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Corporations: Majority Power and Shareholder Arrangements for Control

ROBERT A. KESSLER*

The old story, so often told, of a prominent Eastern newspaperman's reply to the question of what the shares in his company were worth is very apt:

"There are 51 shares," said he, "that are worth $250,000. There are 49 shares that are not worth a — —."

The lot of the minority shareholder in a close corporation is not always happy. Where the corporation utilizes simple form articles of incorporation containing only the mandatory provisions\(^2\) and the predominant contributor is given a majority of the voting shares, without restriction by any shareholder or voting trust agreement, the predominant contributor will have virtually total control. It is axiomatic that a majority elects the entire board no matter how many or few members it has. Thus, that majority controls all corporate decisions including the distribution or withholding of dividends, the election of all officers, and the hiring and firing of all other personnel. It is important that all participants in the corporate venture recognize, at its inception, the ramifications of this majority control.

Typically when a corporation is formed each of the participants desiring an active role will be given one. Thus, in a corporation of three equal shareholders each will frequently be given a directorship and an

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2. The mandatory provisions are set forth in FLA. STAT. § 607.164(1). It should be noted that, as will be discussed below, majority power may also result from a coalition, even an informal or inadvertent coalition. For example, a husband and wife or two relatives together may hold a majority of the voting shares, although each technically has a minority interest; or, two equal shareholders may each sell or give an equal number of shares to a third person and whichever of the two the new shareholder sides with will then have majority power.
office. The lack of power of any one of the participants will not imme-
diately be apparent. It will become so only when the real nature of
majority power is understood. This lack of power of the minority be-
comes apparent when, as is typical, a dispute occurs in a corporation in
which the minority has previously been allowed some participation in
management.

As directors, the minority participants will have legal powers.
However, the well established caselaw rule of directorial autonomy, in
the face of majority shareholder dictation, is largely a myth. In fact,
while direct interference in management may not be possible, a major-
ity shareholder, albeit by more devious means, can generally achieve
the absolute operating control theoretically denied him by the law.

AN EXAMINATION OF MAJORITY POWER

The following example illustrates the control that the majority
shareholder might wield. Let us assume that a corporation has three
shareholders, A, B, and C. A owns a majority of the corporation's
shares, and B and C own the rest. Assume further that all three are
represented on the board and split the offices of president, secretary,
and treasurer. Obviously, this is a typical close corporation arrange-
ment where the relations of the parties are amicable, initially.

If A wants the corporation to take a certain action such as enter-
ing into a long-term employment contract with A's son, D, this is a
matter for the board of directors. A can obviously be outvoted by B
and C, but can A, nonetheless, get his way? He could, of course, offer
to buy B's and C's shares. Possibly overassessing their power and the
value of their interest, B and C might try to blackmail A into a higher

3. The leading case is Automatic Self-Cleansing Filter Syndicate Co., Ltd. v.
Cunninghame, [1906] 2 Ch. 34 (Ct. of Appeal). See also Finn Bondholders, Inc. v.
Dukes, 157 Fla. 642, 646, 26 So. 2d 802 (1946); M. GORDON, FLORIDA CORPORATIONS
MANUAL § 10.03 (1974). See, generally, as to agreements affecting directors, H.
HENN, LAW OF CORPORATIONS 393 et seq. (2nd ed. 1970). Although FLA. STAT. § 607.111(1)
and FLA. STAT. § 607.107(2) allow incursions on board powers, they both indicate ad-
herence to the general rule in the absence of compliance with their special terms.

4. FLA. STAT. § 607.111(1) and FLA. STAT. § 607.107(2). Although FLA. STAT. §
607.111(1) technically only requires a provision in the articles to implement the excep-
tion to board power, no sensible attorney would insert such a provision without ap-
proval of at least all the initial participants.
price than their shares are realistically worth. In any event, the protracted negotiations might make this an undesirable solution.

An obvious means of getting his way is for A to wait until the annual shareholder meeting, and then vote in three directors of his own choice that are “friendly” to his plan. Barring a contrary shareholder agreement or high vote provision in the articles of incorporation, A can elect the entire board. Even if the corporation has cumulative voting, he can still elect two out of the three directors and thus get his way. This, of course, has the disadvantage, from A’s point of view, of having to wait till the next meeting. However, this wait may not be as long as one might assume since A may have the power to advance the date of that next meeting.

In addition to these two obvious methods of achieving his goal, A ordinarily will have available at least one of the following methods for guaranteeing that his demands will be met almost immediately: (1) removal of the directors who oppose him; (2) increasing the number of directors and “packing the board”; (3) decreasing the number of directors to get rid of the opposing members; (4) shortening the duration of

5. Fla. Stat. § 607.094(2). Assuming a quorum is present, the norm is that the affirmative vote of the majority of the shares represented at the meeting and entitled to vote shall constitute the act of the shareholders. However, the statute provides that a number greater than a majority may be required if the articles of incorporation or bylaws of the corporation so provide.

6. In cumulative voting each shareholder may take a number of votes equal to the number of shares owned times the number of directorships to be filled and cast all of them for one candidate or distribute them among several as he chooses. D.F. Vagts, Basic Corporation Law, 825 (2nd ed. 1979).

7. Under the Williams formula for determining the effectiveness of cumulative voting (Williams, Cumulative Voting for Directors, 40-46 (1951)), one multiplies the number of shares represented at the meeting times the number of directors desired to be elected, divides by the number to be elected plus 1, and adds 1 to the result. This gives the number of shares needed to elect the desired number of directors. Under the formula, if 3 directors are to be elected, and A has 51% of the shares it becomes clear that he can elect 2 directors. See also Lattin, Corporations 376 (2nd ed. 1971).

8. Fla. Stat. § 607.084(2) provides for an annual meeting of shareholders to elect directors “on such date and at such time as may be stated in, or fixed in accordance with the bylaws.” It also provides for a court-ordered election if the meeting is not held within any 13-month period. It does not, however, require that a full year elapse between annual meetings. A New York case held under a similar statutory provision that the date of the annual meeting could be advanced. Matter of Mansdorf v. Unexcelled, Inc., 28 A.D. 2d 44, 281 N.Y.S. 2d 173 (1967).
the corporation; or (5) increasing his power as an officer to enable him to do what he wants without director approval. In some jurisdictions he may even be able to abolish the board and retain management power to himself as a shareholder. The success of any of these methods is, of course, contingent upon A's power to call a special shareholders' meeting or approve the changes without one. This is, however, a power which he will frequently possess by virtue of his office or by virtue of statute. The mere threat of its utilization will normally be sufficient to coerce the opposition to give the majority shareholder his way. A further threat to the minority may be very effective. The majority shareholder may under the bylaws have been given the power to remove non-consenting directors from their positions as officers. The votes of directors subject to such action may well be controlled by this threat to their compensation and status in other roles.

9. Florida may possibly be one of these. Fla. Stat. § 607.111(1) provides:
All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors, except as may be otherwise provided in this chapter or in the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the articles of incorporation.
An amendment of the articles might be able to accomplish this, since this is a provision which could have originally been included (Fla. Stat. § 607.177(1)). Although the directors must usually authorize an amendment (Fla. Stat. § 607.181(1)(a)), the shareholders may enact such an amendment without such director approval, at a meeting for which notice of the changes is given (Fla. Stat. § 607.181(4)), by majority vote. Fla. Stat. § 607.181(1)(c). A majority shareholder, even though not an officer, has power to call a special meeting to adopt the amendment. Fla. Stat. § 607.084(3)(b). Although this conflicts with the spirit of Fla. Stat. § 607.107(2) which only authorizes director-infringing provisions where unanimous, it may be upheld, if Florida follows the Delaware "independent validity" doctrine. (Even though an action would be improper under one section of the statute, it is still permitted if it appears arguably proper under another.) This, of course, represents a rejection of the "pari materia" doctrine of statutory interpretation, and may not be followed in Florida.
11. Under Fla. Stat. § 607.151(1) the bylaws may provide for election of officers by the shareholders. If so, they may be removed by the shareholders. Fla. Stat. § 607.154(2). After removal of an officer, the vacancy thus created will, however, apparently be filled by the directors unless the power to fill such vacancies is also reserved to the shareholders. Fla. Stat. § 607.154(3).
DEVICES FOR MAJORITY CONTROL

A number of the devices for majority control delineated above may be available in Florida. Some are not:

Removal of opposing directors.

Although removal of directors for cause is recognized at common law, removal without cause is generally not permitted. This represents the Florida common law rule; however, the current Florida statute, like Delaware’s, provides: “At a meeting of shareholders called expressly for that purpose, directors may be removed in the manner provided in this section. Any director or the entire board of directors may be removed, with or without cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.” Unless cumulative voting is provided for in the articles of incorporation or there are provisions in the articles for class directors, A can remove the uncooperative directors whenever he wants and fill the vacancies thus created with his own “puppets.”

12. FLETCHER, CYC. CORP. § 352 (Perm. Ed. 1975) [hereinafter cited FLETCHER].
14. 8 DEL. CODE ANN. § 141(k).
15. FLA. STAT. § 607.117(1). It is not completely clear whether the requirement of Florida Statute section 607.117(1) for a meeting “called expressly for that purpose” was meant to override the provisions of Florida Statute section 607.394(1) which governs actions by shareholders without a meeting. If the latter section can be utilized A’s task will be more simple.

Since A has the power to call a meeting (FLA. STAT. § 607.084(3)(b)), and, in the absence of special protective devices for the minority, his votes at the meeting will be sufficient to remove the offending directors, it would seem safer to go through the formality of holding such a meeting. See FLA. STAT. § 607.117(1). Removal without cause is still restricted in many states. Petition of Singer, 189 Misc. 150, 70 N.Y.S. 2d 550 (Sup. Ct. 1947); Abberger v. Kulp, 156 Misc. 210, 281 N.Y.S. 373 (Sup. Ct. 1935); Pilat v. Broach Systems, Inc., 108 N.J. Super. 88, 260 A. 2d 13 (Law Div. 1969); FLETCHER §§ 352, 354.
16. FLA. STAT. § 607.097(4).
17. FLA. STAT. §§ 607.044(1), 607.164(1)(d).
18. See FLA. STAT. § 607.117(2), (3), for the limitations.
19. FLA. STAT. § 607.114(6).
Increasing the number of directors—"packing the board."

Florida statutes provide that the number of directors be fixed in the articles of incorporation, in the bylaws, or in a manner provided in those documents.\textsuperscript{20} Although power to amend bylaws is in the directors, "unless reserved to the shareholders by the articles of incorporation,"\textsuperscript{21} the statute continues:

Bylaws adopted by the board of directors or by the shareholders may be repealed or changed, new bylaws may be adopted by the shareholders, and the shareholders may prescribe in any bylaw made by them that such bylaw shall not be altered, amended or repealed by the board of directors.\textsuperscript{22}

Although the statute is not completely clear that the shareholders have the right to increase the number of directors unless they have reserved all power over the bylaws or the number of directors has been fixed by the action of the directors, the language suggests that the grant of power to the directors was not intended to deprive the shareholders of their usual power over the bylaws. Accordingly, A should be able to succeed here as well. The result should be the same even if the number of directors is fixed in the articles of incorporation.\textsuperscript{23} A can, therefore, add two new directors to counter the votes of the two who oppose him.

However, unlike some other states, where the statute expressly gives permission to amend the bylaws to grant the power to the shareholders to fill such vacancies,\textsuperscript{24} or expressly provides that such vacancies will be filled by them,\textsuperscript{25} the Florida statute simply provides:

Any vacancy occurring in the board of directors, including any vacancy created by reason of an increase in the number of directors, may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a vacancy shall hold office only until the next election of directors.

\textsuperscript{20} FLA. STAT. § 607.114(1).
\textsuperscript{21} FLA. STAT. § 607.081.
\textsuperscript{22} Id.
\textsuperscript{23} See text at notes 32, 33 infra.
\textsuperscript{24} See N.Y. Bus. Corp. Law § 705(a) (consol.) (McKinney's Consol. Laws of N.Y.).
by the shareholders.\textsuperscript{26}

No express exception for a contrary article or bylaw provision appears, and, accordingly, the shareholders may not have the power to fill such vacancies. Needless to say, if the directors fill them, A will be in a worse position than before.\textsuperscript{27}

\textit{Decreasing the number of directors.}

A might try to reduce the number of directors to one, that is, himself. Again, in some states this device might succeed.\textsuperscript{28} However, the Florida statute expressly provides:

The board of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director.\textsuperscript{29}

While this method will not accomplish A’s purpose immediately, he may use it as a means of giving himself complete control in the future, by fixing the number of directors at one.

\textit{Shortening the corporation’s duration.}

The practical effect of dissolution can be achieved by amending the articles of incorporation to set as the corporation’s duration a date about to expire. Florida statutes expressly allow an amendment “to

\begin{enumerate}
\item \textit{FLA. STAT.} \textsuperscript{\textsection} 607.114(6).
\item If the shareholders do have the power to fill the vacancies despite lack of express statutory authority, it is clear that A has the power to call a shareholder meeting to do so because he owns over one tenth of the shares. \textit{FLA. STAT.} \textsuperscript{\textsection} 607.084(3)(b)) In fact, it would appear that A will be able to act even without a meeting by virtue of Florida Statute section 607.394(1).
\item \textit{See N.J. STAT. ANN.} \textsuperscript{14A} \textsection 6-5(1) (1968) which does not contain the express restriction contained in \textit{FLA. STAT.} \textsuperscript{\textsection} 607.114(1). \textit{See text} at note 29.
\item \textit{FLA. STAT.} \textsuperscript{\textsection} 607.114(1).
\end{enumerate}
change the [corporation’s] period of duration." In some states all amendments of the articles of incorporation require prior board approval. In such jurisdictions this solution would be unavailable to A. However, under Florida law “[t]he shareholders may amend the articles of incorporation without an act of the directors at a meeting for which notice of the changes to be made is given.” Since A, as a majority holder has the power to call the necessary shareholder meeting, this method should succeed. Thus, the corporation’s duration can be fixed in the articles for a term about to expire immediately.

*Increasing officer power.*

If, as discussed above, A as a shareholder possesses the right to amend the bylaws, he can increase his powers as an officer. The Florida statute provide that “[a]ll officers . . . shall have such authority and perform such duties in the management of the corporation as may be provided by the bylaws.” A bylaw amendment providing for election of officers by the shareholders is also desirable since this will protect A from removal by the board. If A is president of the corporation he has the power, by virtue of his office, to enter into a number of transactions, although possibly not the long-term employment contract hypothesized. A may also have broad express powers if conferred on him by the bylaws.

Whether or not shareholders still retain the power to enact bylaws, still in the absence of a provision in the articles reserving the right, A will have the power, as discussed above, to amend the articles to reserve that power to himself as a shareholder. He can then amend the

36. Fletcher § 566.
37. Fla. Stat. § 607.151(2). “All officers and agents, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws or as may be determined by resolution of the board of directors not inconsistent with the bylaws.”
bylaws to broaden his powers as president. It could be argued that such expansion of officer power is an improper interference with board powers. The counter-arguments which should succeed, provided the amended bylaws do not attempt to supersede board management, are that all powers granted to officers are to some extent an encroachment on board powers and that the statute expressly validates the grant. This device will not prevent the board from later firing A's son if B and C are allowed to remain members. However, if the president has the power to enter into the contract, this may be possible only on pain of the corporation's paying damages. Even if B and C escape liability for causing the corporation to breach the contract, they may be discouraged from repudiating the contract since doing so will mean an injury to them through diminution in the value of their interest in the corporation.

Although sterilization of the board is permitted in Florida, the shareholder unanimity requirement for such action may make it unavailable to A as a practical matter.39 However, even in Florida, A appears to have more than one device available to him, and only one is necessary.

There is very little caselaw in Florida on the availability of these control devices as a means for a majority shareholder to get his way. If the corporation operates under Florida law, this uncertainty may well work to A's advantage. The threat of their use, coupled with B's and C's knowledge that A will ultimately win, at least at the next annual meeting, will probably be effective to persuade them to accede to A's demands.

Obviously, where the initial articles and bylaws are drawn up with provisions favoring the majority holder the success of coercive methods can probably be assured. For example, the articles of incorporation may expressly reserve all power over the bylaws to the shareholders or they may attempt to allow a majority shareholder to fill newly created board vacancies. Majority shareholder control can also prevent any change in the articles or bylaws seeking to delete these preferential pro-

39. FLA. STAT. § 607.107(2).

Except in [certain] cases . . ., no written agreement to which all shareholders have actually assented . . . shall be invalid as between the parties thereto on the ground that it is an attempt by the parties thereto to restrict the discretion of the board of directors in its management of the business of the corporation . . .
visions. If the initial bylaws provide for election of all officers by the shareholders, the majority shareholder can guarantee his election as president and his continued status as such. Presumably, the board will not even have power to suspend him.\textsuperscript{40} Even if it does, this can be countered by removal of the offending members.\textsuperscript{41} The initial bylaws can also provide for broad presidential powers.

The deceptively innocuous appearance of many of these provisions should be noted. An uninitiated minority shareholder might not realize that the effect is to place him almost completely at the mercy of any shareholder owning a mere 51\% of the voting shares. Some provisions are so facially unfavorable that even an unsophisticated minority participant could hardly allow their insertion in the corporate documents unless he was content to be voiceless.\textsuperscript{42} It is not inconceivable, however, that a careless investor might buy into such a corporation without knowledge of a limit on the number of directors.

Even if the provisions guaranteeing majority absolutism are not included in the initial articles of incorporation and bylaws, all except the sterilization provision (which apparently requires unanimous vote for insertion by way of amendment to the articles)\textsuperscript{43} can be added after any annual meeting at which directors favorable to their addition are elected. This could be accomplished even where use of such power is to be held in abeyance until a conflict between the majority and minority participants actually develops.

LIMITING MAJORITY SHAREHOLDER CONTROL

A number of cases throughout the country recognize a fiduciary duty on the part of the majority shareholder to the minority shareholders.\textsuperscript{44} In flagrant cases of unfairness judicial intervention may limit a majority shareholder's absolute control over the corporation where he attempts to destroy fundamental minority rights. As to ordinary management, however, there is little that the minority can actually do to stop the majority. True, a derivative action for waste can be brought

\textsuperscript{40} Compare N.Y. Bus. Corp. Law § 716(a) (McKinney's Consol. Laws of N.Y.).
\textsuperscript{41} Fla. Stat. §§ 607.151(2), 607.154(2).
\textsuperscript{42} Fla. Stat. §§ 607.114(1), 607.107(2), 607.111(1). At least where A is not the sole initial shareholder.
\textsuperscript{43} Fla. Stat. § 607.107(2).
\textsuperscript{44} Fletcher § 5811.
against an improvident contract.\(^4\) (For example, the contract hiring A's son may amount to a kind of gift of the corporate assets.) The minority can also bring an action based on majority oppression.\(^5\) The derivative action for waste is sure to result in a pyrrhic victory since it will not prevent reprisals by A when he immediately, or ultimately, gains complete board control. His board can cut off all dividends, and unless B and C are protected by employment contracts, they may be ousted from officer and employee status. The second alternative, an action for oppression, is almost equally sure to be futile to the minority. Even if allowed, it is likely to result in their complete ouster from the business because dissolution will probably not produce an overly generous financial return. It is clear, therefore, that one way or another, majority voting share ownership means virtually absolute control over corporate management notwithstanding any contrary legal rules.

Obviously, majority power need not repose in the hands of a single shareholder. In fact, except in a corporation with only a sole shareholder, or two equal shareholders, there will always be a majority and a minority. Thus, in a three-person corporation in which each shareholder owns an equal number of shares, any two together can wield the autocratic powers described above. Where on particular decisions allegiances shift, with two voting one way and a different two voting together on another matter, the threat to the one who happens to be in the minority at any particular time may not be too great. This shifting of positions is probably what is envisioned by the participants when they fail to enter into a unanimous shareholder agreement governing their relations and omit minority-protective devices in the articles of incorporation and bylaws.

During the era of goodwill when the corporation is first formed, the assumption that unbiased decisions will be made in the best interest of all concerned may prove true. However, if over a period of time any two combine regularly to form a bloc, the power of the coalition and its consequent danger to the omitted member is obvious whether or not the arrangement is formalized.

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45. FLA. STAT. § 607.147.

46. Although not expressly authorized, as in some states (see, e.g., N.J. STAT. ANN. 14A § (12)(7)(c)), some jurisdictions have recognized a non-statutory right to seek dissolution on this ground. (See Gaines v. Adler, 15 A.D. 2d 743, 223 N.Y.S. 2d 1011 (1962)).

https://nsuworks.nova.edu/nlr/vol4/iss1/1
Shareholder agreements are a means of consolidating power in a corporation. Much like the formation of a political coalition, such agreements may allow a combination of minorities to, in effect, control the affairs of a corporation where the individual power of the participants, when combined under the agreement, constitutes a majority voting bloc. The effect of such agreements, therefore, may be the same as where a single shareholder owns a majority of the corporation's shares. Such agreements are expressly valid in Florida and therefore clearly enforceable. However, all shareholders who are not parties are permanently relegated to a virtually powerless minority status.

THE LAWYER'S OBLIGATION

In setting up a corporation with more than a single shareholder, the attorney must exercise special care. It is axiomatic that an attorney cannot represent conflicting interests without full disclosure and the consent of all parties. Where more than one person comes to an attorney to set up a corporate business it would seem clearly improper, if the attorney purports to act for the two or more parties involved, to set up a typical corporate structure which allows majority control without explaining the implications of such majority power to all involved. The utilization of any of the additional provisions discussed above which help to further solidify such control or enable two or more minority participants to convert themselves, through an agreement, into a controlling majority would seem to require further explanation and knowing acceptance of the potential dangers by all involved. Nor should an attorney, purporting to act for all, set up a corporation and then draw up a shareholder agreement among less than all of the people for whom he formed that corporation without the knowledge and consent of the excluded participants.

A majority shareholder agreement can properly be regarded as an attack on minority interests because it consolidates almost absolute power against them. The agreement in the famous Ringling case is typ-

47. Fla. Stat. § 607.107(1).
tical. It was obviously directed against one of the shareholders of the corporation. In that leading Delaware case there were three shareholders; one owned 370 of the outstanding 1000 shares, while each of the other two held 315 shares. Since the corporation had cumulative voting, the agreement between the two smaller participants, had it been carried out, would have given the two minority shareholders not only control on the shareholder level, but five out of the seven director slots, thereby securing overwhelming management control as well. In a corporation with ordinary (straight) voting they would have elected the entire board! The combined effect was a guarantee of continued, if not excessive, financial participation in the venture.

Obviously, this arrangement will not be considered desirable by an excluded shareholder who will naturally fear a “freeze-out.” The result will be acrimony, if not actual litigation. Accordingly, the lawyer who drafts such an agreement should not be the one who has set up the corporation nor should he have previously represented the individual against whom such an agreement is directed.

ARRANGEMENTS FOR MAJORITY CONTROL

As indicated above, majority shareholder dominance can be achieved by a single majority shareholder’s control over the basic corporate structure at the formation of the corporation. Thus, such a shareholder can insist on the articles of incorporation providing for a single director. As sole director he will then have complete control. He may even be able to “lock in” the other shareholders by imposing restrictions on transfers of shares. Even if he transfers shares he can probably insist that the transferee give him an irrevocable proxy. Certainly he can insist that the transferred shares be placed in a voting trust of which the majority shareholder is trustee, although this may result in undesirable estate tax consequences to the majority share-

50. “In straight voting each share carries one vote for each matter, including one vote for each director to be elected.” H. Henn, Law of Corporations 363 (2nd ed. 1970).
holder transferor.53

Where, as in the Ringling situation, the exercise of majority power depends on a combination of shareholders, the voting trust or irrevocable proxy device can also be used. However, an agreement such as the one involved in the Ringling case is still probably the best model. That agreement wisely includes share transfer restrictions to attempt to assure that if one of the parties desires to sell his shares the other has the opportunity to maintain the previous control power. The significant parts of that agreement are as follows:

1. Neither party will sell any shares of stock or any voting trust certificates in either of said corporations to any other person whatsoever, without first making a written offer to the other party hereto of all of the shares or voting trust certificates proposed to be sold, for the same price and upon the same terms and conditions as in such proposed sale, and allowing each other party a time of not less than 180 days from the date of such written offer within which to accept same.

2. In exercising any voting rights to which either party may be entitled by virtue of ownership of stock or voting trust certificates held by them in either of said corporation, (sic) each party will consult and confer with the other and the parties will act jointly in exercising such voting rights in accordance with such agreement as they may reach with respect to any matter calling for the exercise of such voting rights.

3. In the event the parties fail to agree with respect to any matter covered by paragraph 2 above, the question in disagreement shall be submitted for arbitration to Karl D. Loos, of Washington, D.C. as arbitrator and his decision thereon shall be binding upon the parties hereto. Such arbitration shall be exercised to the end of assuring for the respective corporations good management and such participation therein by the members of the Ringling family as the experience, capacity, and ability of each may warrant. The parties may at any time by written agreement designate any other individual to act as arbitrator in lieu of said Loos.

4. Each of the parties hereto will enter into and execute such voting trust agreement or agreements and such other instruments as from time to time they deem advisable and as they may be advised by counsel are appropriate to effectuate the purposes and objects of this agreement.

5. This agreement shall be in effect from the date hereof and shall continue in effect for a period of ten years unless sooner terminated by

53. IRC § 2036 as amended by the Revenue Act of 1978, § 702(i).
mutual agreement in writing by the parties hereto.

6. The agreement of April 1934 is hereby terminated.

7. This agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators and assigns of the parties hereto respectively.54

In addition to the sort of provisions provided above there would seem to be no objection to the parties' agreeing to vote for themselves as directors by name. Agreements with such provisions were held valid even under the restrictive New York common law.55

The share transfer restrictions could perhaps even be strengthened. A first refusal provision as in the Ringling case, or a first option provision, might be coupled with a provision that transfer to a non-party shall not be made without the consent of all parties to the agreement except where the transferee agrees to become a party to the agreement and bound by its terms.56 On the other hand, a provision whereby the parties agree to cause the corporation to repurchase their shares, or impose a corporate first option for their benefit, may be invalid as an attempt to control the directors, and, if not all shareholders are given equal treatment, may result in a charge of corporate waste if effectuated.57

The provision such as is found in the Ringling case for consultation, joint voting, and arbitration when the parties are unable to agree on how to cast their votes would seem to be valid under Florida Statutes section 607.107(1) which provides:

An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that, in exercising any voting

54. 49 A. 2d 603, 605 (1946), aff'd. 53 A. 2d 441, 443 (1947).
56. Although FLA. STAT. § 607.164(2) only expressly authorizes the articles of incorporation to contain share transfer restrictions an agreement should at least be binding on the parties. A legend should appear on the share certificates to make the restrictions binding on transferees without knowledge. FLA. STAT. § 607.067(3). While the corporation could be obligated to place the required legend on the shares an agreement to cause it to do so might be held to bind the parties in their directorial capacities. Accordingly, they may have to assume the onus of insuring the proper legend themselves.
rights, the shares held by them shall be voted as therein provided, as they may agree, or as determined in accordance with a procedure agreed upon by them. Nothing herein shall impair the right of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names.

This would seem to be true because of the express statutory approval of non-unanimous agreements despite the anti-minority nature of such agreements.

Ballantine, writing in 1946, stated:

No doubt all agreements as to voting by a shareholder should be held contrary to public policy if the tendency of the bargain is to induce the voter to consider, in a decision affecting the rights of others, not the advantage of the corporation but the obtaining of advantages to himself or some other person, such as securing employment as an officer or as a manager for a salary.\(^58\)

Ballentine's statement of the law would seem to be repudiated by the above statute.\(^59\) Certainly the agreement should avoid reciting as consideration such items as securing employment or officer status. Where the agreement clearly indicates that the other party's vote is being bought by a promise of favors from the corporation, the agreement will be hard pressed to withstand attack. But where the agreement demonstrates a result in mutual benefits to all parties through their enhanced control position it will likely survive.

A reference to voting on shareholder matters "in accordance with a procedure agreed upon by them"\(^60\) would also seem to be a clear validation of the arbitration provision when the parties are unable to agree themselves on how their shares should be voted.

It would also seem possible to have the parties expressly agree to give the arbitrator an irrevocable proxy to vote the unwilling party's shares to implement his decision. The Chancellor in the Ringling case held that that was the effect of the agreement. However, he was overruled on that point by the Delaware Supreme Court which, although upholding the validity of the agreement, merely held that the non-con-

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59. FLA. STAT. § 607.107(1).
60. Id.
senting shareholder's shares could not be voted. The Delaware statute was subsequently amended to authorize an irrevocable proxy where it was coupled with an interest. Professor Ernest Folk, Rapporteur for the committee which drafted the Delaware amendments, commenting on that provision, stated:

Irrevocable Proxy: The revised statute has a new provision specifically recognizing the proxy as irrevocable if the instrument so states and the requisite interest is present. An interest in the stock or generally in the corporation will suffice. This should be sufficient to validate an irrevocable proxy held by a creditor during the term of the loan, or by a key officer during his employment contract period, or by a shareholder as an ancillary feature of a voting agreement.61

The Florida Statute section 607.101(5) is clear on this point: "A proxy which states that it is irrevocable is irrevocable when it is held by any of the following or a nominee of any of the following: . . . [and] (e) A person designated by or under an agreement under subsection 607.107(1)."62 Accordingly it would seem possible to provide expressly that the arbitrator has an irrevocable proxy to vote the non-consenting shareholder's shares in accordance with the arbitrator's decision. Cases in a number of jurisdictions have allowed enforcement of such agreements without any irrevocable proxy, using specific performance or mandatory injunction as the remedy.63 The grant of an irrevocable proxy with an express consent by the parties to enforcement of the agreement by equitable remedies might be wise.

While, as in the Ringling agreement, the promise to vote in accordance with its terms is prima facie valid as to matters where the parties are voting in their capacity as shareholders, any attempt to bind them in their director capacities may be invalid and could possibly void the whole agreement. Unless the bylaws already allow election of officers by the shareholders, a clause whereby the parties agree to elect themselves as officers, normally a director function, may be invalid. It would seem permissible, however, for the parties to agree to enact such a bylaw whereby they may elect themselves as officers. Further, it may well be improper for them to agree to vote for dissolution when they

62. See text at note 47 supra.
decide that such is desirable. A prior director vote is required for such action.\textsuperscript{64}

Provisions in the agreement as to declaration of dividends, hiring of non-officer personnel, or any provision under which the parties directly bind themselves on how they will vote on matters confided to the board may well be proscribed. The reason for this limitation is the general rule that agreements by less than all shareholders as to how they will vote as directors are invalid. The leading case is, of course, \textit{McQuade v. Stoneham}.\textsuperscript{65} In that New York decision a majority shareholder agreement to keep a named person as an officer at a specified salary was held invalid since it improperly interfered with the parties' discretion as directors. At the time, election of officers was an exclusively directorial function. Such election could not be confided in the shareholders as is presently possible by a bylaw provision in Florida.\textsuperscript{66}

There was Florida authority supporting the rule that "director-agreements" were invalid.\textsuperscript{67} The adoption of Florida Statute section 607.107(2) (1975), which expressly validates such interference with the board's normal prerogatives only where an agreement authorized by all the shareholders permits it, is an implied acceptance of the rule.

It is unlikely that such a director-sterilizing or board abolition provision will be included in the articles of a corporation where a majority-control agreement will be utilized. If the original participants are unwise enough to include it without assurance that they will be protected under it, the parties to the majority-control agreement may, however, be able to take advantage of the provision by binding themselves to vote on matters normally confided to the directors as well.

"Indirect" control over the board can be achieved by an agreement to vote to remove any directors whenever the holders of a certain percentage of the shares covered by the agreement demand it. Although the vacancies thus created may have to be filled by the board,\textsuperscript{68} this should enable the parties to the agreement to insure that the directors they have elected under the agreement remain loyal to their wishes.

\textsuperscript{64} \textsc{Fla. Stat.} § 607.257.
\textsuperscript{65} \textit{McQuade v. Stoneham et al.}, 263 N.Y. 323, 189 N.E. 234 (1934).
\textsuperscript{66} \textsc{Fla. Stat.}, § 607.151(1).
\textsuperscript{67} \textit{See note 3. Compare, however, Glazer v. Glazer}, 374 F. 2d 390 (5th Cir. 1967), \textit{cert. den.} 389 U.S. 831.
\textsuperscript{68} \textsc{Fla. Stat.}, § 607.114(6).
since their people will constitute the remaining board members. Needless to say, this will produce the same alienation on the part of the ousted party to the agreement as is felt by minority non-parties.

**DANGERS TO THE ARRANGEMENT**

As indicated above, an agreement to consolidate and secure majority power is probably valid despite the obvious personal benefits to its parties provided: (1) it does not appear that the vote of a party is being bought, and (2) that it does not purport to bind the parties in their voting as directors. Both of these possible grounds of invalidity can probably be guarded against by proper drafting. For example, the consideration clause and recitals should be drafted in terms of the mutual benefit of the parties and the corporation. Provisions directly impinging on director functions can simply be avoided. Since the law is not completely certain as to what matters are the exclusive province of the directors a severability clause should also be used. Such a clause may save the balance of an agreement containing provisions later held to be improperly director-impinging.

As is also indicated above, if the effect of action taken under the agreement results in serious injury to minority interests, the transaction\(^69\) may be upset on the ground of breach of the majority's fiduciary duty to the minority. This result, like liability for corporate waste or breach of duty to the corporation by the directors elected under the agreement, is independent of the validity of the agreement and a danger which the majority and its elected directors always face.

The greatest dangers to the arrangement will probably result from a disagreement among the parties or from the acrimonious relations vis-a-vis the non-parties to the agreement which they will quite reasonably regard as directed against them. It is impossible to specify in advance exactly how the shareholder parties will vote on all of the issues submitted to them. There are bound to be disagreements as to specific questions as they arise. The result will be that the arbitrator will make the ultimate decision. If too many decisions must be submitted to him the agreement may become unworkable. Also, since the parties, once they are elected directors, will be autonomous in that capacity,\(^70\) con-

\(^{69}\) For example, dissolution or alteration of shareholder rights.

\(^{70}\) As indicated above, text at note 68, provision can be made for their removal.
control of the corporation’s management will only be effective as long as the parties continue to agree. There can therefore be no guarantee that the agreement will fully achieve its ends.

Factionalization is always dangerous to the successful operation of a business. The excluded minority, the non-parties, may well be victimized by the majority or at least feel that they are. Needless to say, this will hardly inspire them to do their best for the venture. They may resort to litigation. Whether or not such litigation is successful it is bound to disrupt the business and, if continued, may cause its failure. It is this potential for built-in acrimony which is the principal objection to a majority agreement. A unanimous shareholder agreement, executed prior to incorporation, will, on the other hand, fix the rights and powers of all the participants in a manner freely consented to by all of them.

ADVICE TO PERSONS ACQUIRING A MINORITY INTEREST IN A CLOSE CORPORATION

Professor O’Neal gives a number of examples of minority shareholder oppression. A poignant one is that of a trusted employee who is rewarded by his bosses who allow him to buy an interest in the corporation. Understandably, the employee feels flattered at being taken into the business, but as an employee he is reluctant to press the bosses too much about the internal affairs of the corporation. Only too late will he discover what it really means to be a minority shareholder. The majority “bosses” have him almost completely at their mercy. He may be paid no dividends on his stock, and if he objects he may even lose his employment with the corporation. In effect, his investment may be completely lost to him since more sophisticated investors will be unwilling to buy his shares, especially when they know that they carry no return and give no power to compel it. The “favored” employee is in an especially difficult position since if he does not accept the majority’s offer he may jeopardize his employment.

The ordinary prospective purchaser of a minority interest may not

from management positions. The ensuing acrimony will, however, probably lead ultimately to disruption of the management plan.

71. F. O’Neal, OPPRESSION OF MINORITY SHAREHOLDERS § 3.02 (1975).
72. Id., at 41.
be so unfortunate. He can more freely demand greater information about the power dispersal in the corporation. Obviously, if the articles of incorporation disclose provisions which will help to solidify majority power the prospective purchaser should be especially cautious.

The best advice is not to buy a minority interest in a close corporation which allows absolute majority rule. This, of course, is the same advice that would be given to an initial participant in a newly formed close corporation. The desirability of a unanimous shareholder agreement with implementing articles and bylaw provisions agreed to by all parties must be emphasized. Where the original corporate setup does not provide for adequate protection to minority interests the minority investor should insist upon their adoption.

The extent of power conceded to the minority will, of course, depend on the relative bargaining positions. In Florida the minority can be given virtually absolute power through a provision in the articles of incorporation if all shareholders agree. The equivalent of majority shareholder control can be conferred on the minority through a carefully drafted voting trust agreement in which the minority shareholder is made trustee and given broad discretion, and the majority shareholders deposit their shares in the trust. Although the trustee will be subject to fiduciary duties to the majority, the practical effect is to give him the majority power discussed above. The trustee minority shareholder could also be given an irrevocable proxy to vote the shares of the other parties to the agreement. Unless the new minority holder is indispensable, however the majority will not make such drastic concessions.

Where the majority is unwilling to capitulate, the power of the minority can nonetheless be augmented to a greater or lesser degree, depending on the bargain struck. In consideration of the minority's investment, the majority can enter into an agreement including a promise to amend the articles and bylaws where necessary: (1) To fix the numbers of directors at a number large enough to include a slot for the minority; (2) to elect the minority shareholder, and as many of his

76. Fla. Stat. § 607.114(1).
designees as his bargaining position demands; to grant him a veto over all or selected fundamental shareholder decisions through a high vote requirement; if he is not given a majority of the board, at least to give him a veto power through a high vote requirement for all or selected director decisions. These are the same provisions which are advisable in a unanimous shareholder agreement in order to protect the minority (or potential minority) when any close corporation is formed.

Where all of the present participants agree, other devices to further protect the minority shareholder’s interest may be added, such as, cumulative voting, or a recapitalization where shares are made a separate class entitled to elect a specified number of directors, or by reclassifying some majority shares into non-voting shares to further magnify the power of the voting shares.

IN SUMMARY

The archetypal corporate structure gives great potential for majority imposition on the non-majority shareholder in a multi-shareholder close corporation. This potential can be taken advantage of by an agreement which coalesces a group of minority shareholders into an effective majority.

Because an agreement by less than all of the initial shareholders is bound to produce acrimony, it is inadvisable to proceed in such a fashion at the corporation’s inception. To do so poses dangers for the drafting attorney who purports to act for all parties and to any corporate structure seeking to facilitate the agreement. Any shareholder buying into a close corporation which makes possible majority domination

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77. Valid under Fla. Stat. § 607.107(1).
81. Fla. Stat. § 607.177(2)(f), (i), (j).
82. Fla. Stat. §§ 607.164(1)(e), 607.097(1), 607.117(3). This class voting for directors is not to be confused with “classification” or staggered terms, authorized by Fla. Stat. § 607.114(4), which may used to lengthen the terms of some directors, but is frequently not desirable in a close corporation because of the complexity involved, and discriminatory treatment of directors whose terms expire earlier.
83. Fla. Stat. §§ 607.044(1), 607.177(1), (2)(f), (i), (j).
should insist on changes in the basic corporate documents as protection from the minority oppression such a majority-oriented structure permits.

The best approach is an initial arrangement encompassed in a unanimous shareholder pre-incorporation agreement which promises inclusion of the necessary protective provisions for all shareholders in the original articles of incorporation and bylaws.
Time to Abolish Parent-Child Tort Immunity: A Call to Repudiate Mississippi’s Gift to the American Family

JOEL BORMAN*

Your children are not your children.
They are the sons and daughters of Life’s longing for itself.
They come through you but not from you,
And though they are with you yet they belong not to you.
You may give them your love but not your thoughts,
For they have their own thoughts.
You may house their bodies but not their souls,
For their souls dwell in the house of tomorrow, which you cannot visit, not even in your dreams.
You may strive to be like them, but seek not to make them like you.
For life goes not backward nor tarries with yesterday.2


1. INTRODUCTION

The law, like life, must not go backward nor tarry with yesterday. Like children, the law must grow and learn and, hopefully, become wiser as it matures to reflect the ever-changing environment of our society. One of the most important justifications for such change is the proper use by thoughtful, progressive courts of the Latin maxim **cessante ratione**

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1. *Parental Immunity: Mississippi’s Gift to the American Family, 7 Wake Forest L. Rev. 597 (1971).*

2. *KAHLIL GIBRAN, THE PROPHET (1964).*
legis cessant ipsa lex which means that whenever the reasons given to justify a rule never really existed at all, the rule itself should never have come into being. The idea of immunity in tort actions between parents and children is such a rule. According to the view that the reasons for such immunity never existed at all, or alternately that they have ceased to exist, the time has come for abolishing the rule in Florida.

The parental immunity rule bars the right of an unemancipated minor child to bring an action for a tort against a parent; the rule similarly prevents a parent from bringing a tort action against an unemancipated minor child. Under this doctrine of parent-child tort immunity, like that of any status-based legal immunity, the opportunity of the injured party for justice does not depend on the nature of his injury or on the type of act which caused the wrong, but solely on the status or relationship of the wrongdoer vis-a-vis the victim. Thus, pursuant to the general rule, a tortfeasor, by virtue merely of his status as a parent or an unemancipated minor, will be immune from liability for personal injuries suffered by his child or his parent. The legal confusion caused by a multitude of objections to, and limitations on, such an unqualified bar to suit between family members was mentioned in a 1972 annotation of this subject:

The law with respect to the liability of parents for the negligent injuries of their children has been, and continues to be, in a highly unsatisfactory state, as evidenced by the great variety or identifiably distinguishable holdings, the differences in emphasis in decisions ostensibly following similar rules, the shifting of positions; . . . the proliferation of exceptions and limitations to variingly defined general rules, and the apparently completely irreconcilable basic premises invoked as the fundamental rationale.3

A major cause of the confusion that has developed is due to changing economic realities, “particularly the advent of the automobile and the prevalence of liability insurance.”4 (Emphasis Added)

This article will review the background, origin, and development of parent-child tort immunity and will analyze the basic premises and

3. Annot., 41 A.L.R.3d 909 (1972). (Liability of Parent for Injury to Unemancipated Child Caused by Parent’s Negligence is the leading annotation on the subject. This article has frequently been cited in both law review articles and cases.)
4. Id. at 910.
rationales invoked and used by various courts to either justify, limit, or abrogate the rule. The application of the immunity doctrine by Florida courts will also be discussed, along with the conflict between such immunity and tort goals and policies enunciated by the Florida courts and legislature in the 1970's. The inconsistencies in the immunity doctrine, and present public policy which is in conflict with such immunity rule, give rise to the author's opinion that Florida should abrogate the parental immunity rule and join the growing number of jurisdictions which now allow tort actions between parents and children. Whatever justification may have once existed for the immunity rule, if indeed any true justification ever existed, no longer exists, and the doctrine's day has long since passed.

2. HISTORY AND DEVELOPMENT OF PARENT-CHILD TORT IMMUNITY

A. Background

Immunity has never been a generally accepted rule in instances of injury resulting from tortious behavior. The general rule is and has been that liability should result for the infliction of injury from negligent or other tortious conduct; immunity from such liability is the exception. Indeed, even specifically with respect to parents and their children, early legal scholars were of the nearly unanimous opinion that liability of the parent was the rule for tortious behavior, especially for actions resulting in personal injury to a child.

While there is no record in early English law of any suit by an unemancipated minor against a parent, there is also no record of any holding that such a suit could not be maintained. To the contrary, there are indications in several early English cases involving children injured by teachers that tortious injuries inflicted by parents or those persons in loco parentis were actionable, with civil liability an appro-

5. President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Muskopf v. Corning Hospital Dist., 11 Cal. Rptr. 211, 359 P.2d 457 (1961); Lee v. Comer, 224 S.E.2d 721 (W.Va. 1976). The principle enunciated in these cases corresponds to the trend in modern tort law which stresses accident victim compensation as will be discussed infra.

appropriate remedy.⁷ Years later when the parental immunity issue came before a Scottish court, the judges agreed that although it was a case of first impression under Scottish law, there was no common law immunity rule, and unanimously held that an unemancipated minor could sue his parent for parental injuries resulting from negligent conduct.⁸

Further support for the rule of liability for tortious behavior of parents and those to whom parental authority has been delegated is contained in several early American cases involving situations of excessive or unreasonable punishment of a minor,⁹ gross neglect of a minor,¹⁰ or conduct which threatened a minor’s life or health.¹¹

Compounding the problem of the lack of early authority for parent-child tort immunity was the well-established common law principle, adopted in most states, that unemancipated children could sue their parents for damages caused to their property, or over contracts, wills, inheritances and the like.¹² So, as the 19th Century drew to a close, there was almost no legal authority supporting a doctrine of tort immunity between parents and children, and clear precedent existed against similar immunity for causes of action sounding in other areas. No strict rule had yet been formulated. The stage was set.

B. Origin

It was not until 1891 that any court in the United States had placed any limitation whatsoever on the right of an unemancipated child to recover in tort against a parent. In that year, the Supreme Court of Mississippi decided the case of Hewlett v. George,¹³ where a

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¹². Roberts v. Roberts, 145 Eng. Rep. 399 (1657); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Hollingsworth v. Beaver, 59 S.W. 464 (Tenn. Ch. App. 1900); Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960). It is also a well established principle of law in Florida, that an unemancipated minor child may sue his parents with respect to contracts, wills and other property rights. See 24 FLA. JUR., Parent and Child §22 (1959).
¹³. 68 Miss. 703, 9 So. 885 (1891).
minor daughter, who was married but living apart from her husband, brought an action against the estate of her deceased mother for personal injuries inflicted as a result of being wrongfully imprisoned by the mother in an insane asylum. In a short opinion completely devoid of any citations of legal or case authority, the Mississippi court held that solely because of the parent-child relationship, the child was not entitled to maintain the action. In so holding, the justices created a legal rule and precedent based purely on their own opinions of what public policy was and should be. The often quoted reason for the establishment of this rule was stated by the court as follows:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.14

With no further analysis than this, and with no basis in the common law or in statutes or prior cases, the doctrine of parent-child tort immunity was born. Its ramifications are still being felt today.

Twelve years later another jurisdiction followed Mississippi's lead in McKelvey v. McKelvey.15 The Supreme Court of Tennessee in Mc Kelvey affirmed the dismissal of a suit by a minor child to recover damages for cruel and unhuman treatment inflicted by her stepmother at the instigation and with the consent of her natural father. After citing Hewlett as the only previous case authority forbidding a child's suit against a parent, the court proceeded to create the myth of the existence of an entrenched common law basis for the parental immunity rule,16 completely ignoring the fact that the Hewlett court had mentioned no such established common law rule. All that remained to be done was to carry the logic to some extreme conclusion and test the rule to determine its limitations. Such an opportunity presented itself just two years later in the state of Washington.

In Roller v. Roller,17 the Supreme Court of Washington was faced with a civil action where a minor daughter sought damages for injuries

14. Id. at 887.
15. 11 Tenn. 388, 77 S.W. 664 (1903).
16. Id. at 665.
17. 37 Wash. 242, 79 P. 788 (1905).
inflicted as a result of being raped by her father. Even though the father had been convicted of this violent and shocking criminal offense, the court held that the daughter's rape would not be sufficient grounds for allowing her to sue the father for damages. In reversing the trial court's judgment in favor of the daughter, the court reasoned that any other result would threaten family harmony and tranquility.\textsuperscript{18} The opinion went on to perpetuate the myth that commenced with \textit{McKelvey} that there was a well-established common law rule absolutely preventing any tort action from being brought by a minor child against a parent.

In this manner, \textit{Roller} announced and justified the fact that the parental tort immunity rule, created in \textit{Hewlett} and stated in \textit{McKelvey} to be based on common law principles, was an absolute bar to suits by children against their parents.

C. Establishment

The opinions in \textit{Hewlett}, \textit{McKelvey} and \textit{Roller} have been said to "constitute the great trilogy upon which American rule of parent-child tort immunity is based."\textsuperscript{19} Since the rule was enunciated as absolute, even though all three cases involved intentional torts, it was not difficult for courts in those and other jurisdictions throughout the country to uniformly apply the immunity rule in subsequent cases, whether the tortious conduct of the parent was intentional, willful and wanton, or negligent in nature.\textsuperscript{20}

\textsuperscript{18} \textit{Id.}


The often cited case of *Small v. Morrison*,21 decided by the Supreme Court of North Carolina in 1923, helped to firmly establish the parent-child tort immunity rule. *Small* is indicative of the personal philosophy and narrow interpretation of public policy that underlies the great majority of decisions upholding the immunity doctrine. A nine year old girl sued her father and his insurance company for injuries suffered in an automobile accident allegedly resulting from the father's negligent driving. The court reviewed prior opinions and several legal writings dealing with parental immunity and concluded that the child had no right to sue her father in tort. The majority found that its position was supported by all authorities on the subject, with no authority to the contrary,22 a statement clearly contra to the cases and scholarly works mentioned previously herein. It justified its decision as being consonant with natural justice and in keeping with the eternal order of things,23 and further emphasized the importance of the immunity rule in maintaining the peace and tranquility of the home.24 The majority was so confident of its position that its rationale was ultimately founded upon Biblical and spiritual comparisons such as the following: "Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee . . ."25

*Small* also contains a dissenting opinion by Chief Justice Clark which has been called the "first strong, well-reasoned, and extensively quoted attack on the immunity doctrine. . ."26 The dissent carefully

114 S.W.2d 468 (1938). See also Annot., 41 A.L.R.3d 904 (1972). In a period of approximately thirty years, the parent-child immunity rule became firmly entrenched in almost every jurisdiction of this country. The above cases represent a sampling of these decisions adopting the immunity rule.

21. 185 N.C. 577, 118 S.E. 12 (1923).
22. *Id.* at 13.
23. *Id.*
24. *Id.* at 16.
25. *Id.*
26. Annot., 41 A.L.R.3d 904, 911 (1972). As will be shown *infra*, Justice Clark's reasoning has been adopted by an increasing number of courts today. In Small, he stated:

Never before now has this court ever been called upon to take the backward track and bar the claim of justice to the weak, or to "outlaw" the children of the land from their just demand to have their pleas heard for redress of wrongs.

118 S.E. at 21.

The doors of the Temple of Justice should always stand wide open, and to every-
analyzed all prior authority and decided that neither the common law, statutory law, nor any judicial decision prior to *Hewlett* would forbid the maintenance of a tort action by a minor child against his parents. It concluded by calling for the courts to lead the way to greater justice in the redress of such grievances.

By 1930, when *Dunlap v. Dunlap* came before the Supreme Court of New Hampshire, the parental immunity rule was accepted in jurisdictions throughout the United States. In *Dunlap*, a sixteen year old boy sued his father for injuries suffered when a platform collapsed while he was working for his contractor-father. For the first time in any American jurisdiction, the majority opinion announced that the doctrine of parent-child tort immunity was not absolute, and that when a minor child was employed by a parent who carried liability insurance and when such minor was injured in his capacity as employee, the child could legitimately sue his parent for such negligence. The immunity doctrine was said to arise from a disability to sue, and not from a lack of any violated duty. The disability should, thus, not be raised when the allowance of a suit would fail to do violence to the policy underlying the immunity rule, namely the protection of family harmony and parental control.

Although the court only created an exception to the immunity rule where a master-servant relationship had replaced a parent-child relationship, it criticized the rule in its entirety after carefully reviewing early English and American text-writers, prior judicial precedent, American law review articles, and public policy considerations. *Dunlap* has been considered:

> a strong theoretical and broad-based attack on the concept of parental tort immunity generally, revealing its uncertain and recent origin and criticizing as vulnerable its legal foundation, particularly in view of the

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one. Least of all they should be closed to the weak and "those who have no helper," for most of all they need its protection.

*Id.* at 24.

The Master said, "Suffer little children to come unto me and forbid them not." Certainly justice (sic) should not forbid them to plead their wrongs at her altar.

*Id.* at 25.

27. 84 N.H. 352, 150 A. 905 (1930).

28. *Id.* at 915.

29. *Id.*
liability of parents for contract and property wrongs, and the breakdown of tort immunity as between husband and wife, as well as the practical effect of the general prevalence of insurance coverage in various situations involving negligent injury to the unemancipated child.\textsuperscript{30}

Dunlap did not, however, mark a turning point in the history of the parental immunity rule. This was evidenced just four years later in Briggs v. City of Philadelphia,\textsuperscript{31} where the Superior Court of Pennsylvania, although citing Dunlap, upheld the doctrine by indicating the deeply rooted policy concerns underlying the rule.\textsuperscript{32}

D. Justifications:

A "rule which so incongruously shields conceded wrongdoing bears a heavy burden of justification."\textsuperscript{33} Since the establishment of parent-child tort immunity, most courts confronting the question have given specific and distinct reasons for upholding the doctrine. The most frequent justifications cited for the immunity rule include: (1) domestic harmony and tranquility; (2) parental care, discipline, and control; (3) danger of fraud and collusion; and (4) depletion of family resources. These rationales lack persuasive authority when closely scrutinized.

(1) Domestic Harmony and Tranquility

The preservation of family harmony and domestic tranquility is the leading justification used by courts to support the parental immunity rule.\textsuperscript{34} Again and again, courts have proclaimed their belief that

\begin{itemize}
  \item \textsuperscript{30} Annot., 41 A.L.R.3d 904, 911 (1972).
  \item \textsuperscript{31} 112 Pa. Super. 50, 170 A. 871 (1934).
  \item \textsuperscript{32} Id.
  \item \textsuperscript{34} The family harmony rationale has been emphasized by every jurisdiction adopting the parent-child tort immunity rule as the foundation for such doctrine. See Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Securo v. Securo, 110 W.Va. 1, 156 S.E. 750 (1931); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950) (The policy of the law should preserve and maintain the security, peace and tranquility of the home.); Nudd v. Matsoukas, 7 Ill.2d 608, 131

https://nsuworks.nova.edu/nlr/vol4/iss1/1
injuries sustained by minor children must remain uncompensated. The counter-argument is that it is the tortious injury itself, rather than the threatened litigation, that disrupts domestic life.\textsuperscript{35} When the wrong has been committed, the harm, if any, to the basic fabric of the family has already been done and the course of rancor and discord already introduced into family relations.\textsuperscript{36} The most acrimonious family disputes concern lawsuits over property and contract rights. Such suits have never been barred by any immunity rule; it is illogical to deny tort actions because they are disruptive of family harmony.\textsuperscript{37}

The weakness of this rationale is further demonstrated by noting that in many reported cases in this area involving automobile accidents where liability insurance is present, family harmony would be disrupted far more by denying recovery than by granting it.\textsuperscript{38} Finally, if the interest in family harmony is important enough to prevent minor children from suing their parents, it is difficult to rationalize and understand why other family members may sue each other when the possible dis-


\textsuperscript{36} Most of the decisions adopting the family harmony rationale have not specifically discussed whether the immunity rule would advance this justification with respect to their particular fact situations. The following cases have critically examined whether family harmony and domestic tranquility are, in fact, preserved by the doctrine of immunity. \textit{See} Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Sorensen v. Sorensen, 339 N.E.2d 97 (Mass. 1975); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Rozell v. Rozell, 281 N.Y. 16, 22 N.E.2d 254 (1939). \textit{See also} cases cited in notes 37 and 38 \textit{infra}.


turbance to domestic tranquility is just as real.39

(2) PARENTAL CARE, DISCIPLINE, AND CONTROL

A second reason frequently offered by courts to justify the parent-child immunity rule is that to permit a minor child to bring a tort action against his parents is to impair society's interest in maintaining parental authority with respect to the care, discipline, and control of minor children and to encourage such children to disobey their parents.40 These protected parental interests have been deemed to consist of the right and obligation of parents to maintain the home, to nurture and protect their children and guard them from danger, to care for them and to chastise them when necessary.41 A fear exists among courts that to allow a minor child to bring a lawsuit against his parents would alter the natural process of child development and damage the very fabric of their relationship.42 Many of those jurisdictions which have embraced a limited abrogation of the immunity rule view potential interference with parental care, discipline, and control as the one viable circumstance that should continue to prevent minor children from being able to sue their parents in tort.43

39. Comments: Tort Actions Between Members of the Family—Husband and Wife—Parent and Child, 26 Mo. L. Rev. 152, 188 (1961). In this author's opinion, this law review comment presents the finest detailed analysis of this topic to date.

40. McKelvey v. McKelvey, 11 Tenn. 388, 77 S.W. 664 (1903); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Mesite v. Kirchstein, 109 Conn. 77, 145 A.753 (1929); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966). As will be discussed infra, except for domestic harmony and tranquility, the parental control argument has been the most frequently cited justification for the continued retention of the parent-child immunity rule.

41. Lemmen v. Servais, 39 Wis.2d 75, 158 N.W.2d 341 (1968); Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952). In all jurisdictions, criminal sanctions have long been imposed for parental acts violating parental obligations to their children. See Fla. Stat. §§ 827.01-827.07 (1977) for the criminal penalties relating to certain delineated breaches of parental obligations to their children.

42. See Holodook v. Spencer, 26 N.Y.2d 35, 324 N.E.2d 338 (1974) for a strong statement as to the judicial concern in this area.

The parental control argument was dealt with, and rejected by, the Dunlap court which stated that the idea that children would become unruly if given a right to legal redress was farfetched. The problem in the typical case arises where a child is injured by his parent’s negligent operation of an automobile. A suit in most instances is brought at the behest of the parents for the very purpose of allowing the child to recover against their liability insurer. Any judgment rendered will, in all probability, be paid by the insurer thereby providing the family with a fund for the child. The interests of parental control and discipline are, thus, not infringed upon nor weakened.

This rationale becomes further suspect by noting that lawsuits involving property and contract rights, which have never been barred by any immunity rule, may be as disruptive to the family unit as those involving negligently inflicted injuries. Furthermore, the courts that justify the immunity rule on this ground make no distinction between suits brought by parents against children or those brought by children against parents, although this justification is applicable only to cases where a child is suing parent.

(3) DANGER OF FRAUD AND COLLUSION

In upholding the parental immunity rule, a number of courts have indicated concern over the proposition that to allow minor children to maintain negligence actions against their parents would foster fraud and collusion. The cases involving fraud and collusion have centered
around situations where liability insurance is present, and the insurers have raised the spectre of children and parents plotting against them.\textsuperscript{50}

An analysis of this rationale demonstrates that the possibility of fraud and collusion exists not only in situations relating to the parent-child tort immunity rule, but in all liability insurance cases where suits have been allowed.\textsuperscript{51} Courts have entertained tort actions between drivers and passengers of vehicles and close friends and family members other than parents and children without the cry of collusion preventing a consideration of the facts on their merits.\textsuperscript{52} Our legal system itself is quite capable of ferreting out those fraudulent claims that may exist without having to indiscriminately bar all meritorious claims due to a fear of fraud.\textsuperscript{53}

The fraud and collusion argument is, in actuality, entirely incompatible with the family harmony and tranquility argument most often advanced by courts in support of the parental immunity rule.\textsuperscript{54} The former rationale is premised upon the closeness of the family members whereas the latter rationale is based upon the hostility and anger a suit would bring so as to disturb the peace of the home. This blatant inconsistency is explained by taking into account the fact that the existence of liability insurance is considered by courts when dealing with the possibility of fraud but is disregarded when the same courts discuss family harmony.\textsuperscript{55} The illogical nature of this approach is indicative of the cases decided in the last twenty years have, contra to these decisions, downplayed the fraud and collusion rationale as a justification for the retention of the parent-child tort immunity rule. The abrogation of Automobile Guest Statutes in most jurisdictions has indicated the decreasing importance of fraud and collusion as a determining factor in the threshold question of whether a lawsuit should be allowed to be maintained. Florida had abrogated its guest statute in 1972. See Fla. Stat. § 320.59 (1937) (Repealed by Laws 1972, c. 72-1 § 1).

\textsuperscript{50} Barlow v. Iblings, 156 N.W.2d 105 (Iowa 1968).
\textsuperscript{53} An example of the courts' rejection of this fraud rationale is indicated in the trend toward the elimination of Automobile Guest Statutes which have been primarily based on the fear of fraud and collusion between drivers and passengers. Florida repealed its Guest Statute in 1972. (Fla. Stat. § 320.59 (1972)). See Id.; Tamashiro v. DeGama, 450 P.2d 898 (Hawaii 1969); Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970).
\textsuperscript{54} Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952).
\textsuperscript{55} Id.
precarious base upon which the immunity rule is built.

(4) DEPLETION OF FAMILY RESOURCES

Some courts have noted that to permit a child to sue his parents in tort would deplete the family exchequer to the detriment of other children by reducing both the amount of money available for their care and the shares they would receive upon the death of their parents. The argument assumes an equality among the children and an intention on the part of parents to treat their children equally.

This assumption of equality conveniently omits the fact that the child recovering has been injured while other children and family members have not. Furthermore, the notion of equality seems to connote that a child has a vested right to a specific distributive share of the property of his parents. No such right exists. Courts advancing this rationale have also not addressed themselves to the question as to why an injured minor child should be treated differently than a third party who has always been allowed to recover against one who is a parent; both situations would allegedly deplete family resources.

A number of courts have emphasized the prevalence of liability insurance as a complete refutation of the argument that recovery by a child against his parent will deplete family resources. The insurance company is the real party in interest and is the source from which the injured child receives compensation.

E. Exceptions

The exceptions and limitations placed upon the immunity rule have been many and varied. In fact, the doctrine of parent-child tort immunity "is so limited by these exceptions it could be said liability is

56. Roller v. Roller, 27 Wash.2d 242, 79 P. 788 (1905); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Orefice v. Albert, 237 So.2d 142 (Fla. 1970); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932). This argument assumes that the negligent parent will pay the damage award, an assumption which is unrealistic given the widespread prevalence of liability insurance.


the rule and immunity the exception.95 These exceptions have centered around cases where courts consider the parent-child relationship to have been abandoned or where the tortious act of the parent does not arise out of the family relationship.60 The exceptions most often cited involve fact situations where (1) the minor child is emancipated;61 (2) the parent's conduct is characterized as intentional or willful and wanton;62 (3) the parent is acting in his business or vocational capacity and not in his parental capacity when causing the injury;63 and (4) the parent and/or child dies as a result of the parent's negligent act.64

Some of these exceptions are clearly justified when examined in light of the policies underlying the parental immunity rule. Where the parents and/or children are dead as a result of the negligence of the parents, numerous courts have allowed lawsuits to be maintained on the ground that death terminates the family relationship; and, hence, family harmony and discipline would not be disturbed.65 Where a par-

65. See cases cited note 64 supra.
ent has intentionally or willfully and wantonly injured his child, the intrinsic peace and harmony of the family is greatly disrupted, if not destroyed, by the very nature of the tortious act. It will not be further disturbed by a severely injured child recovering from his parent for the parent's reprehensible conduct.68

The other exceptions do not so easily fit into the framework of the policies underlying the immunity rule. All courts have permitted an emancipated child to sue his parents on the ground that the parent-child relationship is terminated since the child is his own master and no longer under the control of his parents.69 Although the policy of parental discipline and control may no longer be of significance when a child is emancipated, the fact remains that parents and children may still constitute a very closely knit family structure. A lawsuit by an emancipated child may be just as destructive to family harmony and tranquility as one maintained by a child who is under the control of his parents. Furthermore, the same danger of fraud and collusion exists whether the child is emancipated or unemancipated.

The courts that have held a parent liable to his child for the parent's tortious conduct committed while acting in his business capacity have reasoned that an action should be permitted since the parent's negligence did not relate at all to the discharge of parental duties.68 Typical of these cases is Trevarton v. Trevarton,69 where a father, engaged in the business of cutting lumber, negligently injured his son by allowing a tree to be dragged over him while he was sleeping. In granting recovery to the child, the court did not concern itself with whether its decision was consonant with the policy justifications underlying the immunity doctrine. It did not discuss the disruption of family harmony, or the disturbance of parental discipline and control, or the possibility of fraud and collusion against the liability insurer of the father, although these policies were as applicable here as in any other case.

Rather than abrogate the parent-child tort immunity rule, the courts have created this series of exceptions to justify the maintenance of actions by injured children against their parents. To allow such suits courts have, in certain instances, conveniently overlooked the policy ra-

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66. See cases cited note 62 supra.
67. See cases cited note 61 supra.
68. See cases cited note 63 supra.
tionales so often quoted in support of the doctrine.

F. Abrogation of Parent-Child Tort Immunity

(1) Partial Abrogation of Immunity

A wave of recent decisions has abrogated the parental immunity rule to the extent of permitting actions by unemancipated children against their parents for negligently-inflicted injuries arising out of automobile accidents. These courts have taken judicial notice of the almost universal existence and availability of liability insurance and have indicated that although such insurance cannot create liability where there was no previous legal duty, it is a proper element to consider when discussing the rationale underlying the immunity doctrine. It is the unanimous opinion of these courts that where liability insurance is present, there is little, if any, possibility that family harmony, parental discipline and control and family resources will be disturbed. In fact, where liability insurance exists, an action by the injured child against his parent will be beneficial rather than detrimental to the family relationship.

Two jurisdictions have abrogated the parental immunity rule in automobile accident cases only to the extent of the parent's liability insurance coverage. However, the great majority of courts eliminating parental immunity in such cases have not limited their abrogation of


71. See cases cited note 38 supra.

72. Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975); Williams v. Williams, 369 A.2d 669 (Del. 1976); See also the concurring opinion of Justice Neely in Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976). Such abrogation reflects changing conditions and circumstances where the existence of liability insurance has become the rule, not the exception.
the doctrine to situations specifically involving insurance, since they acknowledge that insurance is present in almost all cases and that without insurance, it is highly unlikely that any action will be instituted at all. These courts have balanced the competing considerations and have concluded that the interest in securing legal redress to injured children outweighs the policy factors supporting immunity in such cases. 73

Furthermore, two courts have indicated that if the parent-child tort immunity is to be changed with regard to the automobile accident problem, such change should be by legislative decree and not by judicial fiat. The legislatures of these states have acted upon these judicial suggestions and have partially abrogated the immunity rule as it relates to injuries caused by the negligent operation of an automobile. 74

(2) **PARTIAL RETENTION OF IMMUNITY**

The trend among the courts that have recently reviewed the parent-child tort immunity rule has been to abrogate the doctrine with the noteworthy exception of retaining such immunity for parental conduct involving the authority, care, discipline, and control of their children. The avowed purpose behind this limited retention of the immunity rule has been “preserving, fostering and maintaining a proper and wholesome parent-child relationship in a family” 75 to enable parents to freely and properly discharge the duties that society exacts. 76 Many of these

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73. Almost all of the reported cases involving torts committed by parents unrelated to the exercise of parental functions deal with automobile accidents.

74. **CONN. GEN. STAT.** § 52-572C (1970) states as follows:

In all actions for negligence in the operation of a motor vehicle, and in all actions occurring on or after October 1, 1979, for negligence in the operation of an aircraft or vessel, as defined in Section 15-127, resulting in personal injury, wrongful death or injury to property, the immunity between parent and child in such negligence action brought by a parent against his child or by or on behalf of a child against his parent is abrogated.

**N.C. GEN. STAT.** Article 43D, § 1-539.21 states as follows:

Abolition of parent-child immunity in motor vehicle cases. The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

75. Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W. 2d 342 (1968).

76. The following cases are a sampling of the many jurisdictions that follow this principle: **See** Rodebaugh v. Grand Truck Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Borst v. Borst, 41 Wash. 642, 251 P.2d 149 (1952); Goller v.
courts cite the leading Wisconsin case of *Goller v. White*\textsuperscript{77} as persuasive authority for this exception to the abrogation of the immunity rule. The *Goller* court retained parental immunity for the following two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.\textsuperscript{78} According to the language of the decision, the question that must first be decided is one of law as to whether the act falls within the scope of parental authority and discretion; the question of the reasonableness of the act has no bearing in this determination. If a court answers the question in the affirmative, an injured child cannot bring any action against his parents.

The validity of the rationale underlying this remaining area of immunity becomes suspect when analyzing a fact situation involving parental conduct which would present itself to a court for resolution. If a child sues his parents on the theory of negligent supervision or care for injuries incurred in or around the home, the action will, in all likelihood, be instituted by the parents on behalf of the child, and only if insurance is involved.\textsuperscript{79} Parental authority and discretion will not be circumscribed or disrupted in situations such as these. It is true that the possibility exists that by his own volition, an injured minor, by and through a guardian *ad litem*, may sue his parents for negligent care and supervision when no liability insurance is involved. However, this may also occur in automobile accident cases and would indicate that parental authority, discipline, and control has already been dealt a fatal blow.\textsuperscript{80}

\textsuperscript{77} 20 Wis.2d 402, 122 N.W.2d 193 (1963). The Supreme Court of Wisconsin had the distinction of becoming the first judicial body in the United States to abrogate the parental immunity doctrine for injuries negligently inflicted.

\textsuperscript{78} Id. at 198.

\textsuperscript{79} Id. at 197.

\textsuperscript{80} Cole v. Sears, Roebuck and Co., 47 Wis.2d 629, 177 N.W.2d 866 (1970).
The *Goller* court made specific reference to the importance of insurance in negating any possible disturbance to parental discipline and authority but did not discuss the relationship of insurance to the exceptions it carved out.\(^81\) The court cited the *Law of Torts*, by Harper and James\(^82\) as authority for the proposition that an injured child should be allowed to sue his parents where family harmony is not in jeopardy and the "reasonableness of family discipline is not involved,"\(^83\) but it did not critically apply these factors to parental conduct involving the care and supervision of children to determine whether a tort action brought by a minor against his parent would, in reality, have an effect on family discipline.

Seven years after *Goller*, in *Cole v. Sears, Roebuck & Co.*,\(^84\) the Supreme Court of Wisconsin was presented with the opportunity to interpret the exceptions to the abrogation of the parental immunity rule it had earlier delineated. The question at issue was whether the parents of an injured minor child would be liable, in a third party action for contribution, for negligent supervision in allowing their child to play with a defectively designed swing set when they knew or should have known of the set's inherently dangerous nature. The court interpreted the *Goller* exceptions very broadly by stating that negligent supervision of a child's play is not an act involving parental discretion with respect to the care of the child.\(^85\) The term "other care" set forth in the *Goller* exceptions was deemed not to be so broad in scope as to cover all parental conduct associated with the family relationship; and, specifically, parents' supervision of their children at play was held to fall outside the area where immunity has been retained.\(^86\) Parental immunity was, by inference, limited to the legal obligations of exercising authority over, and providing actual necessities to, the child. Since the great majority of reported cases dealing with strictly parental transactions involve acts of supervision,\(^87\) the immunity exceptions are thus


\(^{82}\) 1 Harper and James, *Law of Torts*, 650 § 8.11.

\(^{83}\) Id. at 650.

\(^{84}\) 47 Wis.2d 629, 177 N.W.2d 866 (1970).

\(^{85}\) Id. at 869.

\(^{86}\) Id. at 868.

severely limited in their application.

(3) **Total Abrogation of Immunity**

A number of jurisdictions have completely abolished the parental immunity rule.\(^8\) In the leading case of *Gibson v. Gibson*,\(^8\) a minor sued his father for negligently stopping his car at night on a highway and instructing his son to go out onto the roadway to correct the position of the wheels of the jeep he was towing. After reviewing the immunity rule, the Supreme Court of California recognized the concern voiced by courts with regard to questions of parental discretion and supervision and cited *Goller* as the precedent setting case for the retention of immunity for such parental conduct.\(^8\)

In rejecting the *Goller* approach, the court summarily rejected the granting of spheres of influence to parents where their actions could not be reviewed as a matter of law. Parents could thus act negligently toward their children with impunity.\(^9\) For example, a child could be injured by the negligence of his mother in leaving a known defective electric wire easily within his reach. Pursuant to the *Goller* exceptions, the child foreseeably would not have his day in court regardless of the negligence of his mother and the existence of insurance to pay the damage award. The reasonableness of the mother's actions would not be reviewed.

A further concern of the Supreme Court of California was the spectre that the courts adopting the *Goller* rationale would develop a superstructure of arbitrary and conflicting distinctions as to whether specific parental conduct lies within the immunity guidelines.\(^9\) The

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\(^{8}\) N.Y.2d 35, 324 N.E.2d 338 (1974). Some courts have interpreted Goller in a different manner so as to include parental supervision and control as areas where immunity still remains. See note 94 infra.


90. *Id.* at 652.

91. *Id.* at 653.

92. *Id.*
emergence of such a structure is already developing as courts spend much of their time determining if an exception applies in the specific fact situation as opposed to determining the reasonableness of parental conduct regardless of any exception. This lack of uniformity in approach can only lead to confusion as courts concentrate on categorizing a parent's conduct as opposed to analyzing whether any circumstances exist for allowing a child's injuries to remain uncompensated.

The solution proposed by the Supreme Court of California is to abrogate the parental immunity rule in its entirety and judge parental conduct according to the following question: "What would an ordinarily reasonable and prudent parent have done in similar circumstances?" A parent is thus held to a standard of reasonableness viewed in light of the parental role, regardless of the classification of his conduct.

The California approach will not interfere with the exercise of parental discretion as long as parental actions are reasonable. To allay the fears of those who raise the cry of tampering with the parental prerogative, the court acknowledged that parents must be allowed a wide range of discretion in the performance of their parental functions. The "reasonable parent" standard should thus be construed to

93. See Lemmen v. Servais, 39 Wis.2d 75, 158 N.W.2d 341 (1968). The Supreme Court of Wisconsin decided that alleged parental negligence in failing to instruct their child in how to leave a school bus and cross a highway was not actionable since the act involved the exercise of parental discretion with respect to the care of their child; Gross v. Sears, Roebuck and Co., 158 N.J. Super. 442, 386 A.2d 442 (Super. Ct. App. Div. 1978). The Superior Court of New Jersey decided that the alleged negligence of a father in mowing his lawn and injuring his child was actionable since the act did not arise out of the exercise of "parental authority." The entire opinion dealt with whether an exception was applicable to this fact situation. See also Rodenbaugh v. Grand Trunk Western R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338 (1974).

94. The confusion and lack of uniformity already exists as evidenced by the number of courts interpreting the Goller exceptions to apply to parental functions in general, including supervision. Whereas the court that decided Goller has interpreted the decision to allow actions for parental negligence in supervising their children. See Cole v. Sears, Roebuck and Co., 47 Wis.2d 629, 177 N.W.2d 886 (1970); but see Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338 (1974); Rodenbaugh v. Grand Trunk Western R.R. Co., 4 Mich. App. 559, 145 N.W. 2d 401 (1966).


96. Id. at 653.
take into consideration situations where parents may be forgetful or careless without such conduct being interpreted as stepping beyond reasonable parental behavior. When parental conduct is deemed to be unreasonable under this standard, the time has possibly arrived for consideration of the imposition of criminal sanctions and has certainly arrived for granting a civil remedy to the child to recover for the damages he has suffered. Such parental conduct should not be tolerated.

Where the Goller approach gave to parents a “right” to be negligent in the performance of certain parental functions, the Gibson approach would subject parental conduct to judicial review to determine whether such conduct was clearly unacceptable and unreasonable in view of the wide latitude of discretion that should be granted to parents. Given the state interest in insuring the safety and well being of children, the Gibson rationale is clearly preferable.

3. FLORIDA: BASTION OF PARENT-CHILD TORT IMMUNITY

Florida’s appellate courts first addressed the question of whether a negligence action could be maintained between a parent and child in 1961 when the Second District Court of Appeal decided Meehan v. Meehan. In Meehan, a father sued his minor son, and others, for the

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98. The Florida legislature has specifically provided for criminal penalties against a parent or third party who willfully or through culpable negligence abuses or maltreats a minor child, or deprives a minor child of necessary food, clothing, shelter or medical treatment.

FLA. STAT. § 827.03 deals with aggravated child abuse. FLA. STAT. § 827.04 deals with the willful or culpable deprivation of basic necessities to a minor child and the knowing or culpable allowance of physical or mental injury to the child. FLA. STAT. § 827.05 deals with an individual, though financially able, negligently depriving a minor child of basic necessities. FLA. STAT. § 827.07 deals with the abuse of minor children by willful or negligent acts and provides the procedural mechanisms through which public agencies come into play to safeguard the welfare of the minor child.

wrongful death of another minor son and alleged that the defendant child was negligent in failing to inform his deceased brother of a known defective condition of an electric buffing machine when he gave the machine to him. As a result of the failure to warn, the deceased child was electrocuted while using the machine.

With no precedent in this state to guide it, the court viewed the question facing it as solely one involving public policy. In affirming the summary judgment granted the defendants in the lower court, the District Court of Appeal adopted the position that neither parents nor their representatives could maintain an action in tort against an unemancipated minor child. The rationale advanced for adhering to the parental immunity rule, prevalent in the majority of jurisdictions at that time, was the importance of preserving family unity and maintaining family discipline. No discussion appeared relating to whether the area of immunity the court was creating was justified under the facts of the case in light of the rationale it cited.

The Second District Court of Appeal again had the opportunity to review the immunity doctrine in Rickard v. Rickard,100 where a seven year old child, by and through his father, sued his parents for negligence in failing to provide him with a safe place to play. While in his parents' home, the plaintiff and two of his friends were squirting charcoal lighter fluid when a match was struck by one of the boys resulting in plaintiff's clothing being engulfed in flames. In affirming the lower court's dismissal of plaintiff's complaint, the court cited Meehan,101 noting that the rule adopted there should be controlling regardless of

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100. 203 So.2d 7 (Fla.2d Dist. Ct. App. 1967).
101. Id. at 8.
the fact that a minor was now suing his parents, not a parent suing a
minor child. Again, the court emphasized the importance and necessity
of preserving and encouraging family unity and maintaining family dis-
cipline as the policy justifications underlying the parental immunity
rule.\textsuperscript{102}

Although the court indicated that the immunity rule was not not
absolute and existed only where the suit would disturb family rela-
tions,\textsuperscript{103} it did not undertake to analyze whether family harmony and
discipline would be disturbed since the father was, in reality, instituting
the action against himself and his wife. The court also did not discuss
the effect of the parents' homeowners' insurance policy which insured
them against personal legal liability for bodily injury to another, nor
were the policy goals the court was attempting to achieve through the
doctrine of immunity delineated. The insurance policy was not deemed
to be material to the action.\textsuperscript{104}

The Fourth District Court of Appeal next considered the question
of parental immunity in \textit{Denault v. Denault},\textsuperscript{105} where an unemanci-
pated minor child sued her mother for the negligent infliction of inju-
ries sustained in a collision in which the minor was a passenger in the
mother's automobile. This case was of significance since it was the first
in Florida to deal with a negligence action arising out of an automobile
accident. In affirming the lower court's dismissal of the action on the
authority of \textit{Meehan}\textsuperscript{106} and \textit{Rickard},\textsuperscript{107} the District Court of Appeal did
not discuss the factual differences in the cases or whether such differ-
ences should possibly lead to different results. \textit{Meehan} and \textit{Rickard}
involved the exercise of parental duties and discretion peculiar to the
family relation itself, where \textit{Denault} dealt with a duty to drive with
reasonable care, an obligation which was neither limited to the family
nor involved parental discretion. Furthermore, the court did not men-
tion the existence or non-existence of liability insurance coverage under
the specific facts, and the only conclusion thus to be reached is that it
did not consider this factor important in arriving at its decision.

102. \textit{Id.}
106. 133 So.2d 776 (Fla. 2d Dist. Ct. App. 1961).
107. 203 So.2d 7 (Fla. 2d Dist. Ct. App. 1967).
In 1970, the Florida Supreme Court decided *Orefice v. Albert*, a decision which remains the leading case in Florida on the subject of parent-child tort immunity. In *Orefice*, a minor and his father were both killed in an airplane crash due to the negligence of the father-pilot who was also the co-owner of the airplane. On the basis of the parental immunity rule, the court held that as a matter of law, lawsuits brought by the mother, in her own right and as a parent, and by the estate of the deceased minor child, would be barred. The court indicated that established policy in Florida prevented children from suing their parents and that such policy was grounded upon the protection of family harmony and resources, although no prior Florida decision had ever mentioned the preservation of family resources as a reason for upholding the immunity rule.

There was no discussion by the court as to whether the policies underlying the immunity doctrine would be applicable to the facts of the case since both the father and son were killed, and the family relationship was thus terminated. As in *Denault*, no statement appeared regarding the existence of liability insurance and its effect upon the preservation of family harmony and resources. The Florida Supreme Court followed the lead of the district courts of appeal that had previously considered the parental immunity question by repeating general policy statements without critically examining whether the application of the immunity rule in the particular case furthered these declared policy goals.

In 1972, the Third District Court of Appeal first reviewed the immunity rule in *Webb v. Allstate Insurance Co.*, where a nine year old child, through a guardian, brought an action against his father, his father's automobile liability insurer, his father's employer and the employer's insurer. The plaintiff had accompanied his father to work where the father became so intoxicated that several fellow employees discussed having someone drive him and his son home. The father then took a vehicle belonging to his employer and, while driving home with

108. 237 So.2d 142 (Fla. 1970).
109. *Id.* Orefice has been cited by all subsequent cases in Florida involving the question of tort immunity between parents and children.
110. *Id.* at 145.
111. 220 So.2d 27 (Fla. 4th Dist. Ct. App. 1969).
his son as a passenger, negligently collided with the rear of another car causing injuries to the child. The court affirmed the lower court’s granting of a summary judgment in favor of the father and his insurer on the ground that, as a matter of law, an unemancipated minor child cannot maintain an action against his parents for negligence.

Although the father’s liability insurance carrier was a named party defendant, nowhere in the opinion was the importance of insurance mentioned as it related to the policies underlying the immunity rule. The court also did not analyze whether the father’s voluntary intoxication removed the shield of immunity surrounding him by making his actions so grossly negligent and/or willful and wanton that he completely departed from his parental role.113 As in prior Florida cases, this district court of appeal justified its legal position solely on the basis of broad statements of general public policy. The circumstances of the particular case were not considered.

The same year Webb was decided, the Second District Court of Appeal, in Vinci v. Gensler,114 applied the parental immunity rule to a tragic situation where an entire family, consisting of a mother, father, and two minor children, died in an airplane accident caused by the alleged negligent operation or maintenance of the airplane by the deceased father. The personal representative of the estates of the mother and children brought an action against the administrator of the father’s estate and Fireman’s Fund Insurance Company, the liability insurer of the subject airplane. The policies underlying the disability of the child’s suit against his parents were not even mentioned in this per curiam decision which upheld the lower court’s dismissal of the plaintiff’s complaint.

The dissent in Vinci was lengthy and sharp in its criticism of the majority’s failure to scrutinize the “mistaken axioms and ill-founded reasons” upon which the parental immunity rule was based; and further alleged that “in this particular case even those ill-founded reasons are absent.”115 Since no family member survived the crash, the disruption of family harmony, the danger of fraud and collusion, the destruction of parental discipline and control and the raid on family resources, all often quoted reasons for the maintenance of immunity, were ren-

113. Id. at 841.
115. Id. at 22.
dered moot. The existence of liability insurance, in and of itself, would render most of these rationales inapplicable to this and all cases involving the immunity rule. The majority did not address itself to any of these issues.

The parent-child tort immunity rule is strongly entrenched in Florida tort law. In decisions consistently upholding the immunity doctrine, Florida courts have resisted the changes in the rule that are being proposed and adopted in a majority of courts throughout the country.

4. PARENT-CHILD TORT IMMUNITY: AN ANACHRONISM IN FLORIDA TORT LAW

Florida has experienced rapid change in its tort law in the 1970's with the judicial adoption of comparative negligence in 1973, the statutory waiver in 1973 of sovereign immunity for tort actions, the legislative enactment in 1975 of the Uniform Contribution Among Tortfeasors Act (UCATA), and the judicial adoption of strict liability in tort in 1976. Changes such as these have led the First District Court of Appeal to state:

In view of the recent developments in the tort field, the abrogation of contributory negligence, the adoption of comparative negligence, the enactment of the Uniform Contribution Among Tortfeasors Act, and others, the time may be ripe for the abrogation of the family immunity doctrine. It appears that this would be consistent with the recent development that a loss should be apportioned among those whose fault contributed to the event, as well as providing for contribution among joint tortfeasors.

In abrogating the doctrine of contributory negligence and adopting a pure comparative negligence system, the Florida Supreme Court emphasized its concern for the automobile accident problem and the need to secure just and adequate compensation for accident victims. The

118. FLA. STAT. § 768.28 (1973).
119. FLA. STAT. § 768.31 (1975).
120. West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1978).
court was also concerned with adopting a more socially desirable method of loss distribution so that when the negligence of more than one person contributed to an accident causing injuries, each tortfeasor should pay the proportionate share of the total damages he had caused the injured party. 123

Shortly after the adoption of comparative negligence, Justice Dekle, in a special concurring opinion in Ward v. Ochoa, 124 noted that Florida's common law doctrine preventing contribution among joint tortfeasors was inconsistent with its newly adopted doctrine of apportionment of fault. 125 To accomplish complete equity in determining liability and in achieving a more desirable method of loss distribution, the UCATA was untimely adopted, 126 permitting contribution when two or more persons become jointly or severally liable in tort for the same injury.

The widespread availability and use of liability insurance has played an important role in the judicial adoption of comparative negligence and the legislative enactment of the UCATA. 127 When the doctrines of fault and contributory negligence first came into prominence during the period of the Industrial Revolution, 128 the legal question to then be decided was solely whether a loss should fall on the plaintiff or defendant. Liability insurance against accidents was unknown until the latter part of the nineteenth century. 129 Such insurance is the vehicle by which the burden of bearing losses is shifted from the individual to all the policyholders benefiting from the insured activities. 130 Accident victims may be compensated and human suffering may be lessened by apportioning fault and allocating losses through insurance. 131

In addition to these methods for providing adequate compensation for accident victims and distributing losses, the legislature has also in-

123. Id. at 437.
124. 284 So.2d 385 (Fla. 1973).
125. Id. at 388.
126. FLA. STAT. § 768.31 (1975).
128. Id. at 137.
129. Id. at 138.
131. Id.
dicated its interest in this area by its enactment of the Florida Automobile Reparations Reform Act in 1971.\textsuperscript{132} This act requires every owner or registrant of a motor vehicle in this state to show proof of security by an insurance policy\textsuperscript{133} or other means provided by the Financial Responsibility Law.\textsuperscript{134} The purpose of such security is to provide for payment of personal injury protection benefits to certain designated individuals, regardless of fault, for specifically delineated medical expenses and services, funeral expenses and disability benefits.\textsuperscript{135} By recognizing and primarily employing the mechanism of insurance, the legislature has thus provided a means for guaranteeing the payment of specified amounts to an injured victim by a distribution of losses borne by the total group of policyholders.

The Florida Supreme Court again emphasized the tort goals of accident victim compensation and the distribution of losses resulting from such compensation by its adoption of the theory of strict liability in tort.\textsuperscript{136} The court characterized the doctrine of strict liability as one of “enterprise liability” where the cost of injuries should be borne by the makers of products who place them in commerce, rather than by the injured persons who are usually powerless to protect themselves.\textsuperscript{137} Strict liability was held applicable to not only users and consumers of defective products, but also to foreseeable bystanders who might be injured by such products.\textsuperscript{138}

The theory of enterprise liability is based, in part, on the concept of “risk spreading” whereby manufacturers absorb the inevitable losses incurred as a result of the use of their products by passing such losses on to the public.\textsuperscript{139} Manufacturers are in a better position to spread this risk by insuring themselves against the risk of injuries and distributing

\begin{thebibliography}{99}
\bibitem{132} FLA. STAT. §§ 627.730-.741 (1975).
\bibitem{133} FLA. STAT. § 627.733 (1975).
\bibitem{134} FLA. STAT. § 324.031 (1975).
\bibitem{135} FLA. STAT. § 627.731 (1975).
\bibitem{136} West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1978).
\bibitem{137} \textit{Id.} at 92.
\bibitem{138} \textit{Id.} at 88. The strict liability doctrine set forth in the \textit{Restatement (Second) of Torts} § 402A (1965) was adopted by the Florida Supreme Court. The language of the \textit{Restatement} applies strict liability to users and consumers of products, but public policy considerations surrounding the concepts of enterprise liability are equally applicable to innocent bystanders.
\bibitem{139} Prosser, \textit{The Assault Upon the Citadel}, 69 \textit{Yale L. J.} 1099, 1120 (1960).
\end{thebibliography}
the price of such insurance to the public as a cost of doing business. Although few courts have overtly discussed the importance of liability insurance and its relationship to the theory of enterprise liability, a number of writers have emphasized such insurance as critical to the theory's vitality.

The continued failure of Florida's courts to permit a minor child to recover against his parents for injuries negligently inflicted is incongruous in view of these clearly delineated tort goals and policies. The compensation of accident victims and the distribution of losses through the vehicle of liability insurance is clearly hampered by the immunity rule.

5. PARENTAL IMMUNITY AND THE UCATA

The Florida courts were recently faced with a series of cases in which the avowed goals of fault apportionment and loss distribution came into direct confrontation with the parental immunity rule. All of the cases involved the question as to whether a tortfeasor could obtain contribution from another tortfeasor who was immune from suit by the injured party because of either parental or inter-spousal immunity. In Mieure v. Moore, a case involving injuries suffered in an automobile accident, the First District Court of Appeal answered the question in the negative, unanimously finding that the negligent father/husband was not a joint tortfeasor with the third party defendant seeking contribution from him since, on the basis of the family immunity rule, there was no common liability to the injured chil-

141. Prosser, supra at 1121.
142. See note 121 supra.
143. See note 123 supra.
144. Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976); Paoli v. Shor, 345 So.2d 789 (Fla. 4th Dist. Ct. App. 1977); Shor v. Paoli, 353 So.2d 825 (Fla. 1977); 3-M Electric Corp. v. Vigoa, 369 So.2d 405 (Fla. 3d Dist. Ct. App. 1979); Florida Farm Bureau Ins. Co. v. Gov't Employees Ins. Co., 371 So.2d 166 (Fla. 1st Dist. Ct. App. 1979); Petrick v. New Hampshire Ins. Co., — So.2d — (Fla. 1st Dist. Ct. App. 1979) [1979 FLW 758]. In each of these cases, a third party sought contribution from the negligent spouse and/or child of the injured victim or the liability insurance carrier of such spouse or child.
The court considered itself bound by established precedent to reach its decision, and it called on the Florida Supreme Court to review the wisdom of retaining the family immunity rule in light of recent developments in Florida tort law. 147

Approximately one year after Mieure was decided, the Fourth District Court of Appeal, in Paoli v. Shor, 148 considered a very similar question when a plaintiff husband was injured while a passenger in an automobile being driven by his wife where both the wife and a third party were negligent. In allowing the contribution claim by the negligent third party against the wife, the majority of the court held, contra to Mieure, that the doctrine of interspousal immunity does not bar a right of contribution that would otherwise exist under the UCATA. To hold otherwise, the majority found, would be unfair to the defendant and a windfall to the tortfeasor wife. 149 The dissent noted that the effect of the majority opinion is to "dilute and compromise" the family immunity doctrine since according to such doctrine, the wife and third party cannot be considered joint tortfeasors for the purpose of allowing

146. Id. at 547. See Annot., 34 A.L.R.2d 1108. Until the last decade, most courts that have considered this question have denied a third party tortfeasor the right of contribution from a parent or child on the ground that the essential element of contribution, namely common liability of the tortfeasors to the injured person, is lacking. See also London Guarantee and Accident Co. v. Smith, 242 Minn. 211, 64 S.W.2d 781 (1954); Scruggs v. Meredith, 135 F. Supp. 376 (D. Hawaii 1955); Lewis v. Farm Bureau Mutual Automobile Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Strahorn v. Sears, Roebuck and Co., 50 Del. 50, 123 A.2d 107 (Super. Ct. 1956); Chosney v. Konkus, 64 N.J. Super. 328, 165 A.2d 870 (Essex County Ct. 1960). However, a number of courts that have recently addressed themselves to this issue have allowed contribution claims to take precedence over the rules of parent-child tort immunity or interspousal immunity. See Peterson v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970); France v. A.P.A. Transport Corp., 57 N.J. 500, 267 A.2d 490 (1969); Hayon v. Coca Cola Bottling Co. of New England, 378 N.E.2d 442 (Mass. 1978); Zarella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966); Ross v. Atwell, 315 So.2d 333 (La. Ct. App. 1975); Perchell v. District of Columbia, 444 F.2d 997 (D.C. Cir. 1971).

147. Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976). Although this case involved interspousal tort immunity, the policy concerns and issues involved are the same as in the consideration of the parent-child immunity rule. Furthermore, reference is made in the case to the broad doctrine of family immunity.


149. Id. at 790.
contribution.\textsuperscript{150}

The Florida Supreme Court, in \textit{Shor v. Paoli},\textsuperscript{161} responded to the Fourth District's certified question\textsuperscript{162} by affirming the majority position and adopting its reasoning. Both courts stated that permitting contribution would not destroy the family unit and thus would not injure the very underpinning of the family immunity doctrine.\textsuperscript{163}

However, a closer look at \textit{Shor} indicates that by favoring the tort objectives of fault apportionment and loss distribution, the Florida Supreme Court's opinion did, on its face, do violence to the family immunity rule it so clearly delineated in the leading case of \textit{Orefice v. Albert}.\textsuperscript{164} The \textit{Orefice} court stated that the preservation of family harmony and resources was the cornerstone of the immunity rule. By allowing a negligent third party to obtain contribution against a spouse or child, the court is denying full recovery to the injured family member since the family unit, which in reality must be looked upon as a whole, is not receiving the full amount of compensation that would be due the victim. Family resources are thus drained because such resources must be used to fully compensate the injured party and as a result, family harmony may be threatened due to the costly negligence of the family member.\textsuperscript{165}

\textsuperscript{150} \textit{Id.} at 791.
\textsuperscript{151} 353 So.2d 825 (Fla. 1977).
\textsuperscript{152} Paoli v. Shor, 345 So.2d 789, 790 (Fla. 4th Dist. Ct. App. 1977). The question certified by the Fourth District Court of Appeal to the Florida Supreme Court was as follows:

\begin{quote}
DOES THE COMMON LAW DOCTRINE OF INTERSPOUSAL IMMUNITY CONTROL OVER THE UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT (75-108 LAWS OF FLORIDA, SECTION 768.31, FLORIDA STATUTES) TO PREVENT ONE TORTFEASOR FROM SEEKING A CONTRIBUTION FROM ANOTHER TORTFEASOR WHEN THE OTHER TORTFEASOR IS THE SPOUSE OF THE INJURED PERSON WHO RECEIVED DAMAGES FROM THE FIRST TORTFEASOR?
\end{quote}

The court certified this question due to the obvious conflict of its opinion with that of the opinion of the First District Court of Appeal in Mieure v. Moore, 330 So.2d 546 (Fla. 1st Dist. Ct. App. 1976).

\textsuperscript{153} \textit{Id.} at 790; Shor v. Paoli, 353 So.2d 825 (Fla. 1977).
\textsuperscript{154} 237 So.2d 142 (Fla. 1970).
\textsuperscript{155} Underlying the court's decision in Shor v. Paoli, \textit{supra} must have been an awareness that the existence of liability insurance would prevent the disturbance of family harmony and resources. Otherwise, its policy goals would have been in jeopardy. The liability insurance carriers of both the plaintiff and defendant were named parties in interest. The Florida Supreme Court, following the pattern set by other Flor-
The court’s decision in Shor has marked a judicial retreat from its strict adherence to the parental immunity rule. The UCATA is to be liberally interpreted to achieve the tort goals of fault apportionment and loss distribution; neither the interspousal tort immunity rule nor the parent-child tort immunity rule are to hinder their accomplishment.156

The First District Court of Appeal has very recently strengthened the controlling position of the UCATA over the parental immunity rule in two cases dealing with family exclusion clauses in automobile


156. See Judge Mager’s special concurring opinion in Paoli v. Shor, supra where he quoted with approval from Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966), an opinion which gave precedence to the UCATA over the interspousal immunity doctrine prevalent in that state. Judge Mager quoted as follows:

[W]e cannot believe that in enacting such act the legislature intended to extend the doctrine of interspousal immunity to actions under the act in the light of modern-day conditions. Such intent would be contrary to common sense and justice. We are convinced that the legislature intended contribution in a case such as this. We agree with the words of Dean Prosser that ‘There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally unintentionally responsible, to be shouldered onto one alone * * * while the latter goes scot free.’

PROSSER, TORTS 2d 3d., Chap. 8 § 46, p. 248. However, in 3-M Electric Corp. v. Vigoa, 369 So.2d 405 (Fla. 3d Dist. Ct. App. 1979), the Third District Court of Appeal retreated, in part, from Shor in its interpretation of the UCATA. Parents sued an electrical contractor on behalf of their minor child, alleging that the child was injured by the contractor’s negligence in leaving a pipe protruding in their backyard. The court denied the contractor’s counterclaim for contribution against the parents stating that there was a lack of common liability between the parents and defendant due to the family immunity doctrine. The court simply stated that the “instant case remains within the parameters of the Mieure decision in regard to precluding contribution from the parents.” No policy or other rationale was offered regarding the purposes of the UCATA or the tort objective of loss distribution. This case differs from the others involving the UCATA in that contribution was sought against parents for their negligent supervision of the injured child, and not for their negligent operation of a vehicle. If contribution is allowed in this case, and the parents are without liability insurance or are under-insured, then a part of anything the child recovers against the defendant will have to come out of the family’s resources. This is, in all probability, the reason why the Third District Court of Appeal distinguished this case from Shor. See also, Schneider v. Coe, __ A.2d __ (Del. 1979).
liability insurance policies. In *Florida Farm Bureau Insurance Co. v. Government Employees Insurance Company*, a wife, injured in an accident while a passenger in a vehicle being driven by her husband, sued the third party driver, owner, and the owner's insurer for negligence. After paying the damage award to the wife, the defendant insurer filed a third party complaint against the husband's insurer seeking contribution. The husband's insurer denied coverage based upon a family exclusion clause in its policy which precluded coverage "to bodily injury or to death of the insured or any member of the family of the insured residing in the same household." The court affirmed the trial court's allowance of the contribution claim and stated that *Shor v. Paoli* had clearly given the UCATA precedence over the doctrine of interspousal immunity. Family exclusion clauses were contrary to the established public policy of apportioning joint tortfeasors' responsibility for the payment of claims of innocent injured parties.

In *Petrik v. New Hampshire Insurance Co.*, decided by the First District on the same day as *Florida Farm Bureau Insurance Co.*, the court applied the same rationale to allow a third party contribution against a child's insurer when the parents of the child were injured in an accident due to the negligence of both the third party and the child. The family exclusion clause in the child's liability insurance policy was found to be against public policy. In both cases, the First District certified questions to the Florida Supreme Court.

158. 371 So.2d 166 (Fla. 1st Dist. Ct. App. 1979).
159. _Id._ at 167.
160. _Id._
161. _Id._
162. _So.2d_ _ (Fla. 1st Dist. Ct. App. 1979) [1979 FLW 758].
163. In *Florida Farm Bureau Insurance Co.*, note 157 *supra*, the court certified the following question:

**DOES A FAMILY EXCLUSION CLAUSE IN AN AUTOMOBILE LIABILITY INSURANCE POLICY CONTROL OVER THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT TO PREVENT ONE TORTFEASOR FROM SEEKING CONTRIBUTION FROM ANOTHER TORTFEASOR WHEN THE OTHER TORTFEASOR IS THE SPOUSE OF THE INJURED PERSON WHO HAS RECEIVED DAMAGES FROM THE FIRST TORTFEASOR?**

In *Petrick v. New Hampshire Insurance Co.*, note 157 *supra*, the court certified the following question:
It is time for the Florida Supreme Court to critically examine the parental immunity rule in light of its avowed goals of accident victim compensation, fault apportionment and loss distribution as evidenced by the judicial adoption of comparative negligence and strict liability in tort, the statutory waiver of sovereign immunity for tort actions and the legislative enactment of both the Florida Automobile Reparations Reform Act and the Uniform Contribution Among Tortfeasors Act. The importance of liability insurance to the accomplishment of these goals must be recognized. The increasing number of questions certified to the high court indicate the confusion in this area and the friction between the maintenance of the immunity rule and the policies in tort law being espoused by our legislature and courts.\textsuperscript{164} The present law barring an injured minor child from suing a parent continues to perpetuate the human suffering which our legal system has been attempting to alleviate.

If the policy reasons which gave birth to the parental immunity rule are no longer valid, it is within the authority of the Florida Supreme Court to change or abrogate the doctrine.\textsuperscript{165} Preservation of family harmony and resources can no longer be cited as unquestioned

DOES A FAMILY EXCLUSION CLAUSE IN AN AUTOMOBILE INSURANCE POLICY CONTROL OVER THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT TO PREVENT ONE TORTFEASOR FROM SEEKING CONTRIBUTION FROM ANOTHER TORTFEASOR?

As of this date, neither of the above two certified questions have been answered by the Florida Supreme Court.

\textsuperscript{164} Furthermore, the parental immunity rule intrinsically conflicts with the well established principle of Florida tort law that an injured third party may, under certain circumstances, sue a parent on the theory of negligent care and control over his child as the causative factor of the injuries. See Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955); Seabrook v. Taylor, 199 So.2d 315 (Fla. 4th Dist. Ct. App. 1967); Spector v. Neer, 262 So.2d 689 (Fla. 3d Dist. Ct. App. 1972); Southern American Fire Ins. Co. v. Maxwell, 274 So.2d 579 (Fla. 3d Dist. Ct. App. 1973).

Allowing such actions by third parties against parents who are negligent may disturb family unity and drain family resources. Liability insurance is more unlikely to exist in situations such as these than in the typical parental immunity case with the result that the damage award must be paid by the parents themselves. There is no compelling reason for granting a third party the right to sue a parent by denying such a right to an injured child. This is especially true in light of the fact that in situations where a child sues a parent, the suit will invariably be brought only with the consent of the parents and only if liability insurance is present. See note 46 supra.

policy arguments for the maintenance of such immunity. In fact, the
continued existence of parental immunity threatens the family har-
mony and resources which the doctrine was meant to preserve.166

The recent Florida cases dealing with the family immunity doc-
trine and the UCATA have created cracks in a dam of unyielding
dogma whose time for a critical review has arrived. A setback in the
attempt to deal with losses suffered by accident victims occurs each
time a court precludes an injured child from recovering, as a matter of
law, against his parents and against, in the overwhelming number of
cases, his parent's liability insurer.

CONCLUSION

One of the greatest strengths of the common law is its flexibility
and capacity to change, grow and adapt to new conditions and develop-
ments in society167 so as to provide remedies to all wrongs commit-
ted.168 Courts have tended to implement such change gradually by "dif-
ferration, exception, and ultimately extinction" of outmoded legal
doctrines.169 In the grand tradition of the common law, recent years
have seen the edifice of family immunity beginning to crumble. The
time has come to set aside the parent-child tort immunity rule along
with all of the exceptions and limitations that have grown around it.
The cries of justice must be heard and a remedy provided for what, in
reality, is our most precious resource, our children.

166. See cases cited note 72, supra.
dissenting).
Beyond Reverse Discrimination: The Quest For A Legitimizing Principle

STEVEN JAY WISOTSKY*

Is the Constitution colorblind? Should preferential treatment for minorities be construed to violate the equal protection clause of the fourteenth amendment or the Civil Rights Act of 1964? If preferential treatment is permissible, which groups should be favored? These fundamental questions about the meaning of equality remain shrouded in controversy and confusion despite, or perhaps because of, recent Supreme Court decisions and the rapidly burgeoning body of commentary on the cases, both in the popular press and legal literature. At the heart of the confusion is the simple fact that the Supreme Court has been unable to develop a coherent rationale for its decisions approving affirmative action. What is worse, the fragmentation of the Court—witness its six separate opinions in the Bakke case—has worked against the attainment of doctrinal clarity. The Court has simply

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1. Commenting upon the confusion, Thurgood Marshall humorously observed: “I have seen so many interpretations of our decision [Bakke] now that it’s hard for me to distinguish between what we actually wrote and what the press says we wrote.” Address by Associate Justice Thurgood Marshall at the Second Circuit Judicial Conference (September 8, 1978), 82 F.R.D. 221, 224 (1978).

2. The pages of the Index to Legal Periodicals continue to offer an apparently inexhaustible supply of articles on various aspects of the preferential treatment debate. A number of articles is cited in Justice Powell’s opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 288, n.25 (1978).

3. The origin of the term “affirmative action” has been traced to Executive Order No. 10925 issued by President Kennedy. In bureaucratic practice, it usually means (1) not discriminating against minorities, (2) advertising equal opportunity, and (3) making special efforts to recruit qualified minorities by outreach and special training programs. GLAZER, AFFIRMATIVE DISCRIMINATION 46 (1975). Most commentators use “affirmative action” interchangeably with benign or reverse discrimination to describe preferential treatment for minorities because of minority status.

4. Several commentators have expressed this view. “The Bakke opinions . . .
failed to provide the authoritative guidance needed in order to facilitate the difficult task of reconciling the demands of racial justice and the commands of equal treatment under the law.

The purpose of this article is to make a contribution to an understanding of the issue of preferential treatment for minorities by (1) reviewing the embryonic legal doctrine that has emerged in *De Funis, Bakke, Weber* and the pending* Kreps* case; (2) arguing that American political and constitutional history, from slavery to segregation to the present, requires recognition of the unique status of Blacks in our legal system; and (3) concluding that affirmative action for Blacks for some indefinite period of time is a legitimate and neutral constitutional principle which ought to be adopted by the Supreme Court as the *ratio decidendi* of future reverse discrimination cases.

I. REVIEW OF CURRENT DOCTRINE

A. *De Funis*

The question of the validity of race-conscious programs has been presented to the United States Supreme Court four times. In the first case, *De Funis v. Odegaard*, an unsuccessful white applicant to the University of Washington Law School claimed the law school had discriminated against him because of his race by admitting several minority applicants with lower grades and test scores. The Supreme Court of Washington rejected De Funis' claim; but because he had been admitted to school *pendente lite* and was about to graduate, the United States Supreme Court, by a vote of 5 to 4, dismissed his claim as moot.7

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7. Justice Douglas issued a lengthy dissent, arguing that the case was not moot and that the minority admissions program was discriminatory because of its two-track admissions process by which Blacks, Chicanos, American Indians and Filipinos re-
B. Bakke

The issue of preferential treatment next arose in Regents of the University of California v. Bakke, a prolific source of law review commentary. In Bakke, the California Supreme Court invalidated a procedure whereby sixteen of one hundred seats in the entering medical school class were set aside for a special admissions process employing less stringent standards than those for non-minority applicants applying for the remaining eighty-four seats. Alan Bakke, a white applicant, had applied to the University of California at Davis Medical School in 1973 and 1974 and was rejected both times. In both years, minority applicants were admitted under the special program with grades and test scores “significantly lower” than Bakke’s. In addition, the minority applicants could compete for all one hundred places in the entering class, while non-minority applicants were restricted to competing for only eighty-four places.

Demonstrating clear antipathy for “a line drawn on the basis of race and ethnic status,” Justice Powell’s one-man “opinion of the Court” rejected the concept of benign discrimination and asserted that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” In order to pass constitutional muster, therefore, the Davis special admissions program would have to be “precisely tailored to serve a compelling gov-

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10. 438 U.S. at 277. The issue of qualifications is confused by the fact that other non-minority applicants with higher scores than Bakke were also rejected. Additionally, Bakke’s age was a factor considered by the admissions committee; he was 33 at the time of his second application. The implications of Alan Bakke’s ambiguous position relative to other applicants is creatively explored in Smith, The Road Not Taken: More Reflections on the Bakke Case, 5 S. U.L. REV. 23, 58-60 (1978).
11. 438 U.S. at 289.
12. Id. at 294-95.
13. Id. at 291.
Justice Powell agreed that the admission of a diverse student body was a compelling governmental interest. Nevertheless, the particular two-track procedure used by Davis was held unconstitutional because it was not necessary to the attainment of racial and ethnic diversity in light of the alternative means available. Justice Powell reasoned that race could be considered—that race could be given a “plus” to “tip the balance” in favor of an otherwise qualified minority applicant so long as majority group applicants were not automatically foreclosed from consideration for any of the available seats. Thus, as an example of a constitutionally acceptable alternative means by which to attain ethnic diversity, Powell placed his imprimatur on the Harvard College Admissions Program, attaching it as an Appendix to his opinion.

Justice Powell concluded by affirming that portion of the order of the California Supreme Court ordering Bakke’s admission to the medical school. Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, agreed that Alan Bakke had been the victim of unlawful racial discrimination but declined to reach the constitutional question. They concurred on statutory grounds, that is, Title VI of the Civil Rights Act of 1964 imposed a standard of color blindness and barred exclusion on the grounds of race, color or national origin from benefits “under any program or activity receiving

14. Id. at 299.
15. Id. at 314. Justice Powell rejected the first three of the four interests asserted by Davis as being served by the special admissions program: (1) reducing the under-representation of minorities in the medical profession; (2) mitigating the effects of general societal discrimination; (3) increasing the number of physicians who will practice in underserved communities; and (4) obtaining the educational benefits arising from an increased ethnic diversity among the student body.
16. Id. at 316-17.
17. Id. at 318.
18. Id. at 321-24. The Harvard program establishes a pool of qualified applicants in terms of grades and test scores. It then gives preferences to “equally qualified” applicants who possess desired non-academic attributes: geographical background, athletic or musical skills, or particular racial or ethnic origins.

19. For Justice Powell, the standards under Title VI and the Constitution were the same. 438 U.S. at 287.
Federal financial assistance." At the other antipode, Justices Brennan, White, Marshall and Blackmun approved the use of race-conscious admissions procedures. They, therefore, joined Justice Powell to form a five-man majority to reverse the California Supreme Court's order "insofar as it prohibits the University from establishing race-conscious programs in the future."

C. Weber

The next test of preferential treatment programs came the following year in *United Steel Workers of America v. Weber*. In *Weber*, a new on-the-job training program was created by a master collective-bargaining agreement between Kaiser and the United Steel Workers of America (USWA) covering fifteen Kaiser plants. The agreement between Kaiser and USWA was designed to eliminate "a conspicuous racial imbalance" in Kaiser's craft work force by reserving 50% of the trainee positions for Blacks until the almost all-white craft work force was integrated in proportion to the percentage of Blacks in the local labor force. Both Black and white trainee applicants were selected on the basis of seniority.

At the Gramercy plant where Brian Weber worked, thirteen trainees—seven Blacks and six whites—were accepted from the ranks of production workers. Brian Weber was not among them, even though the most junior Black chosen had less seniority. Weber filed a federal

20. 42 U.S.C. § 2000d et seq. The record reflected that Davis was a recipient of federal funds. 438 U.S. at 412.

21. Id. at 326. The net result of these shifting alliances by the Justices was threefold: (1) Bakke was admitted to the medical school; (2) the Davis two-track special admissions program was invalidated as an explicit racial classification; and (3) Davis was free to go back to the drawing board to reformulate its special admissions program.

Davis did not in fact revise its special admissions program in the aftermath of Bakke. A single admissions committee was established to replace the previous dual system which allowed minorities to be screened by a separate group. A minimum of fifteen out of a possible thirty points is required in order for the applicant to advance beyond the first cut in the admissions process. The system awards five points for race or for severe economic disadvantage, allowing a minority student to reach the second level of review more easily than a non-minority student. Dreyfuss & Lawrence, The Bakke Case: The Politics of Inequality 231 (1979).

class action law suit against Kaiser and USWA under Title VII of the Civil Rights Act of 1964 alleging that the Kaiser/USWA plan illegally discriminated against white workers on the basis of race.\textsuperscript{23} The Supreme Court framed the issue as whether Title VII of the Civil Rights Act of 1964 prohibits employers and unions in the private sector from voluntarily adopting "race-conscious" affirmative action plans "to eliminate manifest racial imbalances in traditionally segregated job categories,"\textsuperscript{24} and concluded that it did not.

The opinion\textsuperscript{25} by Justice Brennan emphasized the "narrowness" of the decision. Conceding that the Kaiser/USWA plan violated the literal language of Title VII, Brennan wrote that the plan was nevertheless within the "spirit" of the statute because of the long years of discrimination against Black workers and their worsening position in the national labor force:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec., at 6552 (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.\textsuperscript{26}

Therefore, the Court concluded, a voluntary affirmative action plan designed to correct "a manifest racial imbalance" is not inconsistent with the legislative intention "to open employment opportunity for Negroes in occupations which have been traditionally closed to them."\textsuperscript{27}

In upholding the Kaiser/USWA plan, the Court gave considerable weight to the moderate and voluntary\textsuperscript{28} nature of the affirmative

\textsuperscript{23} Weber's argument focused on McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976), in which the Court held that whites as well as Blacks are protected by Title VII.

\textsuperscript{24} 443 U.S. at \textemdash, 99 S.Ct. at 2725.


\textsuperscript{26} 443 U.S. at \textemdash, 99 S.Ct. at 2728.

\textsuperscript{27} Id. at 2730, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey).

\textsuperscript{28} As noted by Mr. Justice Rehnquist in dissent, the voluntariness of the Kaiser/USWA plan was attenuated by pressures exerted by the Office of Federal Contract Compliance. Id. at 2737-38, n.2. To the extent such a program is truly voluntary, the Weber decision does not require employers or unions to do anything; it merely permits
action program in terms of its size, scope and duration. First, the craft training program was small; only thirteen jobs were available. Second, it did not require the discharge of any white employee in favor of Blacks. And third, in the words of Mr. Justice Blackmun's concurring opinion, the plan "does not afford an absolute preference for blacks, and . . . it ends when the racial composition of Kaiser's craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance."29

Moderate or not, Justice Rehnquist excoriated the majority for its approval of the racial quota, which it had refused to uphold in Bakke. In a caustic seventeen-page dissent, he denounced the majority for its "Orwellian" interpretation of Title VII and for using tactics reminiscent of "escape artists such as Houdini."30 He insisted that the majority opinion had turned the legislative history on its head in holding that it permitted voluntary racial discrimination in employment. He condemned the racial quota in the Kaiser/USWA plan as a device "destructive to the notion of equality. . . . Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. . . . [N]o discrimination based on race is benign..."31

D. Kreps

The most recent manifestation of the preferential treatment issue

those who wish to implement affirmative action plans to do so. It is questionable how many union negotiators will find it politically feasible to risk antagonizing their own constituents by adopting plans that benefit the Black minority at the expense of the white majority. For further ruminations on the practical impact of Weber, see Neuborne, Observations on Weber, 54 N.Y.U.L. Rev. 546, 556 (1979).

29. 443 U.S. at __, 99 S.Ct. at 2734.

30. Id. at 2737. For a critical examination of Justice Rehnquist's analysis of the legislative intent underlying Title VII, see Dworkin, How To Read The Civil Rights Act, The NEW YORK REVIEW OF BOOKS 37 (Dec. 20, 1979).

31. Id. at 2753. Chief Justice Burger also dissented on the ground that although he would be inclined to vote for such an amendment to Title VII were he a member of Congress, the "statute was conceived and enacted to make discrimination against any individual illegal. . . ." Id. at 2735.
is *Fullilove v. Kreps*, in which the Second Circuit Court of Appeals upheld the 10% minority set-aside provision of the Public Works Employment Act of 1977, rejecting a constitutional challenge by associations of building contractors and subcontractors. The challenged provision was an amendment to the Local Public Works Capital Development and Investment Act of 1976, a two billion dollar appropriation designed to alleviate unemployment in the economically depressed construction industry. The set-aside operated by prohibiting grants for any local public works project "unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." A minority business enterprise (MBE) is defined as a business, at least 50% of which is owned by minority group members—Negroes, Spanish-speaking, Orientals, American Indians, Eskimos and Aleuts.

In evaluating the constitutional validity of the 10% set-aside for minorities under the fifth amendment, the Court, in an opinion that is less than a model of clarity, chose not to articulate the appropriate standard of review, stating in dictum that "even under the most exacting standard of review the MBE provision passes constitutional muster." In reaching this conclusion, the Court gave substantial weight to the inferred Congressional purpose to remedy the effects of past discrimi-

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32. 584 F.2d 600 (2d Cir. 1978).
36. Id.
37. The fifth amendment contains no equal protection clause. Nevertheless, the Supreme Court, in order to prevent the anomaly of permitting discrimination by the federal government that would be prohibited by a state, has held that equal protection principles are embodied in the due process clause of the fifth amendment. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
38. 584 F.2d at 603 (footnote omitted).
39. In order to establish the Congressional purpose of rectifying prior discrimination, the Court referred to statements made by supporters of the amendment in Congress. Statistics prepared by the Department of Commerce and House Committee Reports provided proof of a severe underrepresentation of minorities in the construction industry. 584 F.2d at 605-06. Having inferred a Congressional finding of past discrimination, the Court distinguished *Bakke*, *id.* at 607, in which Justice Powell emphasized that "[w]e have never approved a classification that aids persons perceived as members
crimination in the construction industry. The Court acknowledged "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority [under §2 of the thirteenth amendment and §5 of the fourteenth amendment] to take appropriate remedial measures." 40

Finally, the Court of Appeals considered the effects of the set-aside on non-minority business enterprises. "[I]n fashioning remedies for past discrimination, courts must be sensitive to interests which may be adversely affected by the remedy." 41 In this examination, the Court emphasized the small dollar amount of the set-aside in relation to the total 1977 construction industry expenditure of $170 billion, 42 and concluded that the burden 43 imposed on non-minority business was de minimis.

The Second Circuit decision in Kreps is currently under review. Certiorari was granted, 44 and the case was argued before the Supreme Court of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Bakke, 438 U.S. at 307.

40. 584 F.2d at 604, quoting Bakke, 438 U.S. at 302, n.41. The reliance is not quite apposite for the Public Works Employment Act is probably an exercise of the commerce power under Art. I, sec. 8, cl. 3. During oral argument in the Supreme Court, however, the government did rely on § 2 of the thirteenth amendment as a power source. 48 U.S.L.W. 3365 (Dec. 4, 1979).

41. 584 F.2d at 607.

42. The court of appeals reasoned that the 1977 amendment appropriated $4 billion, or about 2.5 percent of the total of nearly $170 billion spent on construction in the United States that year. The set-aside was for 10 percent of the total grant, or only .25 percent of funds expended on construction work in the United States. "Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred with .25 percent of the opportunities . . . was thinly spread among nonminority businesses comprising 96 percent of the industry." Id. at 608 (footnote omitted).

43. For a theoretical consideration of the extent of the burden test in equal protection analysis, see Comment, Beyond Strict Scrutiny: The Limits of Congressional Power to Use Racial Classifications, 74 N.W.U.L. Rev. 617, 630 (1979).

44. The Court granted certiorari on two questions:

"(1) Is congressional requirement that ten percent of federal grants for local public works projects be set-aside for minority business enterprises constitutionally permissible under Due Process or Equal Protection Clauses?

(2) Is minority set-aside program in violation of Title VI of 1964 Civil Rights Act?"
Court. The questioning at oral argument reflected some skepticism by the Justices regarding the inherent illimitability of the concept of preferential treatment predicated upon past discrimination. For example, Justice Rehnquist wanted to know if under that rationale a preference for Norwegian-Americans would be constitutional. Justice Stewart similarly asked if a finding of past discrimination would justify a set-aside for Presbyterians. Justice Stevens questioned whether Republicans could seek affirmative action programs based on past Democratic majority bias. And other comments from the bench questioned the adequacy of the Congressional "findings" of past discrimination, suggesting that the 10% set-aside was simply a political decision to spread the wealth around.

II. PREFERENTIAL TREATMENT: THE QUEST FOR A RATIONALE

A. Who Should Be The Beneficiaries Of Preferential Treatment?

The questions posed by Justices Stewart, Rehnquist, and Stevens go directly to the crux of the matter: What is the scope of the proposition that past discrimination is a proper predicate for preferential treatment? Which groups would qualify for the preference? Is a showing of past discrimination sufficient, or must there also be present social, economic or political disadvantage resulting from that discrimination? The statements of the Justices on these matters are hopelessly conflicting and reveal no progress toward the development of a cogent juridical principle.

One of the principal difficulties in arriving at an intellectually coherent and ethically satisfactory resolution of the issue of preferential treatment is the failure of the Court to articulate a rationale rejecting or justifying the grab bag of racial and ethnic minorities favored by the various affirmative action programs. In De Funis, Blacks, American

46. Id.
47. Id.
Indians, Chicanos and Filipinos were favored. In *Bakke*, the favored minorities were Blacks, Chicanos, Asians and American Indians and, in theory, the economically or educationally disadvantaged of any race.\(^49\) In *Weber*, the affirmative action plan for the craft training program was a straightforward quota of 50% Blacks and whites. But in *Kreps*, the favored groups included Blacks, Spanish-speaking, Orientals, American Indians, Eskimos and Aleuts.\(^50\)

It is difficult to discern in this potpourri of racial and ethnic groups any unifying principle. The groups are not similarly situated with respect to either past discrimination or present disability, assuming for the moment, those are the relevant criteria. Orientals, for example, are generally well off in terms of economic status and educational attainment.\(^53\) Notwithstanding a long history of virulent discrimination against the Chinese and the Japanese,\(^55\) it is difficult to

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\(^49\) No non-minority disadvantaged students were admitted to Davis under the special admissions program. 438 U.S. at 276.

\(^50\) The inclusion of Eskimos and Aleuts in the definition of minorities is apparently attributable to 42 U.S.C. § 6707(a)(1)(Supp. I 1977) providing for a 2 ½ percent set-aside “for grants for public works projects . . . to Indian tribes and Alaska Native villages.”

\(^51\) GLAZER, supra note 3, at 74 (1975).

\(^52\) The median family income of foreign born and native born (first generation) Japanese in 1969 was $12,772. The parallel figure for Chinese (including Taiwanese) was $10,683. Both figures compare quite favorably, after allowing for inflation, with the 1977 median household income of $14,272 for whites. Based on the rise in the consumer price index between 1969 and 1977, the income figures for Japanese and Chinese corrected for inflation would be approximately 66% higher, or $20,118 and $17,733 respectively. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE United States, 1978, at 38, Table 43 and at 462, Table 747. [hereinafter cited as 1978 ABSTRACT].

\(^53\) Asian Americans comprise .67% of the general population, but 1.05% of total college enrollment. *Id.* at 35, table 38 and at 163, table 265.

\(^54\) The Chinese were the first Asians to immigrate to California. A mass immigration made up primarily of laborers from Kwantung province began around 1850 and received impetus from the discovery of gold at Sutter’s Mill. By 1879 the Chinese population of California exceeded 111,000. Much of the immigration was the product of the “coolie trade,” an arrangement by which Chinese laborers were imported under “contracts” that amounted to a form of slavery.

The efficiency of the Chinese laborers, coupled with their large numbers, earned them the animosity of white labor groups. See, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). Vindictive political measures were enacted by the California legislature and subsequently by Congress.
regard them as disadvantaged. In addition, there is good reason for regarding discrimination against Orientals as a regional concern. The "Spanish-speaking" classification, is absurdly over-inclusive. It encompasses not only the typically low-income Chicanos and Puerto R-

The principle legal manifestation of hostility to the Chinese was the Chinese Exclusion Act of 1882, which suspended the immigration of Chinese laborers for ten years. It also provided that those who had been in the United States since 1880 could leave and enter the United States on an identifying certificate. However, the Scott Act of 1888 voided all outstanding certificates and barred all laborers who had not reentered at the time of the Act's passage. The Supreme Court upheld the validity of the Act in The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889).

The Geary Act of 1892 extended the "suspension" for an additional ten years. In 1902, it was converted into permanent exclusion. The Geary Act was also upheld by the Supreme Court, Fong Yue Ting v. United States, 149 U.S. 698 (1893).

The hostility to the Chinese subsided considerably when the United States entered World War II as an ally of China. The exclusion acts were repealed in 1943, although highly restrictive quotas were established. In 1965, the special immigration restrictions pertaining to Asians were abolished. See Bell, Race, Racism and American Law 69-72 (1972).

55. The Japanese began arriving in the United States in large numbers about 1890. Anti-Chinese feeling was very high, and the hostility was easily transferred to the new Asian arrivals. The victory in the Russo-Japanese War of 1905 aroused fears of a "yellow peril" in the United States.

California agriculture was a principal point of confrontation. Japanese efficiency stimulated the enactment in 1913 of the Alien Land Laws in California. Many states followed suit.

Immigration policy also reflected anti-Japanese sentiment. The Quota Act of 1924 excluded "aliens ineligible to citizenship;" the Japanese did not gain the right to citizenship until 1952. World War II added obvious stresses culminating in the removal of the Japanese from the West Coast. See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). See Bell supra note 54, at 72-76.


57. Statistics for the "Spanish" category are generally not broken down into the constituent national origins. The 1977 median household income for Spanish families was $10,647, compared to $14,272 for whites and $8,422 for blacks. Only 8.4% of Spanish families have median incomes below $3000 per year, compared to 6.3% of the white families and 15.3% of the black families. Id. at 462, table 747.

58. The Chicanos are of Mexican origin and comprise the largest single group of Spanish-surnamed people in the United States. About 7,000,000 Chicanos live in the Southwest. Bell, supra note 54, at 76-81.
cans, but the relatively affluent and upwardly mobile Cubans, who as recent arrivals have no history of discrimination and who were given refugee assistance\(^{59}\) in the flight from Castro’s Cuba.

It is clear that Blacks are the largest,\(^{60}\) poorest,\(^{61}\) and among the least well educated\(^{62}\) of any of the disadvantaged groups typically included in affirmative action plans. No other group in America, with the arguable exception of the American Indian,\(^{63}\) has a comparable history of systematic racial oppression and resulting social and economic inferiority.\(^{64}\) “At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro.”\(^{65}\)

### B. Standards For Preferential Treatment

As demonstrated by the foregoing discussion, the racial and ethnic

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60. The 1970 census reflects a total United States population of 203,212,000. Of that number, 177,749,000 are whites; 22,580,000 are Blacks; 793,000 are Indians; 591,000 are Japanese; 435,000 are Chinese; and 343,000 are Filipino. Spanish-speaking persons are included in the white category. Id. at 35, table 38.

61. See note 57 supra.

62. Blacks comprise 11.11% of the total population, but only 6.95% of college enrollment. Whites are enrolled in proportion to their percentage of the population. 1978 ABSTRACT at 35, table 38 and at 163, table 265.

63. The brutal, at times genocidal, policies of the American government with respect to the Indian tribes cannot be denied. However, for purposes of this article, there are significant practical and legal considerations justifying consideration of Indians as sui generis. The physical concentration of the Indians on reservations in the Western States, their limited numbers (793,000), and their unique statutory, administrative, and treaty status renders it difficult, if not impossible, to fit their situation within the analytical framework relevant to preferential treatment. In Morton v. Mancari, 417 U.S. 535, 551 (1974), the Supreme Court acknowledged “the unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian ward’ status . . . .” The Court also cited Title 25 of the United States Code as further evidence of the unique historical and legal position of the Indian tribes. Id. at 552. See also note 135 infra.


groups selected for inclusion in affirmative action plans are not similarly situated. Nevertheless, two common factors are apparent: a history of discrimination and/or a presently disadvantaged status. These factors are frequently identified by writers as the basis of affirmative action. For example, prior discrimination corresponds roughly to a compensatory rationale and present disadvantage to a distributive rationale, two of the four justifications for racial preference identified by Paul Brest.  

The distributive rationale "holds that it is prima facie unjust for any racial or ethnic group in our society to be appreciably less well off than other groups," regardless of the reason for the inequality. Its use is thus independent of a showing of prior discrimination. The compensatory rationale, on the other hand, focuses on past injustices and would justify compensatory treatment or reparations for historical

66. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 544-45 (1975). The preventive rationale is primarily concerned with institutional self-preservation, i.e., to avoid a charge of de jure discrimination. Cf. Weber, 99 S.Ct. at 2730-32 (Justice Blackmun's opinion discussing the "arguable violations" theory); and 99 S.Ct. at 2737-38, n.2 (Justice Rehnquist's questioning of the voluntariness of the Kaiser program). The instrumental rationale is concerned with institutional or societal improvement. It is exemplified by Justice Powell's opinion in Bakke in which he accepted educational enrichment resulting from ethnic diversity of the student body as a compelling governmental interest.

67. See BREST, supra note 66, at 545.

68. A distributive rationale is the basis of all anti-poverty programs, which are the most efficacious way to address the problem of have-not groups. Payments to or preference for an entire race or ethnic group which is poor as a race or group would necessarily be over-inclusive and under-inclusive. For example, Blacks would be compensated, rich or poor, while whites would not. On the other hand, there are substantial savings in administrative costs to be realized from using race as a proxy for other characteristics, such as poverty. See generally Posner, The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 SUP. CT. REV. 1.

69. The compensatory rationale is analogous to the shifting of losses from victim to wrongdoer which forms the basis of our civil justice system. As applied to racial or ethnic groups, the compensatory rationale is similar to the payment of reparations for injustices committed by one nation or race against another. The outstanding contemporary example is the payment of $820 million by the government of West Germany to the government of Israel in 1967 as reparations for the Holocaust.

On May 4, 1969, James Forman interrupted the Sunday morning service at Riverside Church in New York City and read the Black Manifesto which demanded that the churches and synagogues pay $500 million as "a beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted."
wrongs, regardless of present disadvantage. The compensatory rationale was given short shrift by Justice Powell in *Bakke*.

Intuitively, neither rationale standing alone seems sufficient to justify preferential treatment based on race. But a combination of the two rationales was relied upon by the Court to validate a state law preferring women over men. In *Kahn v. Shevin*, the Supreme Court upheld preferential tax status for women because of prior discrimination and their inferior economic position. Nevertheless, in *Bakke* Justice Powell rejected the analogy to preferential treatment based on sex because racial and ethnic preference “presents far more complex and intractable problems.” Fearing to tread upon the slippery slope, he was unwilling “to evaluate the extent of the prejudice and consequent harm suffered by various minority groups.” He asserted that there would be “no principled basis for deciding which groups would merit” preferential treatment and that the rankings of minority groups “simply does not lie within the judicial competence.”

Thus, the thrust of Justice Powell’s position is that “no principled basis” can be found to justify preferential treatment even for those

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70. 438 U.S. at 306, n.43. Undoubtedly, there are serious ethical problems inherent in the concept of reparations and its practical administration. How are victims to be identified? If payment is made to the group as a whole, then non-victims will be gifted with a windfall. In addition, many persons in the “majority” have no connection with the historical wrongs. These and other issues are explored in sophisticated detail in *Gross, Discrimination in Reverse: Is Turnabout Fair Play*, (1978). See also Calabresi, *Bakke as Pseudo-Tragedy*, 28 Cath. U.L. Rev. 427 (1979). Professor Calabresi is one of the few advocates of a reparations rationale for the solution of the *Bakke* issue. See note 135 infra.

71. 416 U.S. 351 (1974). In Kahn, Justice Douglas relied upon the traditional economic disadvantages imposed upon women in the marketplace and the fact that women’s median annual income was only 57.9% that of men in 1972. *Id.* at 353. Other cases have sustained sex-based preferences on a compensatory rationale. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

72. 438 U.S. at 303.
73. *Id.* at 296-97.
74. *Id.* at 296.
75. *Id.* at 297. Justice Powell quoted from Justice Douglas’ dissent in De Funis that “[t]he reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded. . . .” *Id.* at 297, n.37.

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groups who have been historically oppressed and who are currently disad

advantaged. The remainder of this article will attempt to demonstrate that Mr. Justice Powell’s conclusion is significantly mistaken insofar as it lumps together all racial and ethnic groups for the purpose of constitutional analysis. Without resorting to the compensatory or distributive rationale, or to any extra-constitutional justification, a neutral principle for preferential treatment for Blacks can be anchored in the concrete foundation of constitutional legitimacy. All that is required is a recognition that the Constitution and laws have not been color blind and that they have a special mission to fulfill with respect to the Emancipation of Blacks.

III. THE UNIQUE ROLE OF BLACKS IN THE FORGING OF THE AMERICAN LEGAL SYSTEM: THE UNCOMPLETED EMANCIPATION

The history of Black slavery, segregation, and discrimination was summarized with great eloquence by Mr. Justice Marshall in the separate opinion in Bakke:

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime.

The advent of the Constitution did not undermine slavery; on the contrary, the acknowledgment and protection of slavery were made explicit in the Constitution. The Supreme Court itself, beginning with

77. See Wisotsky, Beyond Legitimacy, 33 U.MIAMI L. REV. 173 (1979) for a general discussion of the concept of legitimacy in Supreme Court adjudication.
78. 438 U.S. at 387-88. The American slave trade is thought to have begun in Jamestown in 1619. “By 1776, there were about 500,000 Negroes held in slavery and indentured servitude in the United States. Nearly one of every six persons in the country was a slave.” Rep. of Nat. Comm. on Civil Disorders, Rejection and Protest: An Historical Sketch 95 (1968), cited in BELL, supra note 54, at 1.
79. Article I, § 2 treated each slave as 3/5ths of a person for purposes of appor-
the Marshall Court,\textsuperscript{80} reinforced the institution of slavery in several early decisions. The most infamous case, \textit{Dred Scott v. Sanford},\textsuperscript{81} held that the Missouri Compromise prohibiting slavery in the portion of the Louisiana purchase territory north of the Missouri River was unconstitutional because it deprived slave owners of their property without due process of law. In rejecting Dred Scott's claim of citizenship, Chief Justice Taney wrote that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ."\textsuperscript{82}

The status of the Negro as property and as a non-citizen was officially transformed by the Civil War and by the post-war constitutional amendments. The thirteenth amendment abolished slavery and involuntary servitude; the fourteenth amendment conferred citizenship upon the freedmen; and the fifteenth amendment guaranteed the right to vote, at least in theory. But the promise of Reconstruction and the Civil War Amendments was nullified by the systematic enslavement of the freedmen:

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.\textsuperscript{83}

In every other area of social, political and economic life the freed-
men were degraded, humiliated, and relegated to a position of inferiority. But most of all, it was the absolute inability of the law to protect their personal safety that was responsible for the subjugation of Blacks. Starting immediately after the Civil War and easing for a short period during Reconstruction when federal troops were present in the South, a reign of white supremacist terror was carried on by the Ku Klux Klan, the White Camellias, and other secret societies. By intimidation, burnings, beatings and lynchings—a reign of terror that could justifiably be called an American pogrom—the freedmen were wantonly victimized and brutalized. Approximately 5,000 lynchings have been documented.

The physical degradation and persecution of Blacks was reflected in the law by physical separation of the races in public accommodations and virtually all other aspects of life. The Supreme Court itself contributed to this process of segregation by creating the state action doctrine in the Civil Rights Cases, which had the legal effect of immunizing “private” racial discrimination from constitutional scrutiny and the psychological effect of encouraging the South in its oppression of Blacks. The coup de grace was delivered in the Court’s “separate-but-equal” ruling in Plessy v. Ferguson. The enforced separation of the races in railway cars upheld in Plessy was accurately interpreted in Mr. Justice Harlan’s dissenting opinion to mean that “colored citizens are so far inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.” The effect of the Plessy decision was to encourage the Southern States to expand the scope of the Jim Crow laws to include segregated residential areas, parks, hospitals, theatres, waiting rooms and bathrooms.

84. The lawlessness was so vindictive and destructive that Congress was moved to enact the Ku Klux Klan Act of 1871 and related civil rights statutes now codified as 42 U.S.C. §§ 1981 et seq.  
85. See Bell, supra note 54, at 857.  
86. 109 U.S. 3 (1883).  
87. 163 U.S. 537 (1896).  
88. Id. at 560.  
89. Jim Crow laws also infected the legal system. In the South, there were segregated jury boxes, witness docks and even a Jim Crow Bible for colored witnesses to kiss. 438 U.S. at 393 (opinion of Mr. Justice Marshall), citing C. Vann Woodward, The Strange Career of Jim Crow 68 (3d ed. 1974). These pernicious practices were not confined to the South. Segregation spread to the Northern States and even to the practices of the federal government. “Under Presi-
The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established.90

The first major blow to segregation—to separate-but-equal as a constitutional doctrine—did not transpire until nearly a century after the Civil War. In Brown v. Board of Education,91 the Supreme Court held that the segregation of public school children on the basis of race "generates a feeling of inferiority as to their status in the community and may affect their hearts and minds in a way unlikely ever to be undone."92 The Court concluded that "[s]eparate educational facilities are inherently unequal."93 Brown was rapidly extended in a series of per curiam decisions to a full range of public facilities such as beaches,94 buses,95 golf courses96 and parks.97 The pernicious separate-but-equal doctrine of Plessy was interred. Blacks were no longer to be excluded by law from public facilities used by whites.

Of course, the process of desegregation of public facilities, particu-
larly schools.\textsuperscript{98} was not accomplished without a struggle and violent resistance. There were freedom marches, demonstrations in the streets and elsewhere,\textsuperscript{99} sit-ins at lunch counters,\textsuperscript{100} stand-ins at voting registration centers. The nightly news in the early sixties was a kaleidoscope of villainy: Bull Connor's men using cattle prods and high pressure hoses on demonstrators; Lester Maddox chasing Black customers with his pick handles; George Wallace standing in the schoolhouse door; Orval Faubus at Little Rock defying the mandate of \textit{Brown v. Board of Education}.\textsuperscript{101} And there were killings: four young girls bombed to death while attending church services in Birmingham, Alabama; Viola Luzzo, the civil rights worker from Detroit gunned down by three Klansmen in Alabama; James Chaney, Andrew Goodman, and Michael Schwerner shot in the night and buried in shallow Mississippi graves; Medgar Evers, NAACP field secretary, shot by an assassin while marching for freedom; and finally Martin Luther King, assassinated by James Earl Ray in Memphis, Tennessee in 1968. Many were martyred in the Civil Rights Movement.\textsuperscript{102}

The second phase of the modern Black Emancipation began with the intervention of Congress. After a decade of virtual torpor on civil rights issues (excepting only voting rights)\textsuperscript{103} while under the domina-


\textsuperscript{100} \textit{See}, \textit{e.g.}, \textit{Peterson v. City of Greenville}, 373 U.S. 244 (1963); \textit{Lombard v. Louisiana}, 373 U.S. 267 (1963).

\textsuperscript{101} \textit{See} \textit{Cooper v. Aaron}, 358 U.S. 1 (1958). Faubus' defiance caused President Eisenhower to mobilize federal troops in order to effect the admission of Negro students to Central High School.

\textsuperscript{102} \textit{See Emerson, Haber \& Dorsten, Political and Civil Rights in the United States} 1000-03 (Student ed. 1967).

Beyond Reverse Discrimination

tion of Southern Congressmen vested with seniority and therefore powerful committee chairmanships, Congress was roused to take legislative action. Under the pressure of international condemnation and domestic dissent, the latter brought to a climax by the People's March on Washington, Congress broke through the obstruction of racist filibusters and enacted the first modern comprehensive civil rights law, the Civil Rights Act of 1964. Continued Southern denial of Black citizenship necessitated the Voting Rights Act of 1965, and a series of broadening amendments. After the adoption of the 1965 Voting Rights Act, Johnson Administration proposals for additional omnibus civil rights legislation were repeatedly blocked in the Senate. Once again, dramatic political developments—in particular, the assassination of Dr. Martin Luther King, Jr.—broke the impasse and Congress enacted the Civil Rights Act of 1968.

This abbreviated review of the Civil Rights Movement and of congressional civil rights legislation is intended to underscore the extent to which the American legal system has been preoccupied with issues of slavery, segregation, and their aftermath, the extent to which special consideration of Blacks is an institutionalized feature of our laws. This leads to a second point. The legacy of white supremacy has been a legacy of subjugation, persecution, and degradation which has uniquely burdened the Black race. As Mr. Justice Marshall put the matter:

The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.

104. 42 U.S.C. § 1971 (1976); and 42 U.S.C. §§ 2000(a)-(e) (1976). The act limited the use of exclusionary voter tests (Title I), outlawed discrimination in places of public accommodation (Title II), authorized suits by the Attorney General to desegregate public facilities (Title III), provided for the desegregation of public education (Title IV), banned discrimination in federally funded programs (Title VI), and prohibited discrimination in employment by employers, employment agencies, and labor unions (Title VII).


106. GUNTER, CONSTITUTIONAL LAW 905 (9th ed. 1975).

107. 42 U.S.C. § 3601 et seq. Perhaps the most important provision was Title VIII, prohibiting discrimination, inter alia, in the sale or rental of property.

108. 438 U.S. at 400.
The question now becomes one of determining the legal significance of that enduring mark.

IV. THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM: THE LEGITIMIZING PRINCIPLE

In *Bakke*, Justice Powell acknowledged the original interpretation of the equal protection clause, which viewed its “one pervading purpose” as securing “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” But, he argued, the late nineteenth century wave of European immigration transformed the United States into “a Nation of minorities. . . . As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.” It was “no longer possible,” Justice Powell concluded, “to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority.” “The clock of our liberties. . . . cannot be turned back to 1868.”

Although Justice Powell’s rhetoric is seductive, his conclusion is predicated upon a false dichotomy: Either the equal protection clause protects all groups equally, or there is “no principled basis” for choosing one group over another for preferential treatment. But Justice Powell’s premise may be rejected. It is a judicial value preference, of course. It is not historically compelled; nor does it reflect sufficient sensitivity to the problems of “a Nation confronting a legacy of slavery and racial discrimination.” More fundamentally, Justice Powell’s universe of discourse is unduly restrictive in its exclusive focus on the contours of the equal protection clause. The constitutional dimensions of the issue are broader.

The inadequacies of Justice Powell’s analysis are revealed by comparison to the force and clarity of Arthur Kinoy’s 1967 essay, *The
Constitutional Right of Negro Freedom. Kinoy's argument, focusing on the debate between Justices Bradley and Harlan in the Civil Rights Cases, persuasively establishes that the Civil War Amendments embody a continuing national commitment to complete the process of Emancipation begun in the Civil War.

Kinoy explains that in Dred Scott, the Supreme Court had articulated, largely in dictum, "a full blown legal and constitutional theory designed to serve as a national justification for the preservation of the institution of slavery." That rationale was the non-citizenship of Blacks, which was justified because they were "a subordinate and inferior class of beings who had been subjugated by the dominant race." After the Civil War, the Dred Scott opinion was directly repudiated by ratification of the thirteenth, fourteenth and fifteenth amendments. The effect of these amendments was to free the Negro "from any discrimination by reason of race or color in the exercise of rights or privileges hitherto enjoyed by white men. . . ." Yet, the nature of the rights created by the Civil War Amendments was not merely to be free of oppression by the states, but as an essential attribute of the newly conferred citizenship "to be free from the stigma of inferiority implicit in the institution of slavery. . . ."

Of course, that degree of equality was antithetical to the political realities of the time. The dominant fact of political life was the Compromise of 1877, a genteel phrase for the sell-out of the freedmen, which was accomplished by the withdrawal of federal troops from the South in exchange for southern Democrat support in the deadlocked House of Representatives for the election of Republican candidate Rutherford B. Hayes as President. This Compromise represented the abandonment "in the political arena . . . of national responsibility for the enforcement of the newly created rights of the race of freedmen." Justice Bradley's opinion in the Civil Rights Cases was the constitutional counterpart of that abandonment, shifting the focus of responsi-

114. 21 Rutgers L. Rev. 387 (1967).
115. Id. at 391.
117. Id. at 394.
118. Id. at 395.
119. The Compromise of 1877 is pithily summarized by Kinoy, id. at 396, n.31.
120. Id. at 396 (emphasis in the original) (footnote omitted).
bility back to the individual Southern States. Thus, Justice Bradley argued that the fourteenth amendment was essentially negative in character, prohibiting state denials of Black equality, but vesting no corrective power in Congress over "private" discrimination. This is the etiology of the state action doctrine which was used to strike down the Civil Rights Act of 1875.

More fundamental and more enduring in its destructive impact was the denial of the special mission of the Civil War Amendments to ameliorate the oppressed condition of the freedmen:

Once he had been granted citizenship the freedman's right not to be discriminated against by reason of his race had no special constitutional significance distinct from any citizen's right not to be discriminated against in the equal enjoyment of rights and privileges. Like the ordinary citizen's right under the laws of a state to be treated equally with any other citizen, the freedman must now look in the first instance for protection in the exercise of these rights to the original source of the "ordinary" civil rights of all citizens, the individual state. It is time, said the Bradley Court in 1883, to eliminate any preferred status for the freedman.  

It is almost as if the shield of the Civil War Amendments were transformed into a sword against the mythical "preferred status" of the freedmen. Kinoy labels this transformation "a rather extraordinary piece of legal legerdemain."  

Discrimination against the freedman in all areas of public life had become, by this skillful process of judicial reasoning, wholly merged into the general phenomenon of any discrimination against any class or group of citizens. The problem legally as well as politically was no longer to be verbalized in terms of the special and unique national responsibility of the elimination of the influences of an entire social and economic institution—human slavery—from the life of the country.

But the right of the Negro not to be discriminated against "is not identical to the general right of all citizens not to be arbitrarily discrimi-

121. Id. at 400-01 (footnotes omitted).
122. Id. at 401.
123. Id. at 402.
nated against,” and it is not an “ordinary civil right.”

It is a nationally created right essential to the establishment of a paramount national objective, the elevation of the black man from the status of slave and inferior being to the status of a free and equal member of the political community of the United States, an elevation without which the grant of citizenship to the Negro would become meaningless. For, as Justice Harlan prophetically warned, unless this nationally created right was protected by the national government the race of freedmen would inevitably sink back into a “second-class” citizenship equivalent in essential respects to the former status of “inferiority” and “degradation” which was the legal and social hallmark of the slave society.

And that is exactly what happened. The withdrawal of federal troops from the South, the enactment of the Black Codes, the spread of segregationist practices to the North, made a mockery even of Justice Bradley’s grudging grant of formal equality under the law. Instead of steady progress toward the goal of Emancipation of the freedmen, the next ninety years were spent confronting the racial animus of slavery and the Civil War in the streets and the courtrooms, while Blacks remained in a condition of political, social, economic, and legal inferiority.

Although he does not explicitly consider the issue of affirmative action in his 1967 essay, the power of Kinoy’s analysis is remarkable. First, it clarifies the nature and meaning of the Civil War Amendments, demonstrating them to be an overriding national commitment to elevate the status of the former slaves to a position of full equality in society. “Until this change in status is achieved the national objective remains unfulfilled and the national responsibility for its accomplishment remains in force.”

Simultaneously, Kinoy’s broader conceptualization of the issue succeeds in developing the sought-after neutral jural principle that legitimates affirmative action. Indeed, it is difficult to imagine a more neutral principle, assuming such a thing exists at all, than the force of the national commitment embodied in the extraordinary majorities

124. Id. (emphasis in original).
125. Id. at 403 (footnote omitted).
126. Id. at 404.
required to ratify three constitutional amendments in five years. Ki-
noy's *Constitutional Right of Negro Freedom* thus offers a principled
justification for affirmative action for Blacks. By simply acknowledging
the special mission of the Civil War Amendments and the national fail-
ure to complete the Emancipation begun over a century ago, we are
liberated from the intractable constitutional dilemmas so widely
thought to be inherent in preferential treatment. More than a century
after the Civil War, the status of Blacks remains inferior; the badges of
slavery have not been eradicated. As recently as 1968, the Supreme
Court observed that racial discrimination against Blacks is a ""relief of
slavery."" 128 Substantive equality has not been achieved, nor is it likely
in light of a century of post-Civil War oppression to come about with-
out "reverse discrimination."

CONCLUSION

The acceptance of the duty to complete Emancipation as the oper-
ative juridical principle justifying affirmative action will not put an end
to the difficult issues which will arise in the course of implementation.
Foremost among these is the allocation of benefits and burdens—which
Blacks shall be benefitted and which whites burdened by preferential
treatment? 129 In addition, the abandonment of fuzzy thinking (or expe-
diency) 130 reflected in a nebulous concept of affirmative action for racial
and ethnic minorities generally in favor of one for Blacks only 131 is

129. DREYFUSS & LAWRENCE, *supra* note 21, at 260 titled their last chapter "A
Choice of Victims." One writer suggests that "[t]he interest of blacks in achieving
racial equality will be accommodated only when it converges with the interests of
whites." Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93
HARV. L. REV. 518, 523 (1980). Professor Bell also discusses the pressures militating
toward social class divisions among whites on the issue of affirmative action in Bell,
*Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L.
REV. 3 (1979).
130. See text accompanying note 48 supra.
131. Professor Calabresi, *supra* note 70, at 432, in his proposed reparations solu-
tion to the issue posed by the Bakke case, would limit "benign quotas" to Blacks "and
perhaps to American Indians. . . ." Professor Sedler, less attentive to principle, offers
no justification for the cognitive leap from Professor Kinoy's *Constitutional Right of
Negro Freedom* to the inclusion of "Puerto Ricans, Chicanos and Native Americans"
in racially preferential admissions programs. Sedler, *Racial Preference, Reality and the
certain to be politically troublesome. It would require, for example, the invalidation of the set-aside in *Kreps*.132

Consideration of these and related questions has been avoided by the Court because it has failed to undertake the antecedent task of developing an analytical framework for the adjudication of affirmative action cases.133 Thus, the failure of the *Bakke* opinions (excepting Justice Marshall's) is their failure to confront squarely and cleanly the issue of race in light of the national "legacy of slavery and racial discrimination,"134 and to use the decision as another opportunity to fulfill the Court's continuing mission of national consciousness-raising on matters of racial justice. It could fulfill that mission most effectively by a judicial acknowledgement of the truth135 about American racism.


132. The invalidation of the minorities set-aside in *Kreps* would be required under the incompleted Emancipation analysis suggested here. However, it remains possible that the Court could uphold the set-aside under the plenary power of Congress to regulate interstate commerce. *Cf.* *Heart of Atlanta Motel, Inc.* v. United States, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). The latter decisions, of course, were predicated on the injury to commerce resulting from racial discrimination against Blacks.

An alternative theory for upholding the *Kreps* set-aside is a Congressional affirmative action power under § 5 of the fourteenth amendment, suggested by Comment, *supra* note 43, at 635-37.

133. Although Weber was correctly decided, it deals with benign quotas in the private sector and does not, therefore, address the more prickly issue of publicly funded "reverse discrimination," as in *Bakke*.

134. 438 U.S. at 294. The failure is also ironic in view of the fact that Justice Brennan's opinion, joined by Justices White, Marshall and Blackmun, attempts to justify the Davis special admissions program almost exclusively in terms of the history of discrimination against Blacks. *Id.* at 324 et seq.

135. It has taken almost eighty-five years and an unprecedented upsurge of the descendants of the freedmen for the nation to begin to face frankly the extraordinary fact of American history—that the "universal freedom" which the Emancipation Amendment was supposed to enact was never achieved; that the social institution of slavery was never fully uprooted; that its badges and indicia continued to mark the Negro with the hallmark of slavery, the stamp of an "inferior race." Neither the Court nor the nation could face this reality. For some it was an evil lived with but never discussed; for some it was an unfortunate but inevitable concomitant of American society; for others it was a welcomed reestablishment of a former way of life. But all shared one common unspoken agreement—the reality was not to be discussed; the phenomenon was not to be named; the

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unpleasant truth could not be faced. It can be argued, as the first Justice Harlan might well have argued, that this strange and deep-seated reluctance to face the reality of the incomcompleted Emancipation lies not only at the root of the complicated conceptual problems which still beset the Court in interpreting the scope and thrust of the Wartime Amendments but, in a more important sense, remains at the heart of the most difficult unresolved problems of contemporary national life.

Kinoy, supra note 114, at 414.
Legislative Overview: The Florida Workers' Compensation Act, 1979

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INTRODUCTION

The innovative, unprecedented changes in the Florida Workers’ Compensation Act have focused national attention on the state’s compensation reform efforts. The reforms are viewed as a creative approach to the resolution of the persistent permanent-partial controversy and as an imaginative response to critics of state-regulated compensation systems. The changes, of course, will have pervasive impact on the practice of workers’ compensation law in the state. This article will outline problems the revisions were designed to address. Then, the major changes in the compensation act will be developed. Finally, the anticipated impact of the revisions as well as potential problems will be treated.

HISTORY

Workers' Compensation insurance is a unique social, political, legal and economic mechanism. A major tenet of the progressive political movement of the early twentieth century, workers’ compensation was the first social insurance mechanism in the United States.1 It was also the first “no-fault” insurance mechanism.2 The concept of workers’ compensation developed as rapid industrialization resulted in

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1. See NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS, COMPENDIUM ON WORKERS’ COMPENSATION, Chapter 2, a report prepared in accordance with the Occupational Safety and Health Act of 1970. The report was presented to the President and Congress July 31, 1972.
2. Id.
vastly increased numbers of industrial accidents. Industrial injury rates in the United States reached their peak in 1907 when in two industries alone, railroading and coal mining, there were 7,000 deaths.³

Before the advent of worker's compensation, a worker injured on the job was required to prove that the injury was a result of the employer's negligence.⁴ Work-related injuries fell under the tort liability system. Employees were required to prove not only that the injury was entirely the fault of the employer, but that they and their co-workers were totally without fault.⁵ By suing an employer, employees risked job loss and long delays for awards of damages. Also, the courts frequently held that certain risks were assumed by an employee in taking a job, and if the injury resulted from those risks, no recovery was permitted.⁶

By the middle of the 19th century, protests against the blatant deficiencies and inequities of the common law approach to handling work-related injuries resulted in the development and enactment of various employers' liability laws in many jurisdictions.⁷ Although these laws restricted the employers' legal defenses, they continued to require that an employee prove employer negligence in order to receive compensation.⁸

This inequitable situation generated the proposal that is the foundation of all modern workers' compensation systems. Reformers recognized the shortcomings of traditional legal remedies that relied on common law doctrines of blame and fault. The approach they suggested was a tradeoff. Injured workers relinquished their right to tort action against their employers for negligence. In exchange, the injured worker received the security of medical and income replacement benefits covering all injuries incurred in the course of employment. Because the inherent hazards of employment were a cost of production, all of the costs of work-related injuries were borne by the employer. New York

⁵. Id. at 3.
⁶. Compendium on Workers' Compensation at 16-17.
⁷. Id.
⁸. Id.
enacted the first compensation act of general application in 1910, and by 1919 thirty-five other states had adopted some form of compensation legislation.9 The first Florida Compensation Act became law in 1935.10 Although most jurisdictions enacted such legislation before the Second World War, workers' compensation was not provided in every state until Mississippi enacted its law in 1948.11

There are five generally accepted objectives of workers' compensation. The first objective is income replacement. That is, the system seeks to replace wages lost by workers disabled by a job-related injury or sickness. Income replacement should be adequate, equitable, prompt, and certain. The second objective is to provide the injured worker with the medical and vocational rehabilitation necessary to restore earning capacity and foster return to employment. The third objective is occupational accident prevention and reduction. The system should provide significant financial and other incentives for employers to strive to decrease the severity and frequency of accidents. The fourth objective is proper cost allocation. The costs of the program should be divided among employers and industries according to the extent to which they are responsible for losses incurred by employees and for expenses related to the insurance mechanism. Finally, the achievement of the four objectives mentioned above should be met in the most efficient manner possible.12 While the objectives sometimes conflict with one another, the accomplishment of multiple objectives should be encouraged to the greatest possible extent.

In general, the workers' compensation statutes impose limited liability on employers for injuries incurred by employees in the course of employment. Adequate benefits are to be predetermined and promptly paid. Appropriate medical care is to be provided. The administration of the Act is the responsibility of an administrative body rather than the courts so that, theoretically, administration is expeditious, somewhat informal, and efficient.13

9. Id. at 18.
11. COMPENDIUM ON WORKERS' COMPENSATION, at 18.
13. ALPERT, Chapter 1.
The legal obligation of the employer to have benefits paid to workers in accordance with state law is usually met through an insurance policy purchased from a private insurance company. If, however, the employer has the financial ability, he may "self-insure" by posting appropriate security. Thus, he may bypass the need for an insurance company and assume the risks of the workplace directly. About 22% of workers’ compensation insurance premium volume in Florida is self-insurance. 14 Several states provide a mechanism known as a state fund, a system under which insurance coverage may be purchased from the state. Under the Florida Act, there is no state fund. Most employers use the private insurance mechanism to meet their obligations under the law.

PROBLEMS

Although workers’ compensation is a patchwork of state by state legislation, severe problems with both the availability and the affordability of compensation insurance coverage arose across the country in the mid-1970's. 15 The compensation system had been subjected to a series of increasingly complicated pressures. Benefit levels rose significantly to keep pace with inflation-induced wage increases. Political considerations also exerted upward pressure on benefit levels. Diseases such as heart trouble, hypertension, and cumulative trauma, which may bear only a remote relationship to an individual’s employment, found their way into the compensation system. Inflation, particularly in the cost of health care, caused tremendous increases in expenditures for benefits. Insurance companies were forced to charge significantly higher premiums for coverage to meet higher costs.

These conditions were exacerbated by the recession of the mid-1970's. Insurance rates skyrocketed across the country as insurance companies attempted to cover eroding profits and vastly increased loss payouts. When profits dropped, companies reacted by implementing se-


verely restrictive underwriting standards. This caused considerable expansion of the involuntary insurance market. As a result, consumers experienced severe availability problems.

Florida did not escape the availability crunch. It was accompanied by soaring rates that increased by 169% between January, 1973, and January, 1978.\textsuperscript{16} The financial burdens imposed on businessmen became increasingly onerous. Despite these increases, from 1972 through 1976, insurance companies contended that they were continuing to sustain significant underwriting losses. Underwriting losses such as those experienced by companies in recent years meant, in practical terms, even higher rates, inadequate markets for consumers, and insufficient funds to improve benefits.

The climate facing Florida legislation in 1979 was characterized in the words of compensation expert, Cornell University Professor John Burton, as "the worst of all possible worlds".\textsuperscript{17} The rapid rate escalation prodded employers, legislators, and regulators to question the validity of overall rate levels as well as the integrity of the underlying data. These conditions led to articulate but erroneous arguments involving insurance company profits and the like.

The 1978 Florida Legislature established a Joint House-Senate Committee to study the Florida Workmen's Compensation Act and to make recommendations for reforms. The 1978 Legislature also added a sunset provision to repeal the Workmen's Compensation Statute (Chapter 440) July 1, 1979, unless the Legislature reenacted a worker's compensation law.\textsuperscript{18} The Joint Legislative Committee identified six major problem areas in the system. They were: the high cost of coverage; the rapid increase of job-related injuries; the minimal utilization of rehabilitation; the high cost and volume of permanent-partial disability claims; the inequity in income compensation among workers with permanent-partial disability claims; the inequity in income compensation among workers with permanent-partial disabilities; and the high

\textsuperscript{16} Statistics compiled by the Florida Department of Insurance based on rate filings submitted on behalf of Florida workers' compensation carriers by the National Council on Compensation Insurance.

\textsuperscript{17} Keynote address to the Third Annual National Symposium on Workers' Compensation at the University of Maine, July 9, 1979.

\textsuperscript{18} 78-300 Fla. Laws §23.
degree of attorney involvement. 19

A detailed study conducted by the National Council on Compensation Insurance of closed claims in Florida, Alabama, and Wisconsin underscored the problems plaguing the Florida compensation system. 20 The study showed that the system was overused and badly abused. High utilization of attorneys and medical services contributed to the excessive cost of the system. Injured Florida workers, for example, received two to three times the medical benefits of their counterparts in Wisconsin and Alabama. They were confined to hospitals more frequently, had higher hospital bills, and utilized the services of specialized medical practitioners more often. The study showed that claimant’s attorneys in Florida were involved more frequently in compensation cases than claimant’s attorneys in Alabama or Wisconsin. Florida attorneys were involved sooner and received substantially higher fees. 21 Of course, it is important to note that higher attorney involvement in Florida was also attributable to inefficient claims handling by compensation insurance carriers.

Finally, and perhaps most important, the closed claims study showed that the cost of permanent-partial disabilities was much higher in Florida than in the other two states. Benefits for permanent-partial injuries are paid to workers who, after reaching maximum medical recovery from their injuries, continue to experience either actual loss in wages earned or a loss in their capacity to earn wages. Put another way, there is a permanent-partial disability when a worker is incapacitated but not completely disabled for the rest of his or her life. Permanent-partial disabilities accounted for a significantly greater percentage of cases in Florida (30%) than in Alabama (7.1%) or Wisconsin (9%). The cost of permanent-partial claims as a percentage of total medical and lost time payments was 67% compared to 37% in Alabama and 40% in Wisconsin. 22

20. See National Council on Compensation Insurance, Workmens’ Compensation Resolved Claims Survey, House Insurance Committee, a study by the National Council on Compensation Insurance. The study was based on cases resulting in seven days of more of total lost time from work that were resolved in November and December, 1977, in Florida, Alabama, and Wisconsin.
21. All of the above statistics were drawn from the Resolved Claims Survey.
22. Id.
Although the closed claims survey, the Joint Committee, and other involved parties noted highlighted a number of severe problems in the Florida system, it must be noted that the Act worked as it was supposed to for most of the workers injured each year. Injuries requiring only medical treatment and involving brief periods of temporary disability represented more than 95% of work-related accidents. In these cases, the system was virtually self-executing. The injured worker enjoyed the security of prompt, appropriate medical treatment and regular benefit checks. The prolonged insecurity of litigation in order to assess fault and obtain judgments was avoided. About 23% of the system's dollar payout stemmed from this vast majority of routinely handled incidents.

On the other hand, permanent-partial cases that amounted to only about 3% of all claims absorbed almost 70% of the money expended in the system. The permanent-partial injury was the Achilles' heel of the Florida compensation system. Legislators focused much of their attention on this aspect of the system in their reform efforts.

Under the pre-1979 act, the Florida system used a bifurcated approach for compensating the permanent-partial injury. Some of the serious injuries fell within a statutory list that specified fixed amounts of compensation for each injury. Most injuries, however, were not on the statutory schedule. For those injuries compensation was based on either a physician's physical impairment rating or on the diminution of wage-earning capacity, whichever was greater. This numerical rating then was plugged into a formula to determine the amount of compensation payable to the injured worker. Both methods were highly subjective. With physical impairment ratings, disputes often arose between the claimant's physician and the insurance company's physician. This led to "doctor shopping" and contributed to the escalation of fraudulent claims. The diminution of wage-earning capacity rating was just as subjective as the physical impairment rating in that it attempted to take factors such as the worker's age, education and experience into account in order to make a prospective estimate of the effect an injury

23. See 1976 CASES, CAUSES, COSTS, compilation prepared by the Florida Department of Commerce.
24. Id.
25. Id.
might have on the worker's future wage-earning ability.

This complex mechanism to compensate injured workers ostensibly protected a worker from the adverse financial impact of work-related injury. Practically, it bore little relation to that purpose. The statute provided fixed compensation to workers suffering scheduled injuries, whether the worker was a carpenter or an attorney. If income protection was the objective, this method was obviously arbitrary. The physician's impairment rating also failed to meet the income protection objective as it was a purely medical evaluation and thus unrelated to a worker's economic needs. The diminution of wage-earning capacity standard came closer to the income protection objective but it, like the others, was inherently flawed by its prospective application. That is, when a worker reached maximum medical improvement, an estimate would be made as to the effect of the injury on future wage-earning ability. These crystal ball judgments were notoriously imprecise and were aggravated by the fact that more than two-thirds of permanent-partial cases were "washed out" (settled by lump-sum payments). Serious injured workers often found themselves destitute while workers with minor injuries received large cash awards although they actually suffered little, if any, income loss.

It is important to point out that Florida was not alone in experiencing serious problems with its approach to handling permanent-partial disabilities. The Report of the National Commission of State Workmen's Compensation Laws, completed in July of 1972, pointed out that the "issue arising from benefits for permanent-partial disability are so critical to the future of workmen's compensation that the subject warrants the highest priority. Unfortunately, the critical need for corrective action is matched by the elusiveness of the proper remedy. . . ." In January, 1977, the Policy Group of the federal government's Inter-departmental Workers' Compensation Task Force expressed deep concern about permanent disability cases, observing "excessive litigation, long delays in payments, high subsequent rates of persons without employment, and little relationship between benefits

27. See Final Report and Recommendations of the Joint Legislative Committee on Workmen's Compensation, Commerce Committee of the Florida Senate.
28. See note 3 supra.
awarded and the actual wage loss." 29

WAGE-LOSS

The wage-loss concept, adopted by the Florida Legislature as the cornerstone of the 1979 Workers' Compensation Reform Act, focuses on the permanent-partial injury as the key to meaningful progress in restoring the vitality of the compensation system. The primary aim of the wage-loss concept is to abandon the present system, which attempts to predict future earning loss and to replace it with a system that compensates a worker for earning loss when he shows, retrospectively, that he is actually losing money as a result of the injury.

The worker who suffers a permanent injury will receive compensation based upon any actual loss in wages he experiences as a result of the injury. A month-by-month analysis of wages earned after maximum medical improvement will determine the amount of compensation to which the worker is entitled. This formula is known as the 85/95 formula. The worker bears the first 15% of wage-loss. He is then entitled to wage-loss benefits calculated as 95% of the difference between post injury wages and 85% of pre-injury wages, subject to a cap of 66 2/3% of the pre-injury wage. 30 Reformers hope this approach will result in the payment of compensation to workers who actually need it while eliminating compensation paid to workers who are as financially secure after the injury as they were before it. There are three situations in which injured workers are eligible to receive compensation in addition to wage-loss benefits. Wage-loss benefits are paid for a maximum of 350 weeks. To partially protect workers from inflation, pre-injury wages will be discounted for 3% after wage-loss benefits have been paid for two years. For workers injured after July 1, 1980, the discount is 5%. 31

The Legislature concluded that the lump sum settlements so frequently utilized under the old system did not contribute to the basic purpose of the wage-loss system. A study conducted by Associated Industries of Florida showed that payments in washouts for future medical benefits accounted for more than a fourth of the system-wide pay-

29. See note 4 supra at 19.
31. Id.
out for medical expenses. The Joint Committee concluded that utilization of lump-sum settlements for future medical benefits involved a very high degree of subjectivity and imprecision, especially in cases when a settlement was made soon after the injury. Periodic payments are considered preferable to one-time cash awards because they insure worker protection against an actual loss in wages. For these reasons, the new Act severely restricts the ability of the parties involved to "wash out" a case. No lump sum settlements are permitted until six months after maximum medical improvement. Lump sum payments in exchange for the release of the employer's liability for future medical expenses are prohibited.

While the wage-loss plan places the basis of compensation for permanent-partial injuries on more objective criteria, it will not eliminate litigation. A significant new litigable issue will undoubtedly develop from determinations as to whether wage-loss is, in fact, due to injuries or whether it is a result of other unrelated factors.

ATTORNEY FEES

As pointed out previously, excessive attorney involvement was a significant problem in the Florida system. The closed claims survey underscored the significantly greater frequency of attorney involvement in the Florida system as compared to other states. In some respects, this extensive involvement can be justified by the accurate observation that, under the old system, a worker without an attorney was a sheep among wolves. This necessary assistance of attorneys was, however, expensive. The Miami Herald reported in February of 1979 that workers' compensation attorney fees in Florida totaled nearly $20 million. Until 1978, the employer and his insurance company were responsible for paying all attorney fees of the successful claimant. This provision was

32. See note 14 supra at 20.
33. Id.
35. See THE PAYOFF FOR PAIN: A LOOK AT FLORIDA'S WORKMEN'S COMPENSATION SYSTEM, a reprint of articles published in the Miami Herald between March 18, 1979, and March 25, 1979. The article cited herein appeared March 18, 1979, and was written by Robert D. Shaw, Jr., Director of the Miami Herald reporting team that investigated and reported on the Florida workmen's compensation system.
36. See, for example, FLA. STAT. § 440.34 (1979).
amended in 1978 to require that the claimant pay 25% of his legal fees. Now, with certain exceptions, the employee is responsible for payment of his entire attorney fee. Because a compensation claimant is now subject to the normal risks of litigation, the number of unwarranted claims should be reduced.

It should be noted that stringent guidelines have been established for attorney’s fees, and approval of such fees by the “deputy commissioner, commission, or court having jurisdiction over such proceedings” is required. Factors are delineated which may be considered if it appears that “the circumstances of [a] particular case warrant” an increase or decrease from the amount allowed under the basic statutory provision.

There are three situations in which the employer or the insurance company still must pay the claimant’s attorney fees. If the claim is for medical benefits only, the claimant pays no fees. In situations when the insurance company denies that a compensable injury occurred, and the claimant prevails, the employer/carrier must pay the fees. Also, when it is determined that the employer or insurance company have handled the claim in bad faith, they must pay the claimant’s legal expenses. By requiring that claimants pay attorney fees in most cases, the Legislature has brought the Florida system in line with most other states.

**BENEFITS**

The 1979 legislation raised benefits. Most disabled workers, previously entitled to only 60% of their average weekly salary, now receive 66 2/3% of their average weekly salary during the period of total disability. The pre-1979 cap on benefits at 66 2/3% of the statewide average weekly wage was increased to 100% of the statewide weekly wages.
or $196 per week.\(^45\) Moreover, this maximum benefit will increase in amounts equal to increases in the statewide weekly wage.\(^46\)

Superficial treatment of benefits focuses only on their amount and adequacy. But the new law also addresses the equity of those benefits. The Joint Legislative Committee found that an unjustifiably large percentage of compensation benefit dollars were going to a small group of workers with relatively minor disabilities. Statistics compiled by the Florida Division of Labor showed that in 1978, for example, only 2.6% of all work injuries and 18% of all disabling injuries resulted in permanent-partial impairments. Yet over 46% of benefits paid out that year went to these workers, many of whom had disabilities of 10% or less.\(^47\)

Wage-loss is designed to redistribute benefits so that workers with legitimate need for compensation will receive it. The changes in the benefit structure will result in 80% to 90% of disabled workers receiving higher benefits. Actuaries, nonetheless, estimate that the use of objective criteria generated by wage-loss and more equitable distribution of benefits will result in overall cost saving.

**ADMINISTRATION**

The success of the new Workers' Compensation Act depends heavily on aggressive, efficient, and effective administration. The Bureau of Workers' Compensation has been upgraded to division status, and 168 new positions have been authorized reflecting the Legislature's commitment to better administration of the system.\(^48\) The new Act requires the Division to take forceful action to inform parties of their rights and obligations, to endeavor to resolve disputes prior to attorney involvement, to compel carriers to handle claims properly, to regulate self-insurers more aggressively, and to oversee utilization of medical services. Without aggressive administration and regulation in the system will be jeopardized.

Before the 1979 amendments to the Workers' Compensation Law were enacted, appeals of orders from judges of industrial claims were

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47. See **Final Report and Recommendations of the Joint Legislative Committee on Workmen's Compensation, Mar, 1979**.
made directly to the Industrial Relations Commission, subject to re-
view only by petition for writ of certiorari to the Florida Supreme
Court. The new act abolished the Industrial Relations Commission.
Appeals from orders of deputy commissioners (formerly known as
judges of industrial claims) will be made directly to the First District
Court of Appeal in Tallahassee.\textsuperscript{49} Appeal to the Supreme Court will be
by petition for writ of certiorari. All appeals that were pending before
the Industrial Relations Commission as of October 1, 1979, were trans-
ferred to the First District Court of Appeal for resolution.\textsuperscript{50}

**REHABILITATION**

Although most employees injured in work-related accidents return
to their jobs after minor medical attention with little if any work time
lost, a minority of injured workers suffer injuries that disrupt their
lives. For some, injuries are so severe that prolonged medical treatment
and convalescence fail to restore them completely to their pre-injury
financial, physical or psychological status.\textsuperscript{51} Only retraining and educa-
tion, combined with special treatment, offer a reasonable prospect for
return to employment. It is anticipated that the introduction of wage-
loss in the Florida system will result in increased attention by employ-
ers and insurance carriers to rehabilitation programs.

Under the pre-1979 compensation act, the provision of rehabilita-
tion was the responsibility of the Bureau of Workmen's Compensation
of the Department of Labor and Employment Security. The 1979
amendments placed the responsibility on the employer and carrier, at
their expense.\textsuperscript{52} The wage-loss system gives the employer and insurance
carrier a direct economic incentive to rehabilitate an injured worker.
Wage-loss benefits payable to the worker will be reduced for every dol-
lar the worker is able to earn after reaching maximum medical im-
provement. Consequently, the employer and insurance carrier will
strive to return the permanently injured worker to the labor force as
quickly as possible at the highest possible wage. Additionally, by plac-

\textsuperscript{49}  FLA. STAT. § 440.25 (4)\textsuperscript{(f)} (1979).
\textsuperscript{50}  Id.
\textsuperscript{51}  See Walter Y. Oi, \textit{An Essay on Workmen's Compensation and Industrial
Safety}, \textit{National Commission on State Workmen's Compensation Laws}, Volume
1, at 41-106.
\textsuperscript{52}  FLA. STAT. § 440.49 (1979).
ing the responsibility for rehabilitation with the employer and carrier, immediate contact with and attention to the injured worker will be insured. It is clear that prompt rehabilitation is an essential element in the effective operation of the wage-loss system. The changes in the compensation act relating to rehabilitation are designed to return the injured employee to the labor force as soon as possible. As a result, the injured worker is provided with employment and less wage-loss benefits are paid out exerting subsequent downward pressure on premium levels.

CONCLUSION

The limited scope of this article precludes discussion of many other changes in the 1979 Workers' Compensation Law. Those changes are less important only in comparison to the significant reforms described above. The reforms enacted by the 1979 Florida Legislature are an ambitious effort to resolve the problems that have plagued the compensation system for many years. The reforms, however, are not a panacea. Even the most optimistic advocates of the reforms recognize that the revisions have engendered some problems.53

Initially, education will be the most significant problem area. Because the Compensation Act has been altered in so many ways, there will be a period of confusion as workers, employers, insurance carriers, attorneys, regulators, and other involved parties attempt to familiarize themselves with their new responsibilities and obligations under the law. However, after involved parties acquire experience with the Act, this problem should gradually disappear.

Another anticipated area of concern is the shift of appeals of compensation cases from the Industrial Relations Commission to the First District Court of Appeal. It is feared that the court of appeal will experience a tremendous increase in its new caseload. Indeed, when the new Act took effect October 1, 1979, 1,114 cases pending before the Industrial Relations Commission were transferred to the First District Court of Appeal.54 With the addition of workers' compensation appeals, the

53. See preface in ALPERT AND MURPHY, FLORIDA WORKMEN'S COMPENSATION LAW (3d ed. 1979) The special 1979 interim supplement provides a pessimistic assessment of 1979 revisions.
54. The Orlando Sentinel Star, October 16, 1979, at 5-C.
court's workload could exceed 4,000 new cases each year. This is an overwhelming burden. When the legislature convenes in 1980, it must respond to this situation.

Finally, as pointed out above, 'the success of the 1979 reforms depends to a significant extent on the strength and efficiency of the Division of Workers' Compensation. The new law contemplates and encourages nonadversary resolution of conflicts in which the need for litigation is reduced. But, in order for this to happen, the Division of Workers' Compensation must exert forceful leadership in the execution of every aspect of its responsibilities. Further, there must be increased coordination between the Division and the Department of Insurance in terms of essential regulatory responsibilities.

The innovative approaches adopted by the Florida Legislature in response to problems that brought the state's workers' compensation system to the brink of collapse will focus national attention on Florida's experience under the new Act during the next few years. The Florida experience will be particularly important in light of recent proposals for federal intervention in workers' compensation. The Florida experience can prove that reasonable reform is possible under state authority. But, if the Florida system is to complete its move to greater equity, greater efficiency, and more complete coverage and benefits for injured workers, cooperation among employers, workers, insurers, attorneys, and regulators will be essential.
David's Copperfield And FIFRA's Labelling Misadventures

I. INTRODUCTION

Compounding the American farmer's struggle for existence is a myriad of federal pesticide regulations. Although formulated with the intent to benefit both the farmer and the public through the protection of environmental quality, such regulations too often place the farmer under a hodgepodge of federal red tape. The resulting effect of such regulation often increases rather than decreases environmental pollution and subsequently places the small crop producer and pesticide manufacturer in a legally precarious position. Nowhere is this more apparent than in the results of across the board compliance with the Environmental Protection Agency's (hereinafter referred to as EPA) pesticide registration policies pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter referred to as FIFRA or the Act) and specifically section 12(a)(2)(G).²

Strict compliance raises serious questions of diminished minor crop production and resulting environmental and agricultural ecosystem deterioration. Scientifically viewed, fallout, resulting from strict compliance, subjects these ecosystems to long term or perhaps irreversible pesticide damage. Ironically, EPA's enforcement pursuant to the Act may be creating the very pesticide pollution problems it has so earnestly sought, and is presently seeking, to prevent.

It is the objective of this article to present examples where compliance with EPA pesticide registration and section 12(a)(2)(G) of the Act produce dysfunctional results and to review the impact of such compli-

3. As used herein, minor crops are those other than corn, cotton, rice, soybeans and wheat. H. Hughes & D. Metcalfe, Crop Production 16, 23 (1st ed. 1972).
ance upon minor crop production and environmental quality. In addition, the author recommends:

(1) Accelerated development and relaxation of FIFRA laws in the manufacture of environmentally sound pesticides.
(2) Increased implementation of integrated pest management programs to minimize the adverse effects of pesticide pollution.
(3) Further FIFRA amendment to permit minor crop growers the benefit of interchange of pesticides with substantially similar or identical chemical composition and usages.
(4) Increased scientific and legal interaction in future formulation of FIFRA laws.

II. EVOLUTION OF REGULATION AND REGISTRATION PROVISIONS

A. Early Perspectives and Authority of the USDA

Federal regulations and registration provisions find their roots early in the twentieth century. Pesticides were first subject to federal regulations through the Insecticide Act of 1910. Briefly, this act prevented the manufacture, sale or transportation of adulterated or misbranded pesticides and established minimal regulation of fungicide and insecticide sale. Following a surge in the development and usage of pesticides during and after the Second World War, Congress reexamined and repealed the Act of 1910 and enacted the Federal Insecticide, Fungicide and Rodenticide Act of 1947. Under this forerunner of the present day FIFRA, the United States Department of Agriculture (hereinafter referred to as USDA) was charged with the promulgation of registration and labeling regulations of pesticides prior to their introduction into interstate commerce. USDA efforts at registration and labeling regulation commenced with the signing of that Act.

4. As used herein, pesticide as defined pursuant to § 136(u) of the Act is "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, . . . ."
B. USDA Under Criticism and EPA Entrance

Opposition to the USDA’s role in pesticide regulation first occurred in 1959 when the organization came under sharp criticism for its fire ant eradication program. Criticism continued in Rachel Carson’s highly popular *The Silent Spring*. As public awareness of pesticide usage increased, there followed, in 1964, an amendment of FIFRA which gave the Secretary of Agriculture authority to refuse to register new pesticides and authorized him to “remove from the market any product whose safety or effectiveness was doubtful.” Shortly thereafter, the USDA again came under criticism, this time from the General Accounting Office for lax enforcement of the Act. Pressures exerted by both governmental agencies and the environmental movement of the mid and late sixties over widespread pesticide usage and lax enforcement served as the catalyst for the establishment of the Environmental Protection Agency in 1970. Enforcement of FIFRA was subsequently transferred to the EPA whose primary function was “protection and enhancement of environmental quality.” Continued public concern of pesticide usage resulted in yet further amendment of the Act in 1972. Through the Federal Environmental Pesticide Control Act of 1972 (hereinafter referred to as FEPCA) Congress emphasized protection via federally controlled use, manufacture, and distribution of pesticides. Two of FEPCA’s provisions central to the theme of this paper included: 1. Registration of pesticides, and 2. EPA’s authority to prevent use of a pesticide inconsistent with its labeling. The regulations and procedures for implementation of the Act became effective on August 4, 1975. Additional amendments affecting “use inconsistent with

the label” were signed into law in 1978 and became known as the Federal Pesticide Act of 1978.\textsuperscript{17} The provisions of this latest amendment and their relation to minor crop production and environmental quality will be discussed in the text of the paper.

III. THE PROBLEMS OF STRICT COMPLIANCE WITH FIFRA REGISTRATION AS IT AFFECTS MINOR PESTICIDE PRODUCTION AND ENVIRONMENTAL QUALITY

A. The Registration Process In Review

Development of an effective yet environmentally safe pesticide which is in compliance with EPA registration is a time-consuming and costly enterprise. Basic tests required for registration of a newly developed pesticide include mammalian toxicity, carcinogenicity,\textsuperscript{18} teratogenicity,\textsuperscript{19} mutagenicity,\textsuperscript{20} fetotoxicity,\textsuperscript{21} and adverse effects on wildlife, particularly endangered species.\textsuperscript{22} When EPA scientists determine through nomination\textsuperscript{23} that, on the basis of a single study, the pesticide meets the risk criteria,\textsuperscript{24} a rebuttable presumption arises.\textsuperscript{25} Issuance of

\begin{itemize}
\item \textsuperscript{18} The ability of an agent to incite development of a carcinoma or any other sort of malignancy. \textit{McGraw-Hill Dictionary of Scientific and Technical Terms} 247 (2d ed. 1978) (hereinafter cited as \textit{McGraw-Hill}).
\item \textsuperscript{19} The ability of an agent to cause formation of a congenital anomaly or monstrosity. \textit{Id.} at 1606.
\item \textsuperscript{20} The ability of an agent to raise the frequency of mutation above the spontaneous rate. \textit{Id.} at 1062.
\item \textsuperscript{21} Fetotoxicity refers to poisoning of the fetus. \textit{Id.}
\item \textsuperscript{22} 36 Fed. Reg. 22, 496 (1971).
\item \textsuperscript{23} Nomination refers to the procedure whereby once the compound is determined to possess a potential hazard on the basis of a single study which indicates that it may be a carcinogen, teratogen, mutagen, fetotoxin, or mammalian toxin, it is submitted for review by either the Office of Special Pesticide Reviews, EPA Registration Division or Reregistration Task Force, an environmental group, Congressional committee or other interested parties.
\item \textsuperscript{24} If a compound is found to be a mammalian toxin, carcinogen, teratogen, mutagen, fetotoxin or adversely affects wildlife on the basis of a single study, then its risk criteria or potential for initiating these effects is said to have been reached.
\item \textsuperscript{25} 7 U.S.C. § 136a (1976).
\end{itemize}
a rebuttable presumption against registration is not, however, notification of the pesticide's cancellation. Once the presumption is raised, a four stage procedure ensues as follows:

1. Investigation of the risk.
2. Rebuttal of the risk.
3. Risk/benefit analysis.
4. Review of outside recommendation.  

During the first phase, the information implicating the pesticide as a potential hazard is reviewed within the Office of Special Pesticide Reviews. Here, the scientific methods employed, as well as conclusions reached during the investigation of the pesticide, are examined by a project manager.

During the rebuttal stage, registrants, environmental groups, and interested parties may submit data to the Agency which either supports or refutes the presumption of risk. The presumption is rebutted either 1) by a demonstration that the research utilized to establish the presumption is not scientifically valid; or, 2) by proof that exposure to the pesticide will not produce the adverse effects as described in the study. For example, the manufacturer must demonstrate that exposure which is most probable to occur is not sufficient to produce the described effects of test exposure.

In the third phase, public participation is encouraged in submitting risk/benefit data. Benefit analysis is confined only to those aspects which are of prime importance among which is the value of the crop.  

Producers of minor crops are especially concerned with this aspect of the risk/benefit analysis, for if registration is denied on the basis of a crop's limited marketability, the grower could be faced with little if any pesticide protection against disease outbreak.

Several aspects of risk/benefit assessment have been subject to criticism.  


27. Here the author wishes to convey the thought that the collective value of the crop is considered in assessing the pesticide's benefit to agriculture as balanced against its toxic detriments.

less risk/benefit analysis should be accorded this third phase. It is further contended that the balancing test is not rational in that human safety is placed second to that of crop economics. In addition, some lawmakers criticize court use of the risk/benefit analysis, contending that Agency review is far more effective in examining available alternatives.29

Finally, following a review of the important aspects of the pesticide’s use, conclusions are submitted to the USDA for review.30 After additional study of important uses the data is submitted to the EPA where it is decided whether the pesticide will be reviewed further.31

B. Research and Developmental Costs

Estimates of expenditures for such registration vary somewhat with the source. The EPA, in citing the National Agricultural Chemical Association regarding research and development expenditures (hereinafter referred to as R & D) notes that these expenses alone have increased from an estimated 70 million dollars in 1970 to an estimated 195 million dollars in 1976.32 These estimates are believed to be accurate representations of the pesticide industry’s expenditures for those respective years and are thought to be a reliable indication of the R & D expenditures of the industry.33

Additionally, EPA estimates that such expenditures per company nearly tripled from 2.1 million dollars in 1970 to 5.9 million in 1976.34 This in itself represents an increase of 68 percent which exceeds other

29. Id.
30. IFAS/FARI Pesticide Workshop, supra note 26. The EPA submits a list of specific questions for USDA assessment teams. Questions may center on the total acreage treated with the pesticide in question, the occurrence of pest outbreaks, environmental residue data, the effect of the pesticide on crop yield, and conditions for the pesticide’s usage.
31. Id. The EPA decides whether all or some of the pesticide’s uses should be cancelled, registered or reregistered, and whether the pesticide should be restricted.
33. Id. at 32.
34. Id.
industrial R & D expenditures in the U.S. in general. Some estimate the cost required from discovery of a pesticide to its registration to be approximately 20 million dollars. Others place the cost average between 2.1 and 4.0 million dollars. Additionally, time from discovery to registration alone exceeds six years. Paul F. Oreffice, Dow president and chief executive officer recently stated that "there is no faster rising costs of business than expense related to government regulations."

C. The Manufacturer's Liability

In addition to R & D costs, pesticide producers are continually faced with the impending thought of legal liability and excessive expenditures in the forecast development of new pesticides. In his article The Law of Pesticides, Rohrmann notes that "A duty of care binds manufacturers and sellers of pesticides. This duty includes a duty to warn of product connected dangers, a duty on the part of the manufacturer to subject the compound to reasonable tests and a duty on the part of the seller to subject the product to reasonable inspection." In addition, the extent of the manufacturers liability often extends to the unforeseeable.

Hubbard-Hall Chemical Co. v. Silverman epitomizes this aspect of unforeseen liability. Here, the manufacturer's pesticide label adequately warned of the dangers of the insecticide in accordance with existing laws. Following an application of the pesticide two workers died. Although the company complied with the labeling laws, the court noted that the jury could have found the manufacturer liable on the premise that the pesticide would be used by illiterates; and therefore,

35. Id.
36. INSTITUTE OF FOOD AND AGRICULTURAL SCIENCES, UNIVERSITY OF FLORIDA, CHEMICALLY SPEAKING (October 1978).
37. Wilkes, supra note 28, at 98.
38. ECONOMIC TRENDS, supra note 32.
42. Id. at 369.
43. 349 F. 2d 402 (1st Cir. 1965).
the label should have included the skull and crossbones. This poses a question as to the extent the manufacturer of newly developed pesticides must be held accountable. Are the present legal sanctions of strict liability and negligence appropriate in view of the massive number of uses and unforeseeable accidents which could occur through such usage?

Ironically, in *Edwards v. California Chemical Co.*, the skull and crossbones were adequately displayed, but the appellate court sided with the plaintiff applicator. Plaintiff, an illiterate, was employed as a groundskeeper in Boca Raton, Florida. After an application of lead arsenate, the laborer became ill. Counsel for the manufacturer brought the court's attention to the skull and crossbones broadly displayed on the label adjacent to the word poison. In addition, the label contained a warning for its use and application. While reversing the lower court's decision, the appellate court noted that a manufacturer of inherently dangerous products has a duty to inform applicators of the product's dangerous potentialities. The court further stated that the applicator was within a class which the manufacturer should have foreseen would be using the product.

Such decisions place the manufacturer in the precarious position of uncertainty even when following legal dictates. In essence, the producer is placed in a legal vice. In one grip is the compliance with existing law, while in the other looms the infinite possibilities of liability through unforeseeable accidents.

In yet another case, a manufacturer was found liable for an accident incurred days after the use of an arsenic compound. Here, the plaintiff had taken a sunbath on a grassy site onto which she had previously discarded rinse water from a tank containing sodium arsenite. Suffering from "physical malfunction" she brought suit against the producer California Chemical. In noting the producer's negligence, the court stated that it was the manufacturer's duty to warn not only of the dangers related to the purpose for which the pesticide was produced,

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44. *Id.* at 405.
45. 245 So. 2d 259 (Fla. 4th Dist. Ct. App. 1971).
46. *Id.* at 263.
47. *Id.*
but also all other necessarily incidental and attendant uses.\textsuperscript{49} The court made mention of the manufacturer's duty to reasonably warn of the "lingering dangers not known or reasonably to be expected by the ordinary user, but which was \textit{foreseeably probable} to the manufacture with his expertise."\textsuperscript{50} Thus, courts frequently follow the rational of Harper and James in noting that a manufacturer must warn \textit{not only} of the purposes for which the pesticide was intended, but also all other necessary and attendant uses.\textsuperscript{51} Such logic is ill founded if not impractical in light of the costs of production and registration of minor pesticides. Courts and legislators must realize the impact of such litigation and act accordingly. Litigation costs and penalties far too often direct pesticide development toward the major crop area, since these expenses can be absorbed far more easily by the widely manufactured and marketed pesticides than by the pesticides directed toward a small and select market. As a result of such shifting pesticide production and development trends fostered by compliance with FIFRA dictates and the threat of legal liability, minor pesticide shortages appear imminent. Such shortages present a dilemma for the minor crop producer who is dependent upon the use of such pesticides for the control of rampant pest outbreaks.

\textbf{D. Ramification of Pesticide Production Resulting from Compliance with EPA Standards Pursuant to FIFRA}

The cost of litigation, research, recall and registration of a pesticide is by no means designed to depict a struggling pesticide industry. Quite to the contrary, the industry's outlook is far from bleak. Pesticide manufacturing is "slightly more profitable than chemical manufacturing"\textsuperscript{52} and has collectively enjoyed higher profits over the past five years than the average industry.\textsuperscript{53} The EPA notes that "leading pesticide manufacturers are among the largest industrial corporations in the U.S. and generally have fared well compared with the other corpora-

\begin{itemize}
  \item \textsuperscript{49} \textit{Id. at 674.}
  \item \textsuperscript{50} \textit{id.}
  \item \textsuperscript{51} F. Harper \& F. James, \textit{The Law of Torts} 1541 (4th ed. 1974).
  \item \textsuperscript{52} \textit{Economic Trends}, supra note 32, at 25.
  \item \textsuperscript{53} \textit{Id.}
\end{itemize}
tions on basis of sales and profits." Nevertheless, corporate incentive towards development of those pesticides with "inherent limitations on market size," that is minor crop pesticides, is influenced by the inescapable realities of skyrocketing R & D costs coupled with litigation costs and minimal foreseeable profits. Future growth trends in the pesticide market thus appear to be directed toward the development of existing markets of major crop usages. Such developmental trends generate serious concern among agricultural extension agents and small crop producers. The EPA has gone so far as to indirectly recognize this problem by defining a minor pesticide as one "in which its market potential is insufficient to economically justify the development of needed data required for registration by the manufacturer." Shortages of minor pesticides are thus foreseeable. Faced with the probability of such shortages, the minor crop grower can either lose his crop through pest damage and consequently lose the "back forty" or resort to broad spectrum pesticide usage to accomplish satisfactory pest control. Implementation of the second alternative far too often results in an adverse effect upon environmental quality. Nowhere are environmental pollution problems as complex than in areas where broad spectrum pesticides are used, many of which have been approved for usage by the EPA.

54. Id. at 16.
55. Id. at 26.
56. Id. at 38.
57. Those individuals who convey applied agricultural expertise to members of the agricultural community.
58. IFAS/FARI Workshop, supra note 26.
59. ECONOMIC TRENDS, supra note 32, at 34.
60. A colloquial term which refers to the farmer's collective holdings.
61. A broad spectrum pesticide is one which has no specificity and is designed to kill a wide range of insects or insect like species and not a specific target organism. R. METCALF & W. LUCKMAN, INTRODUCTION TO INSECT PEST MANAGEMENT 17 (1st ed. 1975).
62. See Sec. III, D-1, Shift to Broad Spectrum Pesticide Usage—The Copper Dilemma, this text.
63. Id.
1. **Shift to Broad Spectrum Pesticide Usage—The Copper Dilemma**

Prior to the development of large numbers of organic fungicides following World War II, inorganic fungicides were extensively used in plant disease control. Low soluble or neutral coppers were one such group of inorganics widely accepted for the prevention of vegetable diseases. Today, development of the organics has not completely eliminated the vegetable grower's reliance on low soluble coppers and limited supplies of minor crop pesticides will no doubt increase this reliance.

Copper fungicides are "characterized" by a copper molecule securely fixed chemically. The effectiveness of these inorganics rest with the copper. Copper is non-specific in its fungicidal properties and consequently can protect the host plant from a large number of disease causing organisms. Copper acts as a protectant in the case of some fungal diseases in that it prevents the germinating fungal spore from entering the plant tissue. Subsequently, to maximize the fungicide's protective action, the crops must be consistently sprayed to protect new growth and replace the fungicide lost to weathering. In the environment, copper fungicides persist indefinitely or breakdown leaving copper residues. Herein lies the problem. Often many such fungicides find

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64. That is, those fungicides containing carbon in their molecules. Those containing no carbon, are termed inorganic compounds. G. Ware, Pesticides, An Auto-Tutorial Approach 13 (1st ed. 1975).
65. Id.
67. Id. at 69.
68. Interview with Dr. James Stranberg, Plant Pathologist, Univ. of Fla., Zellwood Experiment Station, Zellwood, Fla. (Mar. 8, 1979).
69. E. Sharvelle, supra note 66, at 59.
70. Id. at 62.
71. Since the introduction of copper sulfate as a fungicide by Prevost in 1807 for treatment of wheat, coppers have acquired the status of highly important and dependable fungicides for the prevention and control of a large number of plant diseases. Coppers have assumed an important role for combatting major diseases of vegetables and are also important in protecting ornamental and flowering plants from injury, or destruction by fungus diseases. Bacterial diseases are also included. E. Sharvelle, supra note 66, at 62.
72. A spore is defined as the reproductive unit of fungi consisting of one or more
their way through irrigation systems into adjacent aquatic "ecosystems" or persist in the immediate application area. 

In entering the aquatic ecosystem, the copper residues move rapidly from the water to sediments and are taken up by aquatic plants, algae and numerous marine organisms. Toxicity of such heavy metals in the aquatic environment has been well established. For example, some coppers are excellent molluscides and consequently are used to control those transmitters of schistosomiosis. Inshore marine environments near intensified agricultural areas in South Florida have been found to have excessively high copper concentrations. Copper concentrations in these areas have approached values which have been shown in laboratory experiments to reduce the survival of newly hatched amphipods and to inhibit photosynthesis in phytoplankton. Field studies in the area indicate that such heavy metal pollutants lower levels of foliar disease incidence in mangrove communities thereby affecting cells; it is analogous to the seed of green plants. G. Agrios, Plant Pathology 607 (1st ed. 1969).


74. An ecosystem is defined as a functional system which includes the organisms of a natural community together with their environment. McGraw-Hill, supra note 18, at 507.


76. A. McIntosh, Fate of Copper in Ponds, 8 Pesticides Monitoring Journal 225 (1975).

77. Molluscides are agents which kill mollusks or members of the divisions of phyla of the animal kingdom containing snails, slugs, octopuses, squids, mussels, and oysters, characterized by a shell-secreting organ, the mantle, and a radula, a food-rasping organ located in the forward area of the mouth. McGraw-Hill, supra note 18, at 1043.

78. A disease in which humans are parasitized by any of three species of blood flukes; Schistosoma mansoni, S. haematobium, and S. japonicum; adult worms inhabit the blood vessels. Also known as snail fever. McGraw-Hill, supra note 18, at 1411.


80. A small crustacean of the order Amphipoda in which there is no distinct carapace and the first thoracic somite is coalesced with the head. This group contains those forms commonly known as sand fleas, sand hoppers, and scuds or side swimmers. The Dictionary of the Biological Sciences 13 (1st ed. 1967).

81. Horvath, supra note 79, at 182.
the role of nutrient cycling and food chain stabilization. This in turn generates ecological and economic problems resulting from decreased marine populations.

Copper accumulation and persistence in intensified agricultural areas is astounding. Researchers have been able to plate copper onto electrodes immersed in water collected from these soils. In essence, these soils can literally be "mined." Such concentrations of copper can negatively affect the successful implementation of ecologically oriented integrated pest management programs by inhibiting or eliminating the establishment of desirable microflora.

2. **ECOLOGICALLY ORIENTED INTEGRATED PEST MANAGEMENT AS DETRIMENTALLY AFFECTED BY COPPER USAGE**

Integrated pest management (IPM) serves to alleviate possible overuse of agricultural pesticides with resulting protection of the environment. Originally, the term "integrated control" encompassed insecticide utilization in such manner as to permit predators and parasite of insect pests to function in support with the pesticide. As the concept evolved, it encompassed all techniques to improve increased production of food and fiber with a minimal detriment to the environment. It further evolved to include not only insect pests, but weed pests as well as plant diseases.

The EPA sanctions and fully supports the utilization of IPM pro-

84. Id.
85. Interview with Dr. James Stranberg, *supra* note 68.
grams. In its definition and encouragement of IPM the EPA states:

Integrated pest management is a continual process of blending the most feasible management practices which will maximize yield of food and fiber in a socially acceptable manner. It is an interdisciplinary approach to pest problems based upon the knowledge of each pest, its environment and its natural enemies. The concept includes appropriate combinations of pesticides, natural enemies, insect pathogens and cultural treatments. The total effect of these combined methods is synergistic rather than additive. Not only does it reduce the pesticide pollution problem, but the control may be more effective.

The report continues,

IPM is based on the entire ecosystem, that is the complex of organisms, the culture of the crop or animal and the environment. It identifies action thresholds—the population levels at which the pest species cause harm, damage or constitute a nuisance—as a basis for determining the proper timing and method of approaching a pest problem. Thus by using measures only as needed, IPM may obtain adequate control in a manner which is less likely to upset part of the ecosystem.

Some IPM programs are also dependent upon disease control in the soil environment through the utilization of various beneficial bacterial and fungal microorganisms. Growth of such beneficial microorganisms are encouraged in efforts to control soil borne diseases. Herein lies the problem of IPM introduction into areas in which large amounts of heavy metals have accumulated. Beneficial as well as harmful microorganisms are eliminated from the soil biota due to the non-specificity of copper fungicides. With disease control through the use

90. Symposium, supra note 88, at 53.
92. Id.
93. Id.
95. Id. at 191.
of beneficial microorganisms no longer possible, the grower must resort to pesticides. The agricultural system then becomes totally pesticide dependent, and the grower is forced, through fear of crop loss, to continue on this “pesticidal treadmill.” Although the growers immediate goals of food and fiber production are satisfied, the further accumulation of pesticide residues from the broad spectrums undermines the effectiveness of implementing the IPM concept. Environmental harm necessarily results from such pesticide accumulation, yet; the harm is directly brought about by strict compliance with FIFRA and represents an unintended result of the original regulations.

This raises the complex question of whether the small crop producer faced with a pesticide shortage indirectly created by the Act, who is unable to implement an effective IPM program, can resort to other minor crop pesticides which are equally effective and essentially of the same composition? This is answered with an emphatic no, unless the pesticide is used consistent with its labeling pursuant to 12(a)(2)(G) of FIFRA.

IV. THE PROBLEM OF STRICT COMPLIANCE WITH SECTION 12(a)(2)(G) AS IT AFFECTS MINOR CROP PRODUCTION AND ENVIRONMENTAL QUALITY

A. Interpretation and Litigation

The EPA, pursuant to Section 12(a)(2)(G) of FIFRA prohibits the use of any registered pesticide in a manner not permitted by the labeling. This section, however, has undergone considerable change since it was first signed into law. Initially, because of its safety oriented concepts, 12(a)(2)(G) appeared to be excellent legislation. Application of a pesticide to a crop for which it had not been cleared could result in severe health consequences. Yet, as the courts were to find, there were many instances in which a chemical could be used quite effectively and safely, but in a manner inconsistent with labeling requirements as dictated by the laws. In short, the legislation prior to the 1978 amend-

96. E. Sharvelle, supra note 66, at 59.
ments did not encompass many use ramifications which, although unlawful pursuant to FIFRA, would be practical and safe.\textsuperscript{98} Such use ambiguities were manifested in \textit{Kelly v. Butz}.\textsuperscript{99} Here, Kelley, the Attorney General of the State of Michigan brought suit against Secretary of Agriculture, Earl Butz in an effort to prevent the United States Forest Service from applying a mixture of herbicides to a national forest in Michigan. During the proceedings, numerous ambiguities surrounding strict compliance with each of the herbicide's labeling requirements were brought into testimony. The State of Michigan sought to prevent spraying of the forest by noting that use of the herbicide mixture was a use inconsistent with the labeling of each herbicide. Inconsistencies with this FIFRA requirement were all too obvious. It soon became apparent to the court that the problems arising from strict compliance with 12(a)(2)(G) were not adequately reviewed by framers of the section. This was affirmed in expert scientific testimony. Recognizing these problems, Congress once again set out to amend the Act in 1978.

\textbf{B. Passage of the 1978 Federal Pesticide Act As An Effort To Ease 12 (a) (2) (G) Restrictions—An Interpretation}

The Federal Pesticide Act of 1978,\textsuperscript{100} also known as the amendments to FIFRA, provided sweeping changes over prior FIFRA legislation. One of the most important changes involved the incorporation of exceptions to strict compliance with 12(a)(2)(G). These exceptions provided the farmer with workable and practical laws. These, as noted in the amendment, include:

\begin{enumerate}
\item Applying a pesticide at any dosage concentration or frequency less than that specified on the labeling.
\item Applying a pesticide against any target pest not specified on the labeling if the application is to the crop, animal or site specified on the labeling unless the Administrator has required that the labeling specifically state that the pesticide may be used only for pests specified on the labeling after the Administrator has determined that the use of the pesticide against other pests would cause an unreasonable adverse effect on
\end{enumerate}

\textsuperscript{99} See Sec. IV, B-3, The Lannate-Nudrin 1.8 Controversy and Resulting Ramifications—The Pink Bollworm, this text.
the environment.
(3) Employing any method of application not prohibited by the labeling, or
(4) Mixing a pesticide or pesticides with a fertilizer when such mixture is not prohibited by the labeling. 102

The second exception is of considerable significance to the minor crop producer. Prior to the amendment, it was unlawful to spray a pest unless the target organism and the crop were both specified on the label. 103 Briefly, if a pesticide was cleared for usage on a particular crop which was infested with Pest A which was not cleared on the label, the farmer could not, under the penalty of law, spray his crop. The farmer was thus subjected to a legal straight jacket while the pests devoured his crops. Today, section two provides the farmer with much needed relief through a relaxation of the target pest labeling criteria. 104 Now, target pests not listed on the label of a pesticide known to be effective in their control may be sprayed with the pesticide. The pesticide, however, must be cleared for the crop onto which it is to be applied. For the grower, this relaxation provides an expansion of pest control.

1. Section 12(a)(2)(G)'s Incorporation of Section 18 and Amended Sections 5 and 24—Benefits and Shortcomings

Congressional wisdom also implemented additional beneficial exemptions through incorporation of section 18 and amended sections 5 and 24 of the 1978 Act into the definitional concept of 12(a)(2)(G). 105 Viewed collectively, these sections provide an effective practical implementation of the labeling restrictions. This practicality is of special benefit for the minor crop producer.

Section 5 provides for waiver of the 12(a)(2)(G) stipulation in the issuance of experimental use permits. 106 Pursuant to subsection (d) of

105. Section 5 reads:
Any person may apply to the Administrator for an experimental use permit for a pesticide. The Administrator shall review the application. After completion of the review, but not later than one hundred and twenty days after receipt of the
section 5, the Administrator may require preliminary studies be conducted prior to field tests of any chemical not included in a previously registered pesticide.\textsuperscript{106} Environmentally sound, section 5, also provides an outlet for public and private agricultural research agencies or educational institutions to conduct pesticide experiments without strict compliance to 12(a)(2)(G).\textsuperscript{108} The ramifications of such research projects afford an ongoing element of minor pesticide research in a market which is persistently shifting towards major crop emphasis.

Emergency conditions also provide an exemption to strict compliance with 12(a)(2)(G).\textsuperscript{109} Under this broadly sweeping section, any federal or state agency may be exempt from compliance with any provisions of the Act if the Administrator determines that such conditions exist.\textsuperscript{108} The Administrator must first, however, determine if an emergency condition does indeed exist, and then, only upon request of the application and all required supporting data, the Administrator shall either issue the permit or notify the applicant of the Administrator's determination not to issue the permit and the reasons therefore. The applicant may correct the application or request a waiver of the conditions for such permit within thirty days of receipt of the applicant of such notification. The Administrator may issue an experimental use permit only if the Administrator determines that the applicant needs such permit in order to accumulate information necessary to register a pesticide under Section 3 of this Act. An application for an experimental use permit may be filed at any time.


Section 18 reads:

The Administrator may, at his discretion, exempt any Federal or State agency from any provision of this act if he determines that the emergency conditions exist which require such exemption.

The Administration, in determining whether or not such emergency conditions exist, shall consult with the Secretary of Agriculture and the Governor of any state concerned if they request such determination.


Section 24 reads:

A state may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that state to meet special local needs in accord with the purposes of this Act and if registration for such use has not previously been denied, disapproved, or cancelled by the Administrator. Such registration shall be deemed registration under Section 3 for all purposes of this Act, but shall authorize distribution and use only within such state.


Secretary of Agriculture and the governor of the state.\textsuperscript{111} This may not be feasible in situations which involve small crop producers faced with specific disease problems for which minor pesticides are not readily available. The problem manifests itself with the nature of pest outbreaks of plant disease and the size of the producers operation.\textsuperscript{112} For example, it would appear that an independent south Florida grower of watercress or malanga would have greater difficulty in acquiring a minor pesticide in an emergency situation than would a grower in a minor crop co-op.\textsuperscript{113} Additionally, the sheer rapidity of some plant disease epidemics could easily ruin the grower before governmental operation brought effective relief.\textsuperscript{114}

Section 24 deals explicitly with the “Authority of States.”\textsuperscript{115} Exemptions provided under section 24(c) are received with favor among agricultural extension agents and farmers alike. Of particular interest to the minor crop producer is section 24(c)(1).\textsuperscript{116} Under this section, a “state may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs . . . .”\textsuperscript{117} At first, 24(c)(1) would appear to be the panacea for the minor crop producer faced with pesticide shortage. This section, however, is not without its reservation. In 24(c)(3),\textsuperscript{118} emphasis is drawn to those registrations which are inconsistent with the Federal Food, Drug and Cosmetic Act.\textsuperscript{119} Pursuant to 24(c)(3) those products not in compliance with food and feed tolerances are immediately subject to disapproval of registration by the Administrator. Since disapproval can result in prevention of the pesticide’s usage, section 24(c)(1) is therefore not a complete solution for the grower faced with

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} The phenomenon referred to herein is the rapidity of the disease or pest outbreak under optimum conditions for proliferation. For instance, it has been estimated that a single bacterium under optimum growth conditions can produce about 300 billion individuals within a 24 hour period. E. STAKMAN & J. HARRAR, PRINCIPLES OF PLANT PATHOLOGY 180 (2d ed. 1957).
\item \textsuperscript{113} This is to suggest that a smaller grower might not have the co-op’s collective expertise in dealing with the situation or in procuring the needed pesticide.
\item \textsuperscript{114} STAKMAN & HARRAR, supra note 112.
\item \textsuperscript{116} 7 U.S.C. § 136v(c)(1)(Supp. II 1978).
\item \textsuperscript{117} Id.
\end{itemize}
a severe pest outbreak.


The preceding amendments do provide progressive legislation. However, as noted earlier, the minor crop producer is still prevented from interchanging two pesticides of the same or similar generic formulation, but marketed under different trade names during field applications. These chemically similar pesticides cannot be interchanged unless the crop upon which they are to be applied is specifically listed on each label. Interchange of two such pesticides would again result in violation of 12(a)(2)(G) and subsequent civil or criminal penalties pursuant to Section 14 of the Act.

3. THE LANNATE—NUDRIN 1.8 CONTROVERSY AND RESULTING RAMIFICATIONS.—THE PINK BOLLWORM

Civil penalties for violation of the law can be as high as $5,000.00 for each offense, and at the minimum, the issuance of a warning depending upon the classification of the individual in violation and the discretion of the Administrator. Severe criminal penalties can result in fines of $25,000.00, imprisonment for not more than one year, or both. Private applicators can be subjected to criminal sanctions not exceeding $1,000.00, imprisonment for not more than 30 days or both. As such, many pesticide applicators refuse to interchange chemically similar pesticides and question the practicality of the law on this point. Nowhere is this impracticality more blatantly obvious than in the LANNATE L and NUDRIN 1.8 comparison. As used in this comparison, active ingredient as defined pursuant to section 2(a)(1) of the act is "an ingredient which will prevent, destroy, repel or mitigate any pest."

121. Id.
126. DUPONT CHEMICAL, LANNATE L INSECTICIDE (product brochure 1977).
Lannate L produced by DuPont Chemical contains:

**ACTIVE INGREDIENT**
- Methomyl
- S-methyl-N(methylcarbamoyl)oxy) thioacetimidate

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**INERT INGREDIENTS**

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while NUDRIN 1.8 manufactured by Shell Chemical contains:

**ACTIVE INGREDIENT**
- Methomyl
- S-methyl-N-(methylcarbamoyl)oxy) thioacetimidate

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<th>ACTIVE INGREDIENT</th>
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**INERT INGREDIENTS**

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Both chemicals are jointly listed in the *Farm Chemical Handbook* and are described under the common name methomyl.131 Also listed are the exact handling and storage cautions, antidote, applications, toxicity and formulations.132 Entomologists note that if both pesticides were mixed, it would be difficult if not impossible to distinguish the two.133 LANNATE L has been cleared by the EPA for usage against beet army worm on alfalfa and asparagus.134 Nudrin 1.8 does not however have EPA clearance for application to asparagus but has been cleared for alfalfa.135 The interchange problem can best be illustrated through the following hypothetical. Assume a minor crop producer has a field of alfalfa and an adjacent field of asparagus, and both are heavily infested with beet army worm. Faced with crop loss, the grower consults...
the agricultural extension agent who naturally recommends LANNATE L. Assume also that local supplies of LANNATE L are exhausted, and only NUDRIN 1.8 appears available. Nudrin as with Lannate is cleared for usage in the control of beet army worm. However, as noted, it is not cleared for application to asparagus. Its use on asparagus would be unlawful pursuant to 12(a)(2)(G). In an effort to save his asparagus crop, the grower can now either unlawfully apply Nudrin 1.8 or use an alternative insecticide, which might be of greater expense, environmentally less beneficial, or not readily available.

Of environmental significance are LANNATE L and Nudrin's absorption potential. Unlike some other broad spectrum substitutes, LANNATE L and Nudrin are absorbed into the host crop. As such, beneficial insects are spared and only those target organisms feeding on the crop are destroyed. Resort to a broad spectrum pesticide cleared by EPA which is not immediately absorbed will result in destruction of both the target insect as well as its predators and parasites. What follows then has been described by one commentator as "a dangerous biotic vacuum in which either target species can resurge explosively or the unleashed non-target species can erupt abundantly." In addition, the explosive populations may create a greater pest problem than previously encountered. Thus, the grower is forced to use greater and greater amounts of pesticide to control the situation. Again the insecticidal treadmill emerges.

An excellent example of just such an effect of broad spectrum usage can be seen in the pink bollworm outbreak in California's Imperial Valley. Here, what had been originally planned as an integrated pest management concept evolved into a massive pesticide application program, and subsequently a grower's nightmare. Over opposition of the valley's cotton growers, the California Department of Agriculture conducted an extended broad spectrum spray program. Large quantities of pesticides were applied by aerial applicators. In all, twice the number of anticipated treatments were applied. Ramifications of such pesti-

135. SHELL CHEMICAL, supra note 127.
136. Interview with Dr. Fred Johnson, supra note 133.
137. Id.
138. Van Den Bosch, supra note 97, at 618.
139. Id.
140. H. Dunning, Pests, Poisons, and the Living Law: The Control of Pesticides
FIFRA's Labeling Misadventures

cide usage were astounding. Secondary outbreaks of previously minor pests skyrocketed. The situation was further complicated by subsequent outbreaks of beet army worms which caused havoc for the sugar beet growers. Populations of the pink bollworm reached such proportions that cotton growers actually contemplated cessation of planting in an effort to dwindle pest populations. As illustrated, the negative impact of massive pesticide usage in fragile environmental ecosystems is too evident. In addition, environmental effects are frequently noted in the phenomenon known as biomagnification. This phenomenon first involves entrance of the pesticide into the environment and its ingestion by lower members of the food chain. As each organism is itself ingested, the pesticide's concentration increases progressively up the food chain. Humans form the last link in the chain. The phenomenon is classically noted in the aquatic system. Pesticides carried through drainage canals and water runoff from agricultural areas are accumulated in high concentrations in the fatty tissues of marine organisms. Oysters are extremely efficient in removing and concentrating pesticides from water. Other organisms such as shrimp and plankton have this same chemical concentrating ability.

Biomagnification is not the only problem associated with specified broad spectrum pesticides. Treatment with various broad spectrum pesticides frequently poses a field reentry danger to both humans and animals. In addition, accelerated usage of such pesticides can increase resistance in various strains of pest species. It has been estimated that at least 268 species of pests have developed resistance to numerous pesticides. Prohibition of LANNATE L and Nudrin interchange and the possible resulting environmental and agricultural ramification thereof clearly demonstrates the need for further amendment to the Act in guide with scientific and legalistic practicality.

in California's Imperial Valley, 2 ECOL. L. QUARTERLY 668 (1972).

141. Id. at 673.
142. Id. at 678.
145. Interview with Dr. Fred Johnson, supra note 133.
Due to the monoculture aspect of the agricultural ecosystem, minor crop producers generally need some type of chemical control to minimize their losses. Increasingly, however, minor crop growers as well as pesticide manufacturers feel the legal consequence of strict compliance with registration and section 12(a)(2)(G). In the end, the environment suffers from laws originally directed toward its preservation. What are the solutions? Can these solutions be implemented without further federal regulations pursuant to the Act?

V. SOLUTIONS TO THE PROBLEM

Many of the problems faced by the small crop grower and the environment can be eliminated through the development and use of "bio-rational pesticides," proper use of those existing pesticides and trends toward effective utilization of biological control and IPM. The threat of a world overrun with pesticide pollution need not occur if these programs are properly initiated.

A. Emphasis Towards Governmental Incentives Rather Than Hindrance In the Production of "Bio-Rational Pesticides"

Perhaps one of the most dynamic areas of pesticide development lies in the utilization of bio-rational pesticides. Encompassed within this group are insect hormones, insect attractants and their analogs. Plant metabolites having insect-repelling, insecticidal, anti-hormonal or anti-feeding characteristics are also included. An example of such
pesticides is pyrethrins. Extracted from a variety of perennial chrysanthemums found in areas of the equatorial world, these pesticides present an exciting future in pest control. Their advantages are many. Pyrethrins are environmentally non-persistent, and degrade rapidly in the presence of sunlight into innocuous organic compounds. Pyrethrin residues on crops pose little to no hazard to wildlife, people or to soils and other parts of the environment. Additionally, they are extremely low in mammalian toxicity. This in itself is of considerable legal importance for they provide no serious dangers to applicators or field hands. Entomologists find this unique group of pesticides to be fast acting, and possessing no time restriction from last application to harvest. They can also be effectively utilized in post harvest application, and have been evaluated as mosquito larvacides. Other similar pesticides have been discovered, and the possibility of new discovery here and abroad seems quite possible.

Development of insect attractants and biological controls such as insect bacterial and viral diseases also pose a promising future in pesticide research. Laboratories are presently gaining increased knowledge of insect endocrinology, defense and communication. Additionally, investigation of plant metabolites that have insect-repelling, insecticidal, anti-hormonal or anti-feeding characteristics “on which insect behavior or development may be based,” poses an interesting future in insect control. Pesticides could literally be developed for spe-

152. Id.
153. Agriculturalists are prohibited from applying some pesticides immediately before harvest for fear that the pesticide's residue, if ingested, could result in mammalian toxicity.
154. J. CASIDA, supra note 151.
156. Id.
157. Meinwald, et. al., supra note 150, at 1167.
specific pests on specific minor crops. The possibilities for selected minor pesticide development are phenomenal. Bio-rational pesticides have generated such interest that their further investigation was an important motive for founding the International Center of Insect Physiology and Ecology. 158 This center is pursuing numerous avenues of novel approaches to insect control. Should such pesticides be developed for widespread usage, the environmental impact through their utilization would be minimized. There looms however the omnipresent threat of research expenditures, registration costs and possible recall by the EPA pursuant to FIFRA. Bio-rational pesticides, as with other pesticides, must be subjected to identical registration processes. 160 Therefore, the development of these specific pesticides would require expenditures similar to those of the major pesticides. To alleviate some of the problems, the EPA is permitted to waive all or part of the tolerance petition fee if the pesticide producer “can show financial hardship or if waiving the fee would be in the public interest.” 161 The EPA itself notes that in considering the enormous cost of pesticide research and development such waiver cannot be “much of an inducement to potential developments of such products.” 162 EPA clearance of the bio-rational pesticides for agricultural production has been found to be a frustrating, if not abandoning, experience. In his exposé on the conflicts between scientist developing the bio-rationals and the EPA registration requirement, William Tucker notes specifically the problem encountered by Zoecon Corporation. 163 Zoecon was formed by a nucleus of outstanding scientists whose research goals were directed solely toward the development of bio-rational pest control. 164 Ironically, Zoecon found the greatest obstacle in the development of such materials was the EPA. Tucker further notes that the company has only registered one insect growth regulator after more than ten years of intensive research. 165 The company spent half of a million dollars and three years to register “methoprene.” The frustrations encountered by the firm are

158. Id.
159. Id.
162. Id.
163. Tucker, supra note 155.
164. That is, maximizing pest control while minimizing environmental damage.
exemplified by Dr. Djerossi:

The EPA is still trying to change the label to say that it can’t be sprayed where it could get into shrimp beds. It’s not that they say it does harm shrimp, it’s just that we haven’t been able to generate the data yet to show it can’t. Methoprene has a half-life of one day and breaks down entirely after seven days, yet they still require 900 pages of data to show how it might affect non-target organisms. The whole thing was enormously expensive and completely unnecessary. As far as we’re concerned, these environmental concerns have become completely counterproductive.166

If this situation continues, development of environmentally safe pesticides by many private firms may be discouraged altogether.

B. Relaxation of FIFRA Registration In The Production of "Bio-Rational Pesticides"

Lawmakers must and should consider the distinctness between bio-rational and nonbio-rational pesticides. Both groups of pesticides should not be subjected to the same system of registration. Unless this is done, development of bio-rational pesticides which are usually directed towards a limited market cannot possibly prove economically feasible. The registration system must be eased and governmental incentives must be initiated for production of these environmentally safer pesticides for use in pest management systems.

Pursuant to section 3(2)(A)167 of the Act, the Administrator has, however, provided some incentives for the registration of minor use pesticides. Incentives for registration standards are made commensurate with the extent and pattern of use and the level and degree of potential human exposure as well as that of the environment.168 Such standards are based on the national volume of use, distribution, and cost of meeting registration requirements.169 Nevertheless, the cost of present registration procedures are excessively expensive, and as noted, but one factor in the consideration of minor pesticide development.
The culmination of these costs and concerns have forced industry to question continued development of minor pesticides. Incentives for minor use production pursuant to section 3(2)(A) provide not emphasis towards this uniquely beneficial class of pesticides. Such incentives should be implemented.

Solutions to the liability problems faced by manufacturers and users of pesticides perplex lawmakers. Some have suggested the concept of shared liability by arguing that, since governmental agencies register pesticides, the burden of compensation for damages caused by these chemicals should be shared by the government. They further contend that the responsibility of such an important aspect of food producing technology which is of benefit to the public and certified through public agents should have shared public responsibility. Many of the consequences of usage are unknown at the time of certification and to subject to innovator to the possibility of infinite liability can only harm the market. This is especially apparent with small manufacturers who cannot absorb the cost of lawsuits and litigation, but are engaged in valuable environmentally oriented research. Liability imposed upon manufacturers for unforseen pesticide accidents should be reassessed in a light favorable for the minor crop market. Pollution could be curtailed through subsidies and tax incentives directed toward the development of efficient and safe pesticide waste disposal, and the utilization of these wastes in other marketing areas. These incentives should be especially directed toward development and marketing of bio-rational pesticides by small private firms.

Production of environmentally sound pesticides would doubtfully decrease across the board corporate pesticide profits if such corporations directed their development in this area. Many corporations could eventually realize greater profits by recognizing the public's desire to purchase environmentally safe pesticides. In addition, it is quite doubtful that the need for broad spectrum pesticides would completely dissipate. Such pesticides are essential for effective control in many pest management systems.

169. Id.
170. Street, supra note 147, at 401.
171. Id.
172. Id.
VI. CONCLUSIONS

It has been the objective of this article to present examples where strict compliance with EPA dictates pursuant to FIFRA can result in an impact on minor crop production and environmental quality. This article is not a condemnation of the EPA.

The accomplishments of the EPA in the curtailment of pesticide pollution pursuant to FIFRA are indeed impressive. Through legally constructive action, the agency has removed from the market many potentially harmful pesticides. Unfortunately, some aspects of strict compliance with the Act have created questionable ramifications. Realizing some of the Act’s shortcomings, legislators, through amendment, have attempted to alleviate the hardships incurred by the small crop producer and the pollution rendered the environment. Yet, more needs to be done. The Act must be again amended to permit interchange of similar pesticides with agricultural extension approval. More immediate aid must be accorded the small grower in the event of pest outbreaks, coupled with Act created pesticide shortages. Additionally, the registration of bio-rational pesticides must be subjected to further legislative scrutiny in an effort to stimulate rather than discourage their production and development. Further, there must be greater scientific-legal interaction in future formulation and implementation of FIFRA. Nowhere is this more acutely expressed than on the field level. Nowhere is this more noticeably apparent than in the environment. The time has arrived when these two different, yet socially oriented disciplines can no longer “go it alone.”

The pesticidal triangle of minor crop producer, FIFRA, and environmental quality portrays a complex matrix of law, liability, science and dilemma. The immediate solutions proposed for these complex interactions can only be solved with an objective overview of the entire system, and then only through scientific-legal cooperation.

* Michael T. Olexa

* Ph.D. Plant Pathology, with minors in Entomology and Mycology, University of Florida 1976. The author does not advocate the use, nor does he endorse any pesticide noted in the text of this paper.
Impact Fees: National Perspectives to Florida Practice; A Review of Mandatory Land Dedications and Impact Fees That Affect Land Developments

Fast growing communities have found an increased need for the expansion of their public facilities. This has initiated numerous citizen complaints, usually by older and more established residents, which have been in the form of objections to higher taxes to pay for services and facilities for new residents. As a result, local officials have increasingly attempted to place the burden of bearing the construction cost of new facilities on developers. Florida, as a high growth area, is a representative example. The burdens placed on developers usually take one of three forms: rezoning accompanied by certain conditions, mandatory dedications of land to governmental units, or an impact fee.

1. The U.S. Bureau of the Census has indicated that Alaska, Arizona, California, Florida, Nevada, and Texas are states with the top projected percentage growth and top projected growth in raw numbers of people during 1970 to 1976.

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<tr>
<th>Rank</th>
<th>State</th>
<th>%Growth</th>
<th>Rank</th>
<th>State</th>
<th>Raw Numbers of Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Alaska</td>
<td>27%</td>
<td>1</td>
<td>Florida</td>
<td>1,630,000</td>
</tr>
<tr>
<td>2</td>
<td>Florida</td>
<td>24%</td>
<td>2</td>
<td>California</td>
<td>1,567,000</td>
</tr>
<tr>
<td>3</td>
<td>Nevada</td>
<td>24%</td>
<td>3</td>
<td>Texas</td>
<td>1,290,000</td>
</tr>
<tr>
<td>4</td>
<td>Arizona</td>
<td>20%</td>
<td>4</td>
<td>Arizona</td>
<td>498,000</td>
</tr>
</tbody>
</table>

2. E.g.—Christian Science Monitor, June 12, 1979 at 13, col. 2-3 comments on Citrus County, Florida growth.

3. Based on figures from the University of Florida, Bureau of Economic and Business Research, Division of Population Studies and the U.S. Bureau of the Census, the growth of the following counties is the greatest of Florida’s 67 counties. Future service needs will most likely be the greatest in these counties. (Note: The growth that has already occurred in many counties has already exceeded some of these numbers.)

<table>
<thead>
<tr>
<th>County</th>
<th>1970 Census</th>
<th>Up%</th>
<th>Projected 1980 Census</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broward</td>
<td>620,000</td>
<td>63%</td>
<td>1,016,000</td>
</tr>
<tr>
<td>Charlotte</td>
<td>27,000</td>
<td>114%</td>
<td>51,000</td>
</tr>
<tr>
<td>Citrus</td>
<td>19,200</td>
<td>142%</td>
<td>48,000</td>
</tr>
</tbody>
</table>
In Florida, the impact fee has received increased attention by municipal officials who are constantly searching for new, as well as increased, revenue sources.\textsuperscript{4}

Naturally, the impact fee concept has aroused public attention.\textsuperscript{5} The fees seem to range from a low of $125\textsuperscript{6} to a high of $13,000\textsuperscript{7} per housing unit. The impact fee is a national phenomenon, and it has been enacted in cities and counties from Petaluma, California\textsuperscript{8} to West Palm Beach, Florida\textsuperscript{9}.

<table>
<thead>
<tr>
<th>County</th>
<th>Rate</th>
<th>Increase</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clay</td>
<td>32,100</td>
<td>81%</td>
<td>58,000</td>
</tr>
<tr>
<td>Collier</td>
<td>38,000</td>
<td>113%</td>
<td>81,000</td>
</tr>
<tr>
<td>Dade</td>
<td>1,307,000</td>
<td>18%</td>
<td>1,548,000</td>
</tr>
<tr>
<td>Gilchrist</td>
<td>3,600</td>
<td>83%</td>
<td>6,600</td>
</tr>
<tr>
<td>Hernando</td>
<td>17,000</td>
<td>123%</td>
<td>38,000</td>
</tr>
<tr>
<td>Lee</td>
<td>105,200</td>
<td>89%</td>
<td>199,000</td>
</tr>
<tr>
<td>Marion</td>
<td>69,000</td>
<td>60%</td>
<td>114,000</td>
</tr>
<tr>
<td>Martin</td>
<td>28,000</td>
<td>110%</td>
<td>59,000</td>
</tr>
<tr>
<td>Manatee</td>
<td>97,100</td>
<td>71%</td>
<td>136,000</td>
</tr>
<tr>
<td>Okeechobee</td>
<td>11,200</td>
<td>74%</td>
<td>19,500</td>
</tr>
<tr>
<td>Osceola</td>
<td>25,300</td>
<td>60%</td>
<td>40,400</td>
</tr>
<tr>
<td>Palm Beach</td>
<td>349,000</td>
<td>76%</td>
<td>536,100</td>
</tr>
<tr>
<td>Pasco</td>
<td>76,000</td>
<td>103%</td>
<td>155,200</td>
</tr>
<tr>
<td>St. Lucie</td>
<td>50,800</td>
<td>57%</td>
<td>78,000</td>
</tr>
<tr>
<td>Sarasota</td>
<td>120,000</td>
<td>50%</td>
<td>180,000</td>
</tr>
<tr>
<td>Seminole</td>
<td>83,700</td>
<td>82%</td>
<td>153,000</td>
</tr>
</tbody>
</table>

4. The cities of Dunedin, Clearwater, Gulf Breeze, Jacksonville, Maitland, and Tallahassee and the counties of Dade, Broward, and Palm Beach are examples of those Florida cities and counties that have attempted to enact impact ordinances.
8. Petaluma, California, Ordinance 1311 (June 30, 1978).
There are many reasons for the fee. Perhaps one of the most drastic examples was illustrated in a recent circuit court decision in Dade County, Florida in Marca, S.A. v. Dade County. March, S.A., a Panamanian corporation, requested rezoning of 320 acres from agricultural to permit varying degrees of residential development for an overall density of 3.5 units per acre. Marca, S.A. agreed to donate $135,000 and eleven (11) acres of land for off-site improvements which had become necessary due to the proposed development's impact on the community. However, county planning officials estimated that even if the County carried a 75% cost burden of $7,298,000, the developers would still be required to donate between $435,000 and $534,000 to completely cover the cost of off-site improvements. Thus, there was a shortfall in available funding for necessary facilities such as roads, schools, and water/sewer system expansion. The developers would be required to donate at least an additional quarter of a million dollars over their original donation, but the County would have to obtain $7.3 million of its own funds. Not only did the County lack the funds, but they did not anticipate any development in the area until at least 1985, according to the County's land use plan.

Dade County turned down the rezoning primarily because the rezoning would cause increased burdens on an already over-burdened school system. The court concluded that these problems pre-existed the rezoning application and therefore, “inaction on the part of those who are responsible for providing already needed public service and facilities should not be an obstacle to natural growth.” The decision was described as one of grave importance to County planners because it virtually forces a government to permit growth even if that government can ill afford the burden. The local news media called for an appeal of the decision, and noted that the logic of this case “denies any possibility of sound land use planning.” Eventually, the Dade County

12. Id.
13. Id. at 3.
15. Id. at 4.
Commission approved the rezoning in exchange for a withdrawal of the decision on the developer's part. Marca, S.A. is a drastic example of how the need for immediate additional revenue is caused by increased development. The impact fee is a vehicle for supplying those additional funds.

Other reasons for the fee have been given. They are:

1) new users should pay for the cost of the improvements their presence necessitates;
2) existing residents shouldn't pay for the needs of new residents;
3) an immediate need for expanded services for new residents is created when they arrive, while there is a “time lag” before the increased tax base they create becomes available to local officials;
4) developers, without such a fee, will almost never pay the full cost for services they receive while reaping a windfall profit.

Conversely, the impact fee is not “lilly white.” It has been viewed as a hidden tax and an attempt by environmentalists to cause a construction slowdown by adding on extra cost, resulting in a decreased consumer ability to afford housing. This is especially significant in view of the fact that 75% of the United States population cannot afford a single family home. Certainly additional costs might help depress the housing market, if, for example, the fees were as high as the $13,000 fee in Newport Beach, California. However, the argument is quite a bit weaker when the fee is $300, as in the case of Palm Beach County, Florida. Whatever position individuals take in regard to this fee, there is no escaping the fact that increased population growth will require increased expenditures by local government to expand existing facilities. New and expanded sources will most likely be a vital necessity.

PURPOSE AND HISTORY OF FLORIDA IMPACT FEE LAWS

Fees or dedication laws have been introduced in the Florida legisl-
lature or as local ordinances. Legislative intentions have centered around the creation of enabling acts which would afford local governmental units an opportunity to enact their own ordinances. House Bill 837, introduced in 1975, was the only bill ever to successfully pass the scrutiny of one committee in the Legislature. Over the years, there have been four (4) measures introduced, but to date the Legislature has never passed an enabling act. House Bill 837 specifically recognized "that growth imposes costs on local government in providing essential services and facilities." The purpose of this bill was to allow jurisdictions to meet their needs and accommodate orderly growth by passing the cost of new facilities onto the developer and new residents. The bill's author apparently perceived that the bill might assist developers by eliminating the need for the type of development or construction moratoriums that had been experienced in the past to allow local entities to "catch up" in the provision of services.

Local ordinances have had a greater success in Florida, since the state supreme court approved a water and sewer impact fee concept in Contractors and Builders Association of Pinellas County v. City of

24. Fla. H.B.-837 passed the House Committee on Community Affairs on April 24, 1975 probably due to the fact that Representative Boyd was chairman of that committee. The bill subsequently died in the House Committee on Finance & Taxation.
26. There are many reasons why the Legislature has never enacted an enabling act to permit local governments to enact an impact fee. The International City Management Association notes that state officials are skeptical about local ability to manage local financial resources, and states like to preserve revenue sources for their own use. See INTERNATIONAL CITY MANAGEMENT ASSOCIATION, MANAGEMENT POLICIES IN LOCAL GOVERNMENT FINANCE (1976) at 12.
27. Fla. H.B.—837, supra note 24, sec. 2.
28. Specifically exempted from the bill's effect were private, municipal, and rural utility systems.
29. During 1974 Representative Boyd's home county, Broward County, enacted a temporary moratorium on the issuance of new building permits in an effort to give the county a chance to "catch up" with development in the provision of new facilities for new subdivisions. The moratorium also gave planners and environmentalists an opportunity to effect a new county land use plan.
Prior Florida efforts had all been dismissed by Florida courts for one reason or another. The most notable effort which was frustrated by the courts was in the form of a road construction impact fee enacted by the Broward County Commission in 1973. The purpose of the ordinance was to lessen traffic congestion, provide funds for road construction, and promote the public health, safety, and general welfare. Although the County Commission did not elaborate on the purpose of its enactment, as did State Representative Charles Boyd in House Bill 837, it was apparent that the fee was aimed at new residents who would generate an increased need for roads.

The latest impact efforts are taking place in Broward and Palm Beach Counties in the form of road construction fees. The most controversial ordinance is the Palm Beach County ordinance which is currently being litigated. This ordinance states that the County Commission has determined a need for a $2.5 billion road construction program just to maintain the status quo in road services. This is exclusive of road right-of-way acquisition necessary to widen roads. The legislative intent notes that it is only a part of a master finance plan, and that it will generate only a portion of the necessary funds for road construction. The drafter placed language in the ordinance that specifically limits its effectiveness to pay the cost of road construction necessitated by new residents who pay the fee. Because of the recent

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30. 329 So.2d 314 (Fla. 1976) reh den. This fee was affirmed using a water/sewer regulatory statute as authority. Fees for other purposes will not be able to rely on this statute as authority.


32. See Broward County v. Janis Development Corp., 311 S.2d 371, supra.

33. Id. at 372 n. 1, sec.2.

34. Palm Beach County, Florida, Ordinance 79—7 (1979), supra note 9.

35. Home Builders & Contractors of Palm Beach County, Inc. v. Palm Beach County, No. 79—3281 CA(L)01 (Fla. 15th Cir. Ct., filed Aug. 15, 1979).

36. Palm Beach County, Florida, Ordinance 79-7, supra note 9.

37. This appears to subtly suggest a tie to economic planning which is called for in FLA. STAT. § 163.3177 (2), (3) (1977).

38. See Dunedin, 329 So.2d at 321. The Court noted that fees collected from new residents could only be used to benefit those new residents by the expansion of public facilities to serve those new residents. Compare the Palm Beach County concept to the language in Broward County, Florida Ordinance 73—2, § 5 (May 7, 1973) which was invalidated in and may be observed in Janis, supra at 373.
growth in Palm Beach County, the purpose of the ordinance contained language geared to bolster the need for such an ordinance; "All land development is deemed to create a traffic impact and therefore create a demand for increased road capacity."39 In addition, the intent of the ordinance indicates a strong reliance on the county's police power, as legislative authority to enact the "fair share contribution"40 or impact fee ordinance. The measure provides that increasing road capacity will make transportation safer and more efficient, thus promoting the public health, safety, and welfare.

This appears to mirror the concepts behind House Bill 837, since both pieces of legislation indicate that the public health, safety, and welfare will be promoted by regulating land development in order to facilitate orderly growth. Because of this reliance on the police power, it appears to the author that the fee could be a type of regulatory device used to hold back growth and development rather than provide for well planned growth. Additionally, review of various pieces of legislation introduced in the Florida Legislature and a sampling of local ordinances indicate there are three publicly stated purposes behind impact exactions.41 Primarily, they attempt to hold down local taxes by making new residents pay for expanded facilities that they cause to be needed.42 Secondarily, they are land use control mechanisms, in that they assure at least a portion of the capital expansion funds needed for new facilities will be available to local government.43 Thirdly, due to such language as appears in House Bill 837, there is evidence that impact ordinances are geared to manage the economy in such a way as to avoid construction moratoriums which cause severe unemployment in the construction industry while local government attempts to "catch up" with the growth that has already occurred.44

REZONING: CONTRACTS AND EXACTIONS

While various jurisdictions have struggled with mandatory dedica-
tions and impact fees, others have attempted to exact certain guarantees and dedications from developers as a prerequisite to adopting a rezoning ordinance which the proposed construction project requires. There are problems with this approach because it involves "dicker- ing" between planning and zoning officials and developers. "Dicker- ing" has been judicially restrained because it is a key element in contract zoning, which involves rezoning of land by zoning officials in exchange for the filing of restrictive covenants by developers and land owners that affect the subject property. Accordingly, an attack on the validity of the rezoning measure may be made in the courts on the basis that the measure was a form of contract zoning. This means that any agreement reached between the zoning officials and the developer would be totally invalid. Approximately twelve state tribunals, including Florida, have ruled against this practice. In Hartnett v. Austin the Burdines Department Store chain attempted to purchase Austin's land for a new department store. A Dade County, Florida municipality refused to rezone the land, unless the store would agree to a number of conditions. Florida's highest court said this constituted contract zoning.

A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various terms, covenants, and restrictions in a collateral deed or agreement to be executed between the city and the property owner.

While expanding on the Hartnett opinion, a Florida appellate court indicated that a governmental entity which does contract with a land-

45. "Dickering" is a term used in the vernacular. It means to carry on lively negotiations leading to a deal, agreement, or contract.
46. 2 ANDERSON, AMERICAN LAW OF ZONING, § 9.21 (2nd ed. 1976).
47. See State ex rel. Zupancic v. Schimenz, (46 Wis. 2d 22, 174 N.W. 2d 533, 537 (1970), Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270, 277 (1963), and City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953).
48. 93 So.2d 86 (Fla. 1956).
49. The conditions included: 1) building a wall to separate the proposed center from a nearby residential area, 2) protection of the residential area from any glare or other disturbances, 3) providing a 40 foot setback, 4) landscaping the setback, and 5) paying for police protection.
50. Hartnett, 93 So.2d at 89.
owner will find its contract to be invalid as an *ultra vires* act.\(^{51}\) Thus, the landowner’s restrictions will be void, but the rezoned land will not be returned to its original zoning. The courts allow this since the rezoning never could have occurred in the first place, if it weren’t done for the public health, safety, and welfare of the community.\(^{52}\)

In essence, the general national rule is that “a municipality cannot contract away the exercise of its police powers . . . . In the exercise of this governmental function a city cannot legislate by contract.”\(^{53}\) Similarly, other arguments have been leveled against contract zoning.\(^{54}\) For example, *Scrutton v. County of Sacramento*\(^{55}\) attacked this form of zoning as spot zoning. Spot zoning has been defined as “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. ‘Spot zoning’ is the very antithesis of planned zoning.”\(^{56}\) The apparent view in *Scrutton* is that, if the neighborhood changed, then the isolated rezoned use is spot zoning. The California Supreme Court stated that, “that kind of zoning is valid when long term changes in the neighborhood have created conditions compatible with the proposed new use.”\(^{57}\) However, *Goffinett v. County of Christian*,\(^{58}\) an Illinois appellate court opinion, notes that there is a correlation between the size of the rezoned tract and spot zoning.

In *Goffinett*, a 236-acre tract was rezoned and found not to be a case of spot zoning, even though the rezoning seemed peculiarly out of place for the area (a gas works facility located in the midst of an Illinois agricultural area). The court cited an example of a rezoning in an unnamed case in which 14.6 acres in Illinois probably represented the largest tract in the nation judicially declared to be a case of spot zon-


\(^{52}\) Id.

\(^{53}\) 93 So.2d at 89.


\(^{56}\) 2 ANDERSON, AMERICAN LAW OF ZONING, § 5.08 (2d ed. 1976). In Florida, see: Bd. of County Commissioners v. Lowas, 348 So.2d 13 (Fla. 3rd Dist. Ct. App. 1977) and Miles v. Dade County, 260 So.2d 553 (Fla. 3rd Dist. Ct. App. 1972).

\(^{57}\) Scrutton, 79 Cal. Rptr. at 878.

\(^{58}\) 30 Ill. App.3d 1089, 333 N.E.2d 731, 737 (1975).
Therefore, spot zoning is usually viewed as a small tract rezoned in a highly unusual way in comparison to the rest of the neighborhood. On appeal, the Supreme Court of Illinois affirmed the appellate decision, and reaffirmed an old standard by stating:

that although it did not encourage inconsistent zoning of small parcels of land, it would not declare every reclassification of a single tract void *ipso facto*. The test was to determine whether the change was in the property in that locality, and the size of the parcel would only be one factor to consider.

The *Hartnett* decision points out another problem with contract zoning in that a municipal ordinance must be "clear, definite, and certain in terms;" otherwise it is invalid. In *Hartnett*, Justice Thorna1 expressed the view that "the provisions of a municipal ordinance which conditions its effectiveness upon the necessity for the subsequent execution of a contract with private parties . . . cannot be held to provide the degree of clarity and certainty required of municipal legislation." However, there appears to be a different method to accomplish the same result as contract zoning without actually violating the rule against contract zoning. It has been suggested that the actual rezoning ordinance should not incorporate any restrictive agreements or conditional promises to rezone. Rather, the landowner prior to the rezoning should record the necessary restrictive covenants and create a dominant estate in the municipality.

Another approach that governments have utilized to skirt the rule against contract zoning is the vehicle of conditional zoning. One authority defines conditional zoning as an amendment to a zoning ordinance which "permits a use of particular property in a zoning district subject to restrictions other than those applicable to all land similarly classed. . . ." The notable difference between this approach and contract zoning is that there is no agreement by the governmental body to rezone the subject property. The express bilateral agreement between

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59. See 333 N.E.2d at 737.
60. 65 Ill. 2d 40, 2 Ill. Dec. 275, 357 N.E.2d 442 (1976).
61. Id. at 449.
62. 93 So.2d at 88.
64. 2 ANDERSON, AMERICAN LAW OF ZONING, § 9.20 (2nd ed. 1976).
the governing body and a landowner is not only the cornerstone of contract zoning, but it is the key point that differentiates contract zoning from conditional zoning. The idea of conditional zoning is similar to a method of circumventing the no contract rule approved in Zupancic v. Schimenez. Here, the Wisconsin Supreme Court approved a rezoning in which the land developers and surrounding property owners negotiated and entered into an agreement limiting the use of the developer's land and vesting enforcement rights in the City of Milwaukee. The court viewed the city as merely a third party beneficiary of the agreement. The significant point in this case is that the court echoed the Hartnett restrictions against contract zoning while approving the above plan.

Since the use of any of the methods discussed above results in the local governmental entity obtaining the type of restrictions it wants, this author believes that any of these arrangements act as an inducement to a local governing body to rezone the subject property. One commentator notes that such an "agreement has blurred the legislative judgment of the municipality or that such a process is likely to lead to official misconduct." However, the same commentator goes on to point out that this proposition is unfounded, because the rezoning ordinance is passed with the same police power and is subject to the same reasonableness test as other zoning ordinances. Notably, it appears that the key distinguishing point in Florida under the Hartnett decision between illegal contract zoning and a legal rezoning arrangement may be reached if the developer files his restrictive covenants prior to the official rezoning action.

The concept of filing restrictive covenants to induce local officials to rezone a piece of property will probably survive an attack based on illegality due to contract zoning. This viewpoint is arguably based on Broward County v. Griffey. The Griffys owned a large tract of land west of Fort Lauderdale, Florida on which they wished to construct a high density 1700 unit apartment complex. To construct the complex the property needed to be rezoned. The County Commission deferred

66. Id. at 643.
67. 46 Wis. 2d 22, 174 N.W.2d 533 (1970).
68. Id. at 537.
69. Kennedy, supra note 54 at 834.
70. Id.
71. 93 So.2d at 88-89.
action on the rezoning proposal pending a number of stipulations which included dedication of land for right-of-way for road construction. The Griffeyes dedicated the land, and the Commission approved the rezoning shortly thereafter. However, due to contractor problems the project was never constructed. Years later the Commission decided to "down-zone" the land pursuant to a new land use plan. The Griffeyes attached this by arguing that the whole rezoning was illegal as contract zoning. They sought the return of their previously dedicated right-of-way. The trial court agreed, but the appellate court reversed by stating that the dedication was merely an inducement to receive favorable county action on the rezoning proposal. The court apparently ignored any negotiations between the Griffeyes and the County Commission that culminated in an oral agreement to rezone the land in consideration of a right-of-way dedication. The court even cited Hartnett as authority, noting that no written contracts were negotiated; therefore, the County did not bargain away its police power. Thus, it appears that it is possible for developers to negotiate the rezoning of land in exchange for dedications of land and presumably for aid in financing the construction of public facilities.

AUTHORITY FOR IMPACT FEE ORDINANCES

The pitfalls of conditional and contract zoning can be overcome by a newer approach involving mandatory land dedications or impact fees. An advantage of the impact fee ordinance is that developers will pay for the growth that they generate, and in planning for their new developments, developers will be able to compute the fees or dedications that local government will require in exchange for approval to develop. While it is readily apparent that such an ordinance will allow

73. "Downzoning" as used in this text means to lower the overall permitted use and/or density of a particular piece of land.
74. 366 So.2d at 870.
75. Id. at 871.
76. While Florida has one of the strongest policies in the nation against contract zoning, there appears to be one curious deviation from the rule. It is suggested that this deviation would not be a reliable citation to support a cause in a Florida courtroom. In Herr v. City of St. Petersburg, 114 So.2d 171 (Fla. 1959) reh den, the Florida Supreme Court approved the City's contract to rezone without even mentioning Hartnett. The City contracted to exchange railroad land (tracks) running though the downtown area that the City obtained by eminent domain. Part of the bargain called for new land to be rezoned for the railroad in exchange for the downtown land.
local government to expand its basic resources without an increase in
ad valorem taxes or without bonding,77 developers have been successful
in avoiding enactment of these ordinances in many instances.78 This
trend appears to be changing based on various theories, such as the
Voluntary Dedication and Economic Benefit Theories and various
Relationship Tests, that have been adopted by various jurisdictions
governments in Florida for two reasons. Merely obtaining the land as

A. Voluntary Dedication

Closely related to the covenanting and conditional zoning con-
cept80 is the idea of exchanging plat approvals for the dedication of
land by a developer for school, park or road facilities. Historically, this
concept has been upheld by virtue of the leading case: Billings Proper-
ties, Inc. v. Yellowstone County.81 The Montana Supreme Court ruled
that this concept could be based on the zoning police power,82 assuming
that the dedication was judicially viewed as voluntary on the part of the
developer.83 However, this approach would not serve the needs of local
governments in Florida for two reasons. Merely obtaining the land as
a dedication for roads, schools or parks would never meet the costs
necessary for park or school development, much less road construction.
Therefore, the dedication would have to be coupled with some other
type of financing program. Also, because of the manner in which Flor-
ida has been developing, large tracts of undeveloped land have already
been platted. Thus, dedication on a voluntary basis would be virtually
nonexistent in many areas. This situation will surely continue, because

77. An example of the need for bonding is attributable to the lack of an impact
ordinance in Broward County, Florida. In 1975, a 1973 road impact fee ordinance
was invalidated in Janis, supra, note 31. The County's political structure was unable to
raise its ad valorem tax rate to raise capital needed for new facilities due to fear of
political fallout, since the county had a conservative political structure. On September
12, 1978, county voters were compelled to approve a $125,000,000 road bond and
$73,000,000 parks and recreation bond package, as part of a $256,000,000 bond propo-
sal. This was due to the severe lack of recreational and road facilities.
78. Almost all suits challenging impact ordinances in Florida have been brought
by developers.
79. Florida may be one of those states. See text accompanying notes 107-112,
258, and 259.
80. 394 P.2d at 186.
82. Id. at 186.
83. Id.
it is part of the cyclical nature of land speculation that has become firmly implanted in Florida.44

B. Economic Benefit Theory

This theory is based on the concept that development of one's land is a privilege and not a right.85 While this argument may be faulty,86 the land taken under a mandatory dedication or impact exaction will be utilized for the public health, safety, and welfare. The public facilities that will be available will enhance the value of the developer's project. Cases have supported this concept, most notably Jordan v. Menomonee Falls.87 The Wisconsin Supreme Court approved an impact exaction in which the Village of Menomonee Falls sought a land dedication from a developer before granting approval for development. The Court noted that the dedication would be used for public facilities and thus enhance the development making it more valuable.88 Also, the dedication was found to assist in satisfying the demands created by the developer's activities, namely increasing the need for public facilities cause by the related population growth.

Another representative case is Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek.89 This case is particularly notable, because the developer attached a local ordinance enacted by Walnut Creek, California pursuant to a state impact fee enabling act.90 Associated Home Builders91 involved an attempt by local authorities to force a land dedication for park purposes, which resulted in an action for inverse condemnation. Both the police power and the economic benefit theory were cited by the California Supreme Court in its

86. Id. at 81-82.
88. 137 N.W. 2d at 448.
91. 484 P.2d 606.
opinion approving Walnut Creek's action. While it appears that there is authority supporting the use of this theory to substantiate impact exaction ordinances, no Florida Court has approved the economic benefit theory to date. However, the late Judge Nathan, in an appellate opinion, did make a remark that at least appears to be receptive to the theory when he stated, "... [a]nd in a very real sense, the subdivider profits from the conditions imposed on him, since the provision of safety and health requirements benefits potential buyers, thus rendering the lost of the subdivision more attractive."  

C. The Relationship Tests

Three tests have been developed by various judicial authorities to review and substantiate impact fees and/or mandatory land dedications. The foundation of all three concepts lies in the police power. The particular statutory authority delegating the police power in Florida will be examined below, but first, it is essential to understand the three relationship tests that determine to what extent the police power may be applied as an exaction. The essence of the three tests rests on the view that the developer will be compelled to provide public systems as a cost of developing. This will occur only when the developer's project causes a need for new systems. Thus, the tests relate to the amount a governmental unit may exact from a developer for new facilities to the amount of need created for those new facilities from the developer's activities. The three tests range from pro-municipality to pro-developer in their application.

1. The Reasonable Relationship Test

The reasonable relationship test is the oldest of the three tests. In *Ayres v. City Council of the City of Los Angeles*, a developer was ordered to dedicate an eighty foot strip of land for an extension of a street in exchange for approval of the development. The developer attacked the mandatory dedication as an unreasonable taking without compensation. However, in 1949, the California Supreme Court ruled

93. 34 Cal.2d 31, 207 P.2d 1 (1949).
that the eighty foot dedication was reasonable even though the street to be extended only had a width of sixty feet.94 The Court noted that a municipality may substantiate its taking when it shows that the taking is "reasonably related" to the needs of the community.95 This test allows a local governmental entity such flexibility in its exaction that a court would have to uphold the taking "short of gross abuse,"98 according to a Florida court. As a result this approach is unacceptable in Florida, since this concept places the burden of proof totally upon the developer to prove that the exaction is reasonable. The Wald decision notes that:

while such wide latitude is routinely accorded in other areas of police power regulation, required dedication as a condition for approval for subdivision plats stands in derogation of constitutionally protected property rights. Thus, it is imperative that some sort of standard be imposed which will not allow virtually unbridled interference with private property.97

2. THE SPECIFICALLY AND UNIQUELY ATTRIBUTABLE TEST

The second test which developed is essentially an intension of the reasonably related test. The test is rooted in a pair of Illinois decisions. In the first decision, Rosen v. Village of Downers Grove,98 two plaintiffs, Herman Rosen and Firestone Realty, wanted to subdivide a tract of land into fifty-two lots. The Village Planning Commission approved the plat only after the company agreed to pay $325 per lot into an escrow account for future construction of schools in the Village. The Court cited the Ayres test, but instead of using the term "reasonably related", the Court utilized a new terminology to describe the proper application of the police power. That term was "specifically and

96. Wald, 338 So.2d at 865.
97. Id. at 866.
98. 19 Ill.2d 448, 167 N.E.2d 230 (1960).
uniquely attributable." The enactment of the fee ordinance in *Downer's Grove* was found to be broader than the authority delegated by the Illinois Legislature. The Illinois Supreme Court focused on this concept a year later in *Pioneer Trust and Savings Bank v. Village of Mount Prospect*. In this case, the plaintiff sought to develop a tract of land with two-hundred fifty residential units. The Village of Mount Prospect used a platting ordinance to compel dedication of 6.7 acres of land for an elementary school. The Court referred to the *Rosen* decision and invalidated the application of the ordinance by indicating that the developer should not be forced to pay the fee, since the construction would not generate the need for a new elementary school. The need for the new school would apparently be generated only to a smaller degree by the developer. Thus, community needs were not "specifically and uniquely attributable" to the developer's activities. Under this test, it appears that a court will validate an exaction only if the increased need is solely attributable to the activities of the developer. The test is considered to be so stringent that the local governmental entity has the entire burden of proving that the exaction is valid. Therefore, this test has an effect that is opposite to that of the reasonably related test.

Florida court decisions have been somewhat inconsistent so far, but some of the earlier decisions approve the specifically and uniquely attributable test. In *Carlann Shores, Inc. v. City of Gulf Breeze*, a Florida Circuit Court first took note of this test and approved it. The City of Gulf Breeze enacted an ordinance which required land subdividers to dedicate 5% of their land or pay a fee equal to 5% of the valuation of the land in their project to the City for park purposes. Since the plaintiff refused to abide by the ordinance, the City voted to reject the plan for development. The Court found for the plaintiff and approved the specifically and uniquely attributable test by citing *Pioneer Trust*. In *Admiral Development Corp. v. City of Maitland* a

100. 167 N.E.2d at 233-34.
102. *Id.*
103. 338 So.2d 863.
104. 26 Fla. Supp. 94 (Santa Rosa Cir. Ct. 1966).
105. *Id.* at 96.
106. 267 So.2d 860 (Fla. 4th Dist. Ct. App. 1972) reh den.
dedication ordinance that was virtually identical to the Gulf Breeze ordinance came into question. Although the Fourth District Court of Appeals referred to the *Carlann Shores* case, it did not approve or even mention the specifically and uniquely attributable test. It did, however, invalidate the Maitland ordinance.\textsuperscript{107}

The Third District Court of Appeal has indicated in *Wald*\textsuperscript{108} that this test is not appropriate in Florida, stating that the

\textldots{} approach advocated by *Pioneer Trust* disallows a formidable method of subdivision control, which is an integral part of comprehensive planning. And while it is important to guard against unbridled municipal discretion, it is equally important that those who propose to subdivide may be subjected to rational dedication requirements.\textsuperscript{109}

Nonetheless, the specifically and uniquely attributable test has survived and remains the rule in Illinois.\textsuperscript{110} The test is viewed as being so strict that one commentator has noted that "if anything is acceptable in Illinois, this usually means that it is not likely to run into great trouble elsewhere."\textsuperscript{111}

3. THE RATIONAL NEXUS TEST

The case of *Wald Corporation v. Metropolitan Dade County*\textsuperscript{112} in-

107. The court found that the city could only rely on its charter, as an enabling statute for authority to secure exactions.

108. 338 So.2d 863.

109. *Id.* at 867.

110. In Board of Education of School District No. 68, DuPage County v. Surety Developers, Inc., 63 Ill.2d 193, 347 N.E.2d 149 (1975) \textit{reh den} (1976) the defendant developer constructed a development which contained 1400 new resident elementary school children. DuPage County was able to predict the growth in the number of elementary school children based on the proposal for the subdivision. The county impact fee required a $50,000 construction contribution, land dedication, and an additional fee of $200 per unit home for development of a new school. The court approved this fee by pointing out that 98% of the students in the new school would be from the new development. The "specifically and uniquely attributable" test had been satisfied. \textit{See also} the latest approval in Illinois of this test in *Krughoff v. City of Napierville*, 68 Ill.2d 352, 369 N.E.2d 892 (1977).

111. 3 \textit{ANDERSON, AMERICAN LAW OF ZONING}, § 156.08a (Supp. 1977).

112. 338 So.2d 863.
icates that Florida is probably a rational nexus state.\textsuperscript{113} The author feels that \textit{Wald} is one of the two most significant cases in the nation that deals with this test. Here, a developer sought approval of a plat from the Dade County Commission. The subdivision was in the “glades” area of West Dade County. Apparently, the land was low-lying and subject to flooding unless proper drainage facilities were available. The County agreed to approve the plat only if the developer would dedicate land for a drainage canal and an easement for canal maintenance purposes. The developer refused and claimed that the forced dedication was an unconstitutional taking. Noting the absence of any appellate cases on point in Florida, the Court, in an outstanding opinion, discussed all three relationship tests.\textsuperscript{114} However, the tribunal used an analogy between the use of the police power in impact exactions and in regulating outdoor advertising by citing the Florida Supreme Court decision in \textit{Eskind v. City of Vero Beach}.\textsuperscript{115} \textit{Eskind} stands for the proposition that private business could not be subjected to police power restrictions where there was no reasonably identifiable rational relationship between the demand of public welfare and the restraint upon private business.\textsuperscript{116} It is this decision’s reference to a “rational relationship” that the \textit{Wald Corporation} Court analogized to the rational nexus test. The Court binds the “rational relationship” concept to subdivision control through a discussion by a leading commentator.

The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king’s intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.\textsuperscript{117}

The Court attempted to indicate that there must be an identifiable relationship between the demands of the public welfare and the restraint

\textsuperscript{113} Id. at 867-68.
\textsuperscript{114} Id. at 867.
\textsuperscript{115} 159 So.2d 209 (Fla. 1963).
\textsuperscript{116} Id. at 212.
\textsuperscript{117} Johnston, John J., Jr., \textit{Constitutionality of Subdivision Control Exactions: The Quest for a Rationale}, 52 C\textit{OR}NELL L. Q. 871, 923 (1967).
placed upon the developer who merely represents private business. In a very real sense, this is the moderate approach to the application of the police power. It is nestled somewhere between the extremes of the reasonably related test and the specifically and uniquely attributable test. "It allows the local authorities to implement future-oriented comprehensive planning without according undue deference to legislative judgments. It requires a balancing of the prospective needs of the community and the property rights of the developer." 118

While Wald derives its importance from the fact that it compares the three relationship tests, the other case of national significance is the case of Land/Vest Properties, Inc. v. Town of Plainfield. 119 In this case, the New Hampshire Supreme Court adopted the rational nexus approach and carefully dissected the test. Land/Vest Properties, Inc. owned two tracts of land in Plainfield, New Hampshire. The company proposed to subdivide the land into lots ranging in size from fifteen to ninety-six acres. The town planning board agreed to approve the proposal provided that the developer improve two poorly paved roads into quality highways. Two points were particularly notable about these roads. Both of the roads were primarily outside the town limits, and both served a few other lot owners and residents, although the roads did lead to and terminate inside the Land/Vest property. The town planning board was rebuffed by Land/Vest, and the town attempted to uphold its plan for exacting the road improvements from the developer by utilizing a "but-for" type of test. 120 The roads in their improved state would not be needed "but-for" the Land/Vest subdivision, according to the Town. The Supreme Court noted that the roads did need to be improved, because "an emergency would create a hazard for access due to their present condition. Increased traffic from the plaintiff's proposed . . . lots would also increase the present danger." 121 However, the Court noted that other property owners and residents in the area would be benefiting at the expense of Land/Vest. This contrasts with the Wald project, because it appears that only the Wald Corporation and the public as a whole would benefit by having the drainage system available. The New Hampshire Court then applied the rational

118. 338 So.2d at 868.
120. Id. at 203.
121. Id. at 202.
nexus approach by noting that a balancing of factors was essential. The Court stated that the Town of Plainfield only balanced the "burden imposed on the town by the subdivision against the burden imposed on the subdivider by the town’s precondition for subdivision approval." It was absolutely essential to give consideration to the benefits in such a balancing of factors, according to the Court’s interpretation of the rational nexus test.

Citing a section of the New Hampshire Constitution that had been construed to allow the taking of a person’s property only "on the implied condition . . . that (the landowner) is to receive a just compensation," the Court compared the situation to a case of special assessments which are highly analogous to impact exactions. "Special assessment upon property for the cost of public improvements are in violation of our Constitution, if they are in substantial excess of the (equivalent in special) benefits received." In essence, then, the Court states that the benefits must be considered in the balancing test and "the subdivider can be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and (special) benefits conferred upon, the subdivision."

Thus, the rational nexus test attaches the burden of proof to both the developer and the local governmental entity. The local government will have to substantiate that the developer’s activities are causing a need for expanded facilities while the developer will have to prove the municipality or county wrong. The author feels that it may well be

122. Id. at 204 (emphasis added).
123. Id. (emphasis added).
124. Id. citing Great Falls Manufacturing Co. v. Fernald, 47 N.H. 444, 445 (1867).
125. Id. at 204.
128. Contrast this with the wording in Home Builders Ass’n. v. City of Kansas City, 555 S.W. 2d 832, 835 (Mo. 1977) reh den approving a test sounding like the rational nexus test and finding that the burden of justification of an impact fee ordinance was not on the governing body. The point here is that a developer’s objection to an impact fee can take two forms: 1) the ordinance is unreasonable or 2) the amount of exaction caused by the formula in the ordinance is unreasonable. The rational nexus test apparently allows the developer to put the burden of substantiating the amount of
Implicit in the developer's proof of what is wrong that the developer should be required to prove what is right. This is because some type of dedication or payment of a fee will eventually be required. However, the test is also crucial in that a developer will be compelled to dedicate land or pay cash for improvements only to the extent that his development will generate a need for those new facilities. The idea that the needs must be solely attributable to the developer under the specifically and uniquely attributable test is rejected, because the developer will pay for only what he causes to be needed. This concept is apparently embodied in the *Wald* decision and explained in *Land/Vest*. However, it can be contrasted with the Florida Supreme Court's holding on exactions in *Dunedin*. Without mentioning the rational nexus approach, the Court viewed the City of Dunedin's hike in water and sewer system connection charges under an approach that sounds arguably like the rational nexus test.

Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, . . . . The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent.

It should be reiterated that the *Dunedin* decision also limits the "use of the money collected . . . to meeting the costs . . ." of the particular project.

a. *The Excessive Hardship Corollary to the Rational Nexus Rule*

The rational nexus rule appears to have a strange twist in the form of what the author believes may be termed the excessive hardship corol-
lary. This concept is rooted in dicta in the *Land/Vest Properties* case, and it points out why this case is one of two rational nexus cases of national significance. In this case, the New Hampshire Supreme Court cited a state planning statute which is very similar to a Florida planning statute in that both laws look forward to comprehensive land use planning in a financially stable and cost effective way. The Court then went on to discuss the interrelation between this statute and the rational nexus test by indicating that the test was flexible enough to deal with "a town... faced with such an 'excessive expenditure', (that) its otherwise 'fair share' of the cost may be adjusted to accommodate the municipality's ability to pay." The Court seems to be saying that a developer, under the rational nexus test, might be required to pay for a greater amount of public facilities than his subdivision might be causing a need for. The rationale is that "without this limitation, a private developer could single-handedly require an increase in the municipal tax burden."

Why does the rational nexus test lead to this conclusion? This is apparently because a small community with a small tax base and limited public facilities might experience enough growth from a large development to generate the need for expanded facilities. However, the practical and cost efficient method for the community to expand its facilities might be to build larger facilities than would be immediately needed. An example will help to illustrate this fact. Assume a development's projected growth within a seven (7) year period might indicate a need for a new water plant that could pump 1,000,000 gallons of water daily. However, the plan for this development calls for it to be constructed in phases or segments. The first phase to be built is to be assessed under the rational nexus test for funds that will enable the municipality to build a plant that will pump 200,000 gallons of water daily. Platting or pulling of building permits for additional phases of the project might not be planned for a few years under the development

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132. 379 A.2d 200.
136. 379 A.2d at 205.
137. *Id.*
plan. At this point the municipality has three options. The first option is to assess the developer for what can be legally exacted: funds for the 200,000 gallon per day plant. Then the city would build the plant. As the developer plats later phases of his development and pulls building permits on those phases additional rational nexus assessments would be made. The water plant would be expanded to serve those new segments or phases. However, the plant will be more expensive when built in this manner. Costs will increase due to inflation. Also, it may be more expensive in constant dollars to expand the facility than it would have been to construct the complete 1,000,000 gallon per day facility in the first place from an architectural and engineering standpoint. This means that the developer who is being assessed for this construction will end up paying more in the end in impact fees.

The second option would have been simply to assess the fee for the 200,000 gallon plant and raise the taxes of local residents or bond (with accompanying interest costs) to build the entire 1,000,000 gallon per day plant. This method would be cheaper, but it runs afoul of the rationale for impact fees, as expressed above in Dunedin.138 Simply put the rationale asks why older residents should pay for new facilities that are needed to serve new residents. The third option is to apply the Land/Vest "excessive hardship corollary." Under this theory the developer would pay more than might normally be permitted under the rational nexus test. Obviously, such an assessment might be rare and would be totally dependent on the facts.

It is significant to note that while no Florida court has mentioned the "excessive hardship" concept, the Dunedin139 decision has alluded to it by sustaining a fee and relying, in part, on the same rationale as the New Hampshire Court utilized in sustaining the "excessive hardship corollary."140 In Dunedin, Justice Hatchett stated that, "we see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On the contrary, sound public policy militates against such inflexibility."141 In approving an impact fee in this case, it appears that the Florida Supreme Court ruled out the alternative of compelling a municipality to raise its

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138. See note 130.
139. 329 So.2d 314.
140. 379 A.2d at 205.
141. 329 So.2d at 319-20.
ad valorem taxes in order to avoid deficit financing. This is in effect precisely what the New Hampshire Court did in arguing for the excessive hardship corollary.

Furthermore, it is arguable that there is statutory authority in Florida to authorize this corollary. A section of the Intergovernmental Programs Chapter in the Florida Statutes states:

(2) The regulation of the subdivision of land is intended: . . . (i) To insure that the citizens and the taxpayers of incorporated municipalities and counties will not have to bear the costs resulting from haphazard subdivision of land and the lack of authority to require installation by the developer of adequate and necessary physical improvements.

In any event the New Hampshire Supreme Court indicates that this approach should be (one) used sparingly and only in an effort "to preclude 'danger or injury to health, safety, or prosperity . . . .'" Without this caveat or corollary to the rational nexus rule, a private developer might compel an increase in the municipal tax burden.

b. The Balancing Test Factors

While both the Wald Corporation and the Land/Vest Properties cases call for a careful balancing test "of the prospective needs of the community and the property rights of the developer," only Land/Vest suggests any specific factors to be considered in the balancing. The Land/Vest case involved two roads that led to the developer's tract of land. In fact, only 950 feet out of 10,000 feet of roadway fronted on the developer's land. The trial court applied a so called "proportionality" test which assessed the developer based only on his proportionate share of front footage on the road (9.5%). The New Hampshire Supreme Court rejected this test as too narrow to be considered by itself. Instead, the Court considered a "nonexhaustive categorization of such factors," including: 1) the standard of maintenance

142. See note 130.
144. Id.
145. 338 So.2d at 868.
146. 379 A.2d at 204-05.
147. 338 So.2d at 868.
148. 379 A.2d 200.
of similar roadways in the town; 2) the potential traffic increase that would result due to the new development; 3) the character and potential for development of the neighborhood served by these access roads; and, 4) the number of residents living or normally trafficking these roads. In essence, "no single factor can be determinative of the appropriate mode of apportionment . . ." of costs under the rational nexus test.

D. Application of Florida's Police Power

While the rational nexus test appears to be favored in Florida, another key problem is finding statutory authority for enacting an impact ordinance. The Florida Supreme Court, in Dunedin, had little problem, since the water and sewer fees exacted in that case were enacted under a Florida law that permitted rates or charges for water/sewer hookups. It appears that the police power is the most viable authority that has been delegated to the local level which could be relied upon to support an impact fee. A review of this authority should be viewed from the perspective of three types of local governmental entities. The basic outline of power for charter and non-charter counties and municipalities is noted in the Florida Constitution. Municipalities are guided by their charters which allow them full governmental, corporate, and proprietary powers not inconsistent with state law. Municipalities may carry out any "municipal purpose." A "municipal purpose" is any activity or power which may be exercised by the state or its political subdivisions. Thus, a municipality has the powers of the state's political subdivisions and its own corporate powers. A charter county has extensive local self-government powers including

149. Id. at 205.
150. Id.
151. 329 So.2d at 319.
156. See note 155.
158. Id.
power to enact special, local laws with the approval of the particular county's electorate. 159 It has the power to alter its structure by abolishing certain elective constitutional county offices.160

Perhaps the most restrictive entity of the three is the non-charter county. The reason for this restraint was expressed most clearly by the Florida Supreme Court in Keggin v. Hillsborough County.161

A county is a political subdivision of the state. Article 8, secs. 1, 2, Const. 1885. It is not a corporation. It may be created by the state without the solicitation, consent, or concurrence of the inhabitants, of the territory, thus setting it apart; it is created for administrative purposes; it is the representative of the sovereignty of the state, auxiliary to it, an aid to the more convenient administration of the government. It is purely political in nature, constituting the machinery and essential agency by and through which many of the powers of the state are exercised.162

The non-charter county is totally subservient to the Legislature, and its only "functions relative to the health, convenience, and welfare of the public" is "in the county, particularly outside of municipalities."163 County functions may only be under express or implied statutory authority, assuming there are no contrary provisions of law.164 As a result of this restraint, the remainder of this section will focus on the power of the non-charter county.

Chapters 125 and 163 of the Florida Statutes appear to be key chapters that delegate sufficient police power for local efforts in enact-

159. See note 153.
161. 71 Fla. 356, 71 So. 372 (1916).
162. Id. at 372.
163. Duval County v. Bancroft, 96 Fla. 128, 129, 117 So. 799, 800 (Fla. 1928).
164. Id., but see Amos v. Mathews, 126 So. 308, 321 (Fla. 1930) which states: While a county in the performance of certain functions is an agency or arm of the state, it is also something more than that . . . . While the county is an agency of the state, it is also under our Constitution to some extent at least, an autonomous, self-governing, political entity with respect to exclusively local affairs, in performance of which functions it is distinguished from its creator, the state, and for its acts and obligations when acting in purely local matters the state is not responsible. (emphasis added).
ing an impact ordinance utilizing the rational nexus approach.\textsuperscript{165} In some cases, other jurisdictions have approved impact fee ordinances based on statutory authority that is remarkably similar to language in the Florida Statutes.\textsuperscript{166} Underlying this entire discussion is the fact that zoning power and statutory zoning schemes of most states are similar because a majority are based on the Standard State Zoning Enabling Act.\textsuperscript{167}

Florida Statutes Chapter 125.01 is entitled “Powers and Duties”\textsuperscript{168} of counties. This section states that: “(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to the power to: . . . .” This preamble to the enumeration of county powers seems sweeping, but a look at the manner in which Florida courts have interpreted it does not reflect its plain meaning.\textsuperscript{169}

1. **Strict Constructionist vs. The Permissive View**

The interpretation of this clause has been the subject of continuing litigation.\textsuperscript{170} According to the permissive viewpoint, the clause seems to indicate that, if the Legislature hasn’t usurped the subject area by legislating or prohibiting it by law, it is a permissible county function.\textsuperscript{171} On the other hand, strict constructionists might argue that a non-charter county is merely a child of the state and can only derive specific powers through legislative delegation of authority.\textsuperscript{172} The strict con-

\textsuperscript{165} Interview with Warren Dill, Deputy County Attorney, Palm Beach County, Florida, in West Palm Beach, Florida (August 9, 1978).

\textsuperscript{166} See, 379 A.2d 200 and Jordan, 137 N.W.2d 442, infra note 213.

\textsuperscript{167} ANDERSON, AMERICAN LAW OF ZONING, § 26.01 (1968).

\textsuperscript{168} (emphasis added) This section provides the basic power for all counties. It is the foundation of power for the charter, as well as the non-charter counties. Approximately sixty of Florida’s sixty-seven counties are non-charter counties.

\textsuperscript{169} See note 172, infra.

\textsuperscript{170} Id.

\textsuperscript{171} Individuals such as the county attorneys or county commissioners would probably support this view.

\textsuperscript{172} See such cases as Davis v. Gronemeyer, 251 So.2d 1 (Fla. 1971); State ex rel. Volusia County v. Dickinson, 269 So.2d 9 (Fla. 1972); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944).
structionist view has its roots in many cases, but it is typified by the dissent of Justice Hal Dekle in Orange County v. State. This case involved the power of Orange County, a non-charter county, to issue capital improvement bonds without approval of the electorate. The case discussed two key sections of the Florida Constitution. One of the sections, Article VIII, sub-section 1 (f), is virtually identical in language to the preamble of Chapter 125.01 (1). It states that non-charter governments "have such power of self-government as is provided by general or special law . . . ." However, the same section limits that power such that the non-charter government may enact "county ordinances not inconsistent with general or special law." Justice Dekle persuasively argues that the permissive viewpoint taken by county officials is not really an interpretation of power but actually an enlargement of power. "It not only wipes out the obvious distinction between the two forms of government (charter and non-charter government) but in one fell swoop it authorizes all counties over the state to proceed arbitrarily . . . as they see fit, without voter or legislative approval, but as a virtual independent sovereign, which they are not."

However, it can be argued that, even if non-charter power is "interpreted" or "enlarged" to encompass the permissive viewpoint, the differences between charter and non-charter counties would not be totally obliterated. For example, a charter county's duly enacted ordinances may prevail over any municipality's ordinances, depending on the wording of the particular county's charter. However, if the ordinances of a non-charter county and a municipality are in conflict, the

173. Id.
174. 281 So.2d 310 (Fla. 1973) (Dekle, J., dissenting).
175. Fla. Const. of 1968 art. VIII, § 1(f) and (g).
177. This section was placed in the 1968 Constitution to expand local government home rule. During the mid-sixties, record numbers of local bills were being filed in the Florida Legislature, culminating in 1967 with hundreds of bills. The Legislature was becoming so bogged down with local legislation that home rule had to be granted. Note that this section is very similar in verbage to Fla. Stat. § 125.01 (1) (1977).
178. 281 So.2d at 314.
179. Id.
180. Fla. Const. of 1968 Art. VIII, § 1 (g).
municipality's ordinance shall prevail within its corporate limits. In fact, in Palm Beach County, a recently enacted impact fee was nullified within the corporate limits of a number of municipalities which decided to "opt out" of the ordinance. Another crucial difference that remains between the charter and non-charter counties is the ability of the former to restructure their government. An example is Broward County, Florida. Under its charter, it made the post of tax collector an appointive position which is an elected constitutional officer in most other counties. Broward County also increased its five (5) person County Commission to a seven (7) member body.

Justice Dekle, in *Orange County*, clearly states that, "it is not a matter of proceeding unless precluded but is a matter of proceeding provided by law, as to a non-charter county . . . ." He noted that the Florida Constitutional section (and apparently the section quoted above in F.S.§ 125.01 (1) ) is merely an implementing power for ordinances when a particular power has been specifically granted by the Legislature. Oddly enough a counter-argument to this position can be found by looking at the enumerated powers under Chapter 125.01 (1). One of the powers states that a county may "perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law." Thus, the Legislature has specifically granted a power to proceed unless precluded under the specifically enumerated powers of this general law. Nonetheless, authority can be

181. *Id.* at § 1(f).
182. The cities of West Palm Beach, Lake Worth, Pahokee, Belle Glade, Lake Clarke Shores, and North Palm Beach have all opted out of the fee. Palm Beach Post, July 16, 1979 at 4-5B, col. 4.
183. F.A. CONST. OF 1968 art. VIII, § 1(d).
185. 281 So.2d at 314.
186. *Id.*
187. F.A. STAT. § 125.01 (1) (w) (1977). Justice Dekle in *Orange County*, supra note 111, at 315 points to commentary by the Honorable Talbot D'Alemberte, a drafter of the 1968 Constitution, as further authority for his arguments that Fla. Const. of 1968 art. VIII, § 1 (f) was merely intended to allow non-charter counties to enact ordinances pursuant to specifically granted powers by the Legislature. However, the Legislature in *Fla. Stat.* § 125.01 (1)'s introductory clause and in *Fla. Stat.* § 125.01 (1) (w) seems to have specifically granted the power for non-charter counties to proceed, so long as a law does not preclude their action.
found in *Janis Development Corp. v. City of Sunrise* to argue that this enumerated power does not grant the power to proceed unless precluded for a non-charter county, especially in enacting an impact fee. This trial court opinion discusses a road impact fee that was enacted under the authority of this particular enumerated power. The Court noted in dicta that the fee or tax did not fall within the police power. There was no other reason given as to why an impact fee could not have been enacted under this particular enumerated power.

Perhaps the theory of *ejusdem generis* might arguably limit the "proceed unless precluded" or permissive viewpoint of this enumerated power. This theory limits general words or phrases following an enumeration of specific things or powers to things of powers of the same class or genus, as those comprehended by the preceding specific terms. However, even this argument would be poor because the list of county powers includes the power to zone and regulate business. As will be discussed below, there is a direct tie between these powers and impact fees. The struggle between the so-called permissive view (proceeding unless precluded) and the strict constructionist argument (typified by Justice Dekle's dissent in *Orange County*) has encountered another battle, but this particular battle may have signalled the end of the conflict. On March 5, 1979, the Florida Attorney General's Office released an opinion that dealt with the powers of a non-charter county. Lee County (Fort Meyers), Florida had requested an opinion on the legality of its plan to set up a human relations commission based on Chapter 125 of the Florida Statutes. The Attorney General's Office took the position enunciated by Justice Dekle and indicated that the county has no authority to proceed, since there was no express or implied statutory authority under any general or special law.

188. 40 Fla. Supp. 41, 59 (Fla. 17th Cir. Ct. 1973).
189. FLA. STAT. § 125.01 (1) (w) (1975).
190. This assumes that one must also adopt the view of Justice Dekle in the Orange County case that the similar wording of FLA. CONST. of 1968 art. VIII, § 1 (f) and the introductory clause to FLA. STAT. § 125.01 (1) are not a specific authorization of power but rather merely an implementing power for specifically enumerated powers.
192. FLA. STAT. § 125.01 (1) (h) (1975).
193. 281 So.2d 310.
195. See also FLA. CONST. OF 1968 art. VIII, § 1 (f).
However, only one month earlier, the Florida Supreme Court had issued an opinion adverse to the Attorney General's viewpoint in the case of *Speer v. Olson*. Pasco County, Florida, a non-charter county, a municipal service taxing district under the County Commission, attempted to issue general obligation bonds for water and sewer facilities by pledging future net revenues derived from the operation of the facilities, as well as certain ad valorem taxes. Taxpayers brought suit claiming there was no authority under state law for this action. The County then sought to have the bonds validated. The Court noted that there is no specific authority that authorizes or restricts a non-charter county to issue general obligation bonds to acquire water and sewer facilities and pledge system revenues and ad valorem taxes. Justice Adkins, writing for the majority, specifically noted that the first full sentence of Chapter 125.01 (1) of the Florida Statutes "therefore empowers the county board to proceed under its home rule power to accomplish this purpose." He indicated that, "unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule." By virtue of this decision it appears that a non-charter county can engage in virtually any county function, so long as there is no preclusion in the Constitution or statutes. It is apparent that the Attorney General's Office continues to maintain a different stance in this matter, and thus, it is probable that we have not seen the last of the continuing struggle of non-charter county powers.

2. **Other Arguments**

There are other arguments that might be raised concerning the introductory clause of Chapter 125.01 (1) of the Florida Statutes. These arguments seem to parallel the trend of thought embraced by the permissive view. The clause states that county government "shall have the power to carry on county government. To the extent not inconsistent with general or special law . . . ." What is meant by the two

196. 367 So.2d 207 (Fla. 1978) reh den (1979).
197. *Id.* at 211.
198. *Id.*
199. *Id.*
tent with general or special law . . . ." 200 What is meant by the two terms "county government" and "inconsistent"? One might argue that "county government" is defined by the twenty-five (25) enumerated powers listed in Chapter 125.01 (1). However, the introductory clause of that very section also states that the power to carry on county government shall not be restricted to the enumerated powers. 201 Thus, at most, the enumerated powers merely provide examples or typify the meaning of the term "county government." Another argument can be found in Cable-Vision, Inc. v. Freeman. 202 In this case, when Monroe County sought to provide cable TV service, 203 the Court specifically found that the County had the requisite power to do so, based on the case of State v. Brevard County. 204 The Cable-Vision Court stated that, "determination of what is a county purpose may be express or implied in the provision of the ordinance (setting up the new county program). The Courts will not interfere with such determination, unless it has no legal or practical relationship to a valid county purpose." 205

Thus, according to Cable-Vision, a county may define what a county governmental power is by ordinance. However, this 1975 opinion by the Third District Court of Appeal may have overly enlarged what the Florida Supreme Court actually stated in the Brevard County case. 206 The Florida Supreme Court found that, "what is a county purpose may be determined by the express or implied provisions of a statute . . . ." and not an ordinance. 207 Since statutes are enacted only by the Legislature, it would appear that the Court meant that only the Legislature could determine a county purpose. However, the use of the word "may" in the above quotation doesn't necessarily indicate that

200. (emphasis added) FLA. STAT. § 125.01(1) (1977).
201. See also FLA. STAT. § 125.01 (3) (a) (1969).
203. The Florida Keys stretch for 113 miles to the South and West from the Florida mainland. The nearest television station is approximately 150 miles from the furtherest populated Key, and cable TV is a virtual necessity for television reception.
204. 99 Fla. 226, 126 So. 353, 355 (1930).
205. 324 So.2d at 154.
206. 126 So. 353.
207. (emphasis added) See Brevard County, supra note 204, at 355. In Dade County v. Pan American World Airways, Inc., 275 So.2d 505, 511 (Fla. 1973) reh den the Florida Supreme Court reaffirmed the right of the Legislature to define a county purpose.
the Supreme Court foreclosed a body other than the Legislature from determining what is a county purpose.08 If the Cable-Vision view is followed, a county could simply define that impact fees were a county purpose, so long as that purpose was not “inconsistent” with state law.09 The term “inconsistent” was defined by the Florida Supreme Court in Dade County v. A.R. Brautigam,20 as meaning “contradictory in the sense of legislative provisions which cannot exist.”21 Since there seems to be no law dealing with impact fees specifically, there is apparently no statute for an impact fee ordinance to contradict.

A final argument concerns the reading of the enumerated powers. The Florida Statutes indicate that reading of the powers is to be broad with a liberal interpretation.22 The question then arises, regarding impact fee ordinances, how far might a tribunal go in construing the liberalism clause in a police power statute? In Jordan v. Village of Menomonee Falls23 a mandatory dedication ordinance was based on a state statute that gave local governments the power to approve requirements for subdivisions. The statute authorized a municipality to approve the subdivision of parcels or “. . . provide other surveying, monumenting, mapping, and approving requirements for such division.”24 This statute is extremely similar to the regulating and zoning authority in the Florida Statutes25 and was to be liberally interpreted,

209. See note 201 and accompanying text.
210. 224 So.2d 688, 692 (Fla. 1969).
211. The Court actually defined the term as used in FLA. CONST. OF 1968 art. VIII, § 6 (f) which is analogous to FLA. STAT. § 125.01 (1) (1977): “(f)—DADE COUNTY—POWERS CONFERRED UPON MUNICIPALITIES: To the extent not inconsistent with the powers of existing municipalities or general law . . . .”
212. FLA. STAT. § 125.01 (3) (b) (1969).
214. 137 N.W.2d at 446.
215. FLA. STAT. § 125.01 (1) (h) (1975):
(h) Establish, coordinate, and enforce zoning and such other business regulations as are necessary for the protection of the public.

Recall the discussion in Wald, supra note 92, at 867 concerning impact fees being analogous to a form of business regulation. See also FLA. STAT. §§ 163.165, 163.260
according to state law.\textsuperscript{216} The Wisconsin Supreme Court permitted impact exactions to be included within the local power to approve requirements for subdivisions\textsuperscript{217} and indicated that the Wisconsin Legislature had delegated sufficient police power to allow municipal enactment of an impact fee. A similar situation occurred in \textit{Frank Ansuini v. City of Cranston}\textsuperscript{218} when a developer, who owned a tract of land in Cranston, Rhode Island, sought to improve his land. The City attempted to exact a mandatory land dedication of land equal to 7\% of the size of the development.\textsuperscript{219} Although the Court overruled the dedication as arbitrary,\textsuperscript{220} it did approve the concept of an impact exaction based on implied authority from the statute,\textsuperscript{221} which delegated the police power to municipalities to “adopt, modify, and amend rules and regulations governing and restricting the platting or other subdivision of land in such city or town.”\textsuperscript{222} Despite the fact that this statute appears to focus on platting, it is quite analogous to Florida law.\textsuperscript{223}

Another source of authority is Part II of Chapter 163 of the Florida Statutes which deals with comprehensive planning and land use planning. This section appears to be more far reaching than Chapter 125 due to its concepts of cutting across city and county boundaries, although they both are to be liberally viewed.\textsuperscript{224} It provides authority to both counties and cities, whereas Chapter 125 deals only with county powers. There are numerous sections in Chapter 163 that appear to give implied authority that verges on expressed authority for impact exactions, some of which will be examined below. The legislature intended the authority of Part II of Chapter 163 to be very broad in an

\begin{itemize}
\item \textsuperscript{216} 137 N.W.2d at 446.
\item \textsuperscript{217} \textit{Id.} at 446-48.
\item \textsuperscript{218} 107 R.I. 163, 264 A.2d 910 (1970).
\item \textsuperscript{219} See Carlann Shores, \textit{supra} note 104, and Admiral Development, \textit{supra} note 106, for Florida cases with a similar factual situation.
\item \textsuperscript{220} 264 A.2d at 914.
\item \textsuperscript{221} R. I. GEN. LAWS § 45-23-2 (1956).
\item \textsuperscript{222} 137 N.W.2d at 446-48.
\item \textsuperscript{223} This is true, if the powers are liberally construed as is required by \textit{FLA. STAT.} § 125.01 (3) (b) (1969).
\item \textsuperscript{224} \textit{Cf. FLA. STAT.} § 163.310 (1969): 163.310 Construction “This part shall be liberally construed to promote the purposes for which it is intended except for the penalty provisions, which shall be strictly construed against the commission or governing body.”
\end{itemize}
effort to give counties and municipalities the power to prevent or mini-
mize future problems, enhance present advantages in the community, 
and overcome present handicaps in dealing with the growth that 
Florida is undergoing.\textsuperscript{225} Furthermore, the Legislature intended that 
the express provisions of Part II of Chapter 163 are to be the minimum 
requirements to promote the public health, safety, and welfare.\textsuperscript{226} 
Notably, the scope of this chapter allows “the several counties and 
incorporated municipalities of this state . . . to . . . adopt, and enforce 
subdivision\textsuperscript{227} regulations.”\textsuperscript{228} As part of the subdivision regulation pro-

\textsuperscript{225} FLA. STAT. § 163.165 (1) (1969): 163.165 Legislative intent 
(1) In order to preserve and enhance their present advantages, overcome 
their present handicaps, and prevent or minimize future problems, it is the intent 
of this part to enable the several counties and incorporated municipalities to 
plan for future development and to prepare, adopt and amend comprehensive 
plans to guide future development, to implement the comprehensive plans, the 
several counties and incorporated municipalities may adopt and enforce zoning 
regulations, adopt and enforce subdivision regulations, and adopt and enforce 
building, plumbing, electrical, gas, fire, safety, and sanitary codes. 

Using Chapter 163 as a resource will require the non-charter counties to either adopt a 
comprehensive plan or a resolution electing to operate under the provisions of that 
chapter pursuant to FLA. STAT. § 163.315 (1969). See J.O. Townley v. Marion County, 
343 So.2d 1312 (Fla. 1st Dist. Ct. App. 1977) reh. den. 

\textsuperscript{226} Id. at 163.165 (2): 
(2) The provisions of this part in its interpretation and application are de-
clared to be the minimum requirements necessary to promote, protect, and im-
prove the public health, safety, comfort, good order, appearance, convenience, 
morals, and general welfare; to conserve the value of land, buildings, and re-
sources; and to protect the character and maintain the stability of residential, 
agricultural, business, and industrial areas and to promote the orderly develop-
ment of such areas. 

\textsuperscript{227} FLA. STAT. § 163.170 (7) (1969) defines a subdivision (apparently for devel-
opment purposes) as “the division of a parcel of land, whether improved or unim-
proved, into three or more contiguous lots or parcels of land . . . .” 

\textsuperscript{228} FLA. STAT. § 163.160 (1) (1969): 
163.160 Scope of part II 
(1) The several counties and incorporated municipalities of this state may 
plan for future development, adopt and amend comprehensive plans to guide 
future development, adopt and enforce zoning regulations, adopt and enforce 
subdivision regulations, adopt and enforce building, plumbing, electrical, gas, 
fire, safety, and sanitary codes, and establish and maintain the boards and com-
misions herein described for carrying out the provisions and purposes of this 
part. The powers authorized by this part may be employed by counties and in-
corporated municipalities individually or jointly by mutual agreement in accor-
cess, planning commissions are to be set up. One of the powers and duties of these planning commissions is to "(3) Establish principles and policies guiding action in the development of the area." Local governments are given authority to enact various subdivision regulations to assist in guiding development. The statutory language used seems to be based on thoughts similar to Representative Charles Boyd's House Bill 837 regarding impact fees. The police power delegated in this section provides for "the harmonious, orderly, and progressive development of land within Florida." The section of Chapter 163 which de-

dance with the provisions of this part in such combinations as their common interests may dictate.

163.185 Functions, powers, and duties of commissions
The functions, powers, and duties of the commission shall be, in general and in addition to any functions, powers and duties set forth in the body of this part, to:

(3) Establish principles and policies for guiding action in the development of the area.

163.260 Regulation of subdivisions; purposes
(1) The public health, safety, comfort, economy, order, appearance, convenience, morals, and general welfare require the harmonious, orderly, and progressive development of land within Florida and its counties and incorporated municipalities. In furtherance of this general purpose, counties and incorporated municipalities, individually or in combination as authorized by this part, are authorized and empowered to adopt, amend, or revise and enforce measures relating to land subdivision.

While an impact fee or mandatory land dedication ordinance could be enacted as a subdivision regulation it appears, that the fee could be enacted as a pre-condition to a plat approval. See Fla. Stat. §§ 177.011—.151 (1979). In fact "every plat of a subdivision filed for record must contain a dedication by the developer." Fla. Stat. § 177.081 (1979). The problem with using the plat approved—impact fee method is that land that has already been platted will be able to be developed without payment of the fee. Also, if the developer decided not to plat his land, the developer would not have to pay the fee. A landowner can't be compelled to plat his land and to perform pre-conditions to platting, as a pre-condition to sale or use, if the land is to be sold without reference to a plat. This means the land would have to be sold with a legal description in metes and bounds. Kass v. Lewin, 104 So.2d 572 (Fla. 1958). Nonetheless, Broward County, Florida has a model impact fee ordinance exacting an impact fee as a pre-condition to a plat approval. See Broward County Ordinance, § 5-192 (1979).

232. See notes 23, 24, and 27.
fines the term “regulation of subdivision of land” includes eleven elements of which ten are particularly closely related to impact exactions, depending upon the type of fee (e.g., school, road, water/sewer, etc.). They are:

(a) To aid in the cooperation of land development in counties and incorporated municipalities in accordance with orderly physical patterns;
(b) To discourage haphazard, premature, uneconomic, or scattered land development;
(c) To insure safe and convenient traffic control;
(d) To encourage development of economically stable and healthful communities;
(e) To insure adequate utilities;
(g) To provide public open spaces for recreation;
(h) To insure land subdivision with installation of adequate and necessary physical improvements;
(i) To insure that the citizens and taxpayers of incorporated municipalities and counties will not have to bear the costs resulting from haphazard subdivision of land and the lack of authority to require installation by the developer of adequate and necessary physical improvement;
(j) To insure to the purchaser of land in a subdivision that necessary improvements of lasting quality have been installed, and
(k) To serve as one of several instruments of comprehensive plan implementation authorized by this part.234

Sub-sections (b) and (c) are particularly notable when viewed in the overall text of this law. In Land/Vest Properties235 the New Hampshire Supreme Court approved the rational nexus test while reviewing a state law that provided town planning boards with the authority to promulgate regulations which: “provide against such scattered or premature subdivision of land as would involve danger or injury to safety . . . by reasons of lack of . . . transportation . . . or other public services, or necessitate an excessive expenditure of public funds for the supply of such services.”236 This section implied sufficient authority for the New Hampshire Court to approve an impact exac-
tion, yet it is not nearly as sweeping as sub-sections (b) and (c) above.237 Perhaps the best authority in Florida for an exaction is the *Wald Corporation* case.238 Florida's Third District Court of Appeal not only approved an exaction under the rational nexus test, but it found authority based on concepts of comprehensive planning. The Court noted that the rational nexus approach "allows the local authorities to implement future-oriented comprehensive planning without according undue deference to legislative judgments."239

**OPERATIVE ASPECTS OF IMPACT FEE ORDINANCES**

**A. Tax vs. User/Regulatory Fees**

While there arguably is authority under planning and various local power acts to enact an impact fee there is still another problem that may be encountered. The answer hinges on the manner in which the ordinance is drafted. The author believes that this may be one area in which a fee could be successfully attacked, since the proper form of implementation from an administrative standpoint has not been fully litigated. In other words, if the fee is poorly implemented, it could be overturned in court as a tax240 which raises two problems. First, the Florida Constitution authorizes taxation by ad valorem tax or by general law authorization only.241 There are no general laws covering im-

237. *But see* City of Montgomery v. Crossroads Land Co., 355 So.2d 363 (Ala. 1978) specifically stating that Alabama municipalities do not have the power to exact a fee or land dedication for parks from developers. (*Id.* at 365. There apparently is authority permitting only dedication for recreational purposes inside a subdivision.) The statute in question, ALA. CODE tit. 37, § 798 (Recomp. 1958), states a planning commission shall adopt regulations governing land subdivision, including the provision of open space for traffic, utilities, recreation, etc. *Compare* this with FLA. STAT. § 163.260 (2) (c) and (g) and 163.265 (1) (1969).

238. 338 So.2d 863.

239. *Id.* at 868. For a restrictive view of a planning statute that provides an interesting contrast, *see* Cimarron Corp. v. Bd. of County Commissioners of the County of El Paso, 563 P.2d 946 (Colo. 1977).


241. *See* FLA. CONST. OF 1968 art. VII, § 1 (a) and 9 discussed in City of Tampa v. Birdsong Motors, 261 So.2d 1 (Fla. 1972).
Impact taxation at the present time. A Florida Appellate Court in *Broward County v. Janis Development Corporation* viewed the fee as a tax. The Court found that impact fees were being collected from new residents and placed into a general road construction fund, despite some rather vague wording in the ordinance. Although the funds could have been used to construct roads or improve existing roads by widening them in the areas where the fee-paying residents lived, there was no restriction or definition of the size of the area to be served by the fees collected. Apparently the Court viewed this fee as a tax because there was not adequate assurance that the fee-payers would actually be the true beneficiaries of the fee. Thus, the fee was held to be a tax; a levy paid simply to raise revenue which caused the “fee” to be invalidated.

In *Haugen v. Gleason*, a mandatory land dedication for parks was enacted to exact land for park purposes from developers. Developers could pay a fee in lieu of a dedication, and this methodology was also found to be a tax. While the case is not particularly timely, the underlying rationale is still very valid. The Court found that the primary purpose of the ordinance was revenue generation rather than subdivision regulation. This is apparently the dividing line between fees and taxes; fees directly benefit those individuals who pay them while taxes generate revenues that are used for the benefit of all. Both *Janis* and *Haugen* objections were countered in *Dunedin* where the Florida Supreme Court determined that if the revenue is restricted to the use of benefiting new residents for the purpose of expanding public facilities,

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242. See notes 23 to 25. Bills discussed in those notes were introduced to give specific authority for the enactment of impact fees.


244. Id. at 375. In *Aunt Hack Ridge Estates, Inc. v. Planning Commission of Danbury*, 27 Conn. Supp. 74, 230 A.2d 45 (1967), an impact fee was found to be a tax, since the revenues were not specifically restricted to benefit new residents who paid the fee.

245. It will be recalled that no tax can be implemented without a specific grant of power from the Legislature. See Fla. Const. of 1968 art. VII, § 1 (a). There is no grant of power to enact an impact “tax.”


247. The fee was enacted on the basis of the police power, as a function of a comprehensive planning statute.

248. 329 So.2d 314.
it is a fee rather than a tax. Yet, if new residents are charged a fair \textit{pro rata} share of the cost to benefit them directly by the expansion of public facilities and without generating additional revenue, the exaction is viewed as a fee.\footnote{Id. at 320-21.}

The second problem that is generated by viewing the exaction as a tax is illustrated from another Broward County, Florida case. In \textit{Venditti-Siravo, Inc. v. City of Hollywood}\footnote{Id. at 319-20.} the City passed an ordinance compelling payment of a fee, amounting to 1\% of the cost of construction of a project, to secure a building permit. The fee was to be used for parks and recreation. Ten builders filed a class action suit and a circuit court judge found the fee to be a tax on property.\footnote{The Court appears to have noted that an exaction is a fee rather than a tax when the exaction is not more than the cost of accommodating new users. Local governments are simply seeking “to shift to the user expenses incurred on his account. A private utility would presumably do the same thing in which event surely even petitioners would not suggest that the private corporation was attempting to levy a tax on its customers.” \textit{Id.} at 318-19. At 319 further on in the case, the court stated that: “We see no reason to require that a municipality resort to deficit financing in order to raise capital by means of utility rates and charges.” \textit{Id.} at 123.}

Herein lies the second problem. Once the tax is viewed as an ad valorem tax its effect would have to be added to the existing millage rate. If the combined effect of the fee and the normal ad valorem tax exceeded Florida’s ten mill cap, Florida law would be violated. The tax would have to be invalidated or at least reduced so as not to exceed the ten mill levy.\footnote{Florida has had its own California-style Proposition 13 property tax limitation for years. \textit{See} FLA. STAT. § 200.071 (1969) which imposes a maximum possible tax levy of no more than 10 mills for any county or district. FLA. STAT. § 200.081 (1969) enforces the same rule for municipalities.} Therefore, it is absolutely essential that the exaction be viewed as a fee, and the \textit{Dunedin}\footnote{39 Fla. Supp. 121 (Fla. 17th Cir. Ct. 1973).} case appears to present the rule for differentiating fees from taxes. However, that case does not tell us how to properly implement the fee from an administrative viewpoint so that the fee will not be viewed as a tax. For example, how do we know that funds being paid are, judicially speaking, being used to directly benefit the payors? If roads are built to serve a subdivision, but they are seldom used by residents of that subdivision, are those new residents re-

\begin{itemize}
  \item \footnote{Id. at 123.}
  \item 39 Fla. Supp. 121 (Fla. 17th Cir. Ct. 1973).
  \item \footnote{Id. at 123.}
  \item 329 So.2d 314.
\end{itemize}
ceiving a direct benefit from the roads that they paid impact fees for?255

B. Trust Accounts

To insure that the revenues from an impact fee are not only collected but spent for the expansion of public facilities to benefit those individuals who contributed the funds, Dunedin256 appears to require that the funds be subjected to careful internal control by governmental authorities. Justice Hatchett, writing for the majority, stated:

The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of the moneys, although certain uses, . . . would undercut the legal basis for the fund’s existence. There is no justification for such casual handling of public moneys . . . .257

The answer appears to be a trust fund.258 The Palm Beach County roadway impact fee utilizes this approach.259 The ordinance envisions the use of forty separate trust funds. Each fund will be used for roadway work in forty separate geographical districts in the county. While this may create an accountant’s nightmare, it appears manageable, and it will probably satisfy the Dunedin test for internal control of funds after they are collected. This also might meet the test for distinguishing between a tax and a fee, since the funds will be spent to benefit those

255. Florida governing bodies have excelled at drafting failures when it comes to impact fees. These fees have all failed, because they were merely taxes. Cf. Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Village of Royal Palm Beach, No. 78-2374 CA(L) O1D (Fla. 15th Cir. Ct. May 25, 1979); Home Builders Ass’n. of Brevard County, Inc. v. City of Indian Harbor Beach, No. 75-2977 CA-01-A (Fla. 18th Cir. Ct. July 2, 1976); City of Coral Springs v. Florida National Properties, Inc., No. 76-11522 (Fla. 17th Cir. Ct. January 12, 1977) aff’d 358 So.2d 97 (Fla. 4th Dist. Ct. App. 1978) cert den 366 So.2d 880 (Fla. 1979). Note that the appellate decision is especially instructive concerning the propriety of granting a temporary restraining order to restrain further fee collections during the pendency of the lawsuit.

256. 329 So.2d 314.

257. Id. at 321.

258. This method was used for fiscal internal control in Janis Development, supra note 31, and in Palm Beach County, Florida Ordinance 79-7, supra note 9.

259. Palm Beach County, Florida Ordinance 79-7, supra note 9.
individuals who have contributed revenues in the form of fees. The funds will be spent to build roads only in the contributing residents' particular neighborhood. Of course, all this is dependent on how local authorities define the size of the so-called “neighborhood.”

C. Who Shall Pay The Fee?

1. Purchasers of Unimproved and Commercial Land

It is apparent that a large scale subdivision after a short time will have three (3) basic classes of land: improved residential property, unimproved residential property, and other types of property that will be mostly in a commercial or industrial type of zoning classification. Is it fair to utilize a formula that will assess an impact fee against commercial or industrial properties for construction of new facilities, such as schools? Certainly no factory or store ever increased the number of children in the public school system. Thus, they do not benefit from these particular types of facilities. The concept of benefiting from the fees paid is crucial in differentiating a fee from a tax, and it is crucial, as a factor to be weighed under the rational nexus test.

An answer to this problem is posed in the case of Home Builders Association of Greater Salt Lake v. Provo. The City of Provo enacted a $100 surcharge on water and sewer connection fees designed to provide funds for the expansion of such a system. A homebuilders group contested the fee on the basis that it was discriminatory, since it assessed only a single class of people. That class consisted of new system users. The Utah Supreme Court did not agree with this contention.

The properties actually using the sewer system should alone pay the cost of operation and maintenance, since expenditures for such purposes arise solely from that use. On the other hand, all properties where service was available, whether actually using the service or not, should pay for the construction and installation expense from which every property has received some benefit and increase in value.

It can be argued that commercial and industrial properties don’t directly add children to the school system but their employees do add children to the school district. Commercial and industrial properties pay school ad valorem taxes and presumably, impact fees would be assessed on the same theory. The Court in the Provo City case went on to express the view that improved properties should not be saddled with the burden of providing something that would be of future benefit to presently unimproved land. This would not be “equitably,” a standard that the Florida Supreme Court found to be essential in the fee assessment of Dunedin. The unimproved property was benefitted by the improvement, and more specifically, the unimproved property would benefit unfairly in respect to capital costs and interest thereon, as may have been paid in the past by users of the improvement. Therefore, it appears that some basis can be found for arguing that even unimproved land in a subdivision or planned unit development should be assessed something. However, it appears that most governmental entities prefer to assess impact fees at the time that a building permit is pulled. Thus, the unimproved land’s fee is deferred.

2. DEVELOPERS WHO PAY ONLY TO HAVE THEIR DEVELOPMENTS FAIL

Another sewerage system case that involved impact assessments affirmed the concept of assessing the fee from developers before construction of the development or of the public facility commenced. In S.S.&O. Corporation v. Township of Bernards Sewerage Authority, the New Jersey Supreme Court stated that “as between the utility and the developer, the developer may be required to provide initial financing for the (sewerage) laterals to cover the risk that the development will fail or not bear its proper share of the costs.” However, if the development fails and is not constructed, it appears that there may be a need to refund the money that the developer has paid to the government for facility expansion. One reason might rest on the fact that the need for new facilities has disappeared, since the proposed development is never built. In Wright Development v. City of Mountain View a

262. 329 So.2d 314.
263. 484 P.2d 606.
265. Id. at 747.
266. 53 Cal. App.3d 344, 125 Cal. Rptr. 721 (1975). See also 484 P.2d 606.
fee was collected in exchange for the right to develop a group of condominiums. In California a state law provided that new residential unit developments shall be required to dedicate land, pay impact fees in lieu of dedication or dedicate land in part and pay fees in part for park or recreational development as a condition to approval of the development. The development was never constructed in this case, and the developer sued to obtain a refund. The California Appellate Court ordered the funds returned.

The order was apparently based on the idea that a need for new public facilities was never created. Thus, no impact assessment was necessary. The author believes that, if the developer had donated land rather than paid the fee, the Court probably would have ordered it returned on the lack of need argument. At the very least the governmental entity would have been required to pay a fair market value for the land. The unanswered question that has not been addressed by the courts involves the situation in which the fee is paid and the development virtually completed when a failure occurs. Conversely, the local governmental entity might assess the fee and enter into financial public facility construction commitments that would have to be honored. What happens, if the development fails? Will the courts force the fees to be returned? A close look at the Bernards Sewerage Authority case above might indicate otherwise, because of the requirement that the developer must provide impact funds prior to public facility construction "to cover the risk that the development will fail...".

3. FEES COLLECTED UNDER A TECHNICALLY DEFICIENT ORDINANCE

During the period between 1972 and 1974, the City of Dunedin, Florida operated under an impact fee ordinance that permitted the City to collect funds from its developers for the City's water and sewer facilities. When it became apparent that this ordinance would not survive the scrutiny of Florida's courts, the City enacted a revised impact fee ordinance. CAL. GOVT. CODE § 66477 (West, 1977). The code section indicates that the amount and location of land to be dedicated or fees paid shall bear a reasonable relationship to facility use by future residents of the proposed development. Note the use of the term "reasonable relationship" which was used by the California Supreme Court in both Ayres, supra note 93, and Frisco Land, supra note 95.

268. 125 Cal. Rptr. 723.
269. See note 265 supra.
ordinance in 1974. It provided that impact fees collected from developers could only be used to expand the City's water and sewer system. Trust funds were established as a method of effecting this concept. In its landmark decision, the Florida Supreme Court approved the basic concept enacted in 1972 by the City. However, the Court held the ordinance covering the period between 1972 and 1974 to be technically deficient because of its failure to properly restrict the impact fee funds collected for public facility expansion. The Court remanded the case to the trial court to determine the question of refunds due the various contractors who paid impact fees under the technically deficient ordinance. While the remanded case was pending, the City enacted another new ordinance mandating that the funds collected during the period between 1972 and 1974 would be utilized under the methodology delineated in the 1974 ordinance. Citing Forbes Pioneer Boat Line v. Board of Commissioners, the trial court ruled that the funds collected between 1972 and 1974 had to be returned to the developers. The Forbes case involved a Florida drainage district's efforts to collect tolls from anyone using a canal lock controlled by the district. The Florida Legislature realized that there was no authority for this action, and consequently, the Legislature passed a law ratifying the toll system. In the Forbes decision, the U.S. Supreme Court held that the ratification of an act is void, if the ratifying authority had no power to do the act in the first place. Since the drainage district was without authority to collect tolls the ratification was plainly impossible.

Florida's Second District Court of Appeal distinguished the Forbes case and reversed the trial court ruling by noting that Dunedin had authority to collect the fees during the 1972-1974 period. The City erred in effecting an impact fee in an operation aspect. The Court substantiated its view by citing the Florida Supreme Court version of

271. Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976).
272. Id. at 322.
273. See 358 So.2d 846 and Florida Ordinance 76-16 (1976).
274. 258 U.S. 338, 66 L.Ed. 647, 42 S. Ct. 325 (1921).
276. Id.
277. Id.
the Dunedin impact fee case. In that case Justice Hatchett noted: "... Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on the use of revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected ..."278 The distinguishing point therefore was the passage of an ordinance that restricted the funds retroactively based on the collection and utilization methods specified by the Court. Since Dunedin has passed a restrictive ordinance retroactively restricting past collections, the Appellate Court permitted the City to keep its earlier illegally obtained fees.

Finally, what happens, if the requisite authority is not found to exist? Apparently, the fees would have to be returned on somewhat the same type of idea as expressed in Wright Development.279 However, for litigation of this nature to wind its way through the courts could take years during which time a developer might sell the land on which the fees have been paid. If the property has been deeded to a new landowner, should the fee be returned to the developer who paid the fee or the new owner of the land on which the fee was paid? It appears that this question was answered some years ago in Perlmutter's, Inc. v. Ancell.280 In that case a school impact fee was found to be unconstitutional. Perlmutter's, Inc. had paid a fee of $125 per dwelling unit on each of 120 units under protest. All of the units had been deeded to new residents. Their warranty deeds made no mention of the grantees of the owners succeeding to any rights in the fees upon a court ordered reimbursement.281 The Court determined that the refund should be made to the developer/grantor.

4. EXISTING STRUCTURES AND LANDOWNERS

It seems likely that a subdivision might be approved which in-

278. 358 So.2d at 848, citing 329 So.2d at 322.
279. 125 Cal. Rptr. 723.
281. It appears that it would be wise to reference any succession of rights to a reimbursement in the warranty deed. References in a sales contract would be insufficient in most cases due to the doctrine of merger of the sales contract into the warranty deed. See Volunteer Security Co. v. Dowl, 159 Fla. 767, 33 So.2d 150, 151 (1947) and Fraser v. Schoenfeld, 364 So.2d 533, 534 (Fla. 3rd Dist. Ct. App. 1978).
cludes one or two existing structures. Since an impact fee might be assessed at the time that a building permit is issued or a subdivision plat approved, it is conceivable that an argument might be made as to the invalidity of the fee. Since the owners of the existing structures would not be assessed, it could be argued that the Equal Protection Clause of the U.S. Constitution had been violated. This is because different landowners in the same subdivision were both being treated differently while benefiting from the facility expansion. Precisely this same argument was presented in *Ivy Steel and Wire Co., Inc. v. City of Jacksonville.*

The City of Jacksonville enacted an ordinance compelling those users in the downtown area of the city to pay a special sewer system surcharge for water pollution control. The surcharge was made effective only for new users connected to the system after August 24, 1971. A group of taxpayers brought a class action suit seeking invalidation of the charge, as a violation of the Equal Protection Clause. The Court upheld the city ordinance by stating:

> The Equal Protection Clause does not prevent a statute or regulation from having a beginning and thus discriminating between rights of an earlier and later time . . . plaintiffs have not been denied equal protection so long as they are being treated the same as those similarly situated at the same time.283

Thus, it is conceivable that new structures could be assessed and existing structures not assessed without violating the Equal Protection Clause. However, from a policy standpoint, one could argue that all property owners who seek to build on their land be assessed. It would seem apparent that there is a big difference between a small landowner and a large scale developer. Certainly the difference in effect on the community insofar as a need for public facilities is concerned will be great. The developer is the one who causes the major impact on the community. The Equal Protection argument might permit an exemption for those small property owners who wish to build and reside on land they own. It is conceivable that the impact formula might assess those who build on their land for profit but not to reside. The *Wald*

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Corporation case presents judicial authority for distinguishing between the small landowner and the developer.

A critical distinction... must be drawn between the ordinary property owner and the subdivider. Unlike one who merely reserves his property for personal use of sale as a single tract, the subdivider profits from the sale of lots within subdivision. The local government must consider the welfare of the families who will be filling the development.

The Court went on to indicate that it is only reasonable to assess the developer. This seems to leave some leeway to exempt the small property owner from the impact fee, if he intends to reside on the land.

PREDICTION

It appears, based on the track record of the Florida Legislature, that no impact fee enabling act will be passed in the near future. In fact, there has been no interest in even introducing such a piece of legislation within the last few years. However, the Legislature has left statutory authority that appears to be sufficient to allow local governments to enact a fee. Such a fee would be enacted as an extension of the police power or comprehensive planning powers. Also, based on Wald, it appears that a fee which provides a good balance between the desires of developers and local government would be upheld, since Florida is a rational nexus test state.

It is clear that any local governmental entity will not have an "easy road to hoe," because Florida Courts have not been overly receptive to the impact fee concept. However, many of the impact "fees" that have been subjected to the scrutiny of the judiciary have actually been taxes. Thus, the courts have been correct in invalidating these so-called "fees." Local governmental entities that wish to enact an impact "fee" will have to take great care to make certain that the revenues collected are of direct benefit to the individuals paying them.

It also appears that the fees will have to be increased to an amount of assessment far above what has been the rule in Florida. Small collections of impact fees only provide a small supplement to local governmental budgets. These supplements are pitifully insufficient

284. 338 So.2d at 867.
285. Id.
to build the type of expanded facilities that will be needed to serve the tidal wave of new residents coming to Florida. Therefore, local officials will not only have to bite the bullet by opposing the real estate and construction industry, one of Florida's biggest industries, in enacting impact fees, but local officials will have to set the fee assessment formula high enough to collect sufficient revenues to make a meaningful impact on the community.

Dramatic expansions in public facilities will be needed in all areas of Florida from the Panhandle to the Gold Coast as Florida moves into the 80's. In the end, developers, the Legislature, the courts, local officials and the public will have to make the policy decision, as to whether or not the impact fee is the proper vehicle for funding the public facility expansion that must and will be built for new residents.

Paul Gougelman
I.R.C. Section 2518 and the Law of Disclaimers

The Tax Reform Act of 1976\(^1\) introduced code section 2518,\(^2\) which created definitive standards for a disclaimer to be valid for Federal Tax purposes. As a result of its recent passage, lack of interpretive regulations and absence of court interpretation,\(^3\) its application in many areas is unclear; consequently, much uncertainty surrounds the law of disclaimers. In an attempt to show the virtues, uncertainties and shortcomings of section 2518, this article will analyze section 2518 on two different planes: (1) whether it carries out the intent of Congress and (2) whether it can be improved to enhance the use of disclaimers as an estate planning tool (a somewhat idealistic notion).

To discuss section 2518 meaningfully the reader must understand the use of disclaimers as an estate planning tool, the common law of disclaimers and the events which led to the enactment of section 2518. Therefore, the article begins with several sections designed to acquaint the reader with these areas. The remainder of the article is devoted to a discussion of section 2518’s effectiveness and suggestions to enhance its effectiveness.

1. DISCLAIMERS AS AN ESTATE PLANNING TOOL

A disclaimer is the refusal to accept the ownership of property or rights with respect to property.\(^4\) The major importance of disclaimers is the flexibility they provide for estate planning. Disclaimers can be used to correct errors in an estate plan after it would ordinarily be too late

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2. I.R.C. Sec. 2518 (hereinafter referred to as 2518).
3. But see Ingham v. Hubbell, 462 F. Supp. 59 (S.D. Iowa 1978). In Hubbell, the court was asked to decide a class action under the declaratory judgement act. The issue was whether the plaintiff's disclaimer of a portion of a contingent interest was a qualified disclaimer. The case was dismissed for lack of an actual controversy.
(for example after the testator's death), adjust the estate plan to account for changed circumstances, avoid the creditors of a beneficiary and allow post mortem estate planning. The following examples will demonstrate the use of disclaimers as a method of achieving tax savings; assume each of the following disclaimers are qualified.

A disclaimer may be used to save gift tax. A devises Whiteacre to B. B has no need for Whiteacre and would prefer it to pass to his son C. If B accepts Whiteacre and transfers it to C for less than adequate and full consideration in money or money's worth, B has made a taxable gift to C. Whereas, if B disclaims Whiteacre which thereby passes to C, no gift tax will be imposed on B. There is no gift from B to C because B will be treated as never having owned Whiteacre.

A disclaimer may be used to save estate tax. A devises Whiteacre to B who is terminally ill. B would prefer to give Whiteacre to his son C in a manner that will not have any tax ramifications. If B accepts Whiteacre and then dies, Whiteacre will be included in B's gross estate. If B disclaims Whiteacre, which thereby passes to C, there will be no inclusion in B's gross estate, because B will again be treated as never having owned Whiteacre.

A disclaimer may be used to prevent an overfunding or an underfunding of a marital bequest for purposes of achieving the maxi-

5. I.R.C. Sec. 2518 (a); Ways and Means Committee Report at 65.
7. I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65.
8. "(a) General Rule - For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred by such person." I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65.
9. I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65. For purposes of estate-tax, I.R.C. Sec. 2045 says 2518 applies.
10. "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." I.R.C. Sec. 2033; Treas. Reg. Sec. 20.2033-1.
11. Brown v. Rautzahn, 63 F. 2d 914 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933); I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65.
maximum marital deduction. If an amount greater than the maximum marital deduction allowable passes to the surviving spouse, the excess will be taxed in the estate of each spouse. If the surviving spouse disclaims the excess over the maximum marital deduction allowable, the disclaimed property will not be included in the surviving spouse's gross estate. If an amount less than the maximum marital deduction allowable is provided for the surviving spouse, a disclaimer by another can increase the property passing to the spouse and allow use of the full marital deduction. In much the same way, a disclaimer by one heir can be used to increase an estate's charitable deduction. Thus, a disclaimer can be an important post mortem estate planning tool.

A disclaimer will prevent the imposition of a generation skipping tax. A devises to his son B a life estate in Whiteacre with remainder to B's son C. Assuming that the value of the property at B's death is greater than $250,000, a generation skipping tax will be imposed at

12. I.R.C. Secs. 2518(a) and 2056; Ways and Means Committee Report at 65. In the following discussion it is assumed that achieving the maximum marital deduction allowable is desired. For the law prior to 2518 see generally I.R.C. Sec. 2056 (d) and Treas. Reg. Sec. 20.2056(d)-1 (1958).

13. The maximum marital deduction allowable is the greater of $250,000 or 50% of the decedent's adjusted gross estate as defined in I.R.C. Sec. 2056(c)(2), less the I.R.C. Sec. 2056(c)(1)(B) adjustment.

14. It will be included in both estates as an I.R.C. Sec. 2033 inclusion, since the decedent owned the property at death. This property is not subject to the marital deduction since it exceeds the maximum deduction allowable. When the spouse receives the property under the marital bequest, it will be included in the surviving spouse's gross estate under I.R.C. Sec. 2033 when the survivor dies. However, the double taxation may be reduced by I.R.C. Sec. 2013.

15. The issue of partial disclaimers will be discussed later in this article as part of an analysis of the Tax Reform Act of 1976. See text accompanying notes 74-87.

16. I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65. The possibility of a surviving spouse disclaiming an interest in a marital trust and taking a portion of the disclaimed interest under a non marital trust will be discussed later in this article. For purposes of this example assume the property passes to the issue of the surviving spouse.

17. Id.

18. Id. For an excellent discussion and example of disclaimers with respect to charitable deductions, see Newman and Kalter, The Need For Disclaimer Legislation: An Analysis of The Background and Current Law, 28 Tax Law 571, 577 (1975).

19. I.R.C. Sec. 2518(a); Ways and Means Committee Report at 65. See section 2614(c) and S. Rep. No. 94-1236, 94th Cong. 2d Sess. 607 (1976).
that time. If B disclaims his life estate, no generation skipping tax will be imposed because B will be treated as never having owned a life estate in Whiteacre.

A disclaimer may shift the income tax consequences of a trust. A devisees to B, a wealthy individual with a large income, the power to designate who shall be the recipient of an income interest in the trust res (the power excludes designation of the grantor's spouse). B will be taxed on the income of the trust because he has the power, exercisable solely by himself, to vest the income in himself. If B disclaims his power he will not be taxed on the income. Assuming B disclaims and the income is payable to B's son C (an individual with very little income) income tax will be saved as a result of the graduated tax rates.

2. COMMON LAW

It is important to understand the common law history of disclaimers because, prior to the enactment of section 2518, the federal income, estate and gift tax consequences of a disclaimer were dependent upon state law. In this period, many states lacked disclaimer statutes and were dependent upon their own common law. Moreover, the disclaimer statutes that had been enacted lacked sufficient uniformity to provide

21. I.R.C. Sec. 2518(a); *WAYS AND MEANS COMMITTEE REPORT* at 65. I.R.C. Sec. 2614(c) says for the effect of a qualified disclaimer see Sec. 2518.
22. I.R.C. Sec. 2518(a); *WAYS AND MEANS COMMITTEE REPORT* at 65.
23. I.R.C. Sec. 678(a)(1); Treas. Reg. Sec. 1.678(a)-1 (1956).
24. I.R.C. Sec. 2518(c)(2) treats a power with respect to property as an interest in such property. I.R.C. Sec. 2518(a) will treat B as never having the power if he disclaims it. In *Gallagher v. Smith*, 223 F. 2d 218 (10th Cir. 1954), rev'd. 119 F. Supp. 360 (D.C. Pa. 1953) a widow disclaimed a portion of her interest in a trust. The court held she was only taxable on the income of the portion she retained.
26. *ARIZ. REV. STAT. Sec. 14-2801* (1973); *CAL. PROB. CODE Sec. 190.1* (Deering 1972); *COLO. REV. STAT. Sec. 15-11-801* (1963); *CONN. GEN. STAT. Sec. 45-300* (1972); *FLA. STAT. Sec. 732.801* (1977); *HAW. REV. STAT. Sec. 538-1* (repealed 1974 and Uniform Probate Code was adopted 560:2-801); *IDAHO CODE Sec. 15-2-801* (1971) repealed 1973 by ch. 173 Sec. 1 S.L. 1978; *ILL. ANN. STAT. ch. 110 1/2, Sec. 2-7*
a standard law of disclaimers at the federal level.\textsuperscript{27} Therefore, federal courts were frequently using common law rules in deciding controversies involving disclaimers. The next portion of this article will briefly outline the pertinent points of the common law: that is, who may disclaim, what may be disclaimed and when to disclaim.

A beneficiary under a will was permitted to disclaim his interest,\textsuperscript{28} whereas, an heir was not permitted to disclaim an intestate share because it passed by operation of law.\textsuperscript{29} A disclaimed interest in property was treated as if it was never made.\textsuperscript{30} Therefore, a disclaimer became an effective way to avoid the claims of creditors and/or to reduce taxes.\textsuperscript{31}

One issue which arose at common law involved the question of whether a disclaimer of part, but not all, of an interest in property was valid. The courts took varied positions. Some courts would not recog-
nize a partial disclaimer,\textsuperscript{32} while other courts would recognize a partial disclaimer if the gift was severable.\textsuperscript{33} No court, however, permitted a partial disclaimer of a nonseverable gift absent a statute.\textsuperscript{34} Even before section 2518 was enacted, many states changed the common law by statutes which allowed the partial disclaimer of an interest in property.\textsuperscript{35}

At common law, the right to disclaim was not personal to the devisee unless the testator evidenced a contrary intent.\textsuperscript{36} This meant that the representatives of a deceased devisee could disclaim in the name of the devisee.\textsuperscript{37} The power of a representative to disclaim is a significant estate planning tool and will be discussed in more detail later in the article.

To be effective, a disclaimer must have been made within a reasonable time.\textsuperscript{38} On its face, this requirement seemed logical and understandable; however, the reasonable time requirement became an unworkable standard for determining the federal tax consequences of a disclaimer.\textsuperscript{39} The primary problem in using such a standard was the fact that it had to be applied on a case by case basis.\textsuperscript{40} Prior to the

\begin{enumerate}
\item[A32.] For a collection of cases illustrating this point, see \textit{Page on Wills} 51, n. 1 (sec. 49.10).
\item[A33.] \textit{Id.} at 52, n. 4 (Sec. 49.10).
\item[A34.] \textit{Id.} at 51, n. 3 (Sec. 49.10).
\item[A35.] See note 27 supra.
\item[A36.] For a collection of cases illustrating this point, see \textit{Page on Wills} 42, n. 1 (Sec. 49.5).
\item[A38.] For a collection of cases illustrating this point, see \textit{Page on Wills} 46, 46-47 nn. 5-9 (sec. 49.8). There was both a common law requirement of reasonable time and a federal law requirement of reasonable time. However, in many cases they were treated as a single standard. See Keniath v. Comm'\textquoteright r, 480 F. 2d at 61; Estate of Rolin v. Comm'\textquoteright r, 68 T.C. at 927; Estate of Dreyer v. Comm'\textquoteright r, 68 T.C. at 291; \textit{Contra}, Jewett v. Comm'\textquoteright r, 70 T.C. at 436.
\item[A39.] \textit{Ways and Means Committee Report} at 66-67. Notes 39-50, infra., illustrate many of the difficulties in determining whether a disclaimer was made within a reasonable time.
\item[A40.] See Estate of Dreyer v. Comm'\textquoteright r, 68 T.C. 275 (1977). Therein the court held: "What is the reasonable time varies with the circumstances of each case. The time may be very long if injury to others will not result." \textit{Id.} at 293.
\end{enumerate}
enactment of section 2518, it was nearly impossible to decide with certainty whether a disclaimer was made within a reasonable time. This uncertainty was displayed in *Brown v. Routzahn*41 and the many cases that followed. In *Brown*, the plaintiff (Brown) disclaimed an interest in the property of his deceased wife eight years after her death but prior to settlement and distribution of her estate. The circuit court held that the disclaimer was effective for federal tax purposes because Ohio law did not require a donee to accept or reject a gift within a specified time; therefore, a rejection made prior to distribution was held valid. *Brown* is the first case to recognize that a disclaimer is not a transfer for tax purposes. After *Brown*, regulations were added requiring that disclaimers be made within a reasonable time period after receiving knowledge of the existence of the transfer.42

In *Estate of Rolin v. Commissioner*,43 the decedent created a revocable trust on April 28, 1958. He died on September 30, 1968, and his spouse, the beneficiary of an interest in the trust, died on January 31, 1969. The executors of the deceased spouse disclaimed her interest eleven years after its creation, but within eight months of its becoming indefeasibly fixed. The timeliness of the disclaimer was at issue. The court held that a reasonable time commences when the interest is indefeasibly fixed both in quality and quantity which, in this case, occurred at Mr. Rolin’s death. Thus eight months was held to be a reasonable time.44

In *Kenaith v. Commissioner*,45 the disclaimant had a vested remainder subject to devestiture. The disclaimer was made nineteen years after the creation of the interest but only six months after the death of the life beneficiary. The court was faced with the difficult question of determining when the period of reasonable time commences. The Tax Court46 held that a reasonable time should be inter-

41. 63 F. 2d 914 (6th Cir. 1933).
43. 68 T.C. 919 (1977).
44. *Id.* at 927. Accord, *In re Estate of Mixter*, 372 N.Y.S. 2d 296, 83 Misc. 2d 290 (N.Y. County Sur. Ct. 1975). In Rolin, the court was dealing with the disclaimer of a general power of appointment. *See* Treas. Reg. Sec. 20.2041-3(d)(6) (1958), which requires the disclaimer of a general power of appointment to be valid under local law and to be made within a reasonable time after learning of its existence.
45. 480 F. 2d 57 (8th Cir. 1973).
46. 58 T.C. 352 (1972).
a federal standard;

nineteen years was held not to be a reasonable time. The Eighth Circuit reversed the tax court saying:

In determining 'reasonable time' and the related issue of when the reasonable time commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase 'reasonable time' as used in the context of making valid disclaimers.

After examining many authorities the court concluded that, when a vested interest subject to divestiture is involved, the reasonable time period commences after the death of the life beneficiary; not at the time the interest was created. The result in Keniath was that a disclaimer made nineteen years after the creation of the interest, but six months after the death of the life beneficiary, was within a reasonable time. At that point, it became clear that allowing local law to dictate what a "reasonable time" is presented an inadequate method of determining the federal tax consequences of a disclaimer.

47. The Tax Court relied on Fuller v. Comm'r, 37 T.C. 147 (1961) which held a disclaimer 25 years after the creation of the interest was not within a reasonable time. These tax court decisions create a federal standard, which measures a reasonable time from the creation of the interest whether the interest is a present interest or a future interest, and whether it is vested or contingent.

48. 480 F. 2d at 61.

49. We hold that under the prevailing common law and in particular, the jurisdiction of the state of Minnesota the holder of a vested remainder subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life beneficiary and that an unequivocal disclaimer filed with six months thereof is made within a reasonable time.

*Id.* at 64. Contra, Jewett v. Comm'r, 70 T.C. 430 (1978). In Jewett the court disagreed with Keniath and held that state law does not necessarily provide an adequate guide to the resolution of the federal tax question presented. The court measured the time from the creation of the interest, rather than from the time the interest became indefeasibly fixed, and concluded 33 years was not reasonable. The court relied on Keniath v. Comm'r, 58 T.C. 352 (1972); Estate of Hoenig v. Comm'r, 66 T.C. 471 (1976); Fuller v. Comm'r, 37 T.C. 147 (1961); Treas. Reg. Sec. 25.2511-1 (c) (1958). See also, Estate of Halbach v. Comm'r, 71 T.C. 141 (1978).
3. THE ADVENT OF 2518

As a result of the confusion and uncertainty surrounding the law of disclaimers in the years following the Eighth Circuit’s decision in 
Keniath, considerable discussion of ways to clarify the law surfaced. It was suggested that the law of disclaimers be federalized and specific disclaimer requirements be imposed. The widespread dissatisfaction with the pre 1977 state of the law brought about the enactment of section 2518.

A disclaimer of an interest in property created after 1976 will be effective for federal tax purposes only if it is a qualified disclaimer, which is defined as:

[A]n irrevocable and unqualified refusal by a person to accept an interest in property but only if-

1. such refusal is in writing,
2. such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of-
   (A) the day on which the transfer creating the interest in such a person is made, or
   (B) the day on which such person attains age 21,
3. such person has not accepted the interest or any of its benefits, and
4. as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either-
   (A) to the spouse of the decedent, or
   (B) to a person other than the person making the disclaimer.

If the recipient of an interest in property makes a qualified disclaimer,

51. Id. Ways and Means Committee Report at 66.
52. Id. The dissatisfaction stemmed from the fact that prior to 2518 disclaimers were handled under many different code sections and in many different regulations and were dependent upon local law. See Treas. Regs. Secs. 25.2511-1(c), 20.2041-3(d)(6), 20.2056(d)-1(a) (1958).
53. I.R.C. Sec. 2518(b).
the property will be considered as having never been transferred to such person. 54

The intent of Congress in enacting section 2518 was the creation of a federal standard for disclaimers, thus ending reliance upon state law in determining the federal tax consequences of a disclaimer. 55 Therefore, it was hoped that section 2518 would create a safe harbor. However, section 2518 (b) (4) (A) and (B) requires that the interest must pass to a person other than the disclaimant or the spouse of the decedent 56 (the decedent being the testamentary transferor). The absence of a federal rule or regulation determining who will receive the disclaimed property 57 prevents section 2518 from acting as a safe harbor, for the courts are now forced to look to local law in making this determination. Consequently, if local law does not recognize the disclaimer, section 2518 (b) (4) cannot be satisfied. This can be illustrated by the following example. In state X an intestate share could not be disclaimed. B, an heir of A, satisfying all the requirements of section 2518 (except b(4) because the disclaimer was not recognized under state law) disclaimed his intestate share. If section 2518 is to act as a safe harbor, B's disclaimer should be a qualified disclaimer. It would appear B's disclaimer is not, because the property, as a result of the disclaimer not being effective under state law, did not pass to someone other than the disclaimant. Therefore, the only way to be certain a

54. I.R.C. Sec. 2518(a).

55. "If the requirements of the provision are satisfied, a refusal to accept property is to be given an effect for federal estate and gift tax purposes even if the local law does not technically characterize the refusal as a disclaimer." Ways and Means Committee Report at 67. For a critical analysis of 2518 see Frimmer, Using Disclaimers in Post Mortem Estate Planning: 1976 Law Leaves Unresolved Issues, 48 J. of Tax. 322 (1978).

56. I.R.C. Sec. 2518(b)(4). A peculiar result is reached when a power is disclaimed. Section 2518(c)(2) treats a power with respect to property as an interest in such property. Equating the power with an interest seems to indicate that powers may be disclaimed. A problem is encountered when we apply 2518(b)(4) to the disclaimer of a power. As a result of the disclaimer, the power is generally dissolved and consequently does not pass to a person other than the disclaimant. It would appear that section 2518(b)(4) was not intended to be literally applied to disclaimers of powers. See Frimmer, 48 J. of Tax 322 (1978).

57. There are no federal rules or regulations which deal with who the recipient of the property will be after the property has been disclaimed. Therefore, local law must be consulted.
disclaimer will be a qualified disclaimer is to satisfy both state and federal requirements.\textsuperscript{58} To rectify section 2518's apparent reliance upon state law and, in turn, to fulfill the intent of Congress, section 2518 should be amended to read: As a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer as if the disclaimant predeceased the transferor.\textsuperscript{60} Although the proposed amendment would be reliant upon state law to determine the taker, it would not be dependent upon the state's recognition of the disclaimer.

The most significant change brought about by section 2518 was the establishment of a definitive time in which to disclaim.\textsuperscript{60} Section 2518 changes the common law requirement (that a disclaimer be made within a reasonable time) to a nine month period, adding much needed certainty to the law of disclaimers. The only remaining question concerns the determination of when this nine month period commences. The Conference Report\textsuperscript{61} states the nine month period commences with reference to each taxable transfer.\textsuperscript{62} Therefore, the disclaimant has nine months after the taxable transfer in which to disclaim.

If the transfer is considered made when it is treated as a completed transfer for gift tax purposes,\textsuperscript{63} with respect to inter vivos transfers, or upon the decedent's death, with respect to testamentary transfers, the use of disclaimers will be seriously impaired. The above

\textsuperscript{58} The above example assumes that an intestate share can be disclaimed under Sec. 2518. This issue is discussed later in this article. In many cases, satisfying both state and federal law will not create a hardship; however, in other cases, due to an unreasonably strict state statute, it may prevent a disclaimer from being qualified only because of the state law which governs.

\textsuperscript{59} See 49 NOTRE DAME LAW 839. The Uniform Probate Code also treats the disclaimant as predeceasing the transferor. See Uniform Probate Code Sec. 2-801(c). The mechanics of such a standard would entail the conveyance, by the disclaimant, to the person who would receive the property as a result of the disclaimant being treated as predeceasing the transferor. This would divest the disclaimant of title under state law and vest title in the one who was treated as receiving it for tax purposes.

\textsuperscript{60} I.R.C. Sec. 2518(b)(2).


\textsuperscript{62} "The conferees intend to make it clear that the 9-month period for making a disclaimer is to be determined in reference to each taxable transfer." Id. at 623.

\textsuperscript{63} A gift is complete for gift tax purposes when the transferor has relinquished dominion and control over the property. Treas. Reg. Sec. 25.2511-2(b) (1958).
definition of transfer will make the disclaimer of certain interests in property almost impossible. One such interest in property is created by the exercise of a special power of appointment. Where a donee is given a special power the gift (or devise) is a taxable transfer; the donee has nine months from that date in which to disclaim for it to be considered "qualified". If the donee chooses not to disclaim and subsequently exercises the power, the appointee's disclaimer, for it to be qualified, must be made within nine months of the transfer of the power to the donee. The nine months do not begin when the power is exercised since the exercise of a special power is not a taxable transfer; consequently, the transfer creating the appointee's interest is the transfer of the power to the donee. In many cases, the donee of the power may refrain from exercising it for a period in excess of nine months. In such cases, the appointee will be precluded from making a qualified disclaimer insofar as he is unaware of his interest until it is too late.

In addition to making the qualified disclaimer of some interests impossible, Congress' definition of transfer - taxable transfer - would allow some "qualified" disclaimers to be made many years after the interest was created. If we assume that a special power of appointment can reach the hands of the holder of the power without the occurrence of a taxable transfer (which can easily happen where the holder acquired it for full and adequate consideration in money or money's worth, for example, section 2516), when will the nine month period begin for the appointee under the special power? This question can best be answered in the negative. We know it does not begin when the holder acquired the power since that was not a "transfer". We know it

64. The exercise of a special power of appointment is not a transfer (completed transfer for gift tax purposes). See I.R.C. Sec. 2514, and Self v. United States, 142 F. Supp. 939 (Cl. Ct. 1956). The death of B with a special power of appointment is not a taxable transfer. See I.R.C. Sec. 2041; Clauseon v. Vaughan, 147 F. 2d 84 (1st Cir. 1945); Janes v. Reynolds, 57 F. Supp. 609 (D. Minn. 1944). The reason the exercise of a special power of appointment is not a transfer is because powers of appointment are not interests in property. The following cases, although prior to I.R.C. Sec. 2041, are useful to demonstrate that a power of appointment (general or special) is not an interest in property. Helvering v. Safe Deposit & Trust Co., 316 U.S. 56 (1942), rev'd. 121 F. 2d 307, aff'd. 42 BTA 145; United States v Field, 255 U.S. 257 (1921). The exercise of a general power of appointment is a transfer because of I.R.C. Sec. 2514 and a general power of appointment is included in a decedent's gross estate because of I.R.C. Sec. 2041 (not I.R.C. Sec. 2033).
does not begin when the power was exercised since the exercise of a special power is not a "transfer". Insofar as no other events occurred, we must conclude that the period never commenced; basic logic tells us that a period which never commenced can never end. Therefore, in certain situations, the appointee can disclaim many years later (assuming he has not accepted the interest or its benefits) and have it qualify.

The result in the above discussion would be vastly different if the donee is given a general power as opposed to a special power. Since the exercise of a general power is a taxable transfer,65 the appointee will have nine months from the exercise of the power in which to disclaim. Thus, an appointee under a general power will always have nine months to disclaim;66 whereas, the appointee under a special power (especially if it is a testamentary power) will rarely have such an opportunity.

The obvious question that arises regarding the commencement of the nine month period, is whether a disclaimer of property passing by the exercise of a special power should be treated differently than a disclaimer of property passing by the exercise of a general power. If we focus upon the disclaimant's right to disclaim, there is no justification for such a distinction. The appointees under both a general and a special power are similarly situated: they have no way of knowing if they will be appointed, when they will be appointed or what they will receive if appointed. In each case, their ownership arises as a result of the exercise of the power. Therefore, it is of little concern to the appointee

65. See I.R.C. Secs. 2514 and 2041. See also Treas. Reg. Sec. 25.2514-1(a)(1) (1958). Section 2514 treats the exercise (or lapse) of a general power of appointment as a gift. Section 2041 includes in the decedents gross estate property subject to a general power of appointment. Note there is no code section which treats the exercise or lapse of a special power of appointment as a gift. Similarly, there is no code section which causes the property subject to a special power of appointment to be included in the holder's gross estate unless the exercise of the special power is used to create another power.

66. CONFERENCE REPORT ACCOMPANYING HR. 14844 H.R. REP No. 94-1515, 94th Cong., 2d Sess. 623-24 (1976). The report gives the following example:
[1]In the case of a general power of appointment where the other requirements are satisfied, the person who would be the holder of the general power will have a nine month period after the creation of the power in which to disclaim. The person to whom the property would pass by reason of the exercise or lapse of the power would have a nine month period after a taxable exercise, etc., by the holder of the power in which to disclaim.
what type of power the holder exercised.

The sole distinction between a general and a special power is with respect to the federal taxation of the holder of the power. The holder of a general power is taxed upon its exercise; the holder of a special power is not.67 The imposition of a transfer tax upon the holder of the power is an inadequate basis to justify disallowing the disclaimer by an appointee under a special power (if made within nine months of the exercise of the power), since the tax is unrelated to the rights of the appointee. Therefore, it is unreasonable to require the disclaimer, by an appointee under a special power, be made within nine months of the transfer creating the power (which may be prior to the exercise of the power), when an appointee under a general power is permitted to disclaim nine months after the exercise of the power. To remedy this unwarranted distinction, as well as to cure the situation where no transfer occurs, section 2518 should be amended or regulations promulgated defining transfer in a manner which treats the appointee under a general and a special power similarly in all cases. Florida Statutes Section 732.801 provides an excellent example of when an interest must be disclaimed to assure that the recipient of any interest in property has a fair opportunity to disclaim:

(5) Time for filing disclaimer—A disclaimer shall be filed at any time after the creation of the interest, but in any event within 9 months after the event giving rise to the right to disclaim, including the death of the decedent; or, if the disclaimant is not finally ascertained as a beneficiary of his interest has not become indefeasibly fixed both in quality and quantity at the death of the decedent, then the disclaimer shall be recorded not later than 6 months after the event that would cause him to become finally ascertained and his interest to become indefeasibly fixed both in quality and quantity.68

The requirement that the disclaimant not accept any interest in the disclaimed property provides an adequate safeguard to prevent any abuse that may arise as a result of allowing additional interests to be disclaimed.

Many of the difficult questions raised by Keniath and Dreyer are answered by section 2518, the most important of which is that contin-

gent interests and vested interests subject to divestiture must be dis-
claimed within nine months of the transfer creating the interest. 69 How-
ever, section 2518 leaves many unanswered questions. It is not clear if
the right to disclaim is personal to the disclaimant or may be exerciced
by his representatives after his death. The power of a representative to
disclaim in the name of the decedent can be very significant where the
recipient of an interest in property dies before he becomes aware of
such interest or before he has accepted the property or its benefits. If a
representative is permitted to disclaim, the property will not be taxed
in the decedent's gross estate. 70 If a representative is not permitted
to disclaim, the property will be taxed both when it is tranferred to the
decedent (gift or estate tax) and also upon the decedent's death. 71 Thus,
to enhance the use of disclaimers as an estate planning tool, regulations
should be issued which make it clear that the right to disclaim is not
personal. In the absence of such regulations, it would appear that the
right to disclaim is not personal since section 2518 does not address
this question, and furthermore, common law permitted it.

Another unresolved question is whether section 2518 changes the
common law by allowing the disclaimer of an intestate share. It would
appear that if section 2518 (a) is taken literally— "... disclaimer with
respect to any interest in property ..." - a disclaimer of an intestate
share would be allowed. However, the congressional intent was to fed-
eralize the law of disclaimers, not to expand the common law; hope-
fully, regulations will be issued clarifying this point.

Similarly, it is unclear whether the disclaimer of an interest in
jointly held property will be effective for federal tax purposes. If the
right of each joint tenant vests at the creation of the tenancy (which is
a question of local law), a jointly held interest in property may not be
disclaimed for federal tax purposes, even if it is a valid disclaimer
under local law, since the disclaimant has accepted the interest in prop-
erty or its benefits. 72

69. I.R.C. Sec. 2518(b)(2).
70. See I.R.C. Secs. 2033 and 2518(a).
71. For cases in which representatives of a decedent were permitted to disclaim
the decedent's interest in property; see Estate of Rolin v. Comm'r, 68 T.C. 919; Estate
of Dreyer v. Comm'r, 68 T.C. 275; Perkins v. Phinney, 7 AFTR 2d 1752; Estate of
Hoenig v. Comm'r, 66 T.C. 471; Contra, Uniform Probate Code Sec. 2-801(a). How-
ever, the double taxation may be reduced by I.R.C. Sec. 2013.
72. I.R.C. Sec. 2518(b)(3). See Ltr. Rul. 7911005. In the ruling, the service said
Section 2518 changes the common law by allowing the partial disclaimer of certain interests in property. There is a conflict between section 2518 (a) and section 2518 (c) (1) as to what may be partially disclaimed. Section 2518 (a) appears to permit the partial disclaimer of any interest in property; whereas, section 2518 (c) (1) only allows the disclaimer of "an undivided portion of an interest". Consequently, it is uncertain what interests may be partially disclaimed. 73 However, it appears that the congressional intent was only to allow the partial disclaimer of an undivided portion of an interest. 74

The meaning of "an undivided portion of an interest" is unclear. 75 Consequently, a devisee is faced with the dilemma of whether the disclaimer of any of the following interests will be a qualified disclaimer: a fractional interest in property (an undivided one half interest), a portion of a devise ($25,000 of a $50,000 devise or five acres of a ten acre tract) or a carve out of an interest (a life estate or a remainder from a fee). It is disturbing that Congress used the term without any further elaboration. 76 This term, however, has been used in other code sections 77 and interpreted in the regulations. 78 It has been interpreted as: "A person owns an 'undivided interest' in all substantial rights to a pat-

that if a joint tenant is vested with an undivided interest in the property at the creation of the joint tenancy (a matter of local law), the disclaimant has accepted an interest in the property or its benefits and the disclaimer will not be effective. This ruling, however, is based on law existing prior to section 2518's effective date. The conclusion reached seems to apply to section 2518 as well, insofar as both section 2518 and the prior law have the same requirement that the disclaimer must be made prior to acceptance. See also Krakoff v. United States, 313 F. Supp. 1089 (S.D. Ohio 1970); Bishop v. United States, 338 F. Supp. 1336 (N.D. Miss. 1970), for the nonacceptance requirement which presumably remains unchanged by section 2518. In Letter Ruling 7922018, the service ruled that a widow, who was the sole beneficiary and executrix under decedent's will, did not accept its benefits where she segregated decedent's property and income from it and admitted the will to probate for the sole purpose of her qualification as independent executrix.

73. See I.R.C. Sec. 2518(c)(1); Frimmer, 48 J. OF TAX. 322.
74. The Ways and Means Committee Report at 67 says: "Under the bill, a disclaimer with respect to an undivided portion of an interest is to be treated as a qualified disclaimer of the portion of the interest if the requirements are satisfied as to the undivided portion of an interest."
76. Id.
ent when he owns the same fractional share of each and every substantial right to the patent. The above interpretation of an undivided interest clearly allows partial disclaimers when a fractional interest is involved.

Another and more expansive meaning given to an undivided portion of an interest is illustrated by an example in the regulations where a taxpayer owns 100 acres of land and makes a contribution of 50 acres to a charity. Based on this contribution, the regulations conclude that the donor contributed an undivided portion of his entire interest and a deduction would be allowed. If we apply the service's interpretation of an “undivided portion of an entire interest” (as used in the above regulation interpreting section 170(f)(3)(B)(ii)) to section 2518, we find that the service should, and in all likelihood will, recognize that there is little difference for federal tax purposes between a fractional disclaimer (one half undivided interest) and a disclaimer of a portion of a devise (five acres of a ten acre tract or $25,000 of a $50,000 devise). Consequently, they both will be considered disclaimers of an undivided portion of an interest. If the service rejects the application of the above regulation (which is highly unlikely) as an interpretation of section 2518(c)(1), and attempts to narrowly define “undivided portion of an interest,” the use of disclaimers to prevent the overfunding of a marital bequest will be seriously impaired.

No interpretation of an undivided portion of an interest has ever encompassed the “carve out” of an interest. The carve out type of disclaimer can be distinguished from the other types of disclaimers previously discussed because of its effect on the disclaimant’s estate. If a

82. Both types of disclaimers are similar insofar as the disclaimed property will be excluded from the disclaimant’s gross estate (I.R.C. Sec. 2033) and the retained property will be included (I.R.C. Sec. 2033). The following example demonstrates their similarities. A is devised Whiteacre, a ten acre tract of land. If A disclaims an undivided one half interest, the disclaimed property will not be included in his gross estate at his death; the undivided one half he retained will be included in his gross estate. If A disclaims five of the ten acres, the disclaimed five acres will not be included in his gross estate at his death; the five acres he retained will be included in his gross estate.
83. See the text accompanying notes 13-18 supra.
remainder is disclaimed from a fee, all the property (not just that which is disclaimed) will be excluded from the disclaimant's gross estate, since the retained interest is nondescendable. Conversely, where a fractional disclaimer or a disclaimer of a portion of a devise is made, only the disclaimed property will be excluded from the disclaimant's gross estate, because the retained interest is descendable. The foregoing distinction indicates a possible justification for Congress' use of the term undivided portion of an interest as opposed to some other term i.e. to prevent the carve out of an interest from being a qualified disclaimer. Therefore, it would appear, although it is still uncertain, that such a disclaimer cannot be a qualified disclaimer. In the interest of clarity, regulations should be promulgated which specifically define the interests that may be partially disclaimed. Florida Statutes Section 732.801 provides an excellent delineation of those interests that may be partially disclaimed:

(d) An 'interest in property' that may be disclaimed shall include:
1. The whole of any property, real or personal, legal or equitable, present or future interest, or any fractional part, share or portion of property or specific assets thereof.
2. Any estate in the property.
3. Any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to it.

The most important and possibly the most interesting issue raised by section 2518 is the federal tax consequences of a disclaimer which is valid under state law but is not a qualified disclaimer as defined by section 2518. It should be noted that state law, in certain situations, may be used as a basis for imposing a federal tax and/or to define...

84. I.R.C. Sec. 2033. In Ltr. Rul. 7922018, a widow disclaimed the remainder of a fee. The widow asked for a ruling as to whether such a disclaimer could be a qualified disclaimer. The service declined to rule on this question since the I.R.S. does not rule on issues that cannot be reasonably resolved before the issuance of regulations. An interesting question raised is whether the disclaimer of a remainder of a fee will cause inclusion under I.R.C. Sec. 2036. It seems clear that it may cause a transfer, not ordinarily a generation skipping transfer, to become one.
85. I.R.C. Sec. 2033.
87. See, e.g., I.R.C. Sec. 2053(a) where the amount of the deductions allowed are "... allowable by the laws of the jurisdiction, whether within or without the
one's rights or interests with respect to property for purposes of applying a federal tax.\textsuperscript{88} In this discussion, we will focus on the former. Consider the following situation: B dies intestate with A his only heir; A orally disclaims his entire intestate share. With regard to this example, state law allows oral disclaimers; whereas, it is not a qualified disclaimer under section 2518. What is the federal tax effect of A's disclaimer? There are only two possible ways to answer this question (neither of which is entirely satisfactory): (1) to give conclusive effect to state law or (2) to give conclusive effect to federal law. If state law is conclusive, the effectiveness of section 2518 will be thwarted since the purpose of section 2518 was to eliminate the dependence upon state law in determining the federal tax consequences of a disclaimer.\textsuperscript{89} If federal law is conclusive, A will be taxed on the transfer of property he never owned; A never owned the property because state law determines the ownership of property and rights with respect to property.\textsuperscript{90}

The beginning point to the solution of this question is \textit{Burnet v. Harmel}.\textsuperscript{91} In \textit{Harmel}, the respondent, the owner of Texas oil lands, executed oil and gas leases of the lands. On his income tax return, he treated the gain from the leases as capital gain because the law of Texas considered an oil and gas lease a sale. The commissioner argued that regardless of its characterization under state law, the lease was not a sale; therefore, the higher tax rate applicable to ordinary gain applied. Holding that federal law controls the federal tax consequences of the lease, the court set forth the relationship between state and federal law saying

\begin{quote}
United States, under which the estate is being administered\textsuperscript{a}.
\end{quote}

\textsuperscript{88.} See the cases cited in note 91 infra. In these situations, state law is only used for the purpose of determining whether the federal law has been satisfied. The distinction between the uses of state law can be shown by using section 2518; the first use is where a state disclaimer statute conflicts with a federal law (2518), and the second is where section 2518 requires the determination under state law as to where the property passes as a result of the disclaimer.

\textsuperscript{89.} See \textit{WAYS AND MEANS COMMITTEE REPORT} at 67.


\textsuperscript{91.} 287 U.S. 103 (1932).
Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution to tax income. The exertion of that power is not subject to State control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation . . . State law may control only when the operation of the Federal taxing act, by express language or necessary implication, makes its operation dependent upon State law.92

The Supreme Court reiterated this point in Morgan v. Commissioner.93 In Morgan, state law characterized a power of appointment as a special power; the service argued it was a general power. The court held that, notwithstanding its characterization under state law, the power was general within the meaning of the revenue act.94

The holdings of Harmel and Morgan can be summarized into the following rules:

92. Id. at 110. The Supreme Court went on to apply the law to the facts of the case, saying:

But section 208 neither says nor implies that the determination of 'gain from the sale or exchange of capital assets' is to be controlled by state law. For purposes of applying this section to the particular payments now under consideration, the act of Congress has its own criteria, irrespective of any particular characterization of the payments under local law [citation omitted]. The state law creates legal interests, but the federal statute determines when and how they should be taxed.

But see United States v. White, 311 F. 2d 399 (10th Cir. 1962) and the service's disagreement and nonacquiescence in Rev. Rul. 63-120 1963-1 C.B. 141.

93. 309 U.S. 78 (1940).

94. State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Out duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by the state law.

Id. at 80-81. Many later cases have applied the rules enunciated in Morgan and Harmel to varied situations. See, United States v. Mitchell, 403 U.S. 190 (1971) (liability of spouse for income tax in community property state); Maytag v. United States, 493 F. 2d 995 (10th Cir. 1974) (whether a power of appointment was general or special); Kean v. Comm'r, 469 F. 2d 1183 (9th Cir. 1972) (shareholder's status for subchapter S election); Estate of Miller v. Comm'r, 58 T.C. 699 (1972) (income earned by estate during administration).
(1) If federal law does not expressly or impliedly depend upon the characterization of an interest in property or a transaction under state law, its characterization under state law is not controlling for federal tax purposes.

(2) If federal law does expressly or impliedly depend upon the characterization of an interest in property or a transaction under state law, its characterization under state law is controlling for federal tax purposes.

Depending upon which rule is applicable, state disclaimer statutes may or may not control the federal tax consequences of a disclaimer. In *Doll v. Commissioner*, the court set forth several tests which have been used to determine whether Congress intended state law to control. They are: (1) whether the purposes of the taxing act would be avoided or defeated by applying state law, (2) whether the language or necessary implication of the revenue statutory provision so requires, and (3) whether through such application a uniform nationwide scheme of taxation would be thwarted. If we apply these tests to section 2518, we find that Congress did not expressly or impliedly intend for state disclaimer statutes to control. Therefore, regardless of whether a dis-

95. 149 F. 2d 239 (8th Cir.) *cert. denied*, 326 U.S. 725 (1945).
96. *Id.* at 242. The tests have been developed through case law. See *Estate of Putman v. Comm'r*, 324 U.S. 393 (1945); *Rogers v. Helvering*, 320 U.S. 410 (1943); *Helvering v. Stuart*, 317 U.S. 151, 161 (1942); *United States v. Pelzer*, 312 U.S. 399, 402 (1941); *Helvering v. Horst*, 311 U.S. 112 (1940); *Estate of Sanford v. Comm'r*, 308 U.S. 39 (1939); *Thomas v. Perkins*, 301 U.S. 655 (1937);
97. It may be helpful to refer back to the text accompanying notes 51-59. See *Estate of Halbach v. Comm'r* 71 T.C. 141 (1978). In Halbach, the petitioner contended that because the decedent's disclaimer of her remainder interest was both timely and effective under New York law, such interest should not be included in her gross estate. The Service conceding the fact that the disclaimer was valid under state law, but took issue with the timeliness of the disclaimer for federal tax purposes. The court held that the disclaimer was not timely for federal tax purposes saying:

*Herein, we have no authority or desire to quarrel with the state court's decision that the disclaimer was timely for probate purposes. The issue before that court was the validity and effect of the renunciation in relation to a determination of in which party legal title to the property would vest. That court had no need to take into account, as this court must, the Congressional desire to impose a tax on the transfer of a property interest. Therefore, what is a reasonable time for probate purposes, any time prior to the vesting of title in the party renouncing the interest, is not necessarily reasonable for our purposes, determining whether a transfer of the property interest has occurred.*
claimer satisfies state law, its federal tax consequences are determined solely upon its satisfaction of the requirements of section 2518. In resolution of the situation presently under consideration, A's disclaimer, although valid under state law, will not be a disclaimer for federal tax purposes.

State law, however, may play a role in determining whether the federal requirements for a disclaimer have been satisfied. The operation of section 2518, as previously discussed, is in some ways dependent upon state law (recall the discussion of 2518 (b)(4)). The application of state law in this situation raises the problem of whether a federal court hearing a federal tax case is bound by a state court interpretation of state law. In Commissioner v. Estate of Bosch, the Supreme Court was faced with this very issue. The Supreme Court held that a federal court applying state law is not bound by a state court decision unless it is the decision of the highest state court.

5. REVENUE ACT OF 1978

A 1978 amendment to section 2518 made it possible for property to pass to a decedent's spouse as a result of a disclaimer even if the surviving spouse was the disclaimant. This amendment is important because it allows a surviving spouse to disclaim an interest in a marital trust and take the property under a non-marital trust assuming the de-

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98. This is not to say that state law will not have to be consulted. It may be used to determine one's property rights if such a determination is necessary. This point is discussed, infra, at notes 100 and 101.


100. This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state. In this respect, it may be said to be, in effect, sitting as a state court.

387 U.S. at 465.

cedent's will is set up properly. A spouse will only make such a disclaimer when the marital bequest exceeds the optimal marital deduction i.e. an overfunding has occurred. The spouse will disclaim the excess; thus raising the issue of whether it was the disclaimer of an undivided portion of an interest (except in the very rare case where the total marital bequest will be disclaimed because the optimal marital deduction is zero). Consequently, the interpretation given to an undivided portion of an interest will determine the effectiveness of the amendment.

The benefits to be derived by such a disclaimer are achieving the optimal marital deduction and excluding the disclaimed property from the disclaimant's gross estate. In theory, such a disclaimer is an effective post mortem estate planing device, but before a spouse makes such a disclaimer, he or she will have to be convinced that it is a beneficial course of action. These benefits become apparent when the spouse realizes that the property interests he or she will receive in a properly

102. The decedent's will must contain a marital bequest (one which qualifies for the marital deduction) and a non-marital bequest (one which does not qualify for the marital deduction and does not cause the property to be included in the spouse's gross estate), with the decedent's spouse named as the beneficiary under each trust. The non-marital bequest should be drafted in a manner so as to give the spouse all the incidents of ownership consistent with its exclusion from the spouse's gross estate (see footnote 104 infra). In addition, it would be wise to include in the decedent's will a clause which provides that any property disclaimed shall pass to the non-marital trust (see appendix A).

103. The optimal marital deduction is not necessarily the maximum marital deduction allowable (for example, where the decedent's adjusted gross estate is less than $425,000). The reason the spouse will not disclaim, unless the marital bequest exceeds the optimal marital deduction, is because when considering the value of tax deferral, the estate tax burden will be at a minimum when the optimal deduction is used; consequently, nothing will be achieved by such a disclaimer aside from increasing the burden of estate taxes.

104. Congress intended the amendment to apply to partial disclaimers where the spouse disclaims property passing under a marital trust. See The Staff of the Joint Committee on Taxation, 96th Cong. 1st Sess., LEGISLATIVE HISTORY OF THE TAX REFORM ACT OF 1978 at 443 (1979) where it states:

The Congress believes that, where the decedent's spouse refuses to accept all or a portion of his or her interest in property passing from the decedent and, as a result of such refusal, the property passes to a trust in which the spouse has an income or other interest, such disclaimer should be recognized as a qualified disclaimer.
drafted non-marital trust are substantially equivalent to those disclaimed. Therefore, once the spouse understands the situation, there is no logical reason why he or she will refuse to disclaim.

The following example demonstrates the importance of this amendment. B (A's spouse) dies, his will created a marital trust and a non-marital trust. A is the beneficiary of each trust. Due to an error in the marital deduction formula clause in B's will, the marital trust was overfunded. The optimal marital deduction for B's estate is $500,000 (one half of B's gross estate of $1,000,000); $600,000 was devised to the marital trust. B's will provided that any property that is disclaimed shall become part of the non-marital trust (see appendix A for the form of such a clause). A disclaims $100,000 of the $600,000 marital trust. As a result of A's disclaimer the property passes to the non-marital trust (pursuant to the clause in decedent's will). Prior to the 1978 amendment it was unclear whether A's disclaimer was a qualified disclaimer since the disclaimed property did not pass to a person other than the disclaimant. This amendment would treat A's disclaimer as a qualified disclaimer, thus allowing the optimal marital deduction and excluding the disclaimed property from A's gross estate.

Carrying the above example one step further, assume A has an estate of $100,000 at her death. If A does not disclaim and dies ten years after B (not having disposed of any of the property), A's gross estate will be $700,000 ($100,000 of A's property plus $600,000 from the marital trust); if A disclaims the $100,000 excess, A's gross estate will be $600,000 ($100,000 of A's property plus $500,000 from the marital trust). If we assume A has no deductions, credits, or adjust-

105. The property interests the spouse receives under a marital and a non-marital trust are not all that different in substance. The spouse can receive, under a non-marital trust, the following: a life estate, a special power of appointment, a five and five general power of appointment, a general power of appointment subject to an ascertainable standard, and a trustee can be given the power to invade the corpus for the spouse's comfort or maintenance.

106. Rev. Rul. 76-156, 1976-1 C.B. 292 seems to allow such a clause to determine the taker of the disclaimed property. This ruling dealt with an issue which arises where the decedent's will gives the disclaimant a special power to appoint his disclaimed interest. The service ruled that a disclaimer coupled with a power to appoint is not a disclaimer but is a taxable gift. The service implied that where the decedent's will disposes of the disclaimed property in an ascertainable manner, the disclaimer will then be recognized. See Newman and Kalter, Disclaimers By Surviving Spouse 181 N.Y.L.J. 1 (Jan. 15, 1979).
ments to her gross estate, an additional $100,000 will be taxed on A’s death if she does not disclaim. The tax rate on the additional $100,000 in A’s estate is 37%; the value of the disclaimer is $37,000 in this case. A $37,000 tax savings should not be treated lightly.

6. CONCLUSION

The enactment of section 2518, as demonstrated above, changed the common law in many respects. It improved the prior law by creating a definitive period in which to disclaim i.e. nine months, requiring a writing, and most importantly, creating uniform rules governing the law of disclaimers. Although it was not the intent of Congress to greatly expand the interests that may be disclaimed, section 2518, although unclear, appears to permit the disclaimer of both an intestate share and also some partial interests in property. Hopefully, regulations will be able to clear up this uncertainty in a manner that will enhance the uses of disclaimers. Section 2518’s shortcomings are its dependence upon state law and its disallowance of the disclaimer of certain interests because of its definition of transfer. To cure the above shortcomings section 2518 should be amended.

It is obvious that section 2518 is a long way from being perfect. It is a beginning and, as this article has demonstrated, section 2518, if liberally construed and properly amended, can be made into an effective law of disclaimers.

Donald J. Jaret
APPENDIX A

The following disclaimer forms were taken from P-H Wills forms 3875 New Forms and Ideas.

FORM FOR A DISCLAIMER "QUALIFIED" UNDER THE TAX REFORM ACT OF 1976

I, ____________, beneficiary under the will of ____________, deceased, do hereby unqualifiedly and unconditionally and completely disclaim, reject and refuse to accept the legacy/devise made to me in the Last Will and Testament of said ____________, who died on the __ day of ______, 19___, said Last Will and Testament having been resident of ____________, City/County, State/Commonwealth of ____________. I have received and retain no interest in the property I herein disclaim and this disclaimer is completely irrevocable, regardless of any occurrences either prior to or subsequent to its execution.

Signed ____________,
The __ day of ___,
19____.

FORM FOR A STANDARD DISCLAIMER CLAUSE

If any devisee and/or legatee named in this Will should renounce and disclaim in whole or in part, any property I have herein devised and/or bequeathed to him or to her, then in that event I give, devise and bequeath the property so renounced and disclaimed to ____________. 
Open Season on Ancient Shipwrecks: Implications of the Treasure Salvors Decisions in the Fields of Archaeology, History, and Property Law

Does a recent federal district court decision license a new open season on ancient shipwrecks off the Florida coast? Did the court in its zeal to uphold the American traditions of free enterprise and rugged individualism bargain away an irreplaceable cultural heritage? Are these traditions still viable, or more myth than reality in the functioning of the United States social and economic system? If not viable, is the judicial system justified in perpetuating these myths in the public consciousness? Or, has the United States judicial system again demonstrated its ability to act as a bulwark in defense of individual liberties? All of these questions, and more, are raised by the most recent decision in a series of Florida cases that revolve around the discovery and salvage

1. The rise of the welfare state and the concomitant emergence of the military-industrial complex has wrought vast changes in the social and economic life of the nation. In reviewing two recent analyses of this phenomenon, A.S. MILLER, MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION (1976) and J.M. BUCHANAN, LIMITS OF LIBERTY (1976), W.J. SAMUELS made the following observation:

   The study of American constitutionalism requires scrutiny of the total flow of relevant decisions whenever made, including private decision making having constitutional consequences, for example as made by political parties, large corporations, and unions. Received theory juxtaposes natural persons and the state, whereas in reality group action has grown in significance, and the individual increasingly is important only as a member of a group(s). The system has been transformed into one of nonindividual, nonstatist, nonpossessary economic and social power.

   SAMUELS, Myths of Liberty and the Realities of the Corporate State: A Review Article, 10 ECON. ISSUES 923,924 (1976).


of an ancient Spanish shipwreck believed to be the *Nuestra Señora de Atocha*, sunk in 1622 in a storm off the Florida coast.

Treasure Salvors, Inc., under a contract with the Florida Division of Archives and History and Records Management (DAHRM), explored a site thought to be in state waters. It was believed to be the location of the *Neustra Señora de Atocha* and artifacts were recovered beginning in 1971.

In May, 1976 the validity of the contractual relationship between Treasure Salvors, Inc. and Florida became questionable as a result of *United States v. Florida* wherein the Supreme Court delineated the territorial waters of the State of Florida. The Court's holding precipitated much litigation as the site of the salvage operation of Treasure Salvors, Inc., a shoal near the Marquesas Keys, was in an area designated as international waters. On the basis of this declaration, Treasure Salvors, Inc. instigated what was to be the first of several suits to obtain title to all artifacts salvaged under its contract with the State Division of Archives and History. Eventually, the contract between the state and Treasure Salvors, Inc. was declared void for mutual mistake.

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5. This decision followed a Special Masters Report designating the territorial waters of the State of Florida as opposed to claims of the United States in a suit filed to determine ownership of oil leasing rights on the outer continental shelf. Florida had claimed all of Florida Bay as an inland sea and therefore part of Florida territorial waters. The decree, however, designated Florida Bay as part of the Gulf of Mexico, and rather than using a straight line, drew three-mile closing circles around the lower Florida Keys, the Marquesas Keys, and the Dry Tortugas, and designated these areas as territorial waters of the State of Florida.
7. 408 F. Supp. 907.
8. 459 F. Supp. 507. Was rescission an equitable remedy? Since the law of finds rather than the law of salvage was applied, the contract with the state effectively shielded the site from all other possible finders for many years. In effect, Treasure Salvors, Inc. was declared finder before the search ever began. Also, employees of the State Division of Archives and History cleaned and treated the artifacts in their possession for preservation and the state provided storage for a period of years. Since public funds were expended for this purpose, should not the state have been reimbursed for
The obvious struggle in these Florida treasure ship cases is between the archaeologists and the treasure hunters. The implications of the *Treasure Salvors* decisions, however, reach far beyond the question of who owns the particular antiquities from this particular wreck site. The decisions touch upon legal and policy issues in the areas of balancing individual and group rights, the right to property, forms of ownership, and the role of the United States and its citizens in the legal and illicit antiquities market. Property rights, as allocated between society as a whole and individual citizens, are involved in all of these issues. A look at what “property” is may help illustrate why the intense struggle has ensued.

**PROPERTY RIGHTS IN SHIPWRECK LAW**

The concept of property is a social construct—a description of relationships between people and things, both corporal and incorporeal. Involved are not only rights, but obligations, individual and collective.9 “Property can be, and routinely is, created from whole cloth, since its existence resides in the realm of social facts and not empirical reality.”10

The two essential criteria for objects of property are value and transferability.11 Individuals within a society create the value component; transferability is that which makes the property capable of independent existence, separate from any one individual. Within any given society “[t]here is reasonable agreement that definitions of property cover appropriate objects, include appropriate rights and sanctions and that ownership is vested in the entity appropriate to the case in question.”12 The allocation of objects to individual or collective ownership and the rights and responsibilities attached to this ownership is a societal decision, defined by its political and legal institutions.

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9. “Whoever owns property is responsible for its administration to some authority or group.” Schneider, *Pragmatism and Property*, 1 J. LEGAL & POL. SOC. 5, 8-9 (1943).
11. Id. at 301.
12. Id.
The modern history of Florida shipwreck law presents an interesting illustration of the political and legal institutions in Florida attempting to define, or re-define, these property rights and allocations. The people of Florida have decided, through their elected representatives and the Archives and History Act, that the State of Florida is the appropriate entity in which to entrust protection and ownership of objects of cultural and historical importance, including sunken and abandoned ships. This allocation of ownership has been challenged by the treasure hunters who believe these objects are more legitimately subject to private ownership.

There seems to be no societal consensus at the present time to answer the question of who owns a sunken derelict ship and its cargo. The allocation of this property right has varied from society to society over time. Even within the common law system there is no unanimity. Under the admiralty laws of salvage, there are two rules, diametrically opposed: the English rule and the American rule. The English rule declares the rights of the sovereign in all derelict property found at sea, whether flotsam (goods from shipwreck but still floating), wreck (goods from shipwreck washed ashore), jetsam (goods cast overboard and sunk), or langan (ligan) (goods cast off and sunk but marked by a buoy). This rule is derived from the concept that all property rights reside in the sovereign and all other owners “hold of the king,” an indirect acknowledgement of the social consensus which creates “property” in the first place. Practically, the rule was used to produce more revenue for the Crown. Over time the harshness of the rule was tempered by allowing the owner a year and a day to claim the abandoned property before it reverted to the sovereign. The American rule generally awards ownership of a sunken derelict ship and/or its cargo to whomever first reduces it to possession. Rights vary according to the

14. Altes, Submarine Antiquities: A Legal Labyrinth, 4 SYR. J. INT. LAW & COM. 77 (1976). This is an excellent survey of the state of the law regarding ancient sunken abandoned ships, covering public international law, existing bilateral agreements between nations, and specific national laws.
category: flotsam, wreck, jetsam, or flasam, and a salvage award is usually made from the proceeds of public sale of the property.16

Prior cases which have established precedent for the American rule all have decided ownership of ships and cargos which had a purely commercial value.17 Ownership of the disputed cargos presented no conflict with a demonstrated public interest and would have benefited the sovereign only as a source of revenue. United States courts have for the most part followed the American rule. Recent cases in Florida,18 Texas,19 and North Carolina,20 however, have upheld sovereign ownership of abandoned shipwrecks in state territorial waters. In all three instances sovereign ownership has been asserted in an effort to protect the interest of the public in the sunken vessel.

The Florida case, State ex rel. Ervin v. Massachusetts Co.,21 resolved a dispute over ownership of a United States battleship purposely sunk and abandoned in Escambia Bay in 1922. Over the years the derelict functioned as an artificial reef and became a favored fishing and diving spot for the public, and the superstructure which protruded above the water, served as a navigational aid. In 1956 the Massachusetts Co. set out buoys in accordance with salvage law and announced its intention to salvage the ship. Spurred by conservation and recreation groups, the state filed suit to enjoin salvage operations. The Florida Supreme Court, sitting en banc, declared ownership in the sover-

16. During the heyday of wrecking in Key West, fifty-five ships that had wrecked on the Florida Reef were brought into port at Key West in one year, 1846, and street auctions of the salvaged goods were a daily occurrence. C. Tebeau, A HISTORY OF FLORIDA 142 (1971).

17. United States v. Tyndale, 116 F. 820 (1st Cir. 1902), money found on a body floating on the high seas; Wiggins v. 1100 Tons, 186 F. Supp. 452 (E.D. Va. 1960), a cargo of marble; Murphy v. Dunham, 38 F. 503 (E.D. Mich. 1889), a cargo of coal lying at the bottom of a lake; Eads v. Brazelton, 22 Ark. 499 (1861), a cargo of lead; Howard v. Sharlin, 61 So. 2d 181 (Fla. 1952), contemporary abandoned vessel; Deklyn v. Davis, 1 Hopk. Ch. 135 (N.Y. 1824), a British frigate sunk in the East River in New York, located and raised thirty years later.


21. 95 So. 2d 902.
eign (the State of Florida) of the wrecked vessel based upon the English statutory and common law of 1775 as adopted by Florida when it joined the Union.

The Texas case, *Platoro, Ltd. v. Unidentified Remains of a Vessel*, 22 involved a Spanish galleon sunk in 1555 off Padre Island. A salvage company, operating under contract with the State of Texas, claimed ownership of recovered artifacts as first finder and shipped the artifacts out of state. Suit was filed in federal court and the court upheld the Texas claim based upon sovereign ownership by the Spanish Crown after a year and a day from the date of abandonment, in accord with the Spanish law of that time. Ownership was traced through a succession of governments to the State of Texas. The decision was overturned by the appellate court on other grounds.

The ships in dispute in the North Carolina case, *Bruton v. Flying "W" Enterprises, Inc.*, 23 were an ancient Spanish ship and several ships that dated from the time of the Civil War. The North Carolina courts awarded ownership to the sovereign (the State of North Carolina) based upon a state antiquities statute 24 similar to that enacted in Florida and upon the precedent of the Florida decision in *Ervin*. 25

*Treasure Salvors No. 1*, 26 and *Treasure Salvors No. 2*, 27 in which the United States was an intervenor, specifically reject United States claims of sovereign rights traced to the English Crown. The Fifth Circuit noted, however, that these rights could be declared by legislative action: "While it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale) legislation to that effect has never been enacted." 28

The State of Florida has made this type of legislative declaration through the Florida Archives and History Act. 29 Theoretically, owner-

23. 273 N.C. 399.
25. 95 So. 2d 902.
27. 569 F. 2d 330.
28. Id. at 341.
29. The Florida Archives and History Act declared the public policy of the state in Fl. Stat. § 267.061 (1979):

(a) It is hereby declared to be the public policy of the state to protect and
ship of all sunken derelict ships on state owned submerged territorial waters (within three miles) resides in the State of Florida because control of the seabed within the three mile territorial limit was relinquished by the federal government to the states under terms of the Submerged Lands Act in 1953. As the Florida Archives and History Act was the first modern state antiquities law in the United States, subsequent antiquities laws passed by sister states have been patterned after it.

The Florida statute declares the public policy of the state with regard to antiquities to be the protection and preservation of historic sites and properties and objects of antiquity which have "scientific or historical value or are of interest to the public." A detailed list of covered items is in the statute along with the statement that the policy of protection and preservation is not limited to this list. Sunken or abandoned ships are specifically included. In addition, the Act declares ownership in the sovereign (the state) of all "treasure trove, artifacts and objects of historical or archaeological value" which have been

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32. Fla. Stat. § 267.061
abandoned on state owned land and state owned submerged lands. Title is vested in the Division of Archives and History, which is given the responsibility to “locate, acquire, protect, preserve, and promote the location, acquisition, and preservation” of the articles listed.

There now appears to be, however, some question as to the constitutionality of the Florida Archives and History Act as reference to it was made in Treasure Salvors No. 3, along with the Ninth Circuit case of United States v. Diaz, wherein the federal antiquities statute was declared vague and the conviction under it an unconstitutional violation of due process for lack of notice. The Ninth Circuit objected to the lack of definitions in the federal statute of the terms “ruin,” “monument” and “object of antiquity,” and noted that the Indian masks appropriated from a cave on Indian lands, although used in a ceremony of great antiquity, were only three or four years old. The court found additional lack of notice in the fact that there had been no prior prosecutions under the federal statute although the Act was passed in 1906. Despite the fact that the Florida district court found some similarities in the Florida statute, the comparison is strained. The federal law is encompassed in one paragraph, with two additional paragraphs covering the procedure for declaring national monuments. The Florida law is highly detailed with lists and definitions and contains sixteen separate sections and numerous subsections, paragraphs, and subparagraphs.

The detailed list which the district court in Treasure Salvors No. 3

33. Id.
34. Id.
35. 459 F. Supp. at 525.
36. 499 F. 2d 113 (9th Cir. 1974).
38. 499 F. 2d at 114.
39. 16 U.S.C. § 433 provides that:
Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.
found objectionable included, but was not limited to "monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, historical sites and properties and buildings or objects, or any part thereof relating to the history, government and culture of the state." Under most circumstances this would seem to be sufficient and far from vague. The definition section of the Act further defines "historical sites and properties" as "real or personal property of historical value." The statute could be made more explicit, however, by adding a term of years, for example, "50 years or older," or "100 years or older." In addition, there has been no lack of notice in the State of Florida; the Florida Archives and History Act is a revision of the Florida Antiquities Act of 1965 and has been aggressively enforced since its inception.

The court also objected to the definition of "treasure trove" as "gold, silver bullion, jewelry, pottery, ceramics, antique tools and fittings, ancient weapons, etc.," because this definition is at variance with the traditional common law definition of "treasure trove" as "any gold or silver, plate or bullion, found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown." This definition of treasure trove is not in the Act itself. It exists by administrative regulation but

41. 459 F. Supp. at 525.
43. Fla. Stat. §§ 267.01-267.08 (1965). The original statement of policy appeared in § 267.01:

It is hereby declared to be the public policy of the State of Florida to protect and preserve historic sites, buildings, treasure trove, objects of antiquity which have scientific or historic value or are of interest to the public, including but not limited to fossil deposits, Indian habitations or ceremonial sites, coral formations, sunken, abandoned ships or any part thereof, maps, records, documents, and books relating to the history, government, culture of the State of Florida.

For the revised statement see note 29, supra. Two significant changes were made: the establishment of the Division of Archives, History and Records Management, with title to materials vested in the division; and the deletion of § 267.07, which authorized the awarding of salvage contracts based upon a 75%-25% split with the salvager of the value of objects recovered. The awarding of contracts has continued by custom, however, and is covered by administrative regulations.

44. 459 F. Supp. at 525. The court appears confused at this point in its opinion as it is objecting to a definition that is not in the Act.

45. Id.
is compatible with the overall intent of the legislation. Since the definition sections of any piece of legislation are designed to clarify the intent of the framers, the definitions in their present form are a legitimate use of words to establish meaning and reflect the changing value of items through time. Some of the artifacts of the type listed are not only "worth their weight in gold," but indeed, worth far more. It should be a simple matter, however, to legislatively change the appellation to a less controversial term, one devoid of the romantic and swashbuckling connotations surrounding the word "treasure."

The argument, sustained by the court, that the association of the Nuestra Senora de Atocha with Florida is "tangential at best and certainly is not integral to the heritage and development of the State," is controverted by the language of the Act which declares public policy to be "to protect and preserve historic sites and properties . . . relating to the history, government and culture of the state." With over 2000 miles of coast line, Florida and its entire history is intimately connected with its surrounding waters. Florida was Spanish territory at the time of the Atocha shipwreck. Spanish salvage operations were conducted from a Florida land base. Wrecking and salvage, and tales of shipwreck and survivors have been a part of Florida history from the beginning.

46. The Euphronios Krater was purchased by the Metropolitan Museum of Art for a reported one million dollars. K.E. Meyer, The Plundered Past; The Story of the Illegal International Traffic in Works of Art (1973). This volume presents an extensive and well documented survey of the problem from all points of view.
47. 459 F. Supp. at 512.
49. The first descriptive account of Florida and its people was written by a survivor of a Spanish shipwreck who lived with the Florida Indians for seventeen years before being rescued near Tampa Bay by either Ribault or Menendez. Memoir of Do. d'Escalante Fontaneda Respecting Florida 12-13 (Miami 1944) (1st ed. B. Smith trans. 1854). Fontaneda reported in 1575 that the riches of the Floridians came not from the land but from the sea:
[I] desire to speak of the riches found by the Indians of Ais, which perhaps were as much as a million dollars, or over, in bars of silver, in gold, and in articles of jewelry made by the hands of Mexican Indians, which the passengers were bringing with them. These things Carlos divided with the caciques [chiefs] of Ais, Jeaga, Guacata, Mayajuaco, and Mayacca, and he took what pleased him, or the best part. These vessels, and the wreck of the others mentioned, and of caravels . . . were taken by Carlos. . . .
One of the first acts of the federal government after Florida became a United States possession in 1821 was the establishment of a naval base in Key West to deter the wrecker-pirates operating in the Florida Straits. Rum runners, cocaine cowboys, submarines that stalked the shipping lanes offshore during World War II, oceanographers and treasure hunters are all a part of an historical heritage decreed by the configuration of reefs, islands, and peninsula that is known as the State of Florida.

Although the opinion in *Treasure Salvors No. 3* notes with some asperity that state employees “reacted as though Treasure Salvors were attempting to steal the old Capital Building as well as the great Seal of the State,” the difference is only in degree. The Division of Archives and History, charged with the responsibility of preserving and protecting the cultural heritage of the state and specifically given ownership of sunken and abandoned ships on state owned submerged lands, arguably was acting under a legislative mandate, and not as an officious intermeddler.

### CORPORATE OWNERSHIP OF SALVAGE

The image invoked by the courts in handing down the *Treasure Salvors* decisions, an image of hardy modern day pioneers comparable to those who opened the American West, is seductive, but incongruous upon close examination. Treasure Salvors is a corporation engaged in a multi-million dollar operation, acquiring capital by the sale of stock to shareholders. Although the Fifth Circuit noted that the justices “can find no authority in law or in reason to countenance interference with plaintiffs’ activities simply because they are American citizens . . .,” the court did not address the problems that are presented by corporate ownership.

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*Id.* at 34-35. Since Carlos was cacique of the large community of Calusa Indians which dominated South Florida at this period, it would appear that the right of the sovereign in wrecks of the sea was established very early in Florida history as a principle of customary law.


51. 459 F. Supp. at 512.

52. 408 F. Supp. 907.

53. 569 F. 2d at 343.
The corporation as it has evolved into its modern form in the United States has been regulated in its activities. The degree of regulation has varied over the years, usually in direct proportion to the economic strength of the industries being regulated. Indeed, a traditional mistrust of corporations is as integral a part of American history as the traditions of free enterprise, rugged individualism, and the right to private property.

One of the reasons for regulation is that ownership of property under the corporate structure has become a very "different sort of animal" from private ownership of property, and the responsibility side of the ownership coin tends to be lost. This is of special concern when the responsibility aspect of ownership is placed at the forefront, as it inevitably is when public rights and interests are inextricably entwined with the object that is "owned." Objects of scientific or historical value obviously fall into this category.

The atom of corporate ownership has been split between stockholders, managers, employees, and the collectivity which appears in the courtroom as a fictional person. Split ownership presents complica-

54. The corporation with an unlimited life, almost unlimited powers, and a legal entity as an artificial person emerged in England in the sixteenth century through the peace guilds when local governments were authorized to operate as corporations under Royal Charter. As the British empire expanded, the merchantile companies utilized the same device to acquire rights over foreign territories and resources. These merchantile companies, "absentee owners" with most stockholders domiciled in England, fostered and perpetuated a subservient economic and political status in the colonies, in North America as well as throughout the world, and effectively regulated international trade. The economic and political reality of this subservient status provided impetus to the American Revolution. In the colonies, distrust of the corporate form was legion and led some states to ratify the Constitution under protest because it did not prohibit the formation of "companies." The Corporation as Legal Entity, 55 Canadian Forum 16 (1975); W. Fletcher, Cyclopedia of the Law of Private Corporations, (rev. perm. ed. 1975).

55. "The removal by the leading industrial states of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them . . . ." Louis K. Ligett Co. v. Lee, 288 U.S. 517,557 (1933) (Brandeis J., dissenting).


57. See note 10 supra. This article presents an overview of the social base for the
tions when the law of finds is applied as it was in the Treasure Salvors cases. Who, in this instance, is the true finder? The stockholders, to whom the property would be distributed if the corporation were dissolved? The management, which has actual possession? The individual diver employed by the corporation, who actually picked the artifact from the sand and carried it to the surface? Or the fictional person recognized by the court? Whichever choice is made as to the true finder leaves unanswered the problem of responsibility for safeguarding the interests of society as a whole, in this instance, the protection of the cultural heritage. Which person or group holding a fragment of the fissioned atom of ownership is charged with the “obligation” that has always been an element of ownership?

Numerous authorities have commented upon the blurring of ownership rights and obligations that have occurred with the evolution of the corporate structure in the United States. The result is a separation of ownership and control and a narrowing of the options for action by “owners.”

To speak of the corporation as owner... is merely to make a metaphysical separation of the corporation from the men whose decisions and deeds constitute the corporate activity. It merely conceals the fact that we are in the presence of something which has little in common with the traditional concept of ownership.

Via the corporate structure private ownership has been injected with a large dose of a public element through investment by institutions and through its major role in the production of wealth. Some legal authorities see the law of res in this instance “slipping altogether out of

concept of “property” and an extensive discussion of the evolution of distributive and collective ownership.

58. “[A] pragmatist might conclude... there are improper owners of property whenever (1) the owner has no specific obligations to specific groups, (2) the owner does not labor, or (3) the owner owns only persons.” Schneider, supra note 9 at 9.

59. See note 9 and note 10, supra; Moore, The Emergence of New Property Conceptions in America, J. LEGAL & POL. SOC. 34 (Apr. 1943); Reich, The New Property, 73 YALE L. J. 733 (1964); Jones, Forms of Ownership, 22 TUL. L. R. 82 (1947).


61. Id. at 89.
the *ius privatum* into the *ius publicam.*"  

The omnipresence of the public element is as true of a corporation engaged in treasure hunting as of any modern corporation. Most treasure hunters have an ongoing *indirect* source of public funding; most use methods and tools developed by publicly funded national and international underwater research and exploration projects and frequently use surplus government equipment and government trained employees.

**SOCIAL POLICY IMPLICATIONS OF TREASURE HUNTING**

The obligations and responsibilities inherent in ownership of antiquities is underscored by new recognition of the fact that archaeological activity in and of itself is destructive. That which the excavators are not equipped to discover or learn from the site is effectively destroyed at the time of excavation. It is now widely recognized that as much or more can be learned from the context within which an artifact is found as from the artifact itself, and most famous archaeologists of the past century would be looked upon today as mere "pot hunters." Modern archaeologists have developed sophisticated methods of dating materials, complicated record keeping to facilitate computer analysis of provenance and proportional occurrence, pollen sampling which

62. *Id.* at 93.


In the case of commercial salvage on the one hand, there is usually little or no effort made to collect and record archaeological information systematically. On the other hand, an archaeological excavation is a scientific operation which demands a fully developed theoretical basis upon which a research design is formulated for the cultural explication of the site. Resources for conducting archaeological research from within the salvage company had to be balanced against the priorities and expectations of the commercial operation. *Under such a situation, it was impossible to develop a proper excavation program.* . . . Excavation of burial mounds has demonstrated that associations and sequences of associations are ultimately of more value than the artifacts, structures, or burials themselves. Underwater sites are no different. Archaeological explanation of a wreck site is just as dependent upon spatial interpretation of artifact clusters as it is in any
reveals plants that grew in that location and in what proportion, fecal studies which reveal eating patterns, etc. In light of present technology, it is possible that clues which might have revealed the secret of how the Great Pyramids of Egypt were constructed may have been destroyed by those who first entered the sealed tombs. For this reason, the whole thrust of modern archaeology is away from excavation of sites and recovery of artifacts toward preservation; the discovery and identification of such can then be preserved for future generations of scientific technology.4

This emphasis on preservation is spurred by the increasingly rapid destruction of sites.5 Clemency Coggins, prominent Precolombian

terrestrial site.

. . . Field procedures had to be developed so that the answers to the archaeological questions would not be destroyed by the commercial operations.

Id. at 32-33 (emphasis added).

. . . [D]uring exploratory phases of archaeological research on historic wreck sites, goals often overlap and coincide with those of a profit-motivated commercial operation. When this occurs some success can be achieved by working with commercial salvors in solving archaeological problems[,] . . . dependent upon the ability of the researcher to personally motivate and guide individual members of the company through mutual trust and respect.

Id. at 107.

Beyond the exploratory phases (involving wreck site identification and description) it becomes increasingly difficult to maintain the progressive build-up on contextual data. . . . Once archaeological investigations go beyond the descriptive stage and turn toward processual analysis of trying to answer questions dealing with patterns of human behavior, the trend of the research no longer provides immediate tangible feedback to assist the salvage company in achieving its operational goals. When this happens, the company soon loses its interest in supporting such research. At this point archaeological research of acceptable standards is only possible if it is independently supported and administered through a sponsoring educational or scientific institution.

Id. at 108.


65. Of forty-five major archaeological occupation sites known to have existed on the Oregon coast between 1900 and 1950, today only one remains intact and only twenty percent of the others survive in part. Of the forty sites known in the Portland area in 1971, ten have been vandalized or entirely destroyed, four have been covered by industrial developments, three have been flooded or badly eroded, twelve others have been ruined
scholar associated with the Peabody Museum, Harvard University, has commented: "[T]he over-riding and unalterable fact is that evidence of ancient civilization on this planet is nearly lost just as we have become most sophisticated in its interpretation. Future generations will look back with horror on the profligacy with which their past has been squandered."66

Most underwater archaeological sites remained undisturbed until recently. Difficulty of access to these sites was a major factor. An auxiliary factor is the difficulty of preservation once objects of bone, wood, and metal are exposed to the air. The beautifully carved and painted wooden masks and animal forms recovered from the mud of Key Marco off the southwest Florida coast in 1896 are today deteriorated to the point of being almost unrecognizable because of careless storage in someone's attic. Their original beauty of form and color, fortunately, has been preserved in a series of paintings made for the Smithsonian Institution at the time of discovery. Artifacts which have been immersed in salt water for a period of time are best preserved underwater because of salt penetration. On land or in the air, deterioration is rapid unless all salt is removed, a time consuming, expensive, and not always successful process, usually only justified for small objects. Artifacts left in the salt water and especially if protected by an overburden of sand will probably remain "as is" for hundreds of years. The old Spanish cannons coveted by many amateur divers and a common sight in front of homes and commercial establishments throughout Florida have a very brief life span.

The need for preservation of the remaining underwater archaeological sites is underscored by the fact that all of the ancient shipwreck sites in the Mediterranean Sea have been destroyed within the past fifteen years. The impetus for such senseless destruction can be attrib-

uted to the high demand and high prices in the current antiquities market, lax import/export laws, advances in diving technology and underwater surveying methods, the expansion of sport diving and the blue water (clear) diving conditions in the Mediterranean. As the same conditions exist in Florida waters off the Florida coast, and throughout the Caribbean, a concerted and mutual effort is required so that this cultural heritage will not be despoiled within a few years. This is a very real threat as the treasure hunters have already moved to the Silver Shoals off the Dominican Republic, to the Turks and Caicos Islands, and elsewhere. Artifacts from an ancient Spanish ship wrecked on Silver Shoals were recently imported into the United States by salvors working under contract (50-50 split) with the Dominican Republic. A Dominican Republic patrol boat was stationed at the salvage site throughout the salvage operation to protect the site from claim jumpers.67

In an effort to preserve part of the underwater archaeological heritage for future generations, the Florida Division of Archives and History in mid-1979 made plans to move most of a 1715 wreck from waters near St. Lucie County to the protected waters of John Pennekamp State Park. Treasure Salvors, Inc., on the basis of the decision in Treasure Salvors No. 3,68 proceeded to salvage a cannon as first finder, despite the fact that the wreck was located only a few hundred feet from shore and well within the three mile limit of state territorial waters.69 The principals were arrested by state agents pursuant to the provisions of the Archives and History Act, but the grand jury refused to return an indictment.

The methods used by modern treasure hunters also are of concern in coastal zone management and conservation. The large blowers used to remove the sand overburden on a suspected wreck site are a potential hazard to surrounding sea life. As a result, environmental damage from unlicensed and unmonitored treasure hunting activity in Florida waters is as much of a threat to commercial and recreational fishing and diving70 as it is to the preservation of antiquities. Dredging of sand

68. 459 F. Supp. 507.
70. Sport diving on the wrecks accounts for an important segment of the Florida tourist industry. During the summer of 1979, for example, amateur divers paid $975 a
in other activities is now closely monitored by the State Internal Improvement Fund Trustees and the Army Corps of Engineers in order to limit silt damage to coral and other sea life in and about the reefs.

In 1978 a treasure hunter was convicted of damaging a reef and fined $2000 by the United States Department of the Interior which is charged with responsibility for monitoring activities on the outer continental shelf under terms of the Outer Continental Shelf Lands Act.\(^1\) The conviction was recently overturned on appeal by the Fifth Circuit, ruling that the salvors can be regulated only by admiralty law.\(^2\) This decision, coupled with the *Treasure Salvors* decisions,\(^3\) appears to have created a class of people engaged in an activity which is effectively beyond the reach of any law, especially if operations are conducted beyond the three mile territorial limit. If so, another era of wrecker-buccaneers operating in the Straits of Florida is a real possibility.

A spur to treasure hunters off Florida shores is the result of the recent high value placed upon objects of antiquity and their investment potential in an inflationary economy. As might be expected under these conditions, the illicit market in antiquities has reached the proportions of international scandal; a pollution of international commerce fueled by money, principally from United States museums and private collectors.\(^4\) Private collectors have found antiquities a lucrative investment as a hedge against inflation and tax shelter, so much so that within the past year investment vehicles specializing in collectibles have been made available to investors on Wall Street. Most private collections are, in time, donated to a museum or other tax exempt group and the cost of acquisition taken by the collector/donor as a tax writeoff or deduction. This puts the American taxpayer in the incongruous position of subsidising the illicit trade in antiquities while at the same time buying back his cultural heritage, or someone else's cultural heritage perhaps illegally transported to this county, at grossly inflated prices.

The majority of United States museums are privately funded, un-

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\(^2\) United States v. Alexander, 602 F. 2d 1228 (5th Cir. 1979).
\(^3\) *See* note 3 *supra*.
\(^4\) *See* note 46 *supra*. 

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*Historic Shipwrecks at Looe Key, Earthwatch Research Expeditions, 27* (Summer & Fall 1979).
like museums in other countries, and therefore, are not subject even to the loose control of public scrutiny. In 1972, a controversy that still rages was sparked by the Metropolitan Museum of Art when it acquired the Greek vase known as the Euphronios Krater. Numismatists were understandably outraged when the outstanding Metropolitan collection of ancient coins was sold, and dispersed, in the search for funds to acquire the Krater, illegally exported from Italy.

Publicity, and the cloud on the legal title to the Euphronios Krater, caused the Metropolitan Museum to back off when the Lysippus bronze statue appeared on the international art market, also illegally spirited out of Italy. Dating from the fourth century B.C., the statue was purchased in 1977 for $3.9 million by the Getty Museum in Los Angeles where it is currently on display. Meanwhile, Italy is negotiating with the United States government for the return of the statue.

NATIONAL AND INTERNATIONAL ANTIQUITIES LEGISLATION & POLICY

The role of the United States in the illicit market for antiquities is decisive for the most restrictive legislation has been passed in those nations least able to enforce it. A comparative look at national legislation in the field of antiquities reveals the isolated stance of the United States, especially in this hemisphere, but also worldwide.

In the Western Hemisphere five countries have national laws which declare that all cultural properties are ultimately the property of the state: Bolivia, Brazil, British Honduras, El Salvador, and Mexico. Six countries have laws protecting all cultural property: Canada, Columbia, Equador, Guatemala, Honduras, and Peru. Worldwide, ten countries have placed ownership of cultural properties in the state: Nationalist China, Peoples Republic of China, Greece, Iraq, Jordan, Lebanon, Nigeria, Turkey, USSR, and Yogoslavia. Nine countries protect all cultural properties: India, Indonesia, Iran, Italy, Japan, Pakistan, Philippines, Spain and Syria. Most of the other countries allow export

75. Id.
76. Id.
78. See note 14 and note 46 at Appendix B, supra.
of cultural materials only by permit. In contrast, the United States protects only those antiquities which are located on public lands.

Australia passed an Historic Shipwreck Act in 1976 which protects all shipwrecks on the Australian continental shelf and it has a bilateral agreement with the Netherlands to negotiate ownership of wrecks which belonged to the Dutch East India Company. Australia passed an Historic Shipwreck Act in 1976 which protects all shipwrecks on the Australian continental shelf and it has a bilateral agreement with the Netherlands to negotiate ownership of wrecks which belonged to the Dutch East India Company. 79 Wrecks of archaeological interest in French waters belong to the state. 80 In Spain, the state now acquires ownership after three years. 81 Great Britain, Norway and Denmark have wreck protection statutes. 82

The “treasures” involved in the Treasure Salvors controversy have been declared by the court to be in international waters and effectively beyond the control of either the United States or the State of Florida. Even if these decisions are upheld on appeal, the questions are not stilled. Should some protection be afforded the shipwrecks which remain? If so, in what way and by whom? If, according to the reasoning of the court, the only sovereign with a legitimate interest in the artifacts is Spain, should Spanish regulations apply? The logistics of distance and control would preclude this solution, but do emphasize the problem of attempting to make antiquities protection and concern only a parochial problem. This is a stance which becomes increasingly untenable as the interdependance and mobility of world populations continues unabated.

The policy of extending the protection of the sovereign to those objects and sites deemed important to the national heritage is one that is now seemingly embraced in the United States by a concensus of the whole society, a justified assumption based upon passage of the Federal Antiquities Act of 1906, 83 the Historic Sites Act of 1935, 84 the Reservoir Salvage Act of 1960, 85 the Historic Preservation Act of 1966. 86 However, since both the national and the Florida antiquities laws are under attack in the courts, new legislation would seem to be essential. This could be accomplished on the national level by legislation declar-

80. Supra, note 14 at 88-89.
81. Id. at 87.
82. Id. at 89,91.
ing the rights of the sovereign in those items important to the national heritage. A revision of the 1906 Antiquities Act has just been passed by Congress, and separate legislation that would control underwater sites is pending.

A measure of control could be placed in the United States government if the protection and control over the continental shelf were, by legislative declaration, extended to “cultural resources” as well as “natural resources.” Anything lying beyond the continental shelf probably would be unsalvageable today, but that undoubtedly would not be true in the future as underwater engineering techniques are further developed.

Precedent for an extension of United States jurisdiction in a maritime context was established by a recent decision involving the boarding of a vessel in international waters that was suspected of carrying illegal drugs. In United States v. Cadena, the Fifth Circuit stated:

That the vessel was outside the territorial waters [of the United States] does not, of course mean that it was beyond United States jurisdictional limits or the operation of domestic law. Jurisdictional and territorial limits are not co-terminous. . . . [The jurisdiction of the United States] extends to persons whose acts have an effect within the sovereign territory even though the acts themselves occur outside it.

The opinion in one of the Treasure Salvors cases noted that an extension of sovereignty over the outer continental shelf might provoke an international controversy, but such a controversy already exists regarding the acquisition policies of United States museums and the import-export policies of the United States government with regard to antiquities. That the role of the United States is pivotal is under-

88. H. R. 1195. This bill declares ownership in the United States of any abandoned historic shipwreck located on the outer continental shelf.
89. 569 F. 2d at 339.
90. 585 F. 2d 1252 (5th cir. 1978).
91. Id. at 1257.
92. 408 F. Supp. at 911.
93. See note 46 and note 77 supra. The United States places few restrictions on the importation of cultural objects and there is no import duty on items that are more than one hundred years old. Some attempts have been made to curb the illicit trade in
scored by the fact that the signing of a treaty with Mexico\(^4\) and the passage of a law affecting twelve other Latin American countries in 1971\(^5\) prohibiting the import of Precolombian murals and monumental sculpture has been a major factor in stemming the illicit trade in those items.\(^8\)

The only international convention that might apply, the Geneva Convention on the Continental Shelf,\(^7\) by interpretation through International Law Commission commentary, excludes shipwrecks. Bilateral treaties covering situations similar to that which exists in the United States with regard to ancient shipwrecks have been negotiated between England and Spain and between several countries and the Netherlands.\(^8\)

A UNESCO resolution in this area recommends allowing member states to regulate property rights on its territory, but suggests:

> Finds should be used, in the first place, for building up, in the museums of the country in which excavations are carried out, complete collections fully representative of that country's civilization, history, art, and architecture. . . . [T]he conceding authority, after scientific publication, might consider allocating to the excavator a number of finds from his excavation. . . .\(^9\)

The United States has ratified the UNESCO Convention, but has not passed enabling legislation. The Florida Archives and History Act,
however, would appear to be in substantial compliance.

CONCLUSION

In the early 1970s awarding property rights to the excavators even in coastal waters was thought to be the best way "to encourage and stimulate the legitimate exploration for and excavation of evidence of past civilizations contained in the sea." From the vantage point of 1980, and with a new awareness of the need for preservation, the facts would seem to controvert this viewpoint. As amateur and professional organizations, museums, and scholars have become increasingly alarmed by the loss of sites, they have passed policy resolutions relating to collecting and collections. Perhaps the treasure hunters can be

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100. SAN DIEGO L. REV. 668 (1972). An extensive discussion of the field of marine archaeology noted:

[W]herever coastal state jurisdiction over marine archaeology ends, it seems clear that the property rights to archaeological material found beyond that jurisdiction would currently vest in the marine archaeologist reducing it to possession, based on a characterization of the finds as abandoned property. While such rights are warranted in view of the investment of time and money by the finders, there is also a definite interest in protecting such property and the information about past civilizations it represents from eluding public and scientific interest. *Id.* at 689.

101. The gravity of the situation has prompted a number of museums associated with educational institutions to issue policy statements on acquisition and collecting. For example, the following statement was issued by the University of California, Berkeley, in 1973:

Preamble: For the past several years, reputable museums throughout the world have been concerned with the scientific, legal, ethical, and diplomatic problems involved in the acquisition of art, antiquities, and archaeological materials. Large quantities of primitive and ancient artifacts, as well as occasional old-master paintings and prints, are being stolen, illegally excavated, or smuggled out of their countries of origin and illegally imported into the United States. This is particularly shocking in the area of archaeological materials, which are being clandestinely excavated in direct contravention of the laws of the countries of their origin, to such an extent that resentment against this illicit trade is running high in many countries, threatening to disrupt the legitimate and highly desirable research of American archaeologists abroad. If this market were to continue at its present systematic rate, it could obliterate large segments of the cultural heritage and national treasures of many countries.

Hence, we believe that the museums of the University of California, Berkeley, must join other museums throughout the world in formulating a policy...
persuaded to change the form of the souveniers that they carry home from the hunt, just as the African big game hunters switched from stuffed heads to photographs. Even Mel Fisher, president of Treasure Salvors, Inc., has admitted, "The search, the hunt is the real reward." 

The decision in Ervin, and the Florida Archives and History Act, rather than being aberrations, appear to be at the forefront of progressive antiquities law in the United States. It is unconscionable to allow the protective cloak of a free enterprise ideology to shelter or obscure the systematic destruction of an irreplaceable cultural heritage. It is staggering to learn that all known underwater sites in the Florida Keys formerly protected by state law were totally or partially destroyed within two years of the United States v. Florida decision. New law, both judicial and legislative, is imperative, on all levels: local, national, and international.

Beth Read

which will regulate, reduce, and control the illicit traffic in art and antiquities.

Policy: Therefore, on behalf of the Lowie Museum of Anthropology and the University Art Museum, the University of California, Berkeley, will use its best efforts to ensure that any object to be accessioned to their respective collections has not been (1) excavated without permit, where such permits are required, whether in the United States or abroad; (2) stolen from a private collection, a dealer in art and/or antiquities, a museum, or a nationally designated monument; or (3) exported from its country of origin in violation of the laws of that country and/or the country where it was last legally owned.

Moreover, should either of these museums of the University of California, Berkeley, come into possession of any object in violation of these principles, the University will, if practicable, return it to the rightful owner.


IMS TO DIVEST ITSELF OF COLLECTIONS:
At a special meeting of the IMS Board of Directors, held on July 12, 1979, it was resolved that the IMS will in the future decline donations of all artifacts from private or individual sources, unless they are on loan with express permission of the country of origin. It was further resolved that a Committee be appointed to study ways and means of divestiture and make its recommendations known to the Board within six months.

Newsletter, Institute of Maya Studies, Inc., August 15, 1979 at 1. See also note 46 supra at Appendix D.

102. Nova Law Center, Perspective, Fall, 1979 at 3.
103. 95 So. 2d 902.
104. 425 U.S. 791.
Admiralty Law: Trial of a Treasure Hunter
Treasure Salvors, Inc. v. Nuestra Señora de Atocha

Treasure hunters today are forced to battle not only the perils of the sea, but also the powers of government. This note examines whether ownership of an abandoned “derelict” and its treasure found by a treasure hunter outside the territorial limits of a state should be awarded to the treasure hunter or to the state. A trilogy of cases in the United States courts have recently held that the treasure hunter owns the treasure.\(^1\) A closely related question arises if the derelict and its treasure are located within state territorial waters (the so-called three-mile limit). The Florida Supreme Court has held that the treasure is owned by the state if located within its jurisdiction,\(^2\) but the United States District Court for the Southern District of Florida has recently raised doubts about the validity of the supreme court’s conclusion.\(^3\) This latter issue is certain to be hotly contested in the near future.\(^4\)

In the midst of this controversy, federal legislation has been proposed. A bill pending in Congress, if passed, would vest title to certain shipwrecks and their treasure in the United States Government.\(^5\) The future of this bill could have a significant impact on the current litigation and mark significant changes in existing treasure law.

\(^1\) Treasure Salvors, Inc. v. The Unidentified Wrecked And Abandoned Sailing Vessel Believed To Be The Nuestra Señora de Atocha, 408 F. Supp. 907 (S.D. Fla. 1976), modified, 569 F.2d 330 (5th Cir. 1978) [hereinafter cited as Treasure Salvors #1]. Treasure Salvors, Inc. v. The Unidentified Wrecked And Abandoned Sailing Vessel Believed To Be The Nuestra Señora de Atocha, 569 F.2d 330 (5th Cir. 1978) [hereinafter cited as Treasure Salvors #2]. Treasure Salvors, Inc. v. The Unidentified Wrecked And Abandoned Sailing Vessel Believed To Be The Nuestra Señora de Atocha, 459 F.Supp. 507 (S.D. Fla. 1978) [hereinafter cited as Treasure Salvors #3].

\(^2\) State ex rel. Ervin v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), cert. denied. 355 U.S. 881 (1957).

\(^3\) Treasure Salvors #3, 459 F.Supp. at 509.

\(^4\) Cobb Coin Co. v. The Unidentified Wrecked And Abandoned Sailing Vessel Believed To Be The Almirante, No. 79-8266-CIV-JLK (S.D. Fla., filed August 17, 1979) [hereinafter cited as Cobb Coin Co. v. The Almirante].

BACKGROUND: NUESTRA SEÑORA DE ATOCHA

In the year 1622, Spain was supreme. Her economy was soaring with the wealth of gold and silver being mined in the “New World.” King Philip IV regularly dispatched two fleets to transport this wealth safely home over seas teeming with buccaneers and pirates. The vice-flagship of the fleet which sailed between Spain and northern South America was named Nuestra Señora de Atocha.

On the morning of September 4th, the Atocha and her twenty-eight sister ships sailed out of Havana, homeward bound. The Atocha was hauling a magnificent treasure in gold, silver and jewelry—perhaps, in present worth, a treasure exceeding a half-billion dollars. Two days later, helplessly situated in the Straits of Florida, the ships were besieged by a hurricane which hurled them mercilessly back onto the coral reefs near the Florida Keys. Aground and awash, the fleet was battered and broken. Five hundred and fifty drowned, and the immense treasure was lost.

In early June, 1971, Mel Fisher, founder and president of Treasure Salvors, Inc., discovered the first clue in his five-year search for the Atocha; a single lead musket ball was retrieved from the ocean floor. Two weeks later, mid-June, a diver found a lone silver coin; later that day, another discovered a piece of a huge ancient anchor. Then, incredibly, a diver surfaced with gold—eight long feet of delicate gold chain. And with that, at last, a tiny part of Nuestra Señora de Atocha glittered again in the warm rays of the tropical sun.

But almost before having had a chance to dry upon the ship’s deck, the treasure was seized by Florida’s Division of Archives. Previously, under threats of arrest, Fisher had been coerced into signing a

6. According to records kept by the House of Trade in 1622, the Atocha carried 901 silver bars (70 lbs. ea.), 250,000 pieces of eight, and 161 items in registered gold (216.5 lbs.). It is estimated that a similar amount was stowed away in contraband. R. DALEY, TREASURE 23 (1977). Current estimated value has reached $600,000,000. Lyon, The Trouble With Treasure, 149 NAT’L GEOGRAPHIC 787 (June, 1976).

7. The Atocha was located two weeks after the disaster, but subsequent salvage attempts failed. Three attempts were launched during the following three years, but the Atocha was never located again. See Lyon, supra note 6, at 84-90.

8. Other items retrieved shortly thereafter were: swords, daggers, cannonballs, matchlock muskets, spoons, cups, pewter plates, rings, medallions, a delicate rosary, cannons, an astrolabe, and navigational dividers. See Lyon, supra note 6, at 787.
"salvage contract" with the state. The contract provided that in exchange for Treasure Salvors' right to explore certain underwater areas (assumed to be state-owned lands), the state would be allowed to keep, and, at its pleasure divide, all cargo or wreckage salvaged by Treasure Salvors, the state retaining twenty-five percent and Treasure Salvors eventually getting the rest.

For the next four years, until early 1975, Fisher's company continued salvaging the Atocha, entirely at its own expense; and the state continued, in "bad faith," seizing and hoarding the treasure. Then, in March of 1975, the United States Supreme Court, in an unrelated case, determined that Florida's boundaries did not encompass the site of the Atocha. It thus became clear that the "salvage contract" between Treasure Salvors, Inc. and Florida was unenforceable since the Atocha lay in international waters leaving Florida with no claim to

"(5) The division may make and enter into all contracts and agreements . . . ."
"The coercive acts of the Division of Archives in threatening arrest and confiscation voids the contract under the general maritime law." Treasure Salvors #3 459 F.Supp. at 520.


11. Other than placing an agent on Fisher's boat to oversee the work, the State of Florida made no contribution in money or personnel to the salvage expedition. See R. Daley, supra note 6, at 131.

12. It is basic to a maritime contract that the parties act in good faith. The state's use of coercion to acquire contractual rights, refusal to divide the salvaged treasure, compounded by the Division of Archives' arrangement with the United States Government to obtain an antiquities permit if the United States was successful in its claim against the treasure is strong evidence of the "bad faith scheme" devised by the State of Florida. Treasure Salvors #3, 459 F.Supp. at 521-22.


14. The contract failed on several grounds:
(1) Mutual mistake of fact - both parties believed the Atocha was located within state territorial waters.
(2) Lack of consideration - Florida tendered nothing since it lacked authorization to contract regarding the salvage of a vessel outside the state's territorial sovereignty.
(3) Bad faith - on behalf of the state rendering the maritime contract void.
(4) Contract terms - provision to render the contract void if the state's title failed.
the treasure. Accordingly, Fisher promptly filed suit in federal district
court against the Atocha, claiming Treasure Salvors, Inc. owners as
against the entire world. The Florida Department of Archives, power-
less to stop Fisher, requested the United States Department of Justice
to intervene, urging them to claim ownership of the treasure. The
United States obliged; and the fundamental issue of this paper was laid
before the court: Whether ownership of an abandoned “derelict” (the
Atocha) and its treasure, found by a treasure hunter (Treasure Salvors,
Inc.) outside the territorial limits of the state (the United States),
should be awarded to the treasure hunter or to the state.

TREASURE SALVORS #1

On what grounds could the United States possibly claim the trea-
ure? After all, Treasure Salvors had found the treasure and salvaged it
entirely at its own expense without any help from the government.
Furthermore, the Atocha and her treasure lay in international waters,
outside the reach of any government. Admittedly, a United States At-
torney quipped, “We've got to hustle around and see if we can find
enough law to get our guys in.”

The United States eventually based its claim on the doctrine of

Immediately following oral argument in United States v. Florida, Treasure Salvors
15. Treasure Salvors #1, 408 F.Supp. 907 (S.D. Fla. 1976), modified, 569 F.2d
330 (5th Cir. 1978).
16. Special terminology is applied in maritime law to property “lost” at sea. The
term “wreck” refers to property lost at sea which has washed ashore. “Flotsam” refers
to the same property which remains afloat. “Jetsam” refers to property purposely
thrown overboard in an attempt to save a foundering vessel. When buoyed in order to
be retrieved at a later time, this property is labelled “ligan.” Vessels lying at the bot-
tom of the sea, as the Atocha, are called “derelicts.” Kenny and Hrusoff, The Owner-
ship Of The Treasures Of The Sea, 9 WM. & MARY L.REV. 383, 384 (1967). See also
Annot., 63 A.L.R.2d 1360, 1365.
17. Both the United States and Treasure Salvors, Inc. agreed “the site of the
wreck is on the continental shelf but outside the territorial waters of the United
States.” Treasure Salvors #1, 408 F.Supp. at 909.
18. It took six years of research and diving expeditions and an expenditure in
excess of $2,000,000 to locate the Atocha. Unfortunately, the cost was measured not
only in time and money; it encompassed four lives, including Fisher's son and daugh-
ter-in-law. Lyon, note 6 supra.
19. 189 SCIENCE 1070 (September 26, 1975).
“sovereign prerogative,” a common law notion derived from the right of the King of England to objects recovered from the sea by his subjects.” The government contended the doctrine of sovereign prerogative had been legislatively asserted by Congress through the enactment of the Antiquities Act and the Abandoned Property Act. The district court in subsequent litigation, Treasure Salvors #3, characterized this claim as “flimsy.”

Dealing first with the Abandoned Property Act, which applies to property “which may have been wrecked, abandoned, or become derelict,” the court noted that it had long been decided that the Act referred only to property “strewn about the country and its harbors during the Civil War.” Clearly, the Atocha was not within its purview.

The Antiquities Act, in similar fashion, purports to apply to “any historic or prehistoric ruin or monument, or to any object of antiquity.” But this Act, the court pointed out, “has been held to be un-

20. Also known as the “English Rule.” For an in-depth analysis of the development of the English Rule, see 9 WM & MARY L.REV., note 16 supra.
21. Treasure Salvors #1, 408 F.Supp. at 909.
24. “It would amaze and surprise most citizens of this country, when their dream, at the greatest of costs, was realized, that agents of respective governments would, on the most flimsy of grounds, lay claim to the treasure.” Treasure Salvors #3, 459 F.Supp. at 509.
   The administrator of General Services is authorized to make such contracts and provisions as he may deem for the interest of the Government for the preservation, sale, or collection of any property, or the proceeds thereof, which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States, and in such contracts to allow such compensation to any person giving information thereof, or who shall actually preserve, collect, surrender, or pay over the same, as the Administrator of General Services may deem just and reasonable. No costs or claim shall, however, become chargeable to the United States in so obtaining, preserving, collecting, receiving, or making available property, debts, dues, or interests, which shall not be paid from such moneys as shall be realized and received from the property so collected, under each specific agreement.
27. 16 U.S.C. § 432 (1970). This section provides in part: “Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the
constitutionally vague." Moreover, both the Antiquities Act and the Abandoned Property Act apply only to property found within the jurisdiction of the United States. The Atocha, lying on the outer continental shelf beyond territorial waters was plainly beyond the reach of the United States; thus, neither Act could apply to it.

But the United States asserted the Atocha was within the jurisdiction of the United States through the use of the Outer Continental Shelf Lands Act (OCSLA). The court rejected this argument since "this statute [OCSLA] merely asserts jurisdiction over the minerals in and under the continental shelf." Additionally, the court noted, even

Secretaries of the Interior . . . ."

16 U.S.C. § 433 (1970). This section provides:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.


29. The pertinent part of the Antiquities Act states "situated on lands owned or controlled by the Government of the United States." For complete text, see note 27 supra.

30. Treasure Salvors #1, 408 F.Supp. at 909.

31. Id. at 910. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1332 (1953):

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

See also Guess v. Read, 290 F.2d 622, 625 (1961), cert. denied, 386 U.S. 957 (1962) for a more detailed analysis of this Act.

32. Treasure Salvors #1, 408 F.Supp. at 910.
if OCSLA did extend the jurisdiction of the United States over wrecked ships, it would be invalid because it would conflict with the Geneva Convention on the Continental Shelf. And, the court pointed out, the International Law Commission, in its report on the Geneva Convention stated: “It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.”

Thus, having considered and rejected each aspect of the United States’ “hustled” sovereign prerogative theory, the district court granted Treasure Salvors’ motion for summary judgment, declaring it the new owner of the *Atocha* and her treasure as against the whole world.

**TREASURE SALVORS #2**

The United States appealed. In addition to reasserting its claim that Congress had legislatively asserted sovereign prerogative through the Abandoned Property Act and the Antiquities Act, the government also contended that a legislative assertion of the doctrine was not necessary. The Fifth Circuit rejected these arguments (and others raised by the government which are not pertinent here), and affirmed the

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35. Treasure Salvors #1, 408 F. Supp. at 911.

36. Treasure Salvors #2, 569 F.2d at 341.

37. The United States Government raised three procedural arguments in addition to the substantive claims. The government claimed: (1) the federal district court lacked jurisdiction since the wreck was outside the territorial waters; (2) summary judgment was improper due to the existence of two unresolved factual questions; and, (3) salvage law was inappropriately applied. The Fifth Circuit held jurisdiction was proper since the government by intervening and by stipulating to the court’s admiralty jurisdiction had waived the usual requirement that the res be present. The issues unresolved were not questions of fact, but concerned administrative or legislative action,
district court’s decision, though modifying it slightly.

As to the purported assertion of sovereign prerogative through the Antiquities and Abandoned Property Acts, the Fifth Circuit adopted the reasoning of the district court; the Acts clearly applied only to certain property within the jurisdiction of the United States. Any extension of United States' jurisdiction beyond the three-mile limit by the Outer Continental Shelf Lands Act was obviously only "for the purpose of exploring the area and exploiting its natural resources." Since the *Atocha* was outside the three-mile limit and, obviously, not a "natural resource," the Antiquities and Abandoned Property Acts were again held inapplicable.

The court also rejected the government’s claim that sovereign prerogative need not be legislatively asserted. The government had argued that sovereign prerogative was a part of American maritime law because “a number of the royal colonies” had asserted “certain prerogative rights” to abandoned property found within their jurisdiction. The court disagreed: “[T]he notion of sovereign prerogative never took root in America.” To substantiate its ruling, the court went on to cite cases and authorities for the inapposite “American Rule,” which has been “widely recognized by courts and writers.”


38. *Id.* at 341.

39. *Id.* at 339. See note 31 supra regarding the Convention on the Continental Shelf. See also President Truman’s proclamation of September 28, 1945 stating in part: “[T]he Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States . . . .” Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945).

40. Treasure Salvors #2, 569 F.2d at 343.

41. *Id.* at 342.

42. *Id.*


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This American Rule was Treasure Salvors' ally to the end. In direct conflict with the "English Rule" (sovereign prerogative), the American Rule vests title to lost or abandoned goods in the finder. The case law in America overwhelmingly adopts this rule. Only a minority of the state courts, most notably the Florida Supreme Court, have ever purported to adopt the English Rule of sovereign prerogative. The highly criticized Florida decision will be dealt with below. At this point, it is only important to note that Fisher's ownership of the Atocha and her treasure was affirmed by the Fifth Circuit. The only modification of the district court's decision was that Treasure Salvors' title to the Atocha was not binding on those not parties or privies to the suit. Remarkably, the Florida Division of Archives took this modification as an invitation to lay yet another claim to the treasure.

TREASURE SALVORS #3

The Division of Archives had never released the treasure it had seized and collected from Treasure Salvors since the day of the first musket ball. Accordingly, to effectuate the Fifth Circuit's mandate, the District Court for the Southern District of Florida issued an ancillary warrant to compel the Division of Archives to release Fisher's treasure.

The Division of Archives alleged that the district court lacked jurisdiction to issue the warrant, and, additionally claimed sovereign

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44. For the history and a discussion of the American Rule, see 9 WM & MARY L.REV., note 16 supra.
45. See cases cited in note 43 supra.
47. This modification was necessary since only "constructive possession" was attained over the wreck site and the treasure yet undiscovered. "The district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States." Treasure Salvors #2, 569 F.2d at 335-36.
49. "In order to effectuate the mandate of the Fifth Circuit, and carry out the judgment of this Court, a warrant for arrest was issued to seize certain salvaged articles in the possession of the Division of Archives, History and Records Management, Department of State, State of Florida . . . ." Id. at 508-09.
50. Id. at 509.
immunity under the eleventh amendment. Furthermore, it claimed not to have been in privity with the United States in the two previous lawsuits, and asserted ownership of the treasure on two grounds: the old "salvage contract" with Fisher; and like the United States before it, Florida maintained it had a sovereign prerogative to the treasure which had been legislatively asserted by section 267.061 of the Florida Statutes.

The jurisdictional and sovereign immunity arguments were brushed aside by the district court; but the Division of Archives' privity argument, an attempt to "paint itself as a total stranger to the litigation," drew scathing criticism from the court. Citing Florida's high degree of participation in the previous litigation, the court wrote: "It ill behooves the Division of Archives to play such a fast and loose game with the courts. For all practical purposes, the Division of Archives was a party in fact, although not technically in name, to the litigation." Thus, since Florida was in privity to the previous litigation, it followed that, as between Treasure Salvors, Florida, and the United States, Treasure Salvors' claim to ownership of the Atocha and her treasure was supreme. And that should have been the end of it; but, gratuitously, the court went on to consider Florida's contract claim and sovereign prerogative theory.

51. *Id.* The Eleventh Amendment of the United States Constitution provides: "The 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."

52. Treasure Salvors #3, 459 F.Supp. at 522.

53. The Division of Archives challenged the Southern District Court's authority to issue a warrant of arrest against items removed to the Northern District. The warrant was ancillary to the court's established jurisdiction over the res originally arrested in the Southern District and, therefore, a valid exercise of jurisdiction. Further, the State claimed sovereign immunity under the eleventh amendment, claiming this was an independent action against the state. Senior District Judge Mehrtens was swift to state that the eleventh amendment "is not a sword whereby agents of the State can take and appropriate the property and lives of its citizens without due process." *Id.* at 528.

54. *Id.* at 513.

55. Florida had loaned an attorney to the federal government to work on the case, and the Division of Archives had begun preliminary negotiations with the United States regarding the disposition of the treasure if the government won. *Id.* at 514.

56. *Id.* at 513.

57. Having established the State was in privity, the Division of Archives was
The court’s rationale for rejecting any possible claim to the treasure which the State may have had via its “salvage contract” with Treasure Salvors has been discussed above. The State’s further contention, that section 267.061 gave it a sovereign prerogative to the Atocha, was refuted by the court on three grounds:

(1) Like the Abandoned Property Act and the Antiquities Act, section 267.061 applies only to property located on “sovereignty lands of the state”; 80
(2) Like the Antiquities Act, the statute is unconstitutionally vague; 81 and
(3) Most significantly, the statute unconstitutionally purports to give a state jurisdiction over maritime matters—a subject under exclusive federal control. 82

Since Florida Statute section 267.061 is also the primary authority under which the state asserts its claim to wrecks and derelicts found within its territorial waters, this dictum is certain to be raised in future litigation.

However, the controversy over the Atocha’s treasure is not yet settled. Despite the district court’s finding that the Division of Archives was bound by the Fifth Circuit’s earlier decision, and its rejection of bound by the prior judgment and could no longer assert any claim to the treasure. The judge, however, continued to evaluate the State’s arguments. Id.

58. For a discussion of the contract’s flaws, see note 14 supra.
59. Archives and History Act, Fla. Stat. § 267.061 (1975) reads in part:
(1)(a) It is hereby declared to be the public policy of the state to protect and preserve historic sites and properties . . . sunken or abandoned ships . . . or any part thereof relating to the history, government and culture of the state.
(1)(b) It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Archives, History, and Records Management of the Department of State for the purpose of administration and protection.
60. “state-owned lands or state-owned sovereignty submerged lands . . .” Id.
61. “In the alternative, Ch. 267.061 Fla. Stat. is unconstitutional based upon the holding in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) noted with apparent approval of the Fifth Circuit in this case. 569 F.2d at 340.” Treasure Salvors #3, 459 F. Supp. at 524. But see note 99 supra.
62. “The application of Chapter 267, Florida Statutes, to wrecked and abandoned vessels is beyond the state’s power as it is maritime in nature.” Id. at 525.
the state’s claim under section 267.061, the state appealed this decision
to the Fifth Circuit. The treasure remains in the possession of the
Division of Archives.

After seven years of litigation, it appears that Senior District
Judge Mehrtens was indeed correct when he wrote: “As grave as the
perils of the sea are and were, the gravest perils to the treasure itself
came not from the sea but from two unlikely sources. Agents of two
governments, Florida and the United States . . .”

UPCOMING LITIGATION: TREASURE WITHIN
FLORIDA’S THREE-MILE LIMIT

Florida has traditionally claimed title to all “sunken or abandoned
ships” on “state-owned sovereignty submerged lands.” That is why
Fisher, when searching for the Atocha, originally entered the salvage
contract with the State; both parties had erroneously assumed he was
exploring state-owned submerged lands. Having apparently won owner-
ship of the Atocha, Fisher has now gone back into court to play “a
new game of hardball with state officials.” Fisher’s new corporation,
Cobb Coin Company, Inc., is claiming title to the Almirante, a 1715
shipwreck which it claims it discovered. The Almirante, unlike the
Atocha, is just a quarter mile off Florida’s coast in about eighteen feet
of water, well within the three-mile territorial limit.

If Florida loses this suit, it would lose the right to protect hun-
dreds of treasure ships which officials have been preserving for study by
state institutions when money can be found to fund the treasure
hunts. According to Sonny Cockrell, Florida’s outspoken underwater
archeologist, a loss in this suit would “signal an end to all shipwreck
law in our State.” Fisher countered, “I don’t think the State has any
right to be in the treasure salvage business. That should be left to pri-

63. Treasure Salvors, Inc. v. The Unidentified Wrecked And Abandoned Sailing
Vessel Believed To Be The Nuestra Senora de Atocha, No. 78-2950 (5th Cir., Argued
December 4, 1979).
64. Treasure Salvors #2, 459 F.Supp. at 511.
67. Id.
68. The Miami Herald, August 24, 1979, § D, at 1, 10, col. 2.
69. The Fort Lauderdale News, note 55 supra.
Accordingly, Fisher has filed suit against the *Almirante* in the Federal District Court for the Southern District of Florida.\(^{71}\) Almost certainly, both Florida and the United States will intervene and claim ownership. As previously mentioned, doubt has been cast on the validity of Florida’s claim, even to sunken ships well within its territorial waters, as a result of the dictum contained in the district court’s decision in *Treasure Salvors* #3, and general principles of maritime law.

Florida’s claim to “sunken or abandoned ships” within state territorial waters must be based primarily on section 267.061 of the Florida Statutes.\(^{72}\) But, according to the district court in *Treasure Salvors* #3, “the application of chapter 267, Florida Statutes, to wrecked and abandoned vessels is beyond the state’s power as it is maritime in nature.”\(^{73}\) This dictum is apparently an accurate characterization of the present state of admiralty law in this area.

While states certainly have the authority to enact laws which may have some effect on maritime affairs, no state can enact laws which “contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.”\(^{74}\) The application of this tripartite analysis to Florida Statute section 267.061, presents a strong argument against its constitutionality.

The first question proposed by the tripartite test is whether the state statute conflicts with any federal statute. This paper has already discussed the federal Abandoned Property Act and Antiquities Act.\(^{75}\) Obviously, only the Antiquities Act could apply to the *Almirante*, since the Abandoned Property Act is limited to Civil War artifacts.\(^{76}\) Does Florida Statute section 267.061 conflict with the Antiquities Act? This is a question of statutory interpretation to be decided by the courts; but, to the extent that each statute would purport to vest control over the *Almirante* in different governments, it seems clear the statutes do

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\(^{70}\) The Miami Herald, note 57 supra.

\(^{71}\) Cobb Coin Co. v. The Almirante, note 4 supra.

\(^{72}\) For the text of FLA. STAT. § 267.061, see note 59 supra.

\(^{73}\) *Treasure Salvors* #3, 459 F.Supp. at 525.


\(^{75}\) See notes 22 through 29 and accompanying text supra.

\(^{76}\) See note 25 and accompanying text supra.
A recently enacted bill, H.R. 1825, the "Archaeological Resources Protection Act of 1979," is an amendment to the "vague" Antiquities Act. This new law vests title in the United States to all "archaeological resources" found on "public lands." For an abandoned shipwreck to fall within the Bill's broad terms it would have to be viewed as "material remains of past human . . . activities which are of archaeological interest" and be "at least one hundred years of age." Arguably, even with this amendment, the Antiquities Act is still unconstitutionally vague as applied to shipwrecks. The law also ambiguously defines "public lands," inter alia, as "all other lands the fee title to which is held by the United States other than lands on the outer Continental Shelf."

The second point to consider is whether the state statute conflicts with the "characteristic features of the maritime law." As previously

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77. Compare the Antiquities Act at note 27 supra to Fla. Stat. § 267.061 at note 59 supra.

78. This analysis presupposes the Antiquities Act is itself a valid statute. But the Antiquities Act may be unconstitutionally vague. See note 99 infra. Thus, perhaps the Florida statute does not conflict with a valid federal statute. The point is moot, however, since the next "test" indicates that the Florida statute unquestionably conflicts with the principles of general maritime law. Moreover, if the Antiquities Act is vague so is the Florida statute. See note 91 and note 99 and accompanying text infra.


80. Id.

81. It is interesting to note the ambiguity found in the definition of "public lands," which reads in part: "(B) all other lands the fee title to which is held by the United States other than lands on the Outer Continental Shelf." 16 U.S.C.A. § 470bb (3) (Supp. 1979). Does this exclude the Outer Continental Shelf entirely, or does it include it with the exception of only requiring fee title to the other lands mentioned?

82. "The Constitution of the United States, Art. 3, Sec. 2, has been interpreted to include a grant to the courts to declare the general maritime law and to supplement it—a true legislative role." Treasure Salvors #3, 459 F.Supp. at 529. Or, as explained by Professors Black and Gilmore,

The "general" maritime law in the United States, insofar as it remains unmodified by statute, contains . . . two parts. First, is the corpus of traditional rules and concepts found by our courts in the European authorities . . . . Second are rules and concepts improvised to fit the needs of this country, including, of course, modifications of the first component.
explained, the general maritime law in this matter is the "American Rule," i.e., the finder is entitled to the ownership of his discovery. Florida's statute clearly conflicts with this rule, and would, therefore, appear to be invalid by this analysis.

The final consideration is whether the state statute interferes with the "harmony and uniformity" of maritime law in its interstate or international relations. Were this the sole test for determining the status of Florida's statute, it would probably be valid. The statute applies only to "sunken or abandoned ships" sedentarily situated within the state's territorial waters. It is not the kind of statute which may affect commercial shipping, or ships sailing from port to port among the states. The statute is inherently local in nature. As such, it does not lend itself to disrupting the harmony of maritime law in its interstate relations. Nevertheless, this issue need not be further discussed since the statute appears to conflict with general principles of maritime law, and is probably in conflict with the federal Antiquities Act. Thus, as the district court noted in Treasure Salvors #3, Florida Statute section 267.061, is probably invalid, and an unconstitutional usurpation of federal power by the state.

In addition to chapter 267, two other Florida statutes also argua-
bly vest title in the state to abandoned vessels found within its territorial waters, sections 2.01 and 705.01. To the extent that they too purport to govern maritime matters, they, like section 267.061, may be unconstitutional. Notwithstanding their potential invalidity in this respect, each of the three statutes also suffers at least one potential defect on other grounds. Thus, a claim by the state based on its legislation may not be successful.

However, the Florida Supreme Court has held that title to an abandoned vessel located in state territorial waters vests in the state, not in the salvor. In State ex rel. Ervin v. Massachusetts Co., the

89. Fla. Stat. § 2.01 (1975) provides:
Common law and certain statutes declared in force.— The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent, with the constitution and laws of the United States and the acts of the legislature of this state.

This statute was applied in State ex rel. Ervin v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), cert. denied, 355 U.S. 881 (1957).

90. Fla. Stat. § 705.01 (1978) provides: County court judge to order sale.—
(1) Whenever any wrecked derelict goods or abandoned motor vehicle, or other personal property shall be found in any county in this state, the county judge shall ascertain the amount and situation of the same and by his written order shall cause the sheriff to take charge thereof and sell the same at public outcry, after giving a reasonable public notice of the time and place of such sale. (emphasis supplied).

91. Fla. Stat. § 267.061 was declared unconstitutionally vague in Treasure Salvors #3, 459 F.Supp. at 525.

Fla. Stat. §2.01, which incorporates the English common law as of 1776, should not apply to “derelicts.” While this chapter was used by the Florida Supreme Court in the case of State ex rel. Ervin v. Massachusetts Co. to apply sovereign prerogative to a derelict, it should be noted that England had not extended this doctrine to derelicts until 1798 in the Aquila, 165 Eng. Rep. 87 (Adm. 1798). 9 Wm. & Mary L.Rev., supra note 16, at 390.

Fla. Stat. §705.01 authorizes the sale of wrecked derelict goods found within a county. This provision may conflict with section 715.01 which vests title in the finder of personal property found “in or upon public conveyances, premises at the time used for business purposes . . . and other places open to the public . . . unless the same be called for or claimed by the rightful owner thereof within 6 months after the finding thereof.” Fla. Stat. § 715.01 (1975). State ex rel. Ervin v. Massachusetts Co., 95 So.2d at 908 (dissenting opinion).

92. State ex rel. Ervin v. Massachusetts Co., 95 So.2d at 908.
supreme court adopted the doctrine of sovereign prerogative. A battleship, the *Massachusetts*, had been sunk and abandoned by the United States in 1922, approximately 1.2 miles off the Florida coast. Thirty-four years later in 1956, the defendant Massachusetts Co. began salvaging the remains of the ship. The state sought to enjoin the salvage operations by claiming ownership of the *Massachusetts*. The injunction was denied, but the supreme court reversed on appeal. In addition to granting the injunction, the court held that the state owned the ship in its capacity as sovereign.83

Whether the supreme court ever had jurisdiction to decide the issue of ownership, a maritime matter, is questionable. Although federal admiralty jurisdiction is not exclusive, it is exclusive "to those maritime causes of action begun and carried on as proceedings in rem . . . ."144 "It is this kind of in rem proceeding which state courts cannot entertain." Thus, it is probable that the Florida Supreme Court did not have jurisdiction to decide the issue of ownership. Regardless, to the extent that this case purports to be law which determines the ownership of abandoned vessels, it too may be invalid, like Florida Statute section 267.061, as an unconstitutional usurpation of federal power by the state. Thus, Florida's claim to the *Almirante* is, at best, tenuous, based on potentially invalid legislation and questionable case law.

If Florida's claim fails, what of the United States' claim?7 The United States will probably rely on the Antiquities Act; this Act,
however, is arguably unconstitutionally vague. The Abandoned Property Act has been held to be limited to Civil War matters; and, therefore, is inapplicable. Presently, no other federal legislation exists which might apply to this case. Clearly, since there is a lack of applicable federal legislation, Fisher has a good chance of prevailing against the federal government, too. Also in his favor is a large body of federal case law which repeatedly has adopted the American Rule of awarding title to the finder.

It is important to note that a bill is pending in Congress which, if passed, could certainly change the course of this litigation, and treasure law in general. H.R. 1195 provides that "any abandoned historic shipwreck located, in whole or in part, on the outer continental shelf . . . is the property of the United States." Inasmuch as this bill purports to control shipwrecks outside the three-mile limit, it is in direct conflict with the Geneva Convention on the Continental Shelf. Thus, unless modified, it is unlikely this bill will become law.

This bill and the pending case of the Almirante are certain to be crucial factors as the law of treasure is reconsidered in the coming years. Whether the bill should become law or Fisher's company be awarded the Almirante, are questions involving competing social poli-


Nowhere here do we find any definition of such terms as "ruin" or "monument" (whether historic or prehistoric) or "object of antiquity." The statute does not limit itself to Indian reservations or to Indian relics. Hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions. 499 F.2d at 114. In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution. 499 F.2d at 115.

However, the Tenth Circuit recently rejected this reasoning and explicitly upheld the constitutionality of the Act. The court held the law was not vague as applied. United States v. Smyer, 596 F.2d 939 (10th Cir. 1979), cert. denied, 100 S.Ct. 84 (1979). Moreover, Congress has recently passed legislation in an effort to cure the statute's vagueness problem. Archaeological Resources Protection Act of 1979, 16 U.S.C.A. § 470aa (Supp. 1979).

100. Treasure Salvors #1, 408 F.Supp. at 909.

101. See cases cited note 43 supra.


103. Convention on the Continental Shelf, see note 29 supra. Note: the passage of this bill would legislatively overrule the Fifth Circuit's decision in Treasure Salvor's #2.
cies and conflicting legal principles. The outcome will be interesting to observe.

CONCLUSION

At the present time, case law supports the rights of a treasure hunter to ownership of all the treasure he finds outside the jurisdiction of the state. This principle embodies the American tradition of a fair reward for an individual's work, and endeavors to restrain an expanding modern bureaucracy from intruding into an area where personal property rights have traditionally prevailed. We approve of this fair principle. Accordingly, we disapprove of the legislation proposed by H.R. 1195 to the extent it gives the United States unwarranted ownership and improper jurisdiction over shipwrecks and treasure in international waters. Treasure hunters should be free to pursue their demanding and risky profession without government meddling.

Should a treasure hunter own the treasure he finds if it is within the state's jurisdiction? We think so. A wreck lost and undiscovered is the same whether it be one or five miles from the beach. The state should not be enriched unjustly by the industry of the few who devote themselves to the vicissitudes of search and recovery merely because a discovery is near to the shore. The English notion of a sovereign prerogative is misplaced in this context. If Fisher and his company found the Almirante, they should own it.

Archaeological considerations also must be examined. Congress has the power to regulate maritime matters, and more enlightened legislation than that now pending should be created to strike a balance between the need of the people to know their past and the right of every person to a fair compensation for his or her chosen labour. In the final analysis, however, we believe the American tradition of a just reward is too important to be subordinated to any secondary considerations.

104. For a discussion of these considerations, see Open Season On Ancient Shipwrecks preceding this comment.
“A wise and frugal government . . . shall leave men otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labour the bread it has earned — this is the sum of good government.”

Robert Kelley
Melanie May*

105. THOMAS JEFFERSON, WRITINGS.

Note: In regard to a frugal government, it is interesting that over $36,000,000 was spent, not including the cost of litigation, during the course of the Atocha situation. According to David Paul Horan, attorney for Treasure Salvors, Inc. $20,000,000 was spent in the establishment of a Department of Underwater Archeology through the Department of the Interior. An additional $16,440,000.87 was spent in amending offshore oil leases to include a stipulation by which the federal government can require the “lessee to conduct a cultural resources survey based on the probability zone maps” prepared by the government. (This cost includes that of the lessees in compliance.) Brief for Appellant, Treasure Salvors #2, 569 F.2d 330 (5th Cir. 1978), at 20.

* The authors would like to express their appreciation to Mr. Paul Horan, attorney for Treasure Salvors, Inc., of Key West, Florida for his help in obtaining information on the current status of this litigation.
Death with Dignity and the Terminally Ill: The Need for Legislative Action
Satz v. Perlmutter

The advances in the field of medical science during the past several decades have been significant. The benefits society has received from those medical advances are not, however, without serious consequences.¹ Today, with the physician's vast array of weapons to combat sickness and death, terminally ill patients who no longer wish to live, but who desire a natural death with dignity, may have their lives artificially prolonged for months or even years.² There is growing national concern over the use of advanced medical technology to artificially prolong the lives of terminally ill patients. These concerns are echoed by the patient who expresses a desire to face death on his own terms; the health care profession who must provide medical facilities and treat the terminally ill patient; family members who are exposed to an emotional and financial strain; and the state which has an interest in the preservation of life and the protection of other aspects of our society.

Recently, the Florida judiciary was faced with balancing the interests of the state against the rights of the individual to refuse extraordinary medical treatment. Abe Perlmutter, a retired New York taxi cab driver, was diagnosed in January, 1977 as suffering from amyotrophic lateral sclerosis, a condition more commonly known as “Lou Gehrig’s disease.”³ This illness is progressive with life expectancy being approximately two years from the time of diagnosis.⁴ Prior to his affliction, Mr. Perlmutter was active in community affairs and enjoyed his retire-

³. Miami Herald, Jan. 18, 1980, § A at 1. Amyotropic lateral sclerosis “is a disease of the nervous system in which, as a result of degeneration of nerve cells in the spine and brain, there is a progressive wasting of the muscles of the body, with spastic paralysis.” BLACK'S MEDICAL DICTIONARY 37 (31st ed. 1976).
⁴. 362 So.2d at 161.
ment in Lauderdale Lakes, Florida. In May, 1978, his condition had deteriorated to the extent that extraordinary medical treatment was required to prolong his life. Even with the mechanical respirator attached to a breathing hole in his trachea, death was expected within a short period of time. In addition to the respirator, Mr. Perlmutter required a private hospital room, the continuous presence of skilled care, and constant attention from doctors and other hospital staff members. On more than one occasion, Mr. Perlmutter attempted to remove the respirator. His attempts were thwarted by hospital and medical personnel who were alerted by the sounding of an alarm.

Mr. Perlmutter filed a complaint in Broward County Circuit Court asking that he be given the right to determine whether to continue the extraordinary medical treatment that was artificially prolonging his life. On July 11, 1978, Judge Ferris granted Mr. Perlmutter's request. The decision was immediately appealed to the District Court of Appeal of Florida, Fourth District, which on September 13, 1978, affirmed the circuit court order granting Mr. Perlmutter's right to refuse life-prolonging medical treatment. On October 4, 1978, Mr. Perlmutter called his family to his bedside. His son unplugged the

5. Mr. Perlmutter "... was described as a physical fitness advocate who shunned junk food and led an exercise class at his condominium." Fort Lauderdale News, Jan. 17, 1980, § A at 7.
7. Id. at 192.
8. Id. Additionally, in his complaint, Mr. Perlmutter alleged that the hospital placed restraints upon his hands and arms to prevent his continued attempts to remove the respirator. See complaint. 47 Fla. Supp. 190.
10. 47 Fla. Supp. 190. The judge rendered his decision after conducting a bedside hearing with Mr. Perlmutter at Florida Medical Center. During this hearing, Mr. Perlmutter told Judge Ferris that he would prefer to lead a normal life, but absent this possibility, death as a result of the removal of his respirator, could not "... be worse than what I'm going through now." 362 So.2d at 161.
11. Id. at 160.
12. A petition for rehearing was denied on September 27, 1978, as well as a motion to withhold mandate and extend the stay pending Florida Supreme Court review. The Fourth District Court of Appeals issued the mandate October 3, 1978.
13. Mr. Perlmutter was a widower with adult children.
respirator and Mr. Perlmutter removed the tube from his throat. Mr. Perlmutter died forty hours later.

The state appealed the district court decision to the Florida Supreme Court. On January 17, 1980, the Florida Supreme Court unanimously upheld the right of a competent, but terminally ill adult, who has no minor dependents and who has unanimous family approval, to refuse the artificial prolongation of his life and die with dignity.

The initial suit, filed in Broward County Circuit Court by Abe Perlmutter, named a hospital, two physicians, and the State of Florida as defendants. In his suit, Mr. Perlmutter asserted that he had the constitutional right to make the decision to terminate the use of life-prolonging medical treatment. The defendants denied Mr. Perlmutter's asserted right to die with dignity, and the state warned of possible criminal violations of Florida law for anyone assisting in Mr. Perlmutter's effort to terminate the life-prolonging medical treatment.

Judge Ferris, in granting the relief sought by Mr. Perlmutter, ruled that he could: 1) leave the hospital, or 2) remain, free of the respirator and 3) that one designated by Mr. Perlmutter to assist in the removal of the respirator would be without civil and criminal liability.

The circuit court relied on the landmark case, In Re Quinlan, to hold that Mr. Perlmutter's constitutional right of privacy included the right to accept or to refuse artificial life-prolonging medical treatment. The constitutional right of privacy, in cases where patients wish to decline life-prolonging medical treatment, was succinctly stated in Quinlan: “We think that the State’s interest contra weakens and the individual's right of privacy grows as the degree of bodily invasion increases...”

15. Id.
16. This appeal was taken pursuant to FLA. CONST. art. 5, § 3(b)(3).
20. Id., FLA. STAT. § 782.08 (1979) - Assisting self-murder - “Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony in the second degree. . .”
and the prognosis dims. Ultimately there comes a point at which the individual’s rights overcome the State interest."\(^\text{24}\)

In *In Re Quinlan*, the New Jersey Supreme Court decided that a terminally ill young woman, whose life was being artificially prolonged, could elect to discontinue the extraordinary medical treatment. The court went further and declared that because Ms. Quinlan was incompetent, a court-appointed guardian could make that decision for her.\(^\text{25}\)

In distinguishing *Perlmutter*\(^\text{26}\) from *Quinlan*, Judge Ferris found that Mr. Perlmutter was conscious and mentally competent\(^\text{28}\) to make a decision concerning his medical treatment.\(^\text{29}\) The judge stated that neither the judgment of the medical profession nor that of the courts should be substituted for that of Mr. Perlmutter.\(^\text{30}\)

The court also relied on *Superintendent of Belchertown v. Saikewicz*\(^\text{31}\) in finding that Mr. Perlmutter’s decision to refuse further life-prolonging medical treatment outweighed the state’s public policy considerations.\(^\text{32}\) In *Saikewicz*, the court was concerned with an incompetent, terminally ill patient.\(^\text{33}\) The Massachusetts court balanced the right of the individual to refuse medical treatment against the public policy interests of the state,\(^\text{34}\) and held that the state’s interest was insufficient to overcome the individual’s right to refuse life-prolonging medical treatment.\(^\text{35}\)

Lastly, the circuit court held that anyone who might assist Mr. Perlmutter in the removal of his respirator would incur no criminal

\(^{24}\) 70 N.J. 10, 355 A.2d 647, 664.

\(^{25}\) Id.

\(^{26}\) 47 Fla. Supp. 190.

\(^{27}\) 70 N.J. 10.

\(^{28}\) See note 10, supra. This hearing was conducted, in part, to determine Mr. Perlmutter’s competency.

\(^{29}\) 47 Fla. Supp. at 191.

\(^{30}\) Id. at 193.


\(^{32}\) 47 Fla. Supp. at 193.

\(^{33}\) 370 N.E. 2d 417. Mr. Saikewicz was sixty-seven years old, profoundly retarded, having an I.Q. of 10 and a mental age of approximately thirty-two months. He was also suffering from an acute leukemic disorder. *Id.* at 420.

\(^{34}\) Id. at 425. The interests of the state included the preservation of life; protection of the family; maintenance of the integrity of the health care profession; and the prevention of suicide.

\(^{35}\) Id. at 435.
liability under Florida law. The court reasoned that death resulting from the removal of the device would be a natural one, and therefore, an individual aiding Mr. Perlmutter would not be committing an unlawful act. In addition, the court held that anyone assisting Mr. Perlmutter would incur no civil liability.

The State of Florida, represented by the State Attorney for Broward County, appealed the trial court's order to the District Court of Appeal of Florida, Fourth District, emphasizing its obligation to preserve life by enforcing state statutes which prohibit both murder and manslaughter. The Fourth District Court of Appeal unanimously affirmed the trial court's order.

In permitting Abe Perlmutter to end the painful, artificial prolongation of his life, the court relied primarily on the reasoning in Saikewicz and the line of cases cited therein. However, the court in Perlmutter stated that the adoption of the reasoning employed in Saikewicz was limited to the specific facts involving a legally competent, but terminally ill adult who had expressed a desire to refuse or discontinue medical treatment. Judge Letts, writing for the majority, noted: "The problem is less easy of solution when the patient is incapable of understanding and we, therefore, postpone a crossing of that more complex bridge until such time as we are required to do so."

It should be noted that Saikewicz and the cases relied upon in that decision concerned patients who were terminally ill or who had refused medical treatment because of religious considerations. Several of these patients were also legally incompetent due to profound retardation,
age, or in an irreversible comatose condition.\textsuperscript{48} In \textit{Saikewicz}, the majority determined that the right of the individual to refuse life-prolonging medical treatment must be balanced against important public policy considerations.\textsuperscript{49} The four public policy considerations include:

1) Interest in the preservation of life;
2) Need to protect innocent third parties;
3) Duty to prevent suicide;
4) Requirement that it maintain the ethical integrity of medical practice.\textsuperscript{50}

The Fourth District Court acknowledged the state’s interest in the preservation of life. However, the court found that “where the condition is terminal, the patient’s situation wretched, and the continuation of life temporary and totally artificial,” this consideration would be insufficient to override Abe Perlmutter’s desire to die a natural death with dignity.\textsuperscript{51}

The court also found that the state may have an interest in the protection of the family.\textsuperscript{52} This interest is based on two considerations: 1) the state’s role as \textit{parens patriae} in guarding the best interests of the children; and 2) its desire to prevent family members from becoming wards of the state.\textsuperscript{53} The court pointed out that Mr. Perlmutter and his family were adults, well aware of the consequences of Mr. Perlmutter’s contemplated action, and that they were all in agreement with his express wish to discontinue his life-support system.\textsuperscript{54}

Mr. Perlmutter’s refusal to continue life-prolonging medical treatment would not, according to the court, constitute suicide.\textsuperscript{55} In reaching this decision, the court considered Mr. Perlmutter’s basic desire to live without total dependence on artificial life-support, and the fact that his illness was not self-induced.\textsuperscript{56} In refusing to classify Mr. Perlmut-
ter's contemplated action as suicide, the court distinguished between a patient choosing to forego medical treatment such as surgery or chemotherapy, and an affirmative act such as disconnecting a life-support system.\textsuperscript{57} It stated: "[n]otwithstanding, the principle is the same, for in both instances the hapless but mentally competent victim is choosing not to avail himself of one of the expensive marvels of medical science."\textsuperscript{58}

The court also distinguished between cases which involved court ordered medical treatment for incompetent patients or minor children,\textsuperscript{59} and those cases which have upheld the right of competent adults to refuse medical treatment.\textsuperscript{60} The majority agreed that competent adults had the right to refuse medical treatment, and concluded by noting that "... because Abe Perlmutter has a right to refuse treatment in the first instance, he has a concomitant right to discontinue it."\textsuperscript{61}

In considering the threat that the right to refuse medical treatment may pose to the ethical integrity of the medical profession, the majority in specifically adopting the language of \textit{Saikewicz}, agreed that the maintenance of the ethical integrity of the health care profession does not "... demand that all efforts toward life prolongation be made in all circumstances."\textsuperscript{62} The court also recognized that the dying patient is often in need of comfort rather than treatment, and that the patient's right to self-determination must co-exist with the interests of the health care profession.\textsuperscript{63} Again, adopting the language of \textit{Saikewicz}, the court recognized that the right to bodily integrity, inherent in the doctrines of informed consent and the right of privacy, is superior to the interests of the health care profession.\textsuperscript{64}

After weighing the individual's right to refuse medical treatment and die a natural death with dignity against the state's public policy considerations, the Fourth District Court of Appeal concluded:

\begin{itemize}
\item \textsuperscript{57} \textit{Id.} at 163.
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} 362 So.2d at 163, n. 1.
\item \textsuperscript{60} \textit{Id.} at 163, n. 3. It should be noted that of the eight cases listed, three—\textit{Saikewicz}, Schiller, and Quinlan—concerned incompetent parties.
\item \textsuperscript{61} \textit{Id.} at 163.
\item \textsuperscript{62} \textit{Id.}, citing 370 N.E.2d at 426.
\item \textsuperscript{63} 362 So.2d at 162, 370 N.E.2d at 427.
\item \textsuperscript{64} \textit{Id.}
\end{itemize}
It is our conclusion, therefore, under the facts before us, that when these several public policy interests are weighed against the rights of Mr. Perlmutter, the latter must and should prevail. Abe Perlmutter should be allowed to make his choice to die with dignity, notwithstanding over a dozen legislative failures in this state to adopt suitable legislation in this field. It is all very convenient to insist on continuing Mr. Perlmutter's life so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient's sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death. Such a course of conduct invades the patient's constitutional right of privacy, removes his freedom of choice and invades his right to self-determine.  

Although the court determined this issue to be of great public interest, the majority affirmed the trial court's judgment without certifying the question to the Florida Supreme Court for review. Judge Anstead, specially concurring, agreed with the majority opinion, but stated that this issue was of such significant importance as to warrant certification to the supreme court for a thorough review.  

The Florida Supreme Court unanimously affirmed the decision of the Fourth District Court of Appeal. The supreme court adopted the district court's opinion as its own "... because of the clarity of the reasoning and articulation of the applicable principles of law contained in the District Court's opinion." The court did, however, limit its affirmation of the lower court's decision to include only competent, but terminally ill adults with no minor dependents, who have the unanimous approval of all affected family members. 

In order to clarify certain policy positions contained in the appeal, the court addressed the question of which governmental branch, the legislature or the judiciary, should respond to the issue of death with dignity for terminally ill patients. Due to the complex nature of the issue, the various interests involved and the need to provide a forum for

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65. 362 So.2d at 164.
66. Id.
67. Id.
68. 379 So.2d 359 (Fla. 1980).
69. Id. at 360.
70. Id.
71. Id.
the airing of public opinion, the court expressed a preference for legislative action in this area.\textsuperscript{72} The preference for a legislative resolution of this controversial issue does not, however, preclude the courts from responding when "... legally protected interests are at stake.\textsuperscript{73} Justice Sundberg summarized the court’s position by stating: "[L]egislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.\textsuperscript{74}

The court conceded that there were certain limitations in the judicial resolution\textsuperscript{75} of this complex issue, and until the legislature responds, the courts will continue to balance the public policy considerations against the rights of the terminally ill patient to refuse medical treatment on a case by case basis.\textsuperscript{76}

In the \textit{Perlmutter}\textsuperscript{77} decision, the Florida Supreme Court recognized the constitutional right, with specific limitations, of an individual to refuse or discontinue extraordinary medical treatment. The decision was narrowly limited to include only those adults who are competent, terminally ill, without minor children, and whose family members unanimously consent to the patient's decision.\textsuperscript{78}

The strict limitations imposed by the court may seriously hinder many, if not most, terminally ill patients from exercising their rights to refuse medical treatment. This constitutional right may be restricted because many terminally ill patients will fail to meet what may be termed the stringent Five-Prong Perlmutter test.\textsuperscript{79} Other courts that have grappled with this difficult and controversial issue have expanded this constitutional right to allow all terminally ill patients, regardless of

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} 379 So.2d 359, 361 (Fla. 1980).
\textsuperscript{77} 379 So.2d 359 (Fla. 1980).
\textsuperscript{78} Id. at 360.
\textsuperscript{79} Id. In order to meet the Five-Prong test, the patient must be:
1) an adult
2) legally competent
3) terminally ill
4) without minor dependents
5) able to obtain the unanimous consent of affected family members.
competency, to die with dignity. This expanded right may be subject, however, to the general public policy considerations in Saikewicz.

The Perlmutter decision poses an ominous threat to those opposed to death with dignity. Some opponents claim that this and other similar decisions constitute an "opening wedge" that will imperil the sanctity and preservation of life. This theory rests on the proposition that certain factions within society would begin with the elimination of terminally ill patients and eventually include elderly citizens and severely deformed children.

As the court pointed out, there are distinct limitations on the ability of the judicial system to adequately resolve problems in the area of death with dignity. Resolving the problems of the terminally ill who wish to refuse medical treatment on a case by case basis may result in an additional burden on an already overburdened court system. This additional litigation could involve enormous amounts of time and ex-

80. The following cases illustrate the expansion of the right to die with dignity by allowing third parties to order the termination of medical treatment for incompetent, terminally ill patients: In re Quinlan, 70 N.J. 10, 355 A. 2d 647, cert. den. 429 U.S. 922 (1976). See text accompanying notes 24, 25 supra. Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417 (Mass. 1977). See note 33 supra. In Dockery v. Dockery, No. 51439 (Chattanooga, Tenn. Chancery Ct., Part 2, filed Jan. 5, 1977), the court allowed the husband of a comatose (incompetent) patient to order the removal of her respirator, despite the fact that the patient had consented to the use of the respirator before becoming incompetent. In In Re Eichner, No. 21242-I-79 (N.Y. Sup. Ct. Dec. 12, 1979), aff'd ___ N.Y.S. ___ (App. Div. March 27, 1980). The court ruled, in New York's first right to die case, that a respirator could be removed from an incompetent, eighty-three year old Roman Catholic priest. The decision was based not on the express approval of the patient, but partially upon statements he had made in the past concerning the Quinlan decision. In Oharek v. Orlando Regional Medical Center, 79-1653 (Fla. Cir. Ct. Oct. 9, 1979), a circuit judge in Orlando ruled that the son of an incompetent, seventy-one year old man suffering from severe, irreversible brain damage could, as guardian for his father, order the cessation of "heroic" medical procedures. According to the judge's order, extraordinary measures of life support included respirators, antibiotics, or other drugs.

81. 370 N.E. 2d 417. See note 34, supra.

82. 379 So.2d 359 (Fla. 1980).


84. Friedman at 604-606.

85. 379 So.2d 359, 360 (Fla. 1980).
pense for all concerned parties. Also, the imprecise language used in the decision may produce uncertainty and lead to future litigation.86

Finally, the problems created by requests for death with dignity are broad questions of public policy which should and must be resolved by the legislature: "While it is true that legislative inaction has created a vacuum in this difficult area of the law, the ability of the judiciary to fill the void should be seriously questioned."87 This decision places the responsibility for resolving the problems associated with death with dignity back to the legislature, where it belongs.

Ten states have enacted death with dignity legislation. This legislation establishes guidelines for the patient, family, and medical profession to follow when a terminally ill patient elects to discontinue medical treatment.88 Existing death with dignity legislation is not a panacea

86. E.g., the court never defined such basic terms as "terminally ill," "extraordinary medical treatment," "competent," and "family members".
88. The state statutes generally provide guidelines whereby an individual may elect to refuse extraordinary medical treatment. Included in the guidelines are forms to be followed by qualified individuals (qualifications are specified in each statute). The form an individual uses to make his wishes known and legally recognized is called a directive or living will. Also included in the statutes are provisions for the protection of the health care profession from civil and criminal liability; procedures for the execution and revocation of the directive; penalties for the concealment, falsification, or destruction of the document; and definitions of statutory terms.

The following state statutes, together with selected requirements of each law, are listed in the chronological order of their enactment:

CAL. HEALTH & SAFETY CODE § 7185-7195 (Deering Supp. 1979) - California's Natural Death Act, enacted in 1976, was the first statute to recognize an individual's right to die with dignity. The statute, while acknowledging this right, provides more stringent procedural safeguards than most other death with dignity statutes. These include the requirements that: 1) a directive be executed at least fourteen days after an individual has been diagnosed as terminally ill; 2) two physicians must certify that the patient is terminally ill; 3) a physician must determine the validity of the directive; and 4) a "patient advocate" designated by the state must witness a directive executed by an individual in a nursing home. Other statutory safeguards include: 1) the invalidity of the directive during a patient's pregnancy; 2) penalties for physicians who do not comply with the statute; and 3) the requirement that a directive be re-executed every five years.

IDAHO CODE § 39-4501 to 4508 (Supp. 1979)—This 1977 statute is similar to California's statute. The individual must be terminally ill, but the diagnosis may be made by only one physician. The terminally ill patient must be able to communicate with the
for problems associated with death with dignity, but it does offer a

doctor, and there is no requirement that a patient execute the directive fourteen days after being diagnosed as terminally ill. Also, the directive is invalid during a patient’s pregnancy.

Ark. Stat. Ann. § 82-3801 to 3804 (Supp. 1979)—Arkansas’ statute, enacted in 1977, is the briefest, but most comprehensive statute enacted to date. This statute does not provide a specific form to follow when preparing a directive, procedures for revoking a directive, or penalties for tampering with a document. It does contain a provision which allows a directive to be executed on behalf of an individual who is physically or mentally incompetent. This statute is unique because it includes a provision which allows an individual to request that extraordinary life-prolonging procedures be employed.

N.M. Stat. Ann. § 12-35-1 to 35-11 (1977)—This 1977 statute allows a directive to be executed on behalf of a terminally ill minor by family members or guardian. An individual may execute the document prior to the diagnosis of terminal illness; however, a specific form is not included in the statute. The immunity from civil and criminal liability for health care personnel is not as extensive as in other statutes.

Nev. Rev. Stat. § 449.540-690 (1977)—In order to execute a directive, an individual’s terminal illness is not required. A physician is not bound by a directive if the patient is unable to communicate with the attending physician. However, the physician shall consider the directive along with other factors in reaching his decision.

Or. Rev. Stat. Ch. 211 (1979)—Oregon’s 1977 statute requires the directive to be re-executed every five years. It is invalid unless executed at least fourteen days after a patient has been diagnosed as having a terminal illness. This statute provides for a “patient advocate” for nursing home patients, but does not provide for pregnant patients.

Tex. Rev. Civ. Code Ann. § 4590h (Vernon Supp. 1980)—A directive, executed in Texas under the 1977 statute, is effective until revoked. An individual must be diagnosed as having a terminal illness prior to executing a document. The physician has the responsibility for determining the validity of the directive and the patient’s mental competency.

N.C. Gen. Stat. § 90-320-323 (Supp. 1979)—This 1977 statute combines the usual right to die provisions with those setting forth the definition of brain death. The statute provides, subject to specific conditions, procedures for the termination of extraordinary medical treatment in the absence of a declaration. The declaration must be proved by a clerk of the court or notary public.

Wash. Rev. Code Ann. Ch. 112 (Supp. 1979)—This statute requires the physician to determine the validity of the directive. The directive is required to be placed in the patient’s medical file. The document is void during a patient’s pregnancy.

Kan. Stat. Ann. § 65-28, 101 to 28,109 (Supp. 1979)—This is the most recent right to die statute to be enacted. Under the statute, physicians are liable for charges of unprofessional conduct for failing to abide by the statute. The declarant has the responsibility of notifying the physician of the existence of the document.

The relative success of the existing death with dignity legislation (a total absence
reasonable and practical solution to a complex problem.

It is the responsibility of the legislature to respond to this complex social issue in a manner that will meet the needs of all of the citizens.\textsuperscript{89} Death with dignity legislation has been proposed in the Florida Legislature every year since 1968.\textsuperscript{87} It is time, especially in light of the Perlmutter decision, for Florida legislators to shoulder their responsibility.

\textit{Michael T. Hand  
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of litigation and no reported abuse) has had a significant impact on legislators in other states. In 1979, bills were introduced in eighteen additional state legislatures. It would appear that the chances, in the 1980's, are excellent for the enactment of additional death with dignity legislation. "News from Society for the Right to Die", \textit{New Right-To-Die Laws Influence Medical Treatment of Dying Patients}, at 1, 2 (April, 1979) (Press Release).

89. Fort Lauderdale News and Sun-Sentinel, Jan. 20, 1980.

90. Sun-Sentinel (Fort Lauderdale, Fla.), Jan. 18, 1980, § A at 14. It is of interest to note that the first bill was proposed by Walter Sackett, a Miami doctor and former state legislator.
Forfeiture of a Vehicle: Search For a Nexus
Griffis v. State

Enroute from Tallahassee to Stuart in his 1973 Dodge pick-up truck, Griffis was stopped by a Florida Inspector of Agriculture and Consumer Services and ordered to return to an inspection station. At the station, the inspector searched Griffis and his vehicle and seized an unascertained amount of cocaine and marijuana. Griffis pled nolo contendere to the charge of possession of marijuana, and the state dismissed the companion cocaine charge. Shortly thereafter, the state moved for forfeiture proceedings of the seized truck pursuant to the Florida Uniform Contraband Transportation Act [hereinafter cited as the UCTA].

When Griffis failed to show cause why his pick-up truck should not be forfeited under the Florida UCTA, the trial court ordered its forfeiture. Griffis' subsequent appeal of this order raised significant

2. FLA. STAT. §§ 943.41-44 (Supp. 1974). The Florida Uniform Contraband Transportation Act consolidated the narcotics contraband and illegally sold food and beverages forfeiture statutes. FLA. STAT. § 943.42 states that:
   It is unlawful: (1) To transport, carry or convey any contraband article in, upon or by means of any vessel, motor vehicle, or aircraft. (2) To conceal or possess any contraband article in or upon any vessel, motor vehicle, or aircraft. (3) To use any vessel, motor vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

FLA. STAT. § 943.44 then provides for forfeiture proceedings:
   The state attorney within whose jurisdiction the vessel, motor vehicle, or aircraft has been seized because of its use or attempted use in violation of any provisions of law dealing with contraband . . . may proceed against the vessel, motor vehicle, or aircraft by rule to show cause . . . and may have such vessel, motor vehicle, or aircraft forfeited to the use of, or to be sold by, the law enforcement agency making the seizure, upon producing due proof that the vessel, motor vehicle, or aircraft was being used in violation of the provisions of said law.

3. Griffis at 298. One of the unique features of a forfeiture provision is the burden of proof. The State Attorney submits a rule to show cause motion to the court. At that point, the burden shifts to the defendant to show why the vehicle should not be forfeited. A recent successful forfeiture contest in the Second District Court of Appeal,
questions concerning the constitutionality and scope of Florida forfeiture proceedings.

In Griffis, the Supreme Court of Florida held that the state must demonstrate a "nexus" between a vehicle seized and illegal trafficking of contraband, to justify a forfeiture order. No longer is mere possession of contraband within a vehicle sufficient to sustain a forfeiture order.

The ultimate issue left unanswered in Griffis remains the nature of the nexus which supports forfeiture of a vehicle. Should the quantity of contraband be determinative of a finding that a vehicle is being used illegally? For example, does possession of a substantial quantity of contraband in a vehicle justify forfeiture proceedings, presuming possession with intent to sell and concurrent use of that vehicle in facilitating the sale? Will using a vehicle as transportation to the point of the transfer or sale of contraband articles be sufficient to justify forfeiture proceedings? Will the mere act of selling contraband in a vehicle justify its forfeiture? The Griffis court looked beyond Florida cases and considered federal authority in arriving at its opinion. As did the Griffis court, we must examine precedent from many sources to describe the nexus criteria.

FEDERAL CASE LAW

The Florida UCTA was written in 1974 with the express legislative intent to "achieve uniformity between the laws of Florida and the laws of the United States, which was necessary and desirable for effective drug abuse prevention and control." The history of forfeiture proceedings under federal case law, therefore, bears directly on any in-

One 1973 Cadillac v. State, 372 So. 2d 103 (Fla. 2d Dist. Ct. App. 1979), attacked the trial court forfeiture order on the burden of proof issue. The appellant, Mr. Jack Agnew, Sr., explained that the car forfeited was the property of the corporation, and he did not know that his son, in whose possession the car was seized, was involved in any illegal enterprise. In its holding the court stated that: "The seizing agency may release said vessel, motor vehicle, or aircraft to the innocent party or lienholder upon the filing of a sworn affidavit by said innocent party or lienholder that he had no knowledge of the alleged violation causing such seizure and upon then producing a valid certificate of title." Id. at 104.

4. Id. at 297.
5. Id. at 297, 300-02.
treatment of the Florida statute.

Under the federal contraband statute, two federal district courts ordered the forfeiture of motor vehicles where the driver possessed narcotic substances. In United States v. One 1975 Mercury Monarch, the appellate court upheld the magistrate's order of forfeiture of the Mercury even though there was minimal showing as to any significant amount of contraband within the car. This case involved an automobile owner who was arrested after he left his building where marijuana crates were stored. Subsequent to his arrest, the officers searched him and the car, finding cocaine on him and a suitcase containing marijuana residue in the trunk of the car. The court held that the facts were sufficient to sustain a forfeiture order although it was indicated that more than mere possession of contraband by a driver of a vehicle was necessary to uphold a forfeiture under the forfeiture act. The court found that the similarity in appearance of the marijuana in the suitcase with that in the crates took the case beyond mere possession, the suitcase providing the sufficient nexus to justify forfeiture.

The same district court, in United States v. One 1973 Jaguar Coupe, sustained a forfeiture order where the forfeiter's car was being driven by her boyfriend who was searched and subsequently charged with possession of cocaine. The court rejected her contention that the vehicle had no substantial connection to drug trafficking because she was not present nor had she any knowledge concerning the seized co-

7. 49 U.S.C. § 781 (1976) provides:
   (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
   Also see 49 U.S.C. § 782 (1976) which requires that, "[a]ny vessel, vehicle, or aircraft which has been used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited. . . ."
9. Id. at 1030.
10. Id. at 1032.
11. Id.
12. Id.
14. Id. at 129.
caine.\textsuperscript{15} Hence, the owner was deprived of her property with a minimal showing of a link between her actions and the contraband in question. Both of these cases upheld forfeiture where the driver was arrested in the vehicle and was charged with, at least, possession of narcotics.

The district court sitting in New Hampshire, in \textit{United States v. One 1972 Datsun},\textsuperscript{16} reversed a magistrate’s order forfeiting an automobile after government agents followed the owner in his Datsun to two locations where they purchased approximately 5,000 doses of lysergic acid diethylamide.\textsuperscript{17} In reversing the order, the court said that “to be forfeited, a vehicle must have some substantial connection to, or be instrumental in the commission of, the underlying activity which the statute seeks to prevent.”\textsuperscript{18}

The result in \textit{Datsun}, when compared to the results in \textit{Mercury} and \textit{Jaguar}, can be distinguished in that there was no showing of possession of contraband by the driver of the vehicle. However, \textit{Datsun} appears closer to the threshold requirement set out in \textit{Mercury}, as there was a direct relationship between the use of the automobile in the facilitation of the sale of contraband and the forfeiture.

Criteria for the forfeiture of contraband involved vehicles are emerging from circuit court cases reviewing forfeiture orders on appeal. \textit{United States v. One 1971 Chevrolet Corvette},\textsuperscript{19} reversed a district court forfeiture order granted on grounds that appellant had driven the Corvette in an alleged drug transaction. In this case, the suspect was arrested when he attempted to purchase cocaine from a person already in police custody at the Miami International Airport.\textsuperscript{20} The vehicle was the second of three cars the suspect used to get to the airport. In fact, he drove the forfeited car only five blocks before switching to another car which he parked at the airport.\textsuperscript{21} The Fifth

\textsuperscript{15} Id. at 130.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 1205.
\textsuperscript{19} 496 F.2d 210 (5th Cir. 1974). According to the facts on record in the case, Hilda Landeo, the Corvette owner, had returned to Miami, from Peru, only a few hours before her arrest. Met at the airport by her husband, in a borrowed Cadillac, they drove to visit her father-in-law and then drove to the couple’s apartment where they transferred from the Cadillac to the Corvette. They then parked the Corvette at the father-in-law’s house and took his Ford to the airport. Id. at 211.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 210.
Circuit Court of Appeal held that, at best, the Corvette was marginally used to facilitate a contraband related offense. No nexus had been demonstrated since there must be a showing beyond marginal connection before a vehicle forfeiture order will be sustained.\(^2\)

Facts sufficient to meet the criteria for forfeiture were found in *United States v. One 1972 Pontiac GTO, 2-Door Hardtop*,\(^23\) wherein a government agent initiated a heroin purchase while sitting in the Pontiac. Although the drug itself had not been delivered in the automobile, the court justified forfeiture, finding “that the sale was consummated in the car.”\(^24\) Here, the vehicle was involved in facilitating a drug transaction, and forfeiture was clearly warranted.

A forfeiture order was also upheld in a federal court where marijuana and cocaine were found inside the car and where the owner was charged with smuggling marijuana in the vehicle.\(^25\) Therefore, federal courts seem to require a showing that the vehicle has been instrumental in an act which violates drug or contraband statutes in order to justify its forfeiture. In interpreting the intent of federal forfeiture statutes,\(^26\) most federal courts require this connection, holding mere possession of contraband insufficient grounds for forfeiture.\(^27\)

\(^22\). *Id.* at 212.

\(^23\). 529 F.2d 65 (9th Cir. 1976). Aside from the argument concerning the sufficiency of nexus, the appellant also raised the questions of whether the forfeiture provisions unconstitutionally impose the burden of proof upon the claimant and whether the government must prove probable cause by clear and convincing evidence. These claims were both rejected. *Id.* at 66.

\(^24\). *Id.*


\(^26\). 49 U.S.C. §§ 781, 782. An interesting note is that many of the federal cases discussing the statutory intent of the Congress in authorizing forfeiture did not cite *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) which elevated certain requirements for forfeiture to the level of constitutional requisites. The Court reversed a forfeiture order sustained upon a conviction for failing to register as a gambler and in their holding, they stated that, “When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.” *Id.* at 721. While many courts have used the language of “significant involvement” none have cited or attributed this phrase to the case.

\(^27\). *See* note 13 *supra*, for a decision requiring minimal connection.
HISTORY OF FORFEITURE IN FLORIDA

The forfeiture of vehicles related to seizures of contraband in Florida has been primarily governed by two statutes. The Uniform Narcotic Drug Laws [hereinafter cited as UNDL], 28 first authorized forfeiture, giving all "authorized state officers the power to arrest any persons violating the narcotic laws of the State and to seize all vehicles, boats and aircraft used in violation of such laws." In 1974, the forfeiture provision was excised from the UNDL and consolidated with other contraband statutes in the Florida UCTA. 29

The Florida UCTA provides for forfeiture of vessels, motor vehicles or aircraft, by the State Attorney within whose jurisdiction the vessel, motor vehicle or aircraft is seized. The forfeiture order requires a showing that the vehicle seized has been used "to transport, conceal, or possess, . . . or used . . . to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." 30

The Florida UCTA, broader than the UNDL, extends beyond narcotics to include other contraband articles as well. For example, "gambling paraphernalia, lottery tickets . . . and currency used or intended to be used in violation of the gambling laws . . ." 31 or "[a]ny equipment . . . which is being used . . . in violation of the beverage or tobacco laws of the state . . ." 32 can subject the vessel, motor vehicle or aircraft holding these items to be seized in forfeiture proceedings.

The Florida UCTA broadens the grounds for forfeiture proceedings in addition to expanding the types of articles subject to its rule. It provides for forfeiture in the instances where vehicles are used, or where there has been an attempt to use a vehicle to facilitate the trafficking of contraband, as opposed to the requirement of actual use set forth in the earlier act. Judicial interpretation of what acts constitute

29. FLA. STAT. §§ 943.41-44.
30. FLA. STAT. § 943.42.
31. FLA. STAT. § 943.41. A case involving reversal of a forfeiture order of currency seized in connection with gambling allegations is reported in Baker v. State, 343 So. 2d 622 (Fla. 4th Dist. Ct. App. 1977), cert. denied 348 So. 2d 953 (Fla. 1977).
32. FLA. STAT. § 943.41.
“use” or “attempted use” of a vehicle for illegal purposes under either forfeiture statute has been inconsistent, and the language of both acts has given rise to controversy.

Under the Florida Comprehensive Drug Abuse Prevention and Control Act of 1973, 33 the First District Court of Appeal, in Grimm v. State, 34 sustained a forfeiture order where it was the passenger, not the owner of the vehicle, who was convicted of possession of marijuana. The court saw a clear mandate in the statute to uphold the trial court’s action despite the fact that no charge was ever filed against the owner.

Under the same act, however, Florida’s Third District Court of Appeal, in In re 1972 Porsche 2 Door, 35 refused to find grounds for a forfeiture when the owner of the vehicle was arrested for possession of drugs, but his car was not shown to further any drug trafficking. In denying the forfeiture motion, the court said:

[T]o forfeit the person’s ownership of the vehicle just because they are arrested for having some quantity of drugs, whether it be hard drugs or not, is not the intent of this statute. . . . I think it is whether the vehicle is being used to further a drug operation. That is the way I have always interpreted the statute. 36

Grimm and Porsche, thus exemplify the judicial controversy as to the statutory intent of the Florida Comprehensive Drug Abuse Prevention Control Act. It is hard to reconcile the fact that Grimm held that the statutory intent allowed forfeiture of a vehicle where a passenger possessed a mere 13 grams of marijuana whereas Porsche reached an opposite interpretation of the statutory intent, requiring instead, a

33. FLA. STAT. § 893.12 (2) (1973). This act charges law enforcement agencies with the responsibility of seizing contraband and vehicles, vessels and aircraft, and then directs them to proceed with forfeiture pursuant to the Florida UCTA.
34. 305 So. 2d 252 (Fla. 1st Dist. Ct. App. 1974).
35. 307 So. 2d 452 (Fla. 3d Dist. Ct. App. 1975). The owner of a 1972 Porsche had been arrested at the residence of another on charges of possession of cocaine and marijuana. While conducting a post-arrest inventory of the vehicle, an officer found a small amount of PCP under the seat of the car. It should be noted, however, that the court based its decision on arguments that the PCP in the car was the subject of an illegal search and that the state failed to show that “the individual was significantly involved in a criminal enterprise.” Id. at 452.

36. Id. at 452.
showing of a criminal intent to justify an order of forfeiture.

Porsche was cited approvingly in In Re Chevrolet Camaro, wherein appellee's Camaro had been seized after he was arrested for possession of marijuana while in the vehicle. The Third District Court of Appeal upheld the trial court order of forfeiture, giving authority to the dicta in Porsche. "[F]orfeiture statutes are intended to apply to those individuals who are significantly involved in a criminal enterprise, § 943.43, Fla. Stat., . . . authorizing forfeitures, is discretionary, not mandatory."\(^{38}\) The court in Camaro called for a showing beyond the mere possession Grimm found sufficient, requiring significant involvement in a criminal enterprise in order to justify a forfeiture; clearly this is a more liberal interpretation of the contraband forfeiture statute.

In State v. Washington, wherein the defendant was awarded towing and storage costs that resulted from an overturned forfeiture order, the Fourth District Court of Appeal, in dicta, reported the trial court's finding that there were no grounds to support a forfeiture order where the state declines to prosecute.

Helms v. One 1973 Chevrolet El Camino, introduced a requirement that there must be proof that links the vehicle to the offense charged in order to justify forfeiture proceedings. In this case, the Florida Supreme Court refused to find that the seized automobile was used in connection with the offense charged.

These decisions interpreting the different forfeiture statutes suggest that no forfeiture should be sustained where the state declines to prosecute on the charges giving rise to the seizure. Failure to do so would also fail to link the automobile to the commission of the offense charged. The controversy in the statutory interpretation of the acts therefore arises from the district court decisions of Grimm, Porsche and Camaro. These cases present the question of whether possession on

37. 334 So. 2d 82 (Fla. 3d Dist. Ct. App. 1976). The claimant "was arrested for possession of marijuana while in his automobile. Mr. Costigliola pled guilty to the charge and as a first offender was placed on probation." Id. at 82.

38. Id. at 83.

39. 352 So. 2d 138 (Fla. 4th Dist. Ct. App. 1977). The reversal of the lower court implied that an improper forfeiture may leave the city liable for storing, towage and resultant damage to the vehicle.

40. 343 So. 2d 604 (Fla. 1977). The Florida Supreme Court received this case on transfer from the Third District Court of Appeal because of an apparent constitutional issue. The supreme court found that there was "no need to address the asserted constitutional issue." Id. at 605.
the person or in the vehicle constitutes sufficient cause for a forfeiture order. This issue was addressed when the Florida Supreme Court granted direct review in Griffis.

IMPACT OF GRIFFIS

The question of statutory interpretation remained in dispute until the Florida Supreme Court reviewed a circuit court's order of forfeiture of a motor vehicle seized on the grounds that appellant possessed marijuana and cocaine on his person and in the vehicle. The order of forfeiture followed the entry of a plea of nolo contendere to possession of marijuana, the cocaine charge having been dismissed by the state.

Before the supreme court, appellant again argued against the constitutionality of the Florida UCTA, alleging that to "allow forfeiture without evidence of trafficking would render the statutes void as violative of due process, equal protection, and double jeopardy provisions of the Florida and United States Constitutions." The court agreed with appellant's contention that forfeiture should require a showing of a nexus between the vehicle and trafficking. However, in doing so, the court found it unnecessary to reach any state or federal constitutional issues, choosing instead to base its holding on an interpretation of both the current statute and its predecessor.

In construing the Florida UCTA, the court held that the trial court's literal reading of the statute was violative of the express legislative intent behind the enactment of the UCTA. Justice Karl, author of the opinion, quoted the following language from the preamble to the act: "Uniformity between the laws of Florida and the laws of the United States was necessary and desirable for effective drug abuse prevention and control." The court went on to find that this language clearly evinced a legislative intent to achieve state and federal uniformity.

After so concluding, the court analyzed the federal forfeiture stat-
utes to determine whether a nexus is necessary under federal law. The court specifically found the intent of Congress was to include such a requirement. "The congressional committee report that accompanied the amendment leaves no doubt that the congressional intent was not to permit forfeiture for mere possession of a controlled substance but to authorize forfeiture of those vehicles used in trafficking drugs in violation of the Internal Revenue laws." 48

As the federal forfeiture statute requires a showing of a nexus, the Florida UCTA must then also require a showing of trafficking before a forfeiture action can be justified; the intent of the Florida Legislature being to expressly achieve uniformity between the Florida and federal forfeiture procedures.

In support of that proposition, the Griffis court noted language from the decisions in Datsun and Porsche. Datsun precluded forfeiture where there was no clear relationship between the vehicle and possession or sale of drugs therein. 49 The court therefore seemed to be interpreting statutory intent as requiring a showing beyond mere possession. Griffis quoted similar language from Porsche: "forfeiture statutes... are intended to apply to those persons significantly included in a criminal enterprise." 50 Mere possession was not deemed sufficient to give rise to a presumption of involvement in a criminal enterprise.

POST GRIFFIS

An examination of forfeiture appeals post-Griiffis, reveals some confusion at the trial court level as to the proper grounds for forfeiture. Some trial courts still are ordering forfeiture in "mere possession" fact situations.

A forfeiture order had to be quashed in Nichols v. State, 51 after a circuit court in Charlotte County, Florida, ordered the forfeiture of a van because a search of it resulted in the discovery of a small quantity

47. Id. at 299.
48. Id. at 300.
50. 356 So. 2d at 302.
51. 356 So. 2d 933 (Fla. 2d Dist. Ct. App. 1978). The appellate court noted the impact of Griffis, when it rejected a literal reading of the statute; "the teaching of the Supreme Court of Florida in a very recent opinion, however, demonstrates that such an approach is superficial." Id. at 934.
of marijuana and the charging of the owner with possession. The Second District Court of Appeal held that:

The trial judge applied the forfeiture statutes in a literal manner and ordered forfeiture because a small amount of marijuana was found in the vehicle while Nichols was legally in charge of it. Since, however, the evidence before the trial court did not reveal any nexus between the controlled substance found in the van and any illegal drug operation, this appeal is directly controlled by the supreme court’s opinion in Griffis v. State, supra. Accordingly, the order of the trial court must be and is hereby vacated. 52

In Brown v. State, 53 appellant’s car had been forfeited even though he had not been charged with possession of marijuana. The evidentiary hearing on the state’s motion for forfeiture revealed:

A Jacksonville Beach police officer received information from a confidential informant that Brown was in possession of marijuana. The officer went to Brown’s home where he saw Brown and two men get into the car. The officer followed the car and when it stopped, identified himself and asked if he could search the car. Brown consented to the search. The officer found eight one-ounce baggies of marijuana in the trunk. Brown denied they were his. 54

The trial court’s forfeiture order was overturned because the district court felt that there was no showing of a nexus. “[T]ransportation of a controlled substance in a car which is only incidental to possession, . . . is insufficient to invoke the forfeiture provisions of Sections 943.41-44.” 55

Other trial court decisions reveal confusion as to the sufficiency of acts which will give rise to forfeiture. A trial court order denying forfeiture was reversed and remanded by the Fourth District Court of Appeal in State v. Franzer. 56 Franzer was arrested and pled nolo contendere to charges of selling a large quantity of marijuana to Fort

52. Id. at 934.
53. 357 So. 2d 472 (Fla. 1st Dist. Ct. App. 1978). Some of the evidence adduced at the hearing included the fact “that Brown knew that the marijuana was in the car.” Id. at 472.
54. Id. at 472.
55. Id. at 473.
Lauderdale police officers. He had delivered the drugs in his 1974 Corvette. After a review of the statement of stipulated facts, the court held that "the record reflects that the appellee's automobile was used as the delivery vehicle in a scheme to promote the distribution of marijuana. Use of a vehicle to deliver marijuana for sale is clearly sufficient to bring into play the forfeiture provisions."\(^{57}\)

In line with its decision in Franzer, the Fourth District Court of Appeal in Florida upheld a forfeiture order in Mosley v. State,\(^{58}\) wherein negotiations for the purchase of heroin, delivery, and payment, were all accomplished in the forfeited vehicle. The appellant had attempted to have the order vacated because the actual seizure of the car took place eight days after the arrest. The court found the time delay of no consequence and sustained the trial court order.

**CONCLUSION**

The holding in Griffis limits the ability of a State Attorney to move for a forfeiture order in cases of mere possession of narcotics and contraband. It seems clear from the opinion that due to the harshness of forfeiture orders, Florida courts will, be required to find a clear nexus between the use of the vehicle and the intent to traffic in drugs, before an individual's property can be subjected to this penalty.

Griffis raises significant questions as to what constitutes a nexus, as a nexus is deemed necessary to order forfeiture. While mere possession will not be sufficient, those facts which will permit forfeiture remain unclear.

Some of the criteria developed in federal case law may, however, be applicable. For example, where the car is shown to be the location of a narcotics transaction,\(^{59}\) and where the vehicle is used in facilitating the smuggling of marijuana,\(^{60}\) sufficient rationale for forfeiture might well lie within the limits contemplated by the legislature. However, federal criteria established through case law may not always be applicable as in Jaguar, wherein the court was willing to order forfeiture upon a showing of possession of cocaine by the driver.

57. Id. at 63.
59. See note 23 supra.
60. See note 8 supra.
In spite of occasional trial court forfeiture orders in cases of mere possession, the impact of the Griffis decision appears to have been the application of the legislature's intent to make clear that forfeiture is a harsh penalty only to be ordered to curtail trafficking of narcotics and contraband. Therefore, forfeitures seem non-applicable to casual consumers of narcotic substances in a vehicle, nor to "mere possessors" of small amounts of contraband. The federal and Florida forfeiture statutes are meant to reach the tools of narcotics and contraband trafficking in order to curtail those illegal activities, and the use of forfeiture in instances of "mere possession" proves too harsh a penalty.

A recent examination of trial court forfeiture orders leads one to conclude that many trial courts have not yet fully applied the guidelines established in the Griffis decision. Appellate review of improper forfeiture orders provides some legal relief, however, the economic costs of such review often exceed the equity in the vehicle. In such instances, an unfair penalty is wrought. There are criminal statutes designed to govern acts of possession of drugs and contraband substances. To subject an individual to both criminal proceedings and forfeiture orders, without a clear nexus between trafficking and the vehicle, works an unfair double penalty. Griffis reaffirms the spirit of fundamental fairness which we would hope to find in all statutes requiring loss of individual property.

Victoria S. Sigler

Underpinning and Foundation Constructors, Inc. employed in its accounting department an employee by the name of Walker. Among other things, Walker's primary duties placed him in charge of the corporation's books. As such he was responsible for the rectification and examination of any invoices or bills received by Underpinning for payment. Upon receipt of any such bill, Walker would prepare the checks.


2. In reference to the checks in question, Underpinning and Foundation Constructors, Inc. is the "drawer." The Uniform Commercial Code (U.C.C. or Code) neglects to specifically define "drawer." However, a leading authority describes the "drawer" as the "signer in the lower right hand corner on a check or other draft." See J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE at 398 (1972).

A "draft" is defined as a negotiable instrument that is an order to pay and "a check is a draft drawn on a bank and payable on demand." U. C. C. §3-104(1)(b) and §3-104(2)(a) and (b).

A writing which is a negotiable instrument within Article 3 of the U. C. C. is defined in U. C. C. §3-104(1)(a), (b), (c) and (d). See U.C.C. §3-104.

An order is "a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession." U.C.C. §3-102(b).

The drawee bank pays to the party designated as payee only upon the order issued by the drawer. Drawee bank is synonymous with "Payor bank."

"Payor bank" is defined as "a bank by which an item is payable as drawn or accepted." U.C.C. §4-105(b).
by filling in the pertinent information and presenting the checks to the authorized officers or personnel for signature. After the necessary signatures were obtained, the signed checks were then sent to the designated payees.

For approximately one year, either alone or in concert with others, Walker embezzled over a million dollars from his employer, Underpinning. This was achieved by falsifying invoices purportedly received from suppliers with whom plaintiff had, in the past, done substantial business. Walker, as his duties normally required, wrote the checks to pay these false invoices and obtained the necessary signatures from Underpinning's authorized officers. Instead of forwarding the checks to the parties designated as the named payees who, of course, had no interest in them anyway, Walker and his cohorts forged the payees' indorsements and indorsed the checks with signature stamps

Item is defined as "any instrument for the payment of money even though it is not negotiable but does not include money." U.C.C. §4-104(g).

The payee is defined as "the individual who is intended by the drawer to be the recipient of the money." Schweitzer v. Bank of America, N. T. and S. A., 109 P.2d 441 (Cal. App. 2nd 1941). U. C. C. §3-413(2) sets out the statutory contract of the drawer.

U.C.C. §3-413 provides: "The drawer engages upon that dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

3. Signature is defined in U. C. C. §3-401. U.C.C. §3-401(2) provides: "A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."

4. 414 N.Y.S. 2d 298.

5. The named payees of the checks were viewed as having no valuable interest because the invoices were false and did not represent a valid debt.

6. "Indorsement" is a formal act which passes title to the indorser's transferee and obligates the indorsee on the contract set forth in U.C.C. §3-414. U.C.C. §3-414 provides: "Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.' All indorsements fall into two broad categories, special and blank. A special indorsement (pay to the order of Joe Jones, John Peterson) makes the instrument into an 'order instrument' if it is not already one. A blank indorsement (Joe Jones) makes an instrument into a 'bearer instrument.' Thus, §3-204(1),(2) and (3) provide:

1) A special indorsement specifies the person to whom or to whose order it
thought to be similar to those used by the designated payees. These checks were indorsed "For Deposit Only," a type of restrictive indorsement often used in the check collection process. Such an indorsement makes the instrument payable. Any instrument especially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

(2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

(3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. Note that a blank or special indorsement may also be a restrictive indorsement.

J. WHITE and R. SUMMERS, supra note 2, at 413.

7. 414 N.Y.S.2d at 299.

8. U.C.C. §3-205 states:
   An indorsement is restrictive which either
   (a) is conditional; or
   (b) purports to prohibit further transfer of the instrument;
   (c) includes the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection; or
   (d) otherwise states that it is for the benefit or use of the indorser or of another person.

9. A synopsis of the usual chain of events involved in check collection follows:
   1. Payee deposits the check in the bank.
   2. That bank of first deposit gives its depositing customer provisional credit pending payment of the check by the payor bank.
   3. The bank of first deposit prepares the check for machine processing by encoding in magnetic ink the dollar amount of the check. The other information needed for machine processing—coded identifications of payor bank and drawer—has already been preprinted in magnetic ink on the check.
   4. The bank sorts the checks. If a check is drawn upon an account maintained in the same bank where it has been deposited, it is considered by the bank as an on-us check, and internal processing completes the transfer of the check amount from the drawer's to the payee's account. But if the check is drawn on another bank, the funds must be collected from that bank by the bank of the first deposit.

   In some cases, as for local items drawn on a bank of first deposit and being sent to a clearing house, the checks are fine sorted as to individual banks. For most out of town (transit) items, however, the sort pattern is much broader, i.e., all items to one Federal Reserve Bank might be sorted into only two general groups: immediate and deferred credit items.
   5. The bank prepares cash letters—the deposit tickets or computer printed lists—for each sort category, showing the total dollar amount of the checks accompanying the
strictly requires that value given or received for the check be deposited\textsuperscript{10} in the indorser's account.\textsuperscript{11}

6. The bank sends the checks to the appropriate collection intermediary, i.e., clearing organization, Federal Reserve Bank, or correspondent bank or directly to the payor bank.

7. One of the above intermediaries presents the check directly or indirectly (through another intermediary) to the payor bank. This is the formal demand for payment.

8. The payor bank reviews the check:
   (a) If for some reason, such as insufficient funds in the drawer's account to cover the check amount, or a stop-payment order posted to the account, the payor bank does not pay the check, it must return it to the presenting bank within a specified period of time.
   (b) If the bank discovers no reason to reject or dishonor the check and refuse payment, it posts the check to the drawer's account and files it for subsequent mailing to him; and the payor bank must pay to the presenting bank for the amount of the check.

9. Each bank in the collection chain settles for the check with the previous bank until the bank of first deposit has been paid. The credit that the bank had extended provisionally to its depositing customer is now final. (In the case of a returned check, all the credits that had been granted provisionally for the check as it passed through the collection system must be reversed.)

10. U.C.C. §3-206 states:
   (1) No restrictive indorsement prevents further transfer or negotiation of the instrument.
   (2) An intermediary bank, or a payor bank which is not a depositary bank, is neither given notice or otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor of the person presenting for payment.
   (3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms [subparagraphs (a) and (c) of Section 3-205] must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.
   (4) The first taker under an indorsement for the benefit of the indorser or another person [subparagraph (d) of Section 3-205] must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has
Walker and his confederates either cashed or deposited the checks at several banks in accounts\(^1\) with names different from the names of the payee indorsers.\(^2\) Each bank took the checks for collection, totally disregarding the restrictive indorsements, and presented\(^3\) them for payment by the payor bank, which honored and paid them and accordingly charged\(^4\) Underpinning's account.\(^5\)

\(^{11}\) knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty.

[subsection (2) of section 3-304].

11. 414 N.Y.S. 2d at 299.

12. U.C.C. §4-104(1)(a) defines account as “any account with a bank and includes a checking, time, interest, or savings account.”

13. 414 N.Y.S. 2d at 299.

14. U.C.C. §3-504 explains how presentment is made. U.C.C. §3-504 provides:

   (1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee, or other payor by or on behalf of the holder.

   (2) Presentment may be made

      a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

      b) through a clearing house; or

      c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

   (3) It may be made

      a) to any one of two or more makers, acceptors, drawees, or other payors; or

      b) to any person who has authority to make or refuse the acceptance or payment.

   (4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

   (5) In the cases described in Section 4-210 presentment may be made in the manner and with the result stated in that section.

15. See U.C.C. §4-401 infra note 31. U.C.C. §4-401 defines when the bank may charge a customer's account and states that “as against its customer, a bank may charge against his account any item which is otherwise properly payable from the account even though the charge creates an overdraft.” What does properly payable include? U.C.C. §4-104(1)(i) states that “properly payable includes the availability of funds for payment at the time of decision to pay or dishonor.” While the payor bank may pay all properly payable items, in the case of an unauthorized payment, the drawer can insist that the payor bank credit his account with the amount of the payment. See J.J. CLARKE, H.J. BAILEY III, AND R. YOUNG, JR., supra note 8, at 104. A check bearing a forged indorsement is not properly payable since the person receiving
When Underpinning finally realized that it had been embezzled, it instituted suit against all of the depositary banks involved in the transactions for paying the checks with the restrictive indorsements. One of the named defendants, The Bank of New York, had paid ten such checks for a total amount of $452,979.27. Instead of serving an answer, The Bank of New York argued that the drawer of the check could not sue the depositary bank and moved to dismiss the complaint, claiming the drawer was limited to whatever claims it had against the drawee. This motion was denied by the Supreme Court and the Appellate Division sustained the lower court's determination. The order of the Appellate Division was then appealed by The Bank of New York. This brings us to the case at hand.

According to the Uniform Commercial Code, the governing body of law in check forgery cases, an unauthorized signature or payment will not have title to the item. Jerman v. Bank of America National Trust and Savings Association, 87 Cal.Rptr. 88, 7 Cal.App.3d 882 (1970). See also text accompanying note 31, infra.

16. 414 N.Y.S. 2d at 299.
17. "In Article 4 unless the context otherwise requires 'depositary bank' means the first bank to which an item is transferred for collection even though it is also the payor bank." See U.C.C. §4-105(a). A "depositary bank" may be a "collecting bank." "Collecting bank" means any bank handling the item for collection except the payor bank." U.C.C. §4-105(d).
19. The Bank of New York was the depositary bank. See U.C.C. §4-105(a) supra note 17.
20. A payor or drawee bank will be liable to its customer (the drawer) for payment of a check bearing a forged indorsement absent some defense. See notes 38 and 39 infra and accompanying text.
22. 414 N.Y.S. 2d at 298.
23. The Uniform Commercial Code may be abbreviated as U.C.C. or Code. The 1972 Official Text of the Uniform Commercial Code should be referred to for any Code citations.
24. The Uniform Commercial Code, specifically Articles 3 and 4, is the governing body of law covering check forgery cases. The Code has been enacted in all states except Louisiana, however, Articles 3 and 4 have been enacted in all fifty states. Of all the Uniform Commercial Code these two sections probably depart least from prior substantive law. R. Braucher and R. Riegert, Introduction to Commercial Transactions, at xxxvii (1977).
25. The bank collection provisions originally appeared as part of Article 3 on
This applies not only to the unauthorized signature of the payee, but also to the unauthorized signature of the drawer. When the payee’s signature is forged it is considered a forged indorsement, and when the drawer’s signature is forged it is considered a forged check. Ordinarily, when items are “properly payable,” the customer’s account may be charged by the bank. However, since no person is liable on an instrument unless his signature appears thereon, a check bearing an unauthorized signature does not transfer title and cannot be considered “properly payable.” Thus the customer’s account cannot be charged by the bank.

Commercial Paper. Eventually, however, as separate questions were raised peculiar to the subject of bank collections, Article 4 was written. J. J. CLARKE, H. J. BAILEY III, AND R. YOUNG, Jr., supra note 9, at 18. 26. U.C.C. §1-201 (43). 27. “Whether an item is properly payable is the crunch question in a variety of conflicts between customer and bank. Translated into practical terms, if a court finds that an item is properly payable, the bank will be entitled to charge the depositor’s account; conversely, if the Court finds that an item is not properly payable, the bank may not charge the customer’s account, and if it has done so, it must recredit the account.” See J. WHITE AND R. SUMMERS, supra note 2, at 558. 28. U.C.C. §4-104(e) states that “Customer means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank.” 29. U.C.C. §4-401 is as follows:

(1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

(2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to:

(a) The original tenor of his altered item; or

(b) The tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

30. U.C.C. §3-401 is as follows:

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.


32. Since §4-401 (1) states that a bank may charge its customer’s account for any item properly payable, then it may be assumed that it may not charge its cus-

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Accordingly, it has been held\textsuperscript{33} that when the drawer's signature is forged on a check, absent a defense,\textsuperscript{34} the drawee bank is liable to the drawer whose name is forged for the amount paid on the check. Similarly, when the payee's indorsement is forged, the drawee bank is liable to its customer for the amount paid on the check.\textsuperscript{35} The major difference between forged checks and forged indorsements is that with the latter, indemnification may be sought by the drawee bank from the depositary bank, whereas in the former such an indemnification is not allowed.

This liability of the depositary bank to the drawee bank for payment of a check bearing a forged indorsement is founded upon principles of warranty embodied in U.C.C. § 4-207(1)(a).\textsuperscript{36} As the check passes from party to party on its way to final payment, its prior indorsements are guaranteed by each customer or collecting bank. For this reason, the drawee bank may "recredit the customer's account and then sue as far up the collection stream as is feasible"\textsuperscript{37} to recover any loss.

The general rule is that the drawee bank will be liable to its customer, the drawer, for payment of a check bearing a forged signature or indorsement. However, liability can be avoided if an exception to the general rule exists. Of the available exceptions or defenses, the

\textsuperscript{34} See notes 38 and 39 \textit{infra} and accompanying text.
\textsuperscript{36} U.C.C. §4-207(1)(a) is as follows:
(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that (a) he has good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title.

The Official Comment 1 of U.C.C. §4-207 states that the warranties in §4-207 are more or less identical to the warranties in §3-417. For a more complete discussion of the slight differences in these two warranties see J. WHITE AND R. SUMMERS, \textit{supra} note 2, at pp. 510-512, notes 39 and 40.
\textsuperscript{37} J. WHITE AND R. SUMMERS, \textit{supra} note 2, at 513.
Forged Restrictive Endorsements

U.C.C. sets forth five explicitly and permits others by reference to the common law. Of these exceptions, two deal with negligence and can be found in U.C.C. §3-406 and §4-406. U.C.C. §3-406 provides as follows:

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with reasonable commercial standards of the drawee or payor's business.

The Code does not attempt to define what constitutes "negligence" as expressed in this section. However, Comment 7 of the Official Comments of U.C.C. §3-406 states that the most obvious case is that of a "drawer who makes use of a signature stamp or other automatic signing device and is negligent in looking after it."  

Code §4-406, the other negligence defense, requires the customer

38. The five available statutory defenses are embodied in the following Code Sections: §3-406; §4-406; §3-404; §4-103; and §3-405. This text will only discuss §3-406, §4-406 and §3-405. For more information see generally J. White and R. Summers, supra note 2.

39. The common law exceptions to liability include receipt of payment by payee and election of remedies. The Uniform Commercial Code adopts the common law in U.C.C. §1-103. U.C.C. §1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." These common law exceptions will not be discussed in this text. For more information see J. White and R. Summers, supra note 2.

40. Official Comment 7 of U.C.C. §3-406 further states that "the section extends however to cases where the party has notice that forgeries of his signatures have occurred and is negligent in failing to prevent further forgeries by the same person" and "in the case where a check is negligently mailed to the wrong person having the same name as the payee."

41. U.C.C. Code §4-406 reads in full as follows:
   (1) When a bank sends to its customers a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the state-
to examine the statement and items sent to him by his bank and to promptly notify the bank of any unauthorized signatures. Upon failure to do so, the customer may be precluded from asserting against the bank that the signatures were unauthorized and may be held responsible for all losses occasioned by such forgery. It should be stressed, however, that §4-406(3) permits the customer to assert contributory negligence as a counter defense when the bank itself has failed to exercise ordinary care.

Another defense that the drawee bank may assert against its cus-

ment and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or any alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer [subsection (1)] discover and report his unauthorized signature or any alteration on the face or back of the item or does not within 3 years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer’s claim.

“Section 4-406 differs from Section 3-406 in that it deals with the customer’s behavior after the fact, after the alteration or the forgery has already taken place. It is also a much narrower provision than 3-406 in that it deals only with the liability between the bank and its customer upon the customer’s failure to examine and report ‘his’ unauthorized signature or any alteration.” It may not be used as a defense by the collecting bank although the other defenses would still be available. See J. WHITE AND R. SUMMERS, supra note 2, at 539.

42. See note 41 supra.
tomter, the drawer, is that of U.C.C. § 3-405. U.C.C. § 3-405 has been viewed as similar to § 3-406 and § 4-406 for it codifies the proposition that certain behavior is negligent and thus renders all signatures resulting from that behavior effective against the negligent party. In other words, if § 3-405 is considered applicable, the forgery will not be recognized and the signature will be deemed to have effectively passed title. U.C.C. § 3-405 reads in full:

(1) An indorsement by any person in the name of the named payee is effective if
   (a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
   (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or
   (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

Two common problem areas are expressly dealt with in this Code Section. U.C.C. § 3-405(1)(a) covers the "imposter payee" with the "imposter rule" and § 3-405(1)(c) deals with the "padded payroll" situation.

Under § 3-405(1)(a) the prevailing view is that if a drawer draws a check payable to an imposter who represents himself to be the payee,
any signature in the name of the payee will result in an effective indorsement. Therefore, liability for the loss will be placed on the drawer. The position taken here is that the loss, regardless of the type of fraud, whether it be face to face as opposed to imposture by mail, should fall upon the drawer. In effect, the drawer, under §3-405(1)(a) is considered to be negligent for not determining the identity of the payee.

The provision intended to cover the “padded payroll” cases, U.C.C. §3-405(1)(c), also shifts liability to the drawer. The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, then he at least can cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

Like Code §§3-405(1)(a) and 3-405(1)(c), Code §3-405(1)(b) is the property of, and indorsed by, the payee-principal named therein who is not being impersonated by anyone, rather than the property of the so-called agent whose fraud relates merely to status and not to identity.” See L. M. Hudak and P. MacPherson, Jr., Forged, Altered, or Fraudulently Obtained Checks, 23 THE PRACTICAL LAWYER 73, 87 (No.3, 1977).

49. See U.C.C. §3-405, Comment 2.
50. J. White and R. Summers, supra note 2, at 542.
51. See U.C.C. §3-405(1)(c).
52. U.C.C. §3-405, Comment 4. The Comment continues:
“The provision applies only to the agent or employee of the drawer, and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application.

a. An employee of a corporation prepares a padded payroll for its treasurer which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation’s check payable to P.

b. The same facts as (a), except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation.

53. See May Department Stores Co. v. Pittsburgh National Bank, 374 F.2d 109, (3rd Cir. 1967). In May, an employee forged the indorsements of fictitious payees on checks which were issued and prepared by his employer. The employer was supplied the names of the fictitious payees by the defrauding employee. The drawee bank
also a “bankers provision intended to narrow the liability of the banks and broaden the responsibility of their customers.” However, Code §3-405(1)(b), which adopts the fictitious payee doctrine of the Uniform Negotiable Instruments Act (N.I.L.) allows for a more liberal interpretation. Under §3-405(1)(b), an indorsement by any person in the name of the named payee is effective if a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument. For example, if a dishonest corporate officer makes the corporation’s check payable to a payee with the intention that the

charged the employer’s account, and the employer brought an action to recover the amount paid on the forged indorsements raising §3-405(1)(c) as a defense. The court agreed and held that §3-405(1)(c) did indeed bar any liability on the part of the bank.

Subsection (1)(b) restates the substance of the original subsection 9(3) of the N.I.L. The test stated is not whether the named payee is ‘fictitious’ but whether the signer intends that he shall have no interest in the instrument. The following situations illustrate the application of the subsection.

(a) The drawer of a check, for his own reasons, makes it payable to P knowing that P does not exist.

(b) The drawer makes the check payable in the name of P. A person named P exists, but the drawer does not know it.

(c) The drawer makes the check payable to P, an existing person whom he knows, intending to receive the money himself and that P shall have no interest in the check.

(d) The treasurer of a corporation draws its check payable to P who to the knowledge of the treasurer does not exist.

(e) The treasurer of a corporation draws its check payable to P. P exists but the treasurer has fraudulently added his name to the payroll intending that he shall not receive the check.

(f) The president and the treasurer of a corporation both sign its check payable to P. P does not exist. The treasurer knows it but the president does not.

(g) The same facts as (f), except that P exists and the treasurer knows it, but intends that P shall have no interest in the check.

U.C.C. §3-405, Comment 3.

The Uniform Negotiable Instruments Act (N.I.L.), a codification of the law covering negotiable instruments, was the forerunner of the U.C.C. For a general history of the N.I.L. See R. Braucher and R. Riegert, supra note 23 at 4-31.

U.C.C. §3-405(1)(b).

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payee have no interest in it, forges the payee's indorsement, and re-
ceives payment on the check from a collecting bank which collects 
from the drawee bank, the corporate drawee cannot claim that the 
forged indorsement bars the bank from charging its account with the 
amount of the check.\textsuperscript{68} The indorsement will be considered effective.

Absent a defense, the drawer may sue the drawee bank pursuant 
to U.C.C. §4-401\textsuperscript{59} and the absolute contractual liability which exists. 
The drawee bank may then seek indemnification from the collecting or 
depository bank pursuant to U.C.C. §4-207.\textsuperscript{60} Whether the drawer of a 
check has a direct cause of action against the depository bank which 
wrongfully pays the check, however, is a question which has long di-
vided the courts.\textsuperscript{61}

Under the N.I.L.,\textsuperscript{62} the pre-Code cases which considered the liabil-
ity of the depositary to the drawee have been far from unanimous in 
either result or rationale. Some courts permitted recovery by the 
drawer from the depository bank on the theory of conversion\textsuperscript{63} and 
warranty.\textsuperscript{64} Others held that the drawer could only proceed against the 
drawee bank and that any action against the depository or collecting 
bank would be barred.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{58} See First Pennsylvania Banking and Trust Co. v. Montgomery County Bank 
  \item \textsuperscript{59} See note 29 supra.
  \item \textsuperscript{60} See note 36 supra and accompanying text. Ordinarily the drawee bank may 
sue the collecting bank, however, such an action may be barred pursuant to U.C.C. §4-
  406(5). U.C.C. §4-406(5) provides:
  
  If under this section a payor bank has a valid defense against a claim of a cus-
tomer upon or resulting from payment of an item and waives or fails upon re-
quest to assert the defense the bank may not assert against any collecting bank 
or other prior party presenting or transferring the item a claim based upon the 
unauthorized signature or alteration giving rise to the customer's claim.
  \item \textsuperscript{61} 414 N.Y.S. 2d at 299.
  \item \textsuperscript{62} This issue had not been addressed to a Court prior to the N.I.L. (Uniform 
  Negotiable Instruments Act). For a brief history of Negotiable Instruments prior to 
the N.I.L. see Britton, William Everett, Handbook of the Law of Bills and Notes, 
1943 p I-22.
  \item \textsuperscript{63} See Gustin-Bacon Mfg. Co. v. First National Bank, 306 Ill. 179, 137 N.E. 
  793 (1922).
  \item \textsuperscript{64} See Farmers State Bank v. U. S., 62 F.2d 178 (5th Cir. 1932).
  \item \textsuperscript{65} See also First National Bank of Bloomingdale v. North Jersey Trust Co., 18 
  N.J.Misc.449, 14 A.2d 765, (1940) and Lavanier v. Cosmopolitan Bank and Trust Co., 
\end{itemize}
Case law under the Uniform Commercial Code is equally as unresolved and unsettled. Since the Code neglects to make any specific reference to any action by the drawer against the depositary or collecting bank for payment of an item bearing a forged indorsement, one could argue that such an action could not be maintained under the Code. For instance, in Massachusetts a drawer will under no circumstances be allowed to sue the depositary bank. The case standing for this proposition and considered to be the majority view is that of Stone and Webster Engineering Corp. v. First National Bank and Trust Co. In Stone, an employee stole checks from his employer, the drawer, and cashed the checks with forged instruments. Upon discovery of the forgeries, the drawer, Stone and Webster, demanded that the drawee recredit its account, but to no avail. An action was then brought by the drawer against the depositary bank for the full amount of the checks cashed with the forged indorsements, approximately $64,000.00, alleging that the depositary bank had not acted in accordance with reasonable commercial standards as required in §3-419(3). The court held §3-

67. §3-406 is by its terms unavailable to depositary bank since a depositary bank is not a holder in due course as defined in §3-302.
68. §3-419 is as follows:

(1) An instrument is converted when
   (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
   (b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
   (c) it is paid on a forged indorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee’s liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the
419(3) inapplicable and ruled the drawer had no cause of action against the depository bank. Relying on the pre-Code case law and on reasons
of Code policy, the court gave both a “traditional and pragmatic” rationale for its decision. The court held that the plaintiff-drawer had no “valuable rights” in the checks stating that, the drawer has no right to the proceeds of its own check to a third person, and not being a holder, the drawer cannot present the check to the drawer for payment. The value of the checks was limited only to the physical paper on which the checks were written. The court admitted that by allowing direct suit, circuitry of action might be avoided. However, the court feared that a direct suit by the drawer would circumvent defenses available to the drawee bank and indirectly available to the depository bank in a suit by the drawee bank. To avoid violation of the draftsmen’s true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement other than its immediate transferor.

70. J. WHITE AND R. SUMMERS, supra note 2, at 500.

71. Id.


A direct cause of action asserted by the drawer against the collecting bank would probably reduce the effectiveness of at least two of the defenses that the collecting bank could assert against the drawee bank; laches under §4-207(4) and failure to assert the drawee’s negligence under §4-406(5) . . . . “The problem of circuitry of action which is often cited as a prime reason to allow a cause of action by the drawee against the collecting bank may be avoided to some extent by the use of §3-803.” “The U.C.C. allows a payor bank that is sued for payment of a check bearing a forged indorsement to ‘vouch in’ a collecting bank by giving written notice of the claim and stating that the person notified may come
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apparent intention to require the drawer to bring an action against the drawee, the court held that a suit by the drawer against the collecting bank could not be maintained.\textsuperscript{73}

Nevertheless, at least one court has rejected the majority opinion of Stone and permitted a direct suit by the drawer against the depositary bank based on an interesting albeit complicated rationale. In \textit{Allied Concord Financial Corporation v. Bank of America, National Trust and Savings Association},\textsuperscript{74} the drawer had not discovered the forged indorsements until the statute of limitations had run pursuant to §4-406(4)\textsuperscript{75} so that any claim against the drawee bank was lost. The action was brought against the depositary bank, but the complaint was dismissed based on two Code sections. Under §§3-603(2)\textsuperscript{76} and 4-207(1),\textsuperscript{77} the warranties of title running to the depositary bank were said to run to the drawer on third party beneficiary principles. The court stated that “by allowing direct suit we reduce circuity of action and make litigation easier between parties located in different jurisdictions . . . . Settlement in one lawsuit of all aspects of a controversy involving commercial paper is clearly one of the prime objectives of the

\textsuperscript{73} See V. Countryman and A. Kaufman, Commercial Law, Cases and Materials, at 141 (1971).

\textsuperscript{74} See U.C.C. 3-803. If the person notified fails to act seasonable after receipt of notice by so defending he will be bound in that manner. The Official Comment to 3-803 indicates that the notification is not effective until receipt. Substantial compliance with this procedure was found in Bagby v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192 (8th Cir. 1974).

\textsuperscript{75} U.C.C. §4-406(4) supra note 41.

\textsuperscript{76} U.C.C. §3-603(2) states: “Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the right of a transferee.” (Section 3-201).

\textsuperscript{77} See U.C.C. §4-207(1) and supra note 36.
The court ruled, however, that the drawee’s defenses under U.C.C.§4-406(4) would be available to the depositary bank in any action against it by the drawer. It was the availability of one of these defenses, the statute of limitations, which saved the depositary bank. The action was dismissed.

The conclusion reached in Stone and Webster that the drawer could in no situation sue the depositary bank has also been avoided by finding that a drawer may become the assignee of a cause of action against the depositary bank. In National Bank and Trust Co. of Central Pennsylvania v. Commonwealth of Pennsylvania, an action was brought against the collecting bank to recover on checks honored on forged indorsements of the payees. The court in its analysis reviewed the possible theories of recovery but decided that “legal assignment made it unnecessary to rely on any one.” The court stated:

Assignments are not prohibited by the Code and appellant here advances no compelling argument which obviates their significance. The assignments here related only to the legal rights of the drawee as against the collecting bank. They do not affect the rights of defenses that may be asserted by the drawer under §§3-406 and 4-406 of the Code.

The often litigated drawer versus depositary bank issue obviously con-

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78. 80 Cal.Rptr. at 624. See U.C.C. §3-419(3) supra note 69. See also U.C.C. §4-406 supra note 41; §3-803 and §3-417 Comment 8. The court also felt §3-419(3) fortified its conclusion. “Code §3-419 by implication permits direct suit by the true owner of a forged check against a representative, including a depositary or collecting bank, to the extent of any proceeds remaining in the hands of the representative.” Id.

79. See U.C.C. §4-406(4) supra note 40.

80. 80 Cal.Rptr. at 626. Cf. Prudential Insurance Co. v. Marine National Exchange Bank, 315 F.Supp.520 (E.D. Wis.1970), in which the drawer was allowed to sue the collecting bank under a similar analysis.

81. 184 N.E. 2d 358.


83. The various forms of recovery available to the drawer of a check against the collecting bank include actions in both contract for moneys had and received and in tort, for conversion and for negligence by the defendant in cashing checks with the forged indorsements.

84. 305 A.2d at 773.

85. U.C.C. 3-406 supra note 39 and accompanying text.

86. U.C.C. 3-406 supra note 40.

87. 305 A.2d at 773.
fronts problems not solved by the Code and unfortunately, for the concept of uniformity, this split of authority continues to exist.88

Much can be said for not allowing the depositary bank to be sued by the drawer. If the drawer was negligent, a practical application of the Code would require him to bring an action against his own bank, the drawee bank. The drawee bank can more easily determine when the items and statement were sent to the drawer and when the forgeries were discovered and reported. The depositary bank, on the other hand, has no previous contact with the drawer and therefore is considerably disadvantaged.89

Another reason why a drawer should be barred from bringing an action against the depositary bank is that the depositary bank "is not deemed to have dealt with any valuable property of the drawer."90 When the depositary bank pays over a forged indorsement, the indorsement, since it is ineffective, does not authorized any payment from the drawer’s account. Absent such authority, no charge can be made on the drawer’s account and any payment made will be deemed paid by the drawee.

On the other hand, much can also be said for allowing a direct cause of action by the drawer against the depositary bank. The depositary bank is usually located in the plaintiff’s forum, is usually solvent, and often bears the ultimate loss anyway.91 If the drawer were only permitted to sue the drawee, the drawee would then have to bring an action against the depositary bank, resulting in two or more lawsuits instead of one. If the indorsement is considered effective pursuant to §3-405, other considerations also arise. In such cases the check is not only a valid instruction to the drawee to honor the check and to charge the customer’s account, but it is also a valuable instrument which results in the payment of funds from the drawer’s account. When the depositary bank’s failure to obey the restrictive indorsement results in the wrongful acquisition of the drawer’s funds, then such a situation

89. J. WHITE AND R. SUMMERS, supra note 2, at 501.
90. 414 N.Y.S. 2d at 300.
91. J. WHITE AND R. SUMMERS, supra note 2, at 501.
could logically provide a basis for an action against the depositary by the drawer. It was this kind of situation which faced the court in Underpinning.

In a rather complicated opinion by Judge Gabrielli of the Court of Appeals for the State of New York, the court concluded that Underpinning had in fact stated a cause of action against The Bank of New York, the depositary bank, sufficient to withstand the bank’s motion to dismiss for failure to state a cause of action. After discussion the “traditional”\(^2\) reasons for not permitting the drawer to sue the depositary bank for paying a check with a forged indorsement, the court held that the forgeries involved in this case fell within the purview of §3-405(c) and therefore were to be considered effective. The court stated:

Naturally, in such case, since the indorsement is effective no action would lie against a depositary bank for payment over the forged indorsement. Moreover, if the check was tainted in some other way which would put the drawee on notice, and which would make its payment unauthorized and subject it to suit, then the above rationale would not apply, since the payment would once again be from the drawee’s funds rather than the drawer’s account; and thus no action would lie against the depositary bank in favor of the drawer. Hence, it is only in those comparatively rare instances in which 1) the drawee has acted properly and 2) the depositary bank has acted wrongfully that the drawer will be able to proceed directly against the depositary bank.\(^3\)

The court in Underpinning determined that the drawee had acted properly; the checks bearing effective indorsements did indeed authorize the drawer to charge its customer’s account. It was also determined that the depositary bank could be liable to the drawer for the loss since it paid the checks in complete disregard of the restrictive indorsement, something for which the Code holds only the depositary bank responsible\(^4\) pursuant to U.C.C. § 3-206.\(^5\) U.C.C. §3-206 effectively places lia-

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92. See notes 89-91 supra and accompanying text.
93. 414 N.Y.S. 2d at 301.
94. The Code holds the depositary bank responsible in such a situation pursuant to U.C.C. §§3-419(4) and 3-206(2). U.C.C. §3-419(4) states: “An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.”
95. U.C.C. §3-206(2) provides: “An intermediary bank or a payor bank which is
bility solely upon the bank which first takes a check with the restrictive indorsement. Since The Bank of New York had not acted consistently with the restriction, it was responsible and could theoretically be liable for the losses resulting from payment made in violation thereof. The court went on to distinguish the rationale in *Stone and Webster* and concluded:

We note that one reason why several courts have been reluctant to allow the drawer to proceed directly against the depositary bank has been the belief that the drawee is normally in the best position as a practical matter to assert such defenses . . . . While this may be true, we do not deem it sufficient to shield a depositary from all liability in a situation such as this in which it would appear that the depositary bank is the only entity purposely not completely protected by the provisions of the Code from liability for paying in disregard of a restrictive indorsement.

This determination, however, is not absolute. Since the depositary bank in *Underpinning* could have possibly asserted a valid defense, one which would have been impossible to evaluate due to the procedural posture of the case, the court decided that The Bank of New York could not be held liable as a matter of law and refused to rule on the specific question of liability stating:

We have previously held that in an action for money had and received a depositary bank is entitled to any defenses which may be created by the drawer’s failure to use due care in examining his bank statements and returned checks. (*Federal Ins. Co. v. Groveland State Bank*, 37 NY2d 252, 258-259). While it may be that the forgery could not have been discovered by the use of reasonable care or that in any case the deposi-
tary bank's failure to use due care itself precludes such a defense, that question is not now before us. 98

CONCLUSION

The Court's determination in Underpinning produced a result that is not only practicable but is also harmonious with the principles of equity and sound Code policy. The law of commercial paper ascertains that when one of two innocent parties suffers a loss, that loss should be borne by the party most able to prevent the same. 99

In this case, had the forgery not carried the restrictive indorsement, then the loss would have fallen upon the drawer alone. However, the use of such indorsements in the Underpinning case resulted in a transfer of the potential liabilities and obligations pursuant to U.C.C. §§3-206 and 3-419. 100 These sections attempt to insure the continuous negotiability of an instrument restrictively indorsed. The result, however, is to offer no available remedy to the drawer against the drawee for payment on instruments negotiated in violation of the restrictive indorsement. 101 When the unusual case such as Underpinning occurs, the drawer then finds himself not only precluded from suing the drawee on the restrictive indorsements, but also precluded from suing for payment over the forged, yet effective, indorsements pursuant to U.C.C. §3-405. 102 Such a situation results in the drawer's loss of all available actions.

The drafters of the U.C.C. in §3-206(1) and (2) 103 meticulously exempted intermediary 104 banks and payor banks from liability for negotiation of instruments containing restrictive indorsements. Similarly, they provided for a special liability on the grounds of conversion when a depositary bank does not pay or apply a check pursuant to the re-

98. Id. at 302.
99. Id.
100. 61 A.D. 2d at 633. See also U.C.C. §§3-206 at supra note 10 and 3-419(3) and (4) at supra note 69.
101. Id. at 632.
102. See note 49 supra and accompanying text.
103. See note 10 supra.
104. U.C.C. §4-105 defines "intermediary bank" as "any bank to which an item is transferred in the course of collection except the depositary or payor bank."
To prohibit such recovery by the drawer from a depositary bank which inadvertently, yet inexcusably, cashes a check with any restrictive indorsement, but especially the restrictive indorsement “For Deposit Only,” would not only violate the intentions of the Code drafters but would also do violence to logic and common sense.

Georgene Gore

105. See note 69 supra.
Retreat of the Rehabilitation Act of 1973:
Southeastern Community College v. Davis

The aftermath of the VietNam war found many disabled veterans incapable of readjusting to civilian life. The obvious obstacles confronting them seemed insurmountable and, perhaps, at times they were. Their struggle reawakened the American conscience to the problems of integrating persons with physical and mental impairments into the mainstream of society’s activities. In order to accomplish this, however, drastic measures had to be taken to address the existing discriminatory practices aimed at the handicapped. Reacting to such practices, Congress enacted the Rehabilitation Act of 1973. Far reaching ramifications are implied by the Act’s removal of physical and social obstacles to education and employment for the handicapped. More particularly, Section 504 of that act prohibits any recipient of federal funds from

1. Webster’s Third New International Dictionary, 1027 (1971), defines “handicap” as a “disadvantage that makes achievement unusually difficult”. When used generically, “handicap” has a narrower meaning, referring to a particular type of disadvantage: a mental, physical, or emotional disability or impairment. Handicapped is both the accepted everyday meaning and a common statutory term of describing persons having such difficulties.


3. The Rehabilitation Act of 1973 is a financial problem for the nation’s schools and colleges who are concerned with the cost required to provide equal access for a minority of handicapped students. For example, at the University of Minnesota, a campus containing some 300 buildings and a student body of 55,600, it has been estimated that compliance with § 504 will cost $7.2 million dollars. N.Y. Times, Dec. 4, 1977, at 1, col. 1. The Department of HEW predicts that $2.4 billion dollars a year will be required to end handicap discrimination. N.Y. Times, May 1, 1977, at 29, col. 1.

4. The Rehabilitation Act of 1973, § 504 provides:
[N]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or
discriminating against handicapped individuals. With the ever increasing number of applications being filed by the handicapped, college officials were forced to confront the issue of whether admission could be denied on the basis of a physical impairment. In *Southeastern Community College v. Davis*, a case of first impression, the Supreme Court examined the Rehabilitation Act of 1973, specifically, Section 504, and 

**HELD:** A college instituting reasonable physical admission requirements can exclude a deaf individual from entering a clinical nursing program. Mrs. Francis B. Davis, a qualified, licensed practical nurse (LPN) sought to advance her nursing career and, in March, 1973, applied for enrollment in Southeastern Community College's Associate Nursing Program. The college accepted Mrs. Davis for the 1973-74 academic year with advancement to the Clinical Nursing Program contingent upon satisfactory academic progress. The following year, the college informed Mrs. Davis that despite successful completion of her course, she did not qualify for the clinical portion of the Associate Nursing Program. The college refused to accept Mrs. Davis solely because of a hearing impairment.

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5. Section 504 applies to every recipient of federal financial assistance regardless of the amount or type of assistance received. This applies to recipients of federal grants, contracts, and other forms of financial assistance. 45 C.F.R. § 84.3 (f) and (h) (1979).

6. The problems of integrating handicapped individuals into society are compounded by the lack of accurate statistics on the handicapped. "The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society". Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 Geo. L.J. 1501 n.2 (1973). Estimates of the number of handicapped Americans range from twenty million by the Department of Labor to thirty-five million by the Department of HEW. See Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1977).


8. As part of Mrs. Davis' application, she submitted a pre-entrance Medical Record, in which the examining physician evaluated her as "...mentally and physically able to undertake the program in professional nursing". Brief for Respondent at 5, Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979).

9. Id. at 6. Mrs. Davis was interviewed twice, once in April, 1973, and again in March, 1974, as part of Southeastern's evaluation process. As a result of these interviews, the College requested that Mrs. Davis submit to a hearing examination. The
Thereafter, Mrs. Davis requested that the college reevaluate her application. After agreeing to do so, the college sought outside professional opinions as to the effect of a hearing impairment on Mrs. Davis' prospective career. The college consulted the Executive Director of North Carolina's Board of Nursing, who responded unfavorably to the licensing of a deaf woman as a registered nurse (RN): "Mrs. Davis' hearing impairment can preclude her from being safe for practice in any setting allowed by a license as a[n] RN or by license as a[n] LPN."[emphasis added]. The Director of Nursing Services at Southeastern General Hospital, where Mrs. Davis had previously been employed, stated, in contrast, that: "I would employ Mrs. Davis in our Skilled Nursing Facility as an RN if I had a vacancy . . . ."12 Furthermore, the director remarked: "I do not believe that I can truthfully state that she [Mrs. Davis] would not be able to function in any area of nursing with her present determination to continue her education."12

After weighing the merits of each assessment, the college again rejected her application.13 In response, Mrs. Davis filed suit alleging, inter alia,14 a violation of Section 504 of the Rehabilitation Act.15 After audiologist's report revealed that Mrs. Davis had a bilateral moderately severe sensorineural hearing loss. However, with a change in her hearing aid, it was expected that Mrs. Davis would be able to detect sound "... almost as well as a person would who has normal hearing." Id. at 6. Nevertheless, no new interviews were scheduled with Mrs. Davis with her new hearing aid. Instead the College rejected Mr. Davis as not qualified.

10. Id. at 7. The Executive Director of the North Carolina Board of Nursing, evidently, did not know that Mrs. Davis had been licensed by the Board as an LPN and had worked for many years.
11. Id. at 7.
12. Id. at 8.
13. Id.
15. Mrs. Davis claimed that the College, by denying her admission to the clinical program on account of her hearing disability and by failing to make accommodations
a bench trial, the district court concluded that Mrs. Davis was not within the class covered by Section 504 and ruled in favor of the college.\textsuperscript{18} Using the plain meaning approach to statutory construction, the district court interpreted Section 504's "otherwise qualified handicapped person" to mean a person who is "... otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available."\textsuperscript{17} Thus, Mrs. Davis was adjudged not "otherwise qualified" since she would not be able to function sufficiently as an RN with her handicap.\textsuperscript{18}

On appeal, the Fourth Circuit Court of Appeals held that the lower court had erred in its judgment and reversed in part.\textsuperscript{19} The panel did not dispute the findings of fact by the district court but held that the lower court misconstrued Section 504 since the district court did not have the benefit of newly promulgated HEW regulations when it rendered its opinion.\textsuperscript{20} In contrast to the district court's decision, the

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\textsuperscript{17} \textsuperscript{Id.} at 1345. From the decision, it is apparent that the factual context in which this case arose determined the resolution of the statutory interpretation question. The court pointed out, first, that Mrs. Davis' abilities would be inadequate to identify patients' needs or even to pick up clues regarding a patient's vital signs. According to the Executive Director of North Carolina's Board of Nursing, this fact standing alone would preclude Mrs. Davis from being licensed. Second, this projected inability to be licensed as a Registered Nurse in the state of North Carolina was the single major factor in the College's refusal to allow admission. And third, according to the court, it would have been difficult and even dangerous for Mrs. Davis, as a deaf student, to attempt the clinical portion of the training program.

\textsuperscript{18} \textsuperscript{Id.} The district court finalized its decision with an analogy that, while it would be impermissible to exclude a blind or deaf person from admission to law school, if academically qualified, it would nevertheless be permissible to exclude a person without sight from a position as a truck driver.

\textsuperscript{19} 574 F.2d 1158 (4th Cir. 1978). The Court of Appeals affirmed the district court's opinion as to Mrs. Davis' claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). However, the denial of Mrs. Davis' claim under the Rehabilitation Act of 1973 was vacated and remanded.

\textsuperscript{20} \textsuperscript{Id.} at 1161. Approximately six months after the district court's decision, on June 3, 1977, HEW Regulations implementing § 504 became effective. These Regulations establish a mechanism for prohibiting discriminatory practices aimed at the handicapped, as mandated by the Rehabilitation Act. The Regulations define a "qualified
The court of appeals gave due deference to such administrative regulations.21

The district court was consequently ordered to reconsider Mrs. Davis' application for admission without regard to her disability. The panel asserted that the college might use academic performance as a factor in evaluating an applicant's qualification; however, any factor considered must be used uniformly regardless of its objective or subjective nature.22 Furthermore, the court noted that Mrs. Davis should not be foreclosed from pursuing a nursing career merely because she is unable to function effectively in all aspects of the nursing profession. Although Mrs. Davis' handicap might preclude her from working in a hospital's operating theatre, where surgical masks would prevent any reliance upon reading lips, there was no basis for prohibiting Mrs. Davis from working in another setting, such as private industry.23

The Fourth Circuit Court of Appeals remanded and directed the lower court to pay "close attention" to the HEW regulations24—requiring the college to modify its program to accommodate Mrs. Davis—even though such compliance may entail considerable expense.25 From this ruling, Southeastern filed its petition for writ of certiorari to the Supreme Court.26

handicapped person", with regard to post secondary education, as a "handicapped person who meets the academic and technical standards requisite to admission or participation." 45 C.F.R. § 84.3 (k) (3) (1979). Technical standards are considered as "all non-academic admissions criteria that are essential to participation in the program in question." 45 C.F.R. App. A (1979).

21. Id. at 1161. Thorpe v. Housing Auth., 393 U.S. 268 (1969); Cort v. Ash, 422 U.S. 66 (1975); Bradley v. Richmond School Bd., 416 U.S. 696 (1974). Other courts of appeals were required to vacate and remand cases, under § 504, to lower tribunals for reconsideration in light of applicable regulations which postdated their decisions. See United Handicapped Fed'n, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

22. 574 F.2d at 1160.

23. Id. at 1161.

24. 45 C.F.R. § 84.42(a) (1979); as per §§ 84.43(c), 84.44(a), 84.44(d) and 84.12(a). See text accompanying notes 57-62, infra.

In its remand, the 4th Circuit Court, rather than ordering the implementation of modifications mandated by the regulations, only recommended that the above regulations be examined. See 574 F.2d at 1162, n. 8, 1163, n. 9. Arguably, this procedural move weakened the lower tribunal's deference to such regulations.

25. 574 F.2d at 1162-63.

26. Id. at 1163. Southeastern filed a petition for rehearing and suggestion for
Accepting the case for review, the Supreme Court reversed the Fourth Circuit Court of Appeals and remanded. Writing for a unanimous court, Justice Powell, in an unusually short opinion, held that Southeastern Community College did not violate Section 504 when it denied Mrs. Davis admission to the Clinical Nursing Program.

As opposed to the controversy at the trial level, which involved the determination of Mrs. Davis' status as "otherwise qualified," pursuant to Section 504, the central issue facing the Supreme Court in the case at bar was whether Section 504 "... [forbade] professional schools from imposing physical requirements for admission to their clinical program".

Since this was a case of first impression, the Supreme Court was undoubtedly urged to grant review because of the need for a definitive statement regarding the interpretation and scope of Section 504. Conflicting decisions had blurred the intent and impact of Section 504 on both public and private educational institutions. Litigation to enroll a handicapped child stricken with spina bifida in the public schools concluded with contrasting judgments in adjacent circuits. In the fourth circuit, after the Davis district court decision, a different point of view was taken by two district courts in holding that a college must provide

rehearing en banc. The suggestion failed despite a request for a poll of the judges. Two judges dissented to the denial of rehearing en banc and would have affirmed the district court's judgment.

28. 99 S.Ct. at 2371.
29. Id. at 2364.
30. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1451 (25th ed. 1974), defines spina bifida as "... a developmental anomaly characterized by a defective closure of the bony encasement of the spinal cord through which the cord and meninges may ... protrude". In certain cases, this structural defect entails an inability to control the bladder and bowel. See also S. TUREK, ORTHOPAEDICS: PRINCIPLES AND THEIR APPLICATION 869-73 (2d ed. 1967).
31. Compare Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va. 1976), (exclusion of child from regular classroom without a bona fide educational reason is a violation of the Rehabilitation Act of 1973, § 504); with Sherer v. Waier, 457 F.Supp. 1039 (W.D.Mo. 1978), (parents, individually, and on behalf of their daughter who suffered from spina bifida, could not assert a private right of action under § 504 against school officials for failure to provide special individual medical services to the child during school).
interpreter services under Section 504 for deaf students. Furthermore, other areas of daily living were becoming embroiled in litigation as a result of the Rehabilitation Act.

The federal commitment to eradicating discrimination against disabled persons had been piecemeal and sketchy, at best, until the enactment of the Rehabilitation Act of 1973. Initial congressional interest began with returning World War I veterans and their attendant rehabilitative needs. The concern for both disabled war veterans and their civilian counterparts (primarily handicapped industrial workers) led to the Vocational Rehabilitation Program enacted in 1920 when President Woodrow Wilson signed into law the Smith-Fess Act. This act offered limited vocational services. As the definition of "handicapped" evolved from the foundation laid in the Smith-Fess Act, a definition which did not include the mentally ill or mentally retarded, and as the number of those eligible increased, the nature of services provided correspondingly changed. This development, however, was negligible as


33. In the 7th and 8th Circuits, the purchase of public transportation buses without hydraulic lifts and wheelchair securing devices was held to be handicap discrimination, in violation of § 504. Yet, in the 10th Circuit, similar handicap discrimination was found not to be a violation of the Rehabilitation Act. Compare Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); with Atlantis Community, Inc. v. Adams, 453 F.Supp. 825 (1975).

Compare Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977), (students with vision in only one eye denied preliminary injunction to participate in contact sports) with Borden v. Rohr, No. C2 75-844 (S.D.Ohio Dec. 30, 1975) (in an oral decision the court granted a preliminary injunction to allow a state university student, blind in one eye, to play intercollegiate basketball), and Evans v. Looney, No. 77-6052-CV-SJ (W.D.Mo. 1977), (refusal to permit plaintiffs blind in one eye the right to participate in college football held to be both a denial of due process and equal protection).


35. The Smith-Fess Act initially offered only services for the physically handicapped, such as counseling, some training, and placement services. The Vocational Rehabilitation Program was considered a temporary measure which was loosely funded until the passage of the Social Security Act in 1935. Pub. L. No. 74-271, 42 U.S.C. § 301 (1976). Therein Congress allocated permanent funding. See [1973] U.S. CODE CONG. & AD. NEWS 2076, 2082.

36. Due to the impact of World War II, Congress amended the Vocational Re-
the Act focused mainly on vocational rehabilitation training without addressing the aspects of discrimination which confronted trained handicapped individuals.

Initial recognition of social bias against the disabled began in 1948 when Congress enacted a law prohibiting the Federal Civil Service from discriminating against any person due to a physical handicap.37 Continuing with these efforts, in 1971, an attempt was launched to incorporate the handicapped within the provisions of the Civil Rights Act of 1964.38 However, not until early 1972, during the 92nd Congress, did extensive debate begin on providing handicapped individuals with more comprehensive rehabilitative services, including civil rights protections.39

That year, the House Committee on Education and Labor responded to problems inherent in the Vocational Rehabilitation Program by submitting H.R. 8395,40 which passed both houses of Congress by October, 1972. However, during that same month, President Nixon announced his pocket veto of the bill.41 Following the 1972-73 Christmas recess, the Senate Committee on Labor and Public Welfare revised a version of the previous house bill which passed both the Senate and House.42 On March 27, 1973, President Nixon vetoed bill S.7, de-

40. Id. at 2087.
41. Id.
42. Id.

nouncing Congress as masking "bad legislation beneath alluding la-
bels." Although both presidential vetoes centered on the cost of the
proposed legislation, the President also objected to the legislation's di-
vergence from strictly vocational objectives.

After a final attempt by the Senate to override the President's
veto, members of the Labor and Public Welfare Committee met with
administrative officials to work out a compromise. An amended ver-
sion of the two previously vetoed bills was quietly adopted by both
House and Senate. Thus, with little debate or commentary, Congress

With the passage of the Rehabilitation Act of 1973, the Federal
Government undertook a comprehensive program, the effects of which
would ultimately open the door to equality for the nation's handi-
capped. The greatest impact for the handicapped lies within three sec-
tions of Title V of the Act: Section 501, mandating non-discrimina-
tion by the Federal Government in its own hiring practices; Section
503, prohibiting discrimination and requiring affirmative action on the

43. Id. at 2088.
44. Id. at 2088-89. See also 119 Cong. Rec. 7107 (1973) (remarks of Rep.
Landgrebe).
45. On April 3, 1973, the Senate failed to override the President's veto. The vote
was sixty (60) in favor to override and thirty-six (36) against. 119 Cong. Rec. 10822
(1973).
47 "[C]ongress enacted the legislation without legislative hearing and virtually
no floor debate in either house. There is thus little Congressional guidance on the host
of complex questions presented by § 504's far-reaching prohibition against discrimina-
repealed all the provisions and amendments of the Vocational Rehabilitation Act and
substituted its own provisions. 29 U.S.C. § 790 (1976). See also, A Legislative History
of Section 504, in 2 Amicus 38 (1977).
49. See, e.g., Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa. 1976), aff'd,
556 F.2d 184 (3rd Cir. 1977), (denial to a blind woman of employment as a school
teacher was discrimination in employment and contrary to § 504); Davis v. Bucher, 451
F.Supp. 791 (E.D.Pa. 1978), (the denial of public employment to applicants with histo-
ries of drug abuse held to violate § 504).
51. 29 U.S.C. § 793 (1976). For a comparison of § 503 and § 504, see Ochoa,
Sections 503 & 504: New Employment Rights for Individuals with Handicaps, 2
part of federal contractors who receive more than $2,500 in contracts; and Section 504,82 which prohibits discrimination against handicapped individuals in any federally funded program or activity. Hence, whereas previous legislation centered on the very limited goal of providing strictly vocational services, Title V of the Rehabilitation Act offered, for the first time, specific civil rights protections by barring the expenditure of federal funds in programs discriminating against the handicapped.83

As initially passed, Section 504 consisted of a single sentence, unaccompanied by any explanation concerning its scope of coverage or limitations. Congressional intent was simply to enact a provision prohibiting discrimination against the handicapped in programs receiving federal funds.84 Congress later amended the act,85 broadening its

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Any individual who (A) has a physical or mental disability which for such indi-
The protection afforded this expanded class of handicapped individuals is modified, to a certain degree, by the HEW interpretative regulations pertaining to the Act.57

The Rehabilitation Act does not specify enforcement procedures since Congress intended HEW to promulgate regulations in this area. Swift implementation of such regulations was anticipated.58 Yet, four years passed before the Secretary of HEW, after considerable hesitation,59 issued the regulations.60

vidual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. 29 U.S.C. § 706(6) (1970 & Supp. II 1973). This definition in effect limited § 504 to disabled persons capable of employment through vocational rehabilitation.


57. The HEW Regulations implementing § 504 define “qualified handicapped person”, in the employment context, as “... a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question”. 45 C.F.R. § 84.3 (k) (1) (1979). In contrast, regarding post secondary education, a “qualified handicapped person” means a “... handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity.” 45 C.F.R. § 84.3 (k) (3) (1979). The Regulations use the term “qualified handicapped person” and “otherwise qualified handicapped person” synonymously. HEW considered that the omission of the word “otherwise” was necessary in order to conform with the intention of the statute, because “... read literally, otherwise qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be ‘otherwise qualified’ “. 45 C.F.R. § 84 App. A at 376 (1977).


59. In April, 1976, President Gerald R. Ford ordered HEW to “... coordinate the implementation of § 504 ... by all Federal departments and agencies ... so that consistent policies, practices, and procedures are adopted with respect to the enforcement of § 504 ... ” Exec. Order No. 11,914, 3 C.F.R. § 117 (1976). In Cherry v. Mathews, 419 F.Supp. 922 (D.D.C. 1976), District Court Judge John Lewis Smith
Throughout the regulations, it is clear that emphasis is placed upon evaluating handicapped individuals on the basis of their qualifications and not on their disabilities. In education, preadmission inquiries into an applicant’s handicap are prohibited. After admission, but before enrollment, an institution may consider an applicant’s disability in order to determine what academic adjustments must be made to ensure full student participation. Academic requirements can be modified, if necessary, to ensure that they do not discriminate, or have the effect of discriminating against a qualified handicapped student.

In *Davis*, the Supreme Court analyzed Section 504’s language and found that it neither compels schools to disregard a participant’s handicap nor requires them to modify their programs especially for the handicapped. Section 504 demands only that schools not exclude “otherwise qualified persons” solely on account of their disability. In essence, Section 504 signifies that “mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.”

The question of whether Section 504 allows an aggrieved handicapped person a private right of action was not answered by the court. Justice Powell acknowledged the issue in a footnote, but declined to ordered HEW to promulgate regulations implementing § 504 without undue delay. Nevertheless, HEW Sec. Mathews refused to issue the final regulations until Congress reviewed them. Judge Smith considered holding Mathews in contempt, but an appeal of the order gave Mathews enough time to avoid issuing the regulations before the inauguration of the Carter administration. Additional postponement provoked Handicap Rights’ organizations to stage demonstrations and occupy various federal offices in an attempt to publicize the delay. See “Hire the Handicapped”, *Newsweek*, May 9, 1977 at 39.

In announcing the Regulations, Sec. Califano declared, “In sum, the regulations issued today reflects my best judgment of how Congress intended that the broad uncompromising statutory command of § 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly with those recipients of federal funds who will be subjected to significant new requirements”. Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1979).

60. In announcing the Regulations, Sec. Califano declared, “In sum, the regulations issued today reflects my best judgment of how Congress intended that the broad uncompromising statutory command of § 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly with those recipients of federal funds who will be subjected to significant new requirements”. Statement of Joseph A. Califano, Sec., Dept. HEW (Apr. 29, 1979).

61. 45 C.F.R. § 84.42 (b) (4) (1979).

62. 45 C.F.R. § 84.44 (a) and (d) (1979). Such modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and the use of auxiliary educational aids, i.e., typewriters, tape recorders, and print enlargers.

63. 99 S.Ct. at 2366.
address the problem in light of the court's disposition of the case, i.e. finding Mrs. Davis not "otherwise qualified" and thus not entitled to protection under the Act. It is interesting to note that although the court meandered their way out of addressing this point, they still heard Mrs. Davis' claim under Section 504. Eight circuits which have considered the issue have found a private right of action to exist.

Moreover, the Supreme Court reassessed the Fourth Circuit Court of Appeals definition of an "otherwise qualified" handicapped person; a definition which regarded a person as "otherwise qualified" if, regardless of their respective handicap, such person met the academic and technical standards requisite for admission. The Supreme Court perceived this to mean that one need not meet legitimate physical requirements in order to be adjudged "otherwise qualified." Justice Powell

64. 99 S.Ct. 2361, 2366 n.5.
65. Supra note 14, at 14.
66. Aggrieved individuals first secured a private right of action under § 504 in Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), wherein the court enjoined local authorities from purchasing buses that were inaccessible to the physically handicapped. The Seventh Circuit Court of Appeals relied on Lau v. Nichols, 414 U.S. 563 (1973) and Cort v. Ash, 422 U.S. 66 (1975) to hold that 504 confers affirmative rights on handicapped individuals and, in addition, a private right of action to enforce these rights.

See NAACP v. Medical Center, Inc., 599 F.2d 1247 (3rd Cir. 1979) (minority groups and handicapped rights associations were given a private right of action under § 504 to contest relocation of medical facility); Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (mentally ill patient seeking state benefits in a private hospital has private right of action under § 504); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, (1979) (deaf LPN seeking RN degree has a private right of action under § 504); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (mobility-handicapped individuals and association of disabled persons have a private right of action under § 504 to enjoin public transportation system from purchasing mass transit equipment that is inaccessible to handicapped persons); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (students blind in one eye were allowed to claim a private right of action to enjoin a denial of participation in contact sports); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) (Per curiam) (mobility-handicapped persons have a private right of action under § 504 to bring suit for an accessible bus transportation system); Gurman kink v. Costanzo, 556 F.2d 184 (3rd Cir. 1977) (blind teacher seeking public school position conferred private right of action under § 504); Contra: Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 99 S.Ct. 2895 (1979) (RN with deteriorating eyesight, terminated from nursing home position, denied a private right of action). See also Comment, Toward Equal Rights for Handicapped Individuals, supra, note 52.
took exception to this view. He believed that the district court's interpretation of "otherwise qualified", requiring disabled individuals to satisfy all requirements in spite of their handicap, more accurately reflected the true statutory meaning. This position, Powell reasoned, is supported by the HEW regulations which implement the Act. Such regulations mandate that a handicapped student meet academic and technical standards requisite for admission or participation. If physical qualifications are essential to a particular program, "technical standards" for admission may encompass reasonable physical requirements. Thus, a qualified handicapped person would need to meet academic, technical, and physical requirements.

Another issue under consideration by the Supreme Court concerned the appellate court's ruling requiring the college to modify its programs and provide auxiliary aids to facilitate participation by the handicapped. This requirement was held to be excessive. Justice Powell observed, first of all, that despite program modifications, Mrs. Davis would not likely benefit to the same degree as a nonhandicapped participant. Moreover, any interpretation of the regulations requiring substantial adjustments beyond those necessary to eliminate discrimination against "otherwise qualified" handicapped individuals, "would constitute an unauthorized extension of the obligations imposed by that statute." Secondly, Section 504 is silent as to matters of affirmative action, in direct contrast to Sections 501 and 503, both of which contain explicit language authorizing affirmative action. Therefore, the court reasoned that Congress intended to limit affirmative action to certain circumstances prescribed by the Act. HEW, through its regulations, cannot create an obligation not otherwise provided for under Section 504. Even though an administrative agency's interpretation is to be given some deference, "neither the language, purpose, nor history, of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. [Emphasis added]."

67. 99 S.Ct. at 2369.
68. See notes 61 and 62 and accompanying text, supra.
69. 99 S.Ct. at 2369.
71. 99 S.Ct. at 2369. The Solicitor General of the United States, in an amicus curiae brief for the respondent, cited congressional reports and statements by individual members of Congress during the 1978 amendments debate, in support of the argu-
The Supreme Court’s decision, in the instant case, holding that the college’s actions were not in anywise discriminatory, was based on a narrow interpretation of Section 504. The ramifications of such an interpretation are far-reaching. Justice Powell contended that there would be situations where modifications could be made accommodating the handicapped without imposing “undue financial and administrative burdens”. Refusal to modify in those circumstances would be considered unreasonable and discriminatory. However, in the present case, such a refusal was not considered discriminatory, as Mrs. Davis could not have fully participated on account of hearing impairment. The court did not establish any guidelines in this regard, and only asserted that “... the line between illegal handicap discrimination and lawful refusal to extend affirmative action will [not] always be clear.” Consequently, the handicap provision of Section 504 was determined not to “limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.”

*Davis* is a major setback for both the Federal Government and the Handicap Rights Organizations, whose efforts were instrumental in enacting the Rehabilitation Act of 1973. The Court’s decision allowing the consideration of physical admission requirements circumvents Section 504’s regulations prohibiting preadmission inquiry into an applicant’s handicap. If physical ability, such as hearing or sight, is considered an admission requirement, an applicant could be excluded at the outset of the admission process, regardless of whether or not some academic adjustment could be made which would enable a student to effectively participate. For example, since law materials are printed and not usually found in Braille, law schools could require sight as either a technical or physical requirement, and exclude all blind applicants. Clearly HEW intended to prohibit such preadmission handicap

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72. 99 S.Ct. at 2370.
73. 99 S.Ct. at 2371.
74. 99 S.Ct. at 2370.
75. See note 60 and accompanying text, supra.
inquiries.

Davis represents but another “handicap rights” decision founded on considerations of safety and cost. The safety of both Mrs. Davis, practicing as an RN and of any potential patients under her care, overshadowed the controversy of handicap discrimination. The court opined that Mrs. Davis’ handicap prevented her from safely rendering adequate nursing services. Unfortunately, this decision ignores the contributions made by many hearing-impaired persons performing safely and effectively in society, such as doctors, nurses, and dentists. Advances in medical technology have enabled many hearing-impaired registered nurses and doctors to care for their patients without risk or jeopardy. Furthermore, the concern for handicapped workers’ safety has too often been a myth used by employers to reject qualified handicapped workers.

Along these lines, federal courts have recognized that cost is not a justification for denying equal education to handicapped children, nor is it grounds for preventing public transportation for handicapped persons. It seems illogical, then, to exclude a handicapped applicant from professional education programs because of “undue financial burdens”.

Powell’s decision has greatly emasculated the opportunity for ad-


77. See 3 M.D.L.R. 190 (1979).


79. E.g., an electronic amplifying stethoscope to hear lung sounds; a sphygomonometer to measure blood pressure; teletypewriters. See also Ridden, Davis, and Brown, Science for Handicapped Students in Higher Education, American Association for the Advancement of Science, (AAAS) pub. 78-R-2 (1978).


83. 99 S.Ct. at 2370.
vancement in professional schools by the nation's handicapped.\textsuperscript{84} Southeastern Community College, assisted by numerous amici curiae, was successful in diverting the court's attention away from the issue of handicap discrimination by emphasizing the necessity of physical qualifications for admission. One amicus rashly asserted that sustaining the appellate court would entail colleges admitting "... the profoundly mentally retarded to graduate programs or the quadraplegic to forestry programs."\textsuperscript{85} Such an extremist view in all probability played a decisive role in guiding the court to its decision.

A final point must be made regarding the Act's purported guarantee of civil rights protections to the handicapped. The Supreme Court seems to have underscored that purpose in its review of Mrs. Davis' allegation of such discrimination. It appears that the court, in essence, perceived Mrs. Davis' status as being akin to the "profoundly mentally retarded [in graduate programs] or the quadraplegic [in forestry programs]."\textsuperscript{86} This decision raises the question of whether a blind or deaf individual is less of a citizen with fewer rights because of his or her disability. \textit{Davis} emphasizes the discrimination, demeaning practices, and injustices that must be overcome by those Americans burdened with mental or physical impairments.

\textit{Clyde Mabry Collins, Jr.}

\textsuperscript{84} The language in Davis suggests that the holding is confined to professional training programs having reasonable and essential physical requirements. Those being unable to meet such physical prerequisites, despite their respective qualifications or skills, would be foreclosed from pursuing professional careers.


\textsuperscript{86} \textit{Id.}
"Stare decisis et non quieta movere." The sepulchral words roll from the hidebound pages of Bouvier's, bearing the tradition of the throaty chimes of Big Ben. No phrase better typifies the methodology of the common law, no single group of words better represents the unbroken skein of judicial reasoning binding us to an England yet to hear those notes resonating across the Thames. The common law attorney, wherever located, still feels the compulsion "to stand by the decision and not move that which is settled." Yet the same revolutionary fervor which caused the founding fathers "to dissolve the political bands" 1 connecting the colonies with Mother England also found expression in the treatment of precedent in the courts of the new nation. Certainly, the drafters of the Declaration of Independence maintained a healthy respect for the system of British jurisprudence. One of the grievances against King George listed was his "... abolishing the free system of English laws in a neighbouring province ..." 2 However, the new courts tended to shy away from this precedent, adopting it when appropriate, but feeling no compunctions in ignoring it.

Many reasons have been advanced for this action of the post-colonial judges. Beveridge certainly makes a forceful case for Mr. Chief Justice Marshall's lack of precedents in his opinions as resulting from "the meagerness of his learning in the law." 3 Undeniably, law books were not accorded the highest priority in cargo bound for the New World. Still, as Beveridge continues, "... at a later period, when precedents were more abundant and accessible, he [Marshall] still ignored them." 4

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1. DECLARATION OF INDEPENDENCE, 1 Stat. 1 (1776).
2. Id. at 2.
4. Id. at 179.
Certainly the practice of the greatest of the early Chief Justices contributed to what became a very lax view of adherence to precedent. Another factor may have been the total inapplicability of English precedent to the new Constitution. "In constitutional law stare decisis has been applied with much less rigor than in other fields of law, on the theoretical ground that it is the Constitution which is the basic standard and not the previous decisions of the Court." Whatever the reason, our courts interpreting the Constitution have not felt constrained to abide by their own decisions (much less those of England) when the tenor of society demanded otherwise. This willingness to accept change (or, less charitably, this desire to individualize the law) reflects in varying degree in all other areas of the law as interpreted by United States courts. The most prominent legal theorists of the country have earned the collective term of "legal realists" in their advocation of relaxed acceptance of precedent. Yet what began as a moderate relaxation has today evolved into what some of our contemporaries view as a total abnegation of established rules.

An American edition of Blackstone's COMMENTARIES presents an interesting comparison of the English and American approaches. Blackstone's test is imperative: "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." The commentator's note, however, tells us something different:

The rule that established precedents should be adhered to and followed, although it is a general principle wherever the common-law is in force, is not so rigidly observed as to prevent courts of appellate jurisdiction from overruling previous decisions which are deemed to be erroneous and unreasonable.


7. Id. at 36 n.2.
Thus, the English and United States versions differ, perhaps only slightly in test, but considerably in meaning. The development of this change marshalls some of the greatest figures in contemporary jurisprudence, marking perhaps the greatest break between English and American legal theory. However, even before these theorists spoke, precedential value was questioned. By the turn of the century, one historian of the law noted:

Adherence to precedent is useful; but it no longer controls. It is no longer a ground for decision that a question involved has been decided in a certain way by another court or by the same court on a previous occasion. Precedent is persuasive, but no longer decisive. . . .

Gray’s criticism of strict adherence to precedent lay in the danger of accepting as morally right a rule which exists simply because of its venerability. Morality should govern tradition, rather than the reverse. “The decision of a court may unite the character of a judicial precedent with the character of an expression of wise thought or of sound morals, but often these characters are separated.” Yet Gray did not go so far as to demand rejection of precedent. His position instead required harmonizing past decisions with contemporary policy, and using the rationale and logic of past courts to solve current problems. “After all, judicial precedents are only words, written in the past by some judge, and it is only as currently interpreted that they have impact on the community.”

Frank found reliance on precedent to be “illusory.” Indeed, his criticism of the system of precedent goes to the very foundations themselves, questioning the worth of relying on imperfectly reported prior cases. How, he asks, can later judges accurately determine the mental processes by which their predecessors decided the disputes with which they were faced? Judges do not report their entire thoughts and impressions—indeed, they lack the training and capability to do so even if they so desired. Thus, the entire system is suspect. Despite this, Frank

refuses to advocate desertion of the system. It still presents a perfectly valid method of determining disputes, for

... [i]f we relinquish the assumption that law can be made mathematically certain, if we honestly recognize the judicial process as involving unceasing adjustment and individualization, we may be able to reduce the uncertainty which characterizes much of our present judicial output to the extent that such uncertainty is undesirable. By abandoning an infantile hope of absolute legal certainty we may augment the amount of actual legal certainty. 12

Cardozo, too, felt unduly confined by precedent.

Battered and pelted, we grope for a principle of order that will compose the jarring atoms, ... for a rationalizing principle whereby precedents that are outworn may be decently discarded without affront to the sentiment that there shall be no breach of the legal order in the house of its custodians. 13

His statement reflects the struggle of the "legal realists" to retain the principles of law while accepting a flexible application of stare decisis. Tritely, they did not want to send the cleansed jurisprudence down the drain along with the bath water now befouled by the elimination of stale precedent. 14

Contemporary writers have abandoned this moderate stance. They recognize that to a great extent judges continue to seek at least guidance and frequently control from prior cases. One commentator attributes this to self-preservation, for judges who disregard precedent frequently find their decisions reversed, while courts refusing to follow their own cases will not themselves be followed. 15

For whatever reason, the new breed of computer devotees and

12. Id. at 159.
14. "The theme of the legal realists is not, then, that courts ought to disregard established rules in the process of reaching decisions. The point which they wished to emphasize is, rather, that the consideration of such rules ought not to be the decisive method by which decisions are reached." W. RUMBLE, AMERICAN LEGAL REALISM 190 (1968).
statisticians would throw over precedent and restructure the law along more relevant lines. Destroy the building, they urge, when "the pillars, main beams, or indeed any essential parts of the structure are rotten." 16 We need only look to the causes for dissent on the Supreme Court to see that the greatest fomenter of judicial disharmony is the debate on adherence to precedent in the face of social need. 17 At the very least, let us have frequent turnover in judicial precedent. Judicial opinions and capital assets are analogous: "[a]s old precedents obsolesce, eventually ceasing to be a part of the usable stock of precedents, new ones are added to the stock through litigation." 18 Now is the time for all good computers to come to the aid of the law. 19

Fortunately, in this time of troubled theory, a new voice comes to us—a voice that has been urging reforms in England, yet which returns us to the moderate, sensible world of the legal realists. In a brilliant volume that gives as much pleasure to read as it does in provoking thought, an eminent British jurist advocates reshaping the law, but doing so by continuing to use the theory behind cases of the past no longer directly relevant to contemporary society. 20 This call for change in England sounds to Americans as a plea for a reasoned approach to judicial decision-making: one which draws on the past yet seeks to apply it to present problems rather than to either reject it absolutely as no longer relevant or to follow it slavishly as an inflexible dictate.

Lord Denning does not stand alone among British jurists and legal thinkers, although advocates of easing the burden of precedent constitute, at best, a minority. Among others, H.L.A. Hart strongly questions the propriety of unswerving adherence to prior cases, although recognizing that to be accepted practice. Hart's "rule-scepticism" for judicial precedent springs from three observations.

First, there is no single method of determining the rule for which a given authoritative precedent is an authority. . . . Secondly, there is no authoritative or uniquely correct formulation of any rule to be extracted

from cases. . . Thirdly, . . courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted . . . [or] discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent.21

Thus, whether because rules cannot be determined in a uniform manner or with certainty, or because in practice the judiciary has ample tools at its disposal to avoid the general principle, Hart questions the wisdom of total obedience to precedent.

Denning, too, questions precedent on a purely theoretical basis. He goes beyond this, however, to consider the effect of strict stare decisis on practitioners and judges. For the attorney, it means: “He can argue either way as you please.” More significantly, to the judge it means one of two things. The individual judge “. . . does not have to think for himself or to decide for himself. It has already been decided on the previous authority.” For most judges, however, the result is even more insidious:

Whilst ready to applaud the doctrine of precedent when it leads to a just and fair result, they become restless under it when they are compelled by it to do what is unjust or unfair. This restlessness leads them to various expedients to get round a previous authority.22

Judges are thus tempted into the intellectual dishonesty of accepting a rule of decision when it pleases them and, working under cover of the rule (as Hart also noted), avoiding its effects—a mild form of hypocrisy which, although perhaps justified as a means to a laudable end, nonetheless compromises the underlying rationale and ostensibly logical process of judicial reasoning.

Lord Denning’s efforts to turn the tide have extended as far as his stepping down from the House of Lords to accept a seat on the inferior Court of Appeals. Realizing that dissent was futile in the Parliamentary court, he elected to sit on a bench where his voice might be heard more forcefully—where his influence could work greater good although he would suffer a resulting loss of personal status. “In the Court of Appeals it [dissent] is some good. On occasion a head-note there says: 21. H. L. A. Hart, The Concept Of Law 131 (1961).
22. Denning at 285.
'Lord Denning dissenting.'”

This same dedication to and love of the Law and desire to see it improve and more accurately deal with contemporary problems reflects throughout the pages of the book. The dedication and vitality of the man impel the reader through his work, making it a pleasant as well as an enlightening experience. For the joy Lord Denning experiences in the law and transmits to his reader, this volume would be highly recommended to all attorneys and legal scholars. Yet it goes beyond this, for we find a thoughtful, reasoned chronicle of cases in which precedent’s dictates led to decisions which were unquestionably morally flawed. In these cases, Lord Denning would have overruled prior decisions and thus permitted the law to mirror society’s sense of propriety and to grow in the process.

Unfortunately, Lord Denning bypassed an ideal opportunity to respond to the well-reasoned criticism of Julius Stone. Stone examined the opinion of the Court of Appeals in Boys v. Chaplin, in which Lord Denning, writing for the majority, did not follow a precedent which he deemed erroneous. Stone viewed Denning’s attempt to overrule the earlier case as exposing “... the potential of creative chaos existing behind a fragile shell of orderly, settled precedent.” Rather than overruling the case, Stone would have in some way distinguished it, as Denning’s fellow judges attempted to do.

This case, in short, illustrates well the unwillingness of judges to recognize the rather inescapable import for the theory of binding precedent of their own use of precedent. Most appellate judges apparently continue to believe that stability with growth within the common law turns somehow on whether the rule of the Young case should be formally abandoned. Yet, by their actual techniques of handling legal issues, they constantly demonstrate their own freedom to limit the scope within which precedents are binding, so that the question of formal abandonment may be

23. Id. at 287.
26. Stone, supra note 24 at 1441.
27. Young v. Bristol Aeroplane Co., [1944] K.B. 718 (C.A.). This case binds the Court of Appeals to its own decisions, while creating a limited class of vague exceptions to the principle of strict adherence. See Stone, supra note 24 at 1420.
one that rarely need arise. 28

Stone has long espoused the principle of strict adherence, yet has tempered it by relying on the creativity of judges to find ways of avoiding any harsh effects. 29 As has been noted, this places the judge in jeopardy of creating forced exceptions to the general rule to avoid violating a general principle which would lead to a harsh result. The jurist thus must resolve the impossible dilemma of whether the ends (maintaining the stiff upper lip of precedent) justify the means (strained readings of cases and a proliferation of hypertechnical exceptions). Although Lord Denning addresses the issue generally throughout the book, he never comes to grips with the criticism as it relates to Boys. It is never mentioned—even in passing.

This small criticism aside, Lord Denning has produced a marvelous work which should be read by all those who must work with precedent and should be in any serious legal collection. He sounds the clarion of change: in Great Britain, change which moves forward creatively; in the United States, change which retrenches to a more moderate, more meaningful position. At the same time, the force and beauty of his prose add immeasurably to the strength of his argument.

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. . . . All that I am against is its too rigid application—a rigidity which insists that a bad precedent must necessarily be followed. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which impede it. 30

28. Stone, supra note 24 at 1442 (footnote added).
30. Denning at 314.
Judge John Sirica has presented his view of the Watergate affair and his role in it in *To Set The Record Straight.* While the judge would never be accused of being a great writer, his narrative is extremely interesting. It allows us to vicariously experience the two most significant trials of the century and the monumental confrontation between the executive and judicial branches of the federal government which resulted from the battle from the Watergate tapes. It also reveals the author as a person caught in the pivotal position in this confrontation. Judge Sirica's story may eliminate some of the doubts about the conduct of the trials of the Watergate burglars and conspirators and it does seem to successfully justify the sentences of those defendants. It does little, however, to convince us that the integrity of our legal system survived the Watergate crisis.

Judge Sirica describes himself as a regular trial judge, one of hundreds of District Court Judges, in fact, “an obscure judge.” Surprisingly, he is thrust into a conflict with the President of the United States, a man for whom Sirica practically brags that he had voted. But he recognizes his duty; how he lives up to that duty is the heart of this narrative. It is easy to identify with him and sympathize with his struggle. Understandably, he admits to few errors in his handling of the trials.

In the trial of the Watergate burglars, however, he reveals that he suspected a coverup even before the trial started. Before becoming a judge, he had been counsel for the Select Committee of the House of Representatives on the Federal Communications Commission. There he had encountered what he believed to be a coverup and resigned his position, stating, “I don’t want it on my conscience that anyone can

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* B.S.M.E., 1970, Northeastern University; J.D., 1973, University of Connecticut; L.L.M., 1976, Temple University; Associate Professor of Law, Nova University Center for the Study of Law.
2. *Id.* at 143.
say John Sirica, a resident of the District for many years, is a party to a whitewash . . . . "3

This experience, Judge Sirica explains, prepared him to deal with the attempted coverup in the Watergate case. There is something unsettling about the trial judge admitting to such suspicions before the trial. It sounds ominously reminiscent of the Captain in THE CAINE MUTINY4 insisting that a duplicate key existed.

Judge Sirica admits to moments of anger, frustration, and to less than ideal judicial demeanor, but reveals nothing substantial enough in this account to lead the reader to conclude that the trials were improperly handled. On the other hand, he does little to convince the reader that they were properly conducted. There is, for example, the conspiracy trial which took place after Nixon had already resigned and been pardoned. The defendants argued that Sirica should not hear the case because of his participation in the earlier burglary trial and in the Watergate tapes subpoena case. As the Chief Judge, he had the power to decide the assignment of these cases. One must wonder if assignment of the case to a different judge would not have contributed at least to the appearance of fairness. Sirica’s reasons, 1) that he was best qualified to hear the case because he had already “supervised virtually every aspect of the case”5 and, 2) that people might think he avoided the trial with “the big names”6 leave much to be desired.7

Again referring to the conspiracy trial, Judge Sirica admits that he felt from the beginning that the defendants had no viable defense and, therefore, based their hopes on provoking him into making an error. “Wilson knew that my Italian temper was one of my main weaknesses.

3. Id. at 59.
4. H. WOUK, THE CAINE MUTINY (1954). The Captain there insisted that the theft of the strawberries had been accomplished by the use of a duplicate key to the food stores because he had discovered just such a duplicate key in investigating the theft of food years earlier.
5. SIRICA, at 242.
6. Id.
7. See A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE §1.7 The Function of a Trial Judge (1972), which requires that the trial judge should excuse himself whenever he believes that “his impartiality can reasonably be questioned.” Here Judge Sirica did the opposite by assigning himself. He could easily have assigned another judge to hear and avoided any question of impartiality.
From the start he tried to use that weakness to his client's advantage." Judge Sirica congratulates himself on having resisted these attempts, but the picture of the trials which emerges falls short of the ideal.

Judge Sirica treats us to a number of interesting capsule portraits of the personalities involved, particularly the lawyers. Alch was "a bit theatrical and always seemed to be wearing heavy makeup." Henry Rothblatt was "flamboyant" with his toupee and thin moustache "that almost seemed to be drawn onto his upper lip with a pencil." Ben-Veniste "despite his youth showed a lot of courtroom savvy." "Hundley could always be counted on to get off a wisecrack." Frates had "rugged good looks" and a "deep resonant voice that absolutely dominated the courtroom." Jill Volner was "quietly competent." Judge Sirica reveals the demeanor of the lawyers and the defendants certainly do make an impression upon the trial judge.

The sentencing of the defendants has been the object of many negative comments. Judge Sirica's nickname of "Maximum John" combined with his use of provisional sentences has led some to the conclusion that the sentences were overly harsh. His response is clear and convincing:

To be sure, I have always leaned towards stiffer sentences than some of my colleagues on the District Court, especially for white collar crimes, but the outcry about the provisional sentences always ignored two facts; that they were provisional, and that they were required by the statute I had used to put off final sentencing.

The saga of the subpoena for the Watergate tapes is the most compelling part of this book. The discovery that the President has a system to tape record conversations in the White House presented the Senate Committee, the Watergate Special Prosecutor and the public

8. SIRICA, at 258.
9. Id. at 65.
10. Id.
11. Id. at 73.
12. Id. at 259.
13. Id. at 260.
14. Id. at 262.
15. 18 U.S.C. §4208(b) allows such sentencing.
16. SIRICA, at 119.
with the means for verifying the testimony of those involved, particularly John Dean. There was, unfortunately, one problem. The President did not believe that these tapes could be subpoenaed.

Sirica, at this point, realized that he was involved in a contest of strength between the judicial branch and the executive branch over the claim that these tapes were protected by "Executive Privilege," and it became clear to him that Nixon was counting on his appointees to the Supreme Court for support in this claim. Judge Sirica concludes that the constitutional crisis precipitated has been satisfactorily resolved. "Despite efforts in our Executive branch to distort the truth, to fabricate a set of facts that looked innocent, the court system served to set the record straight."17 But those who have read THE BRETHREN18 and contemplated what might have happened had Nixon ultimately refused to hand over the tapes may wonder at the accuracy of his assessment.

The grand juries which investigated the Watergate affair are described by Judge Sirica as "courageous."19 They emerge from this book as the unnoticed heroes of the entire conflict. They spent arduous months investigating. They bore the real burden in the subpoena battle. "Here was the Grand Jury made up of ordinary citizens from the District of Columbia, some of them poor people, telling the President of the United States, the most powerful man in the world, to turn over the tapes."20

On reaching the end of the text, one discovers an appendix which includes short excerpts from the transcripts of the tapes made in the White House. Unfortunately, these excerpts are too short to be particularly informative. Following these are Judge Sirica's opinion and order that the subpoena issued to the President for the Watergate tapes be obeyed;21 a copy of the opinion of the court of appeals in upholding that decision;22 a copy of Judge Sirica's opinion on whether the Grand Jury could release information to the House Judiciary Committee;23 a copy of the United States Supreme Court decision upholding the sub-

17. Id. at 301.
19. Sirica, at 301.
20. Id. at 401.
poena;24 and finally, a copy of Judge Sirica’s order on Liddy’s motion for reduction of sentence.25 These opinions are not integrated into the text. Why sixty pages of this book are devoted to reprinting opinions which are readily available in any law library remains a mystery.

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