant agency pronouncements." Furthermore, actual athletic participation opportunities are the measure for determining the first prong addressing substantial proportionality between the percentage of students and student athletes of one sex.

146. Cohen, 101 F.3d at 169.
147. Id. at 170–71 (emphasis added). Moreover, the majority stressed that "[f]rom the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes 'affirmative action.' Nor does a 'reverse discrimination' claim arise every time an anti-discrimination statute is enforced." Id. at 172.
148. Id.
149. Id.
150. Cohen, 101 F.3d at 173.
151. Id. "The district court's definition of athletics participation opportunities comports with the agency's own definition." Id. at 173.
Court Rejects Brown University’s “Relative Interests” Argument

Perhaps the most novel approach, which, if adopted, would effectively dismantle Title IX, was Brown University’s argument that

an athletics program equally accommodates both genders and complies with Title IX if it accommodates the relative interests and abilities of its male and female students. This ‘relative interests’ approach posits that an institution satisfies prong three of the three-part test by meeting the interests and abilities of the underrepresented gender only to the extent that it meets the interests and abilities of the overrepresented gender. 152

The majority emphasized that

[w]e agree with the prior panel and the district court that Brown’s relative interests approach ‘cannot withstand scrutiny on either legal or policy grounds,’... because it ‘disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.’ 153

In pressing the University’s quota argument, especially as to the third prong, the court stated that “[i]n any event, the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not require preferential or disparate treatment for either gender.” 154 Furthermore,

[o]nly where the plaintiff meets the burden of proof on these elements [the first and third prongs] and the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender-based quota. 155

The court summarized that “[i]n short, Brown treats the three-part test for compliance as a one-part test for strict liability.” 156

152. Id. at 174.
153. Id. (citations omitted).
154. Cohen, 101 F.3d at 175.
155. Id.
156. Id.
The court recognized that “Brown also fails to recognize that Title IX’s remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women.... It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide.” 157

In discarding and dismantling the University’s relative interest argument, the appellate court stated:

We view Brown’s argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. 158

The court continued:

Thus, there exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. Nevertheless, to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant

157. Id.
158. Id. at 178–79.
where, as here, viable and successful women’s varsity teams have
been demoted or eliminated.\textsuperscript{159}

The court stated that, “[f]inally, the tremendous growth in women’s partici-
pation in sports since Title IX was enacted disproves Brown’s argument that
women are less interested in sports for reasons unrelated to lack of opportu-
nity.”\textsuperscript{160} The court observed further that, “[h]ad Congress intended to
entrench, rather than change, the status quo—with its historical emphasis on
men’s participation opportunities to the detriment of women’s opportuni-
ties—it need not have gone to all the trouble of enacting Title IX.”\textsuperscript{161}

(v) The Lady or the Tiger: Should a Title VII Analysis Be Applied to a
Non-Employment Title IX Case?

Brown posited that the district court did not properly apply Title VII
standards to its analysis of whether Brown’s intercollegiate athletics pro-
gram complies with Title IX. The court replied that

\[ \text{[i]t does not follow from the fact that } \$ \text{1681(b) was patterned after}
\text{a Title VII provision that Title VII standards should be applied to a}
\text{Title IX analysis of whether an intercollegiate athletics program}
equally accommodates both genders. While this court has ap-
proved the importation of Title VII standards into Title IX analysis,
we have explicitly limited the crossover to the employment con-
text.}\textsuperscript{162}

The majority stated:

\[ \text{To the extent that Title IX allows institutions to maintain single-sex}
\text{teams and gender-segregated athletics programs, men and women}
do not compete against each other for places on teams rosters. Ac-
ccordingly, . . . the Title VII concept of the ‘qualified pool’ has no}
place in a Title IX analysis of equal athletics opportunities for male
and female athletes because women are not ‘qualified’ to compete
for positions on men’s teams, and vice-versa.}\textsuperscript{163}

\textsuperscript{159.} Cohen, 101 F.3d at 179–80.
\textsuperscript{160.} Id. at 180.
\textsuperscript{161.} Id. at 180–81.
\textsuperscript{162.} Id. at 176.
\textsuperscript{163.} Id. at 177.
The court elaborated:

Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs necessarily allocate opportunities separately for male and female students, and thus, any inquiry into a claim of gender discrimination must compare the athletics participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under represents women, and that the smaller size of the women's program will have the effect of discouraging women's participation.

In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic.164

(vi) The Remedy

The only conflict uncovered by the First Circuit was that "the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved." Brown's proposed compliance plan called for elevating certain women's junior varsity teams. The plan also proposed that "if the Court determines that this plan is not sufficient to reach proportionality, phase two will be the elimination of one or more men's teams." The First Circuit agreed with the district court "that Brown's proposed plan fell short of a good faith effort to meet the

164. Cohen, 101 F.3d at 177-78 (citations omitted).
165. Id. at 185.
166. Id. at 186. Thus, the district court had ordered Brown to "elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status." Id. at 187.
requirements of Title IX . . . ." 167 However, "[i]t is clear, nevertheless, that Brown’s proposal to cut men’s teams is a permissible means of effectuating compliance with the statute . . . . Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX . . . . In all other respects the judgment of the district court is affirmed." 168

(vii) Dissenting Opinion

Chief Judge Torruella issued the dissenting opinion finding that the Supreme Court’s determinations in Adarand 169 and the United States v. Virginia 170 applied to Cohen. 171 "What is important for our purpose is that the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an ‘exceedingly persuasive justification.’ This is evident from the language of both the majority opinion and the dissent in Virginia." 172 Herein, such a justification was absent in the dissent’s view. 173

Second, this judge would eliminate “contact sports” from the analysis of the effective accommodation test. 174 “Even assuming that membership numbers in varsity sports is a reasonable proxy for participation opportunities—a view with which I do not concur—contact sports should be eliminated from the calculus.” 175 The Chief Judge rationalizes this position by noting that the controlling regulation 176 allows schools to operate single-sex teams in contact sports.

The Chief Judge's opinion is susceptible to rebuttal on several fronts. First, this position is another version of the 1974 Tower Amendment, which would have in effect eliminated revenue-producing sports from the analysis, i.e., men's contact sports, such as football and basketball. Congress has never adopted such proposals to remove any teams from a Title IX analysis. 177 No discussion of the legislative history was included in this part of the dissent. Second, the essence of Title IX is the “equal opportunity”

167. Id.
170. See Virginia, 116 S. Ct. at 2287 (discussed supra p. 556).
172. Id.
173. Id.
174. Id.
175. Id. at 192.
176. 34 C.F.R. § 106.41(b).
177. See Heckman, supra note 92, at 12–13.
mandate. The dissent attempts to elevate the “separate teams” portion of the regulation, which contains the contact sport language, to the superior or primacy position, relegating the “equal opportunity” portion to a secondary or subservient position. Such an attempt belies the Title IX vitality. Even the district court in *Gonyo v. Drake University*, when examining the other regulation, which instructs specifically on athletics concerning the distribution of athletic scholarships, found that it is the “equal opportunity” directive which must take precedence. Third, the contact sport dichotomy sanctioned the status quo by permitting schools to continue to prevent individual, talented females from participating in established all-male contact sports. The Chief Judge, who was quick to cite *Virginia*, should have gone a step further and, based on his reliance on this part of the regulation, determined whether, in light of the “exceedingly persuasive justification” standard articulated in *Virginia*, the contact sport distinction could withstand constitutional scrutiny.

As to the three-part effective accommodation test, the dissent concludes as to the third prong that “[e]ven a single person with a reasonable unmet interest defeats compliance.” First, such was not the case herein, and so any such musings must be characterized as dicta. The reality is that during the nearly twenty-five year tenure of Title IX, it is the prospective female student athletes who have had to jump through the obstacle course to have their participation opportunities created, not the males, who have had established teams in place years before enactment of Title IX and thereafter and thus were not required to offer justifications, petitions, and lawsuits. The difference was that the men need only show up and they were suited up, compared to the women who also showed up, accompanied by their attorneys with court orders or settlement agreements. One need only note the struggle of female student athletes at Colgate University to have a club ice hockey team elevated to varsity status, while male student athletes already had a varsity ice hockey team. Third, regardless of the dissent’s dismay

179. 34 C.F.R. § 106.37(c).
182. *Cohen*, 101 F.3d at 196.
with the possibility that "one-woman" tennis, golf, and archery teams might have to be established to fully and effectively accommodate the interests and abilities of the underrepresented sex, clearly whether one person can constitute an intercollegiate athletic team would be a question of fact and a hypothetical clearly not before this court.

Fourth, the dissent apparently ignores the Policy Interpretation, which does not automatically mandate the creation of such teams. A further condition is required for establishment of both contact and non-contact sports. For contact sports,

[e]ffective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of other sex under the following circumstances: (1) The opportunities for members of the excluded sex have historically been limited; and (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.¹⁸⁴

Moreover, these same two conditions apply to "non-contact" sports with a further requirement: "(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated teams, or to compete actively on such a team if selected."¹⁸⁵ There was no mention of these further impediments by the dissent. "All of the negative effects of a quota remain, and the school can escape the quota under prong three only by offering preferential treatment to the group that has demonstrated less interests in athletics."¹⁸⁶ Fifth, the dissent's statement belies the facts in this case. Clearly, the female student athletes who originally brought this case were not "less" interested in athletics. Rather, they were forced to go to court to retain teams in sports in which they were very much interested in participating.

Finally, the dissent intimates a possible First Amendment violation due to the private status of this University, stating that the majority "[i]nstead... established a legal rule that straight-jackets college athletics programs by curtailing their freedom to choose the sports they offer."¹⁸⁷ No

¹⁸⁵ Id.
¹⁸⁶ Cohen, 101 F.3d at 196–97.
¹⁸⁷ Id..
mention is made of the Supreme Court decision in *Grove City College v. Bell*\(^{188}\) which upheld Title IX as companionable with the First Amendment.

The parties in *Favia v. Indiana University of Pennsylvania*\(^{189}\) have agreed to put the case on the inactive docket, while still abiding by the pending preliminary injunction.\(^{190}\)

**b. Cases Commenced Pre-1994 Seeking Elevation of Club Teams**

During August 1993, female students filed a class action lawsuit in *Bryant v. Colgate University*\(^{191}\) alleging sex discrimination in the intercollegiate athletics program. On January 21, 1994, the plaintiffs filed a motion for summary judgment, and the defendants filed a cross motion for summary judgment. Finally, during the spring of 1996, the judge issued his decision denying both motions.\(^{192}\) The trial was scheduled for August 1996. However, the trial was rescheduled to February 2, 1997, in order to allow the parties to update discovery material. This case was commenced after a prior lawsuit, *Cook v. Colgate University*\(^{193}\) was brought by individually-named female members of the club ice hockey team alleging Title IX violation and seeking to upgrade their team to varsity intercollegiate status, where the men had a varsity intercollegiate ice hockey team.\(^{194}\) Colgate University has since hired a full-time coach for the women's club ice hockey team and permitted it to compete in a league comprised of varsity teams. On January 17, 1997, the parties settled the *Bryant* case, with the elevation of the women's club team to varsity status (Division III), effective for the 1997–98 academic year, subject to the court's approval.\(^{195}\)

**c. Cases Commenced During 1994–96 Seeking Elevation of Club Teams**

There were no cases commenced during the three-year period from 1994 through 1996 seeking reinstitution of varsity teams. Rather, a slew of federal class action lawsuits were commenced during 1994 and 1995 seeking elevation of club teams to varsity status. During January 1994, members of


\(^{189}\) 7 F.3d 332 (3d Cir. 1993) (denying University's request to modify an injunction requiring the University to reinstate women's gymnastics and field hockey).

\(^{190}\) Letter from plaintiff's co-counsel to author (Oct. 4, 1996).

\(^{191}\) No. 93-CV-1029 (N.D.N.Y. 1993).

\(^{192}\) *Bryant*, 1996 WL 328446, at *11.


\(^{194}\) Id. at 739–40.

\(^{195}\) Telephone Interview with plaintiff's counsel (Jan. 17, 1997).
the women's field hockey, softball, lacrosse, and crew club sports commenced a federal class action lawsuit in *James v. Virginia Polytechnic Institute & State University*,\(^\text{196}\) seeking elevation of their teams to varsity status. Thereafter, on April 17, 1995, the district court approved a settlement which provided that by the end of the 1996–97 academic year the percentage of female student athletes would be within three percentage points of the percentage of female undergraduate students.\(^\text{197}\)

An interesting aspect was the provision that if the Supreme Court, the Fourth Circuit, or Congress sets forth a certain percentage of female athletes as the minimum required, then either party can petition the court to modify the order. A women’s lacrosse team would be added during the 1994–95 academic year, and women’s varsity softball would be offered by 1995–96. The women’s athletic scholarships would be within five percentage points of the percentage of undergraduate female students by 1997–98, continuing through 2000–01. Comparable facilities for practice, training, and competitive games for female student athletes will also be provided. A new softball facility would be constructed for use during the spring 1996 season. The plaintiffs’ attorneys were accorded $50,000 in fees.

On March 31, 1994, members of the women’s soccer team at Louisiana State University ("LSU") commenced a federal class action lawsuit entitled *Pederson v. Louisiana State University*\(^\text{198}\) seeking elevation of a women’s club soccer team to varsity status.\(^\text{199}\) Thereafter, a companion case was commenced on January 3, 1995, by Cindy and Karla Pineda in *Pineda v. Louisiana State University*\(^\text{200}\) in the Eastern District of Louisiana, requesting declaratory and injunctive relief against the University and, in particular, seeking a preliminary injunction adding fast pitch softball as a varsity sport. On July 5, 1995, the district court denied the plaintiffs’ request for a preliminary injunction requiring: "(a) institution of intercollegiate varsity fast

\(^{196}\) No. 94-0031-R (W.D. Va. 1994).


\(^{198}\) 912 F. Supp. 892 (M.D. La. 1996). Thereafter, on May 16, 1994, the plaintiffs filed a motion for a preliminary injunction, and for class certification and a request for an expedited hearing. *Id.* at 897. The court dismissed plaintiffs’ motion on October 28, 1994. *Id.* at 898. A stipulation was entered into by the parties in *Pederson* that the instatement of women’s varsity soccer team in the fall of 1994 made this request moot. *Id.* at 898 n.2. On September 19, 1994, the defendants filed a motion for summary judgment. *Id.* at 897.

\(^{199}\) *Pederson*, 912 F. Supp. at 897.

\(^{200}\) *Id.* at 899. Defendants’ motion to consolidate the *Pineda* and *Pederson* cases was granted on March 30, 1995. *Id.*
pitch softball in Fall 1995, (b) requesting LSU present a plan for compliance with Title IX, and (c) freezing current expenditures and administrative support for male varsity sports at Louisiana State University."\footnote{Pederson/Pineda v. Louisiana State University.} On October 10, 1995, the trial commenced in Pederson/Pineda v. Louisiana State University. On January 12, 1996, the district court found that the University had violated Title IX.\footnote{Pederson, 912 F. Supp. at 917.} However, the court emphasized that Title IX distinguishes between "claims for unequal treatment of athletes based on sex ["treatment claims"] and, on the other hand, claims for ineffective accommodation of demands of female and male athletes, i.e., equality of opportunity to participate in athletics."\footnote{Id. at 904.} The court elaborated that "[a]ll five plaintiffs asserted a claim for unequal treatment of female varsity athletes, including unequal pay to coaches, lesser quality facilities, and other related grievances. An unequal treatment claim presupposes that the claimant was a varsity athlete who was treated unequally based upon her sex."\footnote{Id. at 905.} The court stressed the prevailing sentiment that the University is not required to provide any athletic opportunity for its students, but if it elects to do so, it "must provide equal athletic opportunity for both sexes and not exclude either group from participation because of their sex. . . . Opportunity is the possibility of participation, not the guarantee of participation."\footnote{Id. at 911-12.}

In reviewing the available Title IX precedents and case law, the court stated critically that "[t]he Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible, in part, to an interpretation distinctly at odds with the statutory language."\footnote{Id. at 911-12.} In examining the three-part effective accommodation test, the first prong would require statistical proportionality between the percentage of students of each sex and the percentage of student athletes; if satisfied, this would constitute compliance with the effective accommodation test. Despite the fact that the First,\footnote{See Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (discussed supra p. 565).} Third,\footnote{See Favia v. Indiana Univ. of Pa., 7 F.3d 332 (1993) (discussed supra p. 579).} Sixth,\footnote{Id. at 899. The court’s more detailed ruling was contained in an October 28, 1994 ruling. Id.} Seventh,\footnote{Id. at 899. The court’s more detailed ruling was contained in an October 28, 1994 ruling. Id.} and Tenth\footnote{Id. at 899. The court’s more detailed ruling was contained in an October 28, 1994 ruling. Id.} Circuits have respectively...
condoned the tripartite test, the district court emphatically stated that as to
the first prong, "[t]his Court disagrees with either proposition and the
analysis leading to such a result, and denies most emphatically so to hold." It stated that

[w]ithout some basis for such a pivotal assumption, this Court is
loath to join others in creating the "safe harbor" or dispositive
assumption for which defendants and plaintiffs argue. Rather, it
seems much more logical that interest in participation and levels of
ability to participate as percentages of the male and female popula-
tions will vary from campus to campus and region to region and
will change with time. To assume, and thereby mandate, an unsup-
ported and static determination of interest and ability as the corner-
stone of the analysis can lead to unjust results.

Moreover,

Title IX does not mandate equal numbers of participants. Rather, it
prohibits exclusion based on sex and requires equal opportunity to
participate for both sexes. As appears in the Policy Interpretation,
inherent in this prohibition and mandate is knowledge of the desire
to participate, the ability to participate and the level of competi-

(discussed infra p. 586).
210. See Kelly v. Board of Dirs. of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), cert. denied,
211. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).
212. See Heckman, supra note 180, at 8.
213. Pederson, 912 F. Supp. at 913. The Title IX statute mandates:

Nothing contained in subsection (a) of this section shall be interpreted to require
any educational institution to grant preferential or disparate treatment to the
members of one sex on account of an imbalance which may exist with respect to
the total number or percentage of persons of that sex participating in or receiving
the benefits of any federally supported program or activity, in comparison with
the total number or percentage of persons of that sex in any community, State,
section, or other area: Provided, That this subsection shall not be construed to
prevent the consideration in any hearing or proceeding under this chapter of sta-
tistical evidence tending to show that such an imbalance exists with respect to the
participation in, or receipt of the benefits of, any such program or activity by the
members of one sex.

214. Pederson, 912 F. Supp. at 913–14. Furthermore, "the jurisprudential emphasis on
numerical 'proportionality' is not found within the statute or the regulations; rather, it is
inferred from language in the Policy Interpretation and the statute which argues against such
an inference." Id. at 914.
tion involved. Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute.\textsuperscript{215}

The district court found that

[n]o plan exists to institute a method to identify the interests and abilities within the male and female student populations at LSU, nor a plan to evaluate the athletic opportunities presented in light of those identified interests and abilities, nor even a plan to effectively and timely implement the decision it has already made to add inter-collegiate varsity women's soccer and fast pitch softball.\textsuperscript{216}

Thus, the court directed that LSU "come into compliance immediately or provide this Court with an adequate plan to do so with all due haste."\textsuperscript{217} The University filed a compliance action plan on February 1, 1996; however, as of February 3, 1997, the court has yet to officially sanction such plan through a court order.\textsuperscript{218}

The court further concluded that the "plaintiffs failed to prove the requisite element of intent necessary to justify monetary damages."\textsuperscript{219} This was based on its finding that

[although the question is a very close one, this Court holds that the violations are not intentional. Rather, they are a result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change. . . . LSU is saved from the conclusion that it intended to discriminate in part by the fact that the jurisprudence and regulations regarding Title IX have been confused and unclear from the very beginning and [the athletic director's] contradictory actions.\textsuperscript{220}

The court ruled the Pederson plaintiffs did not have standing.\textsuperscript{221} The plaintiffs have filed an appeal concerning this issue. However, due to an

\begin{itemize}
\item \textsuperscript{215} \textit{Id.} at 914.
\item \textsuperscript{216} \textit{Id.} at 921–22.
\item \textsuperscript{217} \textit{Id.} at 924.
\item \textsuperscript{218} Telephone Interview with Counsel for Plaintiffs (Feb. 4, 1997).
\item \textsuperscript{219} \textit{Pederson}, 912 F. Supp. at 918.
\item \textsuperscript{220} \textit{Id.} at 918–19.
\item \textsuperscript{221} \textit{Id.} at 908. "Plaintiffs have not alleged any experience of the effect, impact or alleged injury resulting from any other alleged discriminatory practices within LSU's existing women's varsity athletics." \textit{Id.} at 904.
\end{itemize}
intervening Supreme Court decision concerning Eleventh Amendment immunity, this state University filed a motion to dismiss with the district court; the decision remains outstanding as of February 3, 1997.

During August 1994, female student athletes sought redress in Ulett v. University of Bridgeport against the state University alleging discrimination in the athletic department and requested reinstatement of the women's varsity gymnastics team. The complaint indicated that females comprised 54% of the students and 42% of the student athletes. The men's volleyball team was also eliminated. The plaintiffs sought declaratory and injunctive relief. A consent decree was entered into among the parties on July 7, 1995, with the University agreeing to retain the gymnastics team at least through the 1997–98 academic year.

On May 8, 1995, a class action lawsuit commenced by members of the women's club lacrosse and softball teams in Boucher v. Syracuse Univer-

222. See Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1118 (1996). Seminole Tribe was a 5-4 decision proclaiming that "each State is a sovereign entity in our Federal system." Id. at 1122. The Supreme Court held that "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress" the power to abrogate a state's Eleventh Amendment Immunity. Id. at 1119. Thus, "[e]ven when the Constitution vests Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Id. at 1131. Justice Souter, in his dissenting opinion, wrote: "[F]or the first time since the founding of the Republic... Congress has no authority to subject a State to the jurisdiction of a Federal court at the behest of an individual asserting a Federal right." Id. at 1145 (Souter, J., dissenting). See also David J. Garrow, The Rehnquist Reins, N.Y. TIMES, Oct. 6, 1996, § 6, at 71. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. But cf. Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) (requiring that in order to go forward with a Title IX claim against this public University, part of the Commonwealth of Puerto Rico, the plaintiff had to establish that either the University waived its sovereign immunity or that Congress did so when it enacted this federal statute). But see the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1) (1994), which provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of... [T]itle IX of the Education Amendments of 1972." See also Regents of Univ. of Cal. v. Doe, 116 S. Ct. 2522 (No. 95-1694) (1996) (currently pending in the Supreme Court). More recently, in a post-Seminole Tribe case, a federal district court determined that "the University of Minnesota does not have state immunity from an employee’s lawsuit under the Americans with Disabilities Act," University of Minnesota Loses Bid for Legal Immunity, CHRON. HIGHER EDUC., Dec. 13, 1996, at A35.


224. Id.; Plaintiffs' Complaint at 4, 6.

sity\textsuperscript{226} sought elevation of those teams to varsity status. The University has announced plans to offer a women’s varsity soccer team during the 1996–97 academic year and to offer varsity lacrosse in 1988. On June 12, 1996, the district court granted partial summary judgment to the University, and dismissed the causes of action alleging unequal financial assistance and unequal benefits and opportunities for female varsity athletes.\textsuperscript{227} Some controversy exists as to whether class certification should be provided for all the plaintiffs’ differing club sports that are seeking elevation. The plaintiffs are awaiting the judge’s determination on the plaintiffs’ claim for class action status. The defendant filed another motion for summary judgment. The plaintiffs were awaiting rebuttal motion papers due on January 21, 1997.

d. Other Cases Commenced During 1994–96

On July 7, 1995, a lawsuit initiated by a softball player, a student assistant softball coach, and a graduate assistant volleyball coach sought proportionate facilities and funding at Northeast Louisiana University in Hale v. Northeast Louisiana University.\textsuperscript{228} A federal district court in Harker v. Utica College of Syracuse University\textsuperscript{229} found no violation of Title IX when members of women’s athletic teams had to share locker rooms, whereas members of the men’s teams did not.\textsuperscript{230}

2. Interscholastic Level

On December 22, 1994, the Sixth Circuit, in a 2-1 decision in Horner v. Kentucky High School Athletic Association,\textsuperscript{231} affirmed in part the lower court’s granting of summary judgment that no Fourteenth Amendment Equal Protection Clause claim of discrimination existed where the defendants, the Kentucky High School Athletic Association (“KHSAA”) and the Kentucky State Board for Elementary and Secondary Education (“KSBESE”), sanctioned fewer sports for females than the boys and refused to sanction girls’ interscholastic fast pitch softball, despite offering baseball for the boys.

\begin{thebibliography}{99}
\bibitem{226} No. 95-CV-620, 1996 WL 328444 (N.D.N.Y. June 12, 1996).
\bibitem{227} Id. at *4.
\bibitem{228} See Will Kowalski, Athletes, Coaches Turn to Lawsuits to Spur Changes, USA TODAY, Nov. 8, 1995, at 4C.
\bibitem{229} 885 F. Supp. 378 (N.D.N.Y. 1995).
\bibitem{230} Id. at 392.
\bibitem{231} No. C-92-0295-L(J) (W.D. Ky. Jan 11, 1993) (applying a program-wide analysis to determine whether a violation of Title IX had occurred where the state athletic association did not sanction fastpitch softball for females), aff’d in part and rev’d in part, 43 F.3d 265 (6th Cir. 1994).
\end{thebibliography}
However, the appellate court reversed and remanded the case as to the district court's grant of summary judgment on the plaintiffs' Title IX claim.\textsuperscript{232} The court found that both the defendants were recipients of federal funds.\textsuperscript{233} For example, the KHSAA "receive[s] a portion of its revenues from dues paid by member schools."\textsuperscript{234} The court recognized that while the Title IX "regulations do not impose an independent requirement that an institution always sponsor separate teams for each sport it sanctions . . . the regulations do require that institutions provide gender-blind equality of athletic opportunity to its students."\textsuperscript{235} The Sixth Circuit also adopted the three-part effective accommodation test.\textsuperscript{236} Again, limited finances will not be countenanced as an excuse for not complying with Title IX, as the court stated "[t]hus, a recipient may not simply plead limited resources to excuse the fact that there are fewer opportunities for girls than for boys."\textsuperscript{237} A dissent was filed by Judge Alice M. Batchelder, based on her opinion that the plaintiffs failed to present a \textit{prima facie} case.\textsuperscript{238} Thereafter, on March 10, 1995, the Sixth Circuit denied the petitions by the defendants for a rehearing en banc.\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{232} Id. at 276.
\item \textsuperscript{233} Id. at 272.
\item \textsuperscript{234} Id. at 270.
\item \textsuperscript{235} Id. at 273.
\item \textsuperscript{236} Homer, 43 F.3d at 273.
\item \textsuperscript{237} Id. at 275.
\item \textsuperscript{238} Id. at 276. On July 15, 1994, the Kentucky Assembly approved the following amendment to the relevant state statute to include the following:
\begin{itemize}
\item (a) The state board or its designated agency shall assure through promulgation of administrative regulations that if a secondary school sponsors or intends to sponsor an athletic activity or sport that is similar to a sport for which National Collegiate Athletic Association members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which a scholarship is offered. The administrative regulations shall specify which athletic activities are similar to sports for which National Collegiate Athletic Association members offer scholarships.
\end{itemize}
\begin{itemize}
\item KY. REV. STAT. ANN. § 156.070(2)(a) (1996).
\end{itemize}
\item Thereafter, the KHSAA "passed a similar by-law, making an exception for schools in which the underrepresented gender votes otherwise." Erin Cook, \textit{Title IX Report Card, Implementation of Fast Pitch Softball Offers New Scholarship Opportunities for Kentucky's Female Athletes}, WOMEN'S SPORTS EXPERIENCE, Oct. 1995, at 13 (newsletter of the Women's Sports Foundation).
\item \textsuperscript{239} Homer v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994). A meeting between the parties' attorneys was scheduled for August 1, 1995, "in which a plan was to be devised to remedy the existing Title IX violations that surfaced during the trial." Cook, \textit{supra} note 238, at 13.
\end{itemize}
On April 5, 1995, four lawsuits, including Thomsen v. Fremont Public School District # 1,240 were simultaneously filed on behalf of female students in a federal district court in Nebraska against school districts in Fremont, North Platte, Minden, and Holdrege, alleging unequal opportunities and unequal benefits and treatment. The lawsuits seek compensatory damages in unspecified monetary amounts, injunctive and declaratory relief based on violations of the Equal Protection Clause, Title IX, and the Nebraska "Equal Opportunity in Education Act" statute.241

C. Male Student Athletes

All the "equal opportunity" cases brought on behalf of males concerned male collegiate students. The three-year time period also showcased the first co-ed cases brought by collegiate students. As Donna Lopiano, the Executive Director of the Women's Sports Foundation underscored, "[c]utting the level of men’s participation needs to be a last choice."242

On June 3, 1994, the State University of New York at Albany announced plans to drop men’s wrestling, men’s tennis, and men’s and women’s swimming, and add women’s field hockey and women’s golf. In an anomalous situation, the first of its kind, both male and female student athletes commenced an article 78 lawsuit in state court in In the Matter of


241. Complaint at 19, Thomsen (No. 4CV95-3124). The Nebraska statute provides:

The Legislature finds and declares that it shall be an unfair or discriminatory practice for any educational institution to discriminate on the basis of sex in any program or activity. Such discriminatory practices shall include but not be limited to the following practices: . . . (2) denial of comparable opportunity in intramural and interscholastic programs.


Kane v. State University of New York at Albany\textsuperscript{243} challenging the University’s actions as not being in conformity with procedural requirements. On August 19, 1994, the state supreme court trial judge issued a temporary restraining order on behalf of the plaintiffs, precluding the University’s planned actions.\textsuperscript{244} Thereafter, on August 26, 1994, a stipulation and order was entered into reinstating the aforementioned teams for the 1994–95 academic year, requiring that prompt notice of any future decisions to terminate programs be given and that “all defendants in programs shall be in compliance with federal law and made in accordance with appropriate university procedure.”\textsuperscript{245}

During May 1995, litigation commenced in a New York state court in Lichten v. State University of New York at Albany\textsuperscript{246} challenging contempt of the court’s August 19, 1994 order in Kane. Subsequently during August 1995, the state trial court ruled that although there were some discrepancies in the decision making process to eliminate three men’s teams and a women’s team (swimming), where other women’s teams were established, they did not result in an arbitrary or capricious decision or in violation of Title IX.\textsuperscript{247} The court found that the proposed actions would bring the state University into closer compliance with Title IX.\textsuperscript{248} The decision was upheld on appeal.\textsuperscript{249}

Members of the men’s swimming team at the University of California at Los Angeles (“UCLA”) sought a preliminary injunction to reinstate their team at the University. On May 17, 1994, a California state court in Kurth v. University of California Regents\textsuperscript{250} declined to issue a preliminary injunction.

The court found that a university is permitted to eliminate proportional overrepresentation of male student-athletes to achieve the goal of proportional equality. The plaintiffs have appealed the de-

\textsuperscript{243} No. 4834-94 (N.Y. Sup. Ct. 1994). \textit{See also} Lichten v. State Univ. of N.Y. at Albany, 646 N.Y.S.2d 402 (N.Y.A.D. 1996) (asserting failure to comply with the court order in Kane and seeking restitution of the same sports slated for extinction as in Kane).

\textsuperscript{244} No. 4834-94 (N.Y. Sup. Ct. Aug. 19, 1994).

\textsuperscript{245} Id.


\textsuperscript{247} Id.

\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{250} No. SC-029577 (Cal. Sup. Ct. Los Angeles, May 17, 1994).
cision. UCLA had previously announced that it was also cutting women’s gymnastics, but reinstated the sport after female student-athletes threatened to challenge such action as a violation to Title IX. 251

Members of the men’s varsity swimming team sought the reinstatement of their team in Kelley v. Board of Trustees of University of Illinois, 252 where the women’s swimming team was not also scheduled for elimination. On September 1, 1994, the Seventh Circuit affirmed the district court’s granting of the defendant’s motion for summary judgment. 253 The appellate court supports the principle that “an institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes” 254 and endorsed the three-part effective accommodation test set forth in the HEW 1979 Policy Interpretation. 255 The court noted that “[m]en’s swimming was selected for termination because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and it does not have a large spectator following.” 256

The Seventh Circuit held that

[the university could, however, eliminate the men’s swimming program without violating Title IX since even after eliminating the program, men’s participation in athletics would continue to be more than substantially proportionate to their presence in the University’s student body. And as the case law makes clear, if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated. 257

The appellate court also found that the Title IX regulation, 34 C.F.R. § 106.41, “is not manifestly contrary to the objectives of Title IX” and,

253. 35 F.3d 265, 273 (7th Cir. 1994).
254. Id. at 268.
255. Id.
256. Id. at 269.
257. Id. at 270.
therefore, “this Court must accord it deference.” Furthermore, the court rejected the plaintiffs’ argument that the regulation imposes a gender-based quota system. Also, “[r]equiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women.”

Finally, the court rejected the plaintiffs’ argument that the school’s decision to eliminate men’s swimming while retaining women’s swimming would violate the Equal Protection Clause of the Fourteenth Amendment. The Seventh Circuit instead found that Congress has broad powers under the Due Process Clause of the Fifth Amendment to remedy past discrimination.

Title IX’s stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to this end.

On January 23, 1995, the Supreme Court denied the request to hear the plaintiffs’ appeal.

In the second case evaluating whether a University violated Title IX when it dropped a men’s sport, the district court in Gonyo v. Drake University denied the plaintiffs’ request for a preliminary injunction seeking the retention of the men’s varsity wrestling team at this private University during October 1994. On March 10, 1995, the district court granted the defendant’s motion for summary judgment as to Title IX, the Fifth Amendment “equal protection clause,” and the 42 U.S.C. § 1983 action alleging a violation of the Equal Protection Clause. The court had previously denied

259. Id. at 271.
260. Id.
261. Id. at 272.
262. Id.
263. Kelly, 35 F.3d at 272.
266. Id. at 990.
the plaintiffs' motion for a preliminary injunction to refrain from eliminating the men's varsity wrestling team at the end of the 1992–93 academic year.\textsuperscript{268}

The governing regulation\textsuperscript{269} directs substantial proportionality between the percentage of athletes and athletic scholarships.\textsuperscript{270} The plaintiffs argued that the University was not in compliance with this regulation, identified as the "scholarship test."\textsuperscript{271} The plaintiffs argued that a violation of either section 106.37 or section 106.41 should constitute a violation of Title IX.\textsuperscript{272} The court disagreed, stating:

\begin{quote}
[T]he 'safe harbor' of proportional participation extends beyond the question of compliance under section 106.41. As I read Title IX and the implementing regulations, the paramount goal of Title IX is equal opportunity to participate. . . . Scholarships may be a significant aspect of this opportunity, and an important tool in creating opportunity, but they remain only a part of the larger picture, logically subordinate to the overarching goal.\textsuperscript{273}
\end{quote}

During February 1995, male wrestlers instituted a suit in a New York state court in \textit{Cooper v. Peterson}\textsuperscript{274} after St. Lawrence University announced the decision to drop wrestling after the 1994–95 seasons. The case was predicated primarily on alleged breach of contract.\textsuperscript{275} No Title IX claim was made. New York has no state statute comparable to Title IX as it pertains to intercollegiate athletics. The defendant thereafter filed a motion to dismiss, which the state trial court judge granted during April 1995.\textsuperscript{276} "In dismissing the claim for sex discrimination, the court noted that the wrestlers had failed to present sufficient information demonstrating that they had been excluded on the basis of gender or subjected to discrimination in the athletics program."\textsuperscript{277} No appeal was taken.

\begin{itemize}
\item \textsuperscript{268} \textit{Gonyo}, 837 F. Supp. at 996.
\item \textsuperscript{269} \textsection 34 C.F.R. \textsection 106.37(c).
\item \textsuperscript{270} \textit{Gonyo}, 879 F. Supp. at 1004.
\item \textsuperscript{271} \textit{Id.}
\item \textsuperscript{272} \textit{Id.} at 1005.
\item \textsuperscript{273} \textit{Id.}
\item \textsuperscript{274} 626 N.Y.S.2d 432 (N.Y. Sup. Ct. 1995).
\item \textsuperscript{275} \textit{Id.}
\item \textsuperscript{276} \textit{Id.} at 435.
\item \textsuperscript{277} \textit{Governmental Affairs Report, NCAA News}, Aug. 30, 1995, at 5.
\end{itemize}
V. EQUAL OPPORTUNITY IN ATHLETIC EMPLOYMENT

As indicated, the bulk of cases revolved around the “equal opportunity” cases on behalf of female athletic employees or coaches of female teams, all on the post-secondary level. Title VII states in pertinent part that

[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin. . . .

Title VII, which prohibits sex discrimination in certain employment situations, requires satisfaction of either claim: a disparate treatment claim where the individual alleges intentional discrimination by the employer, or a disparate impact claim where a facially neutral or nondiscriminatory practice has a disproportionate negative impact on the hiring, firing, or terms and conditions of that employment for members of one sex over the other.

The crux of the Equal Pay Act is that equal pay must be accorded to employees of the opposite sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .” The Ninth Circuit, in Hein

278. Kowalski, supra note 228.
279. See Heckman, supra note 15, at 998–1018, for exploration of the three federal statutes (Title IX, Title VII, and the Equal Pay Act) routinely used in educational employment cases and for additional background and discussion of the case law issued concerning the athletic employment cases commenced prior to 1994.
281. See EEOC v. Metropolitan Educ. Enters. Inc., 60 F.3d 1225 (7th Cir. 1995), rev’d, 117 S. Ct. 660 (1997) (addressing the issue of the number of employees working, as Title VII only covers employees that have “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”)
Heckman v. Oregon College of Education,283 determined that the Equal Pay Act focuses on jobs that require equal skills and not to employees that possess equal skills. The Eleventh Circuit, in Brock v. Georgia Southwestern College,284 stated that “[i]t is important to bear in mind that the prima facie case is made out by comparing the jobs held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs.”285

While the Title VII and Equal Pay Act statutes have been thoroughly vetted by the courts, Title IX, which pertains only to employment at educational institutions which are recipients of federal funds, has yet to be fully fleshed out. A patchwork of case law is developing, borrowing on the other two federal employment related statutes, but still not explicitly focusing on the Title IX regulations that address employment286 or the requirement within 34 C.F.R. § 106.41(c)5-6 that where schools provide separate teams for members of each sex, that those students must have equality in coaching.

Inexplicably, there has not been one court decision, to date, involving sex discrimination by a coach or athletic director at an educational institution which discusses any of the specific Title IX regulations governing employment, not even in dicta, or a footnote. Query: Where University A hires a nationally renown successful male basketball coach for the men’s intercollegiate basketball team with a salary to reflect that distinction, however, the women’s intercollegiate basketball team is coached by a female former player, whose salary is appreciably less than that of the men’s team—has the school triggered Title IX sexual discrimination in employment and has the school provided equal coaching to both the men’s and women’s team, and the attendant student athletes, as required by Title IX regulations? Second: Does paying a coach of a men’s team a greater amount than the coach of the women’s team for the same sport, on the same divisional level, trigger a violation of Title IX, as opposed to the Equal Pay Act? For example, the NCAA has three divisions: Division I (most prestigious); Division II; and

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283. 718 F.2d 910 (9th Cir. 1983) (concerning litigation by a female assistant professor in the physical education department whose coaching duties approximated one-third of her responsibilities and teaching duties comprised two-thirds, as compared to the men’s varsity basketball coach whose coaching duties approximated one-fourth and teaching duties three-fours).
284. 765 F.2d 1026 (11th Cir. 1985).
285. Id. at 1032 (emphasis added).
286. See, e.g., 34 C.F.R. § 106.7 (Effect of employment opportunities); § 106.51 (Employment); § 106.52 (Employment criteria); § 106.54 (Compensation); § 106.55 (Job classification and structure).
Division III (non-athletic scholarship). Third: Should courts place merit when the men’s male coach has greater accomplishments than the women’s female coach, considering the following two factors?

First, ostensibly, women have been and continue to be almost exclusively absent from coaching men’s teams on the collegiate, and thereafter, the Olympic, and professional levels. During the 1995–96 season, on the collegiate level, there was not one woman coaching Division I men’s football, baseball, or hockey. A lone female, Kerri-Ann McTiernan, was coaching a men’s intercollegiate (non-Division I) basketball team at Kingsborough Community College, in New York, and Dot Murphy is an assistant football coach at Hinds Community College, a non-NCAA institution in Mississippi. No women coached any of the United States men competing in the 1996 Summer Olympics in Atlanta. While affirmative efforts have been voiced about bringing more black (male) coaches into the professional ranks, there has not been even any rhetoric about commencing the inclusion of women into this segment of the job market, despite the passage of almost twenty-five years since Title IX’s enactment, or the expanse of time after Title VII’s enactment. No real progress has been made, no trickle up effect has occurred due to the generation of females who have played interscholastic and intercollegiate sports. Consider the

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287. For example, in 1996, there was not one woman coaching in the National Football League (“NFL”), the National Basketball Association (“NBA”), Major League Baseball (“MLB”), or the National Hockey League (“NHL”). Moreover, there has never been a female referee in either MLB, the NFL, NHL, or Major League Soccer. Julie Sommer, Gender is Deciding Factor for International Referees: Highly Qualified Referee Denied Opportunity, WOMEN’S SPORTS EXPERIENCE, Dec. 1996, at 11–12.

288. Moreover, parity still has not been reached in the number of athletic events available for men and women. For example, for the first time women competed in softball at the 1996 Summer Olympics, but presently it has not received status as a permanent sport to be included for female athletes at future Olympics. Females comprised 34% of all athletes at the Summer Olympics. Women’s basketball was not added as an Olympic sport until 1976, and a women’s marathon was not included until the 1984 Summer Olympics. Moreover, only ten out of 113 members of the influential International Olympic Committee are women. There is only one woman on the IOC Executive Board, Anita DeFrantz. See Christopher Clarey, Perspective: Swifter, Higher, Stronger... Gender, N.Y. TIMES, Nov. 10, 1996, § 8, at 9. Within the next 10 years, each of the 197 participating countries will be required to have women comprise at least 10% of their decision-makers, which the IOC will be required to do so by the year 2000. Jody Smith, International Olympic Committee Increases the Role of Women, WOMEN’S SPORTS EXPERIENCE, Feb. 1996, at 13. The New York Times devoted an entire issue of its Sunday magazine to women’s participation in the Olympics. N.Y. TIMES MAGAZINE, June 23, 1996, § 6 (24th anniversary of Title IX).
second factor: Since there are few outlets for women to coach professional female athletes, a class comparison of a male coach with a female coach impacts to the detriment of a female coach—and so could be used in perpetuity to relegate the female coach to a lesser salary than her male counterpart. So when the judges compare the backgrounds of a George Raveling to a Marianne Stanley, or a Butch Beard to a Sanya Tyler, it is not surprising that the men are coming out on top. However, even if the courts allow this approach for an Equal Pay Act analysis (despite the aforementioned appellate decisions that instruct that the focus should be on the job skills, rather than individual skills), there has yet to be a direct answer as to whether this approach can be utilized when examining a Title IX cause of action. The essence of this commentary was first raised in 1994. Three years later, there has been no advancement in the Title IX panorama.

The 1995 Women’s Basketball Coaches Association (“WBCA”) survey found inequities between coaches of NCAA men’s versus women’s basketball teams in the percentages of radio and television shows, amenities (such as country club memberships, automobiles and amenities), bonuses for team performance, and program support (such as secretarial assistance, promotion and sport information staff time)—all not surprisingly favoring coaches of the men’s NCAA Division I basketball teams compared to coaches of the women’s basketball teams.

A. Hiring

There were no cases initiated concerning hiring policies of women coaching men’s teams, which continues the dearth of case law in this area.

289. This coincides with the complete blackout of any women athletes employed by the men’s teams in the NFL (there has never been a female NFL player), NBA (likewise, there has never been a female NBA player), MLB (the Colorado Silver Bullets, a women’s baseball team had played against minor league baseball players, but the women are not part of the Major League Baseball Players’ Association), or the NHL (during the early 1990s, a Canadian female player, Manon Rheaume, briefly played on a minor league team).

290. For example, since Title IX’s enactment, there have been sporadic professional women’s basketball leagues; however, 1996–97 will feature two women’s basketball leagues, including the American Basketball League, which commenced operation during the Fall 1996, and the National Basketball Association sponsored one, the Women’s National Basketball Association, which will commence operation during the summer of 1997. See Kate McCormick, Spotlight: Women’s Sports on the Professional Track-Part I, WOMEN’S SPORTS EXPERIENCE, Oct. 1996, at 19–21. While the women’s baseball team, the Colorado Silver Bullets has been playing for the last couple of years, the Women’s Professional Fastpitch League will debut during June 1997. Id. at 19.

since Title IX’s inception. The results of the ongoing longitudinal study done by Professors Acosta and Carpenter concerning NCAA colleges and universities revealed further disturbing news with their latest update. As of 1996, only 47.7% of the coaches of women’s teams are women, a decline from the 1994 figure of 49.4%. Furthermore, only 18.5% of all women’s programs are headed by a woman, also a decrease from the 1994 figure of 21%; and only 11.9% of colleges and universities with a full-time sports information director had a woman at the helm. In Division I in 1996, the research indicated that men comprised a startling 91.2% of the athletic directors of women’s programs. In 1996, only a few Division I schools had any women in athletic administration positions. Merely five of the NCAA’s Division I-A athletic directors are women.

B. Equal Pay

The Title IX regulation governing compensation states:

A recipient shall not make or enforce any policy or practice which, on the basis of sex:
(a) Makes distinctions in rates of pay or other compensation;
(b) Results in payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and

292. See Grebin v. Sioux Falls Indep. Sch. Dist., 779 F.2d 18 (8th Cir. 1985) (teaching position for which a female applied was filled by a man, who could also coach football). In this Title VII case, the Eighth Circuit determined the school district had a legitimate nondiscriminatory reason for not hiring the plaintiff, as the male applicant was better qualified. Id. at 21. See also Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988) (discussing another Title VII case concerning a female assistant softball coach who was not promoted to a full-time position).


294. Acosta & Carpenter, supra note 293, at 11.

295. Id.

296. Id. at 12.

297. The women athletic directors are Andrea Seger of Ball State University, Deborah Yow of University of Maryland, Cary Groth of Northern Illinois University, Sandy Barbour of Tulane University, and Barbara Hedges of University of Washington. Arena, NEWSDAY, Sept. 14, 1996, at A28.
responsibility, and which are performed under similar working conditions.298

There has yet to be a court decision in the area of athletics employment at an educational institution which addresses this specific regulation.299

There were only two cases exploring the equal pay considerations for coaches, who were still in their positions while the litigation ensued. The jury trial in Tyler v. Howard University was conducted in a District of Columbia Superior Court during 1993.300 The jury rendered a verdict of $2.39 million for Sanya Tyler, the women's basketball coach at Howard University. On June 29, 1993, the judge reduced the verdict, based on duplicate recovery for the same injuries under alternate legal theories, to $1.06 million against the University, and retained the original $54,000 verdict against the individual defendant.301

On September 15, 1995, the trial judge finally issued an order and memorandum opinion responding to the July 1993 post-trial motions filed by the defendants.302 The four causes of action asserted were: 1) Equal Pay Act; 2) sex discrimination pursuant to Title IX and a District of Columbia statute; 3) retaliation; and 4) defamation. The court granted the defendant's motion for judgment notwithstanding the verdict as to the Equal Pay Act based on the plaintiff not being selected as the Athletics Director in 1991 and a claim of retaliation.

Tyler had been the full-time Associate Athletic Director since 1986, and part-time women's basketball coach since 1980, for an aggregate salary of $62,000. On July 1, 1990, a full-time men's basketball coach was hired at an annual salary of $78,500, plus access to a leased car, with a four-year contract with an option for an additional year.303 Tyler was paid $44,436.304

298. 34 C.F.R. § 106.54 (emphasis added). Note that the regulation does not include the language, on the basis of sex of the individual, to track the Title VII verbiage.
301. Id. The court awarded $600,000 for lost wages pursuant to Title IX and the District of Columbia Human Rights Act; $138,000 damages pursuant to the Equal Pay Act; $72,00 for emotional distress under the sex discrimination claim; $250,000 damages for emotional distress under the retaliation claim; and $54,000 for the defamation claim. Id.
302. The court stated that resolution of the post-trial motions was intentionally delayed awaiting the development of appellate judicial precedent under the Equal Pay Act and Title IX. Mem. Op., supra note 300, at 2 n.1.
303. Id. at 9.
Tyler applied for the top position, which went to another candidate outside the University.

The court noted that the issue concerning the Equal Pay Act was whether this federal statute was violated due to the difference in salary and conditions paid to the men’s and women’s basketball coaches. The University argued that although the head full-time basketball coaches have the same job title and the same general job description, this did not entitle them to the same or identical salary. Rather, the jobs must be “substantially equal.” The court cited an appellate opinion which stated that “[skill] includes consideration of such factors as experience, training, education and ability. . . . Responsibility involves the degree of accountability required in the performance of the job; the controlling factor is not job title but job content—‘the actual duties that the respective employees are called upon to perform.’” The court found the Ninth Circuit decision in Stanley v. University of Southern California was persuasive on the equal pay issues.

Howard University’s men’s basketball coach was a former NBA player and coach, who authored a book and did television color commentary, and according to the University, the school “was forced to compete with market forces,” in obtaining his services. Clearly, he had more playing experience and a higher level of coaching experience than the plaintiff. However, considering the limited or nonexistent professional basketball opportunities for women in this country, certain men will always come in with an advantage (as result of historical discrimination against women in athletic and employment situations, which necessitated federal statutes such as Title IX, Title VII, and the Equal Pay Act).

The court also relied on the fact that the men’s basketball team

304. Id.
305. Id. See also Debra E. Blum, Pay Equity for Coaches: Some Colleges Give Substantial Raises to Mentors of Women’s Teams, CHRON. HIGHER EDUC., Apr. 6, 1994, at A53 (designating specific universities which are awarding coaches of their women’s teams with considerable raises to more closely align their salaries with those of the men’s coaches, such as women’s basketball coaches at The Florida State University, Texas A & M University, University of Florida, and University of Kansas).
307. Id.
308. Id. at 11.
309. 13 F.3d 1313 (9th Cir. 1994).
also served to generate income from the viewing public and spectators, the media, and from other sources to a far greater degree than did the women's basketball team. This revenue-generating function and responsibility placed far greater pressure on Coach Beard to win than was the degree of pressure placed on Ms. Tyler with reference to the women's basketball team. Thus, for this reason, their jobs were not substantially equal.311

The court noted that

[a] question may be raised as to whether societal factors, such as far greater spectator interest in men's basketball than women's basketball, and greater media and television interest and coverage of men's sports, as external factors, should be allowed to justify a disparity or differential in the pay of men and women coaches for the same athletic activities.312

The court responded that

This Court is constrained to follow the existing judicial precedent and leave it to the appellate courts to grapple with the issue of such market forces, as spectator interest and television and media coverage, justifying paying women less compensation than their male counterparts for basically the same function, except for the impact of these market forces over which universities and colleges claim they have no control.313

The defendant's motion was denied as to the sex discrimination claims of being undercompensated as women's basketball coach, involving the pay and working conditions, pursuant to Title IX and a District of Columbia statute. As to the retaliation claim, the court expounded:

While there was some dispute and misunderstandings as to office space assignment, available funds because of budget restraints, and other minor related issues, this Court concludes that the evidence concerning these matters did not rise to the level of establishing the

311. Id.
312. Id.
313. Id. at 18.
required nexus so that a reasonable jury could find that this activity was retaliation for complaining of sex discrimination. 314

Additionally, the motion was denied as to the defamation action alleged against an individual defendant, who allegedly in a single publication to a professional colleague of the plaintiff, intimated that the plaintiff was a lesbian. In conclusion, the court granted the defendant's motion for a new trial or remititut, only as to damages on the two sex discrimination claims of the District of Columbia statute and Title IX, or accepting a reduction to $250,000; and on the defamation claim a reduction from $54,000 to $10,000. Thereafter, the parties settled the case during November 1995.

C. Termination

1. Cases Commenced Pre-1994

On January 6, 1994, the Ninth Circuit in Stanley v. University of Southern California 315 affirmed the district court's denial of the plaintiff's motion for a preliminary injunction seeking restoration of the plaintiff's position as the women's basketball coach at the University pendente lite. Marianne Stanley had commenced her lawsuit in 1993 seeking $8 million in compensatory and punitive damages on a number of legal theories, including: Title IX, the Equal Pay Act, 316 the California Constitution, breach of contract, and wrongful discharge.

The appellate court found the men's basketball coach had "substantially" different responsibilities in raising revenue (the men's basketball program generated 90% revenues compared to the women's basketball program which generated 10%) and public relations responsibilities on behalf of the University that could command a greater salary than

314. Id. at 5.

315. 13 F.3d 1313 (9th Cir. 1994) (granting the defendants' motion for summary judgment). An appeal has been taken to the Ninth Circuit. Prior to this decision, there was only one other decision concerning athletic employment pursuant to Title IX, O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986), which did not reach the merits of the case, but focused on the threshold issue of whether the athletic department was a recipient of federal funds to ensure Title IX protection.

316. See Mike Candal, Equal Coaching for Unequal Pay, Newsday, Apr. 2, 1995, (Sports section), at 18 (concerning the difference in salary paid to the men's and women's basketball coaches at the University of Connecticut). The male head coach of the women's team guided his team to the 1994-95 NCAA Women's Basketball championship. See also Ira Berkow, Auriemma Helps Pave the Way at UConn, N.Y. Times, Apr. 2, 1995, § 8, at 2.
provided to the women’s basketball coach pursuant to the Equal Pay Act. The Ninth Circuit found that “[e]mployers may reward professional experience . . . without violating the EPA.”317 Furthermore, “[r]evenue generation is an important factor that may be considered in justifying greater pay. We are also of the view that the relative amount of revenue generated should be considered in determining whether responsibilities and working conditions are substantially equal.”318

Interestingly, the only reference to Title IX was contained in a footnote, where the Ninth Circuit stated, “Coach Stanley has not contended either in the district court or before this court that this evidence [concerning the revenue-generating ability of the men’s versus women’s basketball programs] would support an inference that USC violated Title IX.”319 Furthermore, the mere fact that the University ultimately offered only a one-year contract did not establish retaliation320 where the men’s basketball coach had a multi-year contract, and Stanley’s expired contract was a multi-year contract. In both the Ninth Circuit decision and the following district court decision, Title IX is essentially left out of the equation in determining whether sex discrimination existed.

On March 10, 1995, the district court granted the defendant’s motion for summary judgment in its entirety, primarily on the determination that the duties and responsibilities of the men’s basketball coach were greater than those required of the women’s basketball coach, with the former position requiring greater pressure to win, raise revenue, and satisfy greater public relations requirements.321 The district court found that

317. Stanley, 13 F.3d at 1322 (citing Soto v. Adams Elevator Equip. Co., 941 F.2d 543, 548 n.7 (7th Cir. 1991)).
318. Id. at 1323. See Naughton & Srisavasdr, supra note 6, at A45, referring to a recent NCAA report that revealed that “more than 60 percent of Division I men’s basketball programs and Division I-A football programs lose money. The average deficits are $226,000 and $1.02 million respectively.” Id. See also Jim Naughton, A Book on the Economics of College Sports Says Few Programs are Financially Successful, CHRON. HIGHER EDUC., Oct. 11, 1996, at A57.
320. 34 C.F.R. § 106.71 (adopting by incorporation 34 C.F.R. § 100.7(e)) (prohibiting retaliation).
Stanley still is unable to show the existence of a genuine issue of material fact on the issue of whether the men's and women's basketball coaching positions are substantially equal and require equal pay under the law. It is clear they are not. Both the men's and women's head coaches recruit student athletes, coach basketball, provide academic guidance to team members, and supervise their coaching staffs. The men's coach, however, is under considerable pressure to generate revenue for the university by attracting paying spectators and producing a winning team.322

The court noted that "[t]his pressure is created by the media, public, and the school's administration and donors."323

The court grouped the sex discrimination claims pursuant to the Equal Pay Act, Title IX, and the California statute324 in one discussion. A review indicated that as with the prior appellate court decision, the focus was on an explicit analysis of the Equal Pay Act. "To state a claim under this section, the plaintiff's job must require substantially the same skill, effort, and responsibility as the higher compensated job held by a member of the opposite sex."325 The only direct mentions of Title IX were in the next to last paragraph of the subsection, where as an aside the district court stated that "[s]imilarly, Title IX of the [Education Amendments] of 1972 prohibits an educational program that receives federal financial assistance from denying benefits to, or subjecting to discrimination, any person on the basis of sex,"326 and "[t]he athletic director's] power as athletic director to hire and fire athletic coaches does not make him an employer for purposes of individual liability under . . . Title IX."327 Once again, there was no discussion of any of the Title IX regulations. First, there was absolutely no mention of the Title IX regulations governing employment. Second, there was no recognition of the Title IX regulation establishing "equal opportunity" which

coach at University of California at Berkeley, after serving as temporary head coach at Stanford University. Stanley will be paid a base salary comparable to that of the men's basketball coach. Cf. University of California, Gender Equity in Intercollegiate Athletics at the University of California: A Report of the Gender Equity Committee of the Department of Intercollegiate Athletics & Recreational Sports, Dec. 1, 1993 (on file with the Nova Law Review).

323. Id. at 15.
326. Id. at 13.
327. Id. at 19.
explicitly mandates equal opportunity in coaching for male and female athletes when a school elects to provide separate teams for their male and female student athletes. The court underscores that the women's basketball coach was not required to make any specific number of public appearances to promote the women's basketball team. . . . The University did not impose public relations responsibilities on her while she was head coach. . . . In contrast, [the men's basketball coach's] required participation in at least twelve outside speaking engagements per year, that he be accessible to the media for interviews, and that he participate in community activities. He was required to participate in fund-raising activities benefiting the athletic department in general and the men's basketball program in particular.

The court fails to recognize that generally it is the recipient of federal funds, the academic institution, which is clearly controlling the issue of public relations responsibilities, by explicitly imposing it as a requirement within a contract of the men's basketball coach and not the contract of the women's basketball coach, and then is permitted to use the absence thereof to penalize the women's basketball coach when it comes to remuneration. As previously identified, surely a women's coach would not be against such minimal additional public relations duties, with a possible additional compensation of $60,000 per annum. The logic certainly seems flawed. Moreover, query whether it triggers a direct attack as to whether the recipient of federal funds was providing "equal opportunity" for its female student athletes, where the school, adopting the court's rationale, was apparently not required to promote this program with the same vigor.

Additionally, the court places significant stock in the revenue-generating responsibilities of the men's coach. "Revenue generation is an important factor in determining whether responsibilities and working conditions are substantially equal and whether greater compensation is justified." Not surprisingly, the men's basketball program raised $4,621,020.90 versus only $59,918.50 by the women's basketball program. The court neglects to provide the dates when the men's and women's basketball teams came into existence at the University. The court does compare the spectators for the appropriate periods for the men's and women's basketball teams. Not surprisingly, the statistics favored the men;

328. Id. at 16.
329. Id. (citations omitted).
however, the men's team averaged merely 4103 spectators for the time period in question, hardly an overwhelming number for a major college basketball program. Of course, the argument can be made, that if the judiciary is going to do a side-by-side comparison, then by necessity the University must provide an "equal opportunity" for both programs, and so the court would be required to insure that that standard was satisfied, before the comparison can be made. This determination, resting as it does on the Ninth Circuit decision, obscures the Title IX picture. As previously identified, revenue-generation is absent from the "equal opportunity" discussion. Furthermore, the "[c]ourt addresses the retaliation claim as if it arises under Title VII." Again, what about retaliation pursuant to Title IX?

Instead, the court reiterated that "[t]he [c]ourt finds no discrimination arising from USC's contract offers to Stanley. It thus was not required to pay her a salary equal to that paid to the men's head coach." The appellee's brief recounted the Ninth Circuit's observation that "the uncontradicted evidence shows that Coach Raveling's responsibilities, as head coach of the men's basketball team, differed substantially from the duties imposed upon Coach Stanley." Coach Raveling has since retired. It is not known what compensation arrangement exists with the current men's basketball coach. Oral argument before the Ninth Circuit occurred on October 7, 1996.

330. The Appellee's Brief, in discussing one of plaintiff's experts' arguments, notes that "[w]hat Frey appears to be saying, although he cites no source for his statement, is that, compared with other men's programs, USC's men's program did not have relatively high attendance; conversely, compared with other women's programs, the USC women's program did have relatively high attendance." Stanley v. University of S. Cal., No. 95-55466, Appellee's Brief, Aug. 25, 1995, at 21 n.17.


332. Id. at 14.

333. Appellee's Brief, Stanley v. University of S. Cal., No. 95-55466, Aug. 25, 1995, at 2 (on file with the Nova Law Review). The brief also summarizes that as to the retaliation/public policy wrongful discharge claims that "[t]he court found it was undisputed that USC had offered Stanley a multi-year contract with very substantial pay increases after she had demanded the same pay as Raveling. . . . Furthermore, Stanley was not terminated, but her written employment contract expired June 30, 1993, and she rejected all offers USC made for a new contract." Id. at 7. Furthermore, defendants argued, "Under the law set by this Court in Stanley I, USC was not required to pay Stanley according to a marketing professor's view of the potential of women's basketball, as distinguished from the underlying actuality of spectator interest, media interest, revenue generation, and the like." Id. at 19–20.

334. The Ninth Circuit posed no direct questions about any of the specific Title IX regulations governing employment. The plaintiff has also filed two other appeals in this case, one challenging the alleged bias of the district court judge, No. 95-56250 (9th Cir. 1996) (briefs have been filed), and another challenging the imposition of costs as of result of the summary
Katalin Deli, the former head coach of women's gymnastics team, alleged sex discrimination in violation of Title IX, Title VII, and the Equal Pay Act in not having received pay comparable to that of the men's football, basketball, and ice hockey coaches (but not the men's gymnastics coach) in *Katalin Deli v. University of Minnesota*. The federal district court granted the University's motion for summary judgment on all three federal statutes. The Title IX claim was dismissed for failure to comply with the statute of limitations. No appeal was taken.

Gabor Deli, the former assistant women's gymnastics coach, also commenced a federal lawsuit in *Gabor Deli v. University of Minnesota*, alleging discrimination, including sex discrimination in violation of Title IX in not receiving pay comparable to that paid to assistant coaches of some men's teams (other than his own sport). On August 18, 1994, the federal district court granted the University's motion for summary judgment. First, as to the Title VII assertion, the court concluded that "[t]he clear terms of the statute prohibit discrimination in compensation based on the sex of the recipient. The statute does not proscribe salary discrimination based on the sex of other persons over whom the employee has supervision or oversight responsibilities." Second, the court rejected plaintiff's Equal Pay Act contention based on the failure to compensate him at the same level as male assistant coaches of certain men's intercollegiate teams. The court stressed that under this statute, the crux must be a difference in what is paid members of one sex compared to the opposite sex. Since the plaintiff here is a man and the comparators (assistant coaches of the selected men's teams) are also all male, this claim cannot advance. Moreover, the court would not entertain such a claim based on the sex of the students coached. "Such compensation differentials are based on a 'factor other than sex' and thus are not

336. Id. at 963.
338. No. 3-93-501 (D. Minn. Aug. 18, 1994) (Memorandum and Order) (on file with the *Nova Law Review* [hereinafter Mem. & Order]).
proscribed by the EPA.”

Third, as to the Title IX violation raised, the court ruled the plaintiff did not have standing to pursue a Title IX claim on behalf of student athletes he had coached, and assuming arguendo that he had, such standing evaporated when his coaching position was terminated, thus rendering any such standing moot. Moreover, the court eviscerated the Title IX claim by addressing merely the “equal opportunity” regulations which require equivalency as to coaching. The rationale was based, in part, on the failure of the plaintiff to assert in his complaint that the athletes he coached received lesser quality coaching as a result of the difference between his salary and the salary paid to the men’s assistant coaches. In Deli v. University of Minnesota, the state Court of Appeals ruled that the dismissals of the assistant coach, Gabor Deli, and the head women’s gymnastics coach, Katalin Deli (Gabor Deli’s wife), were predicated upon just cause.

During December 1995, the jury issued a verdict in favor of the plaintiffs, former coaches, and athletic administrator employees in Meadows v. State University of New York at Oswego. However, during February 1996, the judge overturned it. Subsequently, motions were filed seeking restoration of the verdict. The case was ultimately settled during 1996.

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342. Mem. & Order, at 14 n.4, Deli, (No. 3-93-501). The regulations allow anyone to file an administrative complaint on behalf of aggrieved beneficiaries of Title IX protection, and such an administrative complaint may even be filed confidentially. 34 C.F.R. § 100.7 (1996).
343. Mem. & Order, at 15, Deli, (No. 3-93-501) (referring to 34 C.F.R. § 106.41(c)). Specifically subsections 5 (“Opportunity to receive coaching and academic tutoring”) and 6 (“Assignment and compensation of coaches and tutors”) pertain to coaching.
344. 511 N.W.2d 46 (Minn. Ct. App. 1994).
345. Id. at 54.
2. Cases Commenced During 1994–96

On January 20, 1994, Marty Hawkins, the former coach of the women’s basketball team filed suit in *Hawkins v. University of Loyola at Chicago*, 348 seeking compensatory damages of $1 million and punitive damages of $3 million for his firing which he alleged was predicated on his speaking out for gender equity at the school in violation of Title IX. The federal complaint was voluntarily withdrawn. Thereafter, a lawsuit was commenced in state court. 349

On April 6, 1994, a former women’s basketball coach filed a complaint in *Bowers v. University of Baylor*, 350 alleging sex discrimination and retaliation in violation of Title IX. The plaintiff sought $1 million compensatory damages and $3 million punitive damages, and injunctive and declaratory relief. Thereafter, on April 13, 1994, the district court denied plaintiff’s motion for a preliminary injunction restoring her to the head coaching position of women’s basketball during the pendency of the lawsuit. 351 On August 11, 1994, the district court denied the defendant University’s motion to dismiss the plaintiff’s Title IX claim, holding that an employee may assert a private right of action under this statute. 352 However, it granted the motion as to the individually named defendants, 353 relying principally on *Doe v. Petaluma City School District*. 354

During April 1994, Mary Jane Telford, former women’s basketball coach for seventeen seasons brought suit in *Telford v. St. Bonaventure University* alleging sex discrimination pursuant to Title IX, Title VII, and the Equal Pay Act. On April 28, 1995, the case was settled, reportedly for at least $100,000. 355

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348. No. 94CV00245 (N.D. Ill. 1994) (On Mar. 22, 1994, the case was dismissed without prejudice.).
349. *Hawkins*, No. 94L03300 (Cook County, Ill. Mar. 18, 1994) (The case was pending as of January 24, 1997, and is subject to nonbinding mediation. The parties have selected a mediator and are arranging a date for mediation.).
351. *Id.* (W.D. Tex. Apr. 13, 1994).
353. *Id.* at 146.
354. 830 F. Supp. 1560 (N.D. Cal. 1993). In this case alleging sexual harassment of a female student by her peers in creating a hostile environment, the district court determined that “it is the educational institution that must be sued for violation of Title IX.” *Id.* at 1577. *Accord R.L.R. v. Prague Pub. Sch. Dist.* I-103, 838 F. Supp. 1526, 1530 (W.D. Okla. 1993) (dismissing the action against the alleged coach charged with the actual sexual abuse).
On May 11, 1994, Ellyn Bartges, a former part-time assistant women's basketball coach and women's softball coach, who was terminated during June 1993, filed an amended complaint seeking $5 million damages and injunctive relief in *Bartges v. University of North Carolina at Charlotte*, pursuant to Title IX, Title VII, and Equal Pay Act, based on allegations of sex discrimination, constructive discharge, and retaliation. Bartges had resigned from her position as women's head softball coach. On November 6, 1995, the federal district court granted the University's motion for summary judgment as to all causes of action alleged by the plaintiff. The decision in *Bartges* focused on the Equal Pay Act considerations, as opposed to Title IX, similar to the Ninth Circuit decision in the *Stanley* case.

Bartges had volunteered to be an assistant coach for the women's basketball team during 1988–89. She was then paid an hourly rate for the following season, and hired by the female athletic director, Judith Rose, as the part-time head women's softball coach during the summer of 1990–91. Rose paid Bartges more than she had paid the former women's softball coach, a man, despite her having less experience. Bartges has no prior head coaching experience on the collegiate level, six months of experience as a volunteer assistant basketball coach at another university, six months of experience as head coach of a high school girl's team, and no prior experience as a softball coach. Bartges continued as part-time assistant women's basketball coach and part-time head softball coach for the University for the academic years 1990–91, 1991–92, and 1992–93.

"Later, Bartges lost her job as Assistant Women's Basketball Coach when that position was converted to a full-time position and she was not hired for the full-time slot." She applied for the women's assistant basketball coach's position "only after she was invited to do so" by the athletic director and current coach. Although she was one of the three finalists, she was not selected. Instead, the University chose another woman who had three years head coaching collegiate experience elsewhere and was a former basketball player at the University. In order to comply with NCAA

357. Id. at 1320.
358. Id. at 1334.
359. Id. at 1317.
360. Id. at 1318.
362. Id.
regulations, the University created positions for two full-time assistant coaches and one part-time "restricted earnings" coach, who was limited to $12,000 a year in total compensation from the University.

Bartges agreed to change the term of her employment as softball coach from a twelve-month to nine-month position to retain her health insurance coverage. During her employment, she filed two administrative complaints with the Equal Employment Opportunity Commission ("EEOC"). Bartges also filed an administrative claim with the OCR alleging sex discrimination pursuant to Title IX. She submitted her letter of resignation on July 26, 1994.

The court declined the Equal Pay Act claim that Bartges received lower pay than other coaches. The court observed that the full-time head baseball coach "is responsible for a thirty-two member team as opposed to the fifteen member softball team. Therefore, the Head Baseball Coach must recruit, monitor, and coach more than twice as many student-athletes . . . [and] is also responsible for supervising one full-time coach." The court found the same situation existed with the head volleyball coach, which was also a full-time position. Moreover, Bartges was paid more than the head golf coach. A comparison with the men's assistant coaches illustrated the plaintiff's prior limited coaching experience in basketball and non-existent prior experience with softball, compared to the corresponding assistant coaches. Additionally, the men's assistant basketball coaches were full-time positions, compared to position of the women's assistant basketball coach, which was only a part-time position.

The court highlighted that

the uncontested evidence is that men's basketball is the most marketable and largest revenue producing sport at UNCC. This makes the position considerably more important to the University, and

363. The court did not discuss the pending litigation concerning the permissibility of the "restricted earnings" coaches. See, e.g., Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995) (men's "restricted earnings" basketball coaches instituted an antitrust action against the NCAA); Schreiber v. NCAA, 167 F.R.D. 169 (D. Kan. 1996) (concerning whether class action status would be conferred upon members of NCAA men's "restricted earnings" baseball coaches, who instituted an antitrust action against the NCAA).
365. Id. at 1320.
366. Id. at 1326.
367. Id. at 1323.
368. Id. at 1325.
also means the position entails greater public relations, recruiting and other coaching responsibilities, and means the position carries with it much more pressure to produce winning teams. 370

In addition, “[t]he University has given several reasons why Bartges was paid less than the coaches of other programs: her limited experience, the relative importance of the sport she coached in the University’s sports program, and the prevailing wage for coaches in her sport.” 371 Thus, the court concluded that “[b]ecause UNCC has established that its compensation decisions were based on a factor other than sex... the University is entitled to summary judgment on Bartges’ claim under the Equal Pay Act.” 372

In regard to Title IX, the University argued that the legislative history was not intended to provide a private cause of action for individual educational employees, who were relegated to Title VII. This was based primarily on the assertion that Congress has amended Title VII to include educational employees, within the Equal Employment Opportunity Act of 1972, merely three months prior to the enactment of Title IX and thus, the “legislative history of the Equal Employment Opportunity Act of 1972, which amended Title VII,” is part of the legislative history of Title IX. 373 Thus, the defendant argued that Congress omitted any intention of including a private rights of action for educational employees because it had already been addressed. 374 While that is accurate, can it be interpreted that any omission in a new statute enacted three months later is the tabula rasa? Moreover, the argument ignores the fact that in 1975 Congress enacted specific Title IX regulations solely for educational employees. If Title VII was the exclusive remedy then such regulations would have been superfluous, or Congress could have instead merely incorporated by reference the actual Title VII requirements, as it did for example when referring to retaliation, when it adopted Title VI. However, this was not done. The defendant continued that, assuming arguendo, Title IX did allow for such a private cause of

372. Id. at 1326.
action,\footnote{375} the Title VII standard of intentional discrimination must be established. Since no evidence of intentional discrimination was found, no Title IX cause of action could be maintained.

From a Title IX perspective, assuming arguendo a Title IX private right of action for educational employees, the issue should have been framed as whether the University discriminated on the basis of sex, when: a) comparing the full-time head coaching position for men’s baseball vis-a-vis the part-time head coaching position for the women’s softball team; b) comparing the full-time men’s assistant basketball coaches vis-a-vis the part time women’s assistant basketball coach;\footnote{376} and c) whether an examination of the entire men’s athletic program vis-a-vis the entire women’s athletic program revealed sex discrimination in the assignment, compensation, and opportunity to receive coaching.\footnote{377} The court eschewed such an analysis. On August 14, 1996, the Fourth Circuit affirmed the lower court’s decision for the reasons advanced therein.\footnote{378} No appeal was filed seeking certiorari with the Supreme Court.

\footnote{375} The Fourth Circuit sanctioned such a position in Preston v. Virginia ex rel. New river Community College, 31 F.3d 203 (4th Cir. 1994) (discussed infra p. 615).

\footnote{376} The University asserted that “UNC Charlotte does not pay the coaches in the basketball program more because they coach men.” Appellees’ Brief, 1996, at 22 n.3, Bartges v. University of N.C. at Charlotte, No. 95-3157 (4th Cir. Dec. 18, 1995).

\footnote{377} Subsequently, the OCR found no violation in the assignment or compensation of coaches, but did find a violation in the availability of coaches for women’s teams. Appellees’ Brief, at 48. Even in the appellees’ brief, the University extolled that [o]ne significant factor is the priority UNC Charlotte places on the sport in question. . . . In prioritizing the sports in which it offers intercollegiate competition, UNC Charlotte has simply decided which sports, and consequently which coaches, are most important to the university. In light of those facts, UNC Charlotte’s decision to pay the more important coaches more money is a legitimate, nondiscriminatory reason for the difference between their salaries and the plaintiff’s.

Appellees’ Brief, at 17–18. High priority sports were men’s basketball, men’s baseball, men’s golf, and women’s volleyball. Noticeably absent was women’s basketball from the school’s internal assessment. \textit{See} Heckman 1992 commentary, \textit{supra} note 15, at 970, warning against the practice of school’s “emphasizing” certain sports for a Title IX analysis. The court made no reference to the inequity in the number of participation opportunities (and teams) emphasized for male student athletes at this University, compared to the female student athletes.

\footnote{378} 94 F.3d 641 (4th Cir. 1996). The University’s appellate brief stated that “[t]hough Bartges may believe the she worked as hard as a full-time head coach, her belief is immaterial. She has presented no evidence that the UNC Charlotte required the same effort from its part-time head coaches that it did from its full-time head coaches. It is only when the employer
In *Plotzke v. Boston College*, the former coach of the women's basketball team at the college commenced a federal lawsuit alleging, *inter alia*, Title IX sex discrimination and retaliation during November 1994. On March 27, 1995, the court granted Boston College's motion to dismiss the plaintiff's complaint in part, and denied it in part. The Title IX claim remained, with the court relying on *Lipsett v. University of Puerto Rico*. Likewise, the motion of the individually named University President and athletic director was granted in part, and denied in part. The Title IX claim was also allowed against the two aforementioned individual defendants, again citing *Lipsett*. This stance of retaining the individually named defendants is at odds with the decisions in other cases, which have dismissed such claims. The parties entered into a confidential settlement during 1996.

In *Harker v. Utica College of Syracuse University*, the women's basketball coach's contract was not renewed, and she brought suit pursuant to Title VII, Title IX, and the Equal Pay Act. On April 24, 1995, the court dismissed her complaint on all theories, finding, *inter alia*, that she failed to create an inference of discrimination under Title IX.

Only one case dealt with termination of a female athletic employee of a men's team. On July 18, 1995, JoAnn Hauser, former men's basketball teams' athletics trainer at the University of Kentucky, filed a state court action in *Hauser v. University of Kentucky*, alleging sex discrimination concerning her discharge. No Title IX claim was alleged. During September 1996, the judge dismissed the causes of action directed at the athletic director and men's basketball coach, in their individual capacities, in this lawsuit seeking $2 million.

**D. Retaliation**

Most of the termination cases also contained retaliation aspects. Stephanie Schleuder, the women's volleyball coach at the University of...
Minnesota for thirteen seasons, had been without a contract since 1993. She was fired during December 1994. "She alleges the firing was due to her crusading for pay equity in the women’s athletic department." She originally brought suit in a federal district court claiming violations of Title IX and the Equal Pay Act. After her motion for temporary restraining order restoring her as coach was denied, she voluntarily dismissed the suit and filed a claim with the state agency responsible for sex discrimination. On January 30, 1995, a state court judge in Minnesota v. Regents issued an injunction preventing the University of Minnesota from hiring a new women’s volleyball coach while the Minnesota Department of Human Rights investigated a claim of retaliation pursuant to the Minnesota Human Rights Act. The Commissioner of the agency asserted that the state predicated was broader than the federal one.

The case of Clay v. Board of Trustees of Neosho Community College concerned allegations of retaliation by the male coach of the women’s basketball team, whose contract of employment was not renewed. He had spoken about the lack of Title IX compliance with the male athletic director. The district court noted that "the question of whether Title IX provides a private cause of action for damages for retaliation against a whistle blower, under circumstances similar to the instant case, has not been decided by the Supreme Court or the Tenth Circuit." The court found that "in short, discrimination against women by a community college in its sports programming is a matter of public interest." The district court found that a plaintiff may maintain a Title IX claim for retaliation. Furthermore, the common law wrongful discharge claim would be preempted by Title IX.

391. Id. at 1491–93.
392. Id. at 1494.
393. Id. at 1498.
394. Id. at 1495. The court also held that “Title IX actions may only be brought against an educational institution, not an individual acting as an administrator or employee for the institution.” Clay, 905 F. Supp. at 1495.
395. Id. at 1501.
E. Reverse Discrimination Cases

The first reverse discrimination case was commenced during February 1995 in Reinhart v. Georgia State University. Bob Reinhart, former men's basketball coach at the University commenced the suit, "claiming he was fired because he refused a pay cut intended to bring his salary in line with that of the women's basketball coach."  

VI. EDUCATIONAL EMPLOYMENT TERMINATION OR RETALIATION

Generally

The predominant issue evidenced herein is a threshold issue of whether Title IX provides a private cause of action for employees of educational institutions, or are they limited to a Title VII action, with any prosecution of violations of Title IX involving educational employees confined to the federal government by the Department of Justice or the OCR. On June 13, 1994, an University of Toledo female employee brought an action against the University for sex and age discrimination in Wedding v. University of Toledo.  The district court held that no private cause of action existed under Title IX for sex discrimination in employment.
The plaintiff, a community college student support services counselor, alleged Title IX and Title VII retaliation in *Preston v. Virginia ex rel New River Community College* when she was not elevated to the activities counselor position. She had filed an employment discrimination claim when she was the support services counselor. On August 3, 1994, the Fourth Circuit affirmed the district court’s dismissal of her claim. The appellate court recognized that a Title IX implied private right of action extends to employment discrimination at educational institutions receiving federal funds. However, prior to passage of the Civil Rights Act of 1991, the prevailing case law involving Title VII retaliation was “that an employer is not liable if it would have reached the same employment decision in the absence of the protected conduct.” In 1994, the Supreme Court held the Civil Rights Act should not be retroactively applied. Thus, the Fourth Circuit determined that “Title VII principles should be applied to Title IX actions, as least insofar as those actions raise employment discrimination claims.” Therefore, since the actions complained of occurred prior to the effective date of the Civil Rights Act, the Title VII standard would be applied and retaliation would not be found where the protected activity “played a part—even a substantial part—in the decision-making process.”

In *Fairbairn v. Board of Education of South Country Central School District*, the plaintiff, a female school administrator, was terminated. She brought a claim under a number of legal theories, including Title IX. On January 13, 1995, the district court ruled:

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an educational employee) (Title IX should be afforded “a sweep as broad as its language,”), and explicit Title IX regulations dealing with employment, namely 34 C.F.R. §§ 106.51, .52, .54, the decisions finding a Title IX right of action for educational employees would seem to be the more supportable approach.

400. 31 F.3d 203 (4th Cir. 1994).
401. *Id.* at 204–05.
402. *Id.* at 209.
403. *Id.* at 206.
405. *Preston*, 31 F.3d at 206.
406. *Id.* at 207.
407. *Id.* at 206. *See* Roberts v. Colorado St. Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 902 (1st Cir. 1993); Lipsett v. University of P.R., 864 F.2d 881, 869–97 (1st Cir. 1988); O’Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986).
408. *Preston*, 31 F.3d at 206.
410. *Id.* at 435.
The burdens of proof and production which govern disparate treatment claims under Title VII . . . , likewise are applicable to . . . Title IX . . . . Accordingly, Fairbairn initially was required to establish a prima facie case of discrimination that (1) she belonged to a protected class, (2) she applied and was qualified for a job for which her employer sought applicants, (3) that despite her qualifications, she was rejected, and (4) that after rejection, the post remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.411

A female plaintiff brought a lawsuit against the Board and some individuals in Howard v. Board of Education of Sycamore Community Unit School District No. 427412 on a number of legal theories premised on her allegations of constructive discharge and being replaced with a man who was not minimally qualified.413 The Title IX claim was directed only against the Board concerning claims of sexual discrimination, harassment, and retaliation.414 The district court cited the definition of "program or activity" and determined that such definition does not include the agents of such an entity. The court recognized:

Several other cases, on the other hand, have applied the agency principles under Title VII cases to sexual harassment actions under Title IX . . . . This court is persuaded by the reasoning in Floyd. While it is not entirely clear what the precise parameters are on employer liability, it is at least evident that agency principles provide guidance in Title VII cases.415

"Absent the use of traditional agency principles, the court is left with two alternatives: strict liability based on the conduct of school employees or liability premised only upon the direct knowledge or involvement of the school or educational institution."416 The court opined:

Absent knowledge or direct involvement by the school or educational agency, it is difficult to characterize any form of sex discrimination as an authorized program or activity of the school edu-

411. Id. at 437.
413. Id. at 964–65.
414. Id. at 974.
415. Id. (citations omitted).
416. Id.
cational agency. Thus, this court finds that absent allegations that the Board knew of, or was directly involved in, any of the alleged discriminatory conduct in Counts IV-VI, plaintiff can not maintain a claim against the Board under Title IX. 417

Thereafter, on July 21, 1995, the district court issued another decision, 418 stating:

[T]his court does not read the Cannon, Bell and Franklin decisions as supporting the conclusion that the legislative history of Title IX demonstrates Congress' intent to have Title IX serve as an additional protection against gender-based discrimination regardless of the available remedies under Title VII. Accordingly, this court dismisses plaintiff's Title IX claim as being precluded by Title VII. 419

During May 1995, three female professors alleged sex discrimination against the University of Iowa in Brine v. University of Iowa, 420 concerning the closing of the school's dental hygienist program, which was primarily composed of females. 421 The hygienist program was part of the dental program, which was taught by and had a significant number of men. The female professors were allegedly reassigned to lower paying positions. While the jury rejected their sex discrimination allegations, the jury awarded the women $210,000 in back pay and damages for retaliation in connection with the situation.

On October 3, 1995, the Fifth Circuit, in Lakoski v. James, 422 ruled that Title VII is the proper vehicle to bring an employment discrimination claim

419. Howard, 893 F. Supp. at 815. The court agreed with several other decisions on this point, including Wedding v. University of Toledo, 862 F. Supp. 201 (N.D. Ohio 1994) and Storey v. Board of Regents of Univ. of Wis., 604 F. Supp. 1200, 1205 (W.D. Wis. 1985) (holding that an employee of an educational institution cannot bring a private cause of action for gender discrimination under Title IX).
420. 90 F.3d 271 (8th Cir. 1996). See also Robin Wilson, Federal Jury Rejects Sex-Bias Discharge at University of Iowa, CHRON. HIGHER EDUC., May 12, 1995, at A20.
421. Brine, 90 F.3d at 272.
and that "individuals seeking monetary damages for employment discrimi-
nation on the basis of sex in federally funded educational institutions may
not assert Title IX either directly or derivatively through § 1983."423 The case
concerned a female professor who sued a hospital at the University of Texas
for sex discrimination when she was denied tenure. Thus, the appellate court
concluded that Title IX did not provide a private cause of action.424 The
Supreme Court declined to hear the appeal in this case during the October
1996 term.

In Nelson v. University of Maine System,425 the district recognized that
"[w]hile the First Circuit has yet to address a Title IX retaliation claim, the
court’s treatment of Title IX discrimination claims supports an extension of
this analysis to Title IX retaliation claims,"426 and the court utilized Title VII
standards.427 It stated that "[t]o satisfy the first prong of a prima facie case
for retaliation, the conduct opposed need not necessarily violate Title IX;
rather, the plaintiff need only have a good faith belief that a Title IX viola-
tion was occurring."428

VII. SEXUAL HARASSMENT

The area of sexual harassment in educational institutions is divided into
two main areas, harassment involving students and harassment involving
educational employees. Title VII, which concerns only employment sexual
harassment, is being heavily relied upon in Title IX situations. A consensus
is developing that the Title VII standards for sexual harassment, including

Comm. Unit Sch. Dist. No. 427, 893 F. Supp. 808 (N.D. Ill. 1995); Wedding v. University of
423. 66 F.3d at 758 (emphasis added). But see Chance v. Rice Univ., 984 F.2d 151 (5th
Cir. 1993) (applying Title VI standard); Nelson v. University of Me. Sys., 914 F. Supp. 643,
649 (D. Me. 1996) (stating that "Title IX was specifically modeled after Title VI.") (citing
Grove City College v. Bell, 456 U.S. 555, 586. (1984)).
424. Lakoski, 66 F.3d at 754.
426. Id. at 279.
427. It noted further that
an adverse employment action need not rise to the level of discharge to be ac-
tionable. . . . It must, however, at a minimum, impair or potentially impair the
plaintiff’s employment in some cognizable manner. . . . This Court is weary of
defining an adverse employment action in a manner which discourages open
communication, critical or otherwise, between employers or supervisors and their
employees as to the employee’s employment performance.

Id. at 281.
428. Id. at 284.
both quid pro quo sexual harassment and hostile environment sexual harassment, will be used for determining the Title IX causes of action. As to the latter situation, the Supreme Court, during 1986, issued its landmark decision expounding upon Title VII hostile environment sexual harassment in Meritor Savings Bank, F.S.B. v. Vinson, wherein the Court rejected a strict liability standard upon employers for sexual harassment involving their employees. However, mere ignorance or lack of knowledge of the officious actions would not insulate the employers from complicity. Instead, as the court in Pinckney v. Robinson stated, relying on Vinson:

"[For an employer to avoid [absolute] liability for its supervisor’s sexual harassment creating a hostile work environment, an employer must not only show that it lacked actual or constructive knowledge of the harassment, but the employer must demonstrate that it had an effective and responsive system ("energetic measures") in place at the time of the alleged harassment and that this

429. See, e.g., Lipsett v. University of P.R., 864 F.2d 881, 896–97 (1st Cir. 1988) (applying Title VII standard to a Title IX complaint by medical student-employee alleging hostile environment discrimination created by supervisors and fellow medical students); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993) (stating that hostile environment sexual harassment may be asserted by students against teachers pursuant to Title IX); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360 (E.D. Pa. 1985), aff’d, 800 F.2d 1136 (3d Cir. 1986) (stating that Title IX hostile environment sexual harassment may be asserted by medical student concerning actions by her professor); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), aff’d, 631 F.2d 178 (2d Cir. 1980). But see Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 139 (W.D. Tex. 1994) (“Additionally, a student can not bring a hostile environment claim under Title IX.”) (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989). aff’d on other grounds, 882 F.2d 74 (3d Cir. 1989)). The only case cited which permits such an action is Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1583 (N.D. Cal. 1993), but even the Petaluma court requires evidence of intentional gender-based discrimination allegations that the school district knew or should have known of the harassment and failed to take appropriate corrective action are insufficient. Even though Garza dealt with peer sexual harassment at an educational institution, Patricia H. was not cited therein.


system was one of which the victim knew or should have known and which he or she could have relied upon for a prompt and effective remedy. 433

The EEOC issued regulations, defining sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used on the basis for employment decisions effecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. 434

Within those parameters, this issue will be categorized into six areas: 1) coaches/athletes; 2) teachers/students (including physical education teachers); 3) supervisors/students; 4) others/students; 5) student/student (peer sexual harassment) imputed to the educational institution or school board; and 6) educational employment sexual harassment. Within this paradigm, three levels of sexual harassment are developing, including: 1) sexual abuse (including statutory rape); 2) quid pro quo harassment; and 3) hostile environment harassment.

While there is also a consensus that the actions by the offending individuals are intentional actions, the critical issue is what standard will be applied to analyze whether the recipient of federal funding will be held legally responsible for such conduct pursuant to Title IX. For example, two federal courts within the same jurisdiction within a matter of days came to opposite conclusions. The district court in Rosa H. v. San Elizario Independent School District435 utilized a negligence standard to answer the question of whether the school district would be responsible for allegations of sexual abuse of a fifteen-year-old female student by a male after-school karate instructor.436 Conversely, a few days prior to that decision, the district court in Leija v. Canutilla Independent School District437 applied a strict

433. Id. at 34.
434. 29 C.F.R. § 1604.11(a) (1996).
436. Id. at 143.
liability standard to the school district concerning allegations of sexual abuse of a second grade female student by a male physical education teacher, who was incidentally a coach. The twist was that the district court would severely restrict the amount of Title IX damages that could be awarded. Of course, to complicate the matter even further, on June 26, 1996, the federal district court in *Nelson v. Almont Community Schools* applied the Title VI standard to a case involving allegations of Title IX sexual harassment of a female student by a male teacher. This lack of uniformity poses real problems to both the victims and the educational institution. There is also lack of uniformity when a 42 U.S.C. § 1983 claim is asserted by students, based on sexual harassment, claiming liability by the educational institution. The crux of a 42 U.S.C. § 1983 claim is that the offending action is "state" action or done by a state actor.

438. Id. at 948-49.
440. Id. at 1355.
441. See, e.g., *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1406 (5th Cir. 1996) (ruling that there was a basis for a 42 U.S.C. § 1983 claim against the school district based on allegations that a custodian had raped a female student at the school); *Becerra v. Asher*, 921 F. Supp. 1538, 1548 (S.D. Tex. 1996), aff'd, No. 96-2041, 1997 WL 35402 (5th Cir. July 25, 1997) (concluding that there was no state action by the school district based on the allegation of sexual abuse committed by a teacher, who was employed by the school district and was providing instruction to a child, being schooled at home); *Diverglio v. Skiba*, 919 F. Supp. 265, 269 (E.D. Mich. 1996); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994); *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1461 (N.D. Cal. 1995) (discussed supra p. 628); *Doe v. Rains Indep. Sch. Dist.*, 865 F. Supp. 375 (E.D. Tex. 1994), rev'd, 66 F.3d 1402 (5th Cir. 1995). In *Doe*, a female high school student alleged that her male physical education teacher and coach had sexually abused her, thereby depriving her of her Fourteenth Amendment liberty interest in bodily integrity, pursuant to a 42 U.S.C. § 1983 action. Id. at 377. On September 30, 1994, the district court found that "liability under section 1983 cannot be based on a theory of respondeat superior." Id. at 379. The Fifth Circuit reversed and remanded, finding that another teacher's alleged failure to report the incidents of sexual abuse pursuant to a Texas statute which required teachers to report child abuse in a timely manner, would not alone trigger the "state" action required for a 42 U.S.C. § 1983 violation. Id. at 1417. See also *Doe v. Rains County Indep. Sch. Dist.*, 76 F.3d 666 (5th Cir. 1996). For 42 U.S.C. § 1983 cases discussing peer sexual harassment, see *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (male student sued his school based on allegations of verbal and physical abuse by a fellow male student for an extended period of time, starting in the eighth grade, due to the plaintiff's homosexual orientation); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (male student with a hearing impairment brought suit against the superintendent of his school pursuant to 42 U.S.C. § 1983 for the sexual assaults inflicted by a fellow male student during on-campus living at the dormitory); and *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994). In *Nabozny*, the school district...
In the employment area, the individuals are generally adults and enter into the employment relationship presumably on equal planes. However, when the situation involves minor students, the scrutiny and protection should be greater. Therefore, while dependence on Title VII may be appropriate for the employment situation, should Title IX completely duplicate such Title VII protection, or should Title IX provide greater protection for its unique constituency?

In a record-breaking number, seventy-nine administrative complaints were filed in 1995 claiming sexual harassment in an educational setting. During February 1995, the OCR revised a pamphlet, “Sexual Harassment: It’s Not Academic,” exploring sexual harassment involving students. It states that “[s]exual harassment in educational institutions is not simply inappropriate behavior, it is against the law.” It defines sexual harassment as “consist[ing of] verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.” It advises that

[a]n institution can either utilize its general grievance procedure, required by Section 106.8 of the Title IX regulation, or develop and implement special procedures for handling sexual harassment allegations. Given the especially sensitive nature of this form of sex discrimination, some institutions have opted for the latter course of action and/or have instituted specific training in handling

reportedly settled the case for $900,000. Associated Press, Gay Student Gets $900,000 for Harassment, NEWSDAY, Nov. 21, 1996.

442. For pre-1994 decisions focusing on 42 U.S.C. § 1983 actions involving students and educational employees, see D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176, 1183 (10th Cir. 1990) (concerning allegations of molestation of boys participating in summer basketball camp by a male teacher. The court placed emphasis on the fact that the boys were participating in a voluntary activity, which was not sponsored by the school). See also Jane Doe v. Special Sch. Dist., 901 F.2d 642 (8th Cir. 1990); Doe v. Douglas County Sch. Dist., 770 F. Supp. 591 (D. Colo. 1991); Sowers v. Bradford Area Sch. Dist., 694 F. Supp. 125 (W.D. Pa. 1988), aff’d, 869 F.2d 591 (3d Cir. 1989).


444. Id. at 2. During August, 1996, the OCR issued guidelines on peer sexual harassment which defined sexual harassment, stating “[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when the conduct is sufficiently severe, persistent or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment.” Tamar Levin, Kissing Cases Highlight Schools’ Fear of Liability for Sexual Harassment, N.Y. TIMES, Oct. 6, 1996, at 22.
these cases. Title IX requires that grievance procedures be prompt and equitable.\textsuperscript{445}

Another area under exploration is whether Title IX sexual harassment arises in same-sex situations.\textsuperscript{446}

Nationally, the debate on proper sexual harassment policies at educational institutions arose out of a kindergarten boy who kissed a girl in his class and was charged with violating the school sexual harassment policy. The youngster when interviewed as to whether he knew what sexual harassment was, responded in the negative. The court in Cohen v. San Bernardino Valley College\textsuperscript{447} explored a University’s sexual harassment policy, concluding that it was unconstitutionally vague in violation of the First Amendment concerning freedom of speech and, therefore, did not put the English professor, charged with violating the policy, on proper notice.\textsuperscript{448} The University’s sexual harassment policy prohibited sexual harassment, which it defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. it [sic] includes, but is not limited to, circumstances in which . . . [inter alia] has the purpose or effect of unreasonably interfering with an indi-

\textsuperscript{445} OCR Pamphlet, supra note 443.
\textsuperscript{448} Cohen, 92 F.3d at 972.

The court stated that:

Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor’s classroom speech . . . There are three objections to vague policies in the First Amendment context. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discretionary application. Third, a vague policy discourages the exercise of first amendment freedoms.

\textit{Id.} at 971–72.
individual's academic performance or creating an intimidating, hostile, or offensive learning environment.\textsuperscript{449}

In that case, a female student charged a male professor with sexual harassment in violation of the school's policy. The male professor taught a remedial English class in which the female student was enrolled. It was reported that during a class on pornography the professor "stated in class that he wrote for Hustler and Playboy magazines and he read some articles out loud in class. [The professor] concluded the class discussion by requiring his students to write essays defining pornography."\textsuperscript{450}

A. Coach/Student Athlete

Since Title IX's inception, there has been only one substantive Title IX decision examining sexual harassment between a coach and a student athlete.\textsuperscript{451} However, during the 1990s the headlines have been replete with incidences of allegations of sexual harassment, uniformly concerning the improper activities of male coach's with their female student athletes.\textsuperscript{452}

\begin{itemize}
\item \textsuperscript{449} Id. at 971.
\item \textsuperscript{450} Id. at 970. In addition, other "students came forward to testify about the sexual nature of Cohen's teaching material and his frequent use of derogatory language, sexual innuendo, and profanity." \textit{Cohen}, 92 F.3d at 971.
\item \textsuperscript{452} See also John T. Wolohan, \textit{Title IX and Sexual Harassment of Student Athletes}, J. PHYSICAL EDUC. RECREATION & DANCE, Mar. 1995, at 52; Filip Bondy, \textit{When Coaches Cross the Line}, N.Y. TIMES, May 2, 1993, § 8, at 1, 3. The University of Florida fired its swimming coach, Mitch Ivey, a former Olympian, reportedly for using offensive language; however, there was reported concern regarding his relationship with his female swimmers. See Linda Robertson, \textit{Motivation and Manipulation: Athlete-Coach Bond Occasionally Leads to Temptation, Sexual Harassment}, MIAMI HERALD (1994) (discussing reported incidents involving other individuals and indicating that the American Swimming Coaches Association was the only coaches' association to adopt guidelines on ethical behavior in this area) (on file with the \textit{Nova Law Review}); Don Sabo, Ph.D. & Carole Ogelsby, Ph.D., \textit{Ending Sexual

\end{itemize}
although female coaches are not exempt from such unsavory actions.\textsuperscript{453} As a result, certain governing bodies, such as the American Volleyball Coaches Association, are issuing ethical guidelines.\textsuperscript{454} Parenthetically, the cases involving the relationship between teachers and students are also instructive.

On February 21, 1996, the Sixth Circuit, in \textit{Lillard v. Shelby County Board of Education},\textsuperscript{455} examined a number of allegations of sexual harassment based on Title IX and 42 U.S.C. § 1983 by three high school females against a male high school coach, who was also a physical science teacher. The teacher held a doctorate and coached the girls' soccer team, on which one of the plaintiffs participated. The coach allegedly slapped one of his athletes, a fourteen-year-old female plaintiff, across the face. The child's father informed the school principal of the incident. An FBI agent who learned about this incident informed the school principal that he had observed the coach "cursing and verbally abusing the girls at practices and games, and had 'observed [the coach] hitting the girls on their buttocks.'"\textsuperscript{456} It was further alleged that he intentionally rubbed one of the other female plaintiff's stomach, while passing her in the hall, with a "remark that could be reasonably be interpreted as . . . inappropriate."\textsuperscript{457} The Sixth Circuit addressed a number of issues. First, it concluded that Title IX does not override a 42 U.S.C. § 1983 cause of action.\textsuperscript{458} Second, it held that the state statute of limitations for personal injury actions would be

\begin{quote}
\textit{Harassment in Sports}, 4 \textit{WOMEN IN SPORT \& PHYSICAL ACTIVITY J.}, Fall 1995, at 84–104. "It is also helpful to see sexual harassment in athletics as a form of child abuse." \textit{Id.} at 95. This subsequent article also indicated that the United States Olympic Committee Coaching Ethics Code now includes a statement on sexual harassment. \textit{Id.} at 98.

\textsuperscript{453} See, e.g., Landreneau v. Fruge, 676 So. 2d 701 (La. 3d Cir. Ct. App.), cert. denied, 684 So.2d 930 (La. 1996) (concerning allegations of sexual misconduct against the school district and a female physical education teacher/coach of a female high school student; no Title IX claim was presented).

\textsuperscript{454} The American Volleyball Coaches Association's "Coaches Code of Ethics and Conduct" requires that the member coach abide by the following:

Principle II - Coach/Athlete Relationship. G. Recognize that all forms of sexual abuse, assault or harassment with athletes are illegal and unethical, even when an athlete invites or consents to such behavior or involvement. Sexual abuse and harassment is defined as, but not limited to, repeated comments, gestures or physical contacts of a sexual nature. I will report all suspected cases of sexual assault or abuse to law enforcement as required by law.

\textit{American Volleyball Coaches Ass'n., Coaches Code of Ethics and Conduct} (adopted December 1996).

\textsuperscript{455} 76 F.3d 716 (6th Cir. 1996).
\textsuperscript{456} \textit{Id.} at 719.
\textsuperscript{457} \textit{Id.} at 726.
\textsuperscript{458} \textit{Id.} at 723.
As to the first incident, it found that “it is simply inconceivable that a single slap could shock the conscience” so as to be actionable.\textsuperscript{460} In addressing the 42 U.S.C. § 1983 claims, it found that as to the hallway incident, which the court described as “wholly inappropriate, and, if proved, should have serious disciplinary consequences.... But without more, it is not conduct that creates a constitutional claim. It is highly questionable whether a single, isolated incident of this magnitude could even rise to the level of sexual harassment under Title VII.”\textsuperscript{461} The obtuse decision, while noting the FBI’s unsolicited testimony, appeared to totally discount it in reaching its conclusion. The court emphasized that it was not reaching the merits of the Title IX claims alleged. Thus, it remains to be seen how the finder of fact will classify the incidents within the penumbra of Title IX.

During May 1996, members of the women’s crew team filed a lawsuit against Temple University alleging sexual harassment based on a hostile environment created by coaches and members of the men’s crew team. The lawsuit informs “that the room where the crew teams train was decorated with pornographic pictures and that male athletes made lewd gestures and comments to the women.”\textsuperscript{462} It was also reported that this was not the first lawsuit instituted against Temple University concerning the crew program. During 1994, a female student athlete charged that a male assistant part-time coach of the men’s team made lewd gestures at the woman. The University fired this coach in 1993, when another athlete informed the school about another incident concerning this coach. The case was settled with the University agreeing to pay that plaintiff $5,000 and her dropping the charges and supposedly apologizing for the suit.\textsuperscript{463}

It is difficult to ascertain how many lawsuits may have been commenced by female or male student athletes for sexual harassment actions by their coaches, especially when no publicity surrounds the filing of the lawsuit, and many settlement agreements routinely contain confidentiality clauses.

\textsuperscript{459} Id. at 729.
\textsuperscript{460} Lillard, 76 F.3d at 726.
\textsuperscript{461} Id. (emphasis added).
\textsuperscript{462} Sidelines, CHRON. HIGHER EDUC., June 7, 1996, at A33.
\textsuperscript{463} Id.
B. Teacher/Student

The lead case in this area is the 1992 Supreme Court decision in Franklin v. Gwinnett County Public Schools, which focused on the remedies that Title IX provides, based on allegations of sexual harassment of a female student by a male teacher. The first decision to substantively deal with the issue of whether Title IX confers protection for students for hostile environment sex discrimination was Patricia H. v. Berkeley Unified School District, involving allegations of sexual molestation of female students by a male band teacher. The plaintiffs asserted that the teacher's continued presence at the school alone established a hostile environment.

In Doe v. Taylor Independent School District, a fifteen-year-old female student alleged sexual abuse by a male teacher (a biology teacher and coach) and abridgment of the Fourteenth Amendment Due Process Clause protecting liberty interests by the school district. On March 3, 1994, the Fifth Circuit held the plaintiff was deprived of her substantive due process protections. No Title IX claim was alleged. The plaintiff’s “due process claim is grounded upon the premise that schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and upon the premise that physical sexual abuse by a school employee violates that right.” However, the federal appellate court noted that a “school official’s liability arises only at the point when the student shows that the official, by action or inaction, demonstrates a deliberate indifference to his or her constitutional rights.” The court elaborated:

It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment. Obviously, there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous

466. 15 F.3d 443 (5th Cir. 1994).
467. Id. at 451.
468. Id. at 450.
469. Taylor, 15 F.3d at 454. See Armstrong v. Lamy, 938 F. Supp. 1018 (D. Mass. 1996). In Lamy, there was no 42 U.S.C. § 1983 action to impute liability to the school board for an inadequate hiring policy based on allegations of sexual abuse by a teacher of a student. The court noted that “[a] supervisory official may, however, be held liable under § 1983 on the basis of his or her own acts or omissions.” Id. at 1033.
to the punitive and disciplinary objective attendant to corporal punishment, which might support it.470

Allegations of sexual harassment of a female sixth grade student by a student-teacher and fellow male students were presented in Oona R.-S. v. Santa Rosa City Schools.471 The court declined to grant the individual student-teacher’s 42 U.S.C. § 1983 motion to dismiss, as well as to certain classroom teachers and some other named school officials. The district court underscored that a 42 U.S.C. § 1983 claim does not foreclose a Title IX private cause of action.472 Additionally, the court found that the conduct of an educational employee who engages in sexually harassing activities toward a student may be held culpable, provided that intentional discrimination is established, stating that “the Court finds that intentional discrimination is an element of a claim that an individual official has violated a plaintiff student’s rights under Title IX by engaging in or allowing sexual harassment of that student.”473 However, the “plaintiff student must show that each defendant official either intentionally discriminated against her on the basis of sex or is liable under standard section 1983 supervisory liability principles for his own wrongful conduct in supervising a subordinate who intentionally discriminated.”474 The same standard would be applied to each school official concerning allegations by a student’s peers or non-officials.475

On June 23, 1995, the district court in Kadiki v. Virginia Commonwealth University476 held that a university could be held strictly liable under Title IX if a student successfully provided that her biology professor’s

470. Id. at 451–52. See also Wilson v. Webb, 869 F. Supp. 496 (W.D. Ky. 1994). In Wilson, two female students asserted a 42 U.S.C. § 1983 pursuant to the Fourteenth Amendment Due Process Clause concerning their liberty interests based on allegations of sexual molestation by one of their male teachers on school grounds. The teacher argued that the liberty interests protected were limited to those involving undue restraint. However, the court noted that “[s]choolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and physical sexual abuse by a school employee violates that right.” Id. at 497.


473. Id. at 1464 (emphasis added).

474. Id. at 1465.

475. Id. at 1466. See also Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995) (involving peer sexual harassment).

conduct constituted quid pro quo sexual harassment. The court stated that "knowledge of the quid pro quo harassment may be imputed to a university/employer need..." Furthermore, "[g]iven the purpose of Title IX and Congress' mandate that Title IX be broadly interpreted, it is essentially inconsequential that Title IX does not expressly adopt agency principles."

Allegations of sexual abuse by a male physical education teacher of a female second grade student pursuant to Title IX were the focus in Leija v. Canutillo Independent School District. While the child's primary teacher was told of some of the incidents, none of the members of the school board were notified. First, the district court found that only the educational institution, not the individual teacher, could be liable for Title IX violations. The court dismissed the 42 U.S.C. § 1983 action because the board had "no knowledge of the abuse she suffered and therefore could not have been deliberately indifferent to her rights." Query: Why should the student's informing the primary teacher not have constituted constructive knowledge by the school board? Assuming that the primary teacher was not required to inform the school principal and that the school principal was not required to bring this to the attention of the board, then should the lack of a proper policy not have been a question of fact for the jury as to the school board's failure to have a proper policy in place, in the first instance?

However, on the issue of whether the school district would be liable for the intentional actions of sexual abuse of this young girl, the court eschewed agency principles and instead applied strict liability standard. Thus, while "the court believes that the actions of a teacher should be strictly imputed to an educational institution. Concurrently, the court believes that limitations should be placed on damages." In defending his position, the court stated that "[t]he young student, vulnerable in every way, should not be the only

478. Id. at 754.
479. Id.
480. 887 F. Supp. 947 (W.D. Tex. 1995), rev'd, 101 F.3d 393 (5th Cir. 1996). The Fifth Circuit reversed, finding that the school district was entitled to judgment as a matter of law because the school district "had neither actual nor constructive notice of the sexual abuse." Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 402-03 (5th Cir. 1996). See also John Does 1, 2, 3, and 4 v. Covington County Sch. Bd., 884 F. Supp. 462, 464-65 (M.D. Ala. 1995) (holding that a Title IX cause of action exists against the school board, principal, and superintendent for allegations of sexual abuse committed by a teacher against elementary school students).
481. Leija, 887 F. Supp. at 957.
482. Id. at 950.
483. Id. at 948.
effective line of defense or the policing authority. The job of the student, especially the elementary student, is to learn in a trusting environment.\textsuperscript{484}

This is the first court to so adopt a restricted position as to compensatory damages. The jury had awarded the plaintiff $1.4 million.\textsuperscript{485} Interestingly, the district court indicated that the Fifth Circuit has clearly utilized Title VI of the Civil Rights Act\textsuperscript{486} in determining Title IX cases.\textsuperscript{487} However, the court distinguished that the Fifth Circuit did not address the issue of imputed liability under Title IX.

The court enunciated that "[t]here can be several types of school discrimination: (1) denial of access to the school or school’s programs, normally but not always at the higher education level, (2) physical sexual abuse, or (3) non-physical but sexist harassment."\textsuperscript{488} The court further elaborated that

\begin{quote}
[The problem in teacher-student sexual abuse cases is therefore as follows: (1) only the school district can be liable under Title IX; (2) only intentional acts of discrimination are reached by Title IX; (3) the intentional acts can be committed by the district’s employees who will never have authorization to act; so (4) unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative.\textsuperscript{489}
\end{quote}

In balancing this strict liability, the court in the cases only of teacher-student sexual abuse would limit the damages to compensatory damages for merely expenses for medical treatment, expenses for mental health treatment, and expenses for special education, specifically omitting any monetary damages for pain and suffering. Identifying that unlimited damages, such as the million dollar verdict in this case, can bankrupt school districts, the court stated that "[p]ublic education is of critical importance to our Nation. Limited damages under Title IX protect the schools and simultaneously provide relief to sexually abused students . . . . In cases where rights are implied, ‘appropriate’ remedies will also be implied."\textsuperscript{490} The Title IX statute

\begin{itemize}
\item \textsuperscript{484} Id. at 955.
\item \textsuperscript{485} Id.
\item \textsuperscript{486} 42 U.S.C. §§ 2000d to 2000d-7 (1994).
\item \textsuperscript{487} Leija, 887 F. Supp. at 950 (citing Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993)).
\item \textsuperscript{488} Id. at 951.
\item \textsuperscript{489} Id. at 953.
\item \textsuperscript{490} Id. at 956.
\end{itemize}
contains no restriction on the amount of compensatory damages. Moreover, the court did not discuss at all the Title VII maximum cap of $300,000 damages as another possible option in this situation. Expect an appeal, as the court ordered a new trial on the issue of damages. Thus, while the analysis of the strict liability standard in this case is defensible, the limited damages, as promoted herein, stand on shaky grounds.

On October 17, 1995, the district court, in *Canutillo Independent School District v. National Union Fire Insurance Co.*,491 ruled that an insurance contract did not specifically exclude Title IX claims against a school district.492 Another judge issued this decision based on the underlying facts in *Leija*. The court exemplified that holding a school district in violation of Title IX for sexual harassment of a student by an employee required satisfaction of two elements. It requires

that there be two distinct actions or inaction, at least one of which is intentional in nature, on the part of an employee and on the part of the school district . . . . Title IX does require proof of negligent, reckless or intentional acts by the school district, independent of the intentional conduct of the employee. This Court believes that to hold otherwise is to place the school district in the untenable position of being liable for conduct which it was, or is unable to remedy or rectify. Simply put, case law does not allow the school district (the insured) to be liable for the wrongful act of an employee under either Title IX or § 1983. There must be further wrongful conduct by a school district to prove a Title IX case.493

Note, the court did not require an intentional act by both the offending employee and the school district. On appeal, the Fifth Circuit reversed and rendered judgment in favor of the insurance company, relying principally on the fact that the underlying actions which prompted the lawsuit by the students against the school district were the actions of the physical education teacher, and noted that “the sexual assaults constitute criminal acts under Texas law.”494 It required some discriminatory act on the part of the school


493. Id. (emphasis added).

district or its agents. Moreover, "we note that while injunctive relief may be available for failure to adopt Title IX's grievance policies and procedures, such a failure is not itself an act of discrimination that may be the basis of an award of damages." 495

Three days after the Leija decision, another judge in the Western District of Texas issued his decision in Rosa H. v. San Elizario Independent School District 496 concerning allegations of sexual abuse of a fifteen-year-old female student by a twenty-nine-year-old male after school karate instructor, where karate was being offered by the school district. The jury awarded the plaintiff damages. First, the district court, as in Leija, 497 dismissed the 42 U.S.C. § 1983 action against the school district and the Title IX action against the offending school instructor. Second, there was no doubt that "any school district employee molesting students is acting outside the course and scope of his or her employment." 498 However, this court would also require a negligence standard to find the educational institution liable under Title IX. Thus, while "sexual abuse of a student is always an intentional act. However, to impute liability to the school district there must be some further action or inaction on the part of the school district which would give rise to liability." 499 The court stated that

[t]o prevail on a claim of intentional discrimination under Title IX, the plaintiff must show that: 1) the school district is subject to Title IX; 2) plaintiff was sexually harassed or abused (the intentional conduct); 3) by an employee of the school district; 4) the school district had notice, either actual or constructive, of the sexual harassment or abuse; 5) the school district failed to take prompt, effective, remedial measure; and 6) the conduct of the school district was negligent. 500

This court also did not require an intentional act by both the offending employee and the school district itself. In this construct, the notice provision allows the school district an opportunity to do something about the situation. In addition, the fifth element entails "that the school district be given

495. Id. at 706.
498. Id. at 142.
499. Id. at 143.
500. Id. (emphasis added).
opportunity to act on behalf of the student, that is, terminate the discriminatory conduct, before being subject to liability.”\textsuperscript{501}

In \textit{Slater v. Marshall},\textsuperscript{502} a female student’s complaint against the Montgomery County Community College created a claim under Title IX for quid pro quo sexual harassment by a male professor, based on her being foreclosed from meaningful course work on the basis of gender. However, the complaint failed to state a cause of action under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, the American with Disabilities Act,\textsuperscript{503} and section 504 of the Rehabilitation Act.\textsuperscript{504}

The January 5, 1996, district court decision in \textit{Bolon v. Rolla Public Schools}\textsuperscript{505} carved out the four standards that the courts are using to determine a school district’s liability for sexual harassment by teachers of their students. The courts stated that

\begin{quote}
[c]ourts have adopted several different approaches, including the following: (1) the agency principle . . . (essentially a ‘negligent or reckless’ standard) . . . ; (2) knowledge or direct involvement by the school district . . . ; (3) the Title VII standards of employer liability in sexual harassment cases (i.e., ‘knew or should have known’ for hostile environment and strict liability for quid pro quo harassment) . . . ; and (4) strict liability.\textsuperscript{506}
\end{quote}

After reviewing the aforementioned, the court concluded:

\begin{quote}
This Court, guided by the Supreme Court’s \textit{Franklin} decision interpreting Title IX, holds that intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior, \textit{regardless} of whether the intentional discrimination is the creation of a hostile environment, the demand for sexual favors, the
\end{quote}

\begin{footnotes}
\textsuperscript{501} Id.
\textsuperscript{503} Id. (citing 42 U.S.C. §§ 12101–12213 (1995)).
\textsuperscript{504} Id. (citing 29 U.S.C. §§ 701–796 (1985 & Supp. 1995)).
\textsuperscript{505} 917 F. Supp. 1423 (E.D. Mo. 1996).
\textsuperscript{506} Id. at 1427. In \textit{Nelson v. Almont Community Schs.}, 931 F. Supp. 1345 (E.D. Mich. 1996), the district court applied the Title VI intentional discrimination standard to a Title IX case involving allegations of sexual harassment of a male student by a female English teacher.
\end{footnotes}
removal of females from the classroom, or any other intentional action based on sex in violation of Title IX.\footnote{507}

The court explained:

If Title IX is to have any effect, school districts must be held strictly liable for the actions of a teacher who engaged in blatant sex discrimination, for example, requiring all females to sit in the hall during class. Otherwise, the school would be effectively insulated from all Title IX liability.\footnote{508}

Furthermore,

\[\text{[i]n light of the Supreme Court's holding in } \textit{Franklin} \text{ that sexual harassment constitutes intentional sex discrimination in violation of Title IX, there is simply no reason to apply a different standard of liability when a teacher discriminates by engaging in a sexual relationship with a student rather than by denying him or her an education.}\] \footnote{509}

Thus, the court denied the defendant's motion for summary judgment. The district court in \textit{Pallett v. Palma}\footnote{510} elaborated on institutional responsibility when allegations of sexual harassment are raised involving actions by a professor at a university, stating that \textit{"[t]he institution of higher learning satisfies its legal obligation under facts similar to these cases unless it provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."}\footnote{511} The court seemed satisfied that a sexual harassment prohibition notice was provided to the students and employees, as well as a grievance procedure, commenting that

the College upon learning of the plaintiff's sexual harassment allegations took appropriate remedial action and to the extent that it was unable to or failed to take appropriate remedial action the College was prevented from doing so by the failure and active refusal of the plaintiffs to cooperate with the College administration in pressing formal charges and testifying at the necessary faculty

\footnote{507. \textit{Id.} at 1427–28 (emphasis added). The court noted, however, that it was not required to address the standard concerning peer sexual harassment. \textit{Id.} at 1428 n.2.}

\footnote{508. \textit{Id.} at 1429.}

\footnote{509. \textit{Id.}}

\footnote{510. 914 F. Supp. 1018 (S.D.N.Y. 1996).}

\footnote{511. \textit{Id.} at 1024.}
hearing to terminate [the professor's] tenure upon the required finding of gross misconduct.\footnote{512}

In this case, upon learning of allegations of separate incidents of sexual harassment involving a female undergraduate student and a female graduate student (who was also a University employee), the school suspended the offending tenured professor.

The plaintiffs elected to forego the University's own process, which could have resulted in the professor's termination, and commenced a lawsuit instead. The court noted:

That a faculty member on occasion will violate the published policies of an institution and do so clandestinely, as here, is not a basis for students or employees who have eschewed the established procedures for rectifying the wrong done to them, to run instead to the courts, to mulct the charitable funds of a non-profit teaching institution. These funds could be used better for the instruction of other students.\footnote{513}

In situations of sexual harassment and abuse, the offending individuals often rely on the silence of their victims; however, Title IX does not require that an individual first exhaust a school's internal grievance process or even exhaust an administrative process before instituting a lawsuit. Therefore, it would appear that the \textit{ad hominem} criticism of the plaintiffs' elected course of action seems gratuitous and unnecessary, as according to the court the issue was simply whether the educational institution had a policy in place. Furthermore, it is not the nonprofit status of the educational institution that is the main concern herein, as almost exclusively, educational institutions are nonprofit institutions. Rather, the focus of Title IX is that federal funds should not be used to promote or condone sexual harassment and sex discrimination by these educational institutions, who voluntarily elect to receive such federal funding or allow their students to do so regardless of whether the institution is non-profit or for-profit.

In \textit{Nelson v. Almont Community Schools},\footnote{514} a male high school student, who attempted suicide allegedly because his female English teacher would not allow him to end their relationship, claimed Title IX sexual harassment against the school board. On June 26, 1996, the district court, recognizing

\footnotesize{\begin{itemize}
\item 512. \textit{Id.} (emphasis added).
\item 513. \textit{Id.}
\end{itemize}}
the conflict in the standard being applied to analyze Title IX sexual harassment, summarized the standards being applied as follows:

Some courts follow the agency principles continued in the RESTATEMENT (SECOND) OF AGENCY § 219(2)(6) (essentially a "two-tort" negligent or reckless conduct standard showing the intentional tort of the employee and the negligence of the school district) .... Others, persuaded by the Franklin Court's reference to Meritor ... which was a Title VII employment discrimination case, have applied the Title VII standard of employer liability (i.e., "knew or should have known" for hostile environment claims, and strict liability for quid pro quo harassment) .... A number of courts, because of the above-quoted discussion in Franklin of "intentional" discrimination, have adopted the Title VI intentional discrimination standard, and require a showing of knowledge standard, and require a showing of knowledge or direct involvement by the school district in the discrimination or failure of the school to take appropriate remedial action .... A few courts have applied a "strict liability" standard.515

This court ultimately determined:

This Court agrees with those courts which apply the Title VI intentional discrimination standard. Intentional discrimination requires either (A) a showing of direct involvement of the school district in the discrimination, or (B) a showing of (1) actual or constructive knowledge on the part of the district of the sexual harassment of a student and (2) that the school failed to take immediate appropriate action reasonably calculated to prevent or stop the harassment.516

The August 26, 1996, Eighth Circuit decision in Kinman v. Omaha Public School District517 is notable because the court found that a Title IX sexual harassment hostile environment action can be brought when it involves the same sex. Kinman involved allegations of a homosexual relationship between a female English teacher and a female high school student.518 The appellate court found "no reason to apply a different standard under Title IX. The uncontroverted evidence shows that McDougall

515. Id. at 1355.
516. Id.
517. 94 F.3d 463 (8th Cir. 1996).
518. Id. at 465.
targeted Kinman because she was a woman." As to what standard should be applied in this Title IX case, the court instructed that:

We recently held that Title VII standards for proving discriminatory treatment should be applied to employment discrimination cases brought under Title IX. We now extend that holding to apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student. In such cases, the employer should not be held liable unless the employer itself has engaged in some degree of culpable behavior. For example, the employer could be held liable if it knew or should have known of the harassment and failed to take appropriate remedial action.

Thus, the "'knew or should have known' standard is the appropriate standard to apply. . . ."

C. Supervisor/Student

In Randi W. v. Livingston Union School District, a thirteen-year-old female commenced a lawsuit in a California state court, alleging sex discrimination as the result of molestation by a male vice principal of the school. This court found that Title IX did not extend statutory liability on the school district for the Vice Principal's actions. Aside from the Karibian v. Columbia University case, there were no other decisions rendered concerning allegations of sexual harassment by a supervisor during the three-year time period.

519. Id. at 468.
520. Id. at 469 (citations omitted).
521. Id.
522. 49 Cal. Rptr. 2d 471 (1996).
523. Id. at 473.
524. Id. at 488.
525. 14 F.3d 773 (2d Cir. 1994) (discussed infra p. 649).
526. See Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993). The case featured allegations of Title IX sexual harassment of a female student by a male director of a vocational educational school. The court recognized "that in many cases decided under Title VII, courts have held that an act of a supervisor with direct authority over the harassee makes an employer directly liable for any violations of Title VII." Id. at 1320 (citations omitted).
D. Other/Student

In Murray v. New York University College of Dentistry, a male patient at the dental clinic where the plaintiff, a female dental student, was required to provide services as part of her clinical curriculum was badgering and stalking the plaintiff, according to the allegations. Another dental student informed the chief of the dental clinic that the patient was "unstable" and was sexually harassing the plaintiff. The chief informed the patient to desist with his activities. The plaintiff never advised her professors or the clinic chief that the actions were continuing until after she received a notice from the College informing her that, due to her failure to successfully complete ten out of twenty-eight courses, she would be required to redo her second year. Subsequently, in a letter to the review board, she explained that the subpar performance was due to the illness of a family member, having to work another job to finance her tuition, and the actions of the clinic patient. After receiving the letter, the board did not rescind its determination. The plaintiff contended that the college violated Title IX by "(1) allowing the discriminatory abusive environment created by [the patient] to persist after the College had notice of it, and (2) retaliating against her for asserting her right under Title IX to be free from discrimination on the basis of gender."

The Second Circuit reviewed the conclusions of the district court and held that

the facts alleged in the complaint would not support a finding either (1) that NYU had notice of ongoing harassment sufficiently severe and pervasive to give rise to a "hostile environment" under Title VII standards or (2) that after receiving notice that harassment had occurred, the College took any action disadvantageous to Murray

527. 57 F.3d 243 (2d Cir. 1995). See Floyd v. Waiters, 831 F. Supp. 867 (M.D. Ga. 1993) (holding that no Title IX claim was established against the school district for sexual assaults committed by a male security guard against female students). The court in Floyd did not address whether the educational institution had a responsibility to properly investigate the background of this individual employee and whether any complaints had been filed against him during his employment. See also Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996). In Larson, the district court set aside a jury verdict of $475,000 in favor of a handicapped female student who was sexually abused by a male driver who drove the van which brought the plaintiff to her school. The driver was imprisoned as a result of his actions. However, the appellate court found that the school district was not civilly liable for failing to thoroughly investigate the plaintiff's first complaint of sexual abuse. Id. at 1457.

528. Murray, 57 F.3d at 275.

529. Id. at 247.
from which an inference of discriminatory retaliation could be drawn.\(^\text{530}\)

First, the Second Circuit indicated that “Title IX has been construed to prohibit gender discrimination against both students enrolled in federally supported educational programs and employees involved in such programs.”\(^\text{531}\) Second, the court noted that “[i]n reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII.”\(^\text{532}\) In analyzing Title VII sexual harassment claims, the Second Circuit noted that “[w]hether the harassing conduct of a supervisor or coworker should be imputed to the employer is determined in accordance with common law principles of agency.”\(^\text{533}\) However,

[i]n contrast, employer liability for a hostile environment created by coworkers, or by a low-level supervisor who does not rely on his supervisory authority in carrying out the harassment, attaches only when the employer has ‘either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.”\(^\text{534}\)

Since the plaintiff “fail[ed] to allege that even NYU’s agents knew or should have known of the continued harassment in the present case,”\(^\text{535}\) the Second Circuit affirmed the dismissal of the plaintiff’s complaint.

In an unusual case, Brown v. Hot, Sexy & Safer Productions, Inc.\(^\text{536}\) students contended that compulsory attendance and some of the conduct at an AIDS awareness program put on by an outside company at the school constituted a Title IX violation due to the establishment of a hostile envi-

\(^{530}\) Id.
\(^{531}\) Id. at 248 (citations omitted).
\(^{532}\) Id. The court did make reference to the fact that it “looked primarily to Title VII, as well as to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (1988) (prohibiting racial discrimination in federally supported educational programs), in defining the contours of a student’s private right of action under Title IX for gender discrimination occurring in college discriminatory proceedings.” Murray, 57 F.3d at 248. (citing Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994)).
\(^{533}\) Id. at 249 (citations omitted).
\(^{534}\) Id. (citations omitted).
\(^{535}\) Id. at 250.
\(^{536}\) 68 F.3d 525 (1st Cir. 1995), cert. denied, 116 S. Ct. 1044 (1996).
environment based on sexual harassment. On October 23, 1995, the First Circuit noted that, because the Title IX case law was sparse, it would apply the Title VII standards. As such, "the court must consider not only the actual effect of the harassment on the plaintiff, but also the effect such conduct would have on a reasonable person in the plaintiff's position." The court concluded, based on facts involved herein, "[i]f anything then, they allege discrimination based upon the basis of viewpoint, rather than on the basis of gender, as required by Title IX." Thus, the appellate court affirmed the dismissal of the plaintiffs' complaint.

On April 23, 1996, the Fifth Circuit, in Doe v. Hillsboro Independent School District, a case involving allegations of the rape of a female student by a male custodian, determined that it did not have appellate jurisdiction to review whether Title IX causes of action were valid in this interlocutory appeal. The school district was not a party to this appeal, which was brought by individually named defendants. The court, in dicta, noted that there is no Title IX claim against individuals. However, the court held that the plaintiffs could go forward with their 42 U.S.C. § 1983 claims against individual officials based on allegations of inadequate hiring policies and inadequate supervision stemming from the officials' deliberate indifference to the custodian's criminal record.

E. Student/Student (Peer Sexual Harassment)

1. Interscholastic Students

In Aurelia D. v. Monroe County Board of Education, an action for Title IX peer sexual harassment brought by a female fifth grade student

537. Id. at 529.
538. Id. at 540 (citations omitted).
539. Id.
540. Id. at 541.
541. 81 F.3d 1395 (5th Cir. 1996).
542. Id. at 1407.
543. Id. at 1400 n.9.
544. Id. at 1403. See also Armstrong v. Lamy, 938 F. Supp. 1018 (D. Mass. 1996). In Lamy, a 42 U.S.C. § 1983 action, the district court stated that "[t]o prove that a hiring policy violated her rights, [the plaintiff] must show that (1) the hiring procedures were inadequate; (2) the school officials were deliberately indifferent in adopting the hiring policy; and (3) the inadequate hiring policy was a cause of his injury." Id. at 1036. See also supra note 469.
against the school board for the alleged actions of a fellow male fifth grade student, included the touching of her breasts and vaginal area, and using vulgar language toward the plaintiff. The plaintiff reported these incidents to her teacher, who only verbally admonished the offending student. The alleged sexual harassing activities continued. The principal had also been notified. On August 29, 1994, the district court determined that

the sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to [the plaintiff] was not proximately caused by a federally-funded educational provider. 546

The court, disregarding the decision in Doe v. Petaluma School District,547 thus found “no basis for such a cause of action in Title IX or case law interpreting it”548 for the imposition of Title IX liability on the Board for peer sexual harassment of which the school becomes aware.

During 1996, the Eleventh Circuit explored the issue of whether a violation of Title IX occurs when allegations of sexually hostile environments are created due to the actions of a fellow student, and thus impute liability to the school board. On February 14, 1996, the circuit court in Davis v. Monroe County Board of Education,549 ruled it would apply Title

1994). In Houston, a female plaintiff alleged that a teacher allowed students to use his home for sexual relations. The plaintiff was sexually assaulted by a male student at the teacher's residence. No Title IX claim was raised. The district court held that under Colorado law there was no fiduciary duty between the private school and student. Id. at 835. Cf. Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 169 (N.D.N.Y. 1996). In Bruneau, the district court applied a modified Title VII standard for peer sexual harassment to a Title IX claim. Id. at 169. This court rejected utilization of constructive notice and instead required that “[t]he plaintiff must show that the school and/or school board received actual notice of the sexual harassing conduct and failed to take action to remedy it.” Id. at 173. The trial occurred during November 1996. The attorney for the school district argued in closing summations that “[n]ame-calling and inappropriate touching among sixth-graders amounts to misbehavior, not sexual harassment . . . .” Associated Press, Gay Student Gets $900,000 for Harassment, NEWSDAY, Nov. 21, 1996, at A18. See also Levin, supra note 444, at 22.


547. 830 F. Supp. 1560 (N.D. Cal. 1993), rev'd on other grounds, 54 F.3d 1447 (9th Cir. 1995). See also Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), vacated and reh’g en banc granted, 91 F.3d 1418 (11th Cir. 1996).


549. 74 F.3d 1186 (11th Cir. 1996).
Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.\footnote{551}

The Eleventh Circuit ruled that

\[\text{[t]he elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.}\footnote{552}

Moreover, the Title VII use of the common law principles of agency will be applied to determine the fifth element.\footnote{553} Finally, the court informed that

\[\text{[i]n determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humili-}\]

\footnote{551. \textit{Id.} at 1193 (emphasis added) (citations omitted). \textit{See also} Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996). In \textit{Burrow}, the female plaintiff had a party at her parents' farmhouse, without their presence, which resulted in property damage approximating $1,500. The plaintiff apprised the school of the names of the individuals responsible. Subsequently, according to her allegations, she and her family informed the school of a slew of verbal and physical assaults and alleged that the defendants "failed to take any meaningful action to end the harassment and protect" the plaintiff. \textit{Id.} at 1196. The plaintiff further alleged that she graduated a semester early to escape the ongoing hostile school environment. "[P]rior to October of 1992, the School District had no official policy to deal with cases of sexual harassment . . . and that prior to June of 1993, the School District had no grievance procedure for claims of sexual harassment." \textit{Id.} at 1198.}
\footnote{552. \textit{Davis}, 74 F.3d at 1194 (citations omitted).}
\footnote{553. \textit{Id.} at 1195.
ating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. The Court has explained that these factors must be viewed objectively and subjectively.554

*Doe v. Petaluma School District*555 concerned allegations of verbal sexual harassment of a female student by a male junior high school student, as well as from female students, where the school counselor did nothing after being informed. The allegations included sexual comments, references to her breasts, and lewd writings about the plaintiff on the bathroom walls. First, the district court held that student-to-student harassment is actionable under Title IX.556 Second, in elaborating on what standard should be applied, it noted that

> [t]he 'knew or should have known' standard is in essence a negligence standard... Discriminatory intent (or discriminatory animus) means that one actually meant to discriminate.... Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.557

Third, "individuals may not be held personally liable under Title IX.... [I]t is the educational institution that must be sued for violations of Title IX."558

On May 12, 1995, the Ninth Circuit, in a 2-1 decision, encapsulated the issue to whether the high school counselor had a legal duty at the time of the 1990–92 incidents which would have required him in his official capacity to do something about it. The court stated that "[w]e must examine the state of Title IX law as it existed between the rulings of Cannon and Franklin. In doing so, we conclude that it was not clearly established, at the time of [the counselor's] alleged inaction, that he had a duty to prevent peer sexual harassment."559 The court also concluded that an opinion letter (letter of findings) issued by the OCR was insufficient enough to establish such a duty. The appellate court, however, cautioned that if the counselor "engaged

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554. *Id.* at 1194.
556. *Id.* at 1563.
557. *Id.* at 1576.
558. *Id.* at 1576–77.
559. *Doe*, 54 F.3d at 1451.
in the same conduct today, he might not be entitled to qualified immunity.\textsuperscript{560}

The dissent noted that while there was no Title IX case explicating that a school official would be liable for failing to stop peer sexual harassment, the court should not have provided the counselor with immunity.\textsuperscript{561} "Just as an employer must take remedial action 'reasonably calculated to end' co-worker harassment...so too must school officials take remedial action reasonably calculated to end peer harassment."\textsuperscript{562}

In another case, \textit{Seamons v. Snow},\textsuperscript{563} after the plaintiff, the backup quarterback, had exited the shower area, members of the high school football team used athletic tape to bind him to a towel rack in the boys' locker room. While the plaintiff was restrained, another male student brought a female student, whom the plaintiff had taken to a homecoming dance, into the locker room where she observed the undressed plaintiff. The football coach then suspended and dismissed the plaintiff from the team. Thereafter, the superintendent canceled the remaining football season. The plaintiff alleged a hostile educational environment in violation of Title IX. On October 4, 1994, the federal district court granted the defendants' motion to dismiss the action, including the Title IX claim.\textsuperscript{564}

The court came to a number of conclusions. First, as a general observation, the court stated that "Title IX's protections arise when sex is the motive behind a harmful discriminatory act. Title IX was not intended to create a genderless society in which every act gives rise to a cause of action simply because it affects a male or female."\textsuperscript{565} Second, the court emphasized the three elements necessary to establish a Title IX claim: "(1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives
federal assistance; and (3) that his or her exclusion from the program was on the basis of sex.\textsuperscript{566}

Third, the court found the parents of the plaintiff did not have standing as beneficiaries of Title IX protection, which is in accord with \textit{R.L.R. v. Prague Public School District I-103}.\textsuperscript{567} Fourth, the court also concluded that the plaintiffs in a Title IX action must establish discriminatory intent.\textsuperscript{568} Fifth, the court concluded that the defendants' failure to either adopt a sexual harassment policy or to designate a Title IX coordinator and grievance policy affects both the females and males equally. Therefore, as a matter of law, the plaintiffs did not demonstrate an intent to discriminate.\textsuperscript{569}

Finally, the district court went further and determined that Title IX does not create a cause of action based on negligence for a hostile environment.\textsuperscript{570} Furthermore, since the defendants' conduct was not sexual in any way, the plaintiff's allegations were not sufficient to constitute a claim of sexual harassment.\textsuperscript{571} The Tenth Circuit affirmed the decision as it concerned the Title IX determination on May 8, 1996, but reversed as to the district court's dismissal of the plaintiff's claim regarding freedom of speech.\textsuperscript{572}

In \textit{Mennone v. Gordon},\textsuperscript{573} the female plaintiff, a high school senior, alleged sexual harassment by a male high school student. He repeatedly insulted and assaulted her, "making remarks about her breasts, grabbing her hair, legs, breasts and buttocks, and threatening to rape her. [The teacher] did nothing to stop [the student's] actions. . . . [and t]he school administration took no action against [the male student]."\textsuperscript{574} The district court stated that

\begin{itemize}
\item \textsuperscript{566} \textit{Id.} (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143–44 (W.D. Pa. 1989), aff'd on other grounds, 882 F.2d 74 (3d Cir. 1989)).
\item \textsuperscript{567} 838 F. Supp. 1526 (W.D. Okla. 1993).
\item \textsuperscript{569} \textit{Seamons}, 864 F. Supp. at 1122.
\item \textsuperscript{570} \textit{Id.} at 1118.
\item \textsuperscript{571} \textit{Id.} at 1119.
\item \textsuperscript{572} \textit{Seamons} v. Snow, 84 F.3d 1226, 1239 (10th Cir. 1996).
\item \textsuperscript{573} 889 F. Supp. 53 (D. Conn. 1995).
\item \textsuperscript{574} \textit{Id.} at 54–55.
\end{itemize}
[I]logically, the language of Title IX demands that a defendant must exercise some level of control over the program or activity that the discrimination occurs under. Thus, the plain language of the statute sets forth a functional restriction that does not preclude individual defendants, as long as they exercise a sufficient level of control.575

Furthermore, the court concluded that “Title IX has a sufficiently comprehensive enforcement scheme to demonstrate that Congress intended to foreclose enforcement through § 1983.”576 Allegations of peer sexual harassment of a female student by fellow male students were also addressed in the May 2, 1995, decision in Oona R.-S. v. Sant Rosa City Schools.577

In another case, Bosley v. Kearney R-I School District,578 a female student complained that other students were sexually harassing her. She brought suit against the school district on a number of grounds, including violation of substantive due process under the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983, and Title IX.579 The district court ruled on October 19, 1995, that the plaintiff’s parent was not a proper party plaintiff.580 The court determined there was no Fourteenth Amendment violation581 and enunciated that “compulsory school attendance does not create the custodial relationship necessary to impose constitutional liability on the defendant school district for failing to protect [the plaintiff] against alleged sexual harassment by her fellow students.”582 It also found that Title VII law provided the standards for enforcing the anti-discrimination provisions of Title IX.583 The court stated that “[d]iscriminatory intent is a fluid concept that is sometimes subtle and difficult to apply.”584 Additionally, there

575. Id. at 56.
576. Id. at 59–60.
578. 904 F. Supp. 1006 (W.D. Mo. 1995).
579. Id. at 1013.
580. Id. at 1020.
581. Id. at 1019.
582. Id. at 1018.
583. Bosley, 904 F. Supp. at 1022. “Franklin supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX.” Id. “The Office for Civil Rights also uses Title VII’s hostile environment standard in determining that an educational institution’s failure to take appropriate remedial action regarding known student-to-student sexual harassment is a violation of Title IX.” Id.
584. Id. at 1020 (citations omitted). “It implies that the decision maker... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” Id. at 1021.
existed a genuine issue of material fact as to whether the school district intentionally discriminated against the female student based on her sex. It cautioned that, "[o]nce a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to end the harassment."585 "[T]here is no notice problem where a school intentionally discriminates."586

The district court stated that "[d]iscriminatory intent is not synonymous with discriminatory motive. Neither does it require proof that unlawful discrimination is the sole purpose behind each act of the defendant being scrutinized."587 The court elaborated that discriminatory intent may be demonstrated by "direct" evidence, or by inference as "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."588

The court set forth the elements required to establish a claim of sex discrimination for student-on-student (peer) sexual harassment in any educational program or activity receiving federal funds as follows:

1) the plaintiff was subjected to unwelcome sexual harassment; 2) the harassment was based on sex; 3) the harassment occurred during the plaintiff’s participation in an educational program or activity receiving federal financial assistance; and 4) the school district knew of the harassment and intentionally failed to take proper remedial action. If the finder of fact makes these findings, the finder of fact may infer that defendant intentionally failed to take appropriate remedial action because of plaintiff’s gender.589

586.  Id. at 1025.
587.  Id. at 1020.
588.  Id. at 1021 (citing Washington v. Davis, 426 U.S. 229 (1976)). See also Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996). In Wright, the court stated:

In light of the preceding analysis, this court agrees with the majority view that Title IX encompasses a claim for peer-to-peer sexual harassment. However, the court does not believe that a school district can be held liable under Title IX for its negligent failure to remedy the sexually harassing behavior by a student’s peers despite its knowledge of such behavior. The Supreme Court’s opinion in Franklin explicitly demands more than mere negligence to create liability for monetary damages for a violation of Title IX—it requires plaintiffs to show intent to discriminate.

Id. at 1419.
2. Intercollegiate Athletes

In addition to Title IX, female co-eds are beginning to assert violations of the 1994 Violence Against Women Act. Examples of such assertions by female co-eds can be found in two 1996 cases in which the females alleged that they had been raped by male football athletes at their respective schools.

F. Employment Sexual Harassment

In *Ward v. Johns Hopkins University*, two female employees at Johns Hopkins University instituted suit claiming sexual harassment by a fellow male employee in violation of Title IX. One of the plaintiffs also alleged sexual harassment and retaliation in violation of Title VII. The University moved for summary judgment. On April 22, 1994, the district court noted that "[t]he Supreme Court has recognized that the sexual harassment of an employee may give rise to a claim of sex discrimination under Title VII." The court discussed the two theories utilized to predicate such a claim: quid


591. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996) (dismissing the plaintiff's Title IX claim against the University). The female co-ed at the University claimed she was raped by two male football players (who were not indicted by the grand jury) who she claimed received preferential treatment by the University. In *Brzonkala*, the court stated that "[i]n the final analysis, Brzonkala has alleged a flawed judiciary proceeding, the outcome of which disappointed her, but she has failed to allege facts that would support the necessary gender bias to state a claim under Title IX." *Id.* at 778–79. The case presented a cause of action alleging violation of the 1994 Violence Against Women Act. During July 1996, in the first case to assert a violation of the new law, the district court judge ruled that the Act was unconstitutional. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996). The United States Justice Department had filed a brief in support of the law. *Id.* at 781.

The second case was commenced during 1996 by a female student, who sued the University of Nebraska and Christian Peter, a former defensive tackle for the school and fifth-round draft choice in the 1996 National Football League draft. The woman alleges that she was raped by Peter in 1991, and that she has asserted a violation of the Act. *Arena, supra* note 298, at A63.

593. *Id.* at 369.
pro quo or hostile environment. The Supreme Court recently elaborated on
the hostile environment basis as a “middle path”:

Conduct that is not severe or pervasive enough to create an objec-
tively hostile or abusive work environment—an environment that a
reasonable person would find hostile or abusive—is beyond Title
VI’s purview. Likewise, if the victim does not subjectively per-
ceive the environment to be abusive, the conduct has not actually
altered the conditions of the victim’s employment and there is no
Title VII violation. 596

The court further determined that the substantive law involved with Title VII
sexual harassment would apply to a Title IX claim. 597

On June 13, 1994, the Supreme Court, in Karibian v. Columbia Univer-
sity, 598 denied the University’s petition for writ of certiorari regarding a
collegiate female student-employee’s Title VII claim against the University
based on allegations of sexual harassment by her supervisor, pursuant to the
theories of quid pro quo and hostile environment. 599 The Second Circuit
held actual economic loss was not required to establish quid quo pro sexual
harassment. 600 During June 1996, based on the University’s failure to
reasonably investigate the employee’s sexual harassment claim, the district
court judge vacated the jury’s award of $450,000 in favor of the plaintiff
against Columbia University. 601 However, the jury found no sexual harass-
ment by the supervisor. 602 An appeal can be expected. 603

596. Id. at 373.
597. Id. at 375.
F. Supp. 957, 962–63 (S.D.N.Y. 1995) (ruling that the probationary elementary teacher’s
claim of hostile environment sexual harassment was not sustained pursuant to Title VII, where
there was only a single unwelcomed sexual advance without any physical contact).
599. Karibian, 114 S. Ct. at 2693.
600. Karibian, 14 F.3d at 779.
602. Id. at 150.
603. See also Redman v. Lima City Sch. Dist. Bd. of Educ., 889 F. Supp. 288 (N.D. Ohio
1995) (discussing the suit instituted by a custodian against a school district for actions by the
principal predicated upon Title VII sexual harassment). Another case, Pinkney v. Robinson,
913 F. Supp. 25 (D.D.C. 1996), involved allegations of sexual harassment, based on hostile
environment pursuant to Title IX and Title VII, which the female plaintiff, the confidential
executive secretary of the dean of the University of the District of Columbia, claimed the dean
of the law school committed. The woman had been terminated for allegedly poor performance
on the job. The district court ruled that the Title VII standards would be applied to the Title
IX claim. Id. at 32. The district court rejected a strict liability application. Id. at 33.
G. Cases Commenced by Individuals Charged with Sexual Harassment

In Coplin v. Conejo Valley Unified School District, an unusual case, the accused predator in a sexual harassment action, a male high school band member who had been charged with twenty incidents concerning female students and who further admitted to certain actions in a written document, subsequently sued various school administrators and the school district claiming a violation of due process. The district court issued a judgment in favor of the defendants finding no violation, which the court based on its finding that the plaintiff and his parents knowingly and intelligently waived his right to a hearing. The court rejected the plaintiff’s contention that the school had to identify the plaintiff’s accusers.

VIII. LEGISLATIVE AND EXECUTIVE ACTION

A. Congressional Action

On May 9, 1995, the House Subcommittee on Postsecondary Education, Training & Life-Long Learning, chaired by Representative Howard “Buck” McKeelhon (R-CA), held oversight hearings on Title IX and intercollegiate

However, the court found that a material issue of fact existed as to the law school’s procedures, which prevented the granting of the defendants’ motion for summary judgment. Id. at 34.

604. 903 F. Supp. 1377 (C.D. Cal. 1995). See also Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983 (D. Mass. 1996) (rejecting the theory set forth by an assistant professor, who had been terminated due to sexual harassment charges alleging violation of the American with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994), claiming a psychological disorder, called disinhibition, for which he was being treated); Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994) (regarding a male professor who commenced a lawsuit challenging the University’s determination of his alleged sexual harassment remarks, pursuant to the issue of academic freedom and violation of the First Amendment freedom of speech and abrogation of due process rights afforded pursuant to the Fourteenth Amendment); Yusuf v. Vassar College, 827 F. Supp. 952 (S.D.N.Y. 1993) (concerning a male student who questioned the school’s internal sexual harassment policy which had charged him with sexual harassment of a female co-ed), aff’d in part and rev’d in part, 35 F.3d 709 (2d Cir. 1994). See also Title IX Tickler, NCAA News, Apr. 29, 1996, at 17 (“Former San Diego State University’s women’s volleyball coach, Myles Gabel filed suit April 2 against the institution and individuals involved in the termination of his employment last year . . . [based on] alleged unprofessional conduct and a violation of the school’s sexual harassment policy.”). See also Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) (discussed supra p. 623).

606. Id. at 1387.
607. Id.
On August 3, 1995, Representatives Hastert and Johnson introduced a Title IX amendment. The bill would require that congressional funds could not be used by the OCR, unless it issued a new policy guidance to post-secondary institutions, which includes objective criteria clarifying how such institutions can demonstrate a history and continuing practice of program expansion for members of the underrepresented sex. No action has been taken on the bill, beyond being assigned to the appropriate committee. The issue should be moot with the issuance of the new OCR “Clarification of Intercollegiate Policy Guidance: The Three Part Test.”

The General Accounting Office issued a report during October 1996 investigating Title IX compliance by schools nationally. It was reported that the House of Representatives Committee on the Budget issued a report, 608. See Report, Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning, 104th Cong. (1995). Witnesses included: Norma Cantu, Assistant Secretary of the OCR; Representative Cardiss Collins; Representative Dennis Hastert; Rick Dickson, Director of Athletics of Washington State University; Dr. Christine H.B. Grant, Director of Women’s Athletics at the University of Iowa; Dr. Vartan Gregorian, President of Brown University; Wendy Hilliard, President of the Women’s Sports Foundation; Dr. David L. Jorns, President of Eastern Illinois University; T.J. Kerr, wrestling coach at California State University of Bakersfield; and Charles M. Neinas, Executive Director of the College Football Association. Providing a national forum to presidents of two institutions, who were involved in ongoing Title IX actions (litigation at Brown University, and a compliance review initiated by the OCR examining Eastern Illinois University), should not have been permitted. There were no witnesses representing the female student athletes involved in those cases.

The Senate Committee on Commerce, Science and Transportation held hearings on October 18, 1995 on the Amateur Sports Act and the development of United States Olympic athletes. The representative of the National Association of Collegiate Women Athletic Administrators commented:

[It is important to bear in mind the critical role that Title IX has played and must continue to play in order to ensure young women the opportunity to participate in competitive athletics. . . . But after Title IX was passed and opportunities became available, women’s participation skyrocketed. If we have learned anything from this experience, it is that women are interested in playing sports and that interest expands as opportunities expand.


dated May 14, 1996, containing a proposal which “would essentially prohibit dollars being taken from an existing program and reallocate the money to efforts for gender equity.”\textsuperscript{610} Such a directive would be gilding the lily, as Title IX does not presently require that equivalent funding be afforded separate men’s and women’s athletic programs, but merely “necessary” funds.\textsuperscript{611}

B. Executive Action

On November 29, 1995, the Department of Education issued its regulation, 34 C.F.R. § 668, entitled “Student Assistance General Provisions” (Final Rule)\textsuperscript{612} implementing the 1994 “Equity in Athletics Disclosure Act,” which became effective on July 1, 1996. The information that colleges and universities are required to provide must have been available by October 1, 1996, and must be available by October 15th of each of the following years.\textsuperscript{613}

The school’s report must contain the following information: 1) the number of male and female full-time undergraduate students that attended the institution; 2) a listing of the varsity teams that competed in intercollegiate athletic competition, and for each team the following data: i) the total number of participants, by team; as of the day of the first scheduled contest of the reporting year for the team, and ii) the total operating expenses attributable to those teams.\textsuperscript{614} “Operating expenses” is defined as expenditures on lodging and meals, transportation, officials, uniforms, and equipment.\textsuperscript{615}

It also directs information as to “[w]hether the head coach was male or female and whether the head coach was assigned to that team on a full-time or part-time basis.”\textsuperscript{616} It requires the average annual institutional salary of the head coaches and assistant coaches of the men’s and women’s teams.\textsuperscript{617}

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\textsuperscript{611} 34 C.F.R. § 106.41(c).

\textsuperscript{612} 60 Fed. Reg. 61,424 (1996).

\textsuperscript{613} 34 C.F.R. § 668.41(e)(2) (1996) (originally published at 60 Fed. Reg. 61,424, 61,433 (1995)).

\textsuperscript{614} \textit{Id.} § 668.41(c)(1)–(2) (originally published at 60 Fed. Reg. 61,434 (1995)).

\textsuperscript{615} \textit{Id.} \textit{See also} Integrated Postsecondary Education Data System, effective July 1, 1994, which also requires that post-secondary institutions provide revenue and expense statistics within their athletic departments. \textit{New Federal Regulations Require Schools to Compile Equity Reports}, SPORTS LAW., Vol. XIV, Spring 1996, at 3.

\textsuperscript{616} 34 C.F.R. § 668.48(c)(iii)(A).

\textsuperscript{617} \textit{Id.} § 668.48(c)(7)–(8) (originally published at 60 Fed. Reg. 61,424, 61,434 (1995)).
\end{flushright}
Additionally, it mandates the total amount of money spent on athletically-related student aid, the total amount of expenditures on recruiting aggregately for all men’s and women’s teams, and the total annual revenues generated by the men’s and women’s teams.  

During January 1996, the OCR issued the official “Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test.” The January 16, 1996 letter from Assistant Secretary Cantu accompanying the final Clarification informs that:

[T]he Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term ‘developing interests’ under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities . . . .

Secretary Cantu summarized the three-part test by explaining that

[The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a ‘safe harbor’ for establishing that it provides nondiscriminatory participation opportunities. . . . The second part--history and continuing practice--is an examination of an institution’s good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

618. Id. § 668.48 (c)(3), (5), (6). The district court judge ordered the NCAA to submit, by July 5, 1996, detailed information concerning the salaries of coaches and budgets of the athletic programs of member institutions in association with the case of Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995). The case challenged the Association’s ruling restricting the amount of compensation certain part-time coaches of Division I schools can receive.

619. Letter from Norma Cantu, Assistant Secretary, Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (Jan. 16, 1996) [hereinafter Clarification].

620. Id. at 2.

621. Id.
For satisfaction of prong one, substantial proportionality between the percentage of student athletes and full-time undergraduate enrollments, the Clarification states that, in determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program.\textsuperscript{622} The final Clarification provides a working definition.\textsuperscript{623} It notes that, "[a]s a general rule, all athletes who are listed on a team’s squad or eligibility list and are on the team as of the team’s first competitive event are counted as participants by OCR."\textsuperscript{624} Additionally, "an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates."\textsuperscript{625} The OCR stated that the requirement of "substantially" proportionate would be made "on a case-by-case basis."\textsuperscript{626}

As to the second prong of a history and continuing practice of program expansion for the underrepresented sex, the OCR looks at the institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion . . . [T]he focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.\textsuperscript{627}

However, the OCR will accept as evidence of the second prong "an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students . . . ."\textsuperscript{628} While it will not be acceptable to merely

\textsuperscript{622} Id. at 2–3.
\textsuperscript{623} Id. at 3.
\textsuperscript{624} Clarification, supra note 619, at 3.
\textsuperscript{625} Id.
\textsuperscript{626} Id. at 4. However, the OCR notes that it would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.
\textsuperscript{627} Id. at 4–5.
\textsuperscript{628} Clarification, supra note 619, at 6. "[P]art two considers an institution's good faith remedial efforts through actual program expansion . . . . Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot
promise to expand the program for the underrepresented sex at some time in the future, merely having a policy in place should not be permitted to satisfy prong two.

Finally, as to the third prong, "the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students." The Clarification also states that

\[
\text{[i]n making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.}
\]

Furthermore, "[a]n institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing.... These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities." Proposed revisions to the OCR Title IX Athletics Investigator's Manual are still under review. Additional comments were solicited during the beginning of 1995. Moreover, there has been no updated Policy Clarification concerning coaches compensation.

During the period from March 22, 1988 (when the 1988 Amendments to the Civil Rights Restoration Act of 1987 was adopted) to September 30, 1995, the OCR conducted only 50 Title IX compliance reviews of intercollegiate athletics programs among it's ten regional offices. Also, individuals be considered remedial because they burden members of the sex already disadvantaged by the present program."  

629. Id.

630. See, e.g., Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992) (concerning repeated attempts by female students over a period of about eight years, to establish a women's varsity ice hockey team at the University through the administrative process; however, they were consistently rebuffed), vacated, 992 F.2d 17 (2d Cir. 1993). See also Bryant v. Colgate Univ., No. 93-CV-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996) (discussed supra note 619, at 9).


632. Id.

633. Id. at 10–11.

634. Based on information supplied by the OCR on November 8, 1995, pursuant to a Freedom of Information Act request of the Women's Sports Foundation (on file with the Nova Law Review).
filed ninety administrative complaints against post-secondary institutions. For example, during May 1995, the OCR allowed Eastern Illinois University another opportunity to fashion a compliance action plan. This plan will permit the University to retain two men’s teams and establish a women’s golf team during the 1996–97 academic year. On August 30, 1995, the administrative complaint filed by female athletes against the University of Pennsylvania was settled. It was reported that the University agreed, among other things, “to enhance its facilities and to bolster coaching staffs for women’s sports.”

An administrative complaint was filed against Dearborn High School protesting the closing of a significant number of bathrooms in order to diminish student smoking. It was alleged that this subjected the female students to urinary tract infections, thus discriminating against the female students in violation of Title IX. The school reopened the bathrooms. Subsequently, based on the school district’s actions, the OCR closed the case.

635. The OCR indicated it was concluding its monitoring activities overseeing the compliance action plan agreed to by the University of Toledo. The administrative complaint was filed on May 8, 1990. It took almost four years for the OCR to agree to a plan dated December 8, 1993. The University added two new varsity teams for women, golf and soccer, and also expanded the size of some of the existing women’s intercollegiate teams. OCR File No. 5-90-2070 (Region V) (Final Monitoring Letter, Apr. 17, 1996) (on file with the Nova Law Review). The University of Minnesota indicated that during October 1995, the women’s club ice hockey team would be elevated to a varsity team effective during the 1996-97 academic year. Jody Smith, University of Minnesota Adds Women’s Ice Hockey, WOMEN’S SPORTS EXPERIENCE, Feb. 1996, at 13. During May 1996, Johns Hopkins University announced it was elevating its women’s lacrosse program from Division III to Division I beginning during the 1998-99 academic year. The University of Pittsburgh “announced it was eliminating its men’s tennis and gymnastics programs in a move motivated by Title IX.”

Title IX and the Elimination of Men’s Athletic Programs, SPORTS LAW., Vol. XIV, Spring 1996, at 5.


638. Maryanne George, Dearborn Schools Sued for Locking Bathrooms, DETROIT FREE PRESS, May 11, 1995, at 1B, 2B.

639. “Because women contract urinary tract infections at 30 times the rate of men and need more time for personal hygiene, [attorney, Jean Ledwith] King charges the locked restrooms subject the 600 female students to a much higher risk of health problems than male students.” Id. King has been an advocate for gender equity on the state and national level for 25 years. She represented the students in the administrative complaints filed against University of Toledo and Eastern Kentucky University.

640. OCR File No. 15-95-1139 (closing letter from the OCR Region V, June 7, 1995).
IX. Conclusion

The Title IX decisions rendered since 1994 illustrate, in some instances, polar or contradictory results on the same issues. This is in part fostered by the cursory language of the Title IX statute and the absence of legislative history, or even of regulatory guidance concerning the myriad conditions that may give rise to a claim of sex discrimination involving educational institutions which are recipients of federal funds. The 1992 Supreme Court decision in Franklin continues to have a significant fallout. In allowing monetary damages, the number and breadth of Title IX issues has increased dramatically, as evidenced by the decisions reviewed herein, compared to the total case law issued prior thereto. The cases clearly exemplify that female students and educational employees are still subject to second class status on a nationally. The unveiling of the odious examples of sexual abuse of female students predicated by male educational employees is a disturbing aspect. The "glass sneaker" still exists in the area of interscholastic and intercollegiate athletics for female students and prospective female coaches and athletic directors.

First, while the decisions uniformly demonstrate a greater reliance on Title VII to fill in the gaps or to borrow the standards and relevant case law in the sexual harassment area, there is also prior case law instructing that Title VI should be the focal point for reliance in explicating Title IX claims. Second, since the Title IX statute contains no express statute of limitations, the courts have been forced to borrow state statutes of limitations based on differing related causes of actions (predominantly personal injury actions, as was adopted by the Eighth Circuit in the Egerdahl ruling and the Sixth Circuit in Lillard, versus civil rights actions), which may give potential plaintiffs dramatically different time frames within which to initiate their lawsuits. Third, the courts are ready to recognize a claim of retaliation pursuant to Title IX, as was implicitly done by the Second Circuit in Murray and explicitly done by the district courts in Clemens and Clay. Fourth, interestingly Title IX exempts same sex public military schools from its ambit. However, the "separate but equal" argument utilized by these schools was deployed by the 1996 Supreme Court decision in United States v. Virginia, thus rendering moot any argument as to whether the statute should be amended to eliminate the exception.

641. The author coined this term in her first law review article. See Heckman supra note 92, at 63.

https://nsuworks.nova.edu/nlr/vol21/iss2/1
Fifth, while the Ninth Circuit in *Jeldness* recognized a Title IX cause of action for female prisoners at state prisons, the district court in *Archer* found no Title IX cause of action for female prisoners at federal prisons, which are clearly recipients of federal funds and belies the whole notion of prohibiting sex discrimination in education. This also raises the question as to whether some provision should be made to bring educational programs at federal prisons within the ambit of sexual discrimination protection, whether pursuant to Title IX or independently.

Sixth, in the area of athletic programs and activities, the cross-over cases which had been so instrumental, especially on the interscholastic level during the first twenty years of Title IX’s existence has dwindled significantly to a handful of cases during the 1990s, with minimal case law during this three-year period. Rather, the “equal opportunity” cases, especially on the intercollegiate level, have since come to the forefront in a dramatic way during the 1990s. During 1996, the First Circuit in *Cohen* again favorably resolved an appeal in favor of the female student athletes. The First Circuit recognized the impact of Title IX stating:

There can be no doubt that Title IX has changed the face of women’s sports as well as our society’s interest in and attitude toward women athletes and women’s sports. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern. . . .

One need look no further than the impressive performances of our country’s women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX’s beneficent effects on women’s sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women’s athletic competition was not a

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The uniformity of the circuit courts in adopting or condoning the three-part "effective accommodation" test, as was done by the First, Third, Sixth, Seventh, and Tenth Circuits, was disregarded in January 1996 by a federal district court in *Pederson*, yielding for a possible appellate determination by the Fifth Circuit. However, even in *Pederson*, the female student athletes were successful in proving that the University had violated Title IX, which continues the results of all the "equal opportunity" cases brought on behalf of collegiate female students who have been successful in persuading the courts of their gender equity plights. Conversely, the male collegiate athletes, who have sought restoration of their varsity teams, have all struck out in the judicial arena. Interestingly, no cases were instituted during the applicable time frame seeking reinstatement of women's varsity intercollegiate teams. Perhaps the post-secondary institutions are examining the issue of Title IX compliance and the NCAA gender equity certification requirements before embarking on the elimination of established women's intercollegiate teams, especially when the percentages of female students and female student athletes as compared to the male student athletes is so skewed.

Seventh, while females continue to be shortchanged in gaining employment as coaches of men's teams, or as athletic directors running men's or women's athletic programs, or as head sports information directors, no litigation has been brought to spotlight this anomaly. Instead, the battlefront concerns the equal pay and termination and/or retaliation claims brought by coaches of women's teams (male and female) or female athletic administration employees. The three federal predicates are Title IX, Title VII, and the Equal Pay Act. The 1993 Ninth Circuit decision in *Stanley*, which focused solely on the Equal Pay Act, continues to garner stature as a basis for finding that the duties and responsibilities of the coach of men's intercollegiate (basketball) team were different than the duties and responsibilities of the coach of women's intercollegiate (basketball) team. The decision was relied upon by the federal district courts in the *Deli* and *Bartges* decisions and the District of Columbia Superior Court in the *Tyler* decision. To date, no courts have examined the Title IX regulations operative in this area and the exact import that they possess. The Ninth Circuit heard another appeal in *Stanley* during 1996. During 1996, the Fourth Circuit affirmed the lower

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court’s decision in Bartges without commenting on the Title IX regulations, and the parties settled the Tyler case. The two Deli decisions addressed comparisons of the women’s gymnastics and assistant gymnastics coaches with non-gymnastics coaches. The Bartges case was a hybrid seeking comparison of the women’s softball coach with the men’s baseball coach, as well as other coaches. The first reverse discrimination suit was brought by a former men’s basketball coach, dissatisfied about receiving the salary that the women’s basketball coach was getting. The OCR should issue a revised policy clarification concerning the compensation area, especially when differences hinge on the sex of the athletes coached, rather the sex of the coaches.

Eighth, none of these decisions held that an athletic employee of a University or college that received federal funds was precluded from setting forth a Title IX cause of action. However, this is at variance with a number of other decisions involving educational employees generally.

Ninth, there is a lack of consensus on whether an individually named defendant, who is an employee or a representative of the governing authority such as a school board member, may be named as a party in a Title IX action. Tenth, a number of courts would apply the Title VII standards to Title IX cases of sexual harassment and even retaliation claims.

Finally, when sexual abuse or molestation of a student occurs, as opposed to when nonphysical sexual harassment, should the educational institution be held to a negligence standard of failing to properly act after notice (whether actual or constructive) based on the clearly intentional and egregious actions by their employees or agents; or should strict liability be imposed? Presently, the majority posture as represented in Canutillo Independent School District calls for “two distinct actions or inaction, at least one of which is intentional in nature, on the part of an employee and on the part of the school district . . . Title IX does require proof of negligent, reckless or intentional acts by the school district, independent of the intentional conduct of the employee.”645 While arguably the minority position, the logic for assigning strict liability in Title IX sexual abuse cases, as in Leija, has merit. Clearly, as the judge issued in Leija, the educational institution should be sacrosanct from any and all sexual abuse of students. However, a restriction on the amount of compensatory damages, as the judge urged in exchange for imputing the strict liability standard, remains open to attack for the reasons advanced herein. On whom should the burden lie to

645. Id. at 847.
obviate the liability of the educational institution in the employment and monitoring of its employees: the second grade student or the educational institution? As the Eleventh Circuit in Davis cogently stated, “a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.”

In the hostile environment cases, the Title VII standard appears to continue in the Title IX cases, including the peer sexual harassment cases. However, the courts should carefully scrutinize whether the actions by the educational institutions are protective, timely, and comprehensive enough after being informed of possible unwanted sexual harassment. Assuming the reliance on Title VII, it will be interesting to watch for the first judge to modify a Title IX award to the $300,000 maximum that an individual may collect in a Title VII case. Title IX presently contains no restriction on the amount of monetary damages that may be awarded. The OCR should also issue an updated policy clarification on sexual harassment in education, analyzing the myriad types of harassment that may occur.

Thus, the 1990s will continue to unfold the parameters of Title IX protection, through the judicial process and possibly through the legislative process, especially in light of some of the erratic decisions rendered during the applicable time frame. The gender line in athletics continues to be the kryptonite vault line. The Title IX paradigm remains a work-in-progress.

646. Davis, 74 F.3d at 1194.
TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 664
II. THE EQUITABLE DOCTRINE OF PIERCING THE CORPORATE VEIL ........................................ 665
III. METAPHORS USED FOR PIERCING THE CORPORATE VEIL ........................................ 666
IV. THE DANIA DECISION ............................................................................................... 668
V. STANDARD FOR PIERCING THE CORPORATE VEIL AND DETERMINING IMPROPER CONDUCT ................................................................................................. 672
VI. THE DISTRICT COURTS' INTERPRETATIONS OF DANIA .................................................... 674
   A. First District Court of Appeal .................................................................................. 674
   B. Second District Court of Appeal .......................................................................... 676
   C. Third District Court of Appeal .............................................................................. 677
   D. Fourth District Court of Appeal .......................................................................... 679
   E. Fifth District Court of Appeal .............................................................................. 680
VII. THE RELATIONSHIP BETWEEN IMPROPER CONDUCT AND EQUITABLE ESTOPPEL ........................................................................................................ 681
VIII. CONCLUSION ............................................................................................................ 683

"enveloped in the mists of metaphor" 1

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I. INTRODUCTION

In *Dania Jai-Alai Palace, Inc. v. Sykes*, the Supreme Court of Florida held that the corporate veil may not be pierced absent a showing of improper conduct. The *Dania* court quoted lengthy passages from prior Supreme Court of Florida cases dealing with this issue, including *Riley v. Fatt*, *Advertects v. Sawyer*, and *Roberts’ Fish Farm v. Spencer* to support its holding. However, the court made no attempt to reduce the passages into a workable formula that could be used to determine what types of conduct might be considered improper, and furthermore, did not indicate from where the improper conduct standard was derived.

As a result, Florida courts and practitioners faced with the piercing issue do not have a clear set of guidelines or elements that can be used to evaluate whether the shareholder conduct in question will warrant piercing the corporate veil. Consequently, the purpose of this article is to examine *Dania* and the cases cited therein, as well as post-*Dania* decisions, in an effort to define a set of factors or guidelines that can be used with some consistency to determine what type of conduct might be considered improper.

In addition, the article will examine Oregon law, which also requires a finding of improper conduct to pierce the corporate veil, to show the relationship between equitable estoppel and piercing the corporate veil, and how the elements of equitable estoppel might be used to prove improper conduct. Before beginning to evaluate the *Dania* decision or Oregon law, however, a brief overview of the history and theories behind piercing the corporate veil is necessary.

2. 450 So. 2d 1114 (Fla. 1984).
3. *Id.* at 1121.
4. 47 So. 2d 769 (Fla. 1950).
5. 84 So. 2d 21 (Fla. 1955).
6. 153 So. 2d 718 (Fla. 1963).
7. It is of some interest that the phrase “improper conduct” was mentioned in two other piercing the corporate veil cases in Florida long before the *Dania* decision; however, those cases do not seem to lend any support in deciphering what type of conduct can be considered improper. *See Advertects*, 84 So. 2d at 24; Coryell v. Pilkington, 39 F. Supp. 142, 145 (S.D. Fla. 1941), *aff’d*, 317 U.S. 406 (1943). Of further interest, is the fact that the seventeenth century chancery courts used improper conduct as a standard in denying requests for specific performance. The chancery courts defined improper conduct as, among other things, negligent misrepresentation. *See also* Kevin M. Teven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 145 (1992).
II. THE EQUITABLE DOCTRINE OF PIERCING THE CORPORATE VEIL

"Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood." Notwithstanding the inherent confusion, the doctrine of piercing the corporate veil is easily understood by acknowledging that incorporation's single valuable attribute is limited liability. "Limited shareholder liability was extended to corporate shareholders to encourage risk capital investments." In describing the necessity of limited liability, William O. Douglas once said that "[i]t is legitimate for a man or group of men to stake only a part of their fortune on an enterprise." Behind these theories, the attribute of limited liability did in fact encourage investment and have a positive effect on the economy; but as incorporation became more popular, limited shareholder liability led to abuses of the corporate forum. As a result, courts began to disallow shareholders limited liability protection when they used the corporation as a vehicle to achieve some type of inequity, and in a manner not contemplated by law. This process became known as piercing the corporate veil.

Probably the most important point to be made about the doctrine of piercing the corporate veil is that it is not itself a cause of action. In most cases, a plaintiff cannot seek to pierce the corporate veil until the corporation itself is found liable and the judgment against it is returned unsatisfied. This process is most easily explained in that the doctrine of piercing the corporate veil originated in courts of equity. Historically, a prerequisite to seeking relief in a court of equity was that there be no adequate remedy at law.

13. FLETCHER, supra note 12, § 41.
15. See FLETCHER, supra note 12, § 41.
For example, if a plaintiff is successful in a suit against a corporation but the judgment rendered against the corporation is returned unsatisfied, due to the fact that the corporation is insolvent, the plaintiff despite receiving the judgment, would not have an adequate remedy at law because the corporation's insolvency would not permit the legal remedy to be carried through. In this situation, a plaintiff could then seek equitable relief because the remedy at law is inadequate. Equity principals, under the proper circumstances, would then be used to pierce the corporate veil and hold the shareholders, who would otherwise have limited liability to the amount of their investment in the corporation, personally liable for the judgment against the corporation. In sum, piercing the corporate veil is simply a means of enforcing a judgment against a corporation.

The confusion surrounding application of the doctrine of piercing the corporate veil, and possibly other doctrines or causes of action that originated in equity, may well have to do with the merger of law and equity. It has been said that "[w]hen the principles of equity force their way into the common law they lose their cohesiveness and fly apart." As further analysis indicates, the standards and metaphors that have resulted from the application of the once purely equitable remedy of piercing the corporate veil in courts of law are no exception.

III. METAPHORS USED FOR PIERCING THE CORPORATE VEIL

There have been a number of formulations suggested by courts as to the proper standard for piercing the corporate veil. The most typical standards

18. See generally PHILLIP BLUMBERG, THE LAW OF CORPORATE GROUPS § 6.01 (1987), a multi-volume treatise on piercing the corporate veil. Professor Blumberg asserts that there are three main variants in piercing jurisprudence—instrumentality, alter ego, and identity. The "instrumentality" doctrine has three factors—"excessive exercise of control; wrongful or inequitable conduct; and [a] causal relationship to the plaintiff's loss." Id. § 6.02. The "alter ego" doctrine holds that piercing is proper when:

(1) such unity of ownership and interest exists that the two affiliated corporations have ceased to be separate and the subsidiary has been relegated to the status of the 'alter ego' of the parent; and (2) where recognition of them as separate entities would sanction fraud or lead to an inequitable result.

Id. § 6.03.

[The "identity" doctrine] is such a diffuse and relatively useless approach that it does not deserve extended discussion. . . . [The standard is] "that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate iden-
used in piercing the corporate veil cases seem to be the mere instrumentality doctrine and the alter ego doctrine.\textsuperscript{19} The mere instrumentality approach is most often associated with parent-subsidiary cases.\textsuperscript{20} Florida courts have characterized the mere instrumentality doctrine as "total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation."\textsuperscript{21}

The alter ego approach is more appropriate when the corporation is made up of one or two shareholders.\textsuperscript{22} The alter ego theory is usually invoked by demonstrating that the shareholders have failed to separate their personal affairs from that of the corporation.\textsuperscript{23} Notwithstanding these more common approaches, there are numerous other rules and formulations that courts have relied on to pierce the corporate veil.\textsuperscript{24} Most courts and commentators agree, however, that the labels used to describe piercing the corporate veil are useless metaphors.

Another area of conflict in piercing the corporate veil law revolves around the concept of fraud. On one extreme is the view that "fraud" must be pleaded and proven.\textsuperscript{25} On the other extreme is the view that proof of plain fraud is not a necessary prerequisite to pierce the corporate veil.\textsuperscript{26}
Under this second view, the fact that a corporation is a "mere instrumentality" of another corporation is, in most cases, sufficient to pierce the veil.

The Dania decisions exemplify the lack of uniformity and general confusion associated with piercing the corporate veil standards mentioned above. The district court in Dania applied the "mere instrumentality" test and held "it was not necessary to establish fraud or other wrongdoing on the part of Saturday [the parent] under the mere instrumentality doctrine."^{27} The Supreme Court of Florida, as discussed infra, quashed this formulation, holding instead that the district court decision directly and expressly conflicted with decisions of the supreme court which held that the corporate veil could not be pierced absent a showing of improper conduct.^{28} In other words, satisfying the "mere instrumentality" test alone was insufficient to pierce the corporate veil.^{29}

What is equally significant is that the court did not say that "fraud" must be proven, only that "improper conduct" must be proven.^{30} While it is clear that proof of fraud would satisfy the improper conduct test, it is far from clear what other conduct might also satisfy that test. It is submitted that the Supreme Court of Florida's formulation was designed to chart a middle course between those tests requiring proof of fraud and those that allow piercing without proof of either fraud or wrongdoing. Although the supreme court gave no precise formula, no exact parameters, and no list of elements to the test, a review of the Dania opinion, and the cases cited therein, assists in creating a standard that can be used to indicate what type of conduct may be considered improper.

IV. THE DANA DECISION

In Dania, a woman was hit by a car in the parking lot of a jai-alai fronton owned by Dania Jai-Alai, Inc.^{31} The car that hit the woman was driven by a valet who was employed by Carrousel, Inc.^{32} Carrousel was the sister corporation of Dania Jai-Alai that handled valet parking and other

27. Dania, 450 So. 2d at 1116.
28. Id. at 1121.
29. See In re Homelands of DeLeon Springs, Inc., 190 B.R. 666, 670 (Bankr. M.D. Fla. 1995) (stating that the mere instrumentality doctrine cannot be used without a showing of improper conduct).
30. Dania, 450 So. 2d at 1121.
31. Id. at 1115–16.
32. Id. at 1116.
aspects of the jai-alai business. Both Dania and Carrousel were wholly-owned subsidiaries of Saturday Corporation. The woman chose to sue all three corporations as a result of the injuries she sustained from being hit by the car. Specifically, she sued Carrousel for the negligence of its parking attendant and independent negligence, Dania for alleging that Carrousel was its mere instrumentality or alter ego, and Saturday for alleging Carrousel and Dania were its mere instrumentalities. The trial court found that Dania and Carrousel were Saturday’s mere instrumentalities “and that it was not necessary to establish fraud or other wrongdoing on the part of Saturday under the mere instrumentality doctrine.” The Fourth District Court of Appeal agreed that it is not necessary to show improper conduct in order to pierce the corporate veil. Therefore, the issue posed for the Supreme Court of Florida was whether it was necessary to show fraud or wrongdoing in order to pierce its corporate veil.

The supreme court reversed the Fourth District’s holding. The court held that absent some showing of “improper conduct” the corporate veil could not be pierced. The court relied on Riley v. Fatt, Advertects, Inc. v. Sawyer Industries, and Roberts’ Fish Farm v. Spencer, previously decided Supreme Court of Florida cases on piercing the corporate veil and general corporate law, as authority for its holding. Accordingly, a review of these cases will help reveal what types of conduct can be considered improper.

Riley v. Fatt was the first case the Dania court relied on for its holding that “improper conduct” must be shown in an action to pierce the corporate veil. In that case, Fatt contracted with Riley Builders to make improvements to his property. When Riley Builders breached the contract, Fatt

33. Id. at 1115.
34. Id.
35. Dania, 450 So. 2d at 1116.
36. Id.
37. Id.
38. Id. at 1121.
39. Id.
40. 47 So. 2d 769 (Fla. 1950).
41. 84 So. 2d 21 (Fla. 1955).
42. 153 So. 2d 718 (Fla. 1963).
43. Dania, 450 So. 2d at 1119–21.
44. 47 So. 2d 769 (Fla. 1950).
45. Dania, 450 So. 2d at 1119–20.
obtained a judgment against the corporation to be satisfied out of the assets of the corporation in the amount of the value of the breach. 46

When the judgment was returned unsatisfied, Fatt sought to hold the sole stockholder and president of Riley Builders, Alonzo Riley, personally liable for the value of the judgment he obtained against the corporation. 47 The court however, said that although Riley Builders was a one-man corporation completely dominated by Alonzo Riley, and the corporate funds were not handled with the degree of care expected from a well managed corporation, the facts were insufficient to warrant piercing the corporate veil. 48 “In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate, Fatt cannot be heard to question the corporate existence...” 49 The Riley court held that “the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them.” 50

Riley cited Biscayne Realty & Insurance Co. v. Ostend Realty Co. 51 as authority for its holding. Interestingly, the Dania court did not directly rely on Biscayne for the proposition that “improper conduct” must be shown in order to pierce the corporate veil, however, certain language in Biscayne is seemingly squarely on point.

If the stockholders of a corporation enter into a transaction in their individual and private interests, and utilize the name of the corporation merely as a convenience for the completion of the transaction, where the legal entity as such has no interest in the matter, but the name is used to mislead creditors or perpetuate a fraud upon them, the legal entity in the name of which the transaction was carried will be ignored and the parties held to individual liability. 52

46. Riley, 47 So. 2d at 770–71.
47. Id. at 771.
48. Id. at 773.
49. Id.
50. Id. (citations omitted).
51. 148 So. 560 (Fla. 1933).
52. Id. at 564 (citation omitted).
The Biscayne court also noted that "'[t]he directors of a private corporation have no right under any circumstances to use their official position for their own individual benefit.'" 53

The Dania court next relied on Advertects, Inc. v. Sawyer Industries. 54 In that case, Advertects recovered a money judgment against Sawyer Industries, which was returned unsatisfied. 55 Thus, Advertects sought to have the judgment satisfied out of the personal assets of Neil and Kay Sawyer, the stockholders of Sawyer. 56 Advertects alleged that the Sawyers organized Sawyer as a convenient means of doing business without subjecting themselves to personal liability. 57 However, the court stated that unless Advertects could show that Sawyer

was organized or after organization was employed by the stockholders for fraudulent or misleading purposes, or in some fashion that the corporate property was converted or the corporate assets depleted for the personal benefit of the individual stockholders, or that the corporate structure was not bona fide established or, in general, that property belonging to the corporation can be traced into the hands of the stockholders[,]

the corporate veil could not be pierced. 58 As a result, the Advertects court refused to pierce the corporate veil, even though the Sawyers: 1) habitually operated through numerous corporations, many of which were unsuccessful; 2) were the sole stockholders; and 3) handled the business affairs poorly, because there was no showing that the stockholders improperly converted any of Sawyer's property for their own use or abused their relationship with Sawyer. 59

Roberts' Fish Farm v. Spencer, 60 the last case cited by the Dania court as authority for its holding, may be the most helpful in determining what type of conduct can be considered improper. Dania cited Roberts' Fish

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53. Id. at 565 (quoting Donovan v. Purtell, 75 N.E. 334, 337 (Ill. 1905) (summarizing Hoffman v. Reichert, 35 N.E. 527 (Ill. 1893))).
54. 84 So. 2d 21 (Fla. 1955).
55. Id. at 23.
56. Id.
57. Id.
58. Id. at 24.
59. Advertects, 84 So. 2d at 24.
60. 153 So. 2d 718 (Fla. 1963).
Farm for its remarks on the purpose of corporate entities and the rationale for the law controlling piercing the corporate veil.\(^\text{61}\)

The corporate entity is an accepted, well used and highly regarded form of organization in the economic life of our state and nation. . . . “Their purpose is generally to limit liability and serve a business convenience.” Those who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them against personal liability unless it be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil. This is the reason for the rule, stated in all Florida cases, that the courts are reluctant to pierce the corporate veil and will do so only in a court of competent jurisdiction, after notice to and full opportunity to be heard by all parties, and upon showing of cause which necessitates the corporate entity being disregarded in order to prevent some injustice.\(^\text{62}\)

By citing Roberts’ Fish Farm in this capacity, the Dania court indicates that a shareholder’s conduct will be considered improper if it contravenes the corporate enterprise system’s purpose for existence. As Roberts’ Fish Farm indicates, a corporation’s purpose is not to limit personal liability in personalized transactions but to promote commerce and industrial growth, and encourage investment by limiting personal liability in business transactions.

V. STANDARD FOR PIERCING THE CORPORATE VEIL AND DETERMINING IMPROPER CONDUCT

The equitable nature of the piercing the corporate veil doctrine,\(^\text{63}\) and certain statements made by the Dania court, including the rationales of Riley, Biscayne, Advertects, and Roberts’ Fish Farm, can be combined to create a standard for piercing the corporate veil and indicating what types of conduct might be considered improper. In determining whether or not to pierce the corporate veil the analysis should proceed as follows.

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61. Dania, 450 So. 2d at 1120–21.
62. Roberts’ Fish Farm, 153 So. 2d at 721 (citation omitted).
63. See discussion supra Section II.
First, a plaintiff must seek a judicial determination of whether or not the corporation is liable on the underlying cause of action. If the corporation is found liable, the plaintiff must then try and have the judgment against the corporation satisfied out of the corporation's assets. If the corporation's assets are sufficient to satisfy the judgment, there is no need for the plaintiff to pierce the corporate veil. If however, the judgment against the corporation is returned unsatisfied, the plaintiff may then seek to pierce the corporate veil and hold the shareholders liable for the judgment against the corporation.

The first step in piercing the corporate veil is to ask why is the corporation unable to satisfy the judgment rendered against it. If the corporation is unable to pay simply because its business affairs were poorly managed by the shareholder(s), resulting in the corporation's insolvency, the plaintiff may not be able to pierce the corporate veil. However, if the corporation is unable to satisfy the judgment due to some improper conduct on the shareholders part, the plaintiff should be permitted to pierce the corporate veil. The final question, then, is what type of conduct can be considered improper.

It seems that a plaintiff may be able to identify improper conduct by keeping in mind a few different statements and pervading themes mentioned throughout the Dania opinion. First, a corporation's general purpose is to limit personal liability and serve a business convenience, and that the

64. In Dania, for example, the underlying cause of action was for personal injury sustained by Ms. Sykes.
65. This will be the primary factor in determining if there is an adequate remedy at law.
66. As the Dania court noted, "[i]f this requirement were not made then every judgment against a corporation could be exploited as a vehicle for harassing the stockholders and entering upon fishing expeditions into their personal business and assets." Dania, 450 So. 2d at 1120 (quoting Advertects, Inc. v. Sawyer Indus., 84 So. 2d 21, 24 (Fla. 1955)).
67. See Advertects, 84 So. 2d at 23; Riley v. Fatt, 47 So. 2d 769, 770 (Fla. 1950). See supra note 14 and accompanying text. It is very important to keep in mind that a prerequisite to equitable relief is that there be no adequate remedy at law. Until a judgment against a corporation is returned unsatisfied, there may be no basis for piercing the corporate veil in that there may be an adequate remedy at law, namely, enforcing the judgment against the corporation. This may well have been one of the problems with the plaintiff's case in Dania. The plaintiff sought to pierce the corporate veil before a judgment was returned unsatisfied. It would seem therefore, that the corporate veil cannot, and should not, be pierced unless the corporation has no means of satisfying a judgment against it. See Riesen v. Maryland Casualty Co., 14 So. 2d 197, 199 (Fla. 1943).
68. Riley, 47 So. 2d at 773 (indicating that the courts do not consider the fact that a corporation was poorly run alone sufficient to constitute improper conduct).
69. Roberts' Fish Farm, 153 So. 2d at 721.
shareholders of a corporation have no right to use their corporate positions for their own personal benefit.\textsuperscript{70} Under this basic principle of corporate law, if there is proof that the shareholders, or parent as the case may be, used the corporation in order to mislead creditors,\textsuperscript{71} or shield themselves from liability in a transaction that was in truth personal and not corporate, then the privilege of incorporation has been abused and the requisite improper conduct should be found to exist.\textsuperscript{72} Evidence of the foregoing may be established if the corporate entity had no interest in the matter due to the fact that the subject matter of the transaction was unrelated to the nature of the corporation's business,\textsuperscript{73} or corporate property was converted to, or depleted for, the personal benefit of the stockholders.\textsuperscript{74}

The analysis can now proceed with a look at post-\textit{Dania} decisions to view what kind of conduct the district courts consider to be improper in piercing the corporate veil cases. Analyzing the later cases will also indicate how accurate the proposed standard might be in defining improper conduct.

\section*{VI. THE DISTRICT COURTS' INTERPRETATIONS OF \textit{DANIA}}

\textbf{A. First District Court of Appeal}

In \textit{Futch v. Head},\textsuperscript{75} Head was employed by Realty Center, Inc., a company owned by Futch. Futch promised Head that if he helped her sell the "Melroe" property he would receive a commission. Head found a buyer and the deal went through. In the terms of final sale, Futch received a twenty-percent interest in the Melroe property for her efforts. Futch ultimately sold her interest in the Melroe property for $1,300,000 and paid one of her companies a $130,000 commission from the proceeds. Head filed a breach of contract and fraud claim when Futch failed to pay him his promised commission.\textsuperscript{76}

The trial court found that the sale was consummated for Futch's benefit and that Futch converted the interest she received in the Melroe property to

\begin{itemize}
\item \textsuperscript{70} Biscayne Realty & Ins. Co. v. Ostend Realty Co., 148 So. 560, 565 (Fla. 1933).
\item \textsuperscript{71} \textit{Riley}, 47 So. 2d at 773.
\item \textsuperscript{72} The general underlying theme should be that a corporation cannot be used as a personal convenience to shield its shareholders from personal liability in personalized transactions.
\item \textsuperscript{73} Biscayne, 148 So. at 564.
\item \textsuperscript{74} \textit{Advertects}, 84 So. 2d at 24.
\item \textsuperscript{75} 511 So. 2d 314 (Fla. 1st Dist. Ct. App. 1987).
\item \textsuperscript{76} \textit{Id.} at 316.
\end{itemize}
her own name, with the intent to deprive Head of his portion of the sale.\textsuperscript{77} The first district affirmed the trial court’s findings and added that the fact that Futch merged her corporation’s liabilities and assets with her own personal funds also constituted improper conduct.\textsuperscript{78} Therefore, the corporate veil was pierced and Futch was forced to pay Head’s commission out of the money she received from the sale of her portion of the property that she converted to her own use.\textsuperscript{79}

In \textit{USP Real Estate Investment Trust v. Discount Auto Parts, Inc.},\textsuperscript{80} #90 North was a wholly-owned subsidiary of Discount Auto Parts. The property was leased by #90 North from USP, in order to operate an auto parts business. The premises were abandoned before the lease expired and USP sued #90 North for breach of contract and lease agreement and was awarded a judgment. Evidence showed that the officers of both corporations were the same, #90 never had a bank account, filed no tax returns, could produce no written sublease between it and Discount Auto Parts, and never kept any receipts of expenditures. Therefore, the court found that Discount Auto Parts simply created #90 for the purpose of holding the lease in order to shield itself from any liability if the lease was broken.\textsuperscript{81} In light of these findings, the court held that the improper conduct requirement was satisfied and the corporate veil could be pierced.\textsuperscript{82}

The first district’s reasoning in both cases is aligned with the proposed standard for finding improper conduct. In \textit{Futch}, the district court agreed with the trial court that the transaction was consummated for the benefit of the stockholder and not the corporation.\textsuperscript{83} Furthermore, evidence supported the court’s finding that corporate property was converted to personal use, because Futch sold her interest in the property and converted the money to her own use, in order to deprive Head of his commission.\textsuperscript{84} Thus, Futch used the corporation to evade liability in a transaction that was of a personal and not corporate nature.

In \textit{USP}, the court found improper conduct when a parent created a subsidiary for the sole purpose of holding a lease. The convincing evidence

\textsuperscript{77} \textit{Id.} at 316–17.
\textsuperscript{78} \textit{Id.} at 323.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} 570 So. 2d 386 (Fla. 1st Dist. Ct. App. 1990).
\textsuperscript{81} \textit{Id.} at 392–93.
\textsuperscript{82} \textit{Id.} at 393.
\textsuperscript{83} \textit{Futch}, 511 So. 2d at 323.
\textsuperscript{84} \textit{Id.} at 317, 322–23.
was that the subsidiary did not have any assets or conduct any business. 85 Again, the court would not allow the parent to use a subsidiary for the sole purpose of shielding itself from liability where the subsidiary had no interest in the transaction.

B. Second District Court of Appeal

In *Hester v. Tucker*, 86 J.L. Hester, the president of International Trade, a closely held corporation, contracted with Tucker to build a residence on property owned by International. Hester signed the construction contract in his capacity as president of International. When Hester refused to make payments on the contract price, Tucker sued International and Hester individually. Tucker stated that when he entered into the contract, he was told that the residence would be the asset of International. However, upon substantial completion, the house was transferred from International to Hester.

The second district found that there was no improper conduct because the transfer of the house from International to Hester did not establish fraud at the time the contract was entered into. 87 The court premised its decision on the fact that International had been in business since 1966, as well as the fact that Hester carried on extensive business projects and construction by way of the corporation. 88

Another second district case dealing with the issue was *Southeast Capital Investment, Corp. v. Albemarle Hotel, Inc.* 89 In this case, Southeast Investment, a wholly-owned subsidiary of Southeast Capital, contracted with Albemarle to purchase the Albemarle Hotel. The contract was finalized on the agreement that Southeast Investment would make payment of the full purchase price at the closing. When Southeast Investment did not have the money at the closing, Albemarle sued Southeast Capital for specific performance of Southeast Investment’s contractual obligations. The court held that since the subsidiary entered into a contract for the benefit of the parent without the present ability to perform, the requisite improper conduct was present and the corporate veil could be pierced. 90

85. *USP*, 570 So. 2d at 393.
86. 465 So. 2d 1261 (Fla. 2d Dist. Ct. App.), review denied, 476 So. 2d 674 (Fla. 1985).
87. *Id.* at 1262.
88. *Id.*
90. *Id.* at 51.
The second district’s reasoning in *Hester* does not seem to follow the proposed standard but may indicate a possible misreading of *Dania*. There does not appear to be any reason for Hester to have signed the contract in his capacity as president of International. The contract was for the construction of a residence. There were no facts presented that indicated why the corporation would need a residence and no explanation of why it was transferred to Hester after its completion. Hester clearly converted corporate property to his own use, which is a clear example of improper conduct as stated in *Advertects*. Moreover, Tucker certainly satisfied the requirement of being a mislead creditor. The court’s statement that fraud was not established at the time the contract was entered into lends no support to whether or not Hester acted improperly. Nothing in *Dania* indicates that the improper conduct must take place the time a contract is entered into. The *Hester* decision seems to turn *Dania* on its head.

*Southeast Capital’s* reasoning is much more in line with *Dania* and the proposed standard. The standard indicates that a parent cannot use a subsidiary for the sole purpose of shielding its liability in a transaction that the subsidiary has no interest in. The court used an identical rationale to find of improper conduct on Southeast Capital’s part.

**C. Third District Court of Appeal**

In *Resorts International v. Charter Air Center*, Resorts entered into contract negotiations with Charter regarding the possibility of Charter providing air transportation to a casino owned by Resorts. On the day the parties sat down to sign the contract, Resorts substituted its subsidiary GB, as the named party in the contract with Charter. When GB violated the terms of the contract, Charter sued Resorts for damages. The court held that GB was a mere instrumentality of Resorts, and Resorts use of GB to avoid liability on the contract with Charter was sufficient improper conduct to pierce the corporate veil.

In *Estudios Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A.*, Granados, who owned a controlling interest in EPICA individually, personally guaranteed the repayment of loans given by BNP, the creditor, to ACIA, the debtor. BNP assigned an interest in some of these notes to Swiss Bank Corp., appellee. When ACIA and Granados

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91. *See supra* note 58 and accompanying text.
92. 503 So. 2d 1293 (Fla. 3d Dist. Ct. App. 1987).
93. *Id.*
94. 507 So. 2d 1119 (Fla. 3d Dist. Ct. App. 1987).
defaulted on payment of the notes, the trial court issued an order on SBC’s behalf allowing attachment of a farm owned by Estudios. The court of appeals held that although Estudios was not a debtor of SBC, Estudios was Granados’ alter ego because Granados had a history of transferring his property to Estudios to shield it from creditors. This was considered improper conduct and the attachment was allowed.

In *Ally v. Naim*, Naim was injured during his employment with Hialeah Vending, a company owned by Ally. Naim made a workers compensation claim against Hialeah and Ally individually. However, Naim only received a judgment against Hialeah. When the judgment was returned unsatisfied, Naim sought to pierce the corporate veil of Hialeah and impose personal liability on Ally for Hialeah Vending’s obligations. The court noted that although Hialeah’s business affairs were poorly handled by Ally, there was no showing that Ally improperly converted its property to his own use or abused his relationship with the corporate entity.

The third district cases indicate the accuracy of the proposed standard, and provide factual scenarios which exemplify where improper conduct is, and is not, present. In *Resorts*, the fact that the parent tried to substitute its subsidiary as the contracting party at the last minute is clear evidence of an attempt to evade liability if the contract was breached. Furthermore, the subsidiary had no interest in the transaction other than to shield the parent form liability. In *Estudios*, there was evidence that the shareholder had a history of transferring property to his corporation to shield it from creditors. This is clear abuse of the purpose of the corporate entity. In *Ally*, the shareholder did not act improperly just because the small company did not produce enough income to cover the amount of a judgment against it. Therefore, the third district decisions seem to indicate that the proposed standard correctly states the criteria for defining improper conduct.

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95. *Id.* at 1120.
96. *Id.*
97. *Id.* at 1121.
99. *Id.* at 962.
100. *Id.*
101. *Id.*
102. *Id.*
D. Fourth District Court of Appeal

In *Eagle v. Benefield-Chappell, Inc.*, Eagle contracted with Benefield-Chappell to design and furnish a condominium unit. Derrell Benefield and Virginia Chappell were sole shareholders of Benefield-Chappell. Benefield-Chappell arranged for Daro Builders to do the construction work on the condominium. Daro completed the work and submitted the costs to Benefield-Chappell. Benefield-Chappell obtained some of Daro’s stationery and prepared an identical breakdown, but increased the costs by thirty-percent. This invoice was sent to Eagle.

Next, Eagle sent two $50,000 payments to Benefield-Chappell for furniture deposits. However, shortly thereafter the parties had a falling out and terminated the contract, but Benefield-Chappell refused to return the deposits. Prior to trial, the corporate account that Eagle’s $100,000 was deposited in was depleted to as low as $22,000.

Eagle sued the corporation and Benefield and Chappell individually. The court held that the retention of funds belonging to the Eagles constituted conversion and the deliberate increase of actual construction costs, contrary to the terms of their contract, constituted improper conduct. The court did remark that failure to issue stock and keep proper corporate records, standing alone, was insufficient grounds to render the individuals personally liable.

In *111 Properties, Inc. v. Lassiter*, Vara was the sole shareholder of 111, a corporation that purchased property from Lassiter’s corporation A&M. Vara acknowledged that 111 Properties was formed in part because Lassiter, a partner of A&M, disliked Vara and would not sell the property to him. 111 Properties and Vara were later sued by A&M on a breach of contract theory based on assertions made in the contract by 111 Properties and Vara. The court held that the corporate veil could not be pierced on the grounds that 111 Properties was formed to keep the seller A&M from knowing who they were selling to. The court said that although Vara’s use of the corporate entity was “clever,” it was not the kind of improper conduct referred to in *Dania*.

*Eagle* does not provide much help in interpreting what type of conduct might be considered improper because the facts clearly show conversion and

103. 476 So. 2d 716 (Fla. 4th Dist. Ct. App. 1985).
104. *Id.* at 718–19.
105. *Id.* at 719 (citations omitted).
107. *Id.* at 125–26.
108. *Id.* at 126.
fraud on behalf of the shareholders which will always warrant piercing the corporate veil. *111 Properties*, however, is more interesting. Although there was no evidence that the corporation was being used to evade liability, it was admittedly used to mislead the seller of the property. Notwithstanding, the case does not present the proper factual scenario for piercing the corporate veil or implementing the proposed standard.

**E. Fifth District Court of Appeal**

In *Walton v. Tomax, Corp.*,¹⁰⁹ McGuire was the manager of Tomax Construction. His wife was the sole shareholder but did not participate in the management of the corporation. Walton paid Tomax $20,000 as a deposit for a home that Tomax was to construct for Walton. After Tomax received the deposit it never again contacted Walton. Tomax filed for bankruptcy in 1990, a few months after it received Walton’s deposit. The court found that the property that Tomax was to build Walton’s house on was never owned by Tomax and that McGuire mishandled funds through the corporation.¹¹⁰ Therefore, improper conduct was found and McGuire could be held liable for the return of Walton’s deposit that was paid to Tomax.¹¹¹

The *Walton* decision is reminiscent of the fourth district’s *Eagle* decision. The officer of Tomax accepted a deposit for the purchase of property that was not even owned by the corporation and would not return it. This exceeds “improper conduct” and borders on fraud or conversion. Since fraud and conversion are much more egregious than improper conduct, the fifth district had no trouble finding that McGuire acted improperly.

After reviewing the district court decisions, it seems that the proposed standard for finding improper conduct could effectively be used in piercing the corporate veil cases. The district courts seem to agree that so long as a party can show that the corporation was used as a tool to evade liability, with respect to a transaction in which the corporation has no interest, improper conduct will be found.

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¹⁰⁹. 632 So. 2d 178 (Fla. 5th Dist. Ct. App. 1994).
¹¹⁰. Id. at 180.
¹¹¹. Id. at 181.
VII. THE RELATIONSHIP BETWEEN IMPROPER CONDUCT AND EQUITABLE ESTOPPEL

Treatises and case law agree that one of the theories most frequently employed to justify piercing the corporate veil is equitable estoppel.\textsuperscript{112} This makes perfect sense in that piercing the corporate veil was developed as an equitable doctrine.\textsuperscript{113} As will be seen, the phrase improper conduct takes on a more definite identity when viewed in the context of equitable estoppel. The relationship between the two is brought to light, in the piercing the corporate veil context, in Oregon case law. Oregon courts, in fact, used the improper conduct requirement in piercing the corporate veil cases long before Florida.\textsuperscript{114} The leading case in Oregon that explains and applies the improper conduct standard is \textit{Amfac Foods, Inc. v. International Systems & Controls Corp.}\textsuperscript{115}

The \textit{Amfac} court stated that misrepresentation, commingling, and holding out, are types of conduct that have been held to be improper in piercing the corporate veil cases.\textsuperscript{116} Interestingly, the \textit{Amfac} court noted that some of the cases it cited for the proposition that misrepresentation constitutes improper conduct would also allow recovery on an estoppel theory.\textsuperscript{117} In essence, the \textit{Amfac} court illuminated the relationship between improper conduct and equitable estoppel. By definition, "[e]quitable estoppel is a judicially-developed doctrine that precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{112} See Anderson v. Kennebec River Pulp & Paper Co., 433 A.2d 752, 756 n.5 (Me. 1981) (citing cases and treatises supporting the proposition that equitable estoppel is frequently employed to pierce the corporate veil); United Paperworkers Int'l Union v. Penntech Papers, Inc., 439 F. Supp. 610, 617 n.7 (N.D. Me. 1977) (citing cases and treatises supporting this proposition). It is important to make the distinction that the estoppel theory is also used for another purpose in piercing the corporate veil cases. In piercing cases that involve defrauded or misled creditors, counsel representing the corporation will sometimes argue that the creditor is estopped from alleging that the shareholders are liable, since the creditor chose to contract with the corporation and did not get personal guarantees from the shareholders or further investigate the corporation's credit worthiness.
  \item \textsuperscript{113} See discussion supra Section II.
  \item \textsuperscript{114} The reader should be aware that \textit{Dania} does not cite any Oregon authority as precedent for developing the improper conduct standard; however, since Oregon is the only state that used improper conduct as a standard in piercing the corporate veil actions before Florida, Oregon case law cannot be ignored in trying to decipher the meaning of improper conduct.
  \item \textsuperscript{115} 654 P.2d 1092 (Or. 1982).
  \item \textsuperscript{116} \textit{Id.} at 1102.
  \item \textsuperscript{117} \textit{Id.} at 1098, 1102 n.17.
\end{itemize}
\end{footnotesize}
defense, regardless of its substantive validity.” If equitable estoppel can be triggered by improper conduct, it is plausible to posit that the elements of equitable estoppel may be used to prove improper conduct.

Although the Amfac court did not mention the doctrine of equitable estoppel by name to describe the elements it requires to show improper conduct and pierce the corporate veil, the Amfac court’s requirements and the elements of equitable estoppel are virtually the same. The Amfac court started with the contention that misrepresentation is a type of improper conduct. The Amfac court continued that the shareholder’s conduct must have been improper in relation to the plaintiff entering the transaction, and there must be a relationship between the improper conduct and the plaintiff’s injury. Essentially, the court said that improper conduct occurs when: 1) there is a misrepresentation; 2) that causes the plaintiff to enter into a transaction; and 3) the misrepresentation interferes with the corporation’s performance of its obligation toward the plaintiff.

A comparison of the Amfac court’s elements to those of traditional equitable estoppel will indicate the similarities.

Equitable estoppel as defined by the Supreme Court of Florida requires:
1) a misrepresentation of material fact;
2) reliance on that misrepresentation;
and 3) which causes injury to the party claiming estoppel. In sum, the


119. Amfac, 654 P.2d at 1102. The Amfac court also indicated that “misrepresentations which may not be sufficient to constitute fraud would support a recovery against a shareholder on a misrepresentation theory.” Id.

120. Id. at 1101.

121. Id. at 1103. In regard to this causation requirement, the Amfac court noted that the improper conduct must have either caused the plaintiff to enter into the transaction with the corporation or caused the corporation to default on the underlying obligation. Id. at 1101.

122. Amfac, 654 P.2d at 1101–02.

elements of improper conduct required by the Oregon courts are almost identical to the elements of equitable estoppel as stated by Florida courts.

In the absence of clearer guidance from the Florida courts on what type of conduct can be considered improper, an argument based on what Oregon considers to be improper conduct, although not controlling, would seem to be extremely persuasive. Moreover, because authorities in the field agree that equitable estoppel can be used to pierce the corporate veil and the elements required to prove equitable estoppel in Florida are the same as those required by the Oregon courts to prove improper conduct, the Florida practitioner might possibly use the elements of equitable estoppel to prove that improper conduct is present, instead of simply trying to argue what improper conduct is without any clear guidelines at all.

VIII. CONCLUSION

Although the Dania court did not make it completely clear what type of conduct could be considered improper, the proposed standard or the equitable estoppel theory should provide a persuasive means by which to prove improper conduct. Regardless, absent further clarification from the courts, piercing the corporate veil cases, and the metaphors used therein, may continue to be as elusive as they have been in the past.
Bennis v. Michigan: Does the Innocent Owner Have a Defense to Civil Forfeiture?

TABLE OF CONTENTS

I. INTRODUCTION.............................................................................. 685
II. CIVIL FORFEITURE: THE HISTORY AND PURPOSES............. 688
III. FACTS AND PROCEDURAL POSTURE...................................... 697
   A. The Facts of Bennis v. Michigan .............................................. 697
   B. Procedural Posture ............................................................... 698
IV. THE CASES ARE DISTINGUISHABLE........................................ 700
   A. Admiralty Cases: Forfeiture on the High Seas...................... 700
   B. Forfeiture Comes Ashore ...................................................... 703
V. IMPLICATIONS AND RAMIFICATIONS......................................... 708
   A. Implications of the Standards .............................................. 708
      1. The "Negligent Entrustment" Standard ............................. 709
      2. The "All Reasonable Steps" Standard ............................... 710
   B. The Flaws ............................................................................. 713
   C. An Alternative: A Standard Comprising Both Concepts ......... 715
   D. Ramifications of Bennis v. Michigan ..................................... 716
VI. CONCLUSION ............................................................................. 718

I. INTRODUCTION

On March 4, 1996, the United States Supreme Court handed down its surprising opinion in Bennis v. Michigan ("Bennis III"). The 5-4 opinion,

1. See, e.g., Marcia Coyle, Critics: Forfeiture Ruling Certain to Spur Reform, NAT'L L.J., March 18, 1996, at A12 (stating that the decision surprised forfeiture proponents and opponents); Carol McHugh Sanders, Looking for Drama Among the Shadows, CHI. DAILY L. BULL., March 18, 1996, at 3 (stating that Justice Ginsburg's majority-making vote was surprising); Robert Reno, Reno at Large: Victim Sideswiped By Rolling Wreck of Justice System, NEWSWEEK, March 7, 1996, at A49 ("The 5-4 ruling was not the C]ourt's finest hour."); J. Kelly Strader, Taking the Winds Out of the Government's Sails?: Forfeitures and Just Compensation, 23 PEPP. L. REV. 449 (1996) (commenting on the severe restrictions that had been recently imposed upon governmental seizures and forfeitures); Joan Biskupic, Supreme Court Agrees to Hear Disputes on Seized Automobile; Protection Against Property Forfeitures May Be Widened, WASH. POST, June 6, 1995, at A6 (pre-decision prediction that the case would "lead to new protection for potentially innocent owners who lose their property
authored by Chief Justice Rehnquist, upheld the forfeiture of property that had been used during the commission of a statutory violation. Additionally, the opinion established that the Constitution affords no protection to an innocent owner of that property.

In *Bennis III*, the Court was presented with the opportunity to clearly establish the guidelines by which the government may seize property that has been used to facilitate a crime. While the Court has rarely disallowed the forfeiture of such property, it has often reserved the question of whether a forfeiture would be upheld in the case of an innocent owner, while indicating an anticipated reluctance to do so. However, when faced in *Bennis III* with...
the question of whether the Constitution protects the rights of an innocent owner whose property has, without his or her knowledge or consent, been used in violation of the law, the Court abandoned its reluctance, found that no constitutional protections exist, and declined to establish any guidelines by which to adjudge future forfeiture cases.\textsuperscript{7}

Although the Court's decision was sharply divided, producing two concurring opinions\textsuperscript{8} and two dissenting opinions,\textsuperscript{9} the potential ramifications are great. In \textit{Bennis II}, a vehicle co-owned by a married couple was forfeited due to the husband's unlawful actions, despite the wife's lack of knowledge or consent.\textsuperscript{10} Thus, while the husband's interest in the car was, arguably, appropriately forfeited, the wife's interest in the car was also forfeited, without compensation. The Court, in essence, has imposed a punitive sanction on a woman for trusting her husband enough to purchase a car with him.

By failing to establish any guidelines by which to adjudge future forfeitures, and by further failing to establish the rationale it was relying upon in deciding \textit{Bennis III}, the Court has left itself, and courts nationwide, with no apparent way to preclude most forfeitures. In fact, the Court has seemingly denied itself the option of proscribing even the forfeiture of property against the innocent owner whose property was stolen and subsequently used in the commission of a statutory violation. The Constitution apparently provides no safeguard for any innocent owner, and to hold otherwise would be irreconcilable with the holding in \textit{Bennis III}.

In examining the Court's decision, Part II of this case comment addresses civil forfeiture, examining the history and various purposes ascribed to the practice of forfeiture. Part III explains the factual and procedural background of the case. The facts of this case, although brief, are important to understanding how \textit{Bennis III} is distinguishable from the cases which the Court cited in its opinion. Part IV of the case comment scrutinizes the rationale of the Court's decision. Specifically, this section demonstrates that the cases relied upon by the Court are distinguishable from \textit{Bennis III}. This section argues that by relying upon distinguishable cases dating back to the early 1800s, the Court reached an imprudent conclusion. Part V explores the standards which the parties advocated for adoption by the Court for use in

\textsuperscript{7} \textit{Bennis III}, 116 S. Ct. at 996.
\textsuperscript{8} \textit{Id.} at 1001 (Thomas, J., concurring); \textit{Id.} at 1003 (Ginsburg, J., concurring).
\textsuperscript{9} \textit{Id.} (Stevens, J., dissenting); \textit{Id.} at 1010 (Kennedy, J., dissenting).
future forfeiture cases. These standards were not addressed in the Court’s opinion; however, in light of the sharply divided Court in *Bennis III*, the adoption of a standard by which to adjudge future forfeitures would help establish a guideline to fairly, uniformly, and constitutionally apply to forfeiture statutes and would impose limitations on the government’s ability to seize the property of individuals.

II. CIVIL FORFEITURE: THE HISTORY AND PURPOSES

In our legal system, civil forfeiture has a history beginning in England.\(^\text{11}\) The practice began to take hold in the United States by the late 1700s.\(^\text{12}\) In England, there were three justifications upon which forfeitures were based, each viewed as imposing punishment: 1) deodand; 2) forfeiture upon conviction of felonious or treasonous crimes; and 3) statutory forfeiture.\(^\text{13}\)

At common law, the law of deodand was the forfeiture of property considered to have “directly or indirectly caus[ed] the accidental death of a King’s subject.”\(^\text{14}\) This type of forfeiture had its historical origins in “[b]iblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required.”\(^\text{15}\) When forfeiture eventually became a source of revenue, forfeiture became known to serve as punishment for carelessness.\(^\text{16}\) However, the institution of deodand was abolished in England by an act authored by Lord Campbell in 1846.\(^\text{17}\)

The second justification of English forfeiture was based upon conviction for felonies or treason.\(^\text{18}\) Under this type of forfeiture, “[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.”\(^\text{19}\) The justification for this forfeiture was that it served “to punish felons and traitors, and [was] justified on the ground that property was a right derived from society which one lost by violating society’s laws.”\(^\text{20}\)

\begin{itemize}
\item \text{11.} Austin v. United States, 509 U.S. 602, 611 (1993).
\item \text{12.} Id. at 613.
\item \text{13.} Id. at 611.
\item \text{14.} Calero-Toledo, 416 U.S. at 680–81.
\item \text{15.} Id. at 681 (citing O. Holmes, The Common Law, c. 1 (1881)).
\item \text{16.} Id.
\item \text{17.} Id. at 681 n.19.
\item \text{18.} Austin, 509 U.S. at 611.
\item \text{19.} Calero-Toledo, 416 U.S. at 682.
\item \text{20.} Austin, 509 U.S. at 612 (citations omitted).
\end{itemize}
The third basis of English forfeiture, and the only type to take hold in the United States, was premised upon a statutory violation.\textsuperscript{21} It provided for the forfeiture of “offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer.”\textsuperscript{22} Since the adoption of the Constitution, it is upon this premise that the practice of forfeiture has been based in the United States.\textsuperscript{23}

Civil forfeiture in the United States dates back to early admiralty cases in which the United States government seized ships that were involved in activities such as piracy, slave trade, or smuggling contraband goods.\textsuperscript{24} There are two significant admiralty cases involving the forfeiture of ships found to have engaged in piracy that helped to set the precedent by which civil forfeiture is applied today: \textit{The Palmyra}\textsuperscript{25} and \textit{Harmony v. United States}.\textsuperscript{26}

In \textit{Palmyra}, the ship had been commissioned by the King of Spain to cruise as a privateer and was subsequently engaged in acts of piracy against a United States vessel.\textsuperscript{27} The ship was captured by the United States and was sent to Charleston, South Carolina for adjudication.\textsuperscript{28} In 1827, the Court determined that the ship was properly forfeited to the government and that the owner of the ship, however innocent or guilty, need not be convicted of the offense for the forfeiture to be permissible.\textsuperscript{29} The opinion of the Court, delivered by Justice Story, stated that the reason for holding the owner accountable for the actions of his crew was that “[a] commission to cruise [as a privateer] [was] a delegated authority, and c[ould] only proceed from the sovereign.”\textsuperscript{30} Thus, once the King commissioned a ship, he became vicariously responsible for the activities in which the ship was engaged during the ship’s commission. The premise of the rule permitting the forfeiture of the ship is that “[t]he thing is here primarily considered as the

\begin{itemize}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Calero-Toledo}, 416 U.S. at 682.
\item \textsuperscript{23} \textit{Id.} at 683. It is worth noting that the “First Congress viewed forfeiture as punishment,” and “‘forfeit’ is the word Congress used for fine.” \textit{Austin}, 509 U.S. at 613–14.
\item \textsuperscript{24} \textit{Calero-Toledo}, 416 U.S. at 683.
\item \textsuperscript{25} 25 U.S. (12 Wheat.) 1 (1827).
\item \textsuperscript{26} 43 U.S. (2 How.) 210 (1844).
\item \textsuperscript{27} \textit{Palmyra}, 25 U.S. at 2.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.} at 14–15.
\item \textsuperscript{30} \textit{Id.} at 4.
\end{itemize}
offender, or rather the offence is attached primarily to the thing.” 31 The rationale for this is quite apparent: one cannot commit piracy without a ship.

Almost twenty years later in Harmony, Justice Story again delivered the opinion of the Court which upheld the rule of Palmyra: “The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.” 32 However, the Court in Harmony proceeded to explain the rationale behind the rule as being “done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.” 33

The forfeited ship in Harmony, the Malek Adhel, belonged to the firm Peter Harmony and Co., of New York. 34 However, the Malek Adhel was used, without the knowledge or consent of its owners, 35 to commit acts of piracy upon ships whose owners were British, American, and Portuguese. 36 Because some of the owners were foreign, their governments would have no jurisdiction over the crew of the Malek Adhel and would, therefore, have little success in procuring compensation for the owners’ losses. 37 Thus, in addition to the fact that forfeiture of the ship would undoubtedly suppress the crew’s ability to commit further acts of piracy, forfeiture served the purpose of insuring compensation for injured parties who may not otherwise have been compensated.

In both of these cases the ships, despite the guilt or innocence of the owner, were forfeited “[b]ecause the entire mission of the ship was unlawful[,] admiralty law treated the vessel itself as . . . the offender.” 38 Furthermore, in many instances, especially those of piracy, such forfeiture was considered inherently necessary. Thus, admiralty cases present two policy aims behind civil forfeiture: 1) to eradicate the vessel which was itself the offense by virtue of being too closely attached to the offense to be severed from it and 2) to insure compensation to those injured by the vessel’s actions.

The application of forfeiture was eventually expanded to other forms of property, and its purposes became “to punish, for deterrence and perhaps

31. Id. at 14.
32. Harmony, 43 U.S. at 233.
33. Id.
34. Id. at 229.
35. Id. at 221.
36. Id. at 229.
37. See Harmony, 43 U.S. at 233–34.
38. Id. at 1005 (Stevens, J., dissenting) (citation omitted).
also for retributive purposes, persons who may have colluded or acquiesced in criminal use of their property, or who may at least have negligently entrusted their property to someone likely to use it for misfeasance.\(^{39}\) In the more modern cases, forfeiture has been justified on two theories—that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.\(^{40}\)

In 1877, Justice Clifford delivered an opinion in which the Court expanded the applications of forfeiture set forth in admiralty to other properties. In *Dobbins's Distillery v. United States*,\(^ {41}\) an owner lost his property when it was discovered that his lessee was "defraud[ing] the revenue"\(^ {42}\) by avoiding federal alcohol taxes regarding the distillery upon the property.\(^ {43}\) In this case, the Court upheld the forfeiture despite the innocence of the owner because "he knowingly suffer[ed] and permit[ted] his land to be used as a site for a distillery . . . ."\(^ {44}\) Thus, "the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located."\(^ {45}\) The Court then asserted that "[c]ases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those [e]ntrusted with its possession, care, and custody, even when the owner is otherwise without fault."\(^ {46}\) The Court proceeded to establish, however, that "if [the lessee] abuses his trust, it is a matter to be settled between him and his lessor."\(^ {47}\) Furthermore, the Court elicited the reasoning in *Harmony* that "the necessity of the case requir[es] it as the only adequate means of suppressing the offence or wrong, or of insuring an indemnity to the injured party."\(^ {48}\) Thus, the Court remained reliant on the justifications of forfeiture set forth in the admiralty cases and began to

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40. *Austin*, 509 U.S. at 615.
42. *Id.* at 396.
43. *Id.* at 397.
44. *Id.* at 399.
45. *Id.*
47. *Id.*
48. *Id.* at 400 (citing United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844)).
develop a focus on the "negligent entrustment"\textsuperscript{49} of property by innocent owners to persons who may, unbeknownst to the owner, involve the property in the commission of a statutory violation.

In 1921, the Court heard \textit{J.W. Goldsmith, Jr.-Grant Co. v. United States} ("Goldsmith-Grant").\textsuperscript{50} In this case, the seller of an automobile retained an interest in the vehicle for the unpaid balance of the purchase price; however, the purchaser engaged the vehicle in the illegal act of transporting liquor to evade taxes.\textsuperscript{51} In its opinion, authored by Justice McKenna, the Court upheld the forfeiture of the seller's interest in the vehicle despite his lack of knowledge of the illegal activities.\textsuperscript{52} Again, the Court cited the rule that "the thing is primarily considered the offender"\textsuperscript{53} as justification for the forfeiture. The Court went on to state that the vehicle was appropriately forfeited as "[i]t is a 'thing' that can be used in the removal of 'goods and commodities' and the law is explicit in its condemnation of such things."\textsuperscript{54}

The \textit{Goldsmith-Grant} Court then acknowledged that forfeiture statutes, taken literally, could often result in the forfeiture of property belonging to completely innocent owners and that

\begin{quote}
there is strength ... in the contention that, if such be the inevitable meaning of the [statute], it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress ... And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.\textsuperscript{55}
\end{quote}

However, the Court noted that "there are other and militating considerations."\textsuperscript{56} As such, the Court examined the purposes of forfeiture which were premised on the idea that the "'misfortunes are in part owing to the

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\textsuperscript{49} "Negligent entrustment" is a term which indicates that an owner, although innocent of any wrongdoing, has been in some way negligent in entrusting their property to another who has misused the property. Brief for Petitioner at 9 (citing \textit{RESTATEMENT (SECOND) OF TORTS} §§ 308 (1965)).
\textsuperscript{50} 254 U.S. 505 (1921).
\textsuperscript{51} \textit{Id.} at 509.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 511.
\textsuperscript{54} \textit{Id.} at 513.
\textsuperscript{55} \textit{Goldsmith-Grant}, 254 U.S. at 510.
\textsuperscript{56} \textit{Id.}
negligence of the owner, and therefore he is properly punished by such forfeiture.”\(^{57}\) Thus, while the Court also noted the “guilty-property” theory,\(^{58}\) the Court began to firmly recognize the punitive aspect of forfeiture that began with the law of deodand.\(^{59}\) The Court upheld the forfeiture on the several theories it examined and determined that the idea of forfeiture as punishment for even the innocent owner’s negligence is “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”\(^{60}\) However, in response to the concerns that forfeiture statutes might someday be applied in violation of constitutional provisions, the Court stated that “[w]hen such application shall be made it will be time enough to pronounce upon it.”\(^{61}\) Thus, the Court began to recognize the potential for improper forfeitures and reserved the question, as it repeatedly did, for the appropriate case.

In 1926, the Court turned its attention to \textit{Van Oster v. Kansas},\(^{62}\) a case very similar to \textit{Goldsmith-Grant}. However, in \textit{Van Oster}, it was the seller who engaged the vehicle in the illegal activity and the buyer who lost her interest in the vehicle.\(^{63}\) In the opinion authored by Justice Stone, the Court upheld the forfeiture of a vehicle purchased by Van Oster but left it in the possession of the sellers as partial consideration for use in their business.\(^{64}\) The car was, with the knowledge and permission of Van Oster, frequently operated by an associate of the seller;\(^{65}\) however, unbeknownst to Van Oster, the associate used the vehicle to unlawfully transport liquor in violation of a Kansas statute.\(^{66}\) The Court upheld the forfeiture on the premise that even innocent owners may become liable for the negligent operation of vehicles by those to whom they entrust their property.\(^{67}\) Thus, in \textit{Van Oster}, the Court furthers the theory that innocent owners who negligently entrust their property to those who misuse it may be held accountable for the misuse.

\footnotesize{\textit{57. Id.} at 511 (citations omitted).  
\textit{58. Id.}  
\textit{59. Id.} at 510–11.  
\textit{60. Goldsmith-Grant,} 254 U.S. at 511.  
\textit{61. Id.} at 512.  
\textit{62. 272 U.S. 465 (1926).}  
\textit{63. Id.} at 466.  
\textit{64. Id.} at 465–66.  
\textit{65. Id.} at 466.  
\textit{66. Id.} (citations omitted).  
\textit{67. Van Oster,} 272 U.S. at 467.}
In the much more modern 1974 case, *Calero-Toledo v. Pearson Yacht Leasing Co.*, a leased yacht was forfeited when authorities discovered marijuana aboard the yacht in violation of a statute that provided for the forfeiture of "vessels used to transport, or to facilitate the transportation of, controlled substances, including marihuana." The Court, in its opinion authored by Justice Brennan, upheld the forfeiture, rejecting the contention that to forfeit the property of innocent owners without just compensation is unconstitutional. The Court here, as in previous cases, examined the history and purposes of forfeiture, accepting the theories that the "thing" is the offender; that forfeiture is "'the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party;''" and that forfeiture serves punitive and deterrent purposes that "may have the desirable effect of inducing [property owners] to exercise greater care in transferring possession of their property." However, the Court then qualified its decision by stating:

> [I]t would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

The Court refrained from rendering an opinion on whether it would accept this argument until presented with a more appropriate case. The Court further qualified its decision by emphasizing that in *Calero-Toledo* the property owner had "voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."

69. *Id.* at 665–66 (citing Controlled Substances Act of Puerto Rico, P.R. LAWS ANN. tit. 24, § 2101 (Supp. 1973)).
70. *Id.* at 680.
71. *Id.* at 684.
72. *Id.* (quoting United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844)).
73. *Calero-Toledo*, 416 U.S. at 688.
74. *Id.* at 689–90 (citations omitted).
75. *Id.* at 689.
76. *Id.* at 690.
Thus, the Court reaffirmed the justifications of forfeiture that have evolved from admiralty, while providing an indication that it would consider the establishment of a standard, the "all reasonable steps" standard mentioned in this case, by which to adjudge future forfeitures. The Court also recognized that forfeiture is most often typified by the negligent entrustment of property.

In 1993, the Court decided the most recent case on point, Austin v. United States.\textsuperscript{77} In Austin, the Court refused to uphold the forfeiture of a body shop and mobile home that was seized by the government after Austin was found to have engaged in a single drug transaction within them.\textsuperscript{78} In this case, the government presented the argument that civil forfeiture was not, as the Court had held for well over a century, punitive, but rather it is remedial in nature.\textsuperscript{79} The remedial purposes served by forfeiture, the government contended, were the removal of the "'instruments' of the drug trade 'thereby protecting the community from the threat of continued drug dealing,"'\textsuperscript{80} and compensation for the government's expenses of "law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."\textsuperscript{81} However, the Court flatly rejected the government's contentions.

The reasons upon which the Court based its decision were two-fold: 1) because, just as "'[t]here is nothing even remotely criminal in possessing an automobile,'"\textsuperscript{82} the possession of a body shop and mobile home are similarly not criminal and, therefore, the contention that they are "'instruments' of the drug trade" must be rejected\textsuperscript{83} and 2) because "'forfeiture of property ... [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law,'"\textsuperscript{84} any contention that the forfeiture provides compensation for such law enforcement is undercut by "dramatic variations in the value of conveyances and real property"\textsuperscript{85} that may be forfeitable.\textsuperscript{86} Therefore, the forfeiture of the properties was punitive,

\begin{itemize}
\item \textsuperscript{77} 509 U.S. 602 (1993).
\item \textsuperscript{78} Id. at 605.
\item \textsuperscript{79} Id. at 620.
\item \textsuperscript{80} Id. (quoting Brief of United States at 32).
\item \textsuperscript{81} Id. (citing Brief of United States at 25, 32).
\item \textsuperscript{82} Austin, 509 U.S. at 621 (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id. (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\end{itemize}
serving neither the remedial goal of removing an instrumentality of crime nor the goal of compensating the government for expenses relating to law enforcement, and was subject to the Excessive Fines Clause. The Court emphasized its holding by stating that "'[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term,'" and that "it consistently has recognized that forfeiture serves, at least in part, to punish the owner."

Thus, the justifications of civil forfeiture, beginning with Palmyra in 1827, have evolved into two: 1) the "guilty-property" theory, and 2) the theory that the owner, although innocent, may be held accountable for the misuse of his property by those to whom he entrusts it. Further, the Court has derived a "negligent owner" premise that seemingly underlies both of these theories. The "negligent owner" premise underlying the first theory, that "[t]he thing is here primarily considered as the offender," is that "the owner who allows his property to become involved in an offense has been negligent," which is in turn premised upon Blackstone's explanation of the law of deodand, which states that "'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by the forfeiture.'"

The "negligent owner" premise underlying the second theory, that an innocent owner may still be held accountable for the misuse of his property by those to whom he entrusts it, is similar. "Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent." However, this theory has specifically reserved to the innocent owner the power to recover, from the wrongdoer, his losses. Thus, because both theories have been relied upon by the Supreme Court, and because the concept of negligent entrustment is fundamental to both, the Court has determined that forfeiture is, at least in part, punitive.

87. Austin, 509 U.S. at 622.
88. Id. at 621 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
89. Id. at 618. See, e.g., Goldsmith-Grant, 254 U.S. at 510–11; Calero-Toledo, 416 U.S. at 686.
91. Austin, 509 U.S. at 616.
92. Id. at 616 (quoting Goldsmith-Grant, 254 U.S. at 510–11).
93. Id. at 618.
94. Id. at 617 (citing Dobbins's Distillery, 96 U.S. at 401).
95. See, e.g., Calero-Toledo, 416 U.S. at 684; Goldsmith-Grant, 254 U.S. at 510–11.
A. The Facts of Bennis v. Michigan

In October of 1988, Detroit police officers observed a known prostitute, Kathy Polarchio, standing on a street corner “flagging” passing vehicles. \(^{98}\) Shortly thereafter, the police officers observed a 1977 Pontiac, driven by John Bennis, approach Ms. Polarchio, at which time she entered the vehicle. \(^{99}\) The officers then witnessed the vehicle proceed one block, make a U-turn, and stop. \(^{100}\) From the rear, the officers could see the heads of Ms. Polarchio and Mr. Bennis. When they saw her head disappear toward Mr. Bennis’s lap, they approached the car and observed Ms. Polarchio performing fellatio on Mr. Bennis. \(^{101}\) Although the officers observed Ms. Polarchio “flagging” and subsequently performing a sexual act in a vehicle, acts which would be indicative of prostitution, the officers never witnessed an exchange of money. \(^{102}\) Therefore, Mr. Bennis was arrested for gross indecency, \(^{103}\) and Ms. Polarchio was arrested the following day for accosting and soliciting. \(^{104}\)

Prior to Mr. Bennis’s conviction for gross indecency, John and Mrs. Bennis lost their jointly-owned 1977 Pontiac when a judge declared the vehicle a public nuisance and ordered its abatement and subsequent sale. \(^{105}\) The judge then stated that Mrs. Bennis, despite the fact that she was an innocent owner, was not entitled to any compensation for her interest in the vehicle because, after assessing various costs, “…[t]here’s practically nothing left.” \(^{106}\)

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97. “Flagging” is a term used to describe the act of a prostitute signaling passing vehicles to stop in an effort to solicit customers. *Bennis II*, 527 N.W.2d at 486 n.2.

98. *Id.* at 486.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Bennis I*, 504 N.W.2d at 735.

103. *Id.* Mr. Bennis was initially charged with “indecent and immoral conduct,” and the complaint alleged that he engaged in the services of a prostitute and gross indecency between a male and a female. However, Mr. Bennis was eventually only charged with gross indecency, presumably due to the lack of evidence that Mr. Bennis did or intended to pay Ms. Polarchio for her services. *Id.* at 735 n.1 (citing *Mich. Comp. Laws Ann.* §§ 750.338b, 449a (West 1992)).

104. *Bennis II*, 527 N.W.2d at 486 n.3.

105. *Bennis I*, 504 N.W.2d at 732.

106. *Bennis III*, 116 S. Ct. at 997 (citation omitted). But see *id.* at 1010 (Kennedy, J., dissenting) ("[N]othing supports the suggestion that the value of her co-ownership is so insignificant as to be beneath the law’s protection.").
Approximately three weeks prior to the October incident, Mr. Bennis and his wife purchased the car for $600 with money that Mrs. Bennis had earned through baby-sitting and other odd jobs. The car was jointly-owned by the couple and was driven that evening by Mr. Bennis to and from work. Mrs. Bennis, believing her husband would return directly home from work that evening, as he did every other evening, had no reason to suspect or know that Mr. Bennis would instead be arrested for gross indecency.

B. Procedural Posture

After the trial court abated the interests in the car of both Mr. Bennis and Mrs. Bennis, despite her lack of knowledge that her husband had ever used the car in violation of any statutes, and following Mr. Bennis's conviction for gross indecency, the Bennises appealed the abatement of their vehicle to the Court of Appeals of Michigan.

The court of appeals reversed the trial court's judgment on three bases: 1) the prosecutor was required, but failed, to prove knowledge on the part of Mrs. Bennis that the vehicle was being used in violation of the abatement statute; 2) a single incident of lewdness, assignation, or prostitution in violation of the abatement statute was insufficient to constitute a public nuisance subject to abatement; and 3) the prosecution failed to prove an act of lewdness, assignation, or prostitution by Mr. Bennis in violation of the abatement statute.

However, upon appeal by the Wayne County Prosecuting Attorney, the Michigan Supreme Court reversed the court of appeals, and in doing so, stretched the realm of civil forfeiture beyond any previous application. The court summarily held that: 1) while “lewdness” as used in the statute is limited to acts that are committed in furtherance of prostitution, and further
that although there was no exchange of money, Mr. Bennis’s gross indecency constituted “lewdness” for purposes of the statute; 2) a single act of “prostitution” occurring in a vehicle in a neighborhood known for prostitution is an abatable nuisance, despite the court’s notation that if the vehicle had been driven to another neighborhood the vehicle would not have been abatable;\(^\text{117}\) and 3) Mrs. Bennis’s knowledge or consent of Mr. Bennis’s actions was unnecessary to abate the entire interest of the co-owned vehicle.\(^\text{118}\)

At this point, Mrs. Bennis appealed her case to the United States Supreme Court, challenging the constitutionality of the government’s ability to forfeit the property of completely innocent owners.\(^\text{119}\) Mrs. Bennis’s appeal was based upon both a facial challenge and an as-applied challenge:

**WHETHER A MICHIGAN NUISANCE ABATEMENT STATUTE THAT PERMITS THE FORFEITURE OF A PERSON’S PROPERTY IF IT IS USED IN A PROScribed MANNER BY ANOTHER PERSON EVEN IF THE OWNER HAD NO KNOWLEDGE OF, OR CULPABILITY IN CONNECTION WITH, THE MISUSE OF THE PROPERTY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND/OR THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT (AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT); AND**

**WHETHER THE APPLICATION OF THAT STATUTE TO DEPRIVE A WIFE OF HER INTEREST IN AN AUTOMOBILE SHE JOINTLY OWNED WITH HER HUSBAND VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT (AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT), WHERE THE FORFEITURE RESULTED FROM A FINDING THAT THE HUSBAND ENGAGED IN A SEX ACT WITH A REPUTED PROSTITUTE INSIDE THE AUTOMOBILE, AND WHERE THE RECORD ESTABLISHED THAT THE WIFE HAD NO KNOWLEDGE OF**

\(^{117}\) Id. at 491 n.22 ("We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.").

\(^{118}\) Id. at 492.

\(^{119}\) Bennis III, 116 S. Ct. at 995.
OR CULPABILITY REGARDING HER HUSBAND'S PROSCRIBED USE OF THE VEHICLE.120

The United States Supreme Court affirmed the Michigan Supreme Court in a 5-4 decision.121 The Court held that, based on a line of cases in which various forfeitures were upheld, neither the Due Process Clause of the Fourteenth Amendment122 nor the Takings Clause of the Fifth Amendment were violated.123 Because "the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State,"124 and did not violate the Takings Clause of the Fifth Amendment.125 However, in its decision, the Court relied upon distinguishable cases based upon medieval rationale which affords no consideration to modern societal conditions and failed to establish a standard by which to decide future forfeiture cases.

IV. THE CASES ARE DISTINGUISHABLE

A. Admiralty Cases: Forfeiture on the High Seas

Each of the several principal cases relied upon in the lead opinion is arguably distinguishable from Bennis III. Furthermore, the aims of the forfeitures in these cases are not advanced by the forfeiture in Bennis III. The Court's opinion, authored by Chief Justice Rehnquist, establishes support for the forfeiture of Mrs. Bennis's interest in her and her husband's jointly-owned vehicle by comparing the forfeiture to the forfeiture of ships involved in piracy.126 The Court begins its inquest with Palmyra and Harmony.

In both Palmyra and Harmony, the Court upheld forfeitures of ships that were found to have engaged in piracy based upon the principle that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."127 The rationale supporting the forfeitures is plausible. When the "thing" is so necessary and attached to the

120. Brief for Petitioner at 4.
121. Bennis III, 116 S. Ct. at 996.
122. Id. at 997.
123. Id. at 998.
124. Id. at 1001.
125. Id.
offense that the offense could not be committed without it, it is reasonable that forfeiture is an appropriate course of action with which to proceed. However, unlike in Palmyra and in Harmony, in Bennis the vehicle in which the act of gross indecency occurred was not necessary to commit the offense, nor was the vehicle so attached to the offense as to be inseparable from it. As stated by Justice Stevens in his dissenting opinion, "the forfeited property bore no necessary connection to the offense committed by petitioner's husband." While the vehicle proved convenient, it certainly was not necessary or attached to the offense, as were the ships in the admiralty cases. Without the ships, the crews would have been hard pressed to have reached, let alone engaged in "piratical aggression, search, depredation, restraint, and seizure . . . upon[,] the high seas."  

In support of the State of Michigan, it was posited that, like the ships in Palmyra and Harmony,  

[the forfeited car underlying the instant litigation was intimately related to the offense punished. Mr. Bennis could not have found other means of transportation adequate for acquiring Ms. Polarchio's services. The car was uniquely necessary both for getting to the prostitution market and in 'hosting' the illicit sexual act. The state should be allowed to focus on both the individual engaged in the illicit conduct and the vehicle which facilitated that conduct.  

However, contrary to this argument, Mr. Bennis could have committed the act of gross indecency without the aid of the Bennis's 1977 Pontiac or any other car. While the vehicle did provide transportation to the street corner upon which he found Ms. Polarchio, he could have walked or taken a bus. Once he had engaged the company of Ms. Polarchio, they could have commenced their activities in an alley, on a bus bench, or in any secluded (or public) place. It is implausible that every person who solicits the services of prostitutes both has a car and uses it as the locale for their subsequent activities. Furthermore, the Court accepted that had Mr. Bennis simply driven the vehicle to a different neighborhood where a "nuisance condi-

tion"\textsuperscript{131} did not exist the car no longer would have been abatable. However, if the car were "primarily considered as the offender,"\textsuperscript{132} as were the ships in \textit{Palmyra}\textsuperscript{133} and in \textit{Harmony},\textsuperscript{134} it would be abatable regardless of the neighborhood in which it was parked. Obviously, the car is not so necessary and so attached to the offense.

In \textit{Harmony}, while the Court upheld the rule in \textit{Palmyra}, that the vessel is considered the offender and is subject to forfeiture without regard for the guilt or innocence of the owner, it also offered a rationale for such forfeiture which provides further support for the proposition that these cases are distinguishable from \textit{Bennis}. The two reasons for permitting forfeiture, as espoused in \textit{Harmony}, are: 1) forfeiture is the only way to suppress the wrongful activity and 2) forfeiture is the only way to insure that injured parties will be compensated for their losses.\textsuperscript{135}

First, because the vehicle in \textit{Bennis} is not necessary for engaging in the act of fellatio, forfeiture of the vehicle will not necessarily prevent or incapacitate Mr. Bennis from engaging in such acts in the future. Thus, forfeiture of the Bennis vehicle is not even an, let alone the only, "adequate means of suppressing the offence or wrong."\textsuperscript{136} Undoubtedly, incarceration, or perhaps a stiffer fine, would produce a more deterrent effect.

Second, because there was no "injured party"\textsuperscript{137} in \textit{Bennis III}, the idea of "insuring an indemnity"\textsuperscript{138} to one is incongruous. Furthermore, the reason for forfeiting the ships for compensatory purposes was premised on the fact that many of the ships' owners were located in other countries. Therefore, the United States quite often lacked jurisdiction over the owners for the purpose of awarding indemnity to the injured parties.\textsuperscript{139} Thus, because the illegal acts will not necessarily be suppressed by the forfeiture, and because there are no victims to compensate, the necessity of the forfeiture in the admiralty cases relied upon by the Court is not present in \textit{Bennis III}, and the rationale supporting the forfeitures in \textit{Palmyra} and \textit{Harmony} is inconsistent with any rationale supporting the forfeiture of the Bennis vehicle.

\textsuperscript{131} \textit{Bennis II}, 527 N.W.2d at 491 n.22.
\textsuperscript{132} \textit{Palmyra}, 25 U.S. at 14.
\textsuperscript{133} \textit{Id}.
\textsuperscript{134} \textit{Harmony}, 43 U.S. at 233.
\textsuperscript{135} \textit{Id}.
\textsuperscript{136} \textit{Id}.
\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{See Harmony}, 43 U.S. at 233.
B. Forfeiture Comes Ashore

The next set of cases relied upon by the Court begins with Dobbins's Distillery, in which an innocent owner lost his property due to the illegal business practices of his lessee.\(^\text{140}\) In that case, the owner was aware of the use to which his land was being put—a distillery.\(^\text{141}\) Thus, the possibility that the lessee might undertake illegal activities in the process of running the business is a risk the lessor consequently accepted. In Bennis III, however, Mrs. Bennis was completely ignorant of the use to which the couple's vehicle was being put.\(^\text{142}\) And while, as the Dobbins's Distillery Court noted, forfeiture cases often arise as the result of the "[e]ntrustment"\(^\text{143}\) of property, as one Justice asserted at the Bennis III oral argument, "[Mrs. Bennis] didn't have to entrust it. It's half [Mr. Bennis's] car."\(^\text{144}\) Additionally, it is unlikely that Michigan would permit Mrs. Bennis to sue her husband to recover her losses,\(^\text{145}\) an option provided the lessor in Dobbins's Distillery,\(^\text{146}\) and if Michigan so permits, it would be futile for a wife to attempt to recover from her husband money to which she is already entitled. And, once again, the reasons proffered for upholding forfeitures\(^\text{147}\) do not apply in Bennis III: Forfeiture of the vehicle will not necessarily suppress the wrong, and there is no victim to compensate. Thus, as were the admiralty cases, Dobbins's Distillery is distinguishable from Bennis III.

The Court next relied on Van Oster, in which it upheld the forfeiture of an automobile that was involved in the illegal transportation of liquor, regardless of the innocence of the owner.\(^\text{148}\) The decision was based upon the premise that innocent owners may be held accountable for the misuse of their property by those to whom they negligently entrust their property.\(^\text{149}\) However, as established, Mrs. Bennis did not entrust the vehicle to her

\(^{140}\) 96 U.S. 395, 396 (1877).
\(^{141}\) Id. at 399.
\(^{142}\) Bennis III, 116 S. Ct. at 997.
\(^{143}\) 96 U.S. at 401.
\(^{144}\) Transcript of Oral Argument at 11.
\(^{145}\) It was implied during oral argument that Michigan would permit such an action between spouses only in conjunction with a divorce action. Id. at 30. Despite their difficulties, Mr. and Mrs. Bennis remain married; thus, recovery by Mrs. Bennis from her husband is precluded. Aaron Epstein, Should Property Be Seized When Owner is Blameless? High Court to Hear Forfeiture Case, SEATTLE TIMES, November 25, 1995, at A3.
\(^{146}\) 96 U.S. at 404.
\(^{147}\) Id. at 400.
\(^{148}\) Bennis III, 116 S. Ct. at 998.
\(^{149}\) Van Oster, 272 U.S. at 467.
husband; he had every right to use the car as he was the co-owner; and, even if she had become aware of his illegal activities, "she would have had no right to stop him from using the car." 

Additionally, and perhaps more importantly, the circumstances in *Van Oster* bear a distinct resemblance to the circumstances in the aforementioned admiralty cases: As in the admiralty cases where the ship was so necessary and attached to the offense as to be considered the offender itself, the vehicle in *Van Oster* also was as necessary and attached to the offense. The Kansas statute that was violated in *Van Oster* prohibited the "transportation of intoxicating liquor." While other modes of transportation could have been used in the commission of this activity, a vehicle is a "thing" that is used for the purpose of transportation which is necessary for the violation of the statute. Had the liquor been discovered in a "thing" that could not facilitate its "transportation," then the offense of "transportation of intoxicating liquor" could not have been committed. Discovered in a non-mobile entity, the pertinent "transportation" element of the statute would have been missing. Thus, for these reasons, *Van Oster* is distinguishable from *Bennis III*.

Next, the Court attempted to analogize *Goldsmith-Grant* and *Bennis III*. In *Goldsmith-Grant*, a vehicle that had been misused by the purchaser was forfeited. The seller, who had retained an interest in the car to secure the unpaid balance, lost his interest, as well, despite his lack of consent to or knowledge of the illegal activity. The Court upheld the forfeiture on the several theories it had espoused in previous cases, concluding that forfeiture of an innocent owner's property as punishment for the negligent entrustment of it to others is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." At this point, the *Goldsmith-Grant* Court addressed concerns that the application of forfeiture would extend to unconstitutional lengths: "When such application shall be made it will be time enough to pronounce upon it." The situation in *Bennis III* can be analogized to a scenario the *Goldsmith-Grant* Court suggested might trigger such a review: "It is said that a Pullman sleeper can be forfeited if a bottle

150. Transcript of Oral Argument at 11.
151. Id. at 12.
153. 272 U.S. at 466 (emphasis added).
154. Id.
155. *Bennis III*, 116 S. Ct. at 999 n.5.
156. *Goldsmith-Grant*, 254 U.S. at 511.
157. Id. at 512.
of illicit liquor be taken upon it by a passenger.” The forfeiture of an entire automobile because a grossly indecent act was performed upon its front seat is much more similar to the preceding scenario than to the forfeiture of a ship that was engaged in piracy or to a vehicle forfeited for transporting illegal goods. As such, the Goldsmith-Grant Court might very well have recognized Bennis III as the application upon which it should pronounce. When there has been no violation so connected to the vehicle as to declare the vehicle itself the offender, and when there has been no negligence on the part of the owner to be punished, perhaps it is time to review the forfeiture that is so rooted in America’s jurisprudence.

The next significant case relied upon by the Bennis III Court is Calero-Toledo in which a leased yacht was forfeited upon discovery that drugs were being transported in violation of a statute. The Court premised its opinion upon the theories of forfeiture established in the several previous cases. However, once again, the reasoning of the case relied upon by the Court is inapplicable to Bennis III: As previously established, the Bennis vehicle can hardly be considered the offender, forfeiture of the vehicle will unlikely prevent a recurrence of the unlawful activity, there is no injured party in need of compensation, and because there was no negligent entrustment, there can be no deterrent or acceptable punitive affect. However, while the Court upheld the forfeiture of the yacht upon the basic principle that the owner negligently entrusted his property to the lessees, it reserved the question of whether such a forfeiture would be upheld in the case of a truly innocent owner.

In its Bennis III opinion, the Court acknowledges the passage from Calero-Toledo upon which the petitioner, Mrs. Bennis, relies: “[I]t would be difficult to reject the constitutional claim of... an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.” However, the Court opted to dismiss the issue on the basis that the statement is “obiter dictum,” and “[i]t is to the holdings of [the] cases, rather than their dicta, that [the Court] must at-

158. Id.
159. Bennis II, 527 N.W.2d at 491 n.22 (“We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.”).
161. Id. at 689–90.
tend'". It is seemingly pointless, then, for the Court to expend its energy on an apparently inert abstraction.

The final significant case upon which the Bennis III Court relied is Austin. Despite being the most recent case on point, the Court affords this case no analysis. The Court merely acknowledged that in Austin, it had "no occasion...to deal with the validity of the 'innocent-owner defense,' other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is 'punitive' in motive," and held that because "forfeiture serves, at least in part, to punish the owner," it is subject to the Eighth Amendment's Excessive Fines Clause. However, the Court failed to mention that it therefore reversed the forfeiture of property that, due to its punitive nature, was excessive. It is confusing how the Court could then determine, in Bennis III, that "forfeiture...serves a deterrent purpose distinct from any punitive purpose," after having concluded in Austin that forfeiture serving any retributive or deterrent purposes is punitive. And it is further confusing that in Bennis III the Court acknowledged its determination that forfeiture is at least partially punitive, yet failed to explain how imposing a punitive action upon a completely innocent person is constitutional, or even why it is not unconstitutional.

Initially, the most apparent distinction between the two cases is that, unlike Mrs. Bennis, Austin himself was convicted of the offense by which his property was forfeited. Thus, he made (and had) no claim of innocence. Moreover, based upon the blatant rejection of the government's two-part argument for upholding the Austin forfeiture, it is difficult to decipher the rationale of the Court's decision in Bennis III.

The first contention the government asserted in Austin was that forfeiture of the mobile home and body shop would serve to remove "'instruments' of the drug trade 'thereby protecting the community from the

163. Id. (quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994)).
164. Id. at 1000.
165. Id.
166. Id.
168. Id.
169. Austin, 509 U.S. at 622.
171. Austin, 509 U.S. at 621 (citing Halper, 490 U.S. at 448).
threat of continued drug dealing.’” 173 However, the Court flatly rejected this contention and determined that the punitive measure of forfeiture was excessive because the possession of the property was “‘nothing even remotely criminal.’” 174 This result should surely support the refusal to impose such a punitive measure of forfeiture upon a completely innocent person, since there is likewise “‘nothing even remotely criminal’” in owning a car. These decisions further appear readily conflicting: If the forfeiture of the premises upon which a drug deal occurred would fail to “[protect] the community from the threat of continued drug dealing,” 175 then the forfeiture of a car in which an indecent act occurred surely will not serve to combat the threat of continuing prostitution.

The second contention the government asserted was also rejected by the Court. In Austin, the Court refused to permit the forfeiture of Austin’s properties for the purpose of compensating the government for costs incurred in performing its law enforcement duties 176—the same costs that were assessed against Mrs. Bennis. 177 The basis of the Court’s rejection of this contention was that the “dramatic variations in the value of [property] forfeitable” 178 in these situations fails to provide “‘a reasonable form of liquidated damages,’” 179 thereby having “‘absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.’” 180 Thus, the decision in Austin seems to provide support for rejecting the Court’s acquiescence in assessing “‘costs’” 181 against Mrs. Bennis’s interest in the forfeited vehicle. It seems incongruent for the Court to refuse the assess-

173. Austin, 509 U.S. at 620 (quoting Brief of the United States at 32).
174. Id. at 621 (quoting One 1958 Plymouth Sedan, 380 U.S. at 699).
175. Id. at 620.
176. Id. at 621.
177. See Bennis III, 116 S. Ct. at 1002 n.* (Thomas, J., concurring).
178. Austin, 509 U.S. at 621.
179. Id. (quoting One Lot Emerald Cut Stones v. United States, 407 U.S. 232, 237 (1972)).
180. Id. (quoting Ward, 448 U.S. at 254).
181. Bennis III, 116 S. Ct. at 998. In his concurring opinion, Justice Thomas struggles with the definition attributed to the term “costs” as used by the trial court judge. There is evidence that the judge was referring to costs such as law enforcement and costs of keeping the car. Justice Thomas stated that if these were in fact the costs referred to by the judge, “the State would still have a plausible argument that using the sales proceeds to pay such costs was ‘remedial’ action, rather than punishment.” Id. at 1002 n.* (Thomas, J., concurring). This attribution is completely at odds with the Court’s holding in Austin which reiterated its previous holding that “‘the forfeiture of property . . . [is] a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.’” 509 U.S. at 621 (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).
ment of costs in Austin, and subsequently conclude that it is appropriate to assess against an innocent person these same costs, costs to which the forfeiture of property was deemed to have "absolutely no correlation." This assessment seems especially inappropriate when allegedly the proceeds of the forfeitures often serve to compensate the law enforcement officers directly, not the government for its expenditure on law enforcement.

Had the Bennis III Court determined the outcome of the case prior to its analysis, it is not difficult to understand its reason for "ignor[ing] Austin's detailed analysis of... case law without explanation or comment." Had the Bennis III Court determined the outcome of the case prior to its analysis, it is not difficult to understand its reason for "ignor[ing] Austin's detailed analysis of... case law without explanation or comment." Austin, even without the previously discussed case law, offers no reason for deciding as the Court did and every reason for deciding as the Court did not. Had the previous analyses not been evidence enough that the cases upon which the decision was based were distinguishable, Austin's completely irreconcilable decision should sway those not yet convinced. Thus, in Bennis III, the Court's decision was rooted solely in cases that are distinguishable. The facts are distinguishable, the reasons for upholding the forfeiture are distinguishable, the purposes of the forfeitures are inapplicable to the case, and the characterization of the forfeiture in Bennis III is completely inconsistent with even the Court's most recent decision on point.

V. IMPLICATIONS AND RAMIFICATIONS

A. Implications of the Standards

Although presented with two standards, the Court failed to adopt, or even address, an appropriate standard by which to adjudge future forfeiture cases. Either standard would have limited the government's ability to seize the property of completely innocent owners, safeguarding the property rights of individuals while concurrently ensuring the police powers necessary to deter crime, punish criminals, and nullify the profitability of crime.

182. Austin, 509 U.S. at 621 (quoting Ward, 448 U.S. at 254).
185. Brief for Petitioner at 11; Brief of United States at 7.
1. The “Negligent Entrustment” Standard

The petitioner, Mrs. Bennis, advocated a “negligent entrustment” standard that was suggested by the Court in the Calero-Toledo dicta.\footnote{186} She urged that

[b]ecause of the historic importance of property rights, the need for a clear, uniform standard to guide the lower courts, and the need to avoid “unduly oppressive” confiscations of property from innocent owners like [herself], the Court should adopt the negligent entrustment standard as the measure of culpability required to satisfy due process in these circumstances.\footnote{187}

The “negligent entrustment” standard is adopted from section 308 of the Restatement (Second) of Torts, which states:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in (a manner prescribed by law).\footnote{188}

This standard would permit the forfeiture of property belonging to an innocent owner only if the owner had been negligent in entrusting his property to a third person. Furthermore, this standard would “place the burden on the government to demonstrate that an owner negligently allowed another to use his property for illegal purposes.”\footnote{189}

It is argued that Mrs. Bennis would have met the “negligent entrustment” standard and defeated the forfeiture.\footnote{190} The record reflects uncontradicted testimony that Mrs. Bennis had no knowledge that her husband would use the vehicle in a proscribed manner,\footnote{191} nor any reason to believe that he would do so.\footnote{192} Furthermore, Mr. Bennis, as established at oral argument, had no need to be “entrusted” with the vehicle due to his right, by virtue of

\footnotesize

186. Brief for Petitioner at 9.
187. Id.
188. Id. at 15. “[A] manner proscribed by law” reflects the change suggested by petitioner. These words replaced the actual language “such a manner as to create an unreasonable risk of harm to others.”
189. Brief of The Institute for Justice as Amicus Curiae In Support of Petitioner at 12.
190. Brief for Petitioner at 16.
191. Id.
192. Id.
being a co-owner, to use the car as he chose.\textsuperscript{193} Thus, there is no “negligent entrustment” for which Mrs. Bennis should be punished. Accordingly, Mrs. Bennis met the “negligent entrustment” standard she advocated, and, therefore, the punitive forfeiture of her interest in the vehicle without compensation was inappropriate.\textsuperscript{194}

While the respondent advocated the adoption of no particular standard by which to adjudge forfeiture, both The American Alliance for Rights and Responsibilities ("American Alliance") and the United States, in their \textit{amici curiae} briefs, encouraged the Court to reject the negligent entrustment standard advocated by Mrs. Bennis,\textsuperscript{195} and the United States advocated the adoption of an “all reasonable steps” standard.\textsuperscript{196} The parties encouraged the rejection of the “negligent entrustment” standard for two principal reasons. First, it was suggested that such a standard would exempt many co-ownership arrangements, placing a vast amount of property beyond the hands of forfeiture,\textsuperscript{197} including Mrs. Bennis’s interest in her forfeited automobile. This seemed unacceptable to the parties supporting the respondent, for apparently their goal was to subject as much property as possible to the threat of forfeiture. Second, it was suggested that the “negligent entrustment” standard is unacceptable because it limits the innocent owner’s liability to the time of entrustment. It was contended that this standard should be rejected because “[i]n many cases, an owner can reasonably be expected to take precautions against illegal use of his property after, as well as before, entrusting it to someone else.”\textsuperscript{198} Thus, it was upon these grounds that the parties believed the Court should reject the “negligent entrustment” standard advocated by Mrs. Bennis.

\section*{2. The “All Reasonable Steps” Standard}

While American Alliance was content to encourage the rejection of the "negligent entrustment" standard, the United States advocated the adoption of an “all reasonable steps” standard by which to adjudge future forfeitures.\textsuperscript{199} However, the goal of the United States was not to promote efficiency in future forfeiture cases, rather the United States believed that “[t]he

\begin{itemize}
  \item \textsuperscript{193} Transcript of Oral Argument at 11.
  \item \textsuperscript{194} Brief for Petitioner at 17.
  \item \textsuperscript{195} Brief of United States at 8; Brief of American Alliance at 6.
  \item \textsuperscript{196} Brief of United States at 7.
  \item \textsuperscript{197} Brief of American Alliance at 14.
  \item \textsuperscript{198} Brief of United States at 8.
  \item \textsuperscript{199} \textit{Id. at} 11.
\end{itemize}

[W]hen an owner pleads and proves that he took all reasonable steps to prevent the involvement of his property in the illegal conduct underlying the forfeiture, . . . [he] has, by definition, minimized the foreseeable risk of illegal use and, in turn the risk of forfeiture. . . . Moreover, an owner who can prove that he took all reasonable, affirmative measures to prevent unlawful use is far less likely to be in collusion with the person who uses the property illegally than is an owner who merely asserts lack of knowledge or participation in the illegal use.201

Thus, because the United States contended that the Constitution does not bar forfeiture of property when an innocent owner merely asserts lack of knowledge or reason to know of the illegal use, adopting the “all reasonable steps” standard would provide property owners an incentive to “take affirmative steps to detect and prevent the illegal use of their property, [thereby] eliminat[ing] the need for judicial inquiry into the possibility that the alleged innocent owner is in collusion with the person making illegal use of the property.”202

Although she contended that she would prevail under either standard, Mrs. Bennis urged the Court to reject the “all reasonable steps” standard in favor of the “negligent entrustment” standard.203 She so urged because the vagueness of the former standard “has led to widely divergent innocent owner determinations in federal and state cases, and to arbitrary forfeitures of property.”204 Furthermore, “because [the standard] does not require courts to take account of the relationship between actual or constructive knowledge of misuse and a duty to take preventive measures—courts have too often applied that standard so as to permit a forfeiture in the absence of fault.”205

200. Brief of United States at 8.
201. Id. at 11.
203. Reply Brief for Petitioner at 3.
204. Id.
205. Id. at 6.
In other words, on its face, the "all reasonable steps" standard could aid in the forfeiture of an innocent owner's property merely because the owner was unaware that any steps could or should have been taken.

Mrs. Bennis contended that, were the "all reasonable steps" standard applied, she would prevail on three principal grounds. 206 First, Mrs. Bennis asserted that her undisputed innocence 207 precluded her ability to take any steps to have prevented the act which led to the forfeiture of the Bennis vehicle.

Whether one did all that could reasonably be expected to prevent a misuse is necessarily a function of whether one knew or should have known of another's criminal wrongdoing. . . . Indeed, if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use. As to Mrs. Bennis, it hardly requires argument that a wife would, as a matter of course, take all reasonable steps to assure her husband's fidelity. 209

While the state conceded that Mrs. Bennis had no knowledge of her husband's illegal actions, 210 the United States contended that she failed to prove that she took "all reasonable steps" to prevent it. 211 Furthermore,

[t]he United States concedes that "it may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." And the amicus brief of the American Alliance acknowledges that "an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it." 212

Thus, the fact that Mrs. Bennis was ignorant of her husband's activity would seem to exculpate her from proving that she had taken "all reasonable steps" to deter the misuse. Hence, the contentions of the respondent, United States, and amici curiae are completely inconsistent with Mrs. Bennis's innocence.

206. Brief for Petitioner at 17.
207. Bennis II, 527 N.W.2d at 486.
208. Brief for Petitioner at 17.
209. Id.
210. Bennis I, 504 N.W.2d at 733.
211. Brief of United States at 15.
212. Reply Brief for Petitioner at 8 n.7 (citations omitted).
Second, Mrs. Bennis asserted the fact that "she did not stand to benefit financially or otherwise from the particular use he was found to have made of the car," as further supporting her contention that, had there been steps she could have or should have taken, nothing would have discouraged her from doing so. This contention addresses any supposition that she may have been "in collusion with [her husband in] making illegal use of the property."

Third, "the fact that [Mrs. Bennis] lacked meaningful control over her husband's use of the property is another factor supporting the conclusion that [she] took all steps that 'reasonably could be expected' to prevent the proscribed use." As previously established, Mrs. Bennis did not entrust the car to her husband on October 3, 1988. John Bennis, as co-owner of the car, had every right to use the car when and how he chose, and Mrs. Bennis had no right to impede him from doing so. Thus, without the power and ability to prevent her husband from employing the car as he pleased, Mrs. Bennis was without the power and ability to take "all reasonable steps" to prevent the misuse of the property. As such, she took "all [the] reasonable steps" that she could.

B. The Flaws

Based upon the preceding analysis, it is apparent that each standard possesses inherent flaws which would aid in, rather than prevent, the misapplication of forfeiture. Thus, while the Court may have properly failed to adopt one of the proffered standards, the failure to address the issue or adopt an alternative standard left the Court's opinion incomplete. Without a standard, and without any indication of the Court's position on a standard, courts will be hard-pressed to apply the Bennis III decision in any way other than to uphold the array of forfeitures encountered. Without a standard, and without any indication of the Court's position on a standard, courts will be hard-pressed to derive from Bennis III the characteristics of forfeiture that determine its constitutionality or unconstitutionality, or its permissibility or impermissibility.

213. Brief for Petitioner at 17.  
215. Brief for Petitioner at 17.  
216. Transcript of Oral Argument at 28.  
217. Bennis II, 527 N.W.2d at 486.  
The “negligent entrustment” standard, which strives to achieve a principle purpose of forfeiture, may place a greater limitation on forfeiture than the “all reasonable steps” standard, but may inadvertently provide persons whose property should rightfully be seized a loophole by which to escape the deterrence of forfeiture. The “negligent entrustment” standard, as advocated by Mrs. Bennis, restricts the time of entrustment, in a co-ownership situation, to the time at which a co-ownership is created. In Mrs. Bennis’s situation, for example, the time of entrustment occurred at the time she and her husband purchased the car together. Thus, Mrs. Bennis could be held accountable for negligent entrustment only if she knew or had reason to know of her husband’s tendency to solicit prostitutes at the time the car was purchased. Had Mrs. Bennis become aware of her husband’s activities at any time subsequent to the purchase, she could not be held accountable solely on the premise that there was no entrustment.

While the fact that there was no entrustment in the Bennis situation does distinguish it from previous cases, the lack of entrustment should not be the sole determinative factor in proscribing forfeiture. The “negligent entrustment” standard fails to consider whether the property owner had any knowledge of misuse by a third party to whom they entrusted their property subsequent to the entrustment but prior to the time the misuse occurred. If the owner becomes apprised of the misuse post-entrustment, the “negligent entrustment” standard imposes upon the owner no duty or incentive to take steps to prevent or diminish the misuse. Thus, the application and deterrent nature of the “negligent entrustment” standard is quite limited and does not best serve the intentions of forfeiture.

Likewise, the “all reasonable steps” standard has inherent flaws that would theoretically permit the forfeiture of stolen property more readily than the forfeiture of property that had been negligently entrusted. The “all reasonable steps” standard forces the petitioner to plead and prove the steps he took to prevent the misuse of his property. However, the respondent may then produce “reasonable steps” that had not, but arguably should have, been taken.

Furthermore, as the “negligent entrustment” standard imposes upon the owner no duty to take precautions, the “all reasonable steps” standard fails to

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219. The primary purpose being referred to here is the idea of punishing persons who negligently entrust their property to others who misuse it. This is seen as underlying each of the several theories of forfeiture. *Austin*, 509 U.S. at 618.
220. Transcript of Oral Argument at 12.
221. *Id.*
consider whether the owner was aware of any wrongdoing. In the Bennis situation, Mrs. Bennis was completely unaware of the use to which her husband was putting the car. The United States acknowledged that without knowledge of any potential misuse of the property, an innocent owner is limited in his ability to prevent that of which he is unaware. The United States, advocate of the “all reasonable steps” standard, then failed to suggest any steps that Mrs. Bennis could or should have taken to prevent her husband’s illegal activity. But the United States insists that she failed the test. Thus, if not guilty of negligent entrustment, how could any truly innocent owner meet the standard advocated by the United States?

Although a victim of car theft is arguably the epitome of the innocent owner, it can reasonably be foreseen that a person’s vehicle may at some point be stolen. Thus, in order to prevent the forfeiture of a stolen vehicle that was misused by the thief, the owner must take “all reasonable steps” to prevent the vehicle from being stolen, the key to preventing its subsequent misuse. Perhaps the owner left his car unlocked, placed a spare key in a “hiding” spot on the car which the thief found, or failed to arm the car with an alarm. Certainly locking the doors, refraining from placing a spare key on the car, and installing a car alarm are “reasonable steps” that could or should have been taken. Because there were “reasonable steps” that the owner failed to take, under the “all reasonable steps” standard, the victim of car theft fails, losing his property because it was misused by a thief. Perhaps the government contends that it would use its “prosecutorial discretion” and not proceed with such actions; however, the “all reasonable steps” standard does not prohibit the government from imposing punitive forfeiture upon the victims of car theft if it so chooses.

Furthermore, while the “all reasonable steps” standard completely ignores a basic premise underlying the theories of forfeiture, the punishment of negligent entrustment, both the “negligent entrustment” and “all reasonable steps” standards disregard each of the major theories and purposes of forfeiture: The “guilty property” theory is irrelevant to the standards, as are the purposes of suppressing the wrong and ensuring indemnity to an injured party. Thus, each standard would permit improper applications of forfeiture and would fail to recognize the theories and purposes that have propelled forfeiture into modern jurisprudence.

C. An Alternative: A Standard Comprising Both Concepts

However, were the Court to institute a standard which would encompass both a “negligent entrustment” and an “all reasonable steps” faction, both the theories and purposes of forfeiture could be recognized, and the
property rights of truly blameless individuals could be protected against inequitable forfeitures. Because a basic premise of forfeiture has been to punish the negligent entrustment of property, such a standard is appropriate—even necessary. This would punish those who truly were negligent, while serving to protect those who did not entrust their property, negligently or otherwise. Thus, those whose property had been stolen would be free from the threat of forfeiture, and those who co-own property are not made a "guarantor for the behavior of the person who misuses the property."222 However, it is important to then impose upon the owner, whether or not the property was found to have been negligently entrusted, a "reasonable steps" standard.223 Imposing this subsequent standard would impose upon the owner a duty to take "reasonable steps" to prevent or diminish any misuse or potential misuse of his property, if the owner had, at any time, become apprised of such. Thus, a truly innocent owner would be protected from the threat of forfeiture, while an owner who either negligently entrusted his property and failed to take reasonable steps to prevent the misuse of it, or did not negligently entrust his property but learned of a possible or actual misuse of it and failed to take reasonable steps to prevent or diminish the misuse, would be properly punished for his failure to control his property in a responsible manner. Such a standard would protect the property rights of individuals against unnecessary and improper forfeiture and impose upon property owners a duty to take precautions to ensure that their property will not be misused.

D. Ramifications of Bennis v. Michigan

Although the institution of a standard by which to adjudge future forfeitures would be preferable than lacking any obvious guidelines, the Court did not comply. Thus, bearing in mind the reality, there undoubtedly are post-Bennis III ramifications that will be experienced. As previously addressed, there presumably will be cases in which a court finds itself bound to order or uphold the forfeiture of property that belongs to a truly innocent owner. There may very well be cases in which a court finds itself bound to

222. Reply Brief for Petitioner at 7.
223. The "all reasonable steps" standard has been altered slightly here, dropping the "all." It seems that courts would be constricted with such a qualification, as it would be difficult for any petitioner to plead and prove all reasonable steps. Thus, by omitting the qualification, courts have greater discretion to judge whether the "reasonable steps" that were taken by a petitioner are sufficient to prevent a forfeiture.
order or uphold the forfeiture of property that has been stolen from a truly innocent owner. These scenarios, however, have been intimated.

What has not been intimated is an example of a more practical ramification that could be more expansively suffered. While the preceding commentary considered situations most similar to the situation in Bennis, those who most often have an interest in property belonging to another that is apparently at great risk are financial institutions. The Bennis decision will place money lenders in an extremely perilous predicament—for every loan they approve, they incur the risk of losing their interest in the property upon which they loaned money.224 Faced with this possibility, “financial institutions will be forced to restrict credit and banking availability to many individuals.”225 Thus, it will be essential for financial institutions to conduct in-depth background checks on potential customers to detect those that are at risk for being the subject of a forfeiture proceeding.226 However, the most extensive background check will undoubtedly be unable to detect a person’s potential to be the victim of a forfeiture due to misuse of their property by a third person. Moreover, “no prudent lender could justify a loan against the risk that an honest and good credit risk customer could have their property seized because the government asserts that the property was used to facilitate a crime by another individual.”227

In denying a customer financing collateralized by property based upon a determination that he is at greater risk for being the subject of a forfeiture, the lender “might violate [a] duty to the customer or anti-discrimination laws. Indeed, the lender could even be subjected to defamation claims and lawsuits, all of which would raise the cost of borrowing money.”228 Thus, while the decision will probably permit the forfeiture of property from innocent owners, adversely affecting those faced with the inequitable forfeiture, the most daunting effects of the decision could infiltrate aspects of our society not yet considered, inflicting ramifications not yet fathomed.

225. Id.
226. Id.
227. Id.
228. Id.
VI. CONCLUSION

While it is difficult to deny that forfeiture, if properly applied, can be a useful and successful tool in combating and deterring crime, it is important that the individual rights of innocent people are not compromised in the process. The respondent in this case asserts that the crux of the forfeiture debate lies within the question, "[d]o an individual's property rights outweigh a government's ability to exist?" To this question the respondent replies, "'No.'" While the respondent's answer to the question is seemingly appropriate, the question misses the mark. The "government's ability to exist" hardly hinges on its ability to forfeit the property of innocent owners. More importantly and more accurately, there is absolutely no reason that the government's ability to combat and deter crime should not exist without infringing upon the rights of innocent individuals. While the Court's decision in *Bennis III* has apparently impeded the path to such a coexistence, perhaps legislators will take heed and initiate a few impediments of their own—impediments to the government's seemingly unbridled power to forfeit, that is. Conceivably the Court will detect its own error and rectify the situation in due time. As pointed out by George Will, "[i]n 1896, in *Plessy v. Ferguson* the [C]ourt held that 'separate but equal' public facilities segregated by race were compatible with the 14th Amendment's guarantee of equal protection of laws. Later, the [C]ourt staged a protracted retreat from that position." Does *Bennis III* await the same fate? As aptly stated by Thomas Jefferson in his first inaugural speech exactly 195 years prior to the *Bennis III* decision, "[I]et history answer this question."

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230. *Id.*
Jaffee v. Redmond: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers

TABLE OF CONTENTS

I. INTRODUCTION .............................................................................. 719
II. THE HISTORY OF JAFFEE V. REDMOND ........................................... 722
   A. Facts of the Case .................................................................. 722
   B. Procedural History .............................................................. 724
   C. Analysis of the Seventh Circuit Decision .............................. 724
III. THE SUPREME COURT DECISION .................................................. 726
   A. Plaintiffs' Argument Before the Supreme Court ................. 726
   B. Defendants' Argument Before the Supreme Court ............... 727
   C. The Majority Opinion .......................................................... 729
   D. The Dissenting Opinion ......................................................... 731
   E. Analysis of Jaffee v. Redmond .............................................. 732
IV. CONCLUSION ................................................................................ 738

I. INTRODUCTION

In the recent landmark decision of Jaffee v. Redmond,\(^1\) the United States Supreme Court announced that confidential communications by a patient to a psychotherapist are absolutely privileged.\(^2\) Furthermore, the Court held that confidential communications by a party to a social worker are within the bounds of this psychotherapist-patient privilege.\(^3\) This comment examines the Court's decision in Jaffee, focusing on the respective strengths and weaknesses of the reasoning employed by the majority and the dissent. Specifically, it is this author's position that the majority's decision in Jaffee is sound, well-reasoned, and based on the realities of our current social climate. On the other hand, Justice Scalia's dissent is ill-conceived, illogical, dogmatic, and flies in the face of common sense and reason.

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2. Id. at 1931.
3. Id.
The Supreme Court has consistently been reluctant to create new evidentiary privileges or to expand existing privileges. The general rationale the Court has used for refusing to recognize or expand privileges is that to do so is to exclude relevant evidence from the trier of fact. In other words, in a search for the truth, the public has a right to all relevant evidence. Only when the public need for an evidentiary privilege substantially outweighs the ordinary truth finding process will the Court deviate from this rationale.

In Trammel v. United States, the Supreme Court demonstrated its narrow view toward evidentiary privileges by cutting back the scope of the spousal immunity privilege, holding that only the testifying spouse could assert the privilege.

The federal courts' authority to recognize new privileges is derived from Rule 501 of the Federal Rules of Evidence. When the rules regarding privileges were proposed, the drafters incorporated several common law privileges, including a psychotherapist-patient privilege. However,

8. 445 U.S. 40 (1980). Trammel was charged with conspiracy to import heroin into the United States. Id. at 42. Trammel's wife was called to testify on behalf of the government in order to implicate her husband. Id. at 42-43. Trammel sought to invoke the spousal immunity privilege in an attempt to have his wife's testimony excluded. Id. at 42.
9. Id. at 53.
10. FED. R. EVID. 501. This rule provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with State law.

Id.

Congress rejected a rigid adoption of privileges, and instead, adopted a
general rule giving the federal courts discretion to create new privileges.12

The cornerstone of the Supreme Court's decision in Jaffee was rule
501.13 In Jaffee, two important issues were presented.14 One was whether
the Supreme Court should formally recognize the psychotherapist-patient
privilege under its powers granted by rule 501,15 and two, if such a privilege
were to be recognized, whether the privilege should extend to social workers
as well as to psychotherapists and clinical psychologists.16 Some federal
courts had previously recognized the psychotherapist-patient privilege at the
time Jaffee came before the Supreme Court for review.17 However, there
was still considerable disagreement among the circuits as to whether the
privilege should be recognized at all.18 Moreover, prior to Jaffee, even
where the psychotherapist-patient privilege did exist, various federal courts
held conflicting views regarding the scope of the privilege.19 Therefore,
when the Supreme Court granted certiorari in Jaffee,20 the issue of the
psychotherapist-patient privilege in the federal courts cried out for resolu-
tion.

The issues presented in Jaffee are important ones to our society, given
that many people in our population need therapy in some context or another,
at some point in their lives. Complete and candid disclosure is at the heart of
the relationship between patient and psychotherapist.21 The Supreme
Court's decision in Jaffee will have a significant impact on this relationship,
for it will foster open communication between patient and therapist.

dence, but excluding proposed rule 504 containing 10 specific common law privileges, among
which was the psychotherapist-patient privilege).
14. Id. at 1925.
15. Id.
16. Id.
17. See, e.g., In re Doe, 964 F.2d 1325, 1328 (2d Cir. 1992); In re Zuniga, 714 F.2d 632,
639 (6th Cir. 1983) (holding that the psychotherapist-patient privilege is recognized by the
federal courts).
18. See, e.g., United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); In re Grand
Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989) (refusing to recognize a psychotherapist-
patient privilege). See generally Bruce J. Winick, The Psychotherapist-Patient Privilege: A
Therapeutic Jurisprudence View, 50 U. MIAMI L. REV. 249 (1996) (discussing the general
disagreement in the federal system regarding the privilege).
20. Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), cert. granted, 116 S. Ct. 334
Without access to all of the "pieces to the puzzle," mental health professionals are impeded in their quest first to understand and then to help the patient. The logical end result of the Court's failure to recognize the psychotherapist-patient privilege, or to give it any significant breadth, can only be that the full and honest disclosure, so vital to a successful course of therapy, would be chilled. Thus, the Jaffee decision is extremely significant because it will affect patients who see mental health professionals of all kinds, despite whether or not these patients go on to become litigants. It will bear upon the course of therapy indicated and provided by those professionals and it will surely influence the way lawyers try cases, as well as the nature and extent of evidence that juries get to see. Indeed, the Jaffee decision will affect the very outcome of some cases.

II. THE HISTORY OF JAFFEE V. REDMOND

A. Facts of the Case

On June 27, 1991, Officer Mary Lu Redmond was dispatched to a "'fight in progress'" taking place at an apartment complex in her jurisdiction. Upon arrival, Officer Redmond was greeted at her squad car by two frantic individuals shouting that there had been a stabbing. After calling for backup, Officer Redmond exited her squad car and proceeded to walk toward the apartment complex. As Redmond approached the structure, several men ran from the building, one of whom was waving a metal pipe. Officer Redmond ordered the men to the ground, and upon their refusal drew her weapon. A moment later, two additional men burst from the building. Although the facts are in dispute, according to Officer Redmond, one of

22. Id. See also Brief for American Psychiatric Association at *12–17, Jaffee v. Redmond, No. 95-266, 1995 WL 767892 (U.S. Dec. 29, 1995) [hereinafter Amicus Brief].
23. Id. at *14.
25. Id. at *4. The two individuals turned out to be relatives of the decedent Ricky Allen and would later testify against Officer Redmond at trial. Id.
26. Id.
27. Id.
29. Id.
30. The siblings of the Ricky Allen related a story that conflicted with Officer Redmond’s version of the events. Jaffee, 51 F.3d at 1349. For example, there was conflicting testimony regarding what point in time Officer Redmond drew her weapon. Id.
those men, Ricky Allen, was brandishing a butcher knife while in pursuit of another man.\textsuperscript{31} Despite Officer Redmond’s repeated commands for Allen to drop the weapon and get to the ground, he continued in pursuit.\textsuperscript{32} Finally, when Officer Redmond believed Allen was about to stab the man he was chasing, Redmond fired her service revolver, striking Allen.\textsuperscript{33} Allen was pronounced dead at the scene by emergency personnel.\textsuperscript{34}

Ricky Allen’s surviving family members sued Officer Redmond and her employer, the Village of Hoffman Estates, in federal court for civil rights violations and wrongful death.\textsuperscript{35} During discovery, the plaintiffs learned that Officer Redmond had attended numerous counseling sessions with a clinical social worker named Karen Beyer.\textsuperscript{36} The plaintiffs attempted to discover the content of the counseling sessions between Redmond and Beyer to use as substantive evidence during the trial.\textsuperscript{37} The defendants objected to discovery of the sessions between Redmond and Beyer, asserting that the communications were protected by the psychotherapist-patient privilege.\textsuperscript{38} The trial court rejected the defendants’ argument that the conversations were privileged and ordered discovery of Beyer’s notes of the conversations.\textsuperscript{39}

The trial court’s order was never fully complied with by Officer Redmond or Karen Beyer.\textsuperscript{40} During depositions and at trial, Redmond and Beyer either refused to answer certain questions or were entirely evasive.\textsuperscript{41}

Ultimately, over the defendants’ objection, the trial judge instructed the jury that the refusal to reveal the notes was not legally justified and that the jury could presume that the subject matter of the conversations would have been unfavorable to Officer Redmond and her employer, the Village of

\textsuperscript{31} Brief for Petitioner at *4.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at *5.
\textsuperscript{36} Brief for Petitioner at *5.
\textsuperscript{37} Id. at *5–6.
\textsuperscript{38} Id. at *6.
\textsuperscript{39} Jaffee, 51 F.3d at 1350–51. The district court judge determined that federal law rather than state law governed the privilege issue. Id. In doing so, the judge relied on proposed rule of evidence 504 and held that the rule did not extend to social workers. Id. at 1350 n.5.
\textsuperscript{40} Id. at 1351. See also Brief for Petitioner at *8.
\textsuperscript{41} Jaffee, 51 F.3d at 1351. Karen Beyer refused to hand over her notes of the counseling sessions and provided limited answers regarding Officer Redmond’s version of the shooting. Id. Additionally, Officer Redmond, both at her deposition and during trial, responded “I don’t recall” numerous times. Id.
Hoffman Estates. The jury returned a verdict for the plaintiffs and judgment was entered in favor of Allen’s estate.

B. Procedural History

On appeal, the Seventh Circuit Court of Appeals reversed, holding that the trial court committed prejudicial error by compelling discovery of the notes and giving the adverse jury instruction. Specifically, the court held that the conversations between Redmond and Beyer were protected by the psychotherapist-patient privilege, and therefore, were inadmissible.

The court of appeals reasoned that the law of privileges could be expanded by the federal courts in accordance with the Federal Rules of Evidence. Furthermore, the rules call for recognition of a psychotherapist-patient privilege. The court stated that the privilege is not absolute but rather is a qualified privilege. In each case, the need for the privilege must be balanced against the need to ascertain the truth through the introduction of all relevant evidence at trial.

In the instant case, the need for private communications between a psychotherapist and her patient outweighed the plaintiffs need for the evidence. Hence, the court concluded that the jury instruction, which allowed the jury to draw an adverse inference against Officer Redmond and the Village of Hoffman Estates, constituted prejudicial error.

C. Analysis of the Seventh Circuit Decision

The majority used rule 501 as the foundation for its decision. First, the court stated that reason dictates the recognition of the psychotherapist-patient privilege in the federal courts. The court’s rationale here was that public policy mandates the existence of the privilege. Mental health is of

42. Id. at 1351 n.9.
43. Id. at 1352.
44. Jaffee, 51 F.3d at 1358.
45. Id.
46. Id. at 1354 (citing Trammel v. United States, 445 U.S. 40, 47 (1980)). See also supra note 10.
47. Jaffee, 51 F.3d at 1355–56.
48. Id. at 1357.
49. Id. at 1357–58.
50. Id. at 1358.
51. Id. at 1357.
52. Jaffee, 51 F.3d at 1356–57.
53. Id.
great importance in our society and essential to mental health is open and candid communication between a psychotherapist and her patient.54 Second, experience dictates that the privilege should be recognized, since some form of the psychotherapist-patient privilege is recognized in all fifty states.55

However, as noted, the Seventh Circuit did not rule that the privilege was absolute.56 Rather, the court held that the privilege is qualified and must be balanced against the need to find the truth during the judicial process.57 In balancing these two competing interests, the court reasoned that without the privilege, communications between a psychotherapist and her patient would be chilled.58 Most significantly, the court observed that the need for open communications is essential for effective psychotherapy.59

On the other hand, the court noted that although the conversations between Officer Redmond and Karen Beyer were relevant to the substantive issues of the plaintiffs' case, the plaintiffs had alternative evidence which was just as effective.60

54. Id. at 1355–57.
56. Jaffee, 51 F.3d at 1357.
57. Id. at 1357–58.
58. Id.
59. Id.
60. Id. There were several eyewitnesses who testified on behalf of the plaintiff. Jaffee, 51 F.3d at 1357–58. The testimony of these eyewitness accounts could possibly be used to test Officer Redmond's credibility just as effectively as Beyer's notes from the counseling
Accordingly, the court concluded that the need for the subject matter of the conversations as evidence was outweighed by the public's need for the psychotherapist-patient privilege.  

III. THE SUPREME COURT DECISION

A. Plaintiffs' Argument Before the Supreme Court

The plaintiffs argued that, in light of the Court's cautious approach to the creation of new privileges, the costs of the psychotherapist-patient privilege outweighed any benefits that might be received by recognizing the privilege.

First, the plaintiffs contended that the cost of a psychotherapist-patient privilege would be substantial. The plaintiffs argued that since therapists, unlike lawyers, are not officers of the court, they have no real legitimate interest in the search for the truth. Accordingly, there is a real danger that a therapist may help to generate inconsistent recollections of a particular incident through therapy. Moreover, the plaintiffs contended that to allow such a broad privilege as was adopted by the appellate court would keep highly relevant evidence from the jury. This case turned on Officer Redmond's credibility, the plaintiffs argued, and to allow the privilege would significantly hinder the plaintiffs' attempt to impeach her credibility.

Second, according to the plaintiffs, the benefits of the psychotherapist-patient privilege are unclear and speculative at best. The plaintiffs in Jaffee contended that there is no real science to prove that the absence of the psychotherapist-patient privilege would chill effective psychotherapy, as was urged by the appellate court and the defendants.

Third, the plaintiffs further argued that there is no indication that the experience of the common law calls for an adoption of the psychotherapist-

sessions. Id. at 1358. Moreover, Officer Redmond herself testified at trial and was available for cross examination. Id.

61. Id.
62. Brief for Petitioner at *12.
63. Id.
64. Id.
65. Id.
66. Id. at *21–22.
67. Brief for Petitioner at *21. The plaintiffs alleged that Officer Redmond's memory of the events surrounding the incident became clearer and more self-serving as time passed. Id.
68. Id. at *26.
69. Id. at *26–27.
patient privilege in the federal courts. They observed that although all fifty states have adopted some form of the privilege, no state has adopted a privilege as broad as that urged by the appellate court.

Fourth, the plaintiffs pointed out that state laws which recognize a privilege between a psychotherapist and her patient are inconsistent as to the scope of the privilege. This is evidenced by the fact that the state laws are littered with exceptions. Furthermore, the plaintiffs pointed out that nine states do not recognize any evidentiary privilege between a social worker and her patient.

Finally, the plaintiffs contended that if the Court were to recognize an evidentiary privilege between a psychotherapist and patient, the Court should not expand that privilege of confidentiality to social workers. Here, the plaintiffs relied on the psychotherapist-patient privilege proposed by the Federal Rules of Evidence. Proposed rule 504 speaks only of a “psychotherapist” and makes no mention of the term “social worker.” Hence, plaintiffs argued, Congress did not intend that the privilege extend to social workers as well as psychotherapists.

B. Defendants' Argument Before the Supreme Court

The defendants argued that not only should there be a psychotherapist-patient privilege but that the privilege should extend to social workers as well. The defendants asserted that the decision by the Seventh Circuit was harmonious with rule 501, as well as with the congressional intent behind the rule. The defendants further contended that under rule 501 both reason and experience dictate the creation of the psychotherapist-patient privilege.

70. Id. at *31.
71. See statutes cited supra note 55.
72. Brief for Petitioner at *31.
73. Id. at *37.
74. Id. at *31–33.
75. Id. at *35 n.66.
76. Id. at *39.
78. Brief for Petitioner at *39.
79. Id.
81. Id. at *9.
82. Id. at *9–10.
As for reason, the defendants relied heavily on the public policy underlying the privilege. Like the court of appeals, the defendants pointed out that psychotherapy serves a very important interest in our society.83 The premise here is that society encourages its citizens to seek mental health assistance freely and openly.84 Essential to these sessions is the confidentiality between the patient and therapist.85 Without confidentiality, citizens would be reluctant to candidly disclose crucial information needed to assure effective counseling.86 This is especially true with regard to police officers.87 Police officers such as Mary Lu Redmond are subjected to stressful situations in the line of duty on a daily basis.88 Many times, officers will need to seek counseling in regard to specific incidents that occur while on duty, as did Officer Redmond in this case.89 Critical to an officer's mental health is the need for that officer to reveal the facts surrounding the incident without fear that his or her communications will be disclosed to third parties.90 Therefore, argued the defendants, in order for there to be effective therapy for a police officer or an ordinary citizen, the courts must assure the patient confidentiality at all cost.91

The defendants also contended that experience requires the Court to adopt the psychotherapist-patient privilege,92 noting that all fifty states have adopted some form of the psychotherapist-patient privilege.93 The defendants responded to the plaintiffs by pointing out that although some states do have exceptions to the privilege, it is not logical to reject entirely the psychotherapist-patient privilege for this reason.94

Moreover, the defendants urged that the privilege should apply to clinical social workers, such as Karen Beyer, as well as to psychothera-

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83. Id. See generally Ralph Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 WAYNE L. REV. 175, 184–85 (1960).
84. Brief for Respondent at *22.
85. Id. at *22–23.
88. Id.
89. Id. at *19–20.
90. Id. at *20.
91. Id. at *22.
93. See statutes cited supra note 55.
In rebuttal to the plaintiffs' argument in regard to proposed rule 504, the defendants pointed out that at the time Congress drafted rule 504, the social work profession was in "early adolescence." However, since that time, the social worker has become prevalent in the field of mental health. This is especially true since many people who cannot afford a psychologist or psychiatrist will often seek out the help of a social worker at a lesser expense. In light of the social worker's increased role in the field of mental health, it would be unfair to allow the privilege for psychotherapists and not social workers.

Finally, agreeing with the court of appeals, the defendants conceded that the privilege was not absolute. In every case, in order for the privilege to apply, the need for confidential communications between a psychotherapist and patient must be outweighed by the desire to include all relevant evidence at trial. In this case, the appellate court concluded, the plaintiffs had alternative evidence which would have served the same purpose as the notes of Karen Beyer. Specifically, numerous eyewitness accounts of the shooting were used to impeach Officer Redmond's testimony. Conversely, as indicated, Officer Redmond's need to have her conversations protected are essential to her work as a police officer. Hence, the defendants concluded that the Court should affirm the decision of the appellate court.

C. The Majority Opinion

As it had been for the appellate court, the framework for the Supreme Court's decision in Jaffee was the Federal Rules of Evidence. The Court reasoned that rule 501 was not intended to freeze the law of privileges but

95. Id.
96. Id. at *30–31.
97. Id. at *31.
98. Id.
100. Id. at *12.
101. Id.
102. Id. at *35–37.
103. Id. at *37.
105. Id.
rather to encourage the federal courts to continue to develop evidentiary privileges in light of reason and experience.\textsuperscript{107}

First, the majority conceded that past decisions indicated there should be a strong presumption against creating new evidentiary privileges.\textsuperscript{108} However, the Court noted that new privileges can be justified by ""public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.""\textsuperscript{109}

Like the appellate court, the majority relied heavily on public policy.\textsuperscript{110} The Court stated that like other privileges that have been adopted at common law, the psychotherapist-patient privilege is ""rooted in the imperative need for confidence and trust.""\textsuperscript{111} The majority concurred with the defendants' proposition that like the attorney-client privilege, effective therapy depends on open and candid communications.\textsuperscript{112}

The Supreme Court also adopted the defendants' view, and that of the court of appeals, that experience mandates the creation of the psychotherapist-patient privilege.\textsuperscript{113} The fact that the states have unanimously agreed that some form of the privilege should exist strongly suggests that experience with the privilege has been positive.\textsuperscript{114}

The majority also ruled the privilege should apply to clinical social workers as well as psychotherapists.\textsuperscript{115} Again, the rationale for extending the parameters of the privilege was that the privilege would not serve its purpose to society if not extended to social workers.\textsuperscript{116}

Up until this point, the majority was in agreement with the court of appeals ruling; however, the majority did not agree with the appellate court's finding that the privilege should be a qualified one.\textsuperscript{117} The Court expressed that the privilege would be undermined if judges were to subject the privilege to a balancing test in each and every case as the appellate court had suggested.\textsuperscript{118} In order for the privilege to be effective, the parties to the

\begin{itemize}
\item \textsuperscript{107} Id. at 1927.
\item \textsuperscript{108} Id. at 1928.
\item \textsuperscript{109} Id. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).
\item \textsuperscript{110} Id. at 1929.
\item \textsuperscript{111} Jaffee, 116 S. Ct. at 1928 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 1930.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 1931.
\item \textsuperscript{116} Jaffee, 116 S. Ct at 1931.
\item \textsuperscript{117} Id. at 1932.
\item \textsuperscript{118} Id.
\end{itemize}
conversation "must be able to predict with some degree of certainty whether particular discussions will be protected." The Court concluded, however, that there was no need to develop the full scope of the privilege nor would it be feasible to do so here and left that for future courts to decide.

D. The Dissenting Opinion

In a vigorous dissent, Justice Scalia accused the majority of having incorrectly framed the main issue. Most of the majority opinion was devoted to the question of whether the federal courts should, generally speaking, recognize a psychotherapist-patient privilege. Justice Scalia contended that the only proper question before the Court was whether there should be a social worker-patient privilege. Further, Justice Scalia argued that to frame the issue as the majority had was deceptive and countermanded the Court's earlier decisions requiring it to proceed with caution when developing new evidentiary privileges.

The dissent contended that there is no real evidence to support the assertion that refusing to recognize the privilege would hinder effective psychotherapy, as the majority suggested. Justice Scalia thought it unlikely that an individual will be deterred from seeking counseling merely because he fears his conversations will be disclosed during litigation. Even if the privilege were to exist, the effect it would have on encouraging open communications is at best speculative, urged Justice Scalia. While Justice Scalia, with the majority, agreed that psychotherapy is indeed an essential part of our society, he contended that relevant evidence, in order to ascertain the truth at trial, outweighs that need.

In addition, Justice Scalia asserted that the disagreement among the states as to the nature and scope of the psychotherapist-patient privilege indicates that this is a job for Congress rather than the courts. He pointed to the fact that several states have expressed many exceptions to the privi-
lege and that at least ten states have refused to recognize an evidentiary privilege at all for a social worker. To the dissent, this lack of uniformity suggests that experience with the privilege varies widely among the states. Justice Scalia pointed out that no state has adopted the psychotherapist-patient privilege without restriction as the majority did here. Therefore, according to Justice Scalia's dissent, the majority's reliance on the experience of state legislatures in adopting the privilege was inadequate.

Justice Scalia conceded that, theoretically, perhaps there should be a privilege for social workers and their patients. However, considering the federal courts' authority under rule 501, and the presumption against privileges in general, any need for an evidentiary privilege is outweighed by the need for accurate truth finding at trial. There were fourteen amicus briefs submitted on behalf of the defendants in this case. Most of those briefs came from mental health organizations in support of confidential communications between a mental health worker and her patient. On the other hand, there was not a single amicus in favor of the plaintiffs. According to Justice Scalia, perhaps this is because "[t]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts."

In closing, Justice Scalia expressed disenchantment with what he believed was the Court's failure to live up to the expectation that it will pursue truth, and as a result, Justice Scalia believes, federal courts will become "tools of injustice."

E. Analysis of Jaffee v. Redmond

One would be hard pressed to find fault with the majority's view that full, open, and honest disclosure by patients to mental health professionals is crucial to effective therapy and recovery. Unlike doctors, psychiatrists,
psychologists, and social workers do not rely heavily upon physiological indicia to analyze a patient's problem or to determine an appropriate course of therapy. While biological factors sometimes play a part in certain mental illnesses like schizophrenia or depression, a tongue depressor in the mouth, a stethoscope to the heart or a computerized axial tomography are not methods of exploration primarily employed by mental health professionals. Rather, it is largely talk—what the patient says—that provides the mental health professional with the key that unlocks the door to the patient's particular problems. When, out of fear of reprisal, the subject is highly motivated to suppress information that would otherwise help to give a clear and accurate picture to the therapist, the therapist is vastly impeded from providing effective therapy. According to a report of the Group for the Advancement of Psychiatry, "confidentiality is a sine qua non for successful psychiatric treatment." It would be like a tailor trying to make a suit for somebody without knowing all of the subject's measurements. Counseling that is given in the wake of concealment of the facts or the provision of half truths by the subject renders that counseling a product of ignorance. It is axiomatic that a mentally sound populace is an absolute prerequisite to a stable and productive society. Therefore, given the plethora of mental health problems, ranging from the serious to the extremely acute, that have plagued Americans in recent times, rules of law that profoundly impair effective mental health treatment must be questioned and carefully scrutinized.

We probably will never know what Officer Redmond told her social worker in the aftermath of a terrible tragedy wherein Officer Redmond was the direct instrument of another human being's demise. We do know, however, that most people in Officer Redmond's shoes who harbored even the slightest degree of uncertainty as to whether some act or omission could result in significant penal or pecuniary repercussions to them, would remain silent as to those particulars. It may be that the act or omission in question was completely justifiable from an objective standpoint, yet as the Jaffee majority wisely noted, the fear of uncertainty that what patients say will

142. Id. See also Amicus Brief, Jaffee v. Redmond, No. 95-266, 1995 WL 767892 (U.S. Dec. 29, 1995).
143. Jaffee, 116 S. Ct. at 1928 (citations omitted).
144. See generally Jaffee v. Redmond, 116 S. Ct. 1923 (1996); Jaffee v. Redmond, 51 F.3d 1346 (1995); Amicus Brief, Jaffee, (No. 95-266).
come back to haunt them will cause them to remain mute or distort the facts.\textsuperscript{146} Therapy sessions would then often be relegated to exercises in futility with the therapist flying blind and the subject deriving little or no benefit since the root of the problem never comes to light.\textsuperscript{147}

Zeroing in on the situation of police officers in particular, the \textit{Jaffee} majority’s line of reasoning is persuasive. Implicit in this reasoning is a premise that few would challenge. That is, society needs to have its police officers in a good state of mental health.\textsuperscript{148} In order to maintain this state of mental health among these protectors of society, one must encourage them to divulge each and every aspect of the particular stressful situation which led to the need for counseling in the first place.\textsuperscript{149} Thus, one must not adhere to rules of jurisprudence which will have a chilling effect upon complete disclosure. From this point of departure, there is certainly no great leap in logic involved in applying this reasoning to our citizenry as a whole. For who would dispute that society is nothing more than a collective of individuals and that the mental health of these individuals determines, in turn, the degree of stability of that society? The majority’s logic in \textit{Jaffee} is unassailable if one accepts the premise that complete candor to the therapist is necessary to effective therapy.

However, there is at least one very vocal opponent to that premise, namely Justice Scalia, whose dissent will be discussed.\textsuperscript{150} The central thesis of Justice Scalia’s dissent is weak on its face. His contention is that regardless of any benefit that may inure to society through recognition of a psychotherapist-patient privilege, the “purchase price” of that benefit is too high.\textsuperscript{151} What is this metaphorical “purchase price” to which Justice Scalia refers? According to him, it is that of “occasional injustice.”\textsuperscript{152} Not rampant injustice, or even frequent injustice, but rather “occasional injustice.” What Justice Scalia must be referring to are those instances where the only proof that one engaged in culpable conduct is his or her admission to a therapist and where there is no separate and independent evidence of culpability. The flaw in the dissent’s approach, however, is that if no privilege is recognized, the whole truth will not be disclosed to therapists during counseling.

\textsuperscript{146} \textit{Jaffee}, 116 S. Ct. at 1928.
\textsuperscript{147} \textit{Id.} (citations omitted).
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 1929.
\textsuperscript{150} \textit{Id.} at 1932 (Scalia, J., dissenting).
\textsuperscript{151} \textit{Jaffee}, 116 S. Ct. at 1932.
\textsuperscript{152} \textit{Id.}
Therefore, justice will not be served anyway because therapists cannot testify about that which they do not know. And certainly, if, in a given case, there were to exist some independent evidence, the mere fact that a defendant had made incriminating admissions to a therapist would not shield that defendant from the inculpatory effect of such independent evidence. Thus, with or without the privilege, in the vast majority of cases, the state or plaintiff will have to prove the case without resort to the testimony of the defendant's therapist. Moreover, "occasional injustice" is not an unduly high price to pay for the benefit of maintaining solid mental health among members of society. Only if one accepts the notion that professional therapy is not an effective means of dealing with mental health problems can he buy Justice Scalia's apparent assertion that the cost of recognizing a privilege here is too high. In fact, it is Justice Scalia's position that a talk with "mom" has more therapeutic value than professional counseling.\textsuperscript{153} No wonder that to him instances of injustice for the few cannot be tolerated for the sake of facilitating professional treatment for the many. Scalia contends that the "average citizen," if questioned, would say that his mental health would be more impaired if he were prevented from getting advice from his mother than by being prevented from talking to a psychotherapist.\textsuperscript{154} The response to this is, so what? Justice Scalia's assertion completely begs the question. It is akin to saying: X is more valuable than Y; therefore, Y has little or no value. Furthermore, people do not have to choose between their mother and a therapist. Indeed, there may be a significant portion of the population which would admit that, notwithstanding filial love and devotion, they were actually driven into therapy by too much unsolicited advice from their mothers!

Justice Scalia goes on to compare the psychotherapist-patient privilege to the situation where evidence is excluded because a criminal defendant has not been properly "Mirandized."\textsuperscript{155} In the latter situation that pontificates Justice Scalia, "the victim of the injustice is always the impersonal State [sic] or the "faceless 'public at large.'"\textsuperscript{156} However, this is far from true. Certainly, it is an extremely bitter pill for the family and friends of the victim of a cold-blooded homicide to see the perpetrator "walk," simply because the

\textsuperscript{153} Id. at 1934.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 1932. \textit{See generally} WAYNE R. LAFAYE \& JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1 (2d ed. 1992) (discussing the effects of the exclusionary rule in criminal cases).
\textsuperscript{156} Jaffee, 116 S. Ct. at 1932.
police made a procedural mistake. The loved ones of the decedent must go on each day haunted by the legacy of the private injustice which they have suffered. These loved ones are far more the victims of this injustice than an abstract “impersonal State” [sic] or “faceless public at large.” These victims have faces and they certainly have feelings. This is not to suggest that Scalia is any great patron of the exclusionary rule and, true to his ultra-conservative judicial philosophy, both the psychotherapist-patient privilege and the Fifth Amendment privilege against self-incrimination would be unceremoniously dragged out to the chopping block if he had his druthers. In the end, the price of perfect justice, as it would be in Justice Scalia’s grand design, could ultimately be nothing short of complete eradication of constitutional protections for all defendants. The “purchase price” (to use Justice Scalia’s term) of this would be monumentally higher than the price of “occasional injustice” about which he struts and frets.

Another main contention by the dissent is that even assuming that the federal courts should somehow recognize a psychotherapist-patient privilege, communications to “social workers” should not be embraced within that privilege. Why does Justice Scalia feel that way? His answer is that through the annals of history, we have “worked out [our] difficulties by talking to, inter alios, parents, siblings, best friends and bartenders—all of whom was awarded a privilege against testifying in court.” First of all, a privilege is not an “award,” it is a rule of evidence based on reason and social policy reflecting the complex realities of contemporary society, not of some antiquated agrarian society. Second, even if a privilege were an award, it is not the recipient of the information that is awarded the privilege; rather, it is the communicator of the information who enjoys the benefit, and by proxy, all members of society, who could someday find themselves needing counseling just as Officer Redmond did in this case. Third, unlike licensed social workers, bartenders, parents, and siblings are not professionals trained to deal with mental problems which are often complicated, acute and deeply rooted. When one is thirsty and wants to relax, one does not go to a social worker to mix a drink, just as they would not seek out a bartender

157. Id.
158. U.S. CONST. amend. V. (“No person shall... be compelled in any criminal case to be a witness against himself...”).
160. Id. at 1936.
161. Id. at 1934.
162. See generally MCCORMICK, supra note 5, § 72 (discussing the purpose of evidentiary privileges).
to get their head on straight following some traumatic experience. Indeed, if one chose the mixologist as their psychological mentor in lieu of a trained, experienced professional, then one’s judgment would be open to serious question. And regarding one’s mother, one doubts that a bowl of chicken soup and a loving hug would provide more than a temporary fix to a problem.

Justice Scalia further contends that to broaden the psychotherapist-patient privilege to include a social worker is like broadening the lawyer-client privilege to include a “legal advisor.” While it is not clear what the Justice means when he uses the term “legal advisor,” he is implicitly drawing an analogy—to wit, social workers are to psychotherapists as legal advisors are to lawyers. This analogy cannot withstand even minimal, logical scrutiny. Social workers are trained, tested, and then authorized by the state through licensure to provide mental health therapy to people. Conversely, there is no such thing as a “legal advisor,” other than an attorney, in the eyes of the state. Only lawyers can give legal advice, and states have statutes making it a crime for anyone other than a lawyer to dispense legal advice. Social workers are in the trenches. They often work with children and the disadvantaged, those who cannot afford a high priced “shrink” who takes notes and nods empathetically as the patient on the couch spills his or her guts. Unlike Justice Scalia, one should not believe it is in the spirit of rule 501, to exclude social workers from the ambit of a psychotherapist-patient privilege merely because the drafters of the rules specifically included psychologists and psychiatrists. There is nothing in the committee’s recommendations excluding social workers. Splitting linguistic hairs serves no one. In substance, social workers are positive forces in fostering the mental health of our people, arguably as much, or even more so than psychiatrists and psychologists do. Moreover, the

167. Id. at 1932.
168. Fed. R. Evid. 501. See Senate and House committees’ notes following the rule, in which there is no express language indicating a desire to exclude social workers from any future adoption of the psychotherapist-patient privilege. Id.
Supreme Court was given the elasticity by Congress to recognize those privileges which "experience" and "reason" show should be recognized. The scientific evidence shows that in the last few decades the need for and usefulness of social workers has increased dramatically, way beyond what it was in 1972 when the committee drafted the proposals and recommendations. Therefore, in accordance with reason and experience, confidential communications to social workers should not be excluded from the protection of the privilege. Instead, given the deluge of mental health services provided by these, for the most part, dedicated professionals, experience has taught us that there is every reason to extend the privilege to include them.

IV. CONCLUSION

In the aftermath of Jaffee, there exists in the federal courts an evidentiary privilege between a psychotherapist and her patient. More expansively, Jaffee also means that the psychotherapist-patient privilege will extend to social workers as well. The privilege is not a qualified privilege but an absolute privilege protecting all confidential communications between a therapist and patient.

What does this mean to the future of evidentiary privileges in the federal court system? The Supreme Court made it clear that the contours of the psychotherapist-patient privilege were to be developed by future courts applying Jaffee to specific situations. This statement paves the way for future courts to chip away at the holding in Jaffee by creating exceptions and limiting its scope. Conversely, it opens the door to even further broadening of the privilege.

However, Justice Scalia seems to think that a "search for the truth" is such that everything must be uncovered and laid bare regardless of the cost to privacy or mental health. This type of absolutist thinking is dangerous. Where will this "search for the truth" end? If we speak of truth without counterbalancing important societal interests like mental health, we can

170. See Fed. R. Evid. 501, supra note 10; Jaffee, 116 S. Ct. at 1932; see also Wolfle v. United States, 291 U.S. 7 (1934). The language incorporated in rule 501 was actually borrowed from the majority opinion in Wolfle. See Wolfle, 291 U.S. at 12.
171. Jaffee, 116 S. Ct. at 1931 n.16.
172. Id. at 1932.
173. Id.
174. Id.
175. Id.
176. Jaffee, 116 S. Ct. at 1940 (citations omitted).
begin to justify more systematic incursions by our government. Ultimately, our rationale of “search for the truth” could become irrational and irreconcilable with democracy and reason. The direct result of this could be that at-will, warrantless searches of citizens’ houses and persons would become the order of the day. The majority’s view, vis-à-vis the dissent’s here, is somewhat of a line drawing game. It boils down to values, which are of course, subjective. There may not be a “right” answer to the question of whether a psychotherapist-patient privilege is a benefit worth the cost of Scalia’s “occasional injustice.” Many different values have been represented by many different judicial compositions of the various Supreme Courts throughout our history. However, Justice Scalia (along with Justice Rehnquist who joined Justice Scalia’s dissent in part) is distinctly in the minority among his colleagues, who have wisely allowed experience and reason to prevail in Jaffee.

Jason L. Gunter
Confronting Indecent Cable Television Programming: Balancing the Interests of Children and the Exercise of Free Speech in Denver Area Educational Telecommunications Consortium, Inc. v. FCC

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 741

II. HISTORICAL ANALYSIS ............................................................................................. 743
   A. The Threshold of Obscenity: Miller v. California ................................................... 743
   B. A Pervasive Medium: FCC v. Pacifica Foundation ................................................. 745
   C. Narrowing the Means: Sable Communications of California, Inc. v. FCC .............. 746

III. REGULATING THE CABLE TELEVISION MEDIUM .................................................... 748
   A. The Cable Communications Policy Act of 1984 ..................................................... 748

IV. JUDICIAL HISTORY OF DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. V. FCC ................................................................. 750
   A. Alliance for Community Media v. FCC: The Panel Decision ................................... 750
   B. Alliance for Community Media v. FCC: The En Banc Decision .............................. 753

V. DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. V. FCC .................................................................................................................. 755
   A. Justice Breyer: Setting a New Standard ................................................................. 755
   B. Justice O'Connor: Keeping an Eye on the Children ................................................. 765
   C. Justice Kennedy: Adherence to Strict Scrutiny ....................................................... 766
   D. Justice Thomas: Supporting the Cable Operators ................................................. 770

VI. CONCLUSION ............................................................................................................... 773
   A. Keeping an Eye on the Future .................................................................................. 773
   B. The Benefits of Parental Authority ........................................................................ 775

I. INTRODUCTION

In recent history, courts have been repeatedly confronted with issues involving indecency in literature, on the telephone, over the radio, and on
television. As purveyors of indecent messages, both visual and audio, become more adept at communicating their messages to an increasing number of people, much concern has been expressed over those who inadvertently receive communications of sexually explicit adult material. Although the target audience of pornography peddlers, and of those entrepreneurs whose products are of a more benign nature, may be mature adults, there is little question that this target is not always accurately hit.

Children are receiving products and messages from which they should be protected until such time as they are mature and old enough to legally and morally decide what they want to see, hear, and do. The majority of distributors of indecent materials are undoubtedly lawful and moral businessmen and entrepreneurs, striving to make a profit by making accessibility to their products by an adult audience as easy as possible. Amidst this frantic race for profits, however, sexually explicit materials and messages are often carelessly distributed by mail, broadcast over airwaves, and transmitted over telephone wires. The individuals who create these messages are either ignorant of this budding problem or disinclined to adjust their marketing practices for fear of economic repercussions. Regardless, the inadvertent exposure of sexually explicit materials to minors has become a problem of epidemic proportion, forcing the issue to be confronted by the United States Supreme Court on more than one occasion.

Few of the Supreme Court decisions regarding indecency offer clear standards by which to resolve comparable issues. Those cases which are decided are often done so in terms exclusive to that medium, be it telephone, radio, or television. This practice of narrowness in Supreme Court decisions involving First Amendment protection indicates an unwillingness on the part of the Court to enforce restrictions on specified types of speech in all media. This reluctance further indicates an inclination by the Court to preserve the constitutionally protected right to free speech held invaluable by each citizen of the United States. The downside of this practice is that each subsequent court that is faced with a First Amendment issue is forced to determine which bits and pieces of previous decisions are applicable to the situation at hand and to piece those bits into a coherent decision. Recent decisions, therefore, often involve incongruous combinations of established doctrine and modern technology. As a result, the resolution of disputes in this area of the law are often unpredictable.
One of the most recent Supreme Court decisions regarding indecency is Denver Area Educational Telecommunications Consortium, Inc. v. FCC. In this case, a statute authorizing cable operators to prohibit indecent speech was challenged by a group of cable programmers and viewers. Part II of this article will examine recent Supreme Court cases which have confronted obscenity and indecency, since many of the issues discussed in these cases reemerge in the context of cable television in Denver. These cases have defined the terms and established the levels of First Amendment protection afforded indecent and obscene messages. It is from this foundation that the United States Supreme Court will derive its principles to analyze the Denver case. Part III will explain the substance and effect of sections 10(a), 10(b), and 10(c) of the 1992 Cable Television Consumer Protection and Competition Act of 1992, the Act challenged in Denver. Part IV will follow the case history of Denver prior to the Supreme Court granting a writ of certiorari. Part V will examine the decision of the Court, paying careful attention to the plurality opinion written by Justice Breyer and examining separate opinions written by Justice O'Connor, Justice Kennedy, and Justice Thomas, each of whom differ in their views regarding how this case should have been decided. Finally, Part VI will argue that, although the plurality attempted to strike a balance between the protection of children and the exercise of free speech, it overlooked the most effective and inexpensive means of protecting children from exposure to indecent cable television programming and may have inadvertently set the stage for future First Amendment legal battles.

II. HISTORICAL ANALYSIS

A. The Threshold of Obscenity: Miller v. California

Before determining the standard by which to regulate indecent materials, the United States Supreme Court was faced with the task of evaluating the regulation of obscene materials. The threshold determination in deciding how to prevent inadvertent exposure to obscene materials by children was defining the term "obscene." This issue was decided by the Supreme Court in Miller v. California. Miller advertised the sale of adult literature by mass mailing sexually explicit brochures, one of which was received, unsolicited, by a man and his mother. Miller was convicted of violating section 311.2(a)

3. Id. at 16–18.
of the California Penal Code, which deemed any person distributing obscene materials through the mail guilty of a misdemeanor.\(^4\) The Court began its analysis in *Miller* by reaffirming the established tenet that obscene material is not protected by the First Amendment.\(^5\) Acknowledging the inherent risks involved in regulating an individual’s freedom of expression, the Supreme Court limited the scope of the regulation to materials which describe or display sexual conduct only.\(^6\) The Court proceeded to establish guidelines by which to determine what constitutes obscenity. Among the considerations are: 1) whether an average person applying contemporary community standards would find the material to have a “prurient appeal;” 2) whether the material depicts sexual activity in a patently offensive manner; and 3) whether the material lacks significant literary, cultural, or scientific value.\(^7\) Perhaps the most important attribute of obscene materials under this formulation is the degree of prurient content as judged by contemporary community standards. The Court reasoned it would be unrealistic and futile to attempt to articulate a single standard, given the expansive and diverse American population.\(^8\) This *Miller* standard of obscenity impacts future decisions regarding indecency, including *Denver*, as it sets forth definitive guidelines by which to judge constitutionally unprotected materials.

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4. *Id.* at 16–17. This section at the time read:

Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state “(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has, in, his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . . .”


5. *Id.* at 23 (citing *Kois* v. Wisconsin, 408 U.S. 229 (1992); *United States* v. *Reidel*, 402 U.S. 351, 354 (1971); *Roth* v. *United States*, 354 U.S. 476, 485 (1957)). In *Roth*, the Supreme Court upheld a conviction under a federal statute prohibiting the mailing of obscene, lewd, lascivious, or filthy materials. The opinion stated:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

*Roth*, 354 U.S. at 484.


7. *Id.* at 24.

8. *Id.* at 30.
B. A Pervasive Medium: FCC v. Pacifica Foundation

The regulation of potentially offensive communications was further examined in the medium of radio broadcasting in *FCC v. Pacifica Foundation*.9 A New York radio station, owned by Pacifica Foundation, aired a monologue entitled “Filthy Words” during an afternoon broadcast as performed by comedian George Carlin.10 A man wrote a letter of complaint to the FCC a few weeks later, explaining that he and his young son heard the broadcast and expressing his discontent with the FCC for allowing the program to be aired.11 In an effort to address growing concerns about indecent speech over the airwaves, the FCC turned to 18 U.S.C. § 1464, which provides: “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.”12 The FCC determined the monologue to be indecent, defining “indecent” as “intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”13 Utilizing many of the same terms used to define obscenity in *Miller*, the FCC implemented a community based standard by which to judge indecency. This definition was tailored to protect children from indecent broadcasts to the greatest extent possible. Recognizing the possibility of its order violating the First Amendment, the FCC issued an opinion following its declaration of the monologue as indecent. The FCC stated that it never intended to absolutely prohibit indecent broadcasts, but rather it sought to reduce the risk of exposure to children by channeling that type of programming into time periods when children are least likely to be listening.14

In determining the broadcast to be indecent, the FCC identified several words and phrases in the monologue that repeatedly described sexual and

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10. *Id.* at 729. Carlin’s monologue began: “I was thinking about the curse words and the swear words, the cuss words and the words that you can’t say, that you’re not supposed to say all the time, ['cause words or people into words want to hear your words.” *Id.* at 751. He proceeded to repeat curse words over and over, using them in different contexts and as colloquialisms.
11. *Id.* at 730.
14. *Id.* at 732–33.
excretory activity. Furthermore, the broadcast was aired in the afternoon when children were likely to be listening, therefore making the broadcast patently offensive and indecent. Pacifica Foundation conceded the broadcast was patently offensive but argued the broadcast was not indecent within the meaning of 18 U.S.C. § 1464, claiming the term “indecent” is synonymous with “obscene.” The essential element of “obscenity,” and thus “indecency,” under Pacifica’s reasoning, is prurient appeal. Upon examining the text of the monologue, it is apparent no such prurient appeal exists. The Supreme Court rejected this argument, however, noting the language of 18 U.S.C § 1464 prohibits “obscene, indecent, or profane” language, implying each phrase was meant by Congress to be construed separately.

The Court further determined the statute was not overbroad because it was issued in a specific, factual context, which is an important consideration when reviewing the regulation of indecent communications. The Court explained that radio broadcasting has received the most limited constitutional protection of all media thus far, justifying this limitation in the context of the broadcasting medium. Broadcasting, stated the Court, has “established a uniquely pervasive presence in the lives of all Americans.” This pervasiveness is so great that citizens, including children, may be subjected to unexpected indecent programming while listening at home due to the tendency of listeners to tune in and out. Section 1464 was subsequently deemed a constitutionally permissible method of regulating the broadcasting medium.

C. Narrowing the Means: Sable Communications of California, Inc. v. FCC

More recently, the Supreme Court decided the constitutionality of section 223(b) of the Communications Act of 1934, as amended in 1988,
which imposed an outright ban on indecent and obscene interstate commercial telephone messages. This issue was decided in Sable Communications of California, Inc. v. FCC. Sable operated a dial-a-porn business offering prerecorded sexually explicit phone messages. Sable sought to enjoin the FCC from prosecuting the company under section 223(b).

The Court began its opinion by reiterating the message that First Amendment protection does not protect obscene speech. The Court proceeded to reject Sable's contention that section 223(b) attempts to mandate a national standard of obscenity in violation of the "community standards" requirement established in Miller. The Court asserted that, in light of this varying standard, Sable would have had to bear the costs of conforming its interstate messages to local community standards if it sought to continue providing obscene messages. The Court declined to determine whether the messages provided by Sable were, in fact, obscene, but rather attempted to determine whether Congress may prohibit those messages, whether viewed to be indecent or obscene.

In order for Congress to permissibly restrict this type of speech, it must first demonstrate it is attempting to further a compelling government interest. The Court identified the compelling interest that was being served by the statute as the "physical and psychological well-being of minors." While this interest is compelling, to withstand strict scrutiny, the statute must also be narrowly drawn and designed to serve this compelling interest without unnecessarily interfering with the exercise of the First Amendment. In support of the statute, the government argued that a total ban on indecent telephone messages was justified because it was the least restrictive means of preventing children from gaining access to those messages. The Court rejected the argument that alternatives to an outright ban, such as credit cards, access codes, and scrambling devices, would not effectively promote

26. Id. at 124.
27. Id. at 124–25. In Hamling v. United States, 418 U.S. 87 (1974), the Court stated: "The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of a failure of application of uniform national standards of obscenity." Id. at 106.
28. Sable, 492 U.S. at 124.
29. Id. at 126.
30. Id.
31. Id. at 128.
the compelling interest, noting that no evidence had been presented to support this conclusion. The statute therefore denied adult access to indecent phone messages in a manner which far exceeded the precautions necessary to protect children from receiving those messages.

In an attempt to support the validity of the statute, the government cited Pacifica as an example of the Supreme Court upholding the regulation of indecent programming. The Court rejected this comparison, noting that the Pacifica Court emphasized the narrowness of that decision. The Court further differentiated between the contexts of the two decisions. Pacifica did not involve a total ban on indecent broadcasting. Rather, the FCC wanted to broadcast indecent programming during time periods that would be less likely to promote exposure to children. Section 223(b), meanwhile, mandated an outright ban on the dial-a-porn service. In addition, the media of broadcasting and telephone communications inherently differ in degrees of pervasiveness. Whereas radio broadcasting is extremely pervasive and intrudes into the privacy of the home, making a telephone call involves an affirmative action, thus reducing the risk that an unwilling or underage caller might accidentally be exposed to sexually explicit messages.

III. REGULATING THE CABLE TELEVISION MEDIUM

A. The Cable Communications Policy Act of 1984

Cable television channels originated in the late 1960s, as cable operators received franchises from local governments. As the cable industry grew, Congress enacted the Cable Communications Policy Act in 1984 in an effort to "promote competition in the delivery of diverse sources of video

32. Id. at 128–29. The lack of evidence supporting this conclusion was due to the fact that the FCC implemented these safeguards in 1988, and the effects of these measures have not yet been calculated. Sable, 492 U.S. at 128.
33. Id. at 131. Justice White, delivering the opinion of the court, described the effect of section 223(b) as another case of "burn[ing] the house to roast the pig." Id. (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).
34. Pacifica, 438 U.S. at 733.
35. Sable, 492 U.S. at 127–28. The Court addressed inadvertent exposure by children to indecent programming, stating: "Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." Id. at 128. In regards to children who intentionally seek out those messages, the Court conceded: "It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system." Id. at 130.
programming and to assure that the widest possible diversity of information sources are made available to the public ... .”

The Act required the cable operators to set aside a certain number of channels, depending upon the total number of channels available in that area, for commercial lease by unaffiliated third parties. These channels reserved for private parties became known as leased access channels. The Act further permitted local governments to require operators to set aside certain channels for “public, educational, or governmental use.” These channels became known as public access channels. When Congress initially enacted the Act, it forbade cable operators from regulating programming on both leased access and public access channels.

B. The Cable Television Consumer Protection and Competition Act of 1992

Years later, Congress confronted what it believed to be a serious threat to the well-being of the American public. Senator Jesse Helms of North Carolina explained “that cable companies are required by law to carry, on leased access channels, any and every program that comes along—no matter how offensive and disgusting.” These programs often included indecent material of a sexually explicit nature. Congress was concerned that “early and sustained exposure to hard core pornography can result in significant physical, psychological, and social damage to a child.”

37. 47 U.S.C. § 532(b) (1988). The terms of section 532 require cable operators with 36 or more channels to designate 10% for commercial lease and 55 or more channels to designate 15%. Id. Cable operators with fewer than 36 active channels are exempt from these requirements. Id.
39. Public access channels are also called PEG channels.
40. See 47 U.S.C. §§ 531(e), 532(c)(2).
41. 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). Senator Helms continued: “The end result is perverted and disgusting programs mixed with religious and health shows. These leased access channels were intended to promote diversity, but instead they promote perversity.” Id.
42. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Coats). In support of this correlation, Senator Coats referred to the sexually exploited child unit of the Los Angeles Police Department who have “long known that pornography is often employed by offenders in the extrafamilial sexual victimization of children.” Senator Coats also cited a study conducted by Dr. Zillman of Indiana University, in which pornography was reported to promote the victimization of women and a more lenient view of rape and bestiality. Id.
In response to the growing threat to American children, Congress enacted sections 10(a), 10(b), and 10(c) of the 1992 Cable Communication Policy Act ("Cable Act"). Section 10(a) of the Cable Act permitted cable operators to enforce "a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards" on leased access channels. Section 10(b) required cable operators who permit indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. The plague of indecent programming was not limited to leased access channels. Section 10(c) further permitted cable operators to prohibit the use of public access channels for any programming which contained obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. The section concerning public access channels was not accompanied by a segregate and block requirement for those indecent programs the operator chooses not to ban.

IV. JUDICIAL HISTORY OF DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. v. FCC

A. Alliance for Community Media v. FCC: The Panel Decision

In Alliance for Community Media v. FCC, four groups of cable programmers, listeners, and viewers petitioned for review of sections 10(a), 10(b), and 10(c) of the Cable Act. The petitioners were individually comprised of representatives from: 1) Alliance for Community Media, Alliance for Communications Democracy, and People for the American Way; 2) Denver Area Educational Telecommunications Consortium; 3) American Civil Liberties Union; and 4) New York Citizens Committee for Responsible Media, and Media Access New York, Brooklyn Producers' Group. Each filed suit seeking review of the statute. The four petitions were consolidated

44. Id. § 532(j).
45. Id. § 531.
46. Id.
and heard by a panel consisting of three United States Court of Appeals judges on September 14, 1993. The panel identified two primary constitutional issues that could be extrapolated from the case. First, when the government passes a law requiring cable operators to reserve a certain number of access channels for general use without regard to content, may the government then constitutionally permit cable operators to prohibit indecent programming from being televised? Second, if cable operators do not exercise their power to ban indecent programming, may the government require the cable operator to segregate and block indecent programming on access channels? The panel rejected the government's argument that the statute authorizing cable operators to ban indecent programming does not implicate the First Amendment because no state action exists. The government claimed that the action is being performed by private individuals, namely the cable operators, and not the government. The panel asserted that a private individual may be subject to First Amendment scrutiny if the state significantly encourages the private individuals to commit the act in question. The panel determined that sections 10(a) and 10(c) constituted an adequate amount of encouragement on the part of the government and therefore involved state action.

The panel then turned to the sections of the Cable Act themselves to determine what level of scrutiny should apply. Sections 10(a) and 10(c) attempt to regulate and prohibit programming based solely on whether that programming may be deemed indecent. These sections were therefore

48. Id. at 816.
49. Id. at 817.
50. Id. at 818.
51. Id.
52. Alliance I, 10 F.3d at 818. In support of this assertion, the panel cited Franz v. United States, 707 F.2d 582, 592 (D.C. Cir. 1983), in which the court held that the government's encouragement, through the witness protection program, of a mother's decision to keep children away from their father constituted state action. Id. The Franz court stated:

It is clear that the defendants, by accepting Catherine and the children into the program along with Allen, are largely responsible for the success of Catherine's effort to deny William access to his offspring. Without the aid of the administrators of the program in providing her with a new identity, Catherine almost certainly would not have been able to frustrate William's attempts to exercise and enforce his visitation rights; with that aid, she has been able to act with impunity.

Id. at 591–92.
53. Alliance I, 10 F.3d at 818.
interpreted by the court as content-based restrictions on free speech. The restrictions may have been constitutionally permissible, however, if the means promoted a compelling interest and constituted the least restrictive means to promote that interest.

The protection of children from indecent materials has long been recognized by the court as a compelling interest. The panel was not convinced, however, that sections 10(a) and 10(c) provided the least restrictive means to promote this interest. The total denial of access to indecent material, a ban which would affect children and adults alike, could result in the adult television viewing population receiving only programming that is fit for children. The panel further pointed to the fact that Congress has provided a less restrictive means to promote its objective within the text of the Cable Act itself. The panel asserted that by providing the cable operator with the choice of either totally banning indecent programming or segregating that programming to a separate channel and blocking it, Congress has suggested that there may exist a less restrictive but completely adequate alternative to an outright ban. Sections 10(a) and 10(c), therefore, did not constitute the least restrictive means of promoting a compelling interest and did not withstand strict scrutiny by the panel.

While analyzing section 10(b), the panel pointed out that a restriction on speech may not "single out a class of speakers on the basis of criteria that are wholly unrelated to the interest sought to be advanced." The panel determined that leased access channels were being singled out and regulated in such a manner, while other commercial channels were left relatively undisturbed. This discrepancy was unacceptable. Nonetheless, the panel

54. Id. at 822–23.
55. Id. at 823 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).
57. Alliance I, 10 F.3d at 823 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).
58. Id. at 823–24.
59. Id.
60. Id. at 825. The panel drew an analogy between this case and City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), in which the removal of commercial newsstands for the purpose of promoting safety and aesthetics was found to violate the First Amendment because noncommercial news racks causing the same problems remained unregulated. Id. at 430-31.
61. Alliance I, 10 F.3d at 826.
declined to strike down the section, choosing instead to remand it to the FCC to justify this preferential treatment.\textsuperscript{62}

B. Alliance for Community Media v. FCC: The En Banc Decision

In reviewing the panel decision, the United States Court of Appeals, sitting en banc, determined that the constitutionality of sections 10(a) and 10(c) turned on the absence or presence of state action.\textsuperscript{63} While acknowledging that sections 10(a) and 10(c) promoted cable operators' free speech by empowering them with greater editorial control, the court questioned how these same sections impair the petitioners' freedom of speech.\textsuperscript{64} The court viewed the power struggle between cable operators and programmers as an inherent characteristic of cable television. The more discretion a cable operator has over what programs will be aired, the less power the programmer has to choose what programs to air.\textsuperscript{65} The court argued that to hold that the restoration of editorial control that has resulted from the enactment of the statute is automatically state action would cripple Congress' ability to correct previous mistakes and prevent Congress from attempting to regulate for good cause.\textsuperscript{66} Furthermore, section 10(a) does not mandate the prohibition of indecent programming. Rather it gives cable operators a choice. In the eyes of the court, the regulations prescribed by the Cable Act are not an exercise of governmental authority but are instead an empowerment of individual discretion. The court determined that this empowerment did not constitute state action and the section did not warrant First Amendment

\textsuperscript{62} Id. at 831.


\textsuperscript{64} Id. at 114. The court used stronger language to characterize the petitioners' position, stating that "petitioners are merely complaining about section 10(a)'s and section 10(c)'s restoring to cable operators' their option to reject indecent programming on their cable systems." Id.

\textsuperscript{65} Id. at 115.

\textsuperscript{66} Id. During the debates over the Cable Television Consumer Protection Act, Senator Helmes addressed the ability of Congress to correct its own mistakes by stating:

Congress undoubtedly meant well in requiring cable operators to operate public and leased access channels as a public forum open to any and all speakers. Even in a "traditional public forum" [e.g., a public street], however, . . . the privacy of the home is at stake. If Congress is serious about correcting abuses in the provision of cable television programming, it cannot continue to ignore the problem of pornographic programming on public and leased access channels.

protection. Sections 10(a) and 10(c), consequently, were upheld in their entirety.

In analyzing section 10(b), the court turned to principles established in *FCC v. Pacifica Foundation* and *FCC v. Sable Communications of California*. From these cases, the court derived two applicable tenets: 1) the constitutionality of regulating indecent programming is dependent upon a medium's characteristics; and 2) the government must strive to accommodate both the interest of society by limiting children's exposure to indecent materials and the interest of adults who choose to obtain and utilize those materials. Cable television programming is similar to radio broadcasts in many aspects, noted the court. Both media are incapable of maintaining an adequate early warning system that would alert the audience of upcoming indecent programming, due to the constant tuning in and out of the listeners and viewers. In addition, both radio broadcasts and leased access channels come automatically into the home of the audience, without additional subscription or request beyond what is already present in most homes. For these reasons, the court determined that alternative methods of protecting children from indecent broadcasts, such as airing indecent programs late at night or viewer controlled channel blocking systems, do not adequately combat the pervasiveness of the cable television medium. Thus, the court determined that section 10(b) was the least restrictive means to achieve the established compelling government interest and therefore, withstood strict scrutiny.

In response to petitioners' allegation that section 10(b)'s segregate and block system discriminates against leased access channels, the court pointed out that little would change from the perspective of the viewer if section 10(b) were implemented. The only difference is that prior to the Cable Act, indecent programming was broadcast into the subscriber's home unless it

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67. *Alliance II*, 56 F.3d at 123.
68. Id. at 124.
69. Id.
70. Id.
71. Id. Justice Randolph, writing the opinion, portrayed the unwary cable subscriber as analogous to the motorists in *Pacifica* by stating that "[a] cable subscriber no more asks for such programming than did the offended listener in *Pacifica* who turned on his radio." *Alliance II*, 56 F.3d at 124.
72. Id. at 125. The court denounces two alternatives, voluntary blocking systems and lock boxes, stating the former are certain to cause a programmer error due to the constant maintenance required, and the latter would block leased access programming altogether. Id.
73. Id.
was affirmatively blocked out. Under section 10(b), the indecent programming is not broadcast into the subscriber's home unless it is affirmatively invited in. Therefore, the court decided that no discrimination was being perpetrated through section 10(b) of the Cable Act.

The court rejected the petitioners' argument that section 10(b)'s allowance of a thirty day period in which the cable operator must unblock a segregated channel at the subscriber's request constituted a prior restraint on free speech. The programming will air eventually, reasoned the court, and the subscriber has no basis to demand immediate unblocking. The court analogized this waiting period to that often endured while waiting for cable television to be initially hooked up in one's home, asserting that both of these waiting periods are completely acceptable. The court finally rejected the petitioners' claim that section 10(b) is void for vagueness because it defers responsibility to the leased access programmer to determine which programs are indecent, thereby providing no definitive standard to identify those programs affected by the Cable Act. The court found that the FCC definition was similar to the subjective standard established in *Pacifica* and adequately sets forth an acceptable guideline that would aid the programmer in making that determination. The court determined that section 10(b) satisfied the least restrictive means test, did not single out leased access channels for regulation, did not constitute a prior restraint on free speech, and was not void for vagueness. Section 10(b) was consequently deemed constitutional, and all of the sections in question were found consistent with the Constitution by the United States Court of Appeals.

V. **DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. v. FCC**

A. **Justice Breyer: Setting a New Standard**

Two of the cases challenging the Cable Television Consumer Protection and Competition Act of 1992, *Denver Area Educational Telecommunica-

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74. *Id.* at 126.
75. *Alliance II*, 56 F.3d at 126.
76. *Id.* at 128.
77. *Id.*
78. *Id.* The court admonished that "[s]ubscribers wishing to see indecent speech may not have their wishes fulfilled instantaneously ..." *Id.*
79. *Alliance II*, 56 F.3d at 129.
80. *Id.*


tions Consortium, Inc. v. FCC and Alliance for Community Media v. FCC, were consolidated and heard by the United States Supreme Court as Denver Area Educational Telecommunications Consortium, Inc. v. FCC. Justice Breyer wrote a plurality opinion concerning sections 10(a) and 10(c), and a majority opinion concerning section 10(b). Turning first to section 10(a), Justice Breyer, joined by Justice Stevens, Justice O'Connor, and Justice Souter, (the “Breyer Group”), believed the threshold determination in deciding whether section 10(a) violated the First Amendment to be whether the action being scrutinized could be considered state action. The United States Court of Appeals found no state action being perpetrated by section 10(a), citing an insufficiently close nexus between the government action and the cable operators to make such a determination.

The plurality overturned the Court of Appeals finding that section 10(a) does not constitute state action but rather reaffirms the authority of the individual cable operators to exercise their choice of programming. Cable operators are intertwined with government, argued Justice Breyer, as they exist with government permission and utilize government facilities, i.e. streets and rights of way, to string and lay cables. In addition, most communities are served by only one cable system operator. If the sections in question were upheld, cable operators could conceivably yield a great amount of censorship power, as there usually are no alternatives for cable viewers who could be subject to the editorial whims of the cable operator. According to Justice Breyer, these characteristics establish the action of cable operators as a government function.

Freedom of speech is a constitutionally protected right. The essence of that right, according to Justice Breyer, “is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required.” Justice Breyer noted, however, that the Court’s interpretation of this protection has not rendered

82. Id. at 2382.
83. Alliance II, 56 F.3d at 113.
84. Denver, 116 S. Ct. at 2382-83.
85. Id. at 2383.
86. Id.
87. Id.
88. Id. at 2384.
either Congress or the states powerless to address societal problems. In the plurality opinion, Justice Breyer discussed at length the necessity for flexibility while evaluating First Amendment protection cases. Although several analogies existed between this case and other cases involving the communication media, the Breyer group refused to accept an immutable standard by which to judge all such questions of constitutionality. Rather, the question as posed by Justice Breyer was whether section 10(a) addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."

Justice Breyer acknowledged that the issue addressed by this case is extremely important and is one that "this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material." In *FCC v. Pacifica Foundation*, for example, the Supreme Court upheld the prohibition by the FCC of an indecent broadcast by a radio station, finding that such a prohibition did not violate the station's First Amendment rights. Justice Breyer identified several similarities between *Pacifica* and *Denver*: 1) the accessibility of both media to children; 2) the pervasiveness of both media in the lives of the American public; 3) the lack of warning prior to the broadcast of indecent material; and 4) the availability of such materials on tapes and records and at theaters and nightclubs.

As public media, both radio and television are easily accessible to adults and children. A minuscule number of American homes are without a television, and a large number of those with television are subscribers to

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90. *Denver*, 116 S. Ct. at 2385. Justice Breyer believed the tradition of the First Amendment "embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Id.*

91. *Id.* at 2385.


94. *Id.* at 750.

cable programming.96 Furthermore, the technology of cable television is user-friendly, as small children can easily turn it on and off. As previously noted, George Carlin’s monologue in Pacifica was aired at about two o’clock in the afternoon by a New York radio station and was heard by a motorist and his young son.97 This occurrence was illustrative to the court of common listening practices and was one factor that influenced the Court’s decision to regulate programming. The Court reasoned:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.98

The listening habits of the audience added an additional degree of difficulty in protecting listeners from unwanted material in Pacifica. In a similar analysis, Justice Breyer concluded that cable viewers sample more channels than viewers without cable television before watching a program for a sustained period of time, making them even more susceptible to inadvertently viewing unwanted and indecent programming.99

Justice Breyer further evaluated section 10(a) in light of the ban in Pacifica, finding it less restrictive than the latter, and therefore constitutional in light of case precedent. Section 10(a) is permissive and allows cable operators a certain degree of flexibility.100 This section does not order an outright ban but rather allows the cable operators to reschedule certain programs to serve the needs of its adult viewing audience, while protecting its younger viewers.101 Although cable operators retain the discretion to ban indecent programming, they may or may not choose to do so. Justice Breyer noted:

[T]he same may be said of Pacifica’s ban. In practice, the FCC’s daytime broadcast ban could have become a total ban, depending upon how private operators (programmers, station owners, net-

96. Id. Nearly 56,000,000 homes, more than 60% off all homes with television, have cable (citing H.R. CONF. REP. No. 862, 102d Cong. 2d Sess. 56 (1984)).
98. Id. at 748–49.
100. Id. at 2387.
101. Id.
works) responded to it. They would have had to decide whether to reschedule the daytime show for nighttime broadcast in light of comparative audience demand and a host of other practical factors that similarly would determine the practical outcomes of the provisions before us. 102

The result is that the uncertainty as to the "practical consequences" of both regulations makes it difficult to determine whether the regulation imposed by section 10(a) of the Cable Act is any more severe than the FCC order in Pacifica. 103 This similarity with the Pacifica ban was one factor convincing the Breyer Group of section 10(a)'s constitutional validity.

The petitioners also argued that section 10(a) is unconstitutional because of the public forum doctrine. "Public forums" are places which have been created by the government for use by the public as a forum for expressive and creative activity. 104 In a public forum, "all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject." 105 The government's reasoning, therefore, was that leased access channels are public forums, as they have been opened up for use by the public for television programming. The petitioners added "that the statute's permissive provisions unjustifiably exclude material, on the basis of content, from the 'public forum' that the government has created in the form of access channels." 106

102. Id.
103. Id.
104. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). Perry characterizes public forums as "places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." Id. at 45. The Perry Court continued:

In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property . . . not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

Id. at 55.
105. Id.
Justice Breyer rejected the application of the public forum doctrine to this case.\textsuperscript{107} First, claimed Justice Breyer, the public forum doctrine should not be "imported wholesale into the area of common carriage regulation."\textsuperscript{108} Throughout the plurality opinion, Justice Breyer displayed reluctance to analogize between this case and different areas of the law. The evolving and expanding state of the telecommunications field, reasoned Breyer, hinders the application of previously developed doctrines to such a changing arena.\textsuperscript{109} The public forum doctrine is further inapplicable, as the public forum "is not required to indefinitely retain the open character of the facility."\textsuperscript{110} The parameters of a public forum have not yet been defined, added Justice Breyer, noting:

Our cases have not yet determined, however, that the Government's decision to dedicate a public forum to one type of content or another is necessarily subject to this highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious.\textsuperscript{111}

The public forum doctrine, therefore, even if applicable, would not automatically render section 10(a) constitutional.

Rather than address these potentially problematic issues, Justice Breyer decided that the Court need not necessarily address the public forum issue to resolve this case.\textsuperscript{112} This is because:

[T]he effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content. If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum or on use of common carrier.\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{107} \textit{Id}.
  \item \textsuperscript{108} \textit{Id.} at 2389.
  \item \textsuperscript{109} \textit{Id.} at 2388–89.
  \item \textsuperscript{110} \textit{Id.} at 2389 (quoting \textit{Perry}, 460 U.S. at 46).
  \item \textsuperscript{111} \textit{Denver}, 116 S. Ct. at 2389.
  \item \textsuperscript{112} \textit{Id.} at 2388.
  \item \textsuperscript{113} \textit{Id.} at 2389.
\end{itemize}
According to the Breyer Group, this issue need not be decided in terms related to the public forum doctrine.\textsuperscript{114} Justice Breyer stated that "the government's interest in protecting children, the 'permissive' aspect of the statute, and the nature of the medium," sufficiently justifies upholding section 10(a) of the Cable Act, and the "label" under which this case is decided is irrelevant.\textsuperscript{115}

Finally, Justice Breyer rejected the petitioners' argument that the section's definition of indecent materials is void for vagueness, as it grants too much editorial authority to the cable operator.\textsuperscript{116} A statute is void for vagueness if men of common intelligence must necessarily guess at its meaning and differ as to its application.\textsuperscript{117} Section 10(a) does provide a significant degree of leeway, as it permits cable operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."\textsuperscript{118} Justice Breyer found this definition to be similar to that used in \textit{Miller v. California},\textsuperscript{119} in which obscene material was defined in terms of:

\begin{quote}
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\textsuperscript{120}
\end{quote}

The Breyer Group found that each of these regulations are "vague," in the sense that they offer no strict guidelines by which to judge obscenity and indecency but rather fit into "the category of materials that Justice Stewart

\begin{footnotes}
\footnotetext{114}{\textit{Id.}}
\footnotetext{115}{\textit{Id.}}
\footnotetext{116}{\textit{Denver}, 116 S. Ct. at 2390.}
\footnotetext{117}{Connally v. General Const. Co., 269 U.S. 385 (1926). The Court explained: [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.\textit{Id.} at 391.}
\footnotetext{118}{47 U.S.C. § 532(h).}
\footnotetext{119}{413 U.S. 15 (1973).}
\footnotetext{120}{\textit{Id.} at 24.}
\end{footnotes}
thought could be described only in terms of ‘I know it when I see it.’”121 The identification of these materials therefore depends in large part on degree, context, and time.122 Justice Breyer therefore decided that the “vagueness,” which the petitioners fault as rendering section 10(a) unconstitutional, is a necessary lack of strict guidelines that must be accepted when evaluating materials of this kind.

The Breyer Group further argued that the “vagueness” of section 10(a) further protects against overbroad application by permitting cable operators to ban programming only pursuant to a written policy drawn up by the cable operator.123 This section provides some degree of uniformity, as it required the identical application of the policy to all programs, thus diminishing the threat of arbitrary censorship by misguided cable operators.124

The Breyer Group then justified the qualifier within the statute which allows the cable operator to prohibit programming which he “reasonably believes” to be indecent. This qualifier, claimed Justice Breyer, is designed not to expand the category of programming affected by the statute, but rather to provide some degree of justification for an honest, good faith mistake by the cable operator.125 Section 10(a), therefore, was not rendered unconstitutional for vagueness by the plurality.

Justice Breyer was joined by Justice Stevens, Justice O’Connor, Justice Kennedy, Justice Souter, and Justice Ginsberg in a majority opinion which found section 10(b) unconstitutional. Section 10(b) constitutes a significantly more aggressive attack on indecent cable television programming. Whereas section 10(a) permitted cable operators to block indecent programming, section 10(b) requires cable operators to segregate “patently offensive” sexually explicit programming to a particular channel and to block that channel.126 The channel may be unlocked only by a written request from the cable subscriber.127 In addition, leased access channel programmers would be required to notify cable operators of upcoming programming considered

121. Denver, 116 S. Ct. at 2390 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
122. Id.
123. 47 U.S.C. § 532(h).
125. Id. The Court further claimed the reasonableness section constrains the cable operator as much as it protects them. An operator would have difficulty proving an exercise of discretion was reasonable, if a similar exercise had been deemed unreasonable by an earlier court decision. Id.
127. Id.
Ritchie

patently offensive thirty days prior to air time.\textsuperscript{128} The government argued that this "segregate and block" policy is constitutional because it provides the least restrictive means of addressing a compelling interest, this being "the physical and psychological well-being of minors."\textsuperscript{129} Justice Breyer rejected this argument, finding section 10(b) to be much more extensive and restrictive than necessary.\textsuperscript{130}

In support of this, the majority observed that current methods of protecting children from inadvertent exposure to indecent programming already exist and are much less intrusive into adult viewing practices. Among the current methods are the requirement of cable operators to scramble programming on channels "primarily dedicated to sexually-oriented programming,"\textsuperscript{131} the ability of any cable subscriber to have channels blocked at their request, and the application of the V-chip which, when installed in a television, automatically blocks excessively violent or sexual programs.\textsuperscript{132}

Justice Breyer further questioned how section 10(b) is less restrictive than a phone call based system which would block channels by subscriber request, when in fact each method would achieve the same end, the protection of younger viewers from adult-oriented programming.\textsuperscript{133} Therefore, section 10(b) imposed an unnecessarily great restriction on free speech and was struck down by the majority.

Finally, Justice Breyer was joined by Justice Stevens and Justice Souter in a plurality opinion finding section 10(c) unconstitutional. The final section challenged, section 10(c), is similar in content to section 10(a), as it also permitted the cable operator to block offensive programming. Section 10(c), however, was directed at public access channels, whereas section 10(a) affects only leased access channels. Justice Breyer observed that public access channels have generally been reserved to the city that has awarded the cable franchise to a particular cable operator as partial consideration for the franchise.\textsuperscript{134} The cable operators have historically had very little editorial control over the content of public access channel programming.\textsuperscript{135} These channels have usually been managed by various private and

\textsuperscript{128} Id. \\
\textsuperscript{129} Denver, 116 S. Ct. at 2391. \\
\textsuperscript{130} Id. \\
\textsuperscript{131} Id. at 2392. \\
\textsuperscript{132} Id. \\
\textsuperscript{133} Id. \\
\textsuperscript{134} Denver, 116 S. Ct. at 2394. \\
\textsuperscript{135} Id.
public entities, often composed of community leaders and sponsors. The result of these characteristics, according to the Breyer Group, is that section 10(c) did not restore any power to the cable operator over public access programming. This is because very little power, if any, ever resided within the cable operator regarding public access channel programs.

Justice Breyer also noted that there already exists a policing agency over public access programming, usually a supervising board or government access manager. This agency would likely monitor the content of programming and avoid airing offensive programming when easily accessible to children. The function of the cable operator as a gatekeeper to offensive materials would, therefore, be redundant, as that function is already being performed by the governmental agency in control of the public access channel. The Breyer Group feared that by empowering the cable operator to decide which programs are not offensive when the interests of the children are already being safeguarded, there was a risk that programming which could be considered "borderline" could be prevented from airing.

As a result of the preceding analysis, section 10(a) was found constitutional, and sections 10(b) and 10(c) were deemed unconstitutional. In rendering its final judgment, the plurality had to consider whether sections 10(a), 10(b), and 10(c) were severable, or whether the three sections were to be interpreted as an inseparable package, all or none of which must pass or fail. In making this determination, the Breyer Group looked to the legislative intent of Congress and asked whether Congress would still have passed section 10(a) had it known the other two sections would be struck down. The Breyer Group felt that sections 10(a) and 10(c) clearly stand alone, as each deals with a separate type of cable channel, specifically leased access and public access.

Sections 10(a) and 10(b) have a tighter nexus. Section 10(b) requires the cable operator who was exercising his right under section 10(a) to either ban offensive programming or segregate and block it. Absent section 10(b), cable operators would be afforded greater discretion over programming deemed patently offensive. Justice Breyer alleged that by striking

136. Id.
137. Id.
138. Id. at 2395.
139. Denver, 116 S. Ct. at 2395. The Court notes this misuse could occur either from the use or threatened use of the cable operator’s veto power. Id.
140. Id. at 2397.
141. Id.
down section 10(b), the majority may have promoted the exercise of free speech, as the cable operator will no longer have to bear the cost of segregating and blocking channels which they decide not to ban, increasing the likelihood that the operator will choose to ban fewer programs. Thus, given Congress' stated objective, there was no basis for Justice Breyer to conclude Congress would have preferred no regulation as compared to section 10(a) alone. Section 10(a) was therefore severable and deemed constitutionally valid by the plurality.

B. Justice O'Connor: Keeping an Eye on the Children

Justice O'Connor agreed with the plurality opinion that section 10(a) was constitutionally valid and section 10(b) was not. Justice O'Connor disagreed with the majority decision striking down section 10(c) in spite of several similarities between sections 10(a) and 10(c); similarities which she believed warranted upholding section 10(c) for the same reasons which required a finding that section 10(a) was constitutional. Both sections attempt to serve a vital interest, the protection of children from indecent materials; both sections are permissive as neither mandate an outright ban of indecent programming but rather leave the power of discretion up to the cable operator; and both sections are within the degree of restrictiveness allowed in Pacifica.

Justice O'Connor disagreed with the determination that because sections 10(a) and 10(c) are directed at two different classifications of cable channels, leased access and public access, this differentiation was significant enough to warrant different outcomes in terms of constitutionality. The interest at stake, the protection of children, remained the same for each section, and to Justice O'Connor this interest was significant and compelling enough to outweigh any differences in the origins of the channels in question. The fact that public access programming is usually subject to a certain amount of policing by the manager or agency in charge was of little significance, and was of too speculative a nature to justify deeming section 10(c) unconstitutional.

143. Denver, 116 S. Ct. at 2397.
144. Id.
145. Id. at 2403 (O'Connor, J., concurring in part and dissenting in part).
146. Id.
147. Id.
148. 116 S. Ct. at 2404.
149. Id.
C. Justice Kennedy: Adherence to Strict Scrutiny

Justice Kennedy, joined by Justice Ginsberg, concurred that sections 10(b) and 10(c) are unconstitutional but disagreed with the conclusion that section 10(a) is constitutionally valid. The primary criticism expressed by Justice Kennedy concerned not only the plurality decision, but the method of reasoning, or lack thereof, used to reach that conclusion. Justice Kennedy criticized the plurality for "balking" at taking the next logical step after determining that the sections in question constitute state action. This step, stated Justice Kennedy, is the determination of what standard is applicable to decide if the sections are consistent with the Constitution. According to Justice Kennedy, the regulations in the Cable Act were attempts by government to identify certain types of speech and exclude them from a public forum, specifically public access and leased access channels. It is repugnant to the Constitution to allow any content-based discrimination against free speech by a government body, unless that discrimination can withstand strict scrutiny. According to Justice Kennedy, none of the sections withstand strict scrutiny, and all should be struck down by the Court.

Justice Kennedy found it disturbing that the plurality declined to adopt the strict scrutiny standard. Whereas Justice Breyer was reluctant to declare a rigid formula when confronting this First Amendment issue, Justice Kennedy claimed the utilization of a strict scrutiny test has often been used effectively by the Court and that such a test would insure the protection of free speech without hindering the government's efforts to address societal problems. Justice Kennedy feared the Court's reluctance to declare in advance that the standard of judicial review will result in inequities in the decision making process, unfairness to the petitioners and respondents who...
attempt to predict court decisions, and irregularities among similar cases dependent upon minute changes in situation, technology, and popular opinion.\textsuperscript{158} The standard which the plurality ultimately adopted was whether the Cable Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."\textsuperscript{159} According to Justice Kennedy, this standard represents little more than a futile semantics game, as it is remarkably similar to the established strict scrutiny test, but does not commit to the historical language of the latter.\textsuperscript{160} The result is confusion and disarray within First Amendment litigation, a result with which Justice Kennedy is dissatisfied.

In regard to section 10(c), Justice Kennedy argued that public access channels are a public forum. Public access channels are within the definition of "public forum" set forth by the Court in 1992. The Court has previously held a public forum to be "property that the State has opened for expressive activity by part or all of the public."\textsuperscript{161} Public access channels have been called the "electronic soapbox of the next—soon to be current—communication age," an indication of cable television's emerging role as an expressive and accessible medium.\textsuperscript{162} Once the existence of public access channels as a public forum had been established, it became clear to Justice Kennedy that the public expressive activity being broadcast on those channels may not be regulated on the basis of content by the government without withstanding strict scrutiny.\textsuperscript{163}

The result of this scrutiny, Justice Kennedy argued, is that section 10(c) must be declared unconstitutional.\textsuperscript{164} According to Justice Kennedy, Congress cannot empower cable operators with editorial control over public

\begin{footnotesize}
\begin{enumerate}
\item[158.] Id.
\item[159.] Id. at 2385.
\item[160.] Id. at 2406–07.
\item[161.] International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (holding an airport terminal, operated by a public authority, is not a public forum; thus a ban on solicitation must satisfy only a reasonableness standard). The Court further stated: "[I]ndividuals have a right to use "streets and parks for communication of views,"... such a right flowed from the fact that "streets and parks... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."
\item[163.] Denver, 116 S. Ct. at 2416.
\item[164.] Id.
\end{enumerate}
\end{footnotesize}
access channels because the nature of those channels as public forums prevents the vesting of editorial rights in cable operators in the first place.  

Although a compelling interest does exist in protecting children from indecent programming, section 10(c) is not narrowly tailored to achieve this end. Some cable operators may choose not to ban obscene programming, thus leaving some children unprotected and failing to achieve, in full, the prescribed goal. In addition, adults will be inadvertently victimized by a comprehensive ban. Section 10(c), therefore, represents too intrusive a method to be characterized as narrowly tailored.

Justice Kennedy began his analysis of section 10(a) by drawing an analogy between cable television programming and indecent telephone communication, as explored in Sable. Justice Kennedy asserted that the strict scrutiny which applied to laws prohibiting a common carrier from transmitting phone sex over the telephone wires should also be applied to obscene cable programming. Whereas the former was an attempt by Congress to preclude the transmission of protected speech, section 10(a) is an attempt by Congress to permit a carrier to ban certain forms of speech. Justice Kennedy further stated that the access rules plainly impose common carrier obligations on cable operators, noting that common carriers serve much the same function as a public forum and are deserving of the same level of protection. This is because each strives to ensure a means of communication free from restriction and censorship.

The analogy between common carriers and public forums formed the foundation for Justice Kennedy's analysis, a foundation which he berates the plurality for refusing to acknowledge:

The plurality acknowledges content-based exclusions from the right to use a common carrier could violate the First Amendment. It tells us, however, that it is wary of analogies to doctrines developed elsewhere, and so does not address this issue. This newfound

165. Id.
166. Id.
167. Id.
169. Id. at 2412 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)).
170. Id.
171. Id.
172. Id.
aversion to analogical reasoning strikes at a process basic to legal analysis.\textsuperscript{173}

If the plurality were to apply an analysis based on comparing public forums to common carriers, it would find content-based restrictions on public forum expressions have been permitted, but only when those restrictions were necessary to achieve a specific institutional goal.\textsuperscript{174} This limitation on the ability to restrict public forums assures the people that a legitimate purpose exists for the limitation and inhibits arbitrary and unjustified restrictions by government.\textsuperscript{175} The restrictions imposed by section 10(a) warrant strict scrutiny, as it is an attempt by government to inhibit forms of expression it feels are indecent and unnecessary.\textsuperscript{176} Justice Kennedy stated that section 10(a) does not represent a sufficient governmental interest, that of restoring editorial discretion over leased access channels to cable operators, to warrant upholding this statute.\textsuperscript{177}

In addition to faulting the plurality for failing to adopt a strict scrutiny standard when evaluating the constitutionality of these sections, Justice Kennedy further disagreed with the conclusion reached by the plurality.\textsuperscript{178} Among the reasons for finding section 10(c) constitutional, the plurality noted the tendency of public access channels to be “subject to complex supervisory systems of various sorts, often with both public and private elements.”\textsuperscript{179} Justice Kennedy questioned the effectiveness, if not the existence, of these safeguards in public access channels, noting that “[m]ost access centers surveyed do not prescreen at all, except, as in [two named localities], a high speed run-through for technical quality.”\textsuperscript{180}

Although Justice Kennedy doubted the validity of these claims, the fact that the plurality relied upon these facts indicates an even greater flaw in the plurality’s reasoning concerning section 10(a). Justice Kennedy acknowledged that the policies, if indeed inherent in public access programming, would withstand strict scrutiny as they are narrowly tailored to protect children from indecent programming.\textsuperscript{181} Such a system, if implemented in

\begin{flushright}
174. Id.
175. Id. at 2414.
176. Id.
177. Id. at 2416.
179. Id. at 2394.
180. Id. at 2417 (citation omitted).
181. Id.
\end{flushright}
leased access channel programming, would achieve the same goal, and thus serve the same compelling interest, and constitute a less intrusive measure of policing than that presented in section 10(a). Given this less intrusive and more narrowly tailored means, Justice Kennedy concluded that section 10(a) should be declared unconstitutional.

D. Justice Thomas: Supporting the Cable Operators

Justice Thomas, joined by Chief Justice Rhenquist and Justice Scalia, agreed with the plurality's finding that section 10(a) is constitutionally valid, but disagreed with the conclusion that the remaining two sections, 10(b) and 10(c), are constitutionally invalid. Justice Thomas, like Justice Kennedy, disparaged the plurality for refusing to declare a definite standard by which to judge the First Amendment validity of the sections in question. The Court has attempted to declare such a standard in previous cases, and Justice Breyer's refusal disregarded the reasoning of that previous declaration. Justice Thomas further discounted the standard adopted by Justice Breyer as "heretofore unknown" and "facially subjective" and faulted this standard for inviting a "balancing of asserted speech interests to a degree not ordinarily permitted." Justice Thomas also expressed a need for adherence to precedents, precedents which were not of his making but must, nonetheless, provide form and focus for current cases.

Justice Thomas began his opinion regarding the substance of the statute by noting the distinctions between the print, broadcast, and cable television media that the Court has made in previous decisions. Justice Thomas noted that the level of government control that has been exercised over broadcasting has been struck down as unconstitutional when attempted to be exercised over newspaper reporting. This discrepancy has placed "cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media." However, Justice

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182. Id.
183. Denver, 116 S. Ct. at 2417.
184. Id. at 2419 (Thomas, J. concurring in part and dissenting in part).
185. Id. at 2422.
186. Id.
187. Id. at 2419.
188. Denver, 116 S. Ct. at 2419.
189. Id. at 2420.
Ritchie

Thomas recognized a trend in recent decisions towards affording cable the same protections as those enjoyed by print and non-broadcast media. \(^{190}\)

Based on this principle of higher scrutiny for cable operators, Justice Thomas further discounted the petitioners’ claims that their rights have been infringed upon by the Act. The petitioners have to realize, stated Justice Thomas: “That cable access is not a constitutionally required entitlement and that the right they claim to leased and public access has, by definition, been governmentally created at the expense of cable operators’ editorial discretion.” \(^{191}\) The provisions, therefore, restrict the exercise of free speech by cable operators and actually expand the exercise of free speech by cable programmers who have no constitutional right to speak here. \(^{192}\)

A First Amendment challenge must be made by the party whose constitutionally protected free speech has been circumvented. \(^{193}\) Justice Thomas felt it is the cable operator, and not the access programmer, whose freedom of speech has been inhibited by these sections. \(^{194}\) Justice Thomas stated the “constitutional presumption properly runs in favor of the operators’ editorial discretion, and that discretion may not be burdened without a compelling reason for doing so.” \(^{195}\) Justice Thomas determined that sections 10(a) and 10(c) are not infringements upon the programmers’ ability to freely speak, but are instead restorations of the editorial discretion cable operators would have had but for government regulations that required them to allow leased and public access programmers to program at their pleasure. \(^{196}\) Justice Thomas further noted that cable operators have retained the right to exercise editorial control over both types of channels, although historically, they have not done so with public access channels. \(^{197}\) The

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192. Id.

193. Id. at 2425. The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” Baker v. Carr, 369 U.S. 186, 204 (1962).

194. Denver, 116 S. Ct. at 2425.

195. Id. at 2424.

196. Id.

197. Id. at 2425. Justice Thomas faults the plurality for mistaking the plurality for the absence of the right altogether. Although cable operators have not historically exercised their editorial control, that absence does not diminish the operator’s power to do so. Id.
petitioners in these cases, concluded Justice Thomas, cannot reasonably request the Court to strictly scrutinize the statutes in question in such a manner that diminishes the cable operator's discretion while maximizing the programmer's ability to program at will.198

Justice Thomas rejected the argument that section 10(c) is invalid because it imposes a content-based restriction on the right to speak in a public forum, specifically public access channels.199 Cable systems, noted Justice Thomas, are not public property but rather are privately owned and managed entities.200 Furthermore, the additional obligations imposed on the private cable operators, i.e., access scheduling and production assistance, characterize public access channels as very different from traditional public fora, effectively rebutting any claim made by the petitioners that public access channels might be considered a public forum.201 As such, the public forum doctrine governs access only to private property and does not extend to property, such as public access channels, that is outside the scope of governmental control. Sections 10(a) and 10(c), therefore, were both deemed constitutionally valid by Justice Thomas.202

Analyzing section 10(b), Justice Thomas believed it must be subject to strict scrutiny, as the section places a content-based restriction on private speech programming by requiring cable operators to segregate and block indecent programming.203 Justice Thomas asserted that the government may reinforce parental authority to guide the moral and spiritual well-being of their children.204 The alternatives which the plurality asserts are as equally

199. Id. at 2426.
200. Id.
201. Id. at 2428.
202. Id. at 2432.
203. Denver, 116 S. Ct. at 2429.
204. Id. As examples of parental reinforcement, Justice Thomas cited Ginsberg v. New York, 390 U.S. 629 (1968), which prohibited the sale of indecent literature to minors and imposed default rules intended to protect children from telephone pornography. Id. at 639. The Ginsberg Court noted:

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in [the statute challenged] upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.

Id.
Ritchie

effective as section 10(b) in protecting children, i.e., lock boxes and V-chips, are not adequate alternatives and do not support parental authority as effectively as the section in question. Questionable programs are likely to be shown with little or no warning. This attribute of television programming makes it virtually impossible for a parent to supervise and adjust such devices in accordance with indecent programming.

The plurality further struck down section 10(b) for fear that the written requests necessary for the cable subscriber to gain access to indecent programming will result in societal stigma, and a subsequent reluctance for viewers to subscribe to previously available programming. Justice Thomas questioned this assumption, as the text of section 10(b) does not mention the creation or governing of such a list. Justice Thomas believed this to be an unsupported assumption, one which attributed to section 10(b) evils which it did not possess. The requirement of a written rather than oral request for access to blocked channels has advantages as well, i.e., preventing fraudulent attempts on the part of minors to gain access to channels deemed unsuited for children by their parents.

VI. CONCLUSION

A. Keeping an Eye on the Future

The division within the Supreme Court in deciding Denver illustrates the complexity and the importance of this issue. Denver concerns not only cable television viewing, but also addresses the ability of the government to intrude into the private lives of American citizens. Justice Breyer, writing the plurality opinion, expressed reluctance in applying previous decisions and tests to an area of communications that is constantly changing such as cable television. Other Justices, however, comfortably rely on precedent and established levels of scrutiny in making their own determinations as to the constitutionality of these regulations. The difference between these

205. Denver, 116 S. Ct. at 2429.
206. Id. at 2392.
207. Id. at 2430.
208. Id.
209. Id. at 2385. Justice Breyer stated that "aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now." Denver, 116 S. Ct. at 2385 (citations omitted).
210. See id. at 2404 (Kennedy, J. concurring in part and dissenting in part).
methods of reasoning indicates the difficulty of weighing two very important interests: the protection of children from sexually explicit communications and the protection of First Amendment rights coveted by American citizens. Justice Breyer avoided the difficulty of addressing this unique case with pre-existing precedent by creating his own constitutionality test. This method, no doubt, seemed appropriate to Justice Breyer because no medium is as pervasive or as diverse as cable television. Other Justices, however, believed that precedent must be followed to assure just rulings in accordance with established doctrine.

As technology continues to evolve, however, new problems will certainly arise as to what may or may not be communicated over new media. For instance, the relatively new forum of cyberspace will most likely become an area of concern. One author has commented that "[w]hile cyberspace offers great educational opportunities for child and adult users alike, the minimal effort needed to gain access to cyberspace haunts those Americans concerned about the availability and accessibility of cybersmut to children." With this new issue on the horizon, it is impossible to predict how it will be resolved given the plurality's recent aversion to established principles.

Furthermore, the American public deserves to know on what grounds their constitutional arguments will be evaluated, a point raised by Justice Kennedy. Justice Breyer, no doubt, considered his analysis innovative and flexible, attempting to do justice to all media by recognizing the uniqueness of the cable communication forum. In fact, the plurality has decided this issue in a vacuum, seriously debilitating the impact this decision will have on future First Amendment litigation.

211. Id. at 2385. This test was articulated by Justice Breyer as follows: "[W]e can decide this case more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of relevant interests, an unnecessarily great restriction on speech." Id.

212. Id. at 2385–86.

213. Denver, 116 S. Ct. at 2406. Justice Kennedy stated that "[s]tandards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day." Id.


216. Id. at 2385.
B. The Benefits of Parental Authority

The protection of children is a compelling interest, indeed. In upholding regulations which seek to protect children, however, the Court runs the risk of diminishing the availability of materials to such an extent that adults will be reduced to watching only those programs which are fit for children. One commentator has noted:

Solicitude for children, then, justifies neither the regulation of indecency on television nor different regulation for broadcasting and cable. Such regulation inevitably abridges adults’ first amendment rights, improperly usurps a discretionary parental function with broad governmental fiat, and ignores less restrictive means to protect children equally available in broadcasting and cable.

The passage of the Cable Act was an attempt by Congress to protect children. Yet during all of the proceedings concerning this Act, both legislative and judicial, very little consideration was given to the parents. Certainly parents are charged with the physical and psychological safety of their children. The Cable Act is an effort to usurp this function and replace the traditional role of parenting with government mandates. The power of effective parenting has been described by one author:

In the home... parents are in a better position to make individualized judgments regarding household viewing habits of both sexual material and graphic violence. The Supreme Court long has deferred to a parent’s right to control the development and upbringing of his children. Thus, parental control is not only the most effective method, but the most protective of first amendment rights.

The plurality virtually ignored the role of parents in deciding this issue, apparently assuming parents are either unwilling or unable to supervise their children. While the Breyer Group questioned the effectiveness of current technological devices that may limit television viewing by children, the

combination of parenting and technology may provide the answer. One author articulated the potential of coupling present technology with effective parenting in addressing this problem with:

> When children are unsupervised, program guides and the electronic technology available for both cable and broadcasting can provide the desired control. Indeed, the availability of a simple lock to prevent all unsupervised television watching, even without more refined technology, should be an adequate, less restrictive means of control sufficient to preclude any broader government regulation.²²¹

It would be naive to assume that every child is continually supervised by his or her parents. The economic and domestic situation of most American families precludes this possibility. Certainly, however, this should be a consideration when weighing the interest of society in protecting children from inadvertent exposure to indecent programming against another interest as compelling as free speech. In upholding section 10(a) of the Cable Act, the plurality has infringed upon the rights of adult viewers to watch what they want on cable television. Although this measure seems the least severe alternative to Justice Breyer, it is an infringement nonetheless. The plurality has overlooked the most effective protective measure, however, the measure that comes at no cost to every person. The plurality has overlooked the responsible parents.

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²²¹ Winer, supra note 218, at 522–23.