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Origins of Modern Professional Education: The Harvard Case Method Conceived As Clinical Instruction In Law

by Anthony Chase*

INTRODUCTION

The following analysis attempts to resituate discussion about legal education within the context of modern professionalism and the social history of American education. Particular focus is given to the rise of clinical instruction in legal education during the period after 1870.

Section One reviews the genesis of clinical education at the Harvard Medical School after 1870. Section Two reveals how the case method of legal instruction was introduced as a clinical form of education at the Harvard Law School during the same period. Section Three confronts the reasons why the case method of law teaching has failed to be designated “clinical” instruction during the past fifty years. Section Four demonstrates the close relationship between the rise of the case method law school and the modernization of professional culture. Section Five displays the dynamic self-consciousness of Harvard’s leadership in creating the new model law school which set an example for all others. Section Six concludes with an evaluation of the need for regarding legal education as a social relation.

* B.A., Wisconsin, 1972; J.D., Wayne State, 1978; LL.M. Harvard Law School, 1979; Assistant Professor of Law, Nova University Center for the Study of Law. I would like to express my appreciation to Professors Elizabeth Mensch, Morton Horwitz, Duncan Kennedy, John Schlegel, and Robert Gordon for encouragement and criticism, and to Professor William Nelson and the Northeast group of the American Society for Legal History for an opportunity to present some of the ideas in this essay to a regional meeting in New Haven. I would like to thank Ms. Robin Hornstein for typing the manuscript.


I. MEDICAL EDUCATION

In his outline history of the Harvard Medical School, published in 1930, Dr. Frederick C. Shattuck indicates that up until Charles W. Eliot’s appointment as President of Harvard University in 1869, the lectures offered to students at the Harvard Medical School were essentially designed to supplement the prevailing practice of apprenticeship “whereby a student attached himself to an older physician and thus learned the art from practical training.” Although most historical writing on medical education at Harvard immediately after 1870 constitutes, in essence, a catalogue of the dramatic changes which Eliot brought about in the school, it can be fairly stated that his whole reform program represented a kind of compromise between the lecture and treatise method and the autonomous apprentice system. The result was the first modern professional school of medicine in America. 4

Drs. Henry K. Beecher and Mark D. Altschule, in their recent history of medicine at Harvard, characterize the situation confronted by Eliot:

Until Eliot arrived on the administrative scene in 1869, the Harvard Medical School was a poor thing, unworthy to be associated with Harvard College. . . Each candidate for a degree was obliged to buy tickets to each of the courses for at least one year. Twice a week there was a ‘clinical medical visit’ at the Massachusetts General Hospital for one hour, and on Saturday morning an operative session. (Of the 127 students attending, 31 held a college degree.) There was no gradation of studies, no laboratories, no private courses, no individual instruction. There were two courses of lectures of four months each. The remainder of the students’ work was, theoretically at least, supervised by the outside instructors to whom the students were apprenticed, more or less, for three years. How much this apprenticeship amounted to depended upon the habits and inclinations of the instructor involved. It might be great or it might be essentially useless. Some students were able to see many cases of disease, and some none at all. In the crucial year of 1871 the three-year graded course was adopted and the apprenticeship

terminated.\

Rather than constituting a stride away from the concrete and the practical in medical education, however, Eliot's termination of the apprentice system revealed his desire to bring direct experience with patients within the controlled and regularized structure of university medical education where it could be made systematic and could also be guaranteed. Just as the lecture and treatise method of teaching gradually lost force in the Harvard Law School during Eliot's presidency, the same method was gradually cut back in the medical school as well. It is precisely the bringing of direct and practical experience with patients from the realm of informal apprenticeship into the controlled environment of university professional education which constitutes the genesis of clinical instruction in American pedagogy. Apprenticeship is uneven and mundane while clinical education is sophisticated and special.

Addressing the Medical Society of the State of New York in 1896, Eliot commented on the instructional changes which he brought about in the Harvard Medical School:

Thirty years ago there were only two laboratories in the Harvard Medical School - a dissecting-room, in which the manners and customs were as rough and unwholesome as the room and its accessories, and a little chemical laboratory in which no one was required to work. A small minority of the students voluntarily sought some laboratory training in chemistry. In our present medical school laboratory work of many sorts demands a large part of the student's attention. There are laboratories in anatomy, medical chemistry, physiology, histology, embryology, pathology, and bacteriology; and in all these some work is prescribed, and additional work is done by many. In clinical teaching, moreover, the change is great. Formerly a large group of students accompanied a visiting physician on his rounds at the hospital, and saw what they could under very disadvantageous conditions. Now instruction has become, in many clinical departments, absolutely individual, the instructor dealing with one student at a time, and personally showing him how to see, hear, and touch for himself in all sorts of difficult observation and manipulation. Much instruction is given to small groups of students, three or four at a time - no more than can actually see and touch for themselves. A four

years’ course of training such as I have described has a high degree of training-power both for the senses and the reason. The old medical teaching was largely exposition; it gave information at long range about things and processes which were not within reach or sight at the moment. The new medical education aims at imparting manual and ocular skill, and cultivating the mental powers of close attention through prolonged investigations at close quarters with the facts, and of just reasoning on the evidence.

This long statement of Eliot’s pedagogical faith in the concrete and the practical as the basis of true education reveals his hostility to the lecture and treatise method (“the old medical teaching”) which he sought to undercut throughout university instruction. Even in the college, Eliot replaced the “plain lecture, without carefully organized aids,” with one supplemented by prescribed reading, periodic written examinations, frequent recitations, and careful surveillance of student production and performance by younger faculty.

“While some spoke nostalgically of training systems that prevailed in the early nineteenth century,” writes historian James Gilbert not every observer had the same feelings. As Charles Eliot of Harvard noted, the fashion of studying medicine by caring for the doctor’s horse and buggy or the study of law by copying deeds was, happily, gone forever. There were “better ways of studying medicine or law, namely, by going to professional school, where progressive, systematic instruction rapidly developed is to be had.”

Thus Eliot’s contribution to modern professional education consisted of a struggle on two fronts: against the expository lecture tradition in the schools, on the one hand, and against the independent apprenticeship outside the schools, on the other. The development of laboratory, clinical, and case method instruction in the professional schools (“cultivating the mental powers of close attention through pro-

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7. C. Eliot, University Administration 180 (1908).
longed investigations at close quarters with the facts, and of just reasoning on the evidence"9 dealt a fatal blow to both the lecture and treatise academies and the apprentice system. Neither of the latter could guarantee direct student participation in the professional project as well as systematic and comprehensive instruction.

As Eliot knew, clinical education had developed within French medicine during the Revolution of 1789 as a compromise between the "Gothic universities and aristocratic academies" whose lecture system had trained French doctors under the ancient regime, and the temporary experiment in total liberty under which there was no organization of or control over professional education in medicine.10 In a very interesting passage concerning the birth of the clinic, Michel Foucault points out:

On what was the distinction based among those practising the art of healing? The most important part of the training of an officer of health was his years of practice, which might be as many as six; the doctor, on the other hand, complemented his theoretical training with clinical experience. It was no doubt this difference between the practical and the clinical that was the most innovatory factor in the legislation of the Year XI. The practice required of the officer of health was a controlled empiricism: a question of knowing what to do after seeing; experience was integrated at the level of perception, memory, and repetition, that is, at the level of the example. In the clinic, it was a question of a much more subtle and complex structure in which the integration of experience occurred in a gaze that was at the same time knowledge, a gaze that exists, that was master of its truth, and free of all example, even if at times it had made use of them. Practice would be opened up to the officers of health, but the doctors would reserve the initiation into the clinic to themselves.11

Thus, marvellously Janus-faced since its inception within the European bourgeoisie's struggle against the older order, the clinic presented itself as practical and popular in relation to the old lecture academies as well as transcendent and knowledgable when confronted by the radically democratic effort to completely destroy restrictions

9. See note 6 supra and accompanying text.
10. See Chase, supra note 2, at 343-44.
upon professional entry. It was just this sort of passage which Charles Eliot attempted to steer for clinical medicine through the competing obstacles of the entrenched lecture faculties in the schools and the surviving apprentice tradition among practitioners of the art. Against apprenticeship, the contrast would be drawn between art and science, between artisans and professionals. Against the established schools, the contrast was between mental laxity and rigour, between abstract theory and the kind of judicious reasoning courted by practical men.12

Although the early victories won by clinical instruction at the Harvard Medical School made it the model for all subsequent medical education in the United States, the medical school never achieved during the nineteenth century or early twentieth the kind of preeminence secured by the Harvard Law School. The reason was simply that the medical school failed to develop its own teaching hospital (or relations with Boston medical facilities) which would have permitted the clinical program to fully blossom.

Dr. Shattuck observed at a meeting of the Boston Society for Medical Improvement in 1900 that "(t)he fact that the Harvard Medical School has no hospital of its own, not even an out-patient clinic, is an obtrusive fact. However welcome, the school is still a guest of the hospitals and must adapt itself to rules and regulations which are not necessarily uniform."13 Thirty years later, after favorable relations had been developed with the Massachusetts General Hospital and Boston Children's Hospital, and an Out-Patient Department was set up in one of the school buildings, Shattuck remarked that the construction of Peter Bent Brigham Hospital signaled the eventual resolution of the clinical teaching problem at Harvard. The school's potential was finally realized.14

The significance of Eliot's successful struggle against both the old Harvard medical faculty and the surviving apprentice system cannot be sufficiently emphasized. In spite of their apparent recognition of the disastrous state of medical apprenticeship after the Civil War,15

12. See Chase supra note 2, at 336-40. See also the text of sections II and V infra.
13. F. Shattuck, Reports of Societies: Boston Society for Medical Improvement, 142 B. MED. & SURGICAL J. 567, 568 (1900).
15. See Beecher & Altschule, supra note 5 and accompanying text.
Beecher and Altschule nevertheless make the following inexplicable argument:

Eliot had two definite avenues in mind for the rehabilitation of the Harvard Medical School. Both had to do with quality: of students and of the teaching.... In the second category he intended to eliminate the apprenticeship. Although these goals seemed laudable then, with the passage of time the second has been found to be not entirely sound. It is a curious thing that the apprentice system was (and sometimes still is) spoken of in terms of disdain, yet it still cares for at least 50 percent of medical education through the four to six years of intern and resident programs. The difference is that in the eighteenth and nineteenth centuries, the student was guided usually by a single preceptor, whereas in the late nineteenth and twentieth centuries there were and are multiple preceptors for each student. The principle is the same, and the difference is not important.16

On the contrary, the principles underlying apprenticeship and modern clinical medicine are not the same. As Eliot understood perfectly, the difference was of extraordinary importance. Guided by a single preceptor, as even Beecher and Altschule seem to agree, in the nineteenth century meant often enough that the medical student was not guided at all. Yet professional supervision and individual instruction were for Eliot essential to clinical teaching. Under a single practitioner, what range of cases could a student hope to see? Only clinical experience in university hospitals and laboratories could secure systematic and comprehensive instruction. Indeed, doctors trained under the apprentice system frequently lacked even the manual and ocular skills necessary to carry out a diagnostic examination, given the advance of medical science and clinical instruction by the turn of the century.17

Having indicated that Eliot terminated apprenticeships for Harvard Medical students in 1871, Beecher and Altschule then assert that the apprentice system "still cares for at least 50 percent of medical education through the four to six years of intern and resident programs."18 Thus, the authors seem uncertain of what they mean by "ap-

16. Id. at 93-94.
17. See Eliot, supra note 6 and accompanying text.
18. See note 16 supra and accompanying text.
prenticeship.” The relation between clinical rotations and clinical residencies, between medical schools, teaching hospitals and the medical profession appears to have rather little in common with the old apprenticeship training. Modern clinical medicine may be described as just one more version of apprenticeship only if one is willing to remove the designation "clinical" from its historical context and allow it to represent any educational system whatsoever, so long as there is at least some direct patient exposure involved. As in Foucault’s illustration drawn from French medicine,¹⁹ what was significant about clinical medical instruction was not what it had in common with apprenticeship (i.e., practical experience) but the way in which it was different: the clinic brought first hand training “for the senses and the reason” within the systematically organized and controlled space of professional institutions.

II. LEGAL EDUCATION

Initially, the clinical form of medical instruction at Harvard was presented as a model for the case method’s development.²⁰

When defending the case method of instruction in the law school by comparing it to clinical instruction in the medical school, President Eliot urged that the analog within legal education to the hospital in medical education was not the court or law office, but rather the law library; law books were to the law student what the bodies of the sick and wounded were to the medical student. Only systematic study of case reports and their mode of reasoning could provide the law student with a professional education. This was implicitly, of course, an expression of contempt for the legal apprenticeship system whereby students prepared for the bar by studying in the office of a practicing attorney. Students, observed Eliot, who should habitually spend their time in courts or law offices would waste it. Like clinical instruction in medicine, the case method of teaching law constituted a compromise between the prevailing lecture and treatise method in the schools and the apprenticeship system outside the schools. Indeed, by bringing together cultivation of “mental powers of close attention through pro-

¹⁹. See Foucault, supra note 11 and accompanying text.
²⁰. See Chase, supra note 2, at 333-36, 341-43, especially note 54.
longed investigations at close quarters with the facts" with a systematically organized institutional framework, the case method could be conceived as clinical instruction in law.

That the case method was perceived (following Eliot's analogy) to constitute clinical education in law is suggested by one critique of the method, advanced by an opponent. Professor Christopher G. Tiedeman of the Law Department of the University of the City of New York developed his analysis in the first volume of *The Yale Law Journal*. A special issue, published in 1892, was devoted to the increasingly controversial debate over "methods of legal education."

"Like the student of the different sciences," remarked Tiedeman,

the law student must learn how to make original investigations for himself, and diagnose, so to speak, the principles of law from the cases in actual litigation. But no reason can be given why he must learn the whole science of the law by his own investigations in the undigested mass of raw material in the shape of adjudicated cases."

Tiedeman further argued that because students of clinical medicine had not been altogether denied the treatises within which previous research was recorded, law students under the case method should not be denied the use of "theoretic" or treatise material within their studies. This illustrates how far the case books had come to be the exclusive classroom textbooks under case method instruction.

Tiedeman felt the issue was one of "finding the middle and true ground of a controversy":

Impressed by the defects of the older systems of instruction, in which the law student was presented with more or less abstract propositions of law, with the aid of textbooks, which often were either nothing more than digests of the cases, and put together in an illogical and disorderly manner, or whose statements of the law were so loose and inaccurate as to prove misleading; and more impressed with the necessity of 'legal clinics' in the course of instruction in the law school instead of being left for acquisition in the law office, the advocates of instruction by

21. *See* note 6 *supra* and accompanying text.


23. *See* notes 30 & 31 *infra* and accompanying text.
cases have gone to the opposite extreme or placing too high a value upon the study of cases, and of unduly depreciating the value of the study of theoretic law, apart from learning it through the medium of practical law.\textsuperscript{24}

Thus, Tiedeman acknowledges the improvements made by the case method law school and perceives the inadequacy of the previous abstract presentation in the old law schools, on the one hand, and of leaving the study cases to the law offices, on the other. He fully appreciates the kind of compromise which the case method law school represents.

Yet Tiedeman asserts that, in effect, a good thing has been carried too far. Without questioning the consolidation of professional legal education within the schools or the wisdom of placing case reports at the center of legal study, Tiedeman urges that secondary or discursive work should no more be eliminated from clinical legal education than it had been in clinical medical education. He concludes:

\begin{quote}
The advocates of instruction by the use of cases have effected an important reform in legal education by arousing the law schools of the country to the importance of infusing more life into their instruction, and of introducing into their curricula what I would call 'legal clinics', and for this great good the legal profession should be grateful to them.\textsuperscript{25}
\end{quote}

Like a scientist or doctor, the law student needed to learn to 'diagnose' principles of law from case reports. Many observers of American legal education, doubting that law constitutes a science in any rigorous way,\textsuperscript{26} have failed to recognize the relationship between clinical or laboratory instruction and case method teaching. The relationship was less between law and science than between systematic instruction in law and systematic instruction in medicine or the scientific disciplines. What these departments of the university had in common was their uniformly practical and systematic professional organization under President Eliot. Scientific study referred to practical and concrete instruction within a rationalized professional institution which shunned

\begin{footnotes}
\footnote{24. Tiedeman, \textit{supra} note 22, at 156-57.}
\footnote{25. \textit{Id.} at 157.}
\footnote{26. \textit{See} text at sections IV and V \textit{infra}.}
\end{footnotes}
everything arbitrary and local (i.e., apprenticeship).\textsuperscript{27}

Part of the confusion on this issue no doubt stems from the indirect form in which the case method was analogized by its sponsors to clinical instruction. Eliot, for example, analogized the \textit{law library} (not the case method itself) to the hospital in clinical medicine.\textsuperscript{28} Dean Christopher Langdell deployed a similar metaphor thirteen years later:

\begin{quote}
[It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. . . . If it be not a science, it is a species of handicraft, and may be learned by serving an apprenticeship to one who practices it. . . . But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him, - then a university, and a university alone, can furnish every possible facility for teaching and learning law. . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.\textsuperscript{29}
\end{quote}

Langdell's remarks may be read as an effort to bestow upon the law a conceptual character identical to that of the physical and biological sciences; in that event, the relation between the law school and the scientific and medical departments of the university might appropriately be viewed as one whose nature Langdell misunderstood. But Langdell was as committed as Eliot to the construction of university-based, professional legal education. If the practice of law was not a handicraft, and systematic professional education could not be secured through apprenticeship, then it would become necessary to regard law as a university science.

Eliot and Langdell both know well enough that the law library was

\textsuperscript{27} See note 108 \textit{infra} and accompanying text.
\textsuperscript{28} See note 20 \textit{supra} and accompanying text.
\textsuperscript{29} C. Langdell, Record of the Commemoration, November fifth to eighth, 1886, on the two hundred and fiftieth anniversary of the founding of Harvard College 97-98 (1887) (\textit{quoted in} A. SUTHERLAND, \textit{THE LAW AT HARVARD} 175 (1967)).
not the proper workshop of professional legal education nor were the printed books which were, in effect, the laboratory manuals of case method teaching to be found in the library. Eliot made this point clearly in his description of the case method’s development at Harvard:

Professor Langdell’s fundamental idea was that the law should be taught, not from treatises or from lectures which would probably be either imperfect treatises or commentaries on treatises, but at first hand from the records of actual cases in which important principles or practices had been laid down and established by judicial tribunals. . . . It soon appeared that it was highly inconvenient for the many students to get timely access to the few copies of the reports to which Professor Langdell referred them, and he therefore undertook the preparation of a collection of select cases on contracts. This selection was followed in a few years by a series of volumes of select cases on the subjects of instruction in the Harvard Law School, almost all of which were prepared by Professor Langdell’s colleagues; and his method was gradually adopted by most of the teachers in the School. The possession of these volumes of cases makes it unnecessary for the student to resort incessantly to the volumes of reports on the library shelves, unless the professors revise their selections of cases, or wish to add cases of a date later than that of the volumes in use.31

Thus it was primarily with their casebooks (rather than in the library) that law students prepared for classes and it was in the case method classroom itself (Tiedeman’s ‘legal clinics’) where students not only demonstrated but in fact developed “the mental powers of close attention through prolonged investigations at close quarters with the facts, and of just reasoning on the evidence.”32 Langdell’s fundamental idea (as Eliot indicates) was that law should be taught systematically from concrete cases, by “teachers who have travelled the same road,”33 and only in rationally organized, national professional schools.34

Langdell sought to steer the same course as Eliot between the ab-

30. See Chase, supra note 2, at 332-336.
31. ELIOT, EDUCATIONAL REFORM 199-201 (1898).
32. See note 6 supra and accompanying text.
33. See note 29 supra and accompanying text. See also notes 61 & 81 infra and accompanying text.
34. See note 108 infra and accompanying text.
abstract, expository lecture and treatise tradition and the artisan apprentice system, neither of which could guarantee a professional education. His and Eliot’s definition of scientific discipline itself may have been exhausted by the kind of systematic and concrete instruction which everywhere came to supersede the conservative academies and discredited apprenticeship tradition as the fundamental organizing structure of modern professionalization. As one of Langdell’s early students later made plain in *The American Law Register*:

> In order to judge of Professor Langdell’s success it is necessary to keep clearly in mind what was his aim. He asserted and believed that law is a science, but his vital proposition (for the purpose of weighing his work as a teacher) is not that law is a science, but that there is a scientific method of teaching and studying the law.  

**III. THE REAL CLINIC IN LAW**

Skepticism regarding the status of law as a science frequently amplies a casual inattention to the relation between case method instruction and clinical education. For those less hostile to the association of law and science, misconceiving the law library as the laboratory of legal education has also contributed to the obscurity of the case method’s role as clinical instruction in law.

Law librarian Edward F. Hess, Jr., for example, introduces the 1977 University of Illinois College of Law *Law Library Guide* with the following statement: “Beyond any other group on the campus law students make use of the library as the heart and soul of their education. It is trite but nevertheless true to say that the Law Library is the counterpart of the laboratory in medical or scientific education.” So long as the law library is superficially apprehended as the law school’s laboratory, the real link between case instruction and clinical teaching will be rendered less visible. Indeed, for the past fifty years the reference to clinical teaching in the law schools has oddly been reserved to survivals

35. W. Schofield, Christopher Columbus Langdell 55 O.S. 46 N.S. *The American Law Register* 281 (1907).

and rediscoveries of various kinds of apprenticeship.

Thus, during the 1930s, Jerome Frank was able to attack the case method law school (in behalf of what might be described as a regression to a form of apprentice system) and call his alternative a "clinical lawyer school." It is not unreasonable to argue that because Frank continued to feel that legal education should be confined to professional schools, his option was not so much a reversion to apprenticeship as it was a refinement of the modern professional school, with a greater tilt toward the "concrete and practical" (or perhaps a different conception of what was, after all, "practical").

Yet Frank seems not to have sensed at all the relationship between Langdell's (and Eliot's) transformation of the Harvard Law School and the development of systematic instruction throughout professional education. In perceiving the case method as fundamentally arcane rather than systematic and practical (in relation, alternatively, to the apprenticeship and the lecture method), Frank seems hardly to have understood the successful professional institution which he was criticizing and within whose ideological terrain he would have to justify his reforms so long as he believed law school should remain selective points of entry to the profession.

Certainly Frank was right to argue that the law schools did not provide their graduates with many practical skills essential to the practice of law. But the new professional schools did not pretend to provide that sort of training. However concrete and practical clinical instruction might be, it did not duplicate the character of merely artisan training. As Foucault points out clinical instruction was a species apart, a form of simultaneously direct and mediated experience, less a kind of artisan training than initiation into professional life.

The following observation by Boalt Hall Professor Preble Stolz from a 1969 paper on the failure of "clinical experience" in American legal education typifies the conceptual reduction of clinical instruction to merely artisan or practical experience, and its total divorce (as a term of reference) from the case method:

38. See note 11 supra and accompanying text.
39. In reference to the notion of "initiation", see Chase, supra note 2, at 344.
Modern legal education in this country begins at Harvard in 1870, but it was not until about the turn of the century that the model Langdell created at Cambridge began to be copied generally. Legal clinics have been associated with law schools since that time. As the name suggests, they were conceived on analogy to the medical school clinic where medical students were given exposure to sick people in the context of practice rather than the classroom. Clinical experience rapidly became a central part of medical education but a comparable kind of exposure to the real world of law practice, although repeatedly tried, has never been anything more than a fringe activity in legal education. Why?  

Stolz answers his question with two assertions: first, “until quite recently clinical or practical experience ranked very low in the value structure of legal educators”  

and second, uncertainty about the appropriate “form of the non-classroom experience,” given the poor reputation of “legal aid” bureaus, etc., has discouraged the development of clinical legal education.

At least Stolz’s first sentence is correct: the case method originated as the fundamental organizing principle of an entire law school at Harvard, as we have pointed out. Yet Stolz places the birth of “legal clinics” thirty years later, and seems unaware of the earlier characterization of the case method as a “legal clinic” and as the appropriate equivalent to the medical school clinic or hospital. He seems to equate clinical education in medicine with apprenticeship, not realizing that the clinic stands precisely between the classroom (the old lecture method) and practice (the daily rounds of a practicing physician).

Coming at the turn of the century, then, what actually did constitute Stolz’s “legal clinics”? He explains in a footnote: “There were student-organized ‘Dispensaries’ at the University of Pennsylvania and at Harvard before the turn of the century.” Now if the case method has been introduced at Harvard as a clinical or laboratory way of teaching law, a kind of legal clinic, and a very different kind of instruction is

41. Id.
42. Id. at 55.
43. See Chase, supra note 2, at 336-40.
44. Stolz, supra note 40, at 54 n.1.
introduced under the same name while Eliot and Langdell are both still on the scene, we might reasonably doubt the character of our analysis to this point. Stolz indicates that his information comes from A.Z. Reed's *Present-Day Law Schools in the United States*. 45

References to Reed, however, reveals the lameness of Stolz's theorization. What Stoltz calls "legal clinics," Reed describes as a response to the legal profession's concern for social service. He indicates that the earliest manifestation of this interest "was the establishment of a 'Dispensary' by a law club of the University of Pennsylvania law school in 1893. Later, independent legal aid societies were started among the students at Harvard and at several other schools." 46 Harvard's legal aid society, Reed indicates, was begun in 1913 - not "about the turn of the century" as Stolz indicates. 47 Were these legal aid societies "conceived on analogy to the medical school clinic," as Stolz proposes? According to *The Centennial History of the Harvard Law School*:

In 1913 the Legal Aid Bureau was formed, as part of the activity of the Law School Society of Phillips Brooks House; it is now an entirely independent organization. It offers some of the older students an opportunity of engaging in welfare work while at the same time they acquire professional experience often more enlightening than can be gained in the specialized practice of the modern city office. 48

The legal aid societies would seem to have been modelled on private welfare and charitable organizations rather than clinical education in medicine. The systematic and comprehensive organization of concrete and practical experience in the case method law school presents a much sharper reflection of the clinical approach to medical instruction than the work of legal aid societies, Stolz's "legal clinics." Indeed, the attraction of legal aid work suggested by the law school's *Centennial History* is not its compensation for the absence of clinical legal instruction in the law school, but rather its advantages over other forms and

45. See A. Reed, *Present-Day Law Schools in the United States and Canada* (Carnegie Foundation Bulletin No. 21 (1928)).
46. Id. at 217.
47. See note 40 supra and accompanying text.
ways of acquiring "professional experience." The law school sought to provide its students with professional education, not professional experience, and the legal aid bureau's "older students" did not appear to confuse the two.

Stolz's second reply to his query regarding the "failure" of clinical experience in legal education refers to the low repute of student legal aid bureaus conceived as "teaching institutions" resulting from their limitation "basically to the crisis needs of the very poor." Could the problem be less that such clinical experience is not valued by many legal educators than that such experience is not clinical in the context of Eliot's transformation of modern professional education? Is such experience brought within the carefully administered process of professional transformation which is the essence of those programs sponsored by Eliot and which liquidated the apprentice system? What Stolz actually describes is not the failure of clinical experience in legal education but rather the ineffectual resurgence of apprenticeship within a modern professional school system.

The modulated degree of "exposure to the real world of law practice," which the case method has always represented, may simply constitute the closest relationship to actual practice within which the noviciate law student may be safely placed with a certain guarantee of administrative control over the structure of professional education. Moot courts and law clubs, actively promoted by Dean Langdell, have long been a part of Harvard legal education and constitute, like the case method classroom, a concrete and practical experience which can be effectively controlled.

Stolz's assertion that "practical experience" has ranked low among the pedagogical values of American legal educators certainly does not apply to the originators of the case method at Harvard, who gradually foreclosed the lecture and exposition tradition within American legal education. Professors Ames, Keener, Gray and Thayer frequently

49. Id.
50. Stolz, supra note 40, at 55.
51. Id. note 40 and accompanying text.
52. See C. Warren, 2 History of the Harvard Law School 327-31, 413-16 (1908). During the Langdell period, law clubs gradually replaced the moot courts as the center of Harvard's oral advocacy program.
53. See id. at 419-27; Sutherland, supra note 29, at 162-299.
found themselves defending the case method from an opposite claim: the charge that the case method was too practical and specific to actual adjudicated cases and the legal arguments advanced within them to be useful. “This method of studying law,” asserted New York attorney James C. Carter in Langdell’s defense,

by going to its original sources, is no royal road, no primrose path. It is full of difficulties. It requires struggle. If there is anything which is calculated to try the human faculties in the highest degree it is to take up the complicated facts of different cases; to separate the material from the inmaterial, the relevant from the irrelevant; to assign to each element its due weight and limitation and to give to different competing principles and rules of law their due place in the conclusion that is to be formed, and I know on the other hand of no greater intellectual gratification than those which follow from the solution in this way of the great problems of the law as they successively present themselves.84

Carter was convinced: the case method worked.

IV. SYSTEMATIC INSTRUCTION AND MODERN PROFESSIONALISM

The most recent, and perhaps most elaborate ever, statement of the proposition that Langdell’s main idea was that law must be considered a science is found in Professor Grant Gilmore’s The Death of Contract and The Ages of American Law. Without considering the possibility that Langdell’s major contribution was an institutionalization of the idea that modern professional education in law requires systematic instruction comparable to that in the sciences and clinical medicine, Gilmore asserts:

Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell’s idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell’s idea shaped our legal thinking for fifty years.

84. Carter’s comments, made at the two hundred and fiftieth anniversary of Harvard College celebration in Cambridge, are quoted in W.A. Keener, Methods of Legal Education II, 1 YALE L.J. 147 (1892).
Langdell's idea was that law is a science. . . . From that basic proposition several subsidiary propositions followed.

Ideologically, it followed that legal truth is a species of scientific truth. The quality of scientific truth, as most nineteenth-century minds understood it, is that once such a truth has been demonstrated, it endures. It is not subject to change without notice. It does not capriciously turn into its own opposite. It is, like the mountain, there.55

Gilmore seems to base his analysis upon an extremely limited sampling of Langdell's ideas. He suggests that "[a]part from the casebook on Contracts (plus the Summary) and a second casebook on Sales (1872), [Langdell] seems to have written little or nothing."56 Although it is true that Langdell rarely defended the case method of law teaching itself, his annual reports on the development of the Harvard Law School between 1870 and 189557 encompass a greater number of total pages than his Contracts casebook which, of course, was a collection of case reports rather than original writing. Gilmore makes no mention of these interesting reports.

In the major biographical essay on Langdell (to which Gilmore does not refer), James Barr Ames58 spends two pages discussing (without exaggerating their impact) Langdell's books and essays, including at least twelve articles in The Harvard Law Review. The last of these constitutes an intriguing study of the relationship between law and society in nineteenth century Britain.59 Langdell even published a short history of the Harvard Law School between 1869 and 1894, the period

57. See Forty-Sixth Annual Report of the President of Harvard College: 1870-1871 (1872) through Annual Reports of the President and Treasurer of Harvard College 1894-95 (1896) Langdell's portion of these quite extensive reports on university life and politics as well as growth and development, always begins: "Sir, — I beg to submit the following report upon the Law School for the academic year ________.” Id.
59. Id. at 474-75. See C. Langdell, Dominant Opinions In England During The Nineteenth Century In Relation To Legislation As Illustrated By English Legislation, Or The Absence Of It, During That Period, 19 Harv. L. Rev. 151 (1906). See also note 112 infra.
of his deanship.80

In his sketch of the law school, Langdell discussed the following changes in legal education which he conceived to be most significant: (1) the development of a new course of study; (2) conferring degrees only upon examination; (3) improvement of the library and appointment of a permanent librarian; (4) development of a new method of study and instruction, utilizing casebooks rather than treatises; (5) holding regular faculty meetings; (6) the gradual increase of tuition fees; (7) establishment of examinations regulating advancement from one year to the next; (8) hiring J.B. Ames as an assistant professor in the law school while he was only a student; (9) establishment of the distinction between ordinary and honor degrees; (10) final extension of the degree program to three required years of study; (11) establishment of entrance examinations for those without college degrees; (12) completion of Austin Hall; (13) founding of the Harvard Law School Association; (14) establishment of The Harvard Law Review; (15) issuing a complete catalogue of all the graduates of the law school; (16) listing 108 colleges from which prospective law degree candidates should have graduated; (17) increase in the number of faculty and students in the law school.81

The single most important change, Langdell seemed to believe, was the establishment of law school teaching as a career in its own right, as well as the hiring of Harvard graduates as law teachers not only at Harvard but in schools across the country. Indeed, the professionalization of law teaching was a prerequisite to the realization of Langdell's "main idea" (which he shared with Eliot); the development of systematic and comprehensive, university-based professional education. Langdell argued that the law should be studied not from treatises but directly and in a rigorous way from the reported case decisions themselves. "The method," asserted Eliot,

was much derided at the start by lawyers who had been brought up on treatises and commentaries on treatises; but it soon justified itself in a conclusive way. After a few years it was demonstrated that young men who had been thus trained to the practice of the law could make them-

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81. Id. at 494-98.
selves more useful to their seniors in the offices they entered than fresh law graduates had ever been before, and than young men contemporaneously trained in other methods. There followed a rapid growth of the Harvard Law School which has continued to this day, in spite of numerous restrictive measures which demanded better preparation for admission, more years of residence and finally a preliminary degree in arts or science as a condition of entrance to the School.62

Did these momentous changes occur in the wake of a new gospel, a spreading faith in the scientific quality of law or was the transformation of the American legal profession at the heart of things?

The changes which were taking place in the practice of American law toward the end of the nineteenth century were closely related to the growth of industrialism and urbanism under the direction of corporate capitalism. The birth of new professions and the transformation of older ones within the matrix of industrial society constitute, according to sociologist Magali S. Larson, one aspect of the process of social modernization. ‘Most research analyses, Larson asserts,

implicitly or explicitly present professionalization as an instance of the complex process of ‘modernization.’ For professions, the most significant ‘modern’ dimensions are the advance of science and cognitive rationality, and the related rationalization and growing differentiation in the division of labor. From this point of view, professions are typical products of modern industrial society. The continuity of older professions with their ‘pre-industrial’ past is therefore more apparent than real.63

The effort to maintain continuity of appearance against the real background of discontinuity and transformation provoked, by the beginning of the twentieth century, a crisis of self-image within the legal profession. “In the opening decades of the century,” historian Richard Hofstadter points out, “the American legal profession was troubled by an internal crisis, a crisis in self-respect precipitated by the conflict between the image of legal practice inherited from an earlier age of more independent professionalism and the realities of modern commercial

62. Eliot, supra note 7, at 202-03. See also C. Eliot, The Tendency to the Concrete and Practical in Modern Education (1913).
63. Larson, supra note 1, at xvi.
It is important to add that the movement away from what Hofstadter calls a “more independent professionalism” constituted a movement toward deployment of a model of “cognitive rationality” (e.g., the spread of case method legal education as standarized professional training), and sharper internal stratification or what Larson describes as “growing differentiation in the division of labor.”

In Hofstadter’s view, the older and more independent professionalism among attorneys had been characterized by lawyers whose status and reputation derived from the quality of their courtroom advocacy and broad learning; men of considerable public influence and power within a widely remarked tradition of American statesmanship, whose sense of public responsibility was bound up with a self-conception of being officers of the court as well as agents of particular clients, and who were members of a democratic profession, access to which was open to virtually all as a kind of “natural right.” By the end of the century, however, the status and fortune of leading members of the bar came increasingly to depend upon effective counsel and advice rather than courtroom forensics. The public influence of attorneys also resulted more from their close relationship to concentrations of private capital rather than from having provided the rank and file of practicing politicians. Lawyers saw themselves less and less as officers of the court and increasingly (in the words of one troubled attorney) as “clerks on a salary” to those paying the most generous retainers. And the development towards higher standards in the law schools and promulgation of codes of ethical conduct in the new professional organizations signalled both sharper distinctions between the various echelons within the profession.

“At the turn of the century,” Hofstadter argues,

lawyers as a group were far less homogeneous than they had been fifty years before. The large, successful firms, which were beginning even then to be called ‘legal factories,’ were headed by the wealthy, influential, and normally very conservative minority of the profession that tended to be

64. R. Hofstadter, The Age of Reform From Bryan to F.D.R. 156 (1955).
65. See note 63 supra and accompanying text.
66. Hofstadter, supra note 64, at 157.
67. See id. at 156-64. See also Larson, supra note 1, at 166-77.
most conspicuous in the Bar Associations.68

“There was a second echelon of lawyers,” Hofstadter continues,

in small but well-established offices of the kind that flourished in smaller cities; lawyers of this sort, who were commonly attached to and often shared the outlook of new enterprisers or small businessmen, frequently staffed and conducted local politics. A third echelon, consisting for the most part of small partnerships or individual practitioners, usually carried on a catch-as-catch-can practice and eked out modest livings. As the situation of the independent practitioners deteriorated, they often drifted into ambulance-chasing and taking contingent fees. Much of the talk in Bar Associations about improving legal ethics represented the unsympathetic efforts of the richer lawyers with corporate connections to improve the reputation of the profession as a whole at the expense of their weaker colleagues.69

Hofstadter’s concluding sentence is quite important: it remained necessary for elite lawyers to improve the reputation of the profession “as a whole” in order to improve their own standing within public opinion. At the level of formal professional status, elite attorneys were indistinguishable from the very bottom rung of the professional hierarchy. This fact resulted from an important difference between the formal organization of the American and English bars.

Legal historian J. Willard Hurst points out that the colonial American bar had before it the example of England’s distinction between a higher order of barristers or courtroom advocates and lower echelon of solicitors or client-caretakers.70 The barrister-solicitor distinction in England, according to Hurst,

brought the ablest practitioners together, to form the Inns of Court. Legal education was controlled by the members of the Inns, and these lawyers early began to specialize in advocacy, which was then the most desirable part of law practice. Despite its chance beginnings, the barrister-solicitor distinction grew into a maze of social, legal, and economic

68. Hofstadter, supra note 64, at 157.
69. Id.
In Colonial Virginia, Massachusetts, and New Jersey, Hurst observes the initial American replication of the English bifurcation of formal status within the legal profession. But the combination of a highly mobile class structure in the United States with the specific circumstances surrounding the Revolution (e.g., popular revulsion against the English, the end of formal training for American lawyers at the Inns of Court, hostility to leading members of the bar who had maintained Royalist sympathies) broke up the early influence of local bar associations and professional groups. “In 1790,” Hurst concludes, “the country was poor, scattered and sparsely settled, and engrossed in exploiting its natural wealth; conditions would not allow law practice to develop according to the costly etiquette of the peculiar English type of lawyers’ specialization.”

Indeed, we may even argue that (as Larson suggests) modern professionalism is so closely wedded to industrialization that the first efforts at professional organization in American law filed as consequence of their prematurity in relation to social and economic conditions. Thus, if the nineteenth century (in its industrial phase) is marked by waves of professionalization, it is also (in its pre-industrial phase) marked by waves of deprofessionalization which constitute the equivalent in the United States of decolonization in the professions. This is the sort of historical contour outlined by Robert H. Wiebe, who suggests that “[e]arly in the nineteenth century educational and apprenticeship requirements had still restricted the practice of law in many parts of the East.”

“As in medicine,” continues Wiebe,

depprofessionalization moved apace in the second quarter of the century, when democratized, decentralized admission to the bar demolished practically all standards. Training passed from the colleges to a convenient law office, and along with thousands of others, John Peter Altgeld, an indifferent student, passed the bar examination after reading for a few months in his spare time. A great many practiced law as a sideline. . . .

71. Id. at 309-10.
72. Id. at 310.
It was [an elite of legal experts], partly to honor themselves, partly to work for higher standards, who in the seventies began organizing city and state bar associations, capped in 1878 by the American Bar Association. What started gradually became a flood after 1890. The expanding need for carefully trained lawyers shifted education back to the classroom, where in the better schools the quality of instruction rose rapidly. ...74

If the shift in legal education brought law students into the classrooms of the rising university professional schools (increasingly adopting the case method of instruction), and if the shift in professional organization brought attorneys in increasing numbers within city and state bar associations, the shift in legal practice itself brought greater numbers of lawyers into the employment of large corporations and financial institutions. It was true, of course, that as early as the 1850's attorneys such as Richard Blatchford had brought business to their firms from corporations involved with railroad consolidation or other commercial transactions.75 But it was not until the Civil War that corporations, in conjunction with expanding transport and communications infrastructures and the growth of great cities, began to provide the major retainers for America's elite lawyers.

The concentration of industrial and financial power which accompanied the growth of corporate capitalism transformed the conventional practice of estate planning into a major business speciality and both patent and personal injury law became of sufficient importance to warrant their own practicing bars.76 The gradual expansion of government regulation of private corporate activity during the Progressive period77 created challenging work for attorneys who could safely guide their clients through the statutory obstacle course. "Within this purely professional frame of reference," writes Hurst, "the most basic change in the nature of lawyers' professional work was the shift in emphasis from advocacy to counseling. ...
The years after 1870 showed a more matter-of-fact attitude, a prevailing distaste for litigation as a costly luxury, and increasing effort to use law and lawyers preventively.\textsuperscript{78}

The implication of these changes for legal education was not that law students should be graduated as patent or railroad lawyers, or as experts in various kinds of “legal prevention.” What rising standards for the profession “as a whole” and legitimation of stratification within the profession on the basis of competence and credentialism meant was that the older lecture system of instruction in the schools as well as the apprentice system (or any system, for that matter) outside the schools could not be effective. The broad sweep of these changes is explained by Magali Larson:

\begin{quote}
[T]he passage from restricted monopolies of practice to the organization and control of expanded and competitive markets was a necessary one for the professional sectors of the middle class, seeking to improve their position in the emergent stratification systems of capitalist society. Their task presupposed the abandonment - deliberate or involuntary - of the restrictive corporate warrants of professional credibility. It tended toward the reconstruction of monopoly on the universalistic principles dictated by the new dominant ideology. The crowning of this monopolistic project appears to be a set of legally enforced monopolies of practice. However, the actual effectiveness of such sanctions depends on the parallel construction of a ‘monopoly of credibility’ with the larger public. The conquest of official privilege and public favor was, for the professions, a double external task of ideological persuasion, which had an internal precondition: the unification of the corresponding areas of the social division of labor under the direction of a leading group of professional reformers.\textsuperscript{79}
\end{quote}

And with special relevance to the emergence after 1870 of the case method law school, Larson concludes: “The crucial means for this unification, and therefore the concrete core of the professions’ organizational task, was systematic training - or, in my terms, the standardized and centralized production of professional producers.”\textsuperscript{80} The case method (which made possible for the first time the standardized in-

\begin{thebibliography}{9}
\bibitem{78} Hurst, \textit{supra} note 70, at 302.
\bibitem{79} Larson, \textit{supra} note 1, at 16-17.
\bibitem{80} Id. at 17.
\end{thebibliography}
struction of large numbers of students) in the hands of full-time professional law teachers secured a spectacular centralization of the professional training of attorneys. It is thus hardly surprising that Langdell, as we have seen, regarded the initiation of the law teaching profession at Harvard to be of singular importance. Indeed, even beyond the project of general standardization for the profession as a whole, a relative handful of prominent law professors spread through a number of prestigious university law schools could train the leading members of bench and bar for generations.81

At a time when enrollments were still limited to handfuls of students and university professional schools were struggling to stay alive, Charles Eliot already perceived the case method's potential as an instrument of standardization and controlled expansion. "It should be the aim of a University's Law School," he wrote in 1874-75, "to train young men of good preliminary education and average ability, taken by the hundred. . . ."82 The rigorous training of large numbers of law students, who would carry with them the network of professional relations developed in Cambridge, remained a trademark of the Harvard Law School long after Eliot and Langdell had turned the responsibility of educational leadership to their successors.

V. HARVARD ON THE OFFENSIVE

If, in retrospect, the case method law school appears to be the almost inevitable solution to the problem of "standardized and centralized production of professional producers"83 confronted by the American legal profession during its period of historic "modernization,"84 nothing was quite so simple or transparent to American lawyers and educators in 1870. On the contrary, Eliot and Langdell initially met considerable opposition to their reform program. Any notion of a kind of fatalistic determination by which the social and structural transform-

82. Warren, supra note 52, at 396-97 (quoting C. Eliot).
83. See note 80 supra and accompanying text.
84. See note 63 supra and accompanying text.
mation of the professions automatically precipitated a rationalization of the professional training programs would entirely exclude the actual factor of human agency, the intervention by relatively autonomous individuals within the movement of things. History may present a certain configuration of circumstances, but that totality must still be accurately comprehended by willful individuals capable of initiating change. When considering the role of human agency in social transformation, theorist Antonia Gramsci remarked:

Real will is disguised as an act of faith, a sure rationality of history, a primitive and empirical form of impassioned finalism which appear as a substitute for the predestination, providence etc., of the confessional religions. We must insist on the fact that even in such cases there exists in reality a strong active will. . . . We must stress the fact that fatalism has only been a cover by the weak for an active and real will. This is why it is always necessary to show the futility of mechanical determinism, which, explicable as a naive philosophy of the masses, becomes a cause of passivity, of imbecile self-sufficiency, when it is made into a reflective and coherent philosophy on the part of the intellectuals. . . .

Neither Eliot nor Langdell were willing to leave the orchestration of modern American legal education to providence, and their pedagogy was a reaction against the "imbecile self-sufficiency" of apologists for the educational status-quo.

Their self-consciousness regarding the relationship between a re-structuring of American legal education and the transformation of the legal profession itself is clearly revealed in their annual reports, particularly Langdell's reports on the condition of the law school for the years 1876-77 and 1880-81.

Beyond recapitulating the enrollment and financial figures for the year in relation to previous years, Langdell's main focus in his annual report for 1876-77 was the peculiar situation of law in relation to the other professional disciplines and how it had led Harvard into a serious conflict with the state (i.e., public authority, particularly state courts

86. See note 57 supra.
and legislatures) regarding the future of legal education. Langdell referred to the fact that while admission to the clerical, medical, and scientific professions was controlled by the professions themselves, admission to the legal profession was controlled by the state which gave neither "recognition [n]or countenance"\textsuperscript{87} to the Harvard Law School. The only "privilege"\textsuperscript{88} the school received, even in Massachusetts, was that of having time spent by a student in the school accepted as an equivalent to the same amount spent as an apprentice in a lawyer's office.

Although Langdell pointed to recent movements in New York and Massachusetts to raise standards of admission to the legal profession, he was worried by the fact that such movements were not under the control of the law schools nor designed to make university legal education essential to preparation for the bar. "[N]either this Law School nor any other," stated Langdell, "has participated at all in this movement, nor directly exercised any influence over it; nor was it in any degree the aim or object of the movement either to support and strengthen law schools, or to make use of them in furtherance of the objects in view."\textsuperscript{89}

The special situation of the legal profession was precipitated not only by its subordination to state control of admissions but the kind of control enforced which represented a special way of interpreting the relation of the American to the English legal profession. "The true cause" of the problem, asserted Langdell,

will be found primarily in the fact that the American lawyer represents two professions, which, in their nature, are distinct, which call into exercise different qualities of mind and character, and which require different kinds and degrees of education and training for their successful pursuit; namely, the professions of attorney and counsellor respectively. One reason why these two professions have always been pursued in this country by the same persons, undoubtedly is that they have generally been supposed to be one and the same profession. Sometimes, indeed, it is assumed that a lawyer is only an attorney, and at other times that he is

\textsuperscript{88} \textit{Id}.
\textsuperscript{89} \textit{Id}. at 87-88.
only a counsellor; but the fact is seldom intelligently recognized that he is both. Moreover, the State has commonly treated the legal profession, especially as regards every thing relating to the preparation for it and the admission into it, as if its members were attorneys merely; and this view has not been regarded with disfavor by the profession itself, for the idea is deeply rooted that every young man should begin as an attorney merely, and that age and experience alone are a sufficient warrant for assuming the position of a counsellor. Accordingly, our States, in dealing with the legal profession, have copied the English practice relating to attorneys.

The distinction which Langdell draws between attorneys and counsellors is, of course, identical to the English distinction between solicitors and barristers (Langdell uses the words “counsellor” and “barrister” interchangeably). What is extraordinary is Langdell’s assertion that the two are separate “in their natures,” and not merely in England. He does not deny that the two “professions” of attorney and counsellor have been pursued in the United States “by the same persons,” but he implies that this practice confuses two quite different legal roles.

The reason that Langdell offers for the two professions having been pursued in the United States by the same persons “is that they have generally been supposed to be one and the same profession.” But why, then, the general supposition in favor of a formally unified legal profession in America? Langdell does not pursue the historical contour beyond this initial tautology. He is more interested in exploring the implications of confusing the two professional identities.

The most serious consequence would appear to be adoption on the part of the State of the English practice relating to attorneys. In its initial form, this practice provides the basic justification for State control over admission to the profession. The State had no claim over the loyalty of barristers who were subordinate only to their colleges from which they were “called” to the law. Beyond this necessary first step, treating all American lawyers like members of the lower order in the English profession resulted in dramatically limited restrictions upon

90. Id. at 88.
91. Id. at 88-90.
92. Id. at 88.
ways of preparing for the American bar.

Langdell obviously admired the independence of the English barrister,

[who] is not an officer of the courts, and the latter have neither more nor less authority over him than they have over litigants who conduct their own causes without the assistance of counsel. Such being the status of English barristers, it is needless to say that there is nothing analogous to it in the condition of the legal profession in this country. On the other hand, if we inquire into the status of attorneys in England, we shall find ourselves on familiar ground. While barristers are supposed to constitute a learned and liberal profession of the highest grade, attorneys have always been regarded and treated more as artisans than as professional men; and their chief marks of distinction from the public at large, so far as regards their legal status, consist in their receiving their appointment from the State, in their being liable to have this appointment revoked at any moment, and in their being constantly subject to the surveillance of the courts. . . .

If there was a gradual development within the upper echelons of the American legal profession of a shift from predominantly advocacy practice to that of counsel and legal prevention, there never developed in the American legal profession (even at the corporate firm level) a functional split equivalent to that between solicitors and barristers in England. Indeed, in regard to practical lawyering functions, J. Willard Hurst argues:

In the nineteenth century the advocate emerged as the model of the leader of the bar in the United States, and successful firms typically included a ‘court’ lawyer and an ‘office’ lawyer. Such a partnership was itself a development that differed basically from the English pattern. Neither in fact nor in form was the advocate in this country confined, as was the English barrister, to appearing in court and giving ‘opinions.’

After 1870 leadership at the bar in the United States went to men who more resembled the solicitor. But, as in the early case of the advocate, these ‘solicitors’ were not confined to the role that English etiquette would have assigned them. In such men as Elihu Root or Louis D. Brandeis the bar of the United States developed a type of leader peculiarly its

93. *Id.* at 89.
own. Such men mingled the roles of barrister, solicitor, business adviser, and statesman. 94

In short, the English categories so poorly fit the American reality that the shift from advocacy to counsel functions might just as well be designated as a shift from “counsellor” (or barrister) to “solicitor,” so long as one spoke in terms of specific functions performed rather than in terms of relative access to official privilege. But it is precisely the latter which was of paramount concern to Dean Langdell. Indeed, his whole conception of the distinction “in their nature” between attorneys and counsellors revolved not upon differences in function but rather upon distinctions in social background, formal status, and recognized privilege.

It was “different qualities of mind and character” which required “different kinds and degrees of education and training” 95 which attracted Langdell to the English professional categories. Echoing Foucault’s comparison of doctors educated through clinical experience to health officers trained through apprenticeship, 96 it was the English distinction between a “learned and liberal profession of the highest grade” and a lower order “treated more as artisans than as professional men” 97 to which Langdell was drawn, like a moth to the luminous gaslamps of Victorian English stability. And it was England which revealed most strikingly the ultimate rewards of distinguishing between art and science, between apprenticeship and professional education:

Indeed, it is doubtful if ever, in any country, any profession has occupied a position so exalted as the higher branch of the legal profession in England. In consequence of a very highly centralized judicial system, and in consequence of the profession being divided by law into two branches (counsel and attorneys), all the members of the higher branch, at least with few exceptions, reside in the metropolis and form a large, compact, distinguished, and influential body of men, inheriting great traditions, endowed with great privileges, and clothed with great powers, - with the power, among others, of determining, without appeal, what new members shall be admitted into the body, and whether existing members

94. Hurst, supra note 70, at 310-11 (emphasis added).
95. See note 90 supra and accompanying text.
96. See note 11 supra and accompanying text.
97. See note 93 supra and accompanying text.
shall remain in it, and upon what terms. I say without appeal; for, though the judges have a visitatorial power over the body, yet the judges are all taken from the body and continue to be members of it. Every member of this body, on the one hand, feels the influence, shares the advantages, and enjoys the support and protection of the entire body, and, on the other hand, has all the members of the body to compete with; and upon those who succeed in struggling to the front the State showers its honors and rewards to an extent absolutely unprecedented. Under such a system, legal education will take care of itself in a great measure, at least so far as the interests of the public are concerned. In this country, on the other hand, the State has, upon the whole, done its best to reduce the legal profession to the level of an ordinary pursuit; it has neither done anything for it, nor permitted it as a body to do anything for itself.98

If the State would not formally distinguish and endow an upper echelon of American lawyers, then that professional project would be carried forward by “the body” itself or, at least, a leadership cadre from within it. At the level of professional training, this meant that law schools would have to take the initiative themselves (with whatever risk of declining enrollments) in raising standards and providing national and systematic (rather than local or arbitrary) professional education. At the level of professional organization, this meant that lawyers would have to be persuaded of the potential influence which arose from common association. “The profession does not constitute one organized body at all;” asserted Langdell, “and if it can be said to have any organized bodies within it, they are of the slightest and feeblest description, and do not embrace respectively more than a single city or county.”99

Langdell, of course, did not have long to wait for the nascent bar associations to begin to discover their strength and assert their demands for professional self-regulation.100 What he and Eliot had realized (somewhat ahead of everyone else) was the necessary relationship between modern professionalism and the educational process through which new members of the professions would be recruited and trained,

99. Id. at 81.
100. See, e.g., Hurst, supra note 70 and Auerbach, supra note 81.
then funnelled into various organized strata within the profession. "The only sure way of raising the professional standard," argued Langdell, "is by raising the standard of legal attainments, education, and character in the men by whom the profession is recruited, or at least in the better class of them."\(^{101}\) And it was the case method law school elaborated at Harvard during this period which proved the most effective device for "raising the standard of legal attainments" among those who would assume new roles in determining "what new members shall be admitted into the body."\(^{102}\)

The anachronistic and inefficient apprentice system could never provide the "standardized and centralized production of professional producers" required by modern professionalism. "In short," Langdell claimed, retaining his distinction between artisans and professionals:

> while a lawyer's office is the only place in which an expert attorney can be made, it cannot be too clearly understood that it is not a fit place in which to learn anything relating to the profession of a counsellor or advocate. . . . The art of the attorney, being in its nature local, should be acquired in the place where it is to be practised; while the science of the advocate, being confined within no narrower limits than the system of English and American law, may be best acquired, other things being equal, in the place where that system of law is studied and taught most exclusively as a science, i.e., exclusively of every thing local, temporary, or arbitrary. This consideration alone is sufficient to settle conclusively the destiny of this school; and accordingly, from the time of its first establishment on its present basis, the policy has been uniformly declared and acted upon of making it national, not local. To depart from this policy voluntarily would be madness; to be forced to depart from it would be ruin.\(^{103}\)

Just as Eliot's contribution to modern professional education consisted of a struggle on two fronts (against the expository lecture tradition in the schools and against the independent apprenticeship outside the schools),\(^{104}\) the survival of the Harvard Law School (by the 1870s required a struggle against both madness and ruin, against (respec-
tively) the local bar and the state. This involved a defense of the “study of law as a science” as much in terms of what it excluded (“everything local, temporary, and arbitrary”) as what it included (the systematic study of individual case reports).

Defending the case method from voluntary abandonment under pressure included convincing the local bar of its superiority to the apprentice system. Additionally, it meant preservation and enhancement (against parochial interests) of Harvard as a national law school preparing lawyers for practice in New York, the Middle West, and throughout the country, rather than only in Boston or other New England communities.

Defending the case method from forced abandonment at Harvard meant convincing the state (particularly New York) to admit Harvard Law School graduates to licensed practice on the same basis as graduates of state schools. If individual states gave preference in admission to the bar (through a variety of means including reduction of standards) to graduates of state schools, then students would attend law school where they planned to practice. This would not only defeat Harvard’s national aspirations and tend to reduce the capacity of the profession to develop national organizations, but it would specifically reduce the numbers of students planning to practice in New York City who would study for a law degree at Harvard. Eliot and Langdell go to great lengths in their annual reports to underscore their sense of propriety in requesting equal treatment from the states: it was not a question of anyone favoring Harvard but rather of the state merely permitting the legal profession (with Harvard playing a leadership role) to improve its own standards and practices. “The Law School,” Langdell indicated,

therefore, has all the reasons for continuing its present policy that it has for continuing to exist; and what is required, therefore, is that the State should realize its need of the service which the Law School is seeking to render it, and that it should recognize in the Law School (and in institutions of similar character and aims) an instrument (and the only one within its reach) by which this service can be secured without expense or charge to the public. All that the School asks of the State, in the way of action, is that it give to candidates for the legal profession the option of preparing themselves for its higher branch, and that it recognize an institution which furnishes the means and facilities for such preparation as
doing a national and not a local work.\textsuperscript{105}

Did Harvard Law School under Eliot and Langdell prepare students for the “higher branch” of the profession because, at Harvard, law was taught and studied as a science? Or did Langdell consider the case method “scientific” because it was the best means of training professionals, as opposed to mere “attorneys”? Did case method study in a national law school exclude “everything local, temporary, and arbitrary” because it was taught as a science, or was the reverse true?

Langell’s principal commitment was to the construction of a first-class professional law school which would contribute to the standardized and centralized production of upper echelon lawyers. He seemed willing to recruit the language of science, or of England’s professional traditions, and impose them upon the ensemble of immediate circumstances and options which Harvard confronted, always with his goals clearly in view. Indeed, without elaboration, Langdell asserted that the development of national law schools and the consolidation of power within national professional organizations constituted a service to the state (without mentioning the profession itself) for which the state should be grateful because the public was not being charged. Obviously, Langdell was single-minded in his faith in the professional project.

In his annual report for 1876-77, Langdell stated:

\begin{quote}
The difficulty of examining in a given subject is in proportion to the difficulty of teaching it; and there can be no doubt that English and American law is one of the most difficult subjects to teach. The opinion has, indeed, been prevalent that it is incapable of being taught as a science; and, though the correctness of this opinion will not be admitted by those who represent this School, it may be supported by plausible arguments. \textit{Law has not the demonstrative certainty of mathematics}; nor does one’s knowledge of it admit of many simple and easy tests, as in case of a dead or foreign language; \textit{nor does it acknowledge truth as its ultimate test and standard, like natural science}; nor is our law embodied in a written text, which is to be studied and expounded, as is the case with the Roman law and with some foreign systems. Finally, our law has not any long-established and generally recognized traditions which will
\end{quote}

\textsuperscript{105}. Langdell, \textit{supra} note 87, at 92.
indicate to the examiner what his examination ought to be, and to the student what it will be; . . . 108

Situated within Grant Gilmore’s theoretical outline of the development of American law, Christopher Langdell would appear to be (on the basis of the statement above) an anti-Langdellian, crypto-Legal Realist. The one idea to which Gilmore leads us to believe Langdell will cling tenaciously, the Harvard Dean hurls to the winds. How can such things be?

In fact, Langdell was once again confronted with a challenge to the professional project being developed at the Harvard Law School. The progressive development of state requirements regarding legal education (“making a reasonably long period of pupilage a sine qua non of admission to the profession”)107 appeared threatened by the idea that a sufficiently objective and scientific bar admissions examination could be administered that would provide entry to the profession for those who were qualified and would reject those who were not, rendering unnecessary any reference to whether or not the candidate had studied in a law school.

Here, for the first time, the “law as science” philosophy (which Langdell had deployed so effectively in distinguishing apprenticeship from professional education) suddenly (borrowing Gilmore’s phrase) “turned into its opposite”108 and cut directly against the elaboration of university-based, three-year professional schools as the heart of the professional project’s initiation program. And, in a stroke, Langdell effectively abandons the philosophy. To be sure, the weight of his “other” position rests heavily enough upon his words that he goes to the trouble of finessing the discontinuity (“though the correctness of this opinion will not be admitted by those who represent this School,” etc.).109 Nevertheless, there can be no mistaking Langdell’s intention: he seeks to downplay the presumed identity between law and science sufficiently that no argument can be advanced in behalf of passing “scientific” examinations as the exclusive prerequisite to admission to the legal profession.

106. Id. at 96-97 (emphasis added).
107. Id. at 95.
108. See GILMORE, note 55 supra and accompanying text.
109. See note 106 supra and accompanying text.
In conclusion, at times Langdell makes scientific knowledge analogous to *systematic* (as in the German sense of *Wissenschaft*, knowledge which can be studied systematically)\(^\text{110}\) and legitimately describes the case method as scientific study because the case method law school (in relation to the old lecture academies and the apprentice system) constituted systematic and standardized professional training. At other times, he leaves room for a different relation between law and science to be read into his words, one where the analogy to the rigour of the physical sciences seems implied. But as soon as it appears such a reading may jeopardize the developing professional project at the Harvard Law School, the “law as science” position is dramatically undercut.

This conclusion is reflected in relation to the broader structure of nineteenth century American legal development by Professor Morton Horwitz:

Perry Miller has shown the dominance of the equation of law with science in all antebellum legal theorizing. Except for the identification of ‘science’ with systematization and classification, however, there is no coherent content or methodology to be found in these persistent claims to the scientific character of law. What does seem extremely clear, nevertheless, is that the attempt to place law under the banner of ‘science’ was designed to separate politics from law, subjectivity from objectivity, and laymen’s reasoning from professional reasoning.\(^\text{111}\)

Thus, Eliot and Langdell’s “subjective” vision of how the American legal profession should be organized (and what methods should be employed to secure professionalization in the schools) could be made to appear “objective” and (at least in theory) appeal to the modern mind, by characterizing the case method law school as a scientific enterprise. But a somewhat different (and equally subjective) vision of the legal profession, promoted by state courts or legislatures, could just as readily be made to appear “objective” and above politics through utilization of “scientific” bar examinations to determine admission to the profession. In that instance, Langdell was as adroit as Professor Gilmore in debunking an easy identification of law with the physical sciences. “A

better symbol could hardly be found;" suggests Gilmore, "if Langdell had not existed, we would have had to invent him."Langdell did exist, of course. But that did not prevent Professor Gilmore from inventing him anyway.

VI. LEGAL EDUCATION REGARDED AS A SOCIAL RELATION

It is reasonable to argue that Charles Eliot and Christopher Langdell were at times willing to associate law with science as a kind of rhetorical device, clever salesmanship on the part of premier educational entrepreneurs. Obviously, they were also capable of regarding

112. GILMORE, supra note 55, at 42.
113. Besides its genuine contributions to intellectual argument, Darwinism was also used as a popular rhetorical device. Though it might explain nothing, intellectuals found that an illusion to the theory of evolution was an interesting way to say something quite ordinary, or to provide a scientific explanation for change. In his fascinating essay Individualism and Collectivism, for example, Charles W. Eliot of Harvard used the concept of a biological sport—departure from predictable heredity—to explain how an intelligent student might have poorly educated, lower-class parents.

J. GILBERT, DESIGNING THE INDUSTRIAL STATE: THE INTELLECTUAL PURSUIT OF COLLECTIVISM IN AMERICA 1880-1940 at 45 (1972).

The chapter of Dicey's Law and Public Opinion described by Langdell as most clearly belonging in a "law book" includes a warning against overstating the law's relation to science similar to Langdell's own disclaimer quoted in the text accompanying note 106 supra.

If one may be allowed to apply the terms of logic to law, one is tempted to assert that judicial legislation proceeds by a process of induction, whilst parliamentary legislation proceeds, or may proceed, by a process of deduction. This contrast contains an element of truth... but the suggested contrast, unless its limits be very carefully kept in mind, is apt to be delusive. The Courts no doubt do not begin by laying down a general principle, but then a great deal of their best work consists in drawing out the conclusions deducible from well-established principles, and has therefore a deductive character... ordinary judicial legislation is logical, the best judicial legislation is scientific.


If much of legal realism contends that courts do, indeed, often argue from predetermined principles or bias, Dicey has broken sufficiently in his analysis with any "delusive" belief in the inductive science of law that Gilmore's Langdell should reasonably be expected to respond with angry disagreement. Instead, Langdell praises Dicey's social-historical orientation and concludes: "Any American who wishes to know the England of the nineteenth century as if he were a native will find in Professor Dicey,
legal education at Harvard as a science precisely because it was systemic professional preparation of counsellors who would join a "compact, distinguished, and influential body of men" - just the opposite of merely artisan training turning out legal handicrafters like wooden tops.

But that is not what is important. In the end, it does not make much difference exactly how or why Eliot and Langdell regarded law as science. Indeed, for our purposes, it is not even necessary to decide whether the equation law equals science is true. Our analysis must be carried out on a different level. Recall Professor Gilmore's focus upon an ideological demystification of Langdellian scientism. Yet why was Langdell so successful? Gilmore hardly seems interested. He asserts that "Langdell's idea evidently corresponded to the felt necessities of the time," and adds that

[s]ooner or later a Blackstone or a Langdell appears. . . . If a Blackstone or a Langdell comes at the right time, he will be heard and his words will, for a generation, be devoutly believed: his message is a comforting one and ought to be true even if it is not. Since Langdell was heard and was believed, he evidently came at the right time.

From the point of view of serious social thought, nothing is "evidently" or obviously correct and virtually nothing can be relied upon to happen "sooner or later." No explanation of social reality makes any sense absent reference to the concrete structure of social relations. "In other words," asserts Pashukanis,

we must determine whether or not legal categories are such objective forms of thought (objective for an historically specific society) which correspond to objective social relationships. Consequently, our question is: is it possible to understand law as a social relationship in the same sense

who is a worthy successor of Blackstone, an incomparable instructor." Langdell, supra note 59, at 167. See also E.J. HOBSBAWM, THE AGE OF CAPITAL 1848-1875, at 251-76 (1976).

114. See Langdell, note 98 supra and accompanying text.

115. For brief but convincing arguments that it isn't, see W. SEAGLE, THE QUEST FOR LAW 13-15 (1941) and R. POUND, 2 JURISPRUDENCE § 64 (1959).

116. GILMORE, supra note 55, at 42.

117. Id. at 64.
in which Marx termed capital a social relationship? Such a statement of the question pre-empts reference to the ideological nature of law, and all our consideration is transferred to an entirely different level.\footnote{118}

Therefore, it is necessary to conceive the theorization of “law as science” as an objective form of thought with reference to objective social relations. And it is the correspondence between the social relations of the American legal profession and categories of discourse about professionalism and legal education which must be explained.

Personal Jurisdiction in Florida: Some Problems and Proposals

by Marc Rohr*

As any well-taught law student knows, two things must generally be true in order for an American court to render a binding in personam judgment against a party who does not reside within the borders of the state in which the court is located: (1) the party's conduct must fall within the terms of a statute of that state, universally known as a "long arm statute," conferring power upon that state's courts to hear cases of the kind described therein, and (2) the assertion of personal jurisdiction under the long arm statute must satisfy the "minimum contacts" test articulated by the United States Supreme Court in the case of International Shoe Co. v. Washington. Florida attorneys are presently blessed with a patchwork quilt of long arm statutes, some of which contain obviously duplicative provisions and each of which is tied, not always with clarity or reason, to one or another method of service of process on nonresidents. This collective result of sporadic legislative activity is, at best, aesthetically displeasing, and, at worst, confusing and productive of some judicial decisions that seem wholly without a basis in reason. My primary purposes in writing this article are (1) to explore the interrelationship of Florida's long arm statutes and to recommend amendments which would make them simpler and more sensible, (2) to consider some of the decisions interpreting those statutes, in the light of the recent opinion of the United States Supreme Court in World-Wide Volkswagen Corp. v. Woodson, and (3) to evaluate the continuing vitality of quasi in rem jurisdiction in Florida in the aftermath of the

* Associate Professor of Law, Nova University Center for the Study of Law; B.A. 1968, Columbia; J.D. 1971, Harvard University.
1. Greenspun v. Del E. Webb Corp., 634 F.2d 1204 (9th Cir. 1980).
2. 326 U.S. 310 (1945).
United States Supreme Court opinion in *Shaffer v. Heitner.*

I. THE STATUTORY SCHEME

Florida's "general" (i.e., most comprehensive) long arm statute, § 48.193, was enacted in 1973. Most significantly, it asserts the jurisdic-

6. 48.193 Acts subjecting persons to jurisdiction of courts of state
   (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
      (a) Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state.
      (b) Commits a tortious act within this state.
      (c) Owns, uses, or possesses any real property within this state.
      (d) Contracts to insure any person, property, or risk located within this state at the time of contracting.
      (e) With respect to proceedings for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
      (f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:
         1. The defendant was engaged in solicitation or service activities within this state which resulted in such injury; or
         2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use or consumption resulted in the injury.
      (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.
      (2) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in § 48.194. The service shall have the same effect as
tion of the Florida courts over any "person" who commits a tortious act within Florida,\(^7\) causes injury in Florida resulting from an act or omission outside the state (provided that certain other facts are true),\(^8\) breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida,\(^9\) or engages in a "business or business venture in this state or has an office or agency in this state."\(^{10}\) In any of such cases, the statute provides for jurisdiction only with respect to a cause of action "arising from" one of the enumerated activities.\(^{11}\) The statute is typical and essentially unobjectionable. But when the Florida legislature enacted § 48.193, it did not repeal any of five pre-existing statutes which are arguably unnecessary in light of § 48.193.

Section 48.171\(^{12}\) provides for personal jurisdiction over a nonresident motor vehicle owner or operator with respect to civil actions arising out of any accident or collision occurring within the State of Florida in which the motor vehicle is involved. Section 48.19\(^{13}\) makes similar provision with respect to operators of aircraft or watercraft in

\[\text{FLA. STAT. § 48.193 (1979).}\]
\[\text{FLA. STAT. § 48.171 (1979).}\]
\[\text{FLA. STAT. § 48.19 (1979).}\]


(3) Only causes of action arising from acts or omissions enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section, unless the defendant in his pleadings demands affirmative relief on other causes of action, in which event the plaintiff may assert any cause of action against the defendant, regardless of its basis, by amended pleadings pursuant to the rules of civil procedure.

(4) Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereinafter provided by law.
the state. These statutes obviously make primary reference to conduct which is encompassed by § 48.193 (1)(b), which confers jurisdiction over one who "commits a tortious act within the state." A few Florida cases have held § 48.171 applicable to contract disputes arising out of automobile accidents in the state,14 but such cases should easily fall within the coverage of § 48.193(1)(g). Both § 48.171 and § 48.19 expressly include cases of vicarious liability by nonresidents, but so does § 48.193(1), although admittedly not in the same words; it is therefore possible that the statutes do not completely overlap.15 Another situation to which § 48.171, but not § 48.193, might apply, although apparently there is no reported decision of this kind in Florida, is an action against a nonresident motorist based upon his allegedly negligent omission, outside of Florida, to repair his vehicle prior to driving it into this state; such conduct might well fail to satisfy the terms of either § 48.193(1)(b) or (f). Still, the typical cases under § 48.171 and § 48.19 are now covered by § 48.193.

Another pre-1973 long arm statute which has survived is § 48.181.16 This was by far the most useful and most frequently utilized


15. Section 48.171 confers jurisdiction over one who permits a motor vehicle owned by him to be driven in the State of Florida. Young v. Young, 382 So. 2d 355 (Fla. 5th Dist. Ct. App. 1980). Section 48.193(1) confers jurisdiction over one who "personally or through an agent" does any of the acts enumerated in the statute. The mere fact that the owner of a vehicle has given the driver his permission may not suffice to render the driver the "agent" of the owner, within the meaning of § 48.193(1), although it has generally been held that the owner of an automobile is liable for the negligence of one driving with his consent. E.g., Skroh v. Newby, 237 So. 2d 548 (Fla. 1st Dist. Ct. App. 1970); Slitkin v. Avis Rent-a-Car Sys., Inc., 382 So. 2d 883 (Fla. 3d Dist. Ct. App. 1980); Langstron v. Personal Serv. Ins. Co., 377 So. 2d 993 (Fla. 2d Dist. Ct. App. 1979).

16. § 48.181 Service on nonresident engaging in business in state

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to
statute prior to the enactment of § 48.193, and it continues to be utilized today. It provides for personal jurisdiction over any nonresident legal entity who accepts "the privilege extended by law . . . to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state" with respect to any civil action "arising out of any transaction or operation connected with or incidental to the business or business venture."\textsuperscript{17} Aside from the grammatical reconstruction of the sentence, the language in § 48.193(1)(a) is identical, and indeed Florida courts have held that the language of § 48.193(1)(a) means exactly the same thing as the language of § 48.181(1).\textsuperscript{18} Again, however, there is at least one potential difference between the statutes. Section 48.181(3), added in 1957, provides that any person who sells or leases property through "brokers, jobbers, wholesalers or distributors" to anyone in Florida "shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state." To my knowledge, no reported decision has yet considered the question of whether the principle ex-

\begin{quote}
operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

(2) If a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer.

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers or distributors to any person, firm or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.


pressed in § 48.181(3) is also applicable, by implication, under § 48.193(1)(a); possibly it is not, and possibly that could lead to different results under the two statutes, but certainly it would be simple enough to add the language of § 48.181(3) to § 48.193(1)(a).

The most important distinction, however, between § 48.193, on the one hand, and § 48.181, § 48.171, and § 48.19, on the other, concerns the methods of service of process authorized by these statutes. Section 48.193(2) states that service upon anyone who is subject to the jurisdiction of the Florida courts under § 48.193 “may be made by personally serving the process upon the defendant outside this state, as provided in § 48.194.” Regrettably, the Florida courts have, with virtual unanimity, interpreted this section to mean that nonresidents sued in Florida under § 48.193 must be personally served outside the state in the manner described in § 48.194. This conclusion has led to absurd results, as, for example, where service of process upon a Panamanian corporate defendant was held invalid, in a suit in which jurisdiction was based upon § 48.193(1)(g), because service was made upon the corporation’s president at his home in Dade County.

According to the three older statutes, in contrast, the defendant’s relevant activity in the state constitutes an appointment of the Florida Secretary of State as his agent for service of process. One must then look to § 48.161, which prescribes the method of service upon the Secretary of State and requires that a copy of the process be mailed or delivered to the nonresident defendant as well. From the face of the statutes it would appear that § 48.161 represents the exclusive method for service in cases in which personal jurisdiction is predicated on § 48.171 or § 48.19. Section 48.181(2) provides a preferred alternative method in “business or business venture” cases: if a foreign corporation

engaging in such activity in Florida has a "resident agent or officer" in the state, process "shall" be served on him or her. The Florida courts appear to have held that a foreign corporation amenable to suit in Florida under § 48.181 may be served, if feasible, according to § 48.081(1) and (2), which list the corporate officers and agents upon whom process may be served. 22

What all this means is that, even within the substantially overlapping coverage of § 48.193, on the one hand, and §§ 48.171, 48.181, and 48.19, on the other, the statutes are not duplicative because they are tied to different methods of service of process. I submit that this is a senseless state of affairs, and the product of historical accident rather than design. There is no good reason why methods of service of process available in one category of cases should differ from those available in another category. The sensible thing to do would be to list all of the methods of service upon nonresidents deemed constitutionally acceptable, and provide that any of them may be utilized in conjunction with any long arm statute. Among the methods so listed should be personal service inside or outside the State of Florida, and service by registered or certified mail addressed to persons outside the state. 23 Substituted service upon the secretary of state is a vestige of long-discredited doctrine that should be scrapped. It arose as a feature of the early "im-

22. FLA. STAT. § 48.081(1) & (2) (1979). See also FLA. STAT. § 48.081(3), providing the further alternative of service upon the registered agent required by section 48.091 in the case of Florida corporations and foreign corporations qualifying to do business in Florida.

23. At least a few courts have held that personal jurisdiction over a nonresident corporation is not effectuated merely by satisfaction of § 48.081(1); they have stated that § 48.181 must be satisfied as well. Caribe & Panama, Invs. S.A. v. Christensen, 375 So. 2d 601 (Fla. 3d Dist. Ct. App. 1979); Goffer v. Weston, 217 So. 2d 896 (Fla. 3d Dist. Ct. App. 1979); see also Heritage Corp. of S. Fla. v. Apartment Invs., Inc., 285 So. 2d 629 (Fla. 3d Dist. Ct. App. 1973). The strong implication is that the methods of service provided by § 48.081(1) and (2) may be utilized in cases in which jurisdiction is conferred by § 48.181.

24. Gadd v. Pearson, 351 F. Supp. 895 (M.D. Fla. 1972), offers another example of an undesirable result compelled by the present statutory scheme. The federal district court, obliged to follow Florida law under Federal Rule of Civil Procedure 4(e), quashed service on a Florida resident who received substituted service in North Carolina under §§ 48.161 and 48.181. The court stated that those statutes did not apply because the defendant was neither a nonresident nor concealing himself.
plied consent” statutes designed to circumvent the proscription declared in *Pennoyer v. Neff* against service of process beyond the boundaries of the state. The United States Supreme Court stated over thirty years ago that what matters, as a matter of constitutional due process, is that the notice given to a defendant be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ....” Obviously the meaningful part of § 48.161 is the provision for the mailing of process to the defendant, and not the delivery of papers to a public official; even when the defendant’s whereabouts are unknown, constructive service by publication is more likely to give him notice than substituted service upon the secretary of state.

Once having eliminated the needless differences in the long arm statutes with respect to service of process, the Florida legislature should decide whether any substantive considerations justify the retention of §§ 48.171, 48.181, or 48.19. Two other long arm statutes should be reconsidered as well. One is § 48.071, providing for jurisdiction over a nonresident individual or partnership which “engages in business” in Florida, with respect to civil actions “arising out of such business.” The statute provides for service on “the person who is in charge” of such business, with a copy to be sent by registered or certified mail to the nonresident defendant. If the methods of service of process are harmonized, the overlap with § 48.193(1)(a) appears to be total. If the number of reported decisions are any indication, moreover, this statute has received remarkably little use.

The other statute whose utility should be reconsidered is § 48.081(5), which confers jurisdiction over a corporation which “has a

26. 95 U.S. 714 (1877).
29. 48.081 Service on corporations

(5) Where a corporation has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent, resident in the state, may personally be made, pursuant to this section, and it is not necessary in such case, that the action, suit or proceeding against the corporation shall have arisen out of any transaction or operation con-
business office within the state and is actually engaged in the transac-
tion of business therefrom”; service may be made upon “any officer or
business agent, resident in the state.” Paragraph 48.193(1)(a) is poten-
tially more far-reaching than this statute in that it refers to a party
who “has an office or agency in this state.” But there is one crucial
difference between § 48.193 and § 48.081(5) that gives the latter stat-
ute greater scope: § 48.193(1), again, extends jurisdiction only to
causes of action arising from the Florida activities listed in the statute;
§ 48.081(5), uniquely among the Florida long arm statutes, states that
a civil action against a corporation covered by that section need not
have arisen out of the corporation’s business transacted within the
State of Florida.

Is such a legislative pronouncement constitutional? The Florida
courts seem to have acted somewhat schizophrenically with respect to
that question. When long arm statutes have required that the cause of
action have arisen from the defendant’s relevant Florida activities, the
courts have naturally insisted upon compliance with such statutes,30 but
often they have gone on to suggest that such a statutory requirement
was constitutionally compelled.31 When long arm statutes have not re-
quired such a connection, however, no Florida court has yet suggested
that a serious constitutional problem was presented. Thus, the few re-
ported Florida decisions applying § 48.081(5) have done so without dif-
culty (and without any discussion of due process or “minimum con-
tacts”), despite the fact that the cause of action was clearly

1978); Youngblood v. Citrus Assoc. of the N.Y. Cotton Exch., Inc., 276 So. 2d 505

31. “In addition, in order to meet constitutional standards, the exercise of per-
sonal jurisdiction over a nonresident must be limited to causes of action arising out of
and directly related to the acts of the nonresident by which he ‘purposefully avail[s]
. . . [himself] of the privilege of conducting activities within the state.’” Corley v.
Miliken, 389 So. 2d 976, 977 (Fla. 1980) (applying § 48.19). Similar statements were
made in Illinois Cent. R.R. Co. v. Simari, 191 So. 2d 427 (Fla. 1966); Giannini Cont.
Corp. v. Eubanks, 190 So. 2d 171 (Fla. 1966); Manus v. Manus, 193 So. 2d 236 (Fla.
4th Dist. Ct. App. 1966); but see H. Bell & Assocs. Inc. v. Keasbey & Mattison Co.,
140 So. 2d 125 (Fla. 3d Dist. Ct. App. 1962); Hoffman v. Air India, 393 F.2d 507 (5th
Cir. 1968); Woodham v. Northwestern Steel & Wire Co., 390 F.2d 27 (5th Cir. 1968).

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unconnected to the defendant's Florida contacts.\textsuperscript{32} 

The Supreme Court of Florida confronted the issue in a related context in \textit{Confederation of Canada Life Insurance Co. v. Vega y Arminim}\textsuperscript{33} back in 1962. The plaintiff sued a Canadian insurer for the cash surrender value of an insurance policy purchased by the plaintiff in Cuba in 1928; the transaction had nothing to do with Florida. The defendant had qualified to do business in Florida, and thus personal jurisdiction was upheld under § 624.0221, providing that an insurer who applies for authority to transact business in Florida "shall file . . . its appointment of the [insurance] commissioner . . . as its attorney to receive service of all legal process issued against it in any civil action . . . ." In response to the insurer's argument that due process was violated by applying the statute to a case in which the cause of action was unconnected to the defendant's Florida activities, the court made a firm distinction between corporations which had qualified to do business in Florida and those which had not:

The statute and cases pertaining to service of process upon an actual representative or an impliedly appointed agent of a foreign corporation \textit{not authorized} to do business within the state wherein the suit is brought are not applicable to the instant issue. The issue before us is restricted to those cases wherein the foreign corporation, as a condition precedent to its operations within the state, has expressly designated a public official as its agent for the purpose of receiving service of process.

\textit{[T]he decided weight of authority is to the effect such a foreign corporation qualifying to do business in the state becomes amenable to process even as to causes of action not arising out of its transactions therein and thereby suffers no denial of due process of law.}\textsuperscript{34}

At least one lower Florida appellate court has reached the same conclusion with respect to the statutory provision allowing service to be

\begin{thebibliography}{9}

\bibitem{144} 144 So. 2d 805 (Fla. 1962).

\bibitem{1442} 144 So. 2d at 808 (emphasis in original). \textit{Accord}, Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th Dist. Ct. App. 1972) (applying §§ 624.422-23); Crown Life Ins. Co. v. Luzanaga Y Garay, 141 So. 2d 633 (Fla. 3d Dist. Ct. App. 1962).
\end{thebibliography}
made upon the registered agent of a foreign corporation qualified to transact business in Florida.\textsuperscript{38} The Florida Corporation Code\textsuperscript{38} requires foreign corporations doing non-exempted intrastate business in Florida to "qualify" as such, in order to be able to do so without penalty;\textsuperscript{37} one requirement for qualification is the appointment of a registered agent for service of process.\textsuperscript{38} Sub-section 48.081(3) provides that process may indeed be served upon such an agent. Need the plaintiff's cause of action in such a case have arisen out of the foreign corporation's activities in Florida in order to satisfy the demands of due process? A Florida district court of appeal answered this question in the negative. The court stated that the question of minimum contacts had not been raised in the action, but added:

\begin{quote}
We believe, however, that such minimum contacts would seem patently established where, as here, the foreign corporation has actually qualified under Florida law to transact business in this state and has appointed a resident agent for service of process as required by . . . 48.091, F.S.A.\textsuperscript{39}
\end{quote}

The Florida courts appear to have taken too simplistic a view, in different ways at different times, of the "requirement" that the cause of action have arisen from the defendant's contacts with the forum state. The only requirement - but a constant one - is "minimum contacts." A connection between the plaintiff's cause of action and the defendant's activities in the state is, in effect, one more contact between the defendant and the forum state; it is fairer and more reasonable, in such circumstances, to require the defendant to defend in the courts of the forum state. In the absence of such a connection, "minimum contacts" may still exist, but only if the defendant's contacts with the state are greater, in quantity and/or quality, than would be necessary if the connection existed. The United States Supreme Court appears to have endorsed this point of view, although admittedly in dictum, in the Inter-

\begin{footnotesize}


39. 240 So. 2d at 882.}
\end{footnotesize}
national Shoe case, in which Chief Justice Stone wrote:

“Presence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

There have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.40

Perkins v. Benguet Consolidated Mining Co.,41 on which the Florida Supreme Court relied in the Confederation case, is not to the contrary. There the United States Supreme Court upheld the refusal of the Ohio courts to assert jurisdiction over a Philippine corporation with respect to a cause of action that had arisen outside of Ohio. The Supreme Court stated that Ohio could constitutionally have asserted jurisdiction in such a case, but it must be noted that the Court characterized the activities of the defendant in Ohio as “continuous and systematic.”42

To say, then, that a connection between plaintiff’s cause of action and defendant’s activities in the forum state is, with respect to a given category of cases, either always required or never required, is too simplistic. Moreover, as at least one federal court has recognized,43 it is

41. 342 U.S. 437 (1952).
42. Id. at 448.

We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context. Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another . . . . The principles of due process require a firmer foundation than mere compliance with state domestication statutes.

A sentence from the Supreme Court opinion in Perkins v. Benguet Mining Co. is also worth quoting: “The corporate activities of a foreign corporation which, under
unrealistic to view a case any differently simply because state law compels the written appointment of a state official as one's agent for service of process in order to transact business in that state. To my knowledge, the Florida appellate courts have given no evidence of a proper understanding of this aspect of the "minimum contacts" analysis, with the consequence that the few cases decided under § 48.081(5) have reached very questionable results. Properly applied, however, that section reaches further than § 48.193(1)(a), and thus serves a useful purpose.

II. THE CASE LAW

A. Products Liability Cases Under § 48.193

The United States Supreme Court stated, in *International Shoe*, that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The somewhat amorphous concept of "minimum contacts" remains the test for personal jurisdiction over nonresident defendants, its case-by-case application properly and ultimately guided by considerations of basic fairness. The United States Supreme Court has had several occasions to apply this test in the years since *International Shoe*, and it has done so with uncharacteristic consistency; the one theme that pervades all of its opinions in this area, state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." 342 U.S. at 445.


45. 326 U.S. at 316.

culminating in the \textit{World-Wide Volkswagen}\textsuperscript{47} decision of 1980, is the concept of "purposeful activity." Chief Justice Warren expressed it this way in \textit{Hanson v. Denckla}:
\textsuperscript{48}

The application of the [minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.\textsuperscript{49}

Florida courts have clearly shown that they understand this requirement. Thus, for example, in \textit{Jack Pickard Dodge, Inc. v. Yarbrough},\textsuperscript{50} it was held that a Florida court lacked jurisdiction over a North Carolina automobile dealer whose alleged negligence in repairing a car in North Carolina gave rise to an accident in Florida; the language of § 48.193(1)(f)(2) seemed to apply, the court found, but the North Carolina third-party defendant had engaged in no purposeful activity vis-a-vis the State of Florida. Similarly, according to \textit{Osborn v. And ultimately into Illinois waters. Although the suggestion of "purposeful activity" in Illinois seems a bit strained in this context, the Court of Appeals for the Seventh Circuit concluded simply that it was not "unfair or unreasonable" to extend jurisdiction over the City of Milwaukee in Illinois. 599 F.2d 151, 156 (7th Cir. 1979). The Supreme Court agreed, with Justice Rehnquist, for the majority, addressing the issue in a footnote: "We agree that, given the existence of a federal common law claim at the commencement of the suit, . . . personal jurisdiction was properly exercised . . . ." 49 U.S. Law Week at 4447 n.5. See also Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971).

\textsuperscript{47} U.S. Law Week at 4447 n.5. See also Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971).

\textsuperscript{48} 357 U.S. 235 (1958).

\textsuperscript{49} Id. at 253.

University Society, Inc., Florida had no jurisdiction over a New York defendant in an action seeking payment for services rendered by the Florida plaintiff in New York, despite the literal application of § 48.193(1)(g), where there was no indication that the nonresident defendant had engaged in purposeful activity in Florida.

One of the most interesting contexts in which the "purposeful activity" requirement has been applied is the products liability case. When is it fair for a court to assert jurisdiction over a nonresident manufacturer or seller who has directly or indirectly sent one or more of its products into the forum state? Consider two archetypal and leading cases of the 1960s that considered this question. The famous Illinois case of Gray v. American Radiator & Standard Sanitary Corp. concerned an action by an Illinois resident arising out of the explosion of a water heater in Illinois; she sued the Pennsylvania corporation which had manufactured the water heater and the Ohio corporation (Titan) which had manufactured a safety valve, incorporated into the water heater, which was allegedly defective. Although the opinion of the Supreme Court of Illinois reveals no clear evidence of Titan's intent to send its products into Illinois or knowledge that its products would find their way into Illinois, the court made the following statements in upholding personal jurisdiction over Titan in Illinois:

Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State. . . .

51. 378 So. 2d 873 (Fla. 2d Dist. Ct. App. 1979).
52. A few Florida courts have held that § 48.193(1)(g) applies simply by virtue of the fact that payment by the defendant is due in Florida, and that this is true when the plaintiff resides in Florida even though the contract is silent on the point. Professional Patient Transp. Inc. v. Fink, 365 So. 2d 209 (Fla. 3d Dist. Ct. App. 1978); Madox Int'l Corp. v. Delcher Intercontinental Moving Servs., Inc., 342 So. 2d 1082 (Fla. 2d Dist. Ct. App. 1977); First Nat'l Bank of Kissimmee v. Dunham, 342 So. 2d 1021 (Fla. 4th Dist. Ct. App. 1977). Those holdings are properly modified by the concern for minimum contacts reflected in Osborn and Lakewood Pipe of Tex., Inc. v. Rubaii, 379 So. 2d 475 (Fla. 2d Dist. Ct. App. 1979); but see Guritz v. American Motivate, Inc., 386 So. 2d 60 (Fla. 2d Dist. Ct. App. 1980).
As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.\(^4\)

Compare Gray with the opinion of the Supreme Court of California in *Buckeye Boiler Co. v. Superior Court of Los Angeles County*.\(^5\) In *Buckeye* a California resident sued the Ohio manufacturer (Buckeye) of a pressure tank which exploded in California. Buckeye's contacts with the State of California were not extensive, and no one seemed able to explain how the particular pressure tank which had injured the plaintiff had come to rest in California. Nevertheless, the Supreme Court of California held that Buckeye was amenable to suit in California, and made the following key pronouncements while doing so:

> If the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state.

\(^{56}\) Buckeye did not allege before the trial court that the tank which allegedly injured plaintiff arrived in California in a manner so fortuitous and unforeseeable as to demonstrate that its placement there was not purposeful.\(^6\)

The difference in the theories suggested by the language of the Illinois and California courts is evident. *Gray*, although 'somewhat unclearly', suggests that the purposeful activity requirement can be satisfied by the intentional sale of one's products for ultimate use in other states, with at least a subjective "contemplation" of such use in the forum state. *Buckeye* goes further, suggesting rather clearly that the mere objective foreseeability of the product's entry into the forum state will suffice.

In *World-Wide Volkswagen* the Supreme Court of Oklahoma\(^7\) took a position reminiscent of the *Buckeye* approach to the minimum contacts test, but without explicitly saying so. The plaintiffs in the case, who had been injured in an automobile accident in Oklahoma, sued the

\(^{54}\) *id.* at __, 176 N.E.2d at 766 (emphasis supplied).

\(^{55}\) 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

\(^{56}\) *Id.* at __, __, 458 P.2d at 64, 67 (emphasis supplied).

\(^{57}\) 585 P.2d 351 (Okla. 1978).
manufacturer of their automobile as well as the regional distributor and dealer who had sold them the automobile in New York, alleging defective design and placement of the gas tank and fuel system. The regional distributor and the New York dealer contested the assertion of personal jurisdiction over them in Oklahoma, but without initial success. Oddly, the opinion of the Supreme Court of Oklahoma is devoted entirely to the question of whether the Oklahoma long arm statute applied to these facts; at no point did that court expressly address itself to the question of minimum contacts. Nonetheless, the court did make the following statement en route to its conclusion that the defendants could be sued in Oklahoma: “In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma.”

The United States Supreme Court reversed. In the process of doing so, it seems to have eliminated the possibility of equating the mere objective “foreseeability” of a product’s entry into a state with the requisite “purposeful activity” on the part of the nonresident. Justice White, writing for a six-man majority of the Court, observed that the defendants carried on “no activity whatsoever in Oklahoma.” Conceding that it was foreseeable that the purchasers of automobiles sold by the defendants might take them to Oklahoma, he stated: “Yet ‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” If it were, he continued, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.” Justice White added:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

58. Id. at 354.
59. ___ U.S. ___, 100 S. Ct. 559 (1980).
60. Id. at ___, 100 S. Ct. at 566.
61. Id.
62. Id.
The forum state does not exceed its powers under the Due Process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Compare *Gray v. American Radiator & Standard Sanitary Corp.* . . . 63

The citation of *Gray* is somewhat cryptic. Whether the Supreme Court approves of *Gray's* language and result is impossible to say; the opinion in *Gray* does not disclose whether the plaintiff purchased the water heater in Illinois, nor did the Supreme Court of Illinois insist that the defendant must have had an expectation that such a sale would occur. What is important is that a majority of the United States Supreme Court has suggested, albeit in dictum, that the intentional sale of one's products in the forum state, directly or indirectly, may serve as a basis for the assertion of personal jurisdiction over the seller.

The Supreme Court reinforced that suggestion when it dismissed, for lack of jurisdiction, an appeal from the 1979 ruling of the Supreme Court of Illinois in *Connelly v. Uniroyal, Inc.* 64 The plaintiff in that case sued the Belgian manufacturer of plaintiff's tires, the failure of one of which had allegedly caused injury to the plaintiff. The tire was manufactured in Belgium, then sold there to General Motors, which installed it on an automobile which was shipped to Illinois and sold there to the plaintiff's father. Discovery revealed that numerous such tires manufactured by the defendant had been similarly shipped to Illinois during a relevant time period; the defendant apparently had no other contacts with Illinois. The Illinois Supreme Court held that the courts of Illinois had jurisdiction over the Belgian manufacturer. The

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63. *Id.* at 567. Mr Justice White's highly quotable reference to a "critical" foreseeability standard is misleading (and therefore regrettable) in that it appears to provide a test for jurisdiction but in actuality does not do so. As one commentator has noted, "jurisdictional foreseeability is a conclusion that implies advance litigant perception of relevant grounds for jurisdiction. The foreseeability concept itself cannot provide those grounds." Ratnep, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 N.W. L. Rev. 363, 379 (1980). *See generally* Ripple & Murphy, *Worldwide Volkswagen Corporation v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65 (1980).

64. 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *appeal dismissed*, ___ U.S. ___, 100 S. Ct. 992 (1980).
only real explanation given was as follows:

Defendant Englebert's tires, introduced into the stream of commerce in obvious contemplation of their ultimate sale or use in other nations or States, came into Illinois on a regular basis and in substantial numbers, and we hold that its activities rendered it amenable to process. . . . Given the nature and quality of its activities, we hold further that Englebert has purposefully invoked the benefits and protections of the law of Illinois. . . .

The fact that the United States Supreme Court dismissed the defendant's appeal for lack of jurisdiction, although a somewhat ambiguous act, means in theory that the United States Supreme Court considered any argument for a contrary result to be erroneous. What is troubling about that conclusion is the fact that the Supreme Court of Illinois never focused, even in a conclusory way, upon the knowledge, intent, or contemplation of the defendant with respect to the indirect sale of its products in the State of Illinois. It may be overwhelmingly likely that the defendant did know, contemplate, and perhaps even intend that its tires would be sold to consumers in Illinois, but the law would be clearer if the court had said so. Adding to the unsettling quality of the opinion is its lengthy quotation from Buckeye Boiler, with all of its references to foreseeability, which the Supreme Court of Illinois found "persuasive." Approximately a month after the apparently helpful World-Wide Volkswagen opinion, the United States Supreme Court muddied the waters just a bit by giving its seal of approval to this unclear ruling of the Supreme Court of Illinois.

65. Id. at ____, 389 N.E.2d at 160 (emphasis supplied).
68. 75 Ill. 2d at ____, 389 N.E.2d at 160.
69. More consistent with its World-Wide Volkswagen opinion was the action of the Supreme Court vacating and remanding the opinion of the Colorado Court of Appeal in Byrd v. Butterfield, No. 78-973 (Colo. Ct. App. March 29, 1979), vacated sub nom. Eschmann Bros., & Walsh, Ltd. v. V. Mueller & Co., ____ U.S. ___, 100 S. Ct. 1003 (1980), for further consideration in light of World-Wide Volkswagen. The Colorado court had upheld jurisdiction in a products liability case over a British third-party defendant who had manufactured a component of a product which found its way into
unlikely that the United States Supreme Court meant to retreat so quickly from its forceful statement in World-Wide Volkswagen that “foreseeability alone” will not suffice.\textsuperscript{70} Given the Volkswagen opinion, one is inclined to conclude that the Uniroyal dismissal means that the requisite purposefulness may be \textit{inferred} from continuous and systematic commercial activity vis-à-vis the forum state on the part of a non-resident manufacturer of a component of a product shipped into the state by a third party. I hope that the Uniroyal dismissal means no more than that, because the distinction between subjective contemplation and objective foreseeability makes perfect sense; sending one’s product into a state for sale is surely purposeful activity vis-à-vis that state, whereas the foreseeable but unintentional arrival of that product in the state is not. Curiously enough, the Florida courts do not seem to have focused upon and fully understood that distinction.

To my knowledge, only two Florida appellate courts have ever addressed themselves to the possibility that “foreseeability” might serve as a viable basis for personal jurisdiction in a products liability case. The holdings of these cases are not incorrect, but, in light of World-Wide Volkswagen, their language probably is. The first of these cases, \textit{Aero Mechanical Electronic Craftsman v. Parent},\textsuperscript{71} was decided by the Fourth District Court of Appeal in 1979. The plaintiff was injured in Florida by a product which he purchased here from Sears, Roebuck & Company, part of which had been manufactured by the third-party defendant Colorado; the third-party complaint appears to have contained insufficient allegations of purposeful activity by the third-party defendant vis-à-vis Colorado, and the court made some ambiguous references to foreseeability.

More recently, the Supreme Court dismissed an appeal, for lack of jurisdiction, from the decision of the Utah Supreme Court in Mallory Eng’r, Inc. v. Ted R. Brown & Assocs., Inc., No. 15530 (Utah March 6, 1980), \textit{dismissed sub nom. Valad Elec. Heating Corp. v. Ted R. Brown & Assocs., Inc.}, 49 U.S.L.W. 3420, 3427 (Dec. 9, 1980). The case involved a breach of contract by a New York corporation to supply goods within the State of Utah. In a clear and persuasive opinion, the Utah court held that the New York defendant, by contracting to ship goods into Utah and doing so, had purposefully availed itself of the privilege of conducting activities within the forum state.

\textsuperscript{70} U.S. at \textit{____}, 100 S. Ct. at 566. “Summary actions \ldots should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.” Mandel v. Bradley, 432 U.S. 173, 176 (1977).

\textsuperscript{71} 366 So. 2d 1268 (Fla. 4th Dist. Ct. App. 1979).
Defendant Aero in California. Aero's product had gone through the hands of two other California companies before being sold to Sears, Roebuck & Company in Chicago. The court approached the question of jurisdiction in the following manner:

In construing § 48.193(1)(f)(2), our courts have required a more substantial contact with Florida than the mere possibility that the product might reach this state.

... We . . . interpret the phrase in the ordinary course of commerce [in § 48.193(1)(f)(2)] to mean that the non-resident must at least have some reason to anticipate that his product will reach another state in the ordinary course of interstate commerce. The manufacturer could then be said to have acted in a purposeful manner or with such knowledge as to make its deeds the equivalent of having purposefully availed itself of the privilege of conducting activities within our state.72

Since the complaint contained no allegation that Aero knew or had reason to anticipate that its product would be shipped in interstate commerce when Aero passed it along to another California manufacturer, the court held that Florida had no jurisdiction over Aero. The holding is unobjectionable, but "having some reason to anticipate" that one's product will enter Florida does not constitute purposeful activity in the state.

At least it can be said in defense of the Fourth District Court of Appeal that it wrote the opinion in Aero prior to the ruling of the United States Supreme Court in World-Wide Volkswagen. No similar excuse is available to the panel of the Third District Court of Appeal that recently decided Life Laboratories, Inc. v. Valdes.73 The plaintiff in that case sued the manufacturer of a product, disclosing in her complaint that the defendant manufactured the product for a non-party wholesaler who distributed it. Since these allegations do not adequately support a finding of purposeful activity vis-à-vis Florida, the court's remand for dismissal of the complaint is not surprising. What is surprising is the fact that the court cited World-Wide Volkswagen, yet went on to quote not only the language of Aero set forth above, but some of

72. Id. at 1270 (emphasis in original).
73. 387 So. 2d 1009 (Fla. 3d Dist. Ct. App. 1980).
the "foreseeability" language of Buckeye Boiler as well. Thus, the Third District Court of Appeal seemed oblivious to the fact that the United States Supreme Court had, at the very least, cast serious doubt upon the "foreseeability" analysis over eight months prior to the district court's action. Florida attorneys relying on the language of Life Laboratories do so at their peril.

This was the extent of the relevant case law in Florida prior to the decision of the Supreme Court of Florida on January 8, 1981, in the case of Ford Motor Co. v. Atwood Vacuum Machine Co. The fact pattern in the case closely approximates that of Uniroyal. The plaintiff sued Ford, alleging that she was injured by the faulty operation of the rear door hinge of a new Ford station wagon. Ford impleaded Atwood, a nonresident corporation which had manufactured the door hinge assembly. Ford alleged that Atwood supplied door hinge assemblies to Ford "knowing that they were to be incorporated into automobiles manufactured by Ford and knew that some of these automobiles would be shipped to Florida and sold." Significantly, Atwood did not dispute the factual allegations of the third-party complaint, which therefore had to be regarded as true for the purpose of the motion to dismiss. The supreme court held that the circuit court had jurisdiction over Atwood under § 48.193(1)(f)(2).

Justice Boyd, writing for the majority, properly distinguished this

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74. Id. at 1011.
75. It should also be noted that the Supreme Court of Florida approved of the assertion of jurisdiction over a nonresident defendant in a products liability case on the basis of very general allegations in Electro Eng'r Prods. Co., Inc. v. Lewis, 352 So. 2d 862 (Fla. 1977). Wrote Justice Hatchett:

Here, the facts stated in the complaint show that petitioners manufactured a defective paint gun, and were engaged in the business activity of marketing and distributing this product for use by citizens of this state. These allegations place them within the reach of the Long Arm statute and satisfy the 'minimum contacts' required by the federal constitution.

Id. at 864 (emphasis supplied). The italicized language connotes purposeful activity in Florida. Since the allegations were undisputed, the court held that they had to be regarded as true for purposes of the motion to dismiss.

76. 1981 Fla. L. Weekly 31 (Jan. 9, 1981), appeal dismissed, 49 U.S.L.W. 3890 (June 1, 1981). Again, the theoretical meaning of a dismissal of an appeal by the United States Supreme Court is that the Court agreed with the result in the individual case. See text at footnotes 66-67, supra.
77. Id.
case from *World-Wide Volkswagen*, and framed the question for decision this way: "whether a manufacturer who by continuous and systematic activity indirectly through others serves or seeks to serve a state's market is subject to the jurisdiction of that state's courts." The italicized words are words which arguably connote *purposeful* conduct. Justice Boyd then quoted at length the passage from Justice White's opinion in *Volkswagen* leading up to its citation of *Gray*, finding significance in the implication (which Justice Boyd was willing to draw) that the United States Supreme Court approved of the *Gray* opinion. After quoting at length from *Gray* itself, he added:

A number of courts have cited the *Gray* case as authority for the position that a manufacturer engaged in interstate commerce, which expects its products to be used in other states, can reasonably expect to be held subject to the jurisdiction of those other states' courts.

Although Justice Boyd made no further mention of the fact, it is significant that Atwood had not disputed the allegation that it knew that Ford vehicles containing Atwood's door hinge assemblies would be sold by Ford in Florida. This knowledge on the part of the nonresident that it was benefiting from contact with the State of Florida, on a systematic and continuous basis, obviates the need to analyze the jurisdictional question in terms of mere foreseeability, and, in light of *Unireoyal*, satisfies the "purposeful activity" requirement. While Justice Boyd largely spoke the language of volitional behavior in his majority opinion, it is unfortunate that he did not make this argument more clearly. There is, in fact, some very puzzling language by him toward the end of the opinion that casts doubt on the cogency of his rationale. Included is a terribly ambiguous quotation from a 1966 Arizona opinion that appears to suggest that even foreseeability may not be required for jurisdiction in a products liability case. This regrettable sentence, apparently intended to have some relevance and significance, follows:

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78. *Id.* at 33 (emphasis supplied).
79. 444 U.S. at 297-98, *(quoted at 1981 Fla. L. Weekly at 33-4).*
80. *Id.* at 34 (emphasis supplied).
Other cases have held that the occurrence of a single injury in the state is a sufficient basis upon which to conclude that the nonresident manufacturer's product got there through normal commercial channels, thus justifying the conclusion that sufficient contacts existed.\(^8\)

Given such statements, one can almost understand the viewpoint of Chief Justice Sundberg, joined by Justice England in dissent. Atwood "carries on no discernable activity in this state," wrote the Chief Justice. "Its only connections with this state are that it is foreseeable that some of Atwood's components might end up in cars sold by Ford in Florida, and the indirect economic benefit derived from such sales."\(^9\) The remainder of the dissenting opinion reveals an astute awareness of the teachings of World-Wide Volkswagen, but one wonders whether anyone stressed the fact that, again, Atwood's commercial relationship with Florida was not merely foreseeable but known. Had Ford's pleadings been less helpful, the question would have been whether an inference of "purposeful activity" might properly be drawn from the allegation of ongoing commercial activity; in that regard Uniroyal, whose significance may well have been unclear to the Supreme Court of Florida, would have been relevant.\(^4\) In any event, the result

\(^8\) Id. at 34.
\(^9\) Id. at 35.
\(^4\) Should the Florida courts decide that purposefulness cannot simply be inferred from a continuing course of indirect commercial dealings with the State of Florida, it would probably be necessary for the plaintiff in such a case to make a showing of the state of mind of the defendant or its agents. Discovery might well be necessary in order to make such a showing. Florida plaintiffs have utilized discovery with respect to jurisdictional issues. See, e.g., American Baseball Cap, Inc. v. Duzinski, 359 So. 2d 483 (Fla. 1st Dist. Ct. App. 1978); Youngblood v. Citrus Assocs. of the N.Y. Cotton Exch., Inc. 276 So. 2d 505 (Fla. 4th Dist. Ct. App. 1973); Eder Instrument Co. v. Allen, 253 So. 2d 902 (Fla. 3d Dist. Ct. App. 1971); but see Ward v. Gibson, 340 So. 2d 481 (Fla. 3d Dist. Ct. App. 1976). One district court has held, however, that a trial court could not require a nonresident defendant to appear in Florida for the purpose of giving testimony concerning jurisdiction. Thomas v. Lane, 348 So. 2d 408 (Fla. 3d Dist. Ct. App. 1977). The Court in Thomas went on to say that the defendant could not be required to give a deposition in Florida, but might be required to give one in his state of residence. These conclusions appear to be correct, regardless of the procedural posture of the case or purpose of the deposition. See Kaufman v. Kaufman, 63 So. 2d 196 (Fla. 1952); Madax Int'l Corp. v. Delcher Intercontinental Moving Servs., Inc., 342 So. 2d 1082 (Fla. 2d Dist. Ct. App. 1977); Godshall v. Hessen, 227 So. 2d 506 (Fla. 3d Dist.
appears to be correct, and even the dissenters were willing to state that a nonresident "manufacturer-distributor of the finished product" could be sued in Florida "because of significant business contacts that a manufacturer-distributor necessarily incurs through his commercial efforts." 85

B. Products Cases Under § 48.181

Perhaps more significant than the apparently occasional tendency of Florida courts to reach too far under the long arm statutes is the overly restrictive approach taken by them over the years with respect to this very same category of cases, i.e., cases in which a nonresident defendant has sent products into the state. These restrictive cases, however, have arisen under the "business or business venture" long arm statute, § 48.181. Prior to 1973, it should be remembered, § 48.181

was the primary long arm statute available with respect to torts, other
than vehicular collisions, committed by nonresidents.

The Supreme Court of Florida held in *DeVaney v. Rumsch* that
the practice of a profession constituted "engaging in business" under §
48.181, and stated: "The determinative question is whether goods,
property or services are dealt with within the state for the pecuniary
benefit of the person providing or otherwise dealing in those goods,
property or services." The same court has also made clear that, for §
48.181(1) to apply, the nonresident must have been engaging in a gen-
eral course of business activity in the state, as opposed to an isolated
act stemming from a pecuniary motive; under § 48.181(3), however,
which states in essence that anyone who sells property "through bro-
kers, jobbers, wholesalers or distributors" to anyone in Florida shall be
conclusively presumed to be engaging in a business venture here, even a
single in-state sale will suffice. Sub-section 48.181(1) has been ap-
plied numerous times, in vastly differing fact patterns, and often with
great liberality. Oddly enough, however, there have been several cases
in which the direct shipment of products into Florida would seem to

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86. 228 So. 2d 904 (Fla. 1969).
87. Id. at 906.
88. Dinsmore v. Martin Blumenthal Asso., Inc., 314 So. 2d 561, 564 (Fla.
1975).
89. Id.
90. Among the cases applying § 48.181(1) liberally are Compania Anonima Sim-
1979); Horace v. American Nat’l Bank & Trust Co. of Ft. Lauderdale, 251 So. 2d 33
(Fla. 4th Dist. Ct. App. 1971); McCarthy v. Little River Bank & Trust Co., 224 So. 2d 338
1964); and International Graphics, Inc. v. MTA - Travel Ways, Inc., 71 F.R.D. 598
(S.D. Fla. 1976). The statement in Lake v. Lucayan Beach Hotel Co., 172 So. 2d 260,
(Fla. 3d Dist. Ct. App. 1965), to the effect that "the mere solicitation of business is not
sufficient" was criticized in Reader’s Digest Ass’n v. State *ex rel.* Conner, 251 So. 2d
552 (Fla. 1st Dist Ct. App. 1971), which held to the contrary; even the *Lake* opinion
held in favor of jurisdiction, on the basis of little *more* than "mere solicitation." The
liberal holding of Flying Saucers, Inc. v. Moody, 421 F.2d 884 (5th Cir. 1970), was
disapproved in Youngblood v. Citrus of the N.Y. Cotton Exch., Inc., 276 So. 2d 505
(Fla. 4th Dist. Ct. App. 1973). Of particular interest to Florida attorneys is the case of
Atwood v. Calumet Indus., Inc., 308 So. 2d 555 (Fla. 4th Dist. Ct. App. 1975), in
which a Florida law firm was able to sue a nonresident client for fees in Florida, be-
cause the client had transacted business in Florida *through* the plaintiff law firm.
have supported jurisdiction under § 48.181, yet the court apparently ignored that contact in reaching its conclusion.\textsuperscript{91}

The restrictiveness of the "product" cases under § 48.181 seems owing at least in part to the development of the "control" test under that statute with respect to sales in Florida through "brokers, jobbers, wholesalers or distributors." The "control" test has been applied by Florida courts at least since 1962,\textsuperscript{92} but the Supreme Court of Florida endorsed it in 1975 in the case of \textit{Dinsmore v. Martin Blumenthal Associates, Inc.}\textsuperscript{93} The test requires that the nonresident defendant have "some degree of control" over either (1) the property in the hands of the brokers, or (2) the brokers themselves.\textsuperscript{94} \textit{Dinsmore} was not a products liability case, but the supreme court applied the "control" test in such a context later the same year in \textit{AB CTC v. Morejon}.\textsuperscript{95} The plaintiff in that case sued the Swedish manufacturer of an allegedly defective washing machine which had caused personal injury to the plaintiff in Florida. The defendant claimed that all of its products were sold and shipped in Sweden to its distributor, an independent contractor, which in turn sent the washing machine to Florida. Since the plaintiff failed to prove that the defendant exercised any control over the distributor, or over the washing machine in the hands of the distributor, the plaintiff lost. Given the opinions in \textit{World-Wide Volkswagen, Uniroyal, and Ford},\textsuperscript{96} it appears that the minimum contacts test would have been satisfied in \textit{Morejon} as long as the Swedish manufacturer had "deliver[ed] its products into the stream of commerce with the expectation

\begin{thebibliography}{99}
\bibitem{93}  314 So. 2d 561 (Fla. 1975).
\bibitem{94}  \textit{Id}.
\bibitem{95}  324 So. 2d 625 (Fla. 1975).
\bibitem{96}  See text accompanying notes 58-85 \textit{supra}.
\end{thebibliography}
that they [would] be purchased by consumers in Florida; but the Florida courts showed no interest in such an inquiry. If the "control" test is not constitutionally compelled, why the long arm statute should be so interpreted is unclear, and the Supreme Court of Florida offered no real explanation for the doctrine in either Dinsmore or Morejon. If the "control" test is needlessly restrictive in cases in which products manufactured by a nonresident reach the State of Florida through intermediaries, it is even less justifiable when the nonresident has shipped those products directly into the state, whether to an intermediary or to the plaintiff himself. Yet the "control" test was applied to just such a fact pattern in one of the earliest decisions invoking the doctrine, Fawcett Publications, Inc. v. Rand, quoted with approval by the Supreme Court of Florida in Dinsmore. A recent case arising under § 48.181, American Baseball Cap, Inc. v. Duzinski, illustrates the problem well. The plaintiff in that case was injured in Florida while wearing a baseball helmet manufactured by the defendant, a Pennsylvania corporation. Plaintiff alleged in his complaint that the defendant sold its products in Florida, through middlemen here, on a general basis, and that the particular helmet in question had been sold, either directly or through a distributor, to the Florida supplier of athletic equipment to the plaintiff's school, which gave it to plaintiff. The defendant claimed, among other things, that it shipped its goods directly to buyers, in response to purchase orders. Although it appears that the

98. Cases with similar fact patterns in which the "control" test precluded the exercise of jurisdiction by a Florida court include Cooke-Waite Laboratories, Inc. v. Napier, 166 So. 2d 675 (Fla. 2d Dist. Ct. App. 1964), and Talcott v. Midnight Publishing Corp., 427 F.2d 1277 (5th Cir. 1970).
100. 314 So. 2d at 565. To the same effect are Mac Millan-Bloedel, Ltd. v. Canada, 391 So. 2d 749 (Fla. 5th Dist. Ct App. 1980); Publications, Inc. v. Brown, 146 So. 2d 899 (Fla. 2d Dist. Ct. App. 1962); and Jenkins v. Fawcett Publications, Inc., 204 F. Supp. 361 (N.D. Fla. 1962). Courts found jurisdiction by virtue of strained applications of the "control" test in Dublin Co. v. Peninsular Supply Co., 309 So. 2d 207 (Fla. 4th Dist. Ct. App. 1975), and DiGiovanni v. Gittelson, 181 So. 2d 195 (Fla. 3d Dist. Ct. App. 1965), both involving goods apparently sent directly into Florida by the defendant.
plaintiff alleged in the alternative that the sale had been made through a distributor, the court found no evidence of such sales, and thus held that § 48.181(3) was inapplicable. The court then turned to the applicability of § 48.181(1), the general "business or business venture" section, and said this:

The sales to nonresident major sporting goods companies which were shipped in accordance with the purchaser's directions to sales outlets in Florida could not constitute the doing of business in Florida because . . . those companies were not "brokers, jobbers, wholesalers or distributors" in this state; and even if they were, neither they nor the product after it reached them were under the control of the defendant.102

Was the court making the startling statement that, in order to be doing business under § 48.181, a nonresident seller of goods must be selling through "brokers, jobbers, wholesalers or distributors"? The court went on to observe that the defendant did sell some helmets directly to Florida retailers, but concluded:

[D]irect sales by a foreign corporation, not otherwise doing business in Florida, from a place of business not in this state, to retailers in Florida, when no control is retained by the foreign corporate seller, does not constitute operating, conducting, engaging in, or carrying on a business or business venture in Florida within the meaning and contemplation of § 48.181(1).103

As Judge Ervin said in his reluctant concurrence in American Baseball Cap,104 and as World-Wide Volkswagen suggests, no constitutional concerns would have been raised by the assertion of jurisdiction over the defendant in this case. Judge Ervin felt, however, that the language of Dinsmore, with respect to the "control" test under § 48.181(1) and (3), compelled the result reached by the appellate court. In this he may be correct, although, as he noted, Dinsmore is arguably distinguishable in that it did not involve a general course of business activity in Florida (so that § 48.181(1) did not apply, without the assistance of § 48.181(3)) and the single "sale" did not occur in Florida (so

102. Id. at 488.
103. Id.
104. Id. at 489-90.
that § 48.181(3) did not apply). Furthermore, former Chief Justice Adkins stated in Dinsmore "that the requisite control, as explained herein, is also applicable to § 48.181(1), where the nonresident is doing business through brokers, jobbers, wholesalers, or distributors."\textsuperscript{105} The court in American Baseball Cap seems to have concluded that the defendant was not selling through such persons, yet it applied the "control" test anyway. It seems possible, then, for the court to have distinguished the American Baseball Cap case from the apparently controlling precedents, and it is my belief that justice would have been served by doing so. At least two possible bases for distinction exist: (1) sales through "wholesalers," etc., versus sales through retailers or directly to the consumer; and (2) shipment into Florida through intermediaries versus direct shipment into Florida by the defendant. To draw the second distinction, however, would be to overrule, in effect, the Fawcett line of cases.\textsuperscript{106}

It must be noted that what has been said thus far about the American Baseball Cap decision concerns what is technically dictum in the case. The court declined to fully resolve the "control" issue in the case, concluding instead that § 48.181 could not apply because there was no showing that the plaintiff's cause of action arose out of the defendant's activities in Florida. On this point Judge Ervin disagreed,\textsuperscript{107} and I can only add that I find the majority's ruling on this point absolutely astonishing.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{105} 314 So. 2d at 566 (emphasis supplied).
\item \textsuperscript{106} See notes 99 & 100 supra.
\item \textsuperscript{107} 359 So. 2d 483 (Fla. 1st Dist. Ct. App. 1978).
\item \textsuperscript{108} See also General Tire & Rubber v. Hickory Springs Mfg. Co., 388 So. 2d 264 (Fla. 5th Dist. Ct. App. 1980). Defendant sold its product in Alabama, where it was incorporated into a product sold in Georgia and then in Florida, where it allegedly gave rise to personal injuries. There was no evidence of any notice to or knowledge by the defendant that its product would find its way into Florida, but the court declined to decide the question of whether the defendant was "doing business" in Florida, concluding instead that the plaintiff's cause of action had not been shown to have arisen out of the defendant's activities in Florida. This resolution of the case is a bit odd, since the cause of action certainly did arise out of a connection between the defendant and the State of Florida, and the real question was whether that connection amounted to "doing business" in Florida within the meaning of § 48.181 or § 48.193. Federal Ins. Co. v. Michigan Wheel Co., 267 F. Supp. 639 (S.D. Fla. 1967), is also questionable in this regard.
\end{itemize}
Although Florida courts have sometimes said that jurisdiction under the long arm statutes was meant to extend as far as the United States Constitution permits, it is clear that this has not been the case with respect to actions involving the interstate shipment of goods. Is it possible for Florida courts to completely shed the restrictive "control" test that has evolved under § 48.181? A question that immediately comes to mind is whether the "control" test is also to be applied under the nearly identical "business or business venture" language of the newer long arm statute, § 48.193(1)(a). Although a few cases have indicated that § 48.193(1)(a) is to be interpreted just as § 48.181 has been, and one case under § 48.193(1)(a) has found the "control" test satisfied, no Florida appellate opinion has yet addressed itself to this question. The Florida courts should take advantage of the absence of precedent on this issue and hold that the "control" test was not meant to be encompassed under § 48.193(1)(a). In doing so, the courts might seize upon a reason (albeit an unconvincing one) given long ago for the use of the "control" doctrine; namely the idea that a long arm statute (such as § 48.181, through § 48.161) utilizing substituted service of process should be strictly construed; § 48.193(2) requires personal service of process. They might also note that it would be incongruous for the courts to stretch to the limits of due process in tort and contract cases under § 48.193(1)(b), (f), and (g) while simultaneously


113. See text accompanying note 19 supra. Even if my legislative recommendations are accepted, see text accompanying notes 24-27, any method of service allowed will be a fair one, requiring no "strict construction" of statutes.

114. See Godfrey v. Neumann, 373 So. 2d 920 (Fla. 1979).
doing substantially less under § (1)(a) of the same statute. Admittedly, the “control” test, even if retained under § (1)(a), will be less significant simply by virtue of the existence, under § 48.193, of general long arm provisions concerning tort and contract cases. The Aero and Life Laboratories cases, discussed above,\textsuperscript{117} demonstrate the courts’ lack of interest in “control” in products liability cases under § 48.193(1)(f)(2), as does the opinion of the Supreme Court of Florida in Ford Motor Company v. Atwood Vacuum Machine Co.\textsuperscript{118} Understanding that the “control” test is needlessly restrictive may nevertheless prove to be important with respect to the rare case to which § (1)(b), (f), and (g) do not apply, but in which personal jurisdiction predicated upon the sale of goods in Florida may yet be possible under § (1)(a). In addition, products liability cases can continue to be brought under § 48.181, if my legislative recommendations do not find favor, by plaintiffs who prefer the substituted service provisions of § 48.161 (or the provisions of § 48.081) to the personal service apparently required by § 48.193.

C. Quasi In Rem Jurisdiction

Quasi in rem jurisdiction, of course, describes the situation in which a court lacks jurisdiction to render a binding in personam judgment against a nonresident defendant, but does have power over that nonresident’s interests in property located within the state; the result is that the court may render a judgment against the nonresident which only affects his interests in that property. Quasi in rem jurisdiction has clearly existed in Florida.\textsuperscript{119} No statute speaks explicitly of the availability of quasi in rem jurisdiction, but it seems to be tied to chapter 49 of the Florida Statutes, which provides for constructive service of pro-


\textsuperscript{116} See cases cited at note 52 \textit{supra}.

\textsuperscript{117} See text accompanying notes 71-74 \textit{supra}. See also Shelton v. Wisconsin Motor Corp., 382 So. 2d 1270 (Fla. 3d Dist. Ct. App. 1980).

\textsuperscript{118} 1981 Fla. L. Weekly 31 (Jan. 9, 1981); see also Electro Eng’r Prods. Co., Inc. v. Lewis, 352 So. 2d 862 (Fla. 1977).

cess, *i.e.*, service by publication. Since personal and substituted service of process lead to *in personam* jurisdiction, and there is no general provision for service by mail, service by publication appears to be the only method of service available to effectuate *quasi in rem* jurisdiction in Florida. The publication statute does require, however, that notice of the action also be mailed (but not necessarily by certified or registered mail) to any defendant whose address is even partly known. The statute applies, by its clear terms, only to certain enumerated categories of civil actions, most of which seem to embrace rather obviously the property-or-status-oriented actions that have traditionally been associated with *in rem* or *quasi in rem* jurisdiction.

But the present status of *quasi in rem* jurisdiction is the subject of considerable doubt, following the rule of the United States Supreme Court in the 1977 case of *Shaffer v. Heitner*. The decision held that mere ownership of corporate stock, deemed by the state of incorporation to be located therein, did not suffice to give the courts of that state jurisdiction to adjudicate claims against the nonresident owners that did not arise out of that stock ownership. Writing for six members of the Court, Mr. Justice Marshall stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*." After carefully considering that question, he wrote: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

The most natural inference to draw from this opinion is that *quasi in rem* jurisdiction continues to exist, but subject now to the minimum

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120. *FLA. STAT.* § 49.011 *et seq.* (1979).
125. Mr Justice Brennan, while dissenting as to the application of the minimum contacts test to the facts of the case, concurred with that part of the majority opinion which stated that the test should be applied. *Id.* at 219.
126. *Id.* at 206.
127. *Id.* at 212.
contacts test set forth in *International Shoe*. Because, however, the existence of minimum contacts suffices to give rise to *in personam* jurisdiction, and to an *in personam* judgment if the plaintiff prevails, the concept of *quasi in rem* jurisdiction, which is more limited, appears to be completely expendable in light of *Shaffer*. A given state might choose to retain the more limited form of jurisdiction, even though the constitutional requirements for *in personam* jurisdiction be met, and at least some of the courts which have continued to recognize *quasi in rem* jurisdiction have apparently done so because no state long arm statute applied, thus rendering *in personam* jurisdiction unavailable as a matter of state law. The most rational response to *Shaffer* by a state legislature, however, would be to amend the state’s long arm statutes to extend *in personam* jurisdiction over a nonresident whenever property of the nonresident, located in the forum state, has been brought within the custody of the court; the minimum contacts test, of course, would have to be satisfied in each such case. Is it possible, however, that some lesser showing of “minimum contacts” than is needed for *in personam* jurisdiction might suffice for *quasi in rem* jurisdiction? At least one lower federal court seems to have thought so, but there


129. At least one federal district court was prepared to conclude that the Court in *Shaffer* had “scuttled” *quasi in rem* jurisdiction. Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F. Supp. 755, 758 (S.D.N.Y. 1978).

Another court stated that *Shaffer* “has abrogated *quasi in rem* jurisdiction as a separate and insular conceptual category.” Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1047 (N.D. Cal. 1977).


131. Feder v. Turkish Airlines, 441 F. Supp. 1273, 1274 (S.D.N.Y. 1977) (footnotes omitted): “[W]e would find on the record now before us that [the defendant] has had insufficient contacts with the forum to render it personally liable for a judgment of this Court. Thus, jurisdiction over [the defendant] rests solely upon the attachment.” *See also* Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630, 633 (D. Conn. 1977): “Finally, even if there are not the minimum contacts needed to satisfy *International Shoe* (though there may well be), there are surely sufficient contacts to make the assertion of *quasi in rem* jurisdiction over a foreign corporation fair even under *Shaf-
is not the slightest hint in Shaffer of such a double standard, and, after all, the reference is already to minimum contacts, i.e., the minimally requisite contacts compatible with basic fairness.\footnote{132}

The primary reason for uncertainty about the present status of quasi in rem jurisdiction stems from the concurring opinions in Shaffer by Mr. Justices Powell and Stevens. Mr. Justice Powell said the following, and Mr Justice Stevens said he agreed:\footnote{133}

I would explicitly reserve judgment . . . on whether the ownership


\footnote{132} Mr. Justice Marshall did suggest, in Shaffer, the possibility that “a state in which property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained consistently with \textit{International Shoe.}” 433 U.S. at 210. At least one federal district court has followed that suggestion, allowing the attachment in California of an unrelated debt, owed to the nonresident defendant by a California corporation, as security for a claim being pursued against the defendant in New York. Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977). The court stressed that it was asserting “jurisdiction merely to order the attachment and not to adjudicate the underlying merits of the controversies.” \textit{Id.} at 1048. See generally Leathers, \textit{The First Two Years After Shaffer v. Heitner}, 40 La. L. Rev. 907, 911-12 (1980); Note, \textit{Attachment Jurisdiction After Shaffer v. Heitner}, 32 Stan. L. Rev. 167 (1979). Whether any showing of “minimum contacts” is necessary for such an attachment to be constitutional is presently unclear. The Uranex court stated that where the facts show that the presence of defendant’s property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient area for defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible. 451 F. Supp. at 1048. The Florida legislature may wish to amend the Florida attachment and garnishment statutes, chapters 76 and 77 of the Florida Statutes, to expressly permit Florida courts to utilize those prejudgment remedies in connection with litigation pending in another state. \textit{See Fla. Stat. §§ 76.03, 77.01, 77.031 (1979).} Mr. Justice Marshall also hinted at another possible exception to the Shaffer requirements: “This case does not raise, and we therefore do not consider, the question whether the presence of a defendant’s property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.” 433 U.S. at 211 n. 37. This hint was relied upon in Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630 (D. Conn. 1977); \textit{see also} Amoco Overseas Oil Corp. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979).

\footnote{133} 433 U.S. at 217.
of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common-law concept of quasi in rem jurisdiction arguably would avoid the uncertainty of the general International Shoe standard without significant cost to "traditional notions of fair play and substantial justice."\textsuperscript{134}

Because Mr. Justice Rehnquist took no part in the \textit{Shaffer} decision, it is possible that three Justices would adhere to the traditional concept of quasi in rem jurisdiction in at least some cases. The fact that no other Justice joined the concurrences, however, probably indicates that the other six are strongly in agreement with the sweeping and unequivocal theoretical pronouncements of the Marshall opinion.\textsuperscript{135}

Only one Florida decision,\textsuperscript{136} to my knowledge, has utilized the concept of quasi in rem jurisdiction subsequent to the \textit{Shaffer} decision in 1977. In addition, at least three other appellate opinions\textsuperscript{137} since

\begin{itemize}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{136} Gelkop v. Gelkop, 384 So. 2d 195 (Fla. 3d Dist. Ct. App. 1980), concerned, among other things, a claim for child support against a nonresident father who was served by publication. In upholding the judgment against the father but reversing the order holding him in contempt for failing to pay, the court said this:

It is the prevailing law of this state that a trial court has in rem jurisdiction in a marriage dissolution action to enter a final judgment or order awarding permanent or temporary alimony, child support, attorneys fees and costs against a respondent who had been properly served, as here, by constructive process . . . The trial court in such action may enforce such provisions of the final judgment in rem as against any property held by the respondent within the court's jurisdiction; it may not, however, enforce such provisions in personam by contempt proceedings, as here, or by the entry of a money judgment against the respondent.

\textit{Id.} at 201. The court referred to "in rem jurisdiction," but was clearly describing quasi in rem jurisdiction. No mention was made of \textit{Shaffer} or minimum contacts; the decision is therefore erroneous in this respect.
\item \textsuperscript{137} Gaskill v. May Bros., Inc., 372 So. 2d 98 (Fla. 2d Dist. Ct. App. 1979);
\end{itemize}
then have made reference to the concept as if it were still viable, and, indeed, the Florida statutory scheme appears to continue to allow for it, subject only to the satisfaction of the minimum contacts test. This is because, according to the Florida courts, service by publication under chapter 49 cannot provide the basis for a valid *in personam* judgment; any judgment so obtained, therefore, must be described as *in rem* or *quasi in rem*.

The problem here is twofold. First, *quasi in rem* jurisdiction in the absence of minimum contacts is unfair, for all of the reasons set forth by Mr. Justice Marshall in *Shaffer*, and is conceptually unnecessary if minimum contacts are present. Regardless of the present constitutional status of the concept, then, *quasi in rem* jurisdiction should no longer be recognized under Florida law. Second, the use of service by publication upon a nonresident whose address or location is known is indefensible, regardless of the theoretical basis for jurisdiction. The United States Supreme Court indicated long ago that constructive service is acceptable even as a predicate for *in personam* jurisdiction in the case of defendants whose whereabouts are unknown, and it is to that cate-

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139. "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962), referring to *Mullane* v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). Accord, Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956). Both Schroeder and Walker were actions involving real property, and might have been described as *in rem* or *quasi in rem* proceedings. In any event, it is clear that the defendant's "legally protected interests" are at stake in such proceedings. See *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

140. This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.
category of cases that constructive service should be confined. Even if the best possible notice is not constitutionally required, as in a “true” *in rem* proceeding (e.g., dissolution of marriage), it should be required by statute. Again, service by registered or certified mail should be available and satisfactory, as should personal service, with respect to every form of long arm jurisdiction, but the simple mailing provided for by § 49.12 is not satisfactory.

Because I am recommending the repeal of § 49.011, which lists the categories of cases in which service by publication is permitted, it may be desirable to add some of these categories to the general long arm statute, § 48.193(1). Many disputes traditionally adjudicated on the basis of *quasi in rem* jurisdiction should fall within the scope of § 48.193(1)(c), providing for personal jurisdiction over a nonresident with respect to claims arising from his ownership, use, or possession of real property in Florida. If, for example, it is not clear that § (1)(c) would apply to disputes over ownership of real property in Florida, the statute should be amended. Similarly, § 48.193 presently makes no reference to personal property in Florida, or to dissolution of marriage. A provision should also be enacted conferring jurisdiction upon the Florida courts to enforce the valid judgments of the federal courts and courts of other states; Mr. Justice Marshall suggested in *Shaffer* that such jurisdiction is permissible under the Full Faith and Credit Clause, but such actions in Florida presently appear to be encompassed within § 49.011(1), (7), (8), or (11), and thus may be tied to

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141. Risman v. Whittaker, 326 So. 2d 213 (Fla. 4th Dist. Ct. App. 1976), permitted service by publication upon nonresident defendants whose addresses were known, despite the fact that personal service was concededly possible under §§ 48.193 and .194. Although service by publication gave rise only to “in rem jurisdiction,” the ruling is a regrettable one. Other cases have held that service by publication is permissible only when personal service cannot be effected. Taylor v. Lopez, 358 So. 2d 69 (Fla. 3d Dist. Ct. App. 1978); Bradbery v. Frank L. Savage, Inc., 190 So. 2d 183 (Fla. 4th Dist. Ct. App. 1966).

142. “[W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.” *Shaffer* v. *Heitner*, 433 U.S. 186, 207 (1977) (footnotes omitted).

143. *Id.* at 210, n.36.
III. CONCLUSION

The present configuration of long arm statutes in Florida is needlessly duplicative and complex, the unfortunate product, like so much in this state, of unplanned growth. There is no justification for the present connection between particular long arm statutes and particular methods of service of process. Substituted service of process upon the secretary of state, moreover, is an archaic procedure that should be abolished. Constructive service, by publication, should be confined to those cases in which the defendant, resident or nonresident, cannot be located. The Florida legislature should consider whether any of the long arm statutes other than § 48.193 confers on the Florida courts jurisdiction not conferred by § 48.193 to an extent such that the statute should be retained; if so, the statute should be amended to provide that service of process may be accomplished in any manner provided for by § 48.194. That section should be amended to encompass all permissible methods of service, any of which may be utilized in connection with any long arm statute.

The Florida courts should regard quasi in rem jurisdiction as a thing of the past. At the same time, they should extend in personam jurisdiction under the long arm statutes to the furthest extent permitted by the federal constitution, confining if not abrogating the “control” test under § 48.181 (if that section is not repealed) and drawing a clear distinction, in products liability cases, between “purposeful activity” and mere “foreseeability.” The courts should also recognize, finally, that the existence of “minimum contacts” may depend, in a given case, upon the connection between plaintiff’s cause of action and defendant’s contact with the state, and that no theory of “consent” stemming from the enforced appointment of an agent can lead to a contrary conclusion.
EEOC's New Sexual Harassment Guidelines: Civility in the Workplace

by Robert W. Martin, Jr.*

INTRODUCTION

On November 10, 1980, the Equal Employment Opportunity Commission (EEOC) published an amendment to the Guidelines on Discrimination Because of Sex which stated: "[t]his amendment will re-affirm that sexual harassment is an unlawful employment practice." It is rare indeed for a federal agency to understate the impact of its guidelines or regulations, but this is such a time. The amendment goes far beyond reaffirming that sexual harassment constitutes an unlawful employment practice; in essence it redefines what conduct constitutes sexual harassment under Title VII of the Civil Rights Act of 1964.2

BEFORE THE GUIDELINES

Many federal court decisions have held that sexual harassment is an unlawful employment practice.3 Generally, those decisions required a plaintiff to establish a prima facie case of sexual harassment by proving:

1) submission to sexual advances of a supervisor was a term or condition of employment;

* A.B. Hamilton College; J.D. Rutgers-Camden Law School; Chief, Legal Branch, United States Environmental Protection Agency, Region III; formerly Assistant Professor of Law, Florida State University of Law. This article was written by Mr. Martin in his private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the federal government is intended or should be inferred.

2) this submission substantially affected plaintiff's employment; and
3) employees of the opposite sex were not affected in the same way by these actions.4

While the new guidelines do not specifically address the third requirement, there must be evidence of gender-based discrimination in Title VII suits. If a supervisor makes the same sexual demands of both male and female employees, i.e., a bisexual supervisor, the supervisor may not be engaging in an employment practice prohibited by Title VII.5 But as at least one court observed, the third requirement is generally read such that it may only be an issue in the case of a bisexual supervisor:

It is not necessary to a finding of a Title VII violation that the discriminatory practice depend on a characteristic "peculiar to one of the genders," or that the discrimination be directed at all members of a sex . . . . It is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff "had been a man she would not have been treated in the same manner."6

In contrast to Title VII's nominal impact on the gender discriminatory element in traditional sex harassment claims, the new guidelines have a significant impact on the other two elements of the plaintiff's prima facie case. Prior to the guidelines, Title VII judicial decisions carry the notion that harassment must be done by a supervisor or another in a position to make sexual advances a "term or condition of employment." For example, in Fisher v. Flynn,7 the court stated: "Plaintiff has not alleged a sufficient nexus between her refusal to accede to the romantic overtures and her termination. She has not alleged that the department chairman had the authority to terminate her employment or effectively recommend the same and we cannot so assume."8

Moreover, the language, "term or condition of employment,"

7. 598 F.2d 663 (1st Cir. 1979).
8. Id. at 665.
presents another problem. Conduct which most civilized people would find offensive and actionable may not give rise to a statutory violation unless it is shown to be a "term or condition of employment." For example, in Bundy v. Jackson,\(^9\) the plaintiff fared well in terms of promotions, moving through the civil service ranks from a GS-4 in 1970 to a GS-9 in 1976. In its findings of fact, the Bundy court noted that two of plaintiff's supervisors had made persistent sexual advances.\(^{10}\) Although the court concluded that "[p]laintiff's allegations with regard to improper sexual advances made to her by other Department employees (recall that both Burton and Gainey were supervisors) are fully proved, . . . [d]efendant did not discriminate in any term or condition of her employment. . . ."\(^11\) In other words, the plaintiff lost her case not because she was unable to prove sexual harassment (since the court found that the incidents occurred), but rather because she failed to show any economic detriment. As discussed below, Bundy, and its reversal on appeal, is an excellent example of the judicial climate before and after the guidelines.

In another pre-guidelines case, the court in Tomkins v. Public Service Electric & Gas Co.,\(^{12}\) stated:

we conclude that Title VII is violated when a superior, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's

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10. Id. at 830-31.
   On numerous occasions, Burton called her into his office on Monday mornings to talk about her activities over the weekend, asking her if she liked horses. When plaintiff responded that she rode horses, Burton claimed that he had heard that women who rode horses had a tendency to need sexual relief and rode them for that purpose . . . Burton repeated on numerous other occasions that he had other sexual literature which was not of the type one could buy in a bookstore and that plaintiff should come to his apartment to see it . . .
   After Gainey became plaintiff's first line supervisor, he made several advances to her. On one occasion he stated to her, "Sandy, I've been after you for the last two years and you refuse all my attempts . . . You have turned me down and I have been wanting to get you to a motel . . . ."
11. Id. at 832. This holding was reversed in a decision that refers to the EEOC guidelines with approval. Bundy v. Jackson, 641 F.2d 934 (D.C.D.C. 1981).
12. 568 F.2d 1044 (3d Cir. 1977).
job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands. . . .

This view has prevailed in numerous other courts arriving at similar conclusions.\textsuperscript{14} The guidelines may change the results.

**EEOC GUIDELINES**

In contrast to the rule articulated in *Tomkins* and *Bundy*, EEOC guidelines expand the protection offered to employees by including harassment caused not only by “agents and supervisory employees,”\textsuperscript{15} but also by “fellow employees”\textsuperscript{16} and in some cases by non-employees.\textsuperscript{17} The “term or condition of employment” requirement is now one of three disjunctive requirements that define sexual harassment actionable under Title VII:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working

\textsuperscript{13} See Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975): “[T]here is nothing in the Act [Title VII] which could reasonably be construed to have it apply to verbal and physical sexual advances by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment.” See also Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978). “[F]requent sexual advances by a supervisor do not form the basis of the Title VII violation that we find to exist. Significantly, termination of the plaintiff’s employment when the advances were rejected is what makes the conduct legally objectionable.”

\textsuperscript{14} 568 F.2d at 1048-49.

\textsuperscript{15} 29 C.F.R. § 1604.11(c).

\textsuperscript{16} Id. at § 1604.11(d).

\textsuperscript{17} Id. at § 1604.11(e).
While the power of the EEOC guidelines is still uncertain, the stated goal—eliminating an "intimidating, hostile, or offensive work environment"—appears a radical departure from case law. The guidelines also eliminate the absolute necessity of showing the harassment was done by a supervisory employee and that it was a "term or condition of employment." Although the guidelines may break with precedent, they are consistent with the oft-stated view that Title VII is meant to be interpreted broadly. Speaking of the breadth of section 703 of Title VII (one basis of the EEOC guidelines), the court in *Rogers v. EEOC* said:

> [It] evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discretionary practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of the day and that seemingly reasonable practices of the present can easily become the injustices of the morrow.

**Elimination of an Intimidating, Hostile, or Offensive Working Environment**

EEOC has gone out of its way to reassure us that the guidelines do not abruptly depart from case law. They stated that "[t]he courts have found sexual harassment both in cases where there is concrete economic detriment to the plaintiff . . . and where unlawful conduct results in creating an unproductive or an offensive working atmo-

18. *Id.* at § 1604.11(a) (emphasis added).
19. As with most guidelines and regulations promulgated in the Title VII area, the court's view of their persuasiveness seems to depend upon whether the guidelines or regulations agree with the result the court wants to reach. *See, e.g.*, Ablemarle Paper Co. v. Moody, 422 U.S. 405, 451 (1975): EEOC guidelines said to be entitled to "great deference." *Compare* Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94 (1973): "deference must have limits where, as here, application of the guidelines would be inconsistent with an obvious congressional intent not to reach the employment practice in question."
20. 454 F.2d 234 (5th Cir. 1971).
21. *Id.* at 238.
sphere." EEOC cited *Kyriarzi v. Western Electric Co.* to support the latter portion of this statement. Yet *Kyriarzi* seems an inappropriate case for EEOC to cite in support of its guidelines. Although the court may have found "an unproductive or offensive working atmosphere," it also found that plaintiff's job performance ratings were suspect, and that plaintiff "did not receive the salary to which she was entitled."  

A later proceeding in *Kyriarzi* more clearly addressed the issue of work environment. There the court stated:

> While it is hardly this Court's role to penalize mere rudeness, when a party's deliberate conduct is so extreme that it intentionally interferes with another's ability to practice a profession or earn a livelihood, the wrongdoer must be punished or deterred. It is clear from the conduct of the individual defendant[s] . . . that they made Kyriarzi's work environment intolerable.

However, this statement must be read in light of the court's finding that Kyriarzi had been denied promotions and raises.

EEOC could also have pointed to dicta in *Tomkins v. Public Service Electric & Gas Co.*, a landmark case on sexual harassment. The court there declined to find that sexual harassment, as prohibited by Title VII, can exist where the harassment is not "a term or condition of employment."

Appellant suggests an alternative theory of liability that, in addition to prohibiting specific discriminatory acts, Title VII mandates that employees be afforded "a work environment free from the psychological harm flowing from an atmosphere of discrimination." Analogizing to EEOC findings of Title VII violations where employees have been subjected to their supervisors' racial epithets and ethnic jokes . . . appellant contends that the sexual advances and subsequent retaliatory harassment to which

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24. *Id.* at 943.
26. *Id.* at 340.
27. *Id.* at 336.
28. 568 F.2d 1044 (3d Cir. 1977).
she was subjected created an environment of debilitating sexual intimida
tion constituting a barrier to her employment opportunities. Because
we hold that the facts as alleged constitute a sex based condition of em-
ployment in violation of Title VII, we need not pass upon this second
theory.\textsuperscript{29}

Although judicial precedent for the guidelines is limited to dicta in
two cases, the guidelines are well justified. In an era when the work
environment is being scrutinized for physically disabling factors, it
should also be scrutinized for psychologically disabling ones. Discrimi-
nation is harmful even in the absence of monetary harm. The \textit{Rogers}
court spoke of the effect of ethnic discrimination on the work
environment:

\begin{quote}
[I]t is my belief that employees' psychological as well as economic
fringes are statutorily entitled to protection from employer abuse, and
that the phrase "terms, conditions, or privileges of employment" in Sec-
tion 703 [of Title VII] is an expansive concept which sweeps within its
protective ambit the practice of creating a working environment charged
with ethnic or racial discrimination.\textsuperscript{30}
\end{quote}

In \textit{Bundy v. Jackson}, the court of appeals held that women can
"sue to prevent sexual harassment without having to prove that . . .
their resistance [to the harassment] caused them to lose tangible job
benefits."\textsuperscript{31} Although the court based its decision on \textit{Rogers},\textsuperscript{32}
it cited with approval the EEOC guidelines in fashioning relief for the plain-
tiff.\textsuperscript{33} Thus the guidelines may be less a radical departure from case
law than an integrated and logical extension of the judicial precedent.

\begin{enumerate}
\item \textit{Id.} at 1046 n.1. \textit{See generally} Annot., 46 A.L.R. Fed 224 (1980). Concern-
ing analogous cases involving other Title VII cases \textit{see}, e.g., Compston v. Borden, Inc.,
424 F. Supp. 157 (S.D. Ohio 1976) [religion and ancestry]; Rogers v. Equal Employ-
ment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971) \textit{cert. denied}, 406 U.S. 961
(1972) [race].
\item 454 F.2d at 238.
\item 641 F.2d at 945.
\item \textit{Id.}
\item \textit{Id.} at 947.
\end{enumerate}
Sexual Harassment and the Employer

An employer may find himself a defendant in a Title VII suit for the acts of his supervisors, acts of his employees, and in some instances the acts of non-employees. "A purely personal, social relationship without discriminatory employment effect" is not prohibited; the guidelines still require a connection between the harassment and the employer before he may be held liable for damages.

Under the guidelines, the employer is strictly liable for sexual harassment done by an agent or supervisor:

Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

The imposition of strict liability for harassment by agents or supervisors is consistent with case law. The court in Miller v. Bank of America held the employer was not immunized by lack of knowledge of the harassment or by company policy against such harassment.

The employer can take steps to limit his liability for sexual harassment done by non-supervisory employees. Prior to promulgation of the guidelines, employers' liability for sexual harassment was generally limited to liability for behavior of supervisory personnel. The guidelines now state:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

35. 29 C.F.R. § 1604.11(c).
36. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).
37. Id. at 213.
38. 29 C.F.R. § 1604.11(d).
For acts between co-employees, the potential for liability on the part of the employer is less than for acts of supervisors. This may be justified, since an employee probably feels he is exposing himself to less risk in complaining about a fellow employee than in complaining about harassment by a supervisor. Thus the employer is potentially better informed, and better able to remedy the situation. It is also important to note the correlation between the expanded liability of the employer and the expanded definition of sexual harassment. Employers would be well advised to handle sexual harassment between co-employees in a prudent manner.39

Additionally, an employer may be liable for harassment of his employees by non-employees. Although obscure on this point, the guidelines suggest that employer liability might extend, for example, to independent contractors. The guidelines state:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.40

To this meager guidance, the "supplementary information" issued with the guidelines merely adds that "[s]uch liability will be determined on a case-by-case basis, taking all facts into consideration."41 Absent a situation where the non-employee is perceived as an employee, subject to normal employee rules, courts may be unlikely to find the employer liable for acts done by such persons.

In the light of the above discussion, the employer should take steps to limit his liability. Although both the courts42 and the guidelines impose strict liability on the employer for sexual harassment by a supervisor, the employer should act promptly to minimize liability in situations

39. See text accompanying notes 43-49 infra.
40. Id. at § 1604.11(e).
42. 600 F.2d 211 (9th Cir. 1979).
involving non-supervisory personnel. The following steps are suggested for employers:

1. Establish and publicize a strong policy against sexual harassment;
2. Establish an internal grievance procedure to handle claims of sexual harassment;
3. Follow up on any information received, or any other reason to believe, that sexual harassment is taking place;
4. Investigate any claims of sexual harassment fully; and
5. If harassment is found, rectify the situation by reprimanding, suspending or dismissing employees who engaged in the sexual harassment.

While not guaranteeing immunity for an employer, these procedures are consistent with the guidelines; and seem to be a prerequisite for avoiding liability for the acts of co-employees and designated non-employees. Such good-faith programs by the employer may even affect the extent of liability for the acts of supervisory employees.

In the “supplementary information” accompanying the guidelines, EEOC noted that many comments were received in response to the Interim Guidelines. These responses voiced concern that the guidelines covering employer procedures for prevention and reporting programs were “not specific enough.” The guideline states in pertinent part:

An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Replying to the comments received, EEOC clarified its position: it did not intend to provide rules, but intended to encourage each employer to develop an “individualized” program. The five points above are indeed merely suggestions; the employer must assess his own inter-

44. 29 C.F.R. § 1604.11(f).
46. 29 C.F.R. § 1604.11(f).
nal bureaucracy in devising procedures to insure that he learns of any sexual harassment at the earliest possible moment and properly resolves any problems quickly. For example, some companies may find it desirable to have rules about socializing between supervisory and non-supervisory personnel. While the EEOC does not attempt to prevent purely social relationships, a particular employer may choose to do so.

Alternatively, it may be prudent for the employer to adapt existing company rules governing other personnel policies, which have proven effective, to handle allegations of sexual harassment. This course of action may better protect the rights of the accused supervisor/employee/non-employee. Since not all claims of sexual harassment are well founded, the reputation of the accused must be reasonably protected. An existing, effective complaint-and-hearing system may already protect the rights of all the parties in that workplace.

The guidelines fail to instruct the employer on disciplining the offending employee beyond suggesting the development of “appropriate sanctions.” As a practical matter, the guidelines may make firing the guilty employee the only “safe” remedy, even though circumstances could otherwise dictate demotion or suspension. Take, for example, the situation where a supervisor is engaged in sexual harassment. If he is demoted to a non-supervisory function, the harassment may continue; and the employer may still be liable under the guidelines. The employer’s failure to fire the offender initially may be construed as a failure to express strong disapproval of sexual harassment. Again EEOC suggested a case-by-case analysis. The appellate court in Bundy suggested an injunction requiring the employer to use warnings and other “appropriate discipline.” It thus appears that the normal array of disciplinary actions, even mere warnings, remains available to the employer, as long as “appropriate.”

There is, however, a great deal to be said for severe punishment of a person guilty of sexual harassment; such conduct has been condoned for too long. As in racial discrimination, strong action may be necessary to achieve results. The 1970’s were to sexual harassment what the 1950’s were to racial discrimination. In the long road ahead, some firings may be necessary to insure progress.

48. 29 C.F.R. § 1604.11(f).
49. 641 F.2d at 947.
The EEOC final guidelines contain a section not found in the interim guidelines; it deals with sexual favoritism. In part it states:

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.\(^50\)

If there is a section in the guidelines that stands noble in theory but becomes only empty words in application, this is it. EEOC suggested the potential of the section in its "supplemental information;" even though the Commission does not consider this to be an issue of sexual harassment in the strict sense, the Commission does recognize it as a related issue which would be governed by general Title VII principles.\(^51\) But consider the problems of proof. How does one prove that an employee's advancement was the result of sexual favors if both the supervisor and the promoted employee say otherwise? Unlike most harassment claims where the parties to the sexual conduct are adversaries, here they are co-defendants, not in an adversary position to each other. The courts may find that cases decided on such potentially unreliable evidence may make the cure worse than the disease.\(^52\)

Sexual harassment is prevalent in the workplace. All one has to do is read the newspaper or talk to those involved in personnel disputes to discover the magnitude of the problem. If the guidelines function effectively, what results can we expect in the workplace atmosphere? It will be many years before we can judge their full effect. But if they merely increase public awareness of the problem, they will have a positive effect.

There are those who will argue that what the guidelines define as sexual harassment is not "harassment" but rather part of human nature—part of the interpersonal relationships that are bound to occur in a workplace environment. In *Corne v. Bausch & Lomb, Inc.*\(^53\) for example, the court said that even assuming the allegations of verbal and

\(^{50}\) Id. at § 1604.11(g).


\(^{52}\) Id. at 25,024.

physical sexual advances by another employee were true, absent a showing that the employer somehow benefitted from such harassment, employer liability would not be found.\textsuperscript{54}

It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act [Title VII] because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances towards another. The only sure way an employer could avoid such charges would be to have employees who were asexual.\textsuperscript{55}

Such views will not be changed easily. Some employers will view the guidelines as yet another federal intrusion into their lives. The weight courts give the guidelines is the most important factor in predicting their long-term effects. Empirical evaluations of changes in the workplace atmosphere will eventually yield answers to our questions.

\textbf{Beyond the Guidelines}

As expected, definitions of "sexual harassment" vary widely in state laws. Wisconsin, for example, has a very narrow definition,\textsuperscript{56} which in the words of one commentator "only reaches the most flagrant types of sexual harassment."\textsuperscript{57} He also noted that California has gone a bit further and that Washington "has thrown by far the broadest net."\textsuperscript{58}

The EEOC guidelines will probably serve as a starting point for state legislatures and administrative agencies attempting to curb sexual harassment. For example, during the 1980 Florida legislative session, Rep. Helen Gordon Davis (D-Tampa) introduced a bill which, after

\textsuperscript{54} Id. at 162-63.
\textsuperscript{55} Id. at 163-64.
\textsuperscript{56} Wis. Stat. Ann. § 111.32(5)(g)4 (West 1980) which reads: "For any employer, labor organization, licensing agency or person to make hiring, employment, admission, licensure, compensation, promotion or job assignments contingent upon a person's consent to sexual contact or sexual intercourse as defined in s. 940.225(5)."
\textsuperscript{57} Nat'L L.J., Apr. 21, 1980, at 6, col. 1.
\textsuperscript{58} Id.
committee substitutions, tracked the approach and language of the interim EEOC guidelines. The bill passed in the Florida House of Representatives, but died when the Florida Senate Commerce Committee refused to hear it. The 1981 legislative session also concluded without progress in this matter.

While a statutory amendment to include sexual harassment within the meaning of “discrimination on the basis of sex” now found in Florida Statutes Ch. 23, part IX, is a preferable solution, it is not the only solution. A Florida court could find the broad approach taken by EEOC controlling in a case before it. Even with no amendments to Title VII, and before the EEOC guidelines, actions against sexual harassment brought in federal court were successful. The problem with waiting for state courts to deal with sexual harassment, rather than pressing for a legislative solution, is that they might be reluctant to follow the EEOC guidelines that vary from prior federal decisions.

Should Florida adopt the language and approach taken by EEOC? The answer would seem to be yes, unless Florida can improve on EEOC’s language or approach. Perhaps more thought should be given to the section concerning “sexual favoritism.” This section is weakly worded, but may be acceptable if given the proper gloss by the courts. As there are no other glaring deficiencies in the guidelines, they make an acceptable model; there is no point in reinventing the wheel. If federal courts speak to the guidelines before state legislators consider the language, those rulings could also be taken into account.

CONCLUSION

The Occupational Safety and Health Administration and the Environmental Protection Agency do not have a monopoly on improving the “atmosphere” in the workplace. With its guidelines on sexual harassment, EEOC takes a large step toward making us aware that sexual harassment is a serious and persistent problem. Although courts had been reluctant to find actionable harassment absent some monetary or similar detriment to the plaintiff, EEOC recognizes that harassment

59. FLA. H.B. 331 (1980); FLA. C.S./H.B. 331, S.B. 332 (1980) (was to be codified in FLA. STAT. §§ 23.162(9) and (10).
60. See, e.g., Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).
61. 29 C.F.R. § 1604.11(g).
victims suffer other less tangible damages. The *Bundy* court has seen fit to view sexual harassment as comparable to racial harassment, damaging even in the absence of monetary loss. That court pointed to the guidelines with approval. One can hope this is the trend for the future.
Limiting Contributions to Referendum Political Committees: Taking Out the First Amendment Slide Rule and Going Back to the Supreme Court's Drawing Board

Cheryl Ryon Eisen*

In response to the revelation of various election abuses during the Watergate investigations, many state and local legislative bodies, as well as Congress, began increasing restrictions on election campaign financing. Among the most controversial regulations are those limiting the dollar amounts of contributions by individual citizens to a single political committee in a referendum campaign. Two recent decisions testing the validity of such laws under the first amendment, one by the Fifth Circuit Court of Appeal in *Let's Help Florida v. McCrary,* and another by the Supreme Court of California in *Citizens Against Rent Control v. City of Berkeley,* make it apparent that the United States Supreme Court must review, clarify, and extend the law it developed in the 1970s in response to first amendment challenges to campaign contribution and expenditure limitations, especially in *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti.*


1. For an historical overview of the development of federal election campaign finance investigation and regulation, including examples of abuses revealed during the Watergate investigations, see *Buckley v. Valeo,* 519 F.2d 821, 835-40 (D.C. Cir. 1975).
2. 621 F.2d 195 (5th Cir. 1980), appeal docketed, No. 80-970 (U.S. Dec. 8, 1980).
3. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), appeal docketed, No. 80-737 (U.S. Nov. 5, 1980).
4. 424 U.S. 1 (1976) (upholding against first amendment attack the Federal Election Campaign Act's limitation on contributions to candidates for federal office, but invalidating restrictions on expenditures by or on behalf of candidates).
5. 435 U.S. 765 (1978) (overturning a Massachusetts statute insofar as it prohibited corporations from making any contribution or expenditure to influence the vote.
THE RECENT CASES

Let's Help Florida v. McCrary

This case was one of several arising out of a 1978 initiative campaign for a state constitutional amendment to allow casino gambling in a defined area of South Florida. Let's Help Florida, a political committee, challenged a Florida statute which imposed a $3,000 limitation on persons making contributions to a political committee supporting or opposing a statewide referendum issue. The district court declared the statute unconstitutional. On appeal to the Fifth Circuit Court of Appeal, the case was consolidated with Dade Voters for a Free Choice v. Firestone, wherein a Florida law placing a $1,000 ceiling on contributions to political committees organized in connection with countywide referendum elections was found invalid.

After disposing of several issues of federal jurisdiction and review, the court addressed appellants' substantive arguments: that the statutes should be upheld as (1) aiding in the prevention of political corruption and (2) promoting disclosure about who are the supporters of referendum campaigns. Responding to the anti-corruption argument, the court determined that

[t]he state's interest in preventing the actual or apparent corruption of

on referendum measures).

7. FLA. STAT. § 106.08(1)(d) (1977). This provision was part of a comprehensive election code enacted by the Florida Legislature in 1977 to become effective January 1, 1978. The code did not restrict the number of contributions one could make to different political committees or the total amount of one's independent direct expenditures. FLA. STAT. § 106.011(5) (1977).
9. No. 79-770 (N.D. Fla. Mar. 13, 1979). Dade Voters for a Free Choice was a political committee formed to oppose the passage of a county ordinance which would prohibit smoking in public places.
11. The court rejected the contentions of the appellants in Dade Voters that the district court (1) lacked jurisdiction because no case or controversy existed; (2) should have abstained from hearing the case under the Younger abstention doctrine; and (3) should not have granted injunctive relief. 621 F.2d at 198-99.
Limiting Contributions to Political Committees

candidates, which the Supreme Court found so compelling in Buckley [v. Valeo12], does not justify restrictions upon political contributions in referendum elections. . . . Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment.13

The court also noted that the Supreme Court in First National Bank of Boston v. Bellotti14 had distinguished between candidacy and referendum elections in terms of risk of corruption, concluding that the risk “simply is not present”15 in the referendum context. Similarly, the court rejected appellant’s argument that the contribution limitations promoted disclosure, although it recognized that disclosing campaign contributions serves an important state interest.16 The court wrote:

Florida can and does effectively promote the disclosure of large contributions through measures that are less harmful to first amendment rights [than imposing contribution limitations]. For example, . . . the Florida Election Code [requires] political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public . . . .17

In short, because the contribution limitations added nothing new to the existing disclosure laws to make them more effective, they could not be defended as disclosure measures. Since the statutes did not serve the purpose of preventing political corruption or of promoting disclosure, the district court’s decisions, invalidating the acts as abridging important first amendment rights, were affirmed by the Fifth Circuit Court of Appeal.

13. 621 F.2d at 199-200 (emphasis supplied).
15. Id. at 790.
16. 621 F.2d at 200.
17. Id. at 200-01.
Citizens Against Rent Control v. City of Berkeley

In this case the Supreme Court of California overturned a California Court of Appeal decision\(^1\) invalidating a Berkeley city ordinance\(^2\) imposing a $250.00 maximum on contributions in support of or in opposition to a ballot measure.\(^3\)

Like the Fifth Circuit Court of Appeal in \emph{Let's Help Florida}, the Supreme Court of California examined the ordinance in light of its proposed effectiveness in preventing corruption and promoting disclosure. Unlike the Fifth Circuit, the California court perceived the Berkeley ordinance as both necessary and effective in achieving those objectives. Viewing the corruption to be guarded against not as the corruption of persons but as the corruption of the initiative and referendum mechanisms, the Court reasoned:

[T]he domination of these processes by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will. . . . When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests.\(^4\)

The court also observed that "the electoral process is . . . corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes the difference."\(^5\) And it accepted the contribution limitations as a means of promoting disclosure: although section 112 of the Berkeley ordinance required the city to publish in newspapers a list of all contributors making donations of more than fifty dollars to candidates or commit-

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\(19.\) Berkeley, Cal., Election Reform Act of 1974, § 602, as cited in 27 Cal. 3d at \_\_, 614 P.2d at 746, 167 Cal. Rptr. at 88.
\(20.\) The term “ballot measure” is synonymous with the term “referendum issue” and is so-used throughout this article.
\(22.\) 27 Cal. 3d at \_\_, 614 P.2d at 747, 167 Cal. Rptr. at 89.
tees at least twice during the last seven days of a campaign, the court was concerned that “the campaign propaganda and the identification [of donors] are not simultaneous: inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed.”

Having embraced the corruption and disclosure arguments to establish a compelling state interest in imposing contribution limitations, the Supreme Court of California rejected the notion that countervailing first amendment freedoms of expression and association were being impermissibly abridged. The court distinguished First National Bank of Boston v. Bellotti which was relied upon by the Fifth Circuit Court of Appeal in Let's Help Florida as establishing a distinction between permissible limitations on contributions to candidates and impermissible ceilings on contributions to referendum campaigns on the basis of potential for corruption. The California court simply noted that “[t]he statute at issue in Bellotti totally prohibited . . . expenditures and contributions; the Berkeley ordinance . . . permits contributions . . . in amounts up to $250.” Thus, the court not only rejected the candidacy/referendum reading of Bellotti in Let's Help Florida but further determined that expression and association were not being completely, and therefore impermissibly, repressed, but merely permissibly regulated in the public interest.

Moreover, the Supreme Court of California found the compelling state interests of preventing corruption and promoting disclosure were served by the Berkeley ordinance in a reasonable manner. The district

23. Id. at __, 614 P.2d at 753, 167 Cal. Rptr. at 95.
24. Id. at __, 614 P.2d at 749, 167 Cal. Rptr. at 91. Though the Florida disclosure statute found by the Fifth Circuit Court of Appeals to be more effective than contributions limitations in Let's Help Fla. (FLA. STAT. §§ 106.03,.07 (1977)) did not require publication of the names of contributors, political committees were required to file contribution and expenditure reports quarterly from the time the campaign treasurer was appointed and, following the last day for qualifying for office, either weekly or bi-weekly depending on the scope of the election in question (statewide vs. non-statewide). Id. § 106.07(1).
25. 27 Cal. 3d at __, 614 P.2d at 748-49, 167 Cal. Rptr. at 90-91.
27. 621 F.2d at 200.
28. 27 Cal. 3d at __, 614 P.2d at 748, 167 Cal. Rptr. at 90.
29. The court rejected the argument that the $250 ceiling was too low: “The
court decision invalidating the measure was reversed, four to three.\(^{30}\)

### THE BACKGROUND: BUCKLEY AND BELLOTTI

The Supreme Court predicate for the *Let's Help Florida* and *Berkeley* decisions provides no ready answer as to which court, the Fifth Circuit Court of Appeal or the Supreme Court of California, has decided correctly the validity of limitations on contributions to referendum political committees. A brief review of *Buckley v. Valeo*\(^{31}\) and *First National Bank of Boston v. Bellotti*,\(^{32}\) relied upon by both courts in reaching their opposite conclusions, will show the complexity of the issue and the potential for confusion and conflict created by the Supreme Court in those decisions.

**Buckley v. Valeo**

The Supreme Court opinion in this 1976 case has since been the point of departure for analysis of the validity of a variety of federal, state, and local campaign finance regulations. At issue in *Buckley* were provisions of the Federal Election Campaign Act of 1971,\(^{33}\) limiting (1) contributions by individuals or groups to candidates for federal elective office\(^{34}\) and contributions to any such candidates by political committees\(^{35}\) and (2) expenditures by individuals or groups advocating the election or defeat of such candidates\(^{36}\) as well as expenditures by the major proportion of CARC's [Citizens Against Rent Control] funds came in amounts under the ceiling; moreover, the few contributions that were larger were considerably above the ceiling and hence would not have been aided by a modest upward adjustment.” *Id.* at _, 614 P.2d at 749, 167 Cal. Rptr. at 91.

30. Justice Richardson wrote a cogent and convincing dissenting opinion, *Id.* at _, 614 P.2d at 750-55, 167 Cal. Rptr. at 92-97, with which Justices Clark and Manuel concurred.


Limiting Contributions to Political Committees

candidates themselves\textsuperscript{37} and their own campaign organizations.\textsuperscript{38} The reporting and disclosure requirements of the Act\textsuperscript{39} were also contested.\textsuperscript{40}

The Court held that the \textit{contribution} limitations at issue were not unconstitutional but were supported by substantial governmental interests in limiting corruption and the appearance of corruption in federal elections.\textsuperscript{41} As to the \textit{expenditure} limitations, the Court found these unconstitutional as impermissible burdens on the right of free expression under the first amendment which could not be sustained on the basis of governmental interests in preventing the actuality or appearance of corruption or in equalizing the resources of candidates.\textsuperscript{42}

Thus, a cursory reading of \textit{Buckley} would dictate acceptance of the Supreme Court of California's view in \textit{Berkeley} that the city ordinance was not invalid because it was a contribution limitation, not an expenditure limitation, and contribution limitations prevent corruption. But an examination of \textit{First National Bank of Boston v. Bellotti} leads

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39. 2 U.S.C. §§ 431 et seq. (1970 & Supp. IV 1974) (requiring political committees to report to the Federal Election Commission the names of persons contributing more than $10, with the names of those contributing more than $100 in a calendar year being subject to public inspection) and 2 U.S.C. § 434(e) (1970 & Supp. IV. 1974) (requiring every person or group other than a political committee or candidate who makes political contributions or expenditures exceeding $100 in a calendar year, other than by contribution to a political committee or candidate, to file a statement with the Federal Election Commission).
40. Two other principal holdings in \textit{Buckley} are not relevant here: (1) that the provisions of the Internal Revenue Code for public financing of presidential election campaigns were not unconstitutional as being contrary to the art. I, sec. 8 general welfare clause or the first or fifth amendments or as invidiously discriminating against minority parties or their candidates or candidates not running in party primaries, 424 U.S. at 85-109; (2) that the principle of separation of powers contained in the art. I, sec. 1 appointments clause was violated by the method of appointment of the members of the Federal Election Commission considering its rule making, adjudicatory and enforcement powers (though de facto validity would be given to the Commission's past acts), 424 U.S. at 109-143.
41. \textit{Id.} at 58.
42. \textit{Id.} at 58-59. The Court also decided that the reporting and disclosure requirements were valid. \textit{Id.} at 84.
to the conclusion that a less superficial analysis of *Buckley* will be required to resolve the question of the validity of limitations on contributions to political committees in *referendum* campaigns.

**First National Bank of Boston v. Bellotti**

Although *Let's Help Florida* and *Berkeley* were, like *Buckley*, contribution cases, *Bellotti* was a 1978 expenditure case. Unlike *Buckley*, *Bellotti* was a *referendum* case, not a *candidacy* case. The Massachusetts statute at issue prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."43 The law further provided that "[n]o question submitted to the voters solely concerning the taxation of the income . . . of individuals shall be deemed materially to affect the property, business or assets of the corporation."44 The appellants, two national banks and three business corporations, wanted to *spend* money to publicize their opposition to a proposed state constitutional amendment to allow the legislature to impose a personal income tax.

Although the Massachusetts Supreme Judicial Court had concerned itself principally with the question of whether and to what extent corporations have first amendment rights,45 the Supreme Court took a less subjective approach:

We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vin-


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The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights . . . . Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. 46

The Court was quick to determine that "[t]he speech proposed by appellants is at the heart of the First Amendment's protection" 47 and "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech." 48

The state advanced as one of its principal justifications for the prohibition of corporate speech in the referendum context "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." 49 Pointing out that the state could prevail with this argument only upon showing it to represent a compelling sub-ordinating interest in regulating protected speech in pursuit of which a method "closely drawn to avoid unnecessary abridgement" of the right to engage in that speech had been used, 50 the Court noted that the State's assertion that there is danger in allowing corporate participation in the discussion of a referendum issue rested upon the unsupported assumption that "such participation would exert an undue influence on the outcome of a referendum vote and—in the end—destroy the confidence of the people in the democratic process and the integrity of government." 51 The Court concluded:

46. 435 U.S. at 776.
47. Id.
48. Id. at 777.
49. Id. at 787. The state also asserted a compelling interest in protecting the rights of corporate shareholders whose views were different from those expressed by the management on behalf of the corporation. The Court concluded that "[a]ssuming, arguendo, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking" considering the overinclusiveness and underinclusiveness of the statute. Id. at 795 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960)).
51. 435 U.S. at 789.
If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . ., these arguments would merit our consideration. . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote . . . . But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing. . . ." We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." Buckley, supra, at 48-49. Moreover, the people . . . are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider . . . the source and credibility of the advocate.52

Thus, the Court relied not so much on the fact that an expenditure was at issue but rather emphasized that it was a referendum and not a candidacy election, that was at stake. This was certainly the Fifth Circuit's reading of Bellotti in Let's Help Florida.

SYNTHESIS: BUCKLEY, BELLOTTI, LET'S HELP FLORIDA, BERKELEY

The principal cases indicate that the questions which must be answered in determining the validity of limitations on contributions to political committees supporting or opposing ballot measures are these:

(1) For the purpose of first amendment protection, is a contribution to a referendum political committee political expression or merely a manifestation of political association?

(2) What state interests, if any, are sufficiently compelling to with-

52. Id. at 789-92 (citations and footnotes omitted).
stand the Supreme Court's strict scrutiny of laws infringing on first amendment rights by imposing ceilings on contributions to referendum political committees?

(3) Assuming a compelling state interest in monitoring referendum campaigns, are limitations on contributions to political committees the most effective and least restrictive means of serving such an interest?

1. Is a Contribution to a Referendum Political Committee "Political Expression" or "Political Association?"

Both political expression and political association are forms of "speech" protected by the first amendment. But what the Supreme Court in *Buckley* saw as the symbolic nature of a campaign contribution, as opposed to a direct expenditure of money to express one's views (for example, purchasing newspaper space for a political advertisement), seems somehow to diminish the "political expression" aspect of such contributions. That is not to say that "the dependence of a communication on the expenditure of money operates itself to introduce

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53. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The first amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 . . . (1957). . . . "[T]here is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs . . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966).


54. The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "'freedom to associate with others for the common advancement of political beliefs and ideas,' . . . . *Kusper v. Pontikes*, 414 U.S. 51, 56, 57 (1973), *quoted in Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

*Id.* at 15.

55. *Id.* at 21.
a nonspeech element or to reduce the exacting scrutiny required by the
First Amendment,"56 but

[a] limitation on the amount of money a person may give to a candidate or
campaign organization . . . involves little direct restraint on his politi-
cal communication, for it permits the symbolic expression of support evi-
denced by a contribution but does not in any way infringe [upon] the
contributor's freedom to discuss candidates and issues.57

Thus, according to Buckley, contribution "speech" partakes more of
freedom of association than of freedom of expression in first amend-
ment analysis: "the primary First Amendment problem raised by . . .
contribution limitations is their restriction of one aspect of the contrib-
utor's freedom of political association."58 And though measures cur-
tailing the freedom to associate demand the closest scrutiny,60 "[e]ven
a 'significant interference' with protected rights of political associ-
ation" may be sustained if the State demonstrates a sufficiently impor-
tant interest . . . .59

It is difficult to resist the conclusion that although both political
expression and political association are fundamental rights, contribu-
tions to referendum political committees will fare better for the purpose
of first amendment protection if such contributions are seen primarily
as a non-symbolic form of political expression. Indeed, in Buckley limi-
tations on symbolic, associational campaign contributions were sus-
tained but limitations on campaign expenditures, described as "limita-
tions on core First Amendment rights of political expression,"61 were
declared invalid.

Should contributions to referendum political committees be char-
acterized primarily as political expression for first amendment pur-
poses? In a recent Ninth Circuit Court of Appeal case, California

56. Id. at 16.
57. Id. at 21.
58. Id. at 24-25.
60. 424 U.S. at 25 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975),
N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963), and Shelton v. Tucker, 364 U.S. 479,
488 (1960)).
61. 424 U.S. at 44-45.
Medical Association v. Federal Election Commission,62 (hereinafter CMA) Judge Wallace, dissenting, found contributions to multi-candidate political committees more analagous to campaign expenditures (expression) than to campaign contributions (association)63 for reasons which are analytically applicable in the referendum political committee context. At issue in CMA was the constitutionality of limits on contributions to political action committees64 under the Federal Election Campaign Act as amended in 1976.65 After the Supreme Court upheld the Act's $1,000 limitation on individual's contributions to candidates for federal office in Buckley, Congress, "as a matter of legislative grace, . . . opened a wider avenue by which individuals could channel funds to candidates: any person, including both natural persons and various kinds of organizations, could contribute up to $5,000 to multi-candidate political committees which in turn could contribute up to $5,000 to each candidate."66 In CMA, CALPAC was a multi-candidate political committee affiliated with the California Medical Association.

Comparing the expression and association interests affected by the contribution limitations sustained in Buckley with those affected by the Act's limitation on contributions to political committees, Judge Wallace found the latter to be "more substantial":67

In Buckley the contribution limitations governed contributions from a supporter to a candidate. The communication inhering in such contribu-

63. No. 79-4426, slip op. at 3405.
64. The phrase "political action committee" may be of indeterminate origin, but it appears to have gained currency by 1944 when it was used as a term of art by the Congressional Special Committees to Investigate Campaign Expenditures, H.R. Rep. No. 2093, 78th Cong., 2d Sess. (1944); S. Rep. No. 101, 79th Cong., 1st Sess. (1945). It now has a meaning fixed by federal law. 2 U.S.C. § 441a(a)(4) (1976).
66. No. 79-4426, slip op. at 3375 (footnote omitted).
67. Id. at 3404.
tions is simply that the contributor "supports" the candidate and his views. The Court found that this "symbolic expression of support"... is adequately communicated by the act of contribution: the contribution's size is of "marginal" importance.

In contrast, . . . [t]he object of an unincorporated association's donations to a political committee is not merely to indicate "support" for the committee's views, but to use the instrument of a political action committee to voice its own ideas. Whereas in Buckley [where the contributions were to the candidates themselves] "the transformation of contributions into political debate [involved] speech by someone other than the contributor," . . . here this transformation is accomplished by the committee donors themselves, through a committee which, in large or small measure, they control. 68

Judge Wallace went on to point out that a limitation on donations to political committees ultimately affects not only the total funds available for contributions to candidates, but also the amount available for direct expenditure by the committee: 69

It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the . . . donation restriction to the contribution limitations upheld in Buckley. [The Act] imposes [quoting Buckley] "direct and substantial restraints on the quantity" of . . . "political speech." . . . The individual speech interests are therefore comparable to those affected by the expenditure limitations invalidated in Buckley. 70

It may be argued here that the "limitation on funds available for expenditure" rationale should be de-emphasized because, since Buckley, campaign contributors remain free to make their own direct expenditures in any amount they choose. However, freedom of association is implicated here:

Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political marketplace with other more affluent "persons" capable of huge personal expenditures. . . . [This] restriction . . .

68. Id. (citation omitted).
69. Id.
70. Id. at 3404-05 (footnote and citation omitted).
goes to the heart of the associational right.\textsuperscript{71}

Whatever criticisms or distinctions can be raised in opposition to Judge Wallace's dissenting opinion in \textit{CMA} considering the potential for corruption in the candidacy context,\textsuperscript{72} the opinion is well-tailored to make the point that contributions by individuals to \textit{referendum} political committees should be treated as direct expenditures, as pure speech political expression, for first amendment purposes. Paraphrasing Judge Wright,\textsuperscript{73} the object of an individual citizen's donation to a political committee is not merely to indicate support for or opposition to the committee's views on a ballot measure, but to use the political committee to voice his or her own ideas. Although an individual contributor does not have complete control over the precise "speech" which will emanate from the political committee regarding the ballot measure in question, the issue to be spoken to is clearly established in advance of the donation, as well as the position being supported by the committee, positive or negative. Although such contributors are clearly free to \textit{directly expend} as much money as they are willing and able in favor of or in opposition to a referendum issue, again paraphrasing Judge Wallace,\textsuperscript{74} only in conjunction with other donors will some citizens be able to aggregate sufficient funds to compete effectively in the political mar-

\textsuperscript{71} \textit{Id.} at 3405.

\textsuperscript{72} The 1976 amendments gave political action committees great and unusual powers in comparison to either candidates or individuals: Political action committees are unlimited in the total amounts of money they receive, expend, and contribute to candidates. To vest such extraordinary power in political action committees, without some reasonable limits such as section 441a(a)(1)(C) on how they can collect money, would be to create novel and potentially enormous opportunities for corruption. As one study has concluded, even as limited by section 441a(a)(1)(C), political action committees have become vast, unaccountable, and low visibility centers of electoral influence that effectively detach candidates from their nominal geographic constituencies. \textit{See} Institute of Politics, John F. Kennedy School of Government, Harvard University, \textit{An Analysis of the Impact of the Federal Election Campaign Act, 1972-78}, Prepared for the House Comm. on House Admin., 96th Cong., 1st Sess. 4-5 (Comm. Print 1979) . . . .

\textsuperscript{73} \textit{Id.} at 3377.

\textsuperscript{74} \textit{Id.} at 3405.
ketplace with other more affluent individuals capable of huge personal expenditures. Considering the nature of the election at stake (ballot measure versus candidacy), the referendum political committee will not itself be making contributions, only expenditures to publicize its support or opposition to a concept, not a potentially corruptible candidate. Thus, the referendum political committee serves as a mechanism for effectively pooling expenditure capital for the purpose of first amendment protected political expression.

Recognizing a first amendment right to make unlimited contributions to referendum political committees also serves an important public interest: the public’s right to hear. In Bellotti, the Supreme Court emphasized that it was the nature of the speech proposed that commanded first amendment protection:75 "The Court has declared . . . that ‘speech concerning public affairs is more than self-expression; it is the essence of self-government.’ . . . And self-government suffers when those in power suppress competing views on public issues ‘from diverse and antagonistic sources.’ . . . "76 The Court also noted that "freedom of expression has particular significance with respect to government because ‘[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.’ . . . "77 Surely political communication regarding an issue of such governmental importance as to be the subject of a referendum goes to the "essence of self-government" such that financial limitations on such expression would be in obvious violation of the fundamental purpose for which the first amendment was historically intended.78

2. What State Interests Are "Compelling"?

The Supreme Court has consistently recognized two state interests as sufficiently compelling to allow regulation of political contributions and expenditures: preservation of (1) the integrity of the representative

75. See 435 U.S. at 776-77.
76. Id. at 777 n.12 (citations omitted).
77. Id. n.11.
78. For a discussion of the historical relationship between the first amendment and the public discussion of governmental affairs, see T. Emerson, Toward a General Theory of the First Amendment (1966) and A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948) (both cited in Bellotti, 435 U.S. at 777 n.11).
system of government and (2) the public's confidence in that system of
government. These interests have been expressed in various ways
("prevention of corruption and the appearance of corruption," "pres-
ervation of] the integrity of the electoral process," "sustaining] the
active, alert responsibility of the individual citizen in a democracy for
the wise conduct of government"), but the underlying principles re-
main the same. Of course, a mere assertion of these interests is insuf-
cient if not inherently persuasive or supported by record or legislative
findings, or by Supreme Court precedents.

79. See Buckley, 424 U.S. at 26-27.
80. Id. at 25.
82. Id. at 788-89 (citing United States v. Automobile Workers, 352 U.S. 567,
575 (1957)).
83. See Bellotti as quoted in text accompanying note 52 supra.

In Buckley, the Supreme Court relied on legislative findings to constitutionally
support the Federal Election Campaign Act's $1,000 limitation on contributions to
candidates:

To the extent that large contributions are given to secure political quid pro quo
from current and potential office holders, the integrity of our system of representa-
dive democracy is undermined. Although the scope of such pernicious practices
can never be reliably ascertained, the deeply disturbing examples surfacing after
the 1972 election [in the Watergate investigations] demonstrate that the problem
is not an illusory one.

424 U.S. at 26-27 (footnote omitted). See also note 1, supra.

In striking down the Act's $1,000 limitation on independent expenditures in sup-
port of a candidate, the Court made no reference to any record or legislative findings or
Supreme Court precedents supporting the limitation and apparently found arguments
advanced by the Act's proponents inherently unpersuasive:

The parties defending §608(e)(1) [limiting expenditures] contend that it is nec-
essary to prevent would-be contributors from avoiding the contribution limita-
tions by the simple expedient of paying directly for media advertisements or for
other portions of the candidate's campaign activities. They argue that expendi-
tures controlled by or coordinated with the candidate and his campaign might
well have virtually the same value to the candidate as a contribution and would
pose similar dangers of abuse. Yet such controlled or coordinated expenditures
are treated as contributions rather than expenditures under the Act. Section
608(b)'s contribution ceilings rather than §608(e)(1)'s independent expenditure
limitation prevent . . . [such] disguised contributions. . . . Unlike contributions,
such independent expenditures may well provide little assistance to the candi-
date's campaign and indeed may prove counterproductive. The absence of prear-
rangement and coordination of an expenditure with the candidate . . . not only
Is there any basis for finding a compelling state interest in limiting contributions in the referendum political committee context which would justify infringement on contributors' first amendment rights of political expression and association? In both *Let's Help Florida* and *Berkeley*, the proponents of the regulations limiting such contributions stressed their importance in preventing corruption and promoting disclosure of the identity of campaign contributors, two variations on the integrity of the system/public confidence theme. Although the Fifth Circuit Court of Appeal in *Let's Help Florida* followed *Bellotti* in concluding that, with regard to referendum elections, statutory restrictions upon political contributions cannot be justified as a means for preventing political corruption because there are no candidates to be corrupted, the Supreme Court of California in *Berkeley* merged the integrity of the system/public confidence interests to define the corruption to be guarded against as the corruption of the purpose of the initiative/referendum mechanism itself and the electoral process in general. The California court relied heavily on "[c]ommentators on our political scene" to find a trend toward loss of confidence in the political system and apathy in elections which limitations on contributions to referendum political committees might reverse by "assuring the voters that their vote and their participation, whether in the form of money or services, are significant" and concluded that this interest, served by the ordinance, should be recognized as compelling.

undermines the value of the expenditures to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. 424 U.S. at 46-47 (footnote omitted).

Likewise, in *Bellotti*, the Court found that the state's assertion that there is danger in allowing corporate participation in the discussion of a referendum issue rested upon the unsupported assumption that "such participation would exert an undue influence on the outcome of a referendum vote and,—in the end—destroy the confidence of the people in the democratic process and the integrity of government." 435 U.S. at 789.

84. See text accompanying notes 11-15 supra.
85. See text accompanying notes 21-22 supra.
86. 621 F.2d at 199-200.
87. 27 Cal. 3d at __, 614 P.2d at 746, 167 Cal. Rptr. at 88.
88. *Id.* at __, 614 P.2d at 747, 167 Cal. Rptr. at 89.
89. *Id.* at __, 614 P.2d at 747-48, 167 Cal. Rptr. at 89-90.
90. *Id.* at __, 614 P.2d at 748, 167 Cal. Rptr. at 90.
Will the United States Supreme Court agree? *Bellotti* ("[t]he risk of corruption perceived in candidate elections . . . simply is not present in a popular vote on a public issue") indicates a negative answer, notwithstanding the distinction drawn between the statute in *Bellotti* and the ordinance in *Berkeley* by the California court: "[t]he statute at issue in *Bellotti* totally prohibited . . . expenditures and contributions; the Berkeley ordinance . . . permits contributions . . . in amounts up to $250." This distinction does not take into account the fact that the provisions of the Federal Election Campaign Act found unconstitutional in *Buckley* were financial *limitations*, not *prohibitions*. Thus, particularly if the previously advanced principle is accepted—that contributions to referendum political committees, like *Bellotti’s* referendum expenditures, are pure speech political expression which cannot be dollar-limited according to *Buckley*—the *Berkeley* explanation of *Bellotti* creates a distinction without a difference under the first amendment.

Even assuming that restoring public confidence in the political system and stemming voter apathy are compelling anti-corruption interests, "[i]t is noteworthy that it [was] not the fact of a danger but the potential of a danger that alone generates the compelling interest found by the majority [in *Berkeley*]." Thus, Justice Richardson, dissenting, criticized the *Berkeley* majority for basing its finding of a compelling state interest on a "wholly untested political hypothesis [which was] not based upon any record but rather upon the opinions and conclusions of ‘commentators on our political scene,’ ‘a political scientist,’ [and] a ‘student of the California initiative process.’" Justice Richardson continued:

The rationale for the ordinance’s restrictions, viewed as sufficient by the majority, is the danger of “corruption” of the initiative process through this infusion of unlimited sums of money by “large contributors” . . . favoring or opposing a ballot measure. This, the majority argues, will destroy the electorate’s “confidence in our political system.” . . . In the absence, however, of some affirmative showing “by record or legisla-

91. 435 U.S. at 790 (citations omitted).
92. 27 Cal. 3d at __, 614 P.2d at 748, 167 Cal. Rptr. at 90.
93. Id. at __, 614 P.2d at 751, 167 Cal. Rptr. at 93 (emphasis in original).
94. Id.
tive finding” this precise reasoning, central to the majority opinion, was flatly rejected, as to corporate contributors, by the *Bellotti* court... in these words: “[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government.” Similarly, there has been “no showing” whatever that large contributors, corporate or otherwise, have thwarted or perverted the initiative in California, which at present appears to be alive and well and increasingly used.\(^95\)

Accordingly, even if the California court’s definition of “corruption” in the referendum context gains acceptance, it is possible the Supreme Court will not find that the Berkeley ordinance serves a proven compelling anti-corruption interest.

3. What Form of Regulation is Most Effective and Least Restrictive?

Clearly, one of the most effective means of protecting the political process from the corruption of money is to place ceilings on contributions and expenditures of all kinds. But because of the fundamental first amendment implications of such ceilings, the test for the validity of those measures is not whether they are the most effective means of protecting against corruption but whether they are the least restrictive method of effectively accomplishing that end, “closely drawn to avoid unnecessary abridgment”\(^96\) of first amendment rights.

Accepting the notion that referendum elections do not present the same opportunities for quid pro quo corruption as candidacy elections, and thus limitations on contributions to referendum political committees unnecessarily infringe on first amendment rights, does not preclude some other form of regulation. For example, in *Let’s Help Florida* the Fifth Circuit Court of Appeal recognized Florida’s disclosure laws as effective against corruption of the initiative/referendum process, since they allow the public an opportunity to evaluate the merits of a ballot measure with knowledge of its supporters and opponents.\(^97\) The protection of the electoral system afforded by disclosure measures is not abso-
lute, however. The information made public is just that—information. It is the responsibility of the voter to use this data in conjunction with other information about an issue to make a reasoned decision.

In contrast, the Supreme Court of California regarded the Berkeley disclosure provision as too little, too late, to allow the public reasonable opportunity to use facts made public by disclosure to make rational decisions. 98 Interestingly, the Berkeley ordinance required newspaper publication (twice during the last seven days of a referendum campaign) of contributor information, 99 whereas the Florida law required mainly reporting of financial information to the Secretary of State (which information then became public record).100

Are disclosure laws like those on the books in Florida and Berkeley, California, sufficiently effective against corruption of the referendum process? The answer cannot be objective. In the final analysis it must be tied to the basic political philosophy of those asked to respond. The Fifth Circuit Court of Appeal's attitude toward the Florida disclosure requirement reflects a more conservative view of the relationship between a citizen and his/her government than that held by the Supreme Court of California. Even though the California court may be correct in its observation that "inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed,"101 should one citizen's participation in the political process be sacrificed to another citizen's political naivete? Stated another way, to what lengths should government go to see to it that citizens fully inform themselves before making political decisions? In light of the first amendment implications of limiting contributions to referendum political committees, a more constitutionally acceptable method of improving public awareness would be to rewrite the disclosure laws, a task which the Supreme Court can happily note falls to the legislatures, not the courts.

CONCLUSION

It would be easy to succumb to the symmetry of upholding limita-

98. See 27 Cal. 3d at __, 614 P.2d at 749, 167 Cal. Rptr. at 91.
99. Id. at __, 614 P.2d at 753, 167 Cal. Rptr. at 95.
100. See FLA. STAT. §§ 106.03, .07 (1977).
101. 27 Cal. 3d at __, 614 P.2d at 749, 167 Cal. Rptr. at 91.
tions on political contributions while striking down limitations on political expenditures without regard to the nature of the election at stake (referendum versus candidacy) or, in the case of contributions, the identity of the recipient (political committee versus candidate or candidate's campaign organization). But the stringent demands of the first amendment on those who would seek to balance its protections against state interests do not permit such unsophisticated treatment.

If the Supreme Court overrules the California court on the theory that there is no risk of corruption in the referendum context, the validity of disclosure laws in that setting must be questioned. (If they do not act as anti-corruption measures, what compelling state interest do disclosure laws serve?) If the Court accepts the California court's definition of "corruption" in connection with ballot measures (corruption of the process), the integrity of disclosure laws will be preserved; but if the Court goes the second mile and recognizes contribution limitations as a valid method of avoiding that corruption, a precedent requiring a case-by-case analysis of contribution limitations will be established, necessitating inquiry in each instance as to whether there was a demonstrable threat to the referendum process which required legislative action limiting contributions to political committees.

Recognizing contributions to referendum political committees as pure speech political expression establishes neither the "no risk of corruption" precedent nor the "case-by-case corruption of the process" precedent but does create other problems including the question of the validity of limitations on contributions to candidate political action committees, which the Court may resolve in California Medical Association v. Federal Election Commission,102 and the issue of the validity of limitations on contributions to political committees supporting both candidates and ballot measures. Nonetheless, this appears to be the most desirable judicial approach because it would preserve fundamental first amendment rights while leaving legislative bodies free to impose reasonable disclosure requirements and other protections against abuse of the referendum process.

* * *

Perhaps this discussion demonstrates that the Supreme Court's resolution of the conflict between the first amendment and election

102. See text accompanying notes 62-66 supra.
finance laws can still be only piecemeal at best, notwithstanding the Court’s best efforts in Buckley and Bellotti. Nonetheless, the yearning for one final blueprint still lingers, especially in the souls of advisors to Congressional, state, and local lawmakers.
In re Living Will

Modern medical technology accords physicians the capacity to prolong life and to protract the duration of numerous incurable diseases. However, the ability to sustain life transcends the ability to heal. Lives which once would have expired now endure with organ transplants, respirators, pacemakers, and hemodialysis machines. "Living Wills" have been created by lawyers to assist those who wish to avoid mechanically extending their lives. Medical progress, it seems, sometimes creates unforeseen and undesirable consequences.

People envision the horror of being maintained in an unconscious, non-human limbo in a refrigerated room containing only machines. This state is in stark contradiction to the usual idea of death as a brief, but peaceful end. We envision physicians preparing to dissect an organ for transplant from a body whose brain is dead but whose heart is still beating. We also envision a patient having been attached to a respirator for so long that he has developed "respirator brain" — a condition where the brain becomes softened or liquified — destroying pathological indications of brain injury and preventing a determination of the cause of death. Such horrors exist within hospital walls daily, creating confusion and fear among physicians and hospitals in determining whether to withhold or withdraw life-supporting treatment. Since In re

1. A "living will" is a document, similar to a will, executed by a person during his lifetime setting forth his wishes concerning medical treatment in contemplation of illness or death.
4. See In re Cain, 44 Fla. Supp. 208 (Fla. 4th Cir. Ct. 1976) (the continuation of medical procedures would preclude any possibility of obtaining an effective examination of the deceased woman's brain tissue because such tissue was constantly deteriorating).
Quinlan, the issues of "euthanasia" and "the right to die" have generated controversy in both the medical and legal professions. Reevaluation of the physician's responsibilities to the dying patient has revolved around whether the physician should permit the terminally ill individual to refuse life-supporting treatment or whether he should subsequently withhold or withdraw such treatment. These dilemmas have created a recent flood of interest in the "living will" and in natural death legislation. As a result, many patients questioning the value of prolonging life at the expense of diminishing its quality, are refusing life-supporting treatment, crying "death with dignity."

This right to die by refusing extraordinary treatment has emerged from the recent availability of an alternative to life or death — to be kept "alive" in a limbo state by life-supporting measures. If given the opportunity, a person must be permitted to choose from these alternatives. To many, to die peacefully is a much more attractive alternative than to die with tubes down one's throat and in one's arms. To prolong life at the expense of the loss of bodily functions and intense pain and suffering, absent a hope of cure, does not make the prolongation of life desirable. One such person who shares this belief is the subject of the


7. In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) Twenty-one-year-old Karen Quinlan was diagnosed as being in a permanent vegetative state, having lapsed into a coma after an intake of alcohol and drugs. Her father sought to be appointed as her guardian to authorize the withdrawal of extraordinary treatment enabling her to die naturally. This case was the first to determine what constitutes "extraordinary" treatment. Withdrawal of Karen's respirator was permitted by the court. See Cantor, Quinlan, Privacy, and the Handling of Incompetent Dying Patients, 30 Rutgers L. Rev. 254 (1977); Ladies' Home J., May, 1980, at 90; Trial, September, 1976, at 36; J. Legal Med., May, 1976, at 28.


following hypothetical case.

Our patient is an elderly man residing in Florida, having moved from California two years ago. He exists in a permanent vegetative state,\footnote{This is a state where the individual has no significant cognitive functions, but may be partially responsive. Cognitive functions include the ability to think, feel, see and communicate. Pollick, "Cognitive" and "Sapient" - Which Death is the Real Death? 136 AMER. J. SURGERY 3, 5-6 (1978).} assisted by a mechanical respirator. Usually, this situation would create all the problems involved in recent cases concerning whether to withdraw life-supporting treatment and allow the patient to die. In such cases, the courts have speculated as to whether the patient would have wanted to die. Usually the patient has never contemplated such a problem, as the average person avoids facing the prospect of dying. However, in this case our patient, while a resident of California, executed a directive, otherwise known as a "living will,"\footnote{The task of considering whether the patient would wish to exercise this right is considerably easier where he has expressed his intent not to have his life prolonged beyond a certain point, especially if he made his “living will” in contemplation of illness or death.} stating that he be allowed to die if he becomes terminally ill or is maintained by extraordinary treatment.

More than four million copies of the living will have been distributed in the past twelve years, mostly in response to individual requests.\footnote{6 Concern For Dying Newsletter 2 (Spring 1980). Forms for “The Living Will” can be obtained by writing, Concern For Dying, 250 West 57th Street, New York, New York 10019.} Lawyers, physicians and hospitals have distributed them to their clients and patients. These living wills are available in legal parchment form or as permanent wallet-size cards. Although the living will is a recognized document, included in Modern Legal Forms,\footnote{STONE, MODERN LEGAL FORMS § 10199 (Supp. 1980).} the legality of enforcing a living will has never been tested in court. Nevertheless, it remains as an expression of one’s right to self-determination over his body, relieving the family and physician of all responsibility for the patient’s death.

Our patient’s living will stated that “if the situation should arise in which there is no reasonable expectation of my recovery from extreme physical or mental disability, I direct that I should be allowed to die and not be kept alive by medications, artificial means or heroic mea-
sures.” Further, the document stated that he was of sound mind, that
the document represented his wishes, and that those who carried out
his wishes would be free from any liability. His living will included
additional provisions concerning transplantation of his organs at death,
the names of those persons with whom he had discussed his wishes, and
a statement designating what measures he qualified as extraordinary or
artificial.

California had passed natural death legislation in 1976 which rec-
ognized the right to die in certain situations, but after a decade of
futile attempts, Florida had not yet passed such natural death or right
to die legislation when our client moved here. Aware of this fact, he
reexecuted his living will and distributed copies to his attorney, physi-
cian, clergyman, and family. In addition, he carried a miniature copy of
his living will in his wallet to assure that his wishes would be followed
if he were to be found in an unconscious state, unable to express his
wishes. A copy of his living will follows:

MY LIVING WILL

This is a declaration of my right to die and a directive that my
wishes be carried out.


The Legislature finds that adult persons have the fundamental right to con-
trol the decisions relating to the rendering of their own medical care, including
the decision to have life-sustaining procedures withheld or withdrawn in in-
stances of a terminal condition.

The Legislature further finds that modern medical technology has made
possible the artificial prolongation of human life beyond natural limits.

The Legislature further finds that, in the interest of protecting individual
autonomy, such prolongation of life for persons with a terminal condition may
cause loss of patient dignity, and unnecessary pain and suffering, while providing
nothing medically necessary or beneficial to the patient.

The Legislature further finds that there exists considerable uncertainty in
the medical and legal professions as to the legality of terminating the use or
application of life-sustaining procedures where the patient has voluntarily and in
sound mind evidenced a desire that such procedures be withheld or withdrawn.

In recognition of the dignity and privacy which patients have a right to ex-
pect, the Legislature hereby declares that the laws of the State of California
shall recognize the right of an adult person to make a written directive in-
structing his physician to withhold or withdraw life-sustaining procedures in the
event of a terminal condition.
TO WHOM IT MAY CONCERN

On this 30 day of March, 1979, in the city of Ft. Lauderdale in the county of Broward of the state of Florida, I do hereby make known my wishes that I be allowed to die if I should ever encounter a situation where I, as a result of extreme physical or mental disability or incurable illness from which death will follow, have to be or already am being kept alive by such extraordinary or artificial medical treatment as I have described below, and there is little or no chance of my recovery to a cognitive and sapient life according to all current medical knowledge practiced in this community and two physicians, one being my attending physician. If such extraordinary treatment will only serve to artificially prolong my death and not to preserve my life, I request that such procedures be withheld or withdrawn and that I may be permitted to die naturally.

I do hereby make this expression of my wishes voluntarily, being of sound mind and of majority age. I do hereby declare that my physician, upon carrying out my wishes in good faith, shall be immune from civil or criminal liability and not in violation of §782.08 Florida Statutes. If my physician refuses to act in accordance with my wishes, he should direct my care to another physician who will do so.

Additional Provisions

(1) I have discussed my wishes to have life-supporting treatment withheld or withdrawn with the following who understand these wishes:

Jane Doe (relationship) wife
Richard Doe (relationship) son
May Doe (relationship) sister

(2) I consider the following measures of medical treatment extraordinary or artificial; as such, these measures should not be performed upon me:

- mechanical respirator
- nemedialysis machine
- cardiac pacemaker

(3) If any of my organs would be valuable as transplants to help others, I freely give my consent that they be donated for such use, at the point of my legal and medical death.

(4) This guarantees that if, any time prior to or at the time of my death, I am competent and wish to change or revoke this living will, I will be allowed to do so in writing or orally in the presence of two persons, one being my physician.
(5) My terminal condition is *diffus cerebral and brain stem anoxia resulting from cardio-respiratory arrest*. This must be completed as the only evidence of a terminal condition. Diagnosed this 20 day of January, 1979 by

John Smith M.D.
200 Bay Drive (address)
Oceanview Medical Center (medical center)

(6) This directive shall have no effect after 5 years from this date unless reexecuted, and it will be my responsibility to see that this is done.

(7) *To the Medical Center:* A copy of this directive shall be made part of my medical records at the medical center at which I am subsequently hospitalized and/or administered such extraordinary treatment.

*To the Nursing Home:* If I am under care of a nursing home (per Chap. 400 Florida Statutes) at such time as I am required to reexecute my living will, I shall have the assistance of a patient ombudsman (per §400.307 Florida Statutes) for the purpose of preventing undue influence or fraud.

(8) I guarantee that a qualified attorney has inspected this document and is satisfied that all formal requirements of execution have been met.

Signed: /s/ John Doe

We, as witnesses, to vouch for the sound mind of the signer—that he is emotionally and mentally competent and that these are his true wishes and that he signed voluntarily in our presence today, without any undue influence from any physician or family member. We are not in any way whatsoever related to the signer or in any way whatsoever a beneficiary of any interest of the estate of the signer, or in any way whatsoever financially responsible for or involved with the signer's hospitalization.

Witness Shawn Richards
Witness David Adams

Copies of this document have been distributed to the following:

- **My attorney**
  - Richard Brown, Esquire
  - address: 100 Oceanfront Drive — Ft. Lauderdale, FL

- **My physician**
  - John Smith, M.D.
  - address: 200 Bay Drive — Ft. Lauderdale, FL

- **My clergyman**
  - William Jones
  - address: 800 Seagrape Lane — Ft. Lauderdale, FL

- **My family**
  - Jane Doe
  - address: 100 River Drive — Ft. Lauderdale, FL
Our patient is now in a permanent vegetative state, having lapsed into an irreversible coma following cardio-respiratory arrest. He is being maintained on a respirator. Earlier, his family had agreed to honor his "living will" but now has second thoughts. In addition, his physician now fears criminal liability and refuses to withdraw the extraordinary treatment. Our patient's attorney, who has been an advocate of "right to die" legislation in Florida, presents this case of first impression to the court to determine the legality of this living will.

This case has been predicted in Florida since the recent case of *Satz v. Perlmutter*, wherein the court recognized a patient's right to die. Mr Perlmutter, a competent adult, expressed his wish to discontinue the extraordinary medical treatment which was prolonging his life at the time such treatment was being administered. In contrast Mr. Doe is comatose, incompetent to presently communicate his wishes. Mr. Doe provided for his present situation by previously expressing his wishes in his living will.

Mr. Doe's attorney will attempt to persuade the Florida court to recognize his client's living will and the wishes expressed therein. Since the Supreme Court of Florida arguably recognized a competent patient's right to decide to die, with dignity, expressed in his "contemporaneous living will," the court should recognize this same right to die with dignity expressed in the patient's previously executed "living will." Mr. Doe is incapable of expressing his wishes contemporaneously with his illness since he is comatose. He expressed his right to die at the only time when he personally could exercise this right; he was competent before the onset of this illness. If incompetents and competents are to be treated equally with regard to their constitutional right to privacy, the court must recognize Mr. Doe's wishes in his living will.

15. *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. 4th Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980). The trial court permitted and the Supreme Court upheld the withdrawal of the respirator from Abe Perlmutter, a competent, terminally ill adult who had no minor dependents but had the unanimous approval of his family. *Id. See Note, Death with Dignity and the Terminally Ill: The Need for Legislative Action, 4 NOVA L.J. 257 (1980).

16. 6 Concern For Dying Newsletter 2 (Spring 1980).
DEFINING EXTRAORDINARY TREATMENT

In his living will, our patient refers to heroic or extraordinary measures. What constitutes extraordinary treatment will inevitably affect the outcome of this case. The distinction between extraordinary and ordinary treatment is critical, since judicial decision dictate that a patient is not always free to refuse ordinary treatment when such refusal would affect the patient's death. The court should classify the respirator as extraordinary treatment in conformance with our patient's living will, as it cannot cure his condition but, at best, can only prolong his inevitable death. Therefore, our patient should be free to refuse the treatment.

As medical technology progresses, once extraordinary treatment quickly becomes ordinary treatment. Opposing counsel may argue that we cannot justify withdrawal of the respirator as an extraordinary measure, because it may be considered ordinary tomorrow. This argument is without substance, because the courts and physicians must handle the case at the time when it arises. Arguing hypothetical future advances does not solve the instant problems.

This ordinary-extraordinary dichotomy was a determinative issue in Quinlan, where the New Jersey Supreme Court had to determine whether a respirator was an extraordinary method of treatment. The court stated:

> [W]hile the record here is somewhat hazy in distinguishing between "ordinary" and "extraordinary" measures, one would have to think that the use of the same respirator or like support could be considered "ordi-

17. Ordinary treatment is usually described as treatment that offers a reasonable benefit without excessive pain, expense or inconvenience. Extraordinary treatment is treatment that offers no reasonable benefit and cannot be used without excessive pain, expense or inconvenience. Hirsh & Donovan, supra note 6, at 290.

18. Most cases have involved religious grounds, because patients are almost certain to recover if they accept the treatment. See Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), cert. denied, 331 F.2d 1010 (D.C. Cir. 1964) (the court ordered a blood transfusion against the wishes of the patient—a Jehovah's Witness who had suffered massive blood loss from a ruptured ulcer). See also In re Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); In re Osborne, 294 A.2d 372 (D.C. 1972).

19. 70 N.J. at ——, 355 A.2d at 669. See also Hirsch & Donovan supra note 6, at 290.
nary" in the context of the possibly curable patient but "extraordinary" in the context of the forced sustaining by cardio-respiratory processes of an irreversibly doomed patient.\textsuperscript{20}

In certain situations, such as paralytic poliomyelitis,\textsuperscript{21} even artificial respiration is not an 'extraordinary' means.

The Quinlan court (as well as physicians) lacked guidelines defining extraordinary measures. Unfortunately, it did not set forth any guidelines for use in future situations involving the ordinary versus extraordinary debate.\textsuperscript{22} Until recently this distinction largely had been considered of only medical significance. However, the potentiality for criminal prosecutions mandate formulation of distinct legal guidelines. Some Florida legislators have proposed such guidelines, but none have acquired support.\textsuperscript{23}

The American Medical Association sanctions the "cessation of the employment of extraordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent."\textsuperscript{24} The Vatican issued formal declarations in 1957, wherein Pope Pius XII stressed that no obligation exists to use extraordinary means to prolong life or to give a physician permission to use them.\textsuperscript{25} In July, 1980, Pope

\begin{itemize}
\item 20. \textit{Id.} at 48, 355 A.2d at 667-68.
\item 21. Paralytic poliomyelitis: "an acute viral disease, occurring sporadically and in epidemics, and characterized clinically by fever, sore throat, headaches, vomiting, often with stiffness of the neck and back . . . characterized by . . . paralysis." \textit{Dorland's Medical Dictionary} 1230 (25th ed. 1974). There may be subsequent atrophy of groups of muscles, ending in contraction and permanent deformity. \textit{Id.}
\item 22. 70 N.J. at 48, 355 A.2d at 667-68.
\item 25. It is incumbent upon the physician to take all reasonable, ordinary means of restoring the vital functions and consciousness, and to employ such extraordinary means as are available to him to this end. It is not obligatory, however, to continue to use extraordinary means indefinitely in hopeless cases, but normally one is held to use only ordinary means—according to the circumstances of persons, places, times, and cultures—that is to say, means that do not involve any grave burden for one-
John Paul II approved a flexible new set of guidelines on euthanasia after consultations with medical experts and moral theologians. Relying on the Catholic teaching that God alone has the right to give life or end it, the Vatican through Pope Paul II nonetheless declared that life need not be prolonged by extraordinary means. When inevitable death is imminent, patients may refuse forms of treatment that would only secure a precarious and burdensome prolongation of life. If there is no duty to deliver extraordinary care to our patient, he must be permitted to have his "plug pulled."

Opposing counsel will interject that we have invented an attractive way out of the dilemma which technology has created, since all technology may be viewed as extraordinary, thereby justifying pulling the plug. In response, we will assure the court that it is not our intention to classify all technology as extraordinary. What is ordinary or extraordinary treatment will vary from patient to patient as medical science progresses. Nevertheless, the law must set guidelines and criteria establishing when medical procedures can be withdrawn. Questions of legality will inevitably surface in the form of homicide, malpractice, and life insurance litigation. Case law on the right to die illustrates that criteria used in determining extraordinary treatment must draw heavily on medical expertise and prevailing medical practices in the community. This court must inject law into this theory; otherwise physicians will be in a position to fashion their own law to prolong life according to customary practices, and this will evoke inconsistency.

RIGHT OF PRIVACY BASIS

Although the United States Constitution does not explicitly recognize a right of privacy, the Supreme Court has recognized its existence

Pope Pius XII, Prolongation of Life, 4 AM. Q. PAPAL DOCTRINE 393 (1958).
27. NEWSWEEK, supra note 26, at 58.
28. 70 N.J. at 43, 355 A.2d at 667-68.
since *Union Pacific Railroad v. Botsford.*\(^3^0\) The right of personal privacy has been discussed within the penumbra of specific guarantees of the Bill of Rights,\(^3\) and from language of the first,\(^3^2\) fourth, fifth,\(^3^3\) ninth,\(^3^4\) and fourteenth amendments.\(^3^5\) The Court’s decisions articulate that only personal rights that can be deemed “fundamental” or “implicit” in the concept of “ordered liberty” are included in this guarantee of personal privacy. This constitutional guarantee reached out in *Roe v. Wade*\(^3^6\) to protect a woman’s decision to terminate her pregnancy. The same guarantee extends to preserve one’s right to privacy, or common law right of bodily self-determination, against unwanted infringements of bodily integrity in appropriate circumstances.\(^3^7\)

We would argue that our patient’s constitutionally based right of privacy guarantees him the right to reject further medical treatment. The Court in *Superintendent of Belchertown State Schools v. Saikewicz*\(^3^8\) opined that it was “not inconsistent to recognize a right to decline medical treatment in a situation of incurable illness.” The court articulated that a constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. That the value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being

\[\text{References:}\]

30. 141 U.S. 250, 251 (1891).
33. Terry v. Ohio, 392 U.S. 1, 8-9 (1968).
34. 381 U.S. at 484, 486-99.
37. 70 N.J. at ___, 355 A.2d at 663.
38. 373 Mass. 728, 370 N.E.2d 417, 426 (1977). The court upheld the refusal of chemotherapy for acute leukemia for a severely retarded adult and enumerated four state interests: “(1) the preservation of life; (2) the protection of the interest of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession.” Id. at ___, 370 N.E.2d at 425.
Recognizing this constitutional right, the court in *Quinlan* noted "that if Karen were herself miraculously lucid for an interval . . . and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death." Karen was in a chronic vegetative state and was assisted in breathing by a respirator. She was able to maintain some internal functions such as body temperature and blood pressure, but she had lost most cognitive brain function. Even though Karen was not able to express a preference for death with dignity over life as a vegetable, the court concluded that no compelling state interest should compel Karen to endure the unendurable.

In 1914, Justice Cardozo mandated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." We propose no interpretation other than that this right incorporate the right to die. Logically, the right to initially refuse treatment is concomitant with the right to discontinue or have such treatment withdrawn once it has been initiated. The individual patient knows his capacity for pain, his family's emotional and financial stability, and his own emotional makeup. In *Eichner v. Dillon* the court asserted that an individual has the right to "control his own person." Therefore, we will argue that our patient's right to privacy will be violated if his body continues to be invaded by these medical procedures.

Courts have limited this right to privacy, restricting conduct which is outweighed by public policy considerations. If the conduct offends the public policy and a substantial state interest exists, the individual's

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39. Id. at 426.
40. 70 N.J. at 40, 355 A.2d at 663.
41. Id.
43. Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980). A priest won judicial approval to withdraw extraordinary, life-supporting treatment (respirator) from Brother Joseph Fox, a 83-year-old religious brother who had lapsed into a permanent vegetative state after a cardiac arrest. The court determined from his prior conversations with Brother Fox that he would want to die in this situation. Id.
right to privacy may have to defer to the state interest.\textsuperscript{44} In \textit{Saikewicz}, the court enumerated four state interests including:

\begin{itemize}
    \item 1) the preservation of life;
    \item 2) the protection of innocent third parties;
    \item 3) the prevention of suicide;
    \item 4) the maintenance of true ethical integrity of the medical profession.\textsuperscript{45}
\end{itemize}

The court in \textit{Perlmutter} adopted the four public policy considerations as limitations on the individual’s right to privacy.\textsuperscript{46} Since \textit{Perlmutter} remains the authority in Florida, we shall demonstrate that we have overcome these limitations.

In \textit{Saikewicz}, the court distinguished between preserving a valuable life and preserving an artificial life (i.e., a brain-dead person in a permanent vegetative state), placing the emphasis on preserving the valuable life.\textsuperscript{47} Our terminally ill patient has no life left to preserve. Therefore, no compelling state interest can surmount our patient’s right of privacy under the \textit{Roe} test.\textsuperscript{48}

Another state interest is the protection of innocent third parties. In Mr. Doe’s case, no unborn children are involved as in \textit{Roe} and no minor children as in the \textit{Application of President \& Directors of Georgetown College}, where the patient’s refusal of treatment would have been an abandonment of his minor child.\textsuperscript{49} In \textit{Perlmutter}, the court distinguished its limited decision from \textit{Georgetown}.\textsuperscript{50} Even if Mr. Doe had minor children he would not live to support them due to his terminal illness. Therefore, the state has no compelling interest to override our patient’s constitutional right to privacy and refusal of medical treatment.

\begin{itemize}
    \item 44. 410 U.S. at 154-55.
    \item 45. 373 Mass. at \_, 370 N.E. 2d at 425.
    \item 46. 362 So. 2d at 162.
    \item 47. 373 Mass. at \_, 370 N.E.2d at 425-26.
    \item 48. 410 U.S. at 154. “The right of personal privacy . . . is not unqualified and must be considered against important state interests in regulation. Where certain ‘fundamental rights’ are involved . . . regulation limiting these rights may be justified only by a ‘compelling state interest.’” \textit{Id.} at 155.
    \item 49. 331 F.2d at 1008.
    \item 50. 362 So. 2d at 162.
\end{itemize}
The third interest is the state's duty to prevent suicide. We shall adopt Saikewicz and argue that if our patient's respirator is disconnected, death will result from natural causes instead of from the respirator's removal.\textsuperscript{51} We can negate suicide by demonstrating that our patient did not induce his affliction, and he did wish to live but for his terminal condition. Therefore, there is no compelling state interest in our patient's case.

The final state interest listed by the court in Saikewicz was the maintenance of the ethical integrity of the medical practice. Perlmutter again adopted the language of Saikewicz in its recognition that the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores.\textsuperscript{52} Such a doctrine threatens neither the integrity of the medical profession nor the hospital's role in caring for such patients. Therefore, our patient's right of privacy has outweighed these four judicially determined public policy interests.

Reemphasizing, we maintain that the state's interest in preserving life is less when death is merely postponed rather than when life is preserved. The Quinlan court declared that the state's interest in the preservation of life diminishes and "the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."\textsuperscript{53} In In re Quackenbush,\textsuperscript{54} the court upheld the patient's right to refuse treatment, the amputation of both legs, since this treatment was an extensive bodily invasion.

In addition, in Saikewicz, the court stated that the right of privacy encompasses the right to die,\textsuperscript{55} a right with which the state should not interfere in the absence of minor or unborn children and a clear and present danger to the public welfare or morale.\textsuperscript{56} In Georgetown, the court indicated it would enforce its interest in preserving life and overrule the right of privacy (i.e., right to die) when the bodily invasion ceased, when a reasonable expectation of recovery existed, or when minors or other third parties were involved, whose lives would be jeopard-

\textsuperscript{51} 373 Mass. at ___, 370 N.E.2d at 421.
\textsuperscript{52} 362 So. 2d at 163.
\textsuperscript{53} 70 N.J. at 41, 355 A.2d at 664.
\textsuperscript{54} In re Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978).
\textsuperscript{55} "To die" is used in the context of a right to refuse non-consensual bodily invasions. 373 Mass. at ___, 370 N.E.2d at 424.
\textsuperscript{56} Id. at ___, 370 N.E.2d at 424-26.
ized by the patient’s death.\textsuperscript{57} Comparing the incompetent patient in \textit{Eichner} to the first trimester in \textit{Roe}, we reason that both were incapable of independent, meaningful existence. The state’s compelling interest in life’s preservation only attached when the potential existed for return to a sapient, cognitive life (\textit{Eichner}) or when the fetus was viable (\textit{Roe}). Our patient is terminally ill without hope of returning to a natural existence unaided by artificial life support technology. Therefore our patient should be allowed to die, without artificially prolonging his life.

In affirming \textit{Perlmutter}, the Florida Supreme Court reinforced the district court’s decision to limit the case to its facts. \textit{Perlmutter} applies to only competent terminally ill adult patients with no minor dependents and who have the consent of all affected family members.\textsuperscript{58} We disagree with the provision requiring familial consent, because the right of privacy is a personal right. As such, we do not advocate the state delegating to third parties its own power to override an individual’s right to privacy where this promotes state interests. The adult patient alone should exercise his constitutional right. When the patient is incompetent and unable to exercise this right at the time of his illness, the state should recognize the legality of the living will. Recognizing the expressed wishes contained therein, the state would prevent the exercise of this personal constitutional right by third parties.

In conclusion, we point out the recent passage of House Joint Resolution 387 which created Section 23 of Article I of the Florida State Constitution recognizing a right of privacy.\textsuperscript{59} In Florida, the right to die is based on the right of privacy; therefore, this recent constitutional amendment supports the right to die naturally and the right to refuse prolongation of life through artificial means.

\textsuperscript{57} 331 F.2d at 1000.

\textsuperscript{58} 379 So. 2d at 359 (affirming lower court’s ruling upholding patient’s right to refuse medical treatment).

\textsuperscript{59} Fla. H.R.J. Res. 387, (1980) (approved by voters in the November, 1980, general election.) “Right of Privacy: Every natural person has the right to be let alone and free from governmental intrusion into this private life except as otherwise provided herein. . . .” FLA. CONST. art. I, § 23.
FLORIDA’S BRAIN DEATH STATUTE

An issue that confronts many courts is when life-supporting measures can be terminated. The law has always adopted the medical definition of death. However, in light of recent medical developments, the legal definition of death is changing and the old “heart-lung death” definition is outmoded.

The medical profession’s current definition dictates that if the brain is dead the patient is dead, even though a patient’s vital organs

60. FLA. STAT § 382.085 (Supp. 1980) provides:
Recognition of brain death.

(1) For legal and medical purposes, where respiratory and circulatory functions are maintained by artificial means of support so as to preclude a determination that these functions have ceased, the occurrence of death may be determined where there is the irreversible cessation of the functioning of the entire brain, including the brain stem, determined in accordance with this section.

(2) Determination of death pursuant to this section shall be made in accordance with currently accepted reasonable medical standards by two physicians licensed under chapter 458 or chapter 459. One physician shall be the treating physician, and the other physician shall be a board-eligible or board-certified neurologist, neurosurgeon, internist, pediatrician, surgeon or anesthesiologist.

(3) The next of kin of the patient shall be notified as soon as practicable of the procedures to determine death under this act. The medical records shall reflect such notice; if such notice has not been given the medical records shall reflect the attempts to identify and notify the next of kin.

(4) No recovery shall be allowed nor criminal proceedings be instituted in any court in this state against a physician or licensed medical facility that makes a determination of death in accordance with this section or which acts in reliance thereon, if such determination is made in accordance with the accepted standard of care for such physician or facility as set forth in s. 768.45. Except for a diagnosis of brain death, the standard set forth in this section is not the exclusive standard for determining death or for the withdrawal of life support systems.

An analysis of several states’ brain death statutes can be found in the note, *Toward a Legally and Medically Acceptable Definition of Death*, immediately following this paper.

61. BLACK’S LAW DICTIONARY 360 (5th ed. 1979) defines “death” as “[t]he cessation of life, the ceasing to exist, defined by physicians as a total stoppage of the circulation of blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.”

are maintained by machinery. Brain death is the state when an individual has no reflexes other than spinal reflexes, a flat electroencephalogram (EEG) indicating a complete absence of purposeful electrical activity in the cortex, and no capacity to breathe on his own. This discrepancy between the positions of law and medicine on the definition of death places physicians in the precarious position of facing possible criminal sanctions under the legal definition of death. The "heart-lung death" concept can no longer remain valid in light of modern resuscitative technology, which can virtually revive even those with no chance of survival. Recent developments in the area of transplants have created a demand for organs which have been removed after the donor's death, but before the death of the tissues. As a result, a concern to pinpoint the precise time of death has emerged.

Physicians adhere to the brain death definition in order to proceed with transplants while the vital organs are maintainable by machinery, thereby facilitating and increasing the number of possible transplants. Physicians, however, may be criminally guilty of homicide, if the law retains the "heart-lung death" definition of death. If surgeons are required to wait until the heart stops the donor may be "legally dead," but the organs may be worthless for transplants.

64. Id.
66. In Lovator v. District Court, ___ Colo. ___, 601 P.2d 1072 (1979) the court defined brain death under the Uniform Brain Death Act: "For legal and medical purposes, an individual who has sustained irreversible cessation of all functioning of the brain, including the brain stem is dead." Id. at ____, 601 P.2d at 1080. "Characteristics of brain death consist of: (1) unreceptivity and unresponsiveness to externally applied stimuli and internal needs; (2) no spontaneous movements or breathing; (3) no reflex activity; and (4) a flat electroencephalogram reading after a 24 hour period of observation. Comm. v. Golston, ___ Mass. ___, 366 N.E.2d 744 (1977). An increasing number of states have adopted this so-called "Harvard" definition of brain death, either by statute or court decision." BLACK'S LAW DICTIONARY 170 (5th ed. 1979). See also M. Green & D. Wikler, supra note 62; 238 J. A.M.A. 1651-55 (1977); 238 J. A.M.A. 1744-48 (1977); P. Green, Brain Death, 78 Wis. Med. J. 13 (1979); Status of the Legal Definition of Death, 5 NEUROSURGERY 535 (1979); Brain Death, supra.
The growing need for transplant organs alone does not justify declaring "death" perfunctorily. Physicians need a brain death standard for uniformity so they can make legal as well as wise medical decisions. Courts, scrutinizing physicians' conduct, have found that extraordinary treatment was continued on terminal patients, in substantial part, due to the increasing proliferation of malpractice litigation and possible criminal liability. Physicians have been heard to say, "Let's not pull the plug," fearing criminal liability. Thus, legal concerns rather than a patient's best medical interest may dictate a physician's actions.

Preeminent medical panels have posted new death criteria for resolving the dilemma spawned by recent technological advances. In 1968, the Ad Hoc Committee of the Harvard Medical School adopted the "permanent cessation of brain function" as the definition of death.

Criteria used in diagnosing a patient as "brain dead," include the following:

1. pupils fixed and dilated;
2. no extraocular movements, evident by using caloric testing or doll's eyes;
3. no spontaneous respiration without a ventilator;
4. no motor or sensory response to neurologic testing;
5. patient completely flexic; and
6. no normal cerebral activity evident on the EEG.

The question then arises whether the patient is "legally" dead though the heart continues to beat. If in all brain dead patients who are...
not being sustained by a respirator, their hearts will not beat and in all
brain death patients who are being assisted by a respirator, their hearts
do beat, logic dictates that the respirator keeps the heart beating, not
life. A machine can create an artificial heartbeat. Thus, these patients
are not medically “alive.” Why should these patients be legally alive,
when not medically alive? These differences must be reconciled. The
traditional definition of death was formulated when a heartbeat could
not be artificially sustained.

The most recent test for determining brain death is a radionuclide
cerebral angiogram (RCA). In this test, isotope angiography reveals
the condition of the vessels supplying blood to the brain. The absence
of intracranial blood flow on the dynamic RCA, caused by the lack of
uptake in cerebral sinuses, confirms a diagnosis of brain-death. RCA
enjoys a distinct advantage over other tests for determining brain
deadness. The results obtained by a RCA are not affected by drugs. Other
tests (utilizing an EEG) do not determine brain death as accurately in
a patient whose coma is due to drug intoxication. Studies show that it
is still possible to resuscitate an unconscious patient (due to an over-
dose of sedatives, tranquilizers, narcotics, or hypothermia) for up to six
hours after the appearance of a flat EEG. Therefore, the RCA is a
major step forward in determining brain death and in contributing to
one “medico-legal” definition of death.

While the guidelines for determining death may differ with the
particular test, all require repeated determinations or reexaminations
after specified time intervals. Despite the growing recognition among
physicians of the brain death test, confusion is prevelant. Physicians,
faced with the recent surge of medical malpractice litigation, need set
standards promoting uniformity to conform their medical decisions to
legal standards.

Since 1971, twenty-six states have enacted statutory definitions of
brain death. In 1978, the National Conference of Commissioners on

72. RCA is an x-ray visualization of the vascular system of the brain. See Triage
in Patient Care, 8 HEART & LUNG 1103, 1105 (1979).
73. Appraisal, supra note 71.
74. Id.
75. 1979 ALA. AcTs 165; ALASKA STAT. § 09.65.120 (Supp. 1979); ARK. STAT.
ANN. § 82-537 (1977); CAL. HEALTH & SAFETY CODE § 7180 (Deering 1975); CONN.
PUBLIC ACT 79-556; GA. CODE § 88-1715.1 (1975); HAWAII REV. STAT. § 327C-1
Uniform State Laws approved the "Uniform Brain Death Act" which provides that "[f]or legal and medical purposes an individual who has sustained irreversible cessation of all functioning\textsuperscript{76} of the brain, including the brain stem, is dead."\textsuperscript{77}

In Florida, in 1980, a brain death bill\textsuperscript{78} was introduced at the request of certain hospitals. This bill, which became law on October 1, 1980, states that death is to be determined where there is irreversible cessation of the functioning of the entire brain, including the brain stem. It further states that for legal and medical purposes a determination of death is to be made where respiratory and circulatory functions are maintainable only by artificial means of support. It maintains that no criminal proceedings will be instituted in any court in this state against any physician or medical facility making a determination of death in accordance with this statute. It warns that brain-death is not the exclusive standard for determining death or the withdrawal of life-supporting systems.\textsuperscript{79} We maintain that our patient is both legally and medically dead, and therefore the physician should disconnect the respirator.

THE PHYSICIAN'S ROLE

The physician, in our case, fears criminal sanctions if he carries out the patient's wishes to have treatment withdrawn as the legality of

\textsuperscript{76} Functioning" meaning purposeful activity in all parts of the brain, as distinguished from random activity. M. Green, supra note 69.

\textsuperscript{77} Lovato, ___ Colo. at ___, 601 P.2d at 1080.

\textsuperscript{78} Fla. S. 293 FLA. STAT. § 832.085 (Supp. 1980). See note 60 supra for the text of FLA. STAT. § 382.085 (Supp. 1980).

\textsuperscript{79} Fla. S.B. 293 (1980).
the "living will" has not yet been determined in this state. With the rise in malpractice suits, physicians have had to be extremely cautious as well as secretive in their actions. In 1961, a survey conducted at a Chicago medical convention revealed that more than half of the physicians present believed euthanasia was being practiced by members of the profession.80 In testimony before a 1974 Senate subcommittee,81 it was revealed that about three-fourths of American physicians practiced passive euthanasia regularly, that is, they withdrew artificial life support, permitting the patients to die.82

In Quinlan, it was acknowledged that it was not unusual in the medical community for physicians to terminate or withhold extraordinary treatment in terminal cases without resort to the law.83 Few physicians have been prosecuted for such actions and fewer have been convicted. Therefore, legislation could only have a positive effect, for the state of affairs as it now exists is without controls, and is insufferable.

We do not question the state's undoubted power to punish the taking of human life, but that power should not prevent an individual from refusing medical treatment pursuant to his right to privacy. In Perl-matter, it was argued that the patient's ensuing death should not be classified as homicide, but rather death from existing natural causes. Since the patient was sustained by a respirator, its withdrawal left the patient's system in control and death would ensue naturally.84 In Quin-lan, the court determined that the termination of treatment was lawful because it was justifiable under the circumstances.85 Therefore, the termination of our patient's treatment could not be considered "unlawful."

The advantages of the living will are obvious. If a physician were

82. Id.
84. 362 So. 2d at 1.
85. 70 N.J. at 43, 355 A.2d at 668. 394 U.S. at 559. In Florida, it is a felony to assist another in the commission of self-murder. "Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree. . . ." FLA. STAT. § 782.08 (1979).
prosecuted for permitting a patient to die when that patient’s life could have been prolonged by extraordinary treatment, the physician would have a strong defense in the living will. On the other hand, if the physician refused to honor the living will and maintained the patient on extraordinary treatment, the physician might be sued more successfully for pain, suffering, and expense caused by the unauthorized treatment. Our patient’s living will will give renewed confidence to all physicians and family members performing in accordance with its provisions.

LITIGATION V. LEGISLATION

Court decisions in the past six years have substantially supported the patient’s right to refuse treatment. This right must be accepted by the legal and medical professions, in order that it might be invoked without the delay and uncertainty involved in seeking judicial approval.

The Perlmutter case determined that the issue of the right to die was more suitable for the state legislature. Proponents stress that the legislature is more capable of investigating and synthesizing the facts and opinions that may be relevant to the resolution of such a complex legal, medical, and social issue. In addition, a legislative directive would eliminate the problem of uniformity inherent in a case-by-case approach to the problem. Critics of natural death legislation fear that after the living will is legalized, enabling passive euthanasia to be practiced, the next step would be the legalization of active euthanasia. They maintain that while the withdrawal of life-supporting treatment can be rationalized under existing legal doctrines, the authorization of

86. Courts have uniformly held that it is an assault and battery upon a person to administer medical treatment that he does not want. Trogun v. Fruchtman, 58 Wis. 2d 596, 207 N.W.2d 297, 310 (1973). Mohr v. Williams, 95 Minn. 261, 271, 104 N.W. 12, 16 (1905). Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).
87. The Quinlan court stressed that “termination of treatment” should not require prior judicial determination. 70 N.J. at 50, 355 A.2d at 669.
88. 379 So. 2d at 360.
active euthanasia would obviously require a revision of current criminal law.\textsuperscript{90} There is also concern that these acts will create more problems than they solve by inhibiting other lawful withdrawal of life-supporting treatment, unless such a document has been executed by the patient. Another concern is that physicians' diagnoses can be fallible and patients can experience spontaneous remissions.\textsuperscript{91} Nonetheless, these concerns have been addressed in the statutes and safeguards have been instituted to decrease their occurrence.\textsuperscript{92}

Since the \textit{Quinlan} case, nearly all state legislatures have been presented with natural death bills. The first living will statute was enacted in California in 1976,\textsuperscript{93} followed by seven others in 1977\textsuperscript{94} and two in 1979.\textsuperscript{95}

Our case has come before the Florida judiciary since the legislature has not acted. For the past decade, it has rejected death with dignity legislation.\textsuperscript{96} As a result the Florida courts must take the lead in establishing the law in this area. Legislative inaction must not prevent judicial enforcement of constitutional rights.\textsuperscript{97}

The three latest cases\textsuperscript{98} in this area promote the need for judicial recognition of the living will. In \textit{In re Spring},\textsuperscript{99} the court emphasized

\textsuperscript{90} N. Cantor, \textit{supra} note 89; G. Fletcher, \textit{supra} note 89.
\textsuperscript{91} Ironically, Karen Quinlan is still alive in a nursing home three years after her respirator was disconnected.
\textsuperscript{92} KAN. STAT. §§ 61-28, 102-28, 103 (Supp. 1979).
\textsuperscript{93} CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1980).
\textsuperscript{96} See note 23 \textit{supra} and accompanying text.
\textsuperscript{97} As the \textit{Perlmutter} court stated: "Preference for legislative treatment cannot shackle the courts when legally protected interests are at stake. . . . Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights."
\textsuperscript{99} __ Mass. at __, 405 N.E.2d at 115.
that the "living will" responds to the wishes of patients who have chronic disease which would be fatal if not for modern medical technology.

The court in In re Yetter\textsuperscript{100} enforced an oral expression of an incompetent patient made while she was competent, requesting that she not be treated for terminal illness. The court determined that if she were competent at this moment, she would want the life-supporting treatment terminated.

In Eichner v. Dillon,\textsuperscript{101} Brother Joseph Fox, an 83-year-old incompetent patient, had expressed his wish for a natural death prior to becoming incompetent. The Supreme Court cited this expression as evidence in a decision upholding the lower court's order to terminate respiratory treatment. Unfortunately, Brother Joseph lapsed into a vegetative state after suffering a cardiac arrest and died of congestive heart failure before the opinion was handed down. Brother Joseph had expressed his wishes to Father Eichner and Father Keenan just prior to hospitalization, stating that if he should enter into a state where his brain was rendered permanently incapable of sapient and rational thought, the use of extraordinary life support systems should be discontinued and nature allowed to take its course.

Recognizing these previously expressed oral directives can create tremendous hearsay problems. By adopting such a practice the court would be forced to play a guessing game as to the patient's wishes if competent.

Although living will legislation is a good idea, it has produced difficulties which will undoubtedly be ironed out in time. The North Carolina statute states that once a patient has been declared dead, consent of the family is required to stop treatment.\textsuperscript{102} The Arkansas statute provides for a list of relatives who can execute a living will for an incompetent patient.\textsuperscript{103} One can envision an unknown relative being empowered with the right to make this rather delicate decision. The California statute requires the physician to determine the validity of the living will, a cumbersome and unfair burden to the physician.\textsuperscript{104} In

\begin{itemize}
\item \textsuperscript{100} 62 Pa. D. & C.2d at 620.
\item \textsuperscript{101} -- A.D.2d at --, 424 N.Y.S.2d at 519 (1980).
\item \textsuperscript{102} See statutes cited in note 94 supra.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} See CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1980).
\end{itemize}
Kansas, the physician can presume that the consent is valid if he has no knowledge to the contrary. These matters could be solved through the creation of one uniform living will to be copied in all states, providing for flexibility in the addition of clauses such as the individual's desire to donate organs for medical research.

Many feel that informed consent to refuse treatment cannot be given years before the patient confronts any terminal illness, when the patient is in perfect health. However, wills to dispense of estates are made years before death. Perhaps to compensate for changes in circumstances or feelings of the patient, we should provide for a codicil, much like that for a will. Some states recommend that the living will be reexecuted every set number of years to demonstrate that the patient's intentions have not changed.

On the other hand, proponents of these advance declarations feel that with the mental and physical duress of a terminal illness, the consent may not be rational. While a contemporaneous declaration may be the logical preference as in Perlmutter, the patient must be allowed to exercise his constitutional right to refuse treatment in advance by written directive, as he may never have the opportunity after falling ill.

**Solution: The Living Will**

This court did not have to speculate as to our patient's wishes, since they were enumerated in his living will. As our patient commands a constitutional right to refuse treatment, his living will, in effect, merely establishes in advance those wishes which he could have effected legally under Perlmutter, at the discovery of his terminal illness, were he conscious and capable of expressing his wishes. The living will is destined to be a meaningful and legally recognized manner of providing for future events that directly affect one's right to privacy. Despite a decade of failure by the Florida Legislature to enact any natural

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106. Those states are California, Idaho and Oregon. See notes 93 & 94 *supra*. 
death legislation, courts should find the living will legally valid as the first step toward inducing such legislation.

Sheryl L. Havens
Toward A Legally And Medically Acceptable Definition of Death

Death may be defined as the absence of life. However, this type of circular definition is only as concrete as the corollary term itself. The tragedy faced by the Quinlan family in 1976 focused the attention of the entire country on the need for a realistic definition of death within which both the medical and legal professions could operate. Legislatures and the judiciary have attempted to establish a framework within which both professions can function effectively without infringing on the rights of the dead or dying patient.

Advances in medical technology have necessitated a change in perspective of the concept of death. The purpose of this paper is to examine this shift and to enumerate the ways in which the legislatures and the courts have attempted to define death. Finally, the paper will distinguish between the person who meets the definitional standard of death and the person whom the medical and legal professions will allow to die.

Traditionally, death has been viewed as an event in time, the occurrence of which triggers such legal issues as inheritance, property rights, and liability under insurance contracts. Until recently, the de-

3. Victor, supra note 1, at 38.
termination of the time of death has been relatively straight forward both medically and legally.8 “When the heart stopped beating and the lungs stopped breathing, the individual was dead according to physicians and according to the law.”9

When the question did arise as to the viability of an individual, courts made the determination based on the then universally accepted criteria of heartbeat and respiration.10 These criteria were not statutory, but had developed as part of the common law, with many courts quoting directly from Black's Law Dictionary.11

“With the recent advancement of medical science, the traditional common law ‘heart and lung’ definition is no longer adequate.”12 Modern equipment, such as respirators and dialysis machines, and surgical procedures, such as organ transplants, can now prolong the life of a patient who at an earlier period would have died.13 The situation created by the inadequacy of the traditional definition can be best illustrated by reference to the issues raised in relation to heart transplants. A donor’s cardiac function can be maintained mechanically for an indefinite period of time. If the physician removes the heart from the donor while it is still beating, albeit mechanically, the physician may be liable for homicide.14 However, if the donor’s heart is not maintained mechanically and the heart stops beating, the physician would be absolved of any liability but the operation would be useless.15

The advent of life-sustaining support mechanisms has shifted our perspective in relation to the concept of death. Death can no longer be viewed by the legal profession as a single event in time, but must be

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9. 94 Wash. 2d at —, 617 P.2d at 734.
10. Victor, supra note 1, at 50.
11. Black's Law Dictionary 488 (4th ed. 1951) defines death as “the cessation of life; the ceasing to exist; defined by physicians as total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.” But see, Black's Law Dictionary 360 (5th ed. 1979) which references Brain Death at 170.
12. 94 Wash. 2d at —, 617 P.2d at 734.
13. Hoffman & Van Cura, supra note 6, at 377.
14. Id. at 381.
15. Ufford, supra note 7, at 227.
seen in the same light as in the medical community, as a "continuing process of gradual change."\textsuperscript{16} Recognizing the distinction between the clinical death of the person as an individual and biological death of cells and tissues which may continue to deteriorate over a period of time,\textsuperscript{17} medical science has tried to determine the point at which the "process of death becomes irreversible."\textsuperscript{18} Since the cessation of either the cardiac or the respiratory system is now frequently a treatable condition,\textsuperscript{19} the use of either one as the criteria to determine when the process of death has become irreversible will just as frequently be inconclusive. In those cases in which the 'heart-lung' criteria are inappllicable, the medical profession replaces them with brain death criteria. "Brain death is used to describe a state where there is irreversible destruction to the entire brain despite the continuance of cardiac activity."\textsuperscript{20}

Although technical medical distinctions are beyond the scope of this paper, it is necessary to have an elementary understanding of the organization of the nervous system.\textsuperscript{21} Functionally speaking, the nervous system may be divided into three levels: (1) the spinal cord level, (2) the lower brain level (including the brain stem), and (3) the higher brain or cortical level. The lower brain level is the pathway between the spinal cord and the cortex.\textsuperscript{22} It is the reflex center of the brain and controls the cardiac, vasomotor and respiratory functions.\textsuperscript{23} The lower brain level is considered the subconscious control area, the destruction of which causes the loss of vital body functions resulting inevitably in death.\textsuperscript{24} The higher brain or cortical level is a vast storage area. The human cortex contains the qualities which are unique to mankind and which make the human being a cognitive, sapient individual.\textsuperscript{25} If all or

\begin{footnotesize}
\begin{enumerate}
\item[16.] Id. at 230.
\item[17.] Victor, supra note 1, at 39.
\item[18.] Ufford, supra note 7, at 230.
\item[19.] Victor, supra note 1, at 39.
\item[20.] Id. at 45. Florida has recently enacted a brain death statute. \textit{See} FLA. STAT. § 382.085 (Supp. 1980).
\item[21.] Hoffman & Van Cura, supra note 6, 385-86.
\item[22.] Id.
\item[23.] Id.
\item[24.] Victor, supra note 1, at 48.
\item[25.] Ufford, supra note 7, at 228.
\end{enumerate}
\end{footnotesize}
a significant portion of the cortex is destroyed, a vegetative state will result in which the reflex center of the lower brain maintains vital body functions but all cognitive function is lost.26

In 1968 the Ad Hoc Committee of the Harvard Medical School pointed out the need for the recognition of brain death as a standard.27 Although the six criteria that this committee established for irreversible coma28 "have been found to be inadequate in practice and have been superseded by various other... criteria,"29 they were relied on in the Quinlan case30 and continue to be cited in the most recent cases.31 No single criteria is determinative and multiple, realistic parameters can be developed to establish the absence of cortical and brain stem activity,32 since both functions must be absent for a diagnosis of brain death.

Several states, including Florida in 1980, have adopted statutory definitions of brain death33 which eliminate uncertainty and avoid ret-

27. Hoffman & Van Cura, supra note 6, at 382.
28. Report of the Ad Hoc Committee of the Harvard Medical School To Examine the Definition of Death, A Definition of Irreversible Coma, 205 J. A.M.A. 337 (1968) lists the necessary criteria as:
(1) Unreceptivity and unresponsivity to externally applied stimuli;
(2) No movement of breathing;
(3) No reflexes;
(4) A flat electroencephalogram;
(5) Repetition of tests in 25 hours; and
(6) No evidence of hypothermia or central nervous system depressants.
Id. at 338-40.
29. Hoffman & Van Cura, supra note 6, at 392-93 states that flat EEG is not determinative and has been replaced by angiography. Victor, supra note 1, at 46 states that spinal cord reflexes may be present even when the patient is brain dead.
30. 70 N.J. at __, 355 A.2d 652, 656.
31. See note 73 infra.
32. Victor, supra note 1, at 48.
rospective determination of the rights and duties of the parties involved. These advantages outweigh the fear that the statutes would be poorly drafted or biased in favor of transplantation.

Kansas was the first state to pass a brain death statute in 1974. It recognizes the absence of cardiac-respiratory functions and, alternatively, the absence of spontaneous brain function as the standards for determining death. Whether either of the statutory standards has been met, is "based on the ordinary standards of medical practice." Both the alternative standards and the lack of specific medical criteria were

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34. Ufford, supra note 7, at 234-35.
35. Id. at 231.
36. KAN. STAT. ANN. § 77-202 (1977), which provides:

A person will be considered medically and legally dead if, in the opinion of the physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in the event, death will have occurred at the time these functions ceased; or

A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.

These alternative definitions of death are to be utilized for all purposes in this state, including trials of civil and criminal cases, any laws to the contrary notwithstanding.

The 1979 revision changed the last sentence in the second paragraph to read: "Death is to be pronounced before any vital organ is removed for purposes of transplantation." Id. (Supp. 1980).
37. Id.
approved by the Kansas Supreme Court in State v. Shaffer which held that the Kansas brain death statute was constitutional.

Capron & Kass have criticized the Kansas statute for going beyond a simple definition of death and establishing the “misconception that there are two separate phenomena of death.” Their statutory proposal, which has been adopted by eight states, would “provide two standards gauged by different functions, for measuring different manifestations of the same phenomenon.” The “irreversible cessation of spontaneous brain functions” standard would be applicable only when “artificial means of support preclude” the use of the “irreversible cessation of spontaneous respiratory and circulatory functions” standard. “Irreversible cessation of spontaneous brain functions” is intended to include both cortical and brain stem activity. A patient who has no cortical activity but retains some brain stem activity would be excluded from the statutory standard. “The condition of ‘neo-cortical death’ may well be a proper justification for interrupting all forms of treatment and allowing those patients to die, but this moral and legal problem cannot and should not be settled by ‘defining’ these people as ‘dead.’”

Montana and Tennessee adopted the model statute approved by

39. Alexander Morgan Capron is an Assistant Professor of Law at the University of Pennsylvania. Leon R. Kass is the Executive Secretary on the Committee on Life Sciences and Social Policy, National Research Council - National Academy of Sciences. Capron & Kass, supra note 5, at 87.
40. Id. at 110, 115, 117.
41. Id. at 109.
42. Id. at 111 provides:
A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased.
43. Id. at 112.
44. Id. at 111.
45. Id. at 115.
46. Id.
the American Bar Association in 1975. 48 This model does away with
the cardiac-respiratory standard entirely and relies solely on the "irre-
versible cessation of total brain functions." 49 Nevada adopted the Uni-
form Brain Death Act. 50 The language of this model has the advantage
of specifically excluding any brain stem function from the scope of the
statute. Along with the American Bar Association model, the Uniform
Brain Death Act excludes the cardiac-respiratory standard. The lan-
guage is no longer part of the statute and has been relegated to the
commissioners' comments which state that "the act does not preclude a
determination of death under other legal or medical criteria, including
the additional criteria of cessation of respiration and circulation." 51

Several states, which have not adopted a statutory definition of
brain death, have adopted the brain death standard judicially. The
Massachusetts Supreme Court 52 approved a jury instruction in a mur-
der trial which stated that

as a matter of law, the occurrence of a brain death, if you find it, satis-
fies the essential element of the crime of murder requiring proof beyond
a reasonable doubt of the death of the victim. Brain death occurs when,
in the opinion of a licensed physician, based on ordinary and accepted
standards of medical practice, there has been a total and irreversible ces-
human body with irreversible cessation of total brain function, as determined according
to usual and customary standards of medical practice, is dead for all legal purposes."

TENN. CODE ANN. § 53-459 (1980): "Death defined. — For all legal purposes, a
human body, with irreversible cessation of total brain function, according to the usual
and customary standards of medical practice, shall be considered dead." See statutes
cited in note 33 supra.

48. "For all legal purposes, a human body with irreversible cessation of total
brain functions, according to the usual and customary standards of medical practice,
shall be considered dead." House of Delegates Redefines Death, Urges Redefinition of
49. Id. (emphasis added).
15 (Supp. 1981): § 1. (Brain Death)
For legal and medical purposes, an individual who has sustained irreversible cessa-
tion of all functioning of the brain stem, is dead. A determination under this section
must be made in accordance with reasonable medical standards."
51. Id.
52. Commonwealth v. Golston, 373 Mass. 249, 366 N.E.2d 744 (1977), cert. de-
sation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.53

The murder victim demonstrated neither cortical nor brain stem activity and was pronounced dead in accordance with the Harvard criteria for brain death. His removal from the respirator which artificially maintained circulation and respiration was “in accordance with good medical practice.”54 The court held that the trial judge had merely taken into account technical advances in medical science in forming his instruction.

In Lovato v. District Court,55 the Supreme Court of Colorado stated that the prime issue before it was the “proper definition of death.”56 A young child-abuse victim “sustained cerebral death as evidenced by total lack of brain activity in both the cortex and the brain stem.”57 The district court ordered the child’s guardians ad litem to authorize the child’s physician to remove all extraordinary devices as the child was already dead. On appeal, the Colorado Supreme Court adopted the provisions of the Uniform Brain Death Act,58 but did not preclude “continuing recognition of the standard of death as determined by traditional criteria of cessation of respiration and circulation.”59 The effect of the decision is to provide for “alternative determinations of death.”60

In In re Bowman, the Washington Supreme Court held that it is for the law to define the standard of death and for the medical profession to determine the applicable criteria for deciding when death is present.61 In this case, the child-abuse victim was pronounced brain dead and the hospital was enjoined from removing the artificial life support systems to give the child’s guardian ad litem time to appeal the trial

53. Id. at __, 366 N.E.2d at 747-48.
54. Id. at __, 366 N.E.2d at 747.
55. Lovato v. District Court, 601 P.2d 1072 (Colo. 1980) (en banc).
56. Id. at 1075.
57. Id. at 1074.
58. Id. at 1081. See note 51.
59. 601 P.2d at 1081.
61. 94 Wash. 2d at __, 617 P.2d at 732, 738.
court's adoption of the "irreversible loss of brain function standard." All of the victim's bodily functions had ceased before the Washington Supreme Court was able to hear the case. However, because of the importance of the question presented, the Court issued a decision in the technically moot case.

The Court was careful to distinguish brain death from a "persistent vegetative state." In order for brain death to occur there must be total cessation of both cortical and brain stem functions. The issue then becomes whether brain death is a recognized standard of death in the State of Washington. The issues involved are entirely different when there is some brain stem activity even in the total absence of cortical activity. This condition is known as vegetative coma and a person in this condition is not brain dead according to any accepted medical criteria.

The Washington Supreme Court decision is limited to the adoption of a brain death standard. That Court rejected the Uniform Brain Death Act adopted in Lovato v. District Court because it failed to interrelate the traditional standards with the new brain functions standard. Instead, the Washington Court adopted the provisions of the Uniform Determination of Death Act recommendation which returns to the alternative standards of the Kansas Statute and includes the clarification as to brain stem function found in the Uniform Brain Death Act.

While the legislative or judicial adoption of definition of death which is predicated on a brain functions standard deals with some of the problems created by the recent advances in medical technology, it does not even address the issue of neo-cortical death which is raised by

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62. Id. at __, 617 P.2d at 734.
63. Id.
64. Id. at __, 617 P.2d at 735.
65. Id. at __, 617 P.2d at 737.
66. Id.
67. 601 P.2d 1072.
68. Contra, id. at 1081 provides that the traditional criteria of respiration and circulation continue to be recognized.
69. Wash. 2d at __, 617 P.2d at 735.
70. See text of KAN. STAT. ANN., supra note 36.
71. See text of UNIFORM BRAIN DEATH ACT, supra note 50.
In re Quinlan\textsuperscript{72} and its progeny.\textsuperscript{78} In the view of Capron & Kass, the issues of brain death and when a person is pronounced dead should be clearly distinguished from the issues of neo-cortical death and when a person should be allowed to die.\textsuperscript{74} Several states have passed Natural Death Acts which endorse the concept of the "living will" in order to deal with the problems associated with the withdrawal of artificial life-support systems.\textsuperscript{76} These cumbersome statutes fail to distinguish between life-prolonging and life-saving procedures and deal only with the competent adult who could invoke his constitutional right of privacy to refuse treatment even without the statute.\textsuperscript{78}

The courts, while themselves denouncing the legislative failure in dealing with neo-cortical death, have attacked the issue head on and attempted to fill the legislative vacuum in this area.\textsuperscript{77} The seminal case is In re Quinlan.\textsuperscript{78} On the night of April 15, 1975, Karen Ann Quinlan ceased breathing for at least two fifteen minute periods\textsuperscript{79} and suffered neo-cortical death. In other words, Karen Ann Quinlan was in a chronic vegetative state. While she showed no evidence of cortex function, she did show evidence of brain stem activity. Under the brain death criteria discussed previously, Karen Ann Quinlan was alive although she would never be restored to "cognitive or sapient life."\textsuperscript{80} The New Jersey Supreme Court allowed Ms. Quinlan's father to invoke Ms. Quinlan's right of privacy in a "substituted judgment."\textsuperscript{81} In accordance with the framework set out by the court for the exercise of that right,\textsuperscript{82}

\begin{thebibliography}{99}
\bibitem{72} 70 N.J. 10, 355 A.2d 647.
\bibitem{74} Capron & Kass, \textit{supra} note 5.
\bibitem{75} See generally, Comment, \textit{supra} note 4.
\bibitem{76} See generally, Dawben, \textit{supra} note 4.
\bibitem{77} Contra, Ufford, \textit{supra} note 7, who argues that the courts are the most appropriate place to deal with neo-cortical death.
\bibitem{78} 70 N.J. 10, 355 A.2d 647.
\bibitem{79} \textit{Id.} at _-_, 355 A.2d 653-54.
\bibitem{80} \textit{Id.} at _-_, 355 A.2d at 655.
\bibitem{81} \textit{Id.} at _-_, 355 A.2d at 664-66.
\bibitem{82} \textit{Id.} at _-_, 355 A.2d at 672.
\end{thebibliography}
Mr. Quinlan had all extraordinary, life-prolonging machinery (i.e., respirator) withdrawn from his daughter.83

Although the Quinlan court touched on many of the issues that would be more fully developed by the cases which followed,84 it mainly developed the right of privacy, the mechanism through which that right could be exercised, and a framework for the relief granted. The Quinlan court relied on Justice Douglas' opinion in Griswold v. Connecticut which found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights.85 The "emanations from those guarantees"86 give life and substance to a right which is broad enough to "encompass a woman's decision to terminate pregnancy under certain conditions"87 and, by analogy, "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances."88 The invocation of the constitutional right to privacy triggers a balancing of the right of the individual against the interest of the state in preservation of the sanctity of human life. The state's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the [s]tate interest."89 At that point the individual may exercise his constitutional right of privacy.

The Quinlan court then decided that the rights of a comatose individual could be exercised through the doctrine of "substituted judgment" under the court's equity power.90 "The only practical way to prevent the destruction of the right is to permit the guardian and family . . . to render their best judgment, . . . as to whether she would exercise it in these circumstances."91

83. Id. at __, 355 A.2d at 664-66.
84. E.g., a few of the issues not emphasized in this paper include standing, life-saving vs. life-prolonging treatment, the Catholic viewpoint, and cognitive vs. biological existence.
86. 381 U.S. at 484.
88. Id. at __, 355 A.2d at 663.
89. Id. at __, 355 A.2d at 664.
90. Id. at __, 355 A.2d at 666.
91. Id. at __, 355 A.2d at 664.
The framework developed by the court eliminated the need for judicial decision in this type of case when the family, guardian, attending physician and hospital "Ethics Committee" all agree that there is no "reasonable possibility" of the individual emerging from a comatose condition to a cognitive, sapient state. At that point the life-support systems may be withdrawn without any civil or criminal liability on the part of any of the participants.

The next two cases which helped to develop this area of the law, Superintendent of Belchertown v. Saikewicz and Satz v. Perlmuter, do not deal with neo-cortical death but rather with the right of the guardian of a mentally retarded adult and the right of a competent, terminally ill adult to refuse life-prolonging treatment. Saikewicz held that the "substantive rights of the competent and the incompetent person are the same in regard to the right to decline potentially life-prolonging treatment" because of the value of human dignity. Saikewicz also adopted the mechanism of "substituted judgment" and went to great pains to make it clear that the primary test is a subjective one. "[T]he goal is to determine with as much accuracy as possible the wants and needs of the individual involved."

The primary importance of Saikewicz to the present discussion is that it sets out the state's interests which are to be balanced against the individual's right of privacy, and it rejects what it views as the

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92. Id. at _, 355 A.2d at 671. "The evidence in this case convinces us that the focal point of decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed." Id. at _, 355 A.2d at 669.

93. Id. at _, 355 A.2d at 671.
95. 362 So. 2d 160 (Fla. 4th Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980).
96. 373 Mass. at _, 370 N.E.2d at 423 (except that the incompetent individual may require more procedural safeguards).
97. Id. at _, 370 N.E.2d at 427.
98. Id. at _, 370 N.E.2d at 430-31.
99. Id.
100. The four state interests identified in Saikewicz are: (1) the preservation of life; (2) the protection of third parties; (3) the prevention of suicide; and (4) the ethical integrity of the medical profession. Id. at _, 370 N.E.2d at 425.
Quinlan court's abdication of its responsibility to make the final decision in this type of case. Both of these points have been cited with approval in subsequent cases. The balancing, of course, is a factual determination.

As to the second point, the Saikewicz court took "a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent." Satz v. Perlmutter is significant in that it clearly draws the distinction, alluded to in the previous cases, between life-saving treatment and life-prolonging treatment.

In seeking to protect the rights of an individual who has suffered neo-cortical death, the court may derive its subject matter jurisdiction from a statute, under the state's parens patriae powers over an incompetent or under the more fundamental principle of equity jurisdiction. Further, the court has the obligation to exercise that power, even in the absence of enabling legislation, when it is faced with a "vital problem involving private rights."

The relief sought may be based on the common law right of bodily determination or on the constitutional right to privacy. Since "common-law rights can be abrogated by statute in the exercise of the [s]tate's police powers subject only to due process requirements," it is more effective to grant the relief sought on the basis of a constitutional right which "cannot be so abrogated." The "state action" necessary to apply the right of privacy through the mechanism of the four-

101. E.g., Perlmutter, 379 So. 2d 359; Eicher, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).
102. 373 Mass. at __, 370 N.E.2d at 434; however, In re Spring, ___ Mass. __, 405 N.E.2d 115 (1980), limited this to cases which had been brought before a court of competent jurisdiction at the outset.
103. 362 So. 2d at 163.
104. Eicher v. Dillon, 73 A.D.2d at __, 426 N.Y.S.2d at 534. The New York Supreme Court in Eicher issued a decision in a technically moot case in order to develop "the structural legal framework for reaching similar termination-of-treatment decisions." Id. at __, 426 N.Y.S.2d at 524.
105. Id. at __, 426 N.Y.S.2d at 534.
106. Id. at __, 426 N.Y.S.2d at 540.
107. Id. at __, 426 N.Y.S.2d at 540-41.
108. Id. at __, 426 N.Y.S.2d at 541.
teenth amendment can be found in the nexus between the relief sought and the state's interest in its homicide statutes, hospital regulations and *parens patriae* responsibility to protect incompetents. 109

To conclude that an individual has "a right to refuse medical treatment necessarily implies that there exists a corresponding capability to exercise that right."110 However, there are certain medical criteria necessary to activate the individual's right. "He must be terminally ill; he must be in a [chronic or irreversible] vegetative coma . . .; he must lack cognitive brain function; and the probability [that such] . . . cognitive function [will return] must be extremely remote."111 Unless these criteria are met, the state's interest in the preservation of human life will outweigh the individual's right to privacy.112

The court in *Eicher v. Dillon*113 approved the mechanism of "substituted judgment" to determine the subjective desire of the comatose individual.114 It further approved the admission of previous specific statements of intent by the now comatose individual.115 Finally, the *Eicher* court combined the *Quinlan* procedure with the *Saikewicz* requirement that the neutral presence of the law make the final determination.116

The most recent case, *Severs v. Wilmington Medical Center, Inc.*,117 is the classic neo-cortical death case. Mrs. Severs had suffered extensive damage to her cortex but her brain stem continued to evidence activity. The Delaware Supreme Court technically followed the legal framework developed by the *Eicher* court and found that Mr. Severs was to be appointed guardian and after a proper evidentiary hearing, was entitled to such relief as the evidence warranted.118

In conclusion, it is clear that the rapid advancement of medical

110. *Id.* at _, 426 N.Y.S.2d at 544.
111. *Id.* at _, 426 N.Y.S.2d at 545.
112. *Id.*
113. 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).
114. *Id.* at _, N.Y.S.2d at 547.
115. *Id.*
116. *Id.* at _, 426 N.Y.S.2d at 548-51.
117. 421 A.2d 1334 (Del. 1980).
118. *Id.* at 1349-50.
technology has obfuscated the concept of death. Statutory definitions adopting the brain death standard are preferable to judicial adoption of the standard, especially when the statutes are flexible and recognize the need to allow for changing medical criteria. But these statutes are only a first step; it is necessary to deal with the individual who has suffered neo-cortical death but fails to meet the brain death standard. Although the courts are beginning to develop a realistic framework, within which both the legal and medical professions can operate with relative certainty, judicial determination of this issue is much too cumbersome. A comprehensive legislative package which could be adopted uniformly throughout the country, is a goal that will not be realized in the very near future. However, as technology advances, it will be incumbent on the legislature to act to protect the fundamental rights of the individual.

*Cynthia L. Janov*

The State of Florida appealed the decision of an Osceola County circuit court which dismissed the prosecution of a juvenile in adult criminal court. Mark Cain, a minor, had been charged with two counts of armed burglary, and two counts of grand theft. In his motion to dismiss, Cain attacked the constitutionality of Florida Statute § 39.04(2)(e)4. This statute vests the state attorney with authority to prosecute juveniles, who are 16 years of age or older, in the adult criminal courts when they have committed two past delinquent acts, one of which was a felony. Cain contended that the statute unconstitutionally delegates to the state attorney unfettered discretion to prosecute juveniles as adults. Further, he argued that the statute violates due process of law in that juveniles are transferred to the adult criminal court system without a hearing. The circuit court agreed with Cain, granted his motion to dismiss, and held the statute unconstitutional. The state appealed.

This case represents an attempt by the Supreme Court of Florida to decide whether the legislature can constitutionally vest the state attorney with the power to terminate the juvenile court of its exclusive jurisdiction.

1. State v. Cain, 381 So. 2d 1361, 1362 (Fla. 1980).
The State attorney may . . . with respect to any child who at the time of commission of the alleged offense was 16 or 17 years of age, file an information when in his judgment and discretion, the public interest requires that adult sanctions be considered or imposed. Upon motion of the child the case shall be transferred for adjudicatory proceedings as a child pursuant to s. 39.09(1) if it is shown by the child that he had not previously been found to have committed two delinquent acts, one of which involved an offense classified under Florida law as a felony.
3. 381 So. 2d at 1362.
4. Id.
5. Id.
jurisdiction over minors, and prosecute them as adult criminals.

The Florida legislature acted in chapter 39 of the Florida Statutes to create the Juvenile Justice Act. Pursuant to this chapter the juvenile division of the circuit court is given the exclusive jurisdiction to handle proceedings involving minors. However, there are three statutory exceptions to this exclusive jurisdiction which allow the juvenile to be thrust into the adult criminal court system. First, the juvenile court, in a waiver hearing, may waive its jurisdiction over any child fourteen years of age or older where the criteria delineated in Florida Statute § 39.09(2)(c)1-8 are fulfilled. Second, adult criminal prosecution can be pursued by the return of a grand jury indictment. The indictment must charge the child with a crime punishable by death or life imprisonment. Finally, the state attorney may divest the juvenile court of its jurisdiction by filing an information against the child. The state attorney through § 39.04(2)(e)4 is given discretion to file informations against minors when he believes the public interest will be served best by the imposition of adult sanctions. This last exception was at issue in Cain.

The Florida Supreme Court in Cain, upheld the constitutionality of Florida Statute § 39.04(2)(e)411 which pertains to a waiver invoked by the prosecution. The decision of the court can be questioned on three particular grounds. First, in order to uphold the present waiver statute, the court used past precedent involving the constitutionality of waiver by grand jury indictment. To view these two types of waiver as comparable mistakes the inherent differences between the office of the state attorney and that of the grand jury. Second, in upholding the present waiver statute, the court sanctioned the use of prosecutorial discretion. This action by the court is dubious in light of the United States Supreme Court's opinion of United States v. Kent. Third, the court asserted that a juvenile's rights are not lessened when he is transferred

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11. 381 So. 2d at 1368.
Waiver of Juveniles to criminal court. This statement underestimates the advantages offered by the juvenile system.

In Cain, the court rejected the juvenile's due process attacks by relying on Johnson v. State and Woodward v. Wainwright. These cases upheld the constitutionality of Florida Statute § 39.02(5)(c) which allows adult prosecution of juveniles upon the return of a grand jury indictment charging the juveniles with an offense punishable by death or life imprisonment. The Cain court stated that there was no difference between a state attorney's ability to file an information against a juvenile and the power of the state attorney, as upheld in Johnson, to refer the case to a grand jury for possible indictment. Justice Sundberg, writing the Cain opinion, reasoned that since the present case was indistinguishable from Johnson, a conclusion that the present statute is constitutional must follow.

The court's finding that there is no difference between the prosecutor's power to file an information and his ability to refer the case to a grand jury is dubious at best. First, in filing an information, it is the state attorney who formulates the charge against the minor. When the case is referred to the grand jury, it is the grand jury and not the state attorney who charges the juvenile. Second, the office of the state attorney is an entity separate and distinct from that of the grand jury, with decision-making processes which are totally dissimilar.

13. 381 So. 2d at 1366.
15. 556 F.2d 781 (5th Cir. 1977).
16. FLA. STAT. § 39.02(5)(c) (1979) reads in part:
   A child of any age charged with a violation of Florida law punishable by death or life imprisonment shall be subject to the jurisdiction of the court as set forth in s. 39.067 unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, shall be dismissed and the child shall be tried and handled in every respect as if he were an adult.
17. 381 So. 2d at 1364.
18. 17 FLA. JUR. Indictments and Informations § 3 (1964), which reads in part: “An information is a written accusation of crime preferred by a grand jury.”
19. Id. “An indictment is a written accusation or charge of a crime, against one or more persons, presented upon oath or affirmation by a grand jury legally convoked.” Id.
This latter notion was espoused in the case of *Gerstein v. Pugh*.20 One issue in *Gerstein* was whether a person arrested on an information was entitled to a judicial determination of probable cause, prior to detention. State Attorney Gerstein attempted to defend the power of the prosecutor to charge non-capital offenders by information, without a preliminary hearing, by arguing that the prosecutor's decision to file an information is, itself, a judicial determination of probable cause.21 He further asserted that this identical procedure was practiced by the grand jury.22 The United States Supreme Court rejected his argument and revoked the power of the state attorney to charge non-capital offenders by information without a hearing.23 However, it allowed this procedure to continue with regard to the grand jury.

*Gerstein* illustrates the inherent differences between the state attorney and the grand jury. The grand jury was permitted to substitute its judgment on probable cause for that of the court because of its relationship to the courts and its historical role of protecting individuals from unjust prosecution.24 This same substitution of judgment was not granted to the state attorney because the prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate.25

The *Gerstein* court's finding was based on the premise that the decision-making process of the grand jury is clothed with restraint, while the state attorney operates unrestrained. A grand jury impanelment by the court26 operates as a check on its decision-making process. Furthermore, the diverse membership of the grand jury creates a cer-

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21. *Id.* at 116-17.
22. *Id.* at 113.
23. *Id.* at 114.
24. *Id.* at 117 n.19.
25. *Id.* at 117.
26. 15 FLA. JUR. *Grand Jury* § 2 (1964) states:
A grand jury is an agency of the state, and a part of its judicial system. . . . In essence it is a creature of the court since it cannot constitute itself on its own initiative but can act as a grand jury . . . only when summoned, impaneled and convened by the court.

§ 5 states: "Courts invested with criminal jurisdiction have long been regarded as having a resulting and implied power with reference to the organization of the grand jury."
tain internal policing of its actions. However, the state attorney proceeds without any of these restraints and with practically unfettered discretion.

Therefore, to state that there is no difference between the state attorney’s power to file an information and his ability to refer the case to the grand jury mistaken the fact that two separate institutions are formally accusing the juvenile, and that each entity arrives at its decision to charge in very different ways. It logically follows that Johnson v. State, which upheld waiver through grand jury indictment, cannot be relied upon to uphold the constitutionality of the present statute.

The Supreme Court in Cain also resisted the juvenile’s due process attacks by sanctioning the use of prosecutorial discretion, as created by § 39.04(2)(e)4. This action by the court seems to run against the landmark juvenile case United States v. Kent.

In United States v. Kent, Morris Kent, a juvenile, was apprehended and interrogated concerning a housebreaking and rape. Without conducting an investigation, as required by statute, the juvenile court judge transferred Kent to the criminal jurisdiction of the circuit court. Kent was found guilty of housebreaking and sentenced to the psychiatric ward of the local hospital. The case was eventually appealed to the United States Supreme Court, which held that although a minor has no constitutional right to be treated in a separate juvenile court system, once such a system is authorized by statute a juvenile may not be transferred away from it until due process requirements are met. The court in Kent asserted that the waiver process has tremendous consequences for the juvenile, thus due process requires that no transfer to criminal court should occur without a hearing, ceremony, or a statement of reasons.

In its decision, the court did not specifically enumerate the reasons which should be considered before a juvenile judge transfers a minor to the adult criminal system. However, the decision cited the eight standards for review of waiver which were included in the appellee’s appen-

27. 314 So. 2d 573 (1975).
29. Id. at 543.
31. 383 U.S. at 557.
32. Id. at 554.
These standards came from the District of Columbia courts and are as follows:

1. The seriousness of the alleged offense to the community.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the offense was against persons or against property.
4. The merit of the complaint.
5. Where the codefendants are adults, the desirability of trying the entire action at one trial.
6. The sophistication and maturity of the juvenile.
7. Previous contact with juvenile court.
8. The likelihood of reasonable rehabilitation of the juvenile.

These District of Columbia standards have been adopted in subsequent judicial decisions and state statutes. Florida adopted these standards almost verbatim and in 1975 incorporated them into their statutes. These standards have gone a long way to protect the basic

33. Id. at 565-67.
34. Id. at 566-67.
37. FLA. STAT. § 39.09(2)(c)1-8 as amended in 1978 states as the criteria for transfer:
   1. The seriousness of the alleged offense to the community and whether the protection of the community is best served by transferring the child for adult sanctions.
   2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
   3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.
   4. The prosecutive merit of the complaint.
   5. The desirability of trial and disposition of the entire offense in one court when the child's associates in the alleged crime are adults or children who are to be tried as adults who will be or have been charged with a crime.
   6. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.
   7. The record and previous history of the child, including:
premise of our juvenile court which is, whenever possible, a minor
should be treated, not punished, and that rehabilitation, not retribution
is the goal to be attained.\footnote{88}

In the instant case, the threshold question becomes: what effect
does prosecutorial discretion, as created by § 39.04(2)(e)4, have on the
Kent guidelines for transferring juveniles to criminal court? The an-
swer is clear. The statute permits the state to file an information
against a juvenile and thrust the minor into adult criminal court, with-
out ever considering the Kent standards. Should the Florida Supreme
Court have sanctioned such power?

Consider the effects of this discretion. First, the state attorney op-
erates free and unrestrained in making his decision regarding waiver.\footnote{89}
Second, he is the only party who evaluates that decision; as most courts
have held, the prosecutor’s use of this discretion is non-reviewable.\footnote{40}
Third, the juvenile court judge, a neutral and detached arbiter of jus-
tice, is required by Florida Statute\footnote{42} to consider the eight Kent guide-
lines before effectuating waiver. Yet, the state attorney, who is an ad-
vocate within the system, may bypass these standards, subjecting the

\begin{itemize}
  \item a. Prior periods of probation or community control;
  \item b. Previous contacts with the department, other law enforcement agencies, and courts;
  \item c. Prior adjudication that the child committed a delinquent act or violation of law, greater weight being given if the child had previously been found by a court to have committed a delinquent act involving an offense classified as a misdemeanor; and
  \item d. Prior commitments to institutions.
\end{itemize}

8. The prospects for adequate protection of the public and the likelihood of rea-
sonable rehabilitation of the child, if he is found to have committed the alleged
offenses, by the use of procedures, services, and facilities currently available to
the court.

38. \textit{See} In re Gault, 387 U.S. 1, 16 (1967); \textit{TASK FORCE REPORT: JUVE-
nILE DELINQUENCY AND YOUTH CRIME} (1967); Fla. Stat. § 39.001(1)(2)(3)
(1979).

state attorney may . . . file an information when in his judgment and discretion the
public interest requires that adult sanctions be considered or imposed.”

40. \textit{See} Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977); Russel v. Par-
ratt, 543 F.2d 1214 (8th Cir. 1976); United States v. Bland, 472 F.2d 1329 (D.C. Cir.
1972); United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

minor to the adult system by the single act of filing an information.

Are these effects compatible with the *Kent* holding that a decision of such tremendous consequences should not be rendered without a hearing, ceremony, or a statement of reasons? Does prosecutorial discretion safeguard the basic premise of the juvenile system which is treatment, not punishment; rehabilitation, not retribution? Will the state attorney, as an adversary, consider the welfare of the accused in making his waiver decision, or will he seek transfer of juveniles in response to political pressure or society's demand for retribution? It is suggested that these questions answer themselves.

The Florida Supreme Court should have, at least, endeavored to reconcile the statute directly with *Kent*. Instead, the court attempted to evade *Kent*, holding that its safeguards were applicable only to judges in judicial proceedings and not to prosecutors. It indeed seems puzzling to assert that procedural safeguards should be applicable to a judge, who is a neutral magistrate, and yet contend that these same safeguards do not apply to the prosecutor, who is an advocate. Should not procedural requirements be more carefully guarded when the unfettered prosecutor is the decision maker?

Judge Skelly Wright, dissenting in *United States v. Bland,* wrote that the statutory vesting of waiver authority in the prosecutor could only be created to countermand the Supreme Court's decision in *United States v. Kent.* He stated that such a statute played fast and loose with fundamental rights and concluded that this blatant attempt to evade the force of the *Kent* decision should not be permitted to succeed. One can conclude, therefore, that the Florida Supreme Court's sanctioning of prosecutorial discretion through § 39.04(2)(e), rests upon questionable grounds.

The justices in *Cain* bolstered their finding of statutory constitutionality by stating that the minor loses very few advantages when he is transferred to adult criminal court. This statement underestimates the advantages offered by the juvenile justice system.

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42. 381 So. 2d at 1365-66.
44. *Id.*
46. 472 F.2d at 1341.
47. 381 So.2d at 1366-67.
Flexibility is an asset unique to juvenile court. There are a myriad of different programs to which a juvenile offender can be directed. Those include projects centered around diversion, plans directed at reinforcing family support and community based programs. The justices in Cain suggested that the adult criminal court is not precluded from resorting to these programs. However, the statute presently in issue provides that a prosecutor should file an information when he feels adult sanctions should be imposed against the juvenile. It must be concluded, that once in the adult criminal system, the juvenile will be deprived of access to these valuable programs.

Statistics clearly suggest that shorter periods of incarceration exist in the juvenile system. In Kent, the maximum period of incarceration the defendant would have received as a juvenile would have been five years, while as an adult, the maximum would have been life imprisonment. In conjunction with this fact, two prominent sociologists have conducted studies which indicate that longer periods of incarceration create greater criminality among juveniles.

Finally, it must be remembered that the intent of the juvenile system is treatment and rehabilitation. The adjudication of a minor in the juvenile system turns not upon the issue of guilt, but upon such factors as the child's maturity, his susceptibility to rehabilitation, and the needs of society. When the juvenile is projected into the adult criminal court system, these factors, unlike the paramount issue of guilt, are absent from consideration.

49. See Juv. & Fam. Court J. 49 (May 1980).
50. Id. at 54.
51. 381 So. 2d at 1367.
53. Supra note 49.
54. Yochelson and Samenow reported these studies in Juvenile & Family Court Journal 24 (May 1980).
55. 383 U.S. at 554-55.
56. 472 F.2d at 1349.
It is clear that the juvenile system, by design, offers many opportunities to the juvenile that simply don't exist in the adult criminal system. Any statement by a court to the contrary is groundless.

The Florida Supreme Court has sanctioned prosecutorial waiver of juveniles into the adult criminal court system. It has done so with perplexing statements and doubtful logic. The effect of the supreme court's action will be that many 16 and 17 year olds will be sent to adult prisons where they will serve time with hardened criminals. As Judge Wright states, these children will be sentenced without any meaningful inquiry into the possibility of rehabilitation through humane juvenile disposition. He states further that we will hear from these juveniles again, and that the kind of society we have in the years to come will depend, in no small measure, upon our treatment of them now.

Tim Day

57. Id.
58. Id.
59. Id.
The Fate Of A Non-Resident Personal Representative: In re Estate of Greenberg

*In re Estate of Greenberg* addresses the constitutionality of Florida’s laws on administration of estates. The central issue is whether a non-resident, unrelated to the testator, can act as personal representative of the decedent’s estate. Reaffirming the states’ power to control the administration of estates of their citizens and recognizing the legislative origin of the right to dispose of property after death, the court upheld the constitutionality of Florida Statutes §§ 733.302 and 733.304.


2. *Fla. Stat. § 733.302 (1979)* provides:

   Subject to the limitations in this part, any person sui juris who is a citizen of the United States and a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as personal representative in Florida. A person who has been convicted of a felony or who, from sickness, intemperance, or want of understanding, is incompetent to discharge the duties of a personal representative is not qualified.

   In *In re the Estate of Fernandez*, 335 So. 2d 829 (Fla. 1976), we held that the United States citizenship requirement contained in section 733.302, Florida Statutes (1975), was invalid because such requirement violated the equal protection clauses of the fourteenth amendment to the United States Constitution and article I, section 2 of the Florida Constitution. Therein, we recognized that the statutory requirement that a person appointed as an administrator be a resident of Florida guaranteed the basic ability of one to perform the duties of a personal representative, but we held that the additional requirement of United States citizenship had no bearing on ability. In 1979, the legislature amended section 733.302 to eliminate the requirement of United States citizenship. Chapter 79-343, Laws of Florida (1979). The amendment deleted only the language, “is a citizen of the United States and,” but left the remainder of the statute unchanged.

   *Id.* at 41 n.1.
In reaching its conclusion, the supreme court affirmed the trial court's decision denying Meyer Pincus' petition for appointment as co-personal representative to Leo Greenberg's estate. Mr. Greenberg died a resident of Florida. In his will, he named his son and accountant co-personal representatives of his estate and Mr. Pincus as successor personal representative. Before Mr. Greenberg moved to Florida, Meyer Pincus had acted as his attorney and tax advisor. When the accountant renounced his right to serve as co-personal representative, Mr. Pincus agreed to replace him. However, the court denied permission since Mr. Pincus was neither a relative of the testator as defined by section 733.304 nor a resident of Florida as required by section 733.302.

*Greenberg* illustrates the supreme court's endorsement of the constitutionality of the Florida Statutes controlling the administration of the estates of Florida citizens. According to the court these statutes withstand challenges that they violate the equal protection and due process clauses of the fourteenth amendment and the privileges and immunities clause of article IV, section 2 of the United States Constitution. In *Greenberg*, Mr. Pincus alleged that these statutes denied the testator's fundamental right to choose the person to administer his es-

3. **FLA. STAT. § 733.304 (1977)** provides:
   A person who is not domiciled in the state cannot qualify as a personal representative unless the person is:
   (1) A legally adopted child or adoptive parent of the decedent;
   (2) Related by lineal consanguinity to the decedent;
   (3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent; or
   (4) The spouse of a person otherwise qualified under this section.

   *Id.* n.2. In 1979 this section was amended. Clause 3 now reads "a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person." *Id.* (1979).

4. *See* text of statutes as set forth in notes 2 & 3 *supra*.

5. **U.S. CONST. amend. XIV, § 1**:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

6. **U.S. CONST. art. IV, § 2, cl. 1**: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
tate. Further, Mr. Pincus argued that these statutes abridge the testator's fundamental right to travel. Finally, Mr. Pincus argued that the statutes abridged his fundamental right to pursue a livelihood.⁷

I. EQUAL PROTECTION

A. Brief History

The fourteenth amendment to the United States Constitution prohibits the states from denying to any person within their jurisdiction the equal protection of the laws.⁸ In modern equal protection cases, the key is to identify the proper standard of judicial review. The rational basis or minimum scrutiny test, generally applied in cases involving equal protection challenges, allows any imaginable state of facts to uphold the legislative enactment as reasonable for achieving a legitimate legislative purpose.⁹ A statutory classification will be held "unconstitu-

7. Answer Brief of Amicus Curiae, The Florida Bar, Real Property, Probate and Trust Law Section at 5, In re Estate of Greenberg, 390 So. 2d 40 (Fla. 1980) [hereinafter cited as Answer Brief].

8. See note 5 supra.

9. The Court in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) stated the rules by which this contention must be tested:

1. The equal protection of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wise scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary (citations omitted).

In Dandridge v. Williams, 397 U.S. 471 (1970), the Court stated that its business did not include determining whether a regulation is wise, only that it best fulfills the relevant social economic objective. "[T]he equal protection clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." Id. at 487 (citations omitted).
tionally violative of the equal protection clause under this test if it causes different treatment so disparate" that the classification is "wholly arbitrary."\(^{10}\) The burden of showing there is no rational basis for the classification is on the party attacking the statute.\(^ {11}\) However, this burden is practically insurmountable for there is almost always some basis for the legislative judgment that the measure promotes public interest.\(^ {12}\)

On the other hand, application of the strict scrutiny test usually nullifies the presumption of constitutionality and "is almost always fatal in its application."\(^ {13}\) This test requires the state to justify its classification as a necessary means to achieve a compelling state interest when either (a) a suspect classification\(^ {14}\) or (b) a fundamental interest\(^ {15}\) ex-

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10. 390 So. 2d at 42.
11. See note 9 supra.
13. 390 So. 2d at 42-43. Cf. note 9 supra (when rational basis test is applied the statute is generally upheld).
14. The Supreme Court has identified two types of classification as suspect, calling for strict judicial scrutiny: (1) race, see, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954) and (2) alienage, see, e.g., Korematsu v. United States, 323 U.S. 214 (1944), and In re Griffiths, 413 U.S. 717 (1973).
The Court has also found discrimination against exercise of constitutional rights may invade a fundamental right of privacy, see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979). The Court has also examined discrimination in the context of (1) the right to travel, see, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Sosna v. Iowa, 419 U.S. 393 (1975); Califano v. Torres, 435 U.S. 1 (1978); Dunn v. Blumstein, 405 U.S. 330 (1972); (2) the right to pursue a livelihood, see, e.g., Hicklin v. Orbeck, 437 U.S. 518 (1978); and (3) first amendment rights, see, e.g., Williams v. Rhodes, 393 U.S. 23 (1968).

http://nsuworks.nova.edu/nlr/vol5/iss3/1
licitly or implicitly protected by the Constitution is present in the case.

B. Mr. Pincus’ Argument

Realizing the futility of presenting his challenge under the rational basis test, Mr. Pincus argued that the strict scrutiny test should be applied. This test would have been applicable had the statutes actually impinged upon the testator’s fundamental right to appoint his personal representative, penalized his fundamental right to travel or abridged Mr. Pincus’ fundamental right to pursue a livelihood. However, the United States Supreme Court has carefully and narrowly defined the list of fundamental rights explicitly or implicitly guaranteed by the Constitution. Therefore, unless Mr. Pincus’ allegations involved either a suspect classification or a recognized fundamental right, the rational basis test had to be applied.

“Mr. Pincus characterize[d] as fundamental the testator’s right to appoint a personal representative; thus impelling application of the strict scrutiny test.” However, Pincus attempted to bootstrap the right to appoint a personal representative to the definition of “liberty” in Meyer v. Nebraska and the recognized fundamental right which protects family relationship, thereby creating a new fundamental in-

16. See note 15 supra.
17. Id.
18. The Court has confronted other classifications arguably suspect in nature, but has not yet held them to be suspect. These classifications include: illegitimacy, see, e.g., Mathews v. Lucas, 427 U.S. 495 (1976); gender, see, e.g., Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977); wealth or indigency, see, e.g., James v. Valtierra, 402 U.S. 137 (1971); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Maher v. Roe, 432 U.S. 464 (1977); and age, see, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The Court also refused to extend the list of fundamental interests to other important areas such as adequate housing, see, e.g., Lindsey v. Normet, 405 U.S. 56 (1972); welfare assistance, see, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); employment, see, e.g., Idaho Dep’t of Employment v. Smith, 434 U.S. 100 (1977).
19. In re Estate of Greenberg, 390 So. 2d at 43.
21. See note 15 supra.
The Florida Supreme Court held that this right to appoint a personal representative was not a fundamental right and properly followed United States Supreme Court precedent establishing that "the Supreme Court does not pick out particular . . . activities, characterize them as fundamental, and then give them added protection." The United States Supreme Court emphasized that it is not within its "province to create substantial rights by guaranteeing equal protection." Further, the Court declared that it is not sufficient to characterize a right as fundamental "just because state legislation affects a matter gravely important to society." "The Constitution does not provide judicial remedies for every social and economic ill and the Supreme Court will only recognize an established constitutional right and give to that right no less protection than the Constitution itself demands."

The Constitution does not govern the right to control inheritance, descent, or distribution. The power to create rules establishing, protecting and strengthening life, as well as regulating the disposition of property, is reserved to the legislatures of the states. The vague generalities of the equal protection clause are not applicable. Therefore, since the power is reserved to the states, "nothing forbids the legislatures from limiting, conditioning or even abolishing the power of testamentary disposition of property within their jurisdiction."

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22. Brief for Appellant at 8, In re Estate of Greenberg, 390 So. 2d (Fla. 1980).
23. 390 So. 2d at 43. See also San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973).
24. 390 So. 2d at 43. "The Supreme Court of the United States has refused to expand fundamental rights beyond those explicitly guaranteed by the constitution." Id.
26. 390 So. 2d at 43.
28. Id. at 538-40. See also Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850).
Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.

Id.
29. 390 So. 2d at 43. See also Trimble v. Gordon, 430 U.S. 762, 771 (1977).
The Florida Supreme Court reemphasized this position stating "that the power to alienate any species of property by a last will and testament has never been an inherent right in the citizen, but is derived from legislation." In most jurisdictions, statutes create the decedent's right to name a personal representative to administer his estate. However, since this right is created by statute, the requirements must be strictly complied with. State legislation has established that courts have no jurisdiction to issue letters of administration to the personal representative nominated in the will unless such discretion is granted by statute. Thus, sections 733.302 and 733.304 of the Florida Statutes specifically disqualify Pincus from serving as personal representative, since he is not related to the testator or a resident of Florida.

In certain instances, the United States Supreme Court has recognized the right to domestic travel as a protectable fundamental interest, requiring the strict scrutiny analysis, which cannot be abridged by the states. Whether it is protected against congressional action may be an open question in light of the deferential treatment given to such legislation by the United States Supreme Court. The right to foreign travel


32. Id. See also In re Crosby's Estate, 218 Minn. 149, _ , 15 N.W.2d 401, 505 (1944). "The legislature has the unquestioned power to qualify a testator's right of appointing an executor and may even wholly deprive the testator of that right, for the right to make a will is purely a statutory right, subject to the complete control of the legislature." Id. (citations omitted).

33. See notes 2 & 3 supra.

34. See note 15 supra.

35. See Oregon v. Mitchell, 400 U.S. 112, 286 (1970) (Stewart, J., concurring): "[A]s against the reserved power of the states, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end." See also, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the court, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Consti-
is protected against congressional invasion by the due process clause of the fifth amendment.\textsuperscript{36}

This right to travel has been protected as a fundamental right only when a durational residency requirement is imposed by a state as a condition precedent to receiving the privileges and benefits of a state,\textsuperscript{37} and when the requirement serves to penalize the exercise of that right to travel.\textsuperscript{38} However, the United States Supreme Court has cautioned that an appropriately defined and uniformly applied residency requirement will be upheld.\textsuperscript{39} But generally “the right to interstate travel must be seen as insuring new residents the same right to vital governmental benefits in the state to which they migrate as are enjoyed by other residents” of that state.\textsuperscript{40}

Mr. Pincus alleged that sections 733.302 and 733.304 of the Florida Statutes violate the testator’s right to travel in that the testator should be allowed the same rights and privileges in Florida as he enjoyed in the state from which he came. The United States Supreme Court has specifically rejected such a proposition.\textsuperscript{41} The Court reasoned that “the broader implications of this transposition, in other areas of substantive law, would destroy the independent power of each state

\textsuperscript{36} Kent v. Dulles, 357 U.S. 116 (1958); cf. Zemel v. Rusk, 381 U.S. 1 (1965) (Congress can constitutionally authorize the President to deny passports for travel to designated areas where justified by national security concerns).

\textsuperscript{37} See, e.g., Dunn v. Blumstein, 405 U.S. 330, 343 (1972): “We emphasize again the difference between bona fide residence requirements and durational residency requirements.” “Obviously, durational residency laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly.” Id. at 338. See also, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); McCarthy v. Philadelphia Civil Serv. Comm’n, 424 U.S. 645 (1976); Califano v. Torres, 435 U.S. 1 (1978); United States v. Guest, 383 U.S. 745 (1966).

\textsuperscript{38} Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974).


\textsuperscript{40} 415 U.S. at 261.

\textsuperscript{41} In Califano v. Torres, 435 U.S. 1, 4 (1978), the Court stated that the right to interstate travel does not require that a person who travels from one state to another be given benefits superior to those enjoyed by residents of states to which he travels merely because he enjoyed those rights in the state from which he came.
under the Constitution to enact laws uniformly applicable to all of its residents."

Sections 733.302 and 733.304 of the Florida Statutes do not contain a durational residency requirement and nothing prohibits a nonresident personal representative from taking up residence in Florida prior to qualifying as a personal representative. Thus, these statutes do not penalize the testator's right to travel as defined by the United States Supreme Court where it has applied the strict scrutiny test.

Further attempting to invoke the strict scrutiny test, Mr. Pincus contended that his fundamental right to pursue a livelihood was violated by the statutes at issue. In *Hicklin v. Orbeck*, the United States Supreme Court held that an Alaskan "hire law," which contained a one year durational residency requirement before non-residents could work on the Alaskan pipeline, violated the non-resident's right to pursue a livelihood. However, in *Baldwin v. Montana Fish and Game Commission*, the Court stated that (1) it did not decide the full range of activities sufficiently basic to the livelihood of the nation and (2) that the states may not interfere with a non-resident's participation without similarly interfering with a resident's participation.

The Florida Supreme Court held that, since there was no fundamental right to appoint a personal representative explicitly or implicitly guaranteed by the United States Constitution, there was no fundamental right to serve as a personal representative. Mr. Pincus' argument did not persuade the court. He claimed that serving as a personal representative and earning an incidental fee was equivalent to the fundamental right to pursue a livelihood. Moreover, Pincus was not li-

42. *Id.* at 4-5.
43. Answer Brief at 15.
44. *See* note 15 *supra*.
46. 436 U.S. 371, 381 (1978). *See also* *Davis v. Rose*, 97 Fla. 710, 122 So. 225 (1929).
47. *In re Estate of Greenberg*, 390 So. 2d at 43.
48. *Id.* at 45.
49. This court [should] have little sympathy for that sideline to the practice of law, just as it would regard real estate commissions generated by a lawyer's law practice if he held a brokerage license, as a part of his livelihood entitled to protection as a fundamental right. Moreover, in instances which a testator's attorney is named a personal representative, it is with
licensed to practice law in Florida.50

Similar to the fundamental right to travel, residency requirements also have been considered when analyzing the fundamental right to pursue a livelihood. When confronted with the question of whether a residency requirement for admission to the Puerto Rico Bar unconstitutionally deprived an individual of his right to pursue a livelihood, the Court in Ward v. Board of Examiners,51 held that residency is not a suspect classification. The Court further stated that the actual residency requirement did not burden a fundamental right. The Court utilized the rational basis analysis and upheld the non-durational residency requirement for admission to the bar. In Greenberg, the Florida Supreme Court expressly recognized the state residency requirement of section 733.302 of the Florida Statutes.52

Since the legislation in question affected neither a suspect class nor a fundamental right, the rational basis or minimum scrutiny test invalidated this equal protection challenge.53 Utilizing this test, the Florida Supreme Court held that the statutes bear a reasonable relationship to a legitimate state objective and therefore did not deny Mr. Pincus the right to pursue a livelihood.54

the thought that administration expenses will be saved by virtue [of] combining the personal representative and the personal representative's attorney into one office. In the typical example in which the testator migrated to Florida having named his northern lawyer as personal representative, the assumption that the testator had made in naming the lawyer would be no longer valid, because the lawyer's inability to practice law in the State of Florida would prevent the saving in administration expenses that had been contemplated.

Answer Brief at 17.

50. Id.; see also Leis v. Flynt, 439 U.S. 438 (1979).
52. 390 So. 2d at 45.
53. Id.
54. Cf. Fain v. Hall, 463 F. Supp. 661 (M.D. Fla. 1979) (The court applied strict scrutiny analysis and held blood requirement for qualification of non-resident personal representative was unconstitutional). But see 390 So. 2d at 43, where the court stated that “[n]otwithstanding the decision of the federal district court in [Fain], which [they found] to be wholly unpersuasive . . . that the right to appoint a personal representative is not one of the fundamental rights implicating utilization of the strict scrutiny test.”
What then are the legitimate state interests? The state "recognized that the administration of a decedent's estate is an intensely localized matter requiring the personal representative to be thoroughly informed on local matters and to be available to the court, beneficiaries and creditors of the estate." Even though availability is used in a broader sense than when the word is used in reference to service of process, the search for a legitimate state interest could have ended here. The United States Supreme Court held that if there exists a reasonably conceived state of facts, the classification of a law will be sustained. Amenability to service of process has been recognized as a legitimate state interest for upholding the residency requirement in section 733.302 of the Florida Statutes, and has passed the strict scrutiny test. Nevertheless, the state also declared that these statutes serve the valid function of insuring that the personal representative, if not a relative of the testator, is close enough in proximity to the Florida estate to protect the rights of the creditors, insure that the estate will be probated without needless delays caused by travel, and reduce the cost of representation to the estate by reducing travel costs or preventing the need to associate an in-state representative.

The dissent agreed that the rationality standard of review was appropriate, but argued that the state's interest in reducing "delay in the administration of estates," and costs incurred through "travel and the association of an in-state representative" and insuring "proximity to the interests of the Florida estate to protect interested parties' rights" did not pass the rational basis test. It argued that the "state's classification for qualified non-resident personal representative [was] arbitrary and irrational . . . denying equal protection of the laws." On one
hand, the dissent wanted to act as a super-legislature and strike down the residency statute. On the other hand, it called on the legislature to gather its collective mind and make the statute applicable to personal representatives, resident and non-resident.

However, “[e]qual protection does not require a state to choose between attacking every aspect of a problem or not attacking it at all. . . .” Further, a statutory classification will not be set aside if any set of facts may reasonably be conceived to sustain the classification. Additionally, the dissent cannot overlook decisions of its own court which reiterate the same propositions. The Florida Supreme Court has stated that “it is not unreasonable for an exception to be created for non-resident relatives because, more than likely, the non-resident relative will also be a beneficiary of the decedent’s estate.” Furthermore, the argument that the statute has not gone far enough to provide equal protection of the laws was specifically rejected by the United States Supreme Court.

In summary, since none of Pincus’ arguments fall within the definition of a suspect class or a fundamental interest the rational basis test must be applied. In the application of this test, the court held that sections 733.302 and 733.304 of the Florida Statutes bear a reasonable relationship to a legitimate state objective. Hence, these sections do not violate the equal protection clause of the fourteenth amendment.

II. PRIVILEGES AND IMMUNITIES

Additionally, Pincus contended that the operation of the residency requirement in the challenged statutes violated the privilege and immunities clause of article IV, section 2 of the United States Constitution. The United States Supreme Court has upheld as permissible “[s]ome
distinctions between residents and nonresidents [which] merely reflect . . . that this is a nation composed of individual states. . . .” On the other hand, the Court prohibits those distinctions which hinder the formation, purpose, or development of a single union.71

The Florida Supreme Court explained that the privileges and immunities clause secures for the citizens of a state the same freedoms existing in other states as to the acquisition and enjoyment of property, pursuit of happiness and guarantee of equal protection of the laws.72 Thus, the privileges and immunities clause secures to citizens of each state those virtues of their status as citizens which are common to the citizens in other states under their constitution and law.73 “Performing the task of personal representative does not rise to the level of a privilege or immunity bearing upon the vitality of the nation as a single entity”74 and certainly is not common to all states.75 Therefore, the residency requirement for personal representatives does not violate the privileges and immunities clause.

III. DUE PROCESS OF FOURTEENTH AMENDMENT (IRREBUTTABLE PRESUMPTIONS)

During the 1970’s, the United States Supreme Court employed a new form of heightened scrutiny to review statutory classifications which contained rules denying a benefit or placing a burden on all individuals possessing a certain defined characteristic. This scrutiny was characterized as an irrebuttable presumption76 (e.g., all women after their fifth month of pregnancy are incapable of working).

Under equal protection standards and other standards utilizing strict scrutiny, a perfect meeting between the purpose of the state statute and the classification created by the statute is not required. The

73. Id.
74. 390 So. 2d at 49. See In re Mulford, 217 Ill. 242, __, 75 N.E. 345, 346 (1905).
75. Answer Brief at A-6 & A-7 (see survey of eligibility of non-resident personal representative statutes).
irrebuttable presumption analysis was a furtive maneuver, under the guise of due process, to impose "extraordinarily strict safeguards on overinclusive classification.""77 "In practice, the application of this analysis invalidated the generalization and produced a requirement for individualized hearings."78 The Court in Vlandis v. Kline, held that if it is not necessarily or universally true in fact the basic fact implies the presumed fact, and the statute's irrebuttable presumption denies due process of law.79

However, as rapidly as the irrebuttable presumption doctrine emerged in the early 1970's, its decline was not far behind. Chief Justice Burger wrote in his dissenting opinion in Vlandis that this doctrine represented a transfer of the compelling state interest test from the equal protection area into the due process area.80 He further stated that the Court's function in constitutional adjudication is "not to see whether there is some conceivably less restrictive alternative to the statutory classification under review since all legislation might be improved by such an individualized determination."81 In Cleveland Board of Education v. LaFleur,82 Mr. Justice Powell (concurring in result)83 and Mr. Justice Rehnquist (dissenting)84 espoused similar views.

Finally, in Weinberger v. Salfi,85 the Court addressed a claim that a federal statute violated due process. The majority stated the issue as "whether Congress, [concerned] . . . by the possibility of an abuse which it legitimately desired to avoid, could have rationally concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."86 Two years later in Ulsery v. Turner Elkhorn Mining Co.,87 the

77. G. Gunther, CONSTITUTIONAL LAW 969 (10th ed. 1980).
78. Id. at 970.
80. 412 U.S. 441, 459-60 (1973) (dissenting opinion).
81. Id. at 460.
85. 422 U.S. 749 (1975).
86. Id. at 777.
Court further clarified its holding in *Weinberger* and applied the rational basis analysis to uphold a federal law containing two irrebuttable presumptions.88

The *Weinberger* and *Turner Elkhorn* decisions illustrate that “just as... severe limitations [were] placed upon the strict scrutiny test in equal protection cases, the irrebuttable presumption doctrine... has now been limited... so that legislation that creates an irrebuttable presumption will be examined by the deferential test of a rational relationship in matters of economic legislation.”89 A strict scrutiny analysis will only be applied when a classification is at least arguably suspect90 or when there is an interest that is at least arguably fundamental.91

In this instance, Pincus had no fundamental right compromised and he did not belong to a suspect class. Therefore, the rational basis analysis was proper in light of *Weinberger* and *Turner Elkhorn*. Hence, sections 733.302 and 733.304 of the Florida Statutes do not violate the due process clause of the fourteenth amendment since they represent a rational means of accomplishing a legitimate state goal.

IV. THE CONTENTION OF AMICUS CURIAE - DUAL PROBATE

The Florida Supreme Court properly concluded that sections 733.302 and 733.304 of the Florida Statutes are constitutional. The court arrived at this decision based upon principles established by the United States Supreme Court under the privileges and immunities clause and the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States.92

However, this lengthy analysis may have been unnecessary had consideration been given to an argument put forth in the answer brief of amicus curiae.93 This well taken argument deals with the concept of dual probate which vitiates all constitutional arguments made by Mr.

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88. 422 U.S. 749 (1975).
89. Answer Brief at 34.
92. 390 So. 2d at 49.
93. Answer Brief at 3.
Pincus.\textsuperscript{94} As previously set forth, Mr. Pincus alleged that the testator's constitutional right to travel and his fundamental right to choose a personal representative were denied. Additionally Mr. Pincus' own right to earn fees for administering the estate was prohibited by sections 733.302 and 733.304 of the Florida Statutes which disallow an unrelated non-resident from becoming a personal representative in Florida.

The concept of dual probate has been widely employed by other states and was adopted in Florida in 1978.\textsuperscript{95} In essence the original probate of the will of a decedent, domiciled in Florida at the time of death, will be simultaneously probated in Florida and New York. The New York administration, with Mr. Pincus as personal representative, could have disposed of most or all of the decedent's estate, including all of the personal property owned by the decedent even though it was situated in Florida at the time of death.\textsuperscript{96}

Dual probate should not be confused with the concept of ancillary administration. Ancillary administration applies when a person dies leaving real property in another state. Primary administration takes place in the state of the decedent's domicile and ancillary administration applies in situations involving personal property.

\textsuperscript{94} Id. at 5.
\textsuperscript{95} FLA. STAT. § 731.106(2) (Supp. 1980):
When a non-resident decedent who is a citizen of the United States or a citizen or subject of a foreign country provides in his will that the testamentary disposition of his tangible or intangible personal property having a situs within this state, or of his real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of his death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile, as the case may be.

\textsuperscript{96} N.Y. [EST., POWERS & TRUSTS] LAW § 3-5.1(h) (Consol. 1979):
Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state. The formal validity of the will, in such case is determined in accordance with paragraph (c).
tion takes place in the state where the real property is situated. On the other hand, “[i]n a typical dual probate estate, a Florida [domiciliary could] have all his personal property, tangible and intangible, probated by an unrelated non-Florida resident [e.g., the decedent’s tax advisor or attorney], in another state, under the judicial supervision of the other state.”

In other words, a person emigrating to a foreign state could direct in his will that all property, wherever situated, be subject to administration in the state from which he emigrated. This tactic is useful especially where the named personal representative cannot qualify under the new state's residency statute. For instance, Mr. Pincus could not qualify as a personal representative in Florida and had Mr. Greenberg so directed in his will, Mr. Pincus could have administered the bulk of Greenberg’s estate in New York even if it was situated in Florida. Had Greenberg chosen this tactic, “the only assets subject to the simultaneous original probate in Florida would [have been] the real property located in Florida which in many instances passes outside of probate by virtue of joint ownership.”

**CONCLUSION**

Florida Statutes sections 733.302 and 733.304 do not prevent the estate of a Florida resident from being probated within the state from which he emigrated. Therefore, in applying the statutes to Mr. Greenberg's case, no violation can be found of his “fundamental” right to appoint Mr. Pincus, an unrelated non-resident, as successor personal representative to his estate. Moreover, this application would preclude any alleged impingement on the testator's fundamental right to travel. In addition, these Florida Statutes contain no provisions to prevent such an unrelated, non-resident personal representative from earning a personal representative’s commission approved by the court of a foreign state. “It is only if the decedent or his family chooses to forego dual

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97. See generally Redfearn, supra note 30, at § 20.13.
98. Answer Brief at 3.
99. Id. at 5.
100. Id.
101. See note 96 supra.
probate and submit all the intangible personal property to probate in the Florida Court that sections 733.302 and 733.304 will apply.”

Since Mr. Greenberg chose to submit his estate to the laws of Florida, sections 733.302 and 733.304 of the Florida Statutes were applied. In light of a challenge that the Florida Statutes violate the equal protection and due process clauses of the fourteenth amendment and the privileges and immunities clause of article IV, section 2 of the United States Constitution, the Florida Supreme Court properly applied the United States Supreme Court precedent and upheld the constitutionality of the Florida law.

Peter S. Broberg

102. Answer Brief at 5.
I dissociate myself from the implication . . . that there is something insignificant or unreliable about a rape victim's observation during the crime of the facial features of her assailant when that observation lasts "only 10 to 15 seconds."¹

The inferences contained in the above quotation explain why all trial court judges and trial lawyers should read Eyewitness Testimony. As every law student soon learns, verdicts usually hinge on facts found by juries or judges after hearing witnesses testify as to what they have seen, heard, touched or smelled. One commonly pictures an "eyewitness" as the pedestrian on the street corner who saw two automobiles collide or the drug store clerk who was robbed at gunpoint. That jurors and judges place much weight on the testimony of such witnesses can scarcely be denied. As such, many prosecutors would agree that the persuasive value of a positive eyewitness is even greater than that of the proverbial "smoking gun."

Why, then, are so many lawyers and law students demonstratively ignorant of this important subject? Go to any busy courthouse and watch some trials. Sooner or later, you will observe the epitome of a poor eyewitness cross-examination. Assume the witness has identified the accused as the robber. The cross-examination must attack and destroy or at least neutralize the witness. Chances are this is how it might be done:

Lawyer: "You testified it was Mr. Jones who robbed your store."

Witness: "Yes."
Lawyer: "Now, had you ever seen Mr. Jones before that night?"
Witness: "No."
Lawyer: "You didn’t notice anything unusual about the robber when he entered your store?"
Witness: "Not really."
Lawyer: "You certainly didn’t expect to be robbed, did you?"
Witness: "No."
Lawyer: "And you weren’t particularly paying any attention to him before he pulled the gun."
Witness: "No."
Lawyer: "And this startled you?"
Witness: "Yes."
Lawyer: "And you wanted to do just what he told you?"
Witness: "Yes, of course. I wanted to get it over as fast as possible."
Lawyer: (flushed with victory in his grasp): "But, in spite of all this, you’re sure the person you saw in the store that evening with the gun was my client, Mr. Jones?"
Witness: "Yes, I’ll never forget his face."
Lawyer: (now fully deflated): "No further questions, your honor."

While the above cross-examination would probably not be considered bad if conducted by a fledgling third-year law student, few attorneys would say it accomplished its purposes. The attorney has scored some points, but how can he be certain the jury understands their significance? The witness has survived, and unless other evidence is produced, Jones will probably be convicted.

Criticism of the American legal profession for ignoring the psychological aspects of eyewitness testimony is not new. In 1909 John Henry Wigmore, the noted evidence scholar, demonstrated the legal profession’s unfamiliarity with the available psychological literature. Wigmore’s criticism took place under the guise of a fictitious libel suit
brought by the American bar against Dr. Hugo Munsterberg for allegedly charging the law with ignoring what psychologists had recently discovered about the inaccuracy of eyewitness testimony.\(^4\) The bar wins damages of one dollar, but the judge’s closing remarks indicate much truth existed in the defendant’s claim.

It is impossible to claim that innocent people have not been the victims of miscarriages of justice. In 1932 Professor Edwin Borchard described sixty-five cases in which innocent people were convicted as a result of mistaken identification, circumstantial evidence (from which erroneous inferences were drawn), perjury, or some combination of these factors.\(^5\) Most startling of these convictions may have been that of Adolf Beck.\(^6\) Identified by ten witnesses as the man who defrauded them of jewelry, Beck was convicted in 1896, served five years in prison, and was wrongly charged again with the same offense in 1904. Fortunately, this time the police found the real swindler. Beck was subsequently pardoned on the earlier charge.

Aberrations of this nature are not a phenomena of the past. Recently the Minneapolis Tribune described the plight of Bruce T. Werner, who was jailed four months on a rape charge. As the story relates, “[w]hat happened to him is not supposed to happen in the criminal justice system, but it sometimes does. It is a classic case of mistaken identity.”\(^7\) Werner did not match the victim’s description, nor did he have the scratches she claimed to have inflicted on her assailant. He also passed a lie detector test; however, because he had been selected at a lineup, his prosecution and conviction seemed imminent. Fortunately, while Werner was in jail, the true rapist was apprehended and confessed to the crime. Both men were remarkably similar in appearance.\(^8\)

Psychologists have long known the dangers of eyewitness testimony. Unfortunately, however, few legal practitioners realize just how fragile such an identification can be. Why is this so? Perhaps a failure

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4. For the full description of Professor Munsterberg’s claim, see H. MUNSTERBERG, ON THE WITNESS STAND (1908).
5. E. BORCHARD, CONVICTING THE INNOCENT (1932).
6. Id. at 7-13.
8. The Minneapolis Tribune story includes photographs of Werner and the real assailant. As stated by one police officer in the article, “They’d pass for brothers.” Id. § A at 9, col. 1.
of communications between the two disciplines is the answer. As recently stated,

[p]sychologists need to translate significant experiments (e.g., attribution and exchange or perception and cognition theory) into language available to the legal profession. For example, many legal problems related to eyewitness identification process suffer precisely because the psychological 'stuff' in perception or memory is simply not translated or made available in ways useful to lawyers.9

Likewise, much of the legal literature on eyewitness identification has centered on such legal doctrines as the sixth amendment right to counsel or the fourteenth amendment right to procedural due process without explaining how these rights relate to possible identification defects. Eyewitness Testimony, however, is instructive, for it begins, in language understandable to both lawyers and lay persons alike, the long overdue integration of knowledge between the legal and psychological professions.10

Professor Loftus begins her book with a discussion of how mistaken identifications may have contributed to miscarriages of justice in the past. After a brief description of the Sacco-Vanzetti murder trial and the role suggestive police identification procedures may have played in obtaining what was arguably a questionable conviction,11 Loftus discusses the Sawyer brothers' case, from which one may reasonably conclude that the accused were innocent and their identifications erroneous.12 The author ends the chapter with the theme of the remain-

10. Besides EYEWITNESS TESTIMONY, Professor Loftus has authored numerous articles in psychological and quasi-legal periodicals. In a recent article, Loftus, The Eyewitness on Trial, 16 Trial 30 (October 1980), Loftus briefly summarizes many of the experiments and conclusions discussed in EYEWITNESS TESTIMONY.
12. In referring to the Sawyer Brothers case, Loftus makes a pointed comment on the legal system's inability to determine the actual frequency of wrongful convic-
der of her book: "[E]yewitness testimony is not always reliable. It can be flawed simply because of the normal and natural memory processes that occur whenever human beings acquire, retain, and attempt to retrieve information."13

In chapter two, the author describes several studies relating the impact of eyewitness testimony on the jury's mind. One particular experiment, conducted by Loftus herself, is especially revealing. Three sets of fifty jurors each read accounts of a robbery and the evidence available to prove such. Without any eyewitness testimony, only eighteen percent of the jurors would have convicted the defendant. With one eyewitness, the conviction rate skyrocketed to seventy-two percent. Even when cross-examination showed the witness was not wearing glasses the day of the robbery, had only 20/400 vision and could not have seen the robber's face, astonishingly, sixty-eight percent of the jurors would still have reached a guilty verdict. The chapter also discusses those factors which lead juries to believe one eyewitness over another: e.g., witness likeability, motive to falsify, and powerful versus powerless speech.14 Loftus' conclusion, that "the way in which a witness gives testimony can affect the potential monetary award,"15 is instructive; for it indicates that attorneys may maximize their chances for success if they teach their witnesses the most effective ways to answer questions.16

In the next three chapters, the book's heart, the author presents the results of her own as well as other experimenters' works. She demonstrates that memory is not a simple process, but is composed of three separate stages: perception, retention, and retrieval. Chapter three fo-

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13. Id. at 7.
14. According to Loftus, powerless speech has six possible characteristics: (1) frequent hedging, (2) rising intonation in declarative statements, (3) repetition, indicating insincerity, (4) intensifying adjectives, (5) empty adjectives, and (6) frequent quotation, indicating a deference to authority. Id. at 15.
15. Id. at 16.
16. Theodore Koskoff, past president of the American Trial Lawyers's Association, is a disciple of Professor Loftus's earlier work. Koskoff has suggested that trial lawyers consider Loftus's conclusions when conducting a direct examination. See Koskoff, The Language of Persuasion, 3 LITIGATION 27 (Summer 1977).
Focuses on error at the perception stage. Two sets of factors, events factors and witness factors, affect the ability to perceive an event accurately. Among event factors are such items as exposure time, frequency of exposure, detail salience and the type of fact perceived. Loftus mentions that psychological studies have demonstrated that people overestimate the amount of time it takes for an event to transpire, and that the speed of automobiles is particularly difficult to judge; yet, the law of evidence permits witnesses to testify as to these events with little, if any, protective safeguards. Witness factors include such things as the stress which an event produces, expectations based upon personal and cultural prejudices, the activity engaged in by the witness while making an observation, and expectations as to what might be observed. Loftus disputes the notion that stress is usually a clarifying factor tending to remove distortion. She argues that one type of stress, weapon focus, is particularly intrusive on good perception: “The weapon appears to capture a good deal of the victim’s attention, resulting in, among other things, a reduced ability to recall other details from the environment, to recall details about the assailant, and to recognize the assailant at a later time.”

Chapter four focuses on the retention stage of memory. Loftus concisely states the chapter’s premise as follows: “Post event information can not only enhance existing memories but also change a witness’s memory and even cause nonexistent details to become incorporated into a previously acquired memory.”

The author shows that suggestive questioning may not only enable a witness to remember what was forgotten, but can also introduce into the memory process, and ultimately courtroom testimony, facts or oc-

17. Estimates of speed are commonly allowed, if based on first hand observation. See Kotlikoff v. Master, 345 Pa. 258, 27 A.2d 35 (1942); Kelly v. Vuklich, 111 Kan. 199, 206 P. 894 (1922). The Federal Rules of Evidence allow opinions by lay witness if “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” Fed. R. Evid. 701.

Arguably, jurors could be instructed that in considering a witness’s testimony, they may, but are not required, to consider that people often overestimate the amount of time it takes for an event to occur. To this reviewer’s knowledge, no jurisdiction has currently adopted such an instruction.

18. Loftus, supra note 12, at 35.

19. Id. at 55.
currences never before perceived. In one of her experiments, Loftus explains how a number of witnesses, after being subjected to a series of verbal suggestions, recalled a green car to be blue and a stop sign to be a yield sign. According to Loftus, non-verbal influences may also create distortions:

A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos. It is here that nonverbal as well as verbal suggestions can easily be communicated. If the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when [asking which number suspect it might be] the witness's opinion might be swayed.20

Two other aspects of retention seem especially dangerous: guessing by witnesses in identifications and the freezing effect such an identification may have. Loftus believes that in an honest effort to help, witnesses often guess at identification when not certain. Once such a tentative identification has been made, it grows stronger with time until it becomes absolutely positive. As such, a pre-trial identification or description of an event (e.g., at a preliminary hearing or deposition) may have such a freezing and reinforcing effect on a witness's memory as to preclude his/her ability to recollect the originally perceived event at the time of trial.21

Chapter five completes the discussion of the three-fold memory

20. *Id.* at 73-74.
21. Freezing of the memory process may occur in another way. After a witness makes what police consider to be an accurate identification, the police may later confirm the suspect's identification. The expected result will be that later in court, the witness will remember not only the crime and the subsequent identification, but also the police confirmation, thus attributing to an even more positive identification. Courts have refused to suppress identification testimony despite such police confirmations. *See* State v. Richie, 110 Ariz. 590, 521 P.2d 1136 (1974) (after picking out suspects from six photographs but prior to a preliminary hearing, the victim was advised by police that he had chosen the correct pictures, and that the defendant was already in custody); State v. Ponds, 227 Kan. 627, 608 P.2d 946 (1980) (detective's confirmation that victim correctly picked the defendant's photograph was "not suggestive since it followed the photo identification. . . .") *Id.* at __, 608 P.2d at 949.
process by detailing problems in retrieving once stored information from a person's memory. Loftus maintains that the retrieval environment can have a major effect on the witness's power to recall. Although admitting it may be somewhat impractical, the author suggests that more accurate recollections would take place at the scene of the crime or accident, rather than at the police station, where identifications are commonly made. Evidently, placing the witness back at the scene of occurrence somehow serves as a jog to help recall once forgotten information. Loftus also suggests that the wording of questions may be extremely important. Examining three types of questions commonly used to interview witnesses, (narrative, controlled narrative and interrogatory), she recommends that to achieve the highest degree of both accuracy and completeness, interrogators should "let the witness tell the story in his own words, and when he has finished, then ask specific questions."22

The remaining and most interesting part of Eyewitness Testimony links these psychological findings to their effect on the legal system. Chapter seven deals with the inherent problems associated with the identification process and what can be done to remedy them. Two problems in recognition are particularly troublesome. Cross-racial identifications are shown to be highly inaccurate, even when a witness has had significant contact with the racial group of the identified person.23 Likewise, unconscious transference "in which a person seen in one situation is confused with or recalled as a person seen in a second situation,"24 can also lead to misidentifications. This problem is particularly associated with lineups. Loftus suggests that the real or functional size of a lineup may be less than the numbers of persons it actually contains. This occurs when the individuals in the lineup are dissimilar with respect to critical characteristics mentioned by the witness, as well as height, weight, race, and other common physical attributes. In addition, lineups may be photo-biased if they follow a photo-identification. "Almost invariably only one person is seen in both the photographs and the lineup. It is unlikely that a witness will identify in the lineup any-

22. LOFTUS, supra note 12, at 92.
23. This seems to hold true for all racial groups without exception.
24. LOFTUS, supra note 12, at 142.
one other than the person who was chosen from the photospread."25 The chapter concludes by offering suggestions as to how attorneys can use psychological testing devices to determine the functional size of a lineup and whether photo-bias has occurred.

Chapter ten attempts to relate how the courts have unsuccessfully dealt with the problems inherent in eyewitness identifications.26 This chapter is probably the most important and interesting to the legal reader; however, for a variety of reasons, it is the most disappointing. Professor Loftus' description of the current legal doctrines dealing with eyewitness identification is sometimes misleading, extremely simplistic, and, most discouragingly, incomplete.

The chapter begins with a discussion of the Wade-Gilbert-Stovall trilogy,27 in which the Supreme Court first addressed the problems associated with eyewitness identifications. Loftus correctly analyzes Stovall as dealing with eyewitness identification problems from a due process rather than a sixth amendment right to counsel approach.28 Also accurate, is her description of Wade and Gilbert, in which the Court held that if a line-up is conducted at a critical stage of the proceedings without defense counsel present, any subsequent in-court identification of the defendant by the witness is forbidden, unless the prosecution can show the witness's identification has an "independent origin" apart from the line-up. Surprisingly, however, the author fails

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25. Id. at 32.

26. Courts have utilized two constitutional doctrines in examining identification problems. The sixth amendment right to counsel guarantees the presence of counsel, absent waiver, whenever an accused is exhibited at a lineup or showup during a "critical stage" of the criminal process. The due process clauses of the fifth and fourteenth amendments guard against suggestive identifications in general. The United States Supreme Court has three times employed the sixth amendment to suppress certain identification testimony. See United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Moore v. Illinois, 434 U.S. 220 (1977). It has applied the fourteenth amendment right to due process, however, only once in suppressing such testimony. See Stovall v. Denno, 388 U.S. 293 (1967). This suggests that as a practical matter, due process protections against erroneous identifications are more theoretical than actual.


28. Stovall declared a petitioner would be granted relief only if "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." 388 U.S. at 301-02.
to question whether such an "independent origin" is psychologically possible, although her earlier discussion of retention and retrieval suggests that the line-up identification, rather than the identification made at the scene of the incident, may be what the witness is actually recalling.

Loftus errs, however, in stating that these cases (Wade, Gilbert, and Stovall) "apply only to those crimes where the police had to establish the identity of the perpetrator by means of photo identification, a showup . . . or a lineup . . . ." 20 Wade and Gilbert both dealt with lineups, and Stovall dealt with a one person showup in a hospital room where the victim was being treated, but none of these cases dealt with photographic identifications.

Perhaps two reasons explain Professor Loftus' error. First, while both Wade and Gilbert analyzed the problems of eyewitness identification under a sixth amendment right to counsel approach, Stovall examined the same issues under a due process clause analysis. By discussing these cases together, the author has mixed two legal doctrines and their applicability. Secondly, although Professor Loftus separates the two doctrines later in her discussion, she fails to mention United States v. Ash, 21 in which the Court held that "the sixth amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." 22

Loftus must also be criticized for concluding her discussion of the sixth amendment cases with Kirby v. Illinois. 23 In that case, it was found that a suspect in a robbery case did not have the right to have counsel present at a stationhouse showup because he had not yet been indicted and was thus not in a critical stage of the proceedings. Initially, many courts believed Kirby made "indictment" a magic word in a sixth amendment right to counsel analysis. As Loftus points out, after Kirby, police delayed in indicting defendants so that lineups could be conducted without defense counsel present. However, in 1977, the

29. LOFTUS, supra note 12, at 180.
31. Id. at 321. Ash recognized that even though the sixth amendment did not apply to photographic identifications, due process violations could still exist, requiring the suppression of eyewitness testimony.
Court clarified Kirby in Moore v. Illinois. Moore was identified at a preliminary hearing after the victim had signed a formal complaint against him. The state argued that because Moore had not yet been indicted, he had no right to have counsel present at the hearing. Justice Powell, however, declared that "[s]uch a reading cannot be squared with Kirby itself, which held that an accused's rights under Wade and Gilbert attach to identifications conducted at or after the initiation of adversary judicial criminal proceedings, by way of formal charge [or] preliminary hearing." Thus, since Moore, the right to counsel under the sixth amendment has been determined not by whether one has been indicted, but by whether adversary judicial proceedings have begun. Why the author fails to recognize this is somewhat perplexing: Loftus ends her discussion of the due process identification cases with Manson v. Brathwaite, decided the same year as Moore; and Moore was decided in 1977, long before Eyewitness Testimony was published! For whatever reason Moore was not addressed, the discussion suffers from its absence.

The remainder of chapter ten examines four methods of guarding against mistaken identification: excluding unreliable eyewitness identification, requiring corroboration before a conviction can be based on eyewitness testimony, giving cautionary jury instructions, and allowing expert psychological testimony on the reliability of eyewitness identifications. Loftus dismisses the first two suggestions as having too many problems, but states that the third does not go far enough. She believes cautionary instructions do "not supply the jury with any information that it can use in the task of evaluating the reliability of any

34. Id. at 228 (quoted in Kirby v. Illinois, 406 U.S. at 689).
36. Since Eyewitness Testimony was published, the Supreme Court has decided three more eyewitness identification cases: United States v. Crews, _ U.S. _, 100 S. Ct. 1244 (1980); Watkins v. Sowders, _ U.S. _, 101 S. Ct. 654 (1981), and Sumner v. Mata, _ U.S. _, 101 S. Ct. 764 (1981). In Watkins, the Court held that the Due Process Clause does not require in every case a hearing outside the jury's presence to determine the admissibility of identification testimony. Justice Brennan's dissent cites Eyewitness Testimony five times.

Professor Loftus cannot be criticized for failing to anticipate these developments. However, these cases point out the need for frequent revisions of Eyewitness Testimony.
particular eyewitness account" and wonders whether the instructions, themselves, may be so complicated as to preclude their comprehension by the jury.

Loftus believes that allowing expert testimony is the best safeguard. The remainder of her book is devoted to building a case for its use. Loftus freely admits that expert testimony may lead to some procedural problems, such as a potential battle of experts, but argues that it is the best alternative available. To illustrate its use, she devotes the final chapter to discussing an actual murder case in which she testified as an expert and offers an edited version of her testimony to the reader in an eighteen page appendix.

Why read Eyewitness Testimony? Several reasons have already been presented. For the concerned citizen, law student, or judge, it contains a wealth of information. For the police, it should suggest ways to minimize incorrect identifications. For the lawyer, it will suggest better ways to present direct testimony and attack eyewitness identifications in criminal cases. Some prosecutors may cringe at the effect an increased understanding of this subject matter may have on the conviction rate, but considering the benefits which may inure to society in reducing the number of unjust convictions, such is really in the public interest. Discounting a few shortcomings in her legal discussion, Loftus has done an admirable job of presenting, in a readable fashion, information about this most significant subject. Hopefully, other writers will follow in her footsteps. Likewise, if the legal system is truly concerned with the administration of justice, many of Eyewitness Testimony's criticisms and suggestions should be seriously considered.

As Ephraim Tutt said, "The lawyer no more than his client can forget the past." Maybe not, but with the help of Eyewitness Testimony we can learn from it and prevent its repetition.

37. Loftus, supra note 12, at 190.
38. The Federal Rules of Evidence provide a means of dealing with this problem by allowing the court to appoint experts where appropriate. Fed. R. Evid. 706.
Seldom, if ever, can a judge have aroused so much popular acknowledgment in his time as the author of this book, Lord Denning.¹

* D.S.O.; M.A., Pembroke College, Oxford, 1932; Visiting Professor of Law, Valparaiso University, School of Law.

This review is, in part, a response to Professor Michael Richmond's review of Lord Denning's book published at 4 NOVA L.J. 327 (1980). Both reviews were selected for publication in the JOURNAL to accommodate the classic scholarly tradition of discussion and debate. Of Professor Richmond's review, Mr. Powell had this to say: "It was with great interest and admiration that I read the review by Michael Richmond of Lord Denning's 'The Discipline of Law.' It is unusually talented and perceptive. Yet I disagree with what I conceive to be his main conclusions, I ask myself why should this be so?

The answer is in my different experiences with Lord Denning's work, and in my understanding of the law's usefulness to society. For much the greater part of my life, I was a legal practitioner in England where Lord Denning's decisions had effect, and, quite apart from any reaction of mine to these, I believe that the hope of any advanced society in legal practice and theory is to be found not in its courts and judges, but in the 'constructive practitioner.' By that I mean a lawyer who keeps his client advised well in advance of the client's activities: whether in the boardroom, or in designing trusts and wills, or in drawing a commercial agreement, or in making the best of the margin of activities permitted by the Internal Revenue or Anti-Trust Acts. For the constructive lawyer, a measure of certainty and stability in his legal system is essential. Whatever the benefits expected to flow from Lord Denning's activities and reforms, certainty and stability are not among them. I have tried to express these notions more fully in this review of my own, which condenses the reactions of almost a professional lifetime exposed to Lord Denning's concepts."

Certainly Lord Denning has done some unusual things in his time—quite apart from his decisions. Having been made a Judge of the High Court of Justice in 1944, he became a Lord Justice of Appeal in 1948. Lord Denning continued occasionally to take cases at first instance (that is, not on appeal) to keep his hand in as a trial judge. He became a Lord of Appeal in Ordinary in 1957 but in 1962 demoted himself, as it were, to the Court of Appeal, and became Master of the Rolls to give himself more work. He became 82 years of age on January 23, 1981.

Yet in spite of Lord Denning’s remarkable record, his enormous gift for work, his scholarship, and his quite unusual command of the English language, there is a section of lawyers who have some reserva-

2. The Lords of Appeal in Ordinary are the legal judges of the House of Lords, which constitute the final court of appeal in Great Britain. An appeal in civil cases from County Courts and the High Courts of Justice, and in criminal cases from the Crown Courts, lies to the Court of Appeal and then to the House of Lords. See 1 Europa, Year Book 1980, at 1358 (1980).

3. David Walker in The Oxford Companion of Law 816 (1980) defines Master of the Rolls as follows:

The office probably originated in the Chancery clerk whose duty was to oversee the scribes who composed the Chancellor's Roll. In the Middle Ages, the title was Clerk or Curator of the Rolls, and he was one of the Masters in Chancery who assisted and acted for the Chancellor.

With the development of Chancery jurisdiction, the judicial duties of the Masters in Chancery increased and a large part of these fell on the Master of the Rolls; as early as the mid-sixteenth century he was sometimes called vice-chancellor, and some jurisdiction was delegated to him by special commission. By the early seventeenth century, he heard causes in the absence of the Chancellor and became the Chancellor's general deputy.

In 1729, it was provided that all orders made by the Master of the Rolls should be valid, subject to an appeal of the Lord Chancellor, and thereafter he sat regularly as a Chancery judge. In 1833, his jurisdiction was extended and it was enacted that he should sit continuously, but his orders were subject to appeal to the Lord Chancellor and after 1851 to the Court of Appeal in Chancery. He could also, and frequently did, sit in the Court of Appeal in Chancery.

Since 1875, the Master of the Rolls has been President of the Court of Appeal. Until 1958 he had the general responsibility for the public records (a responsibility then transferred to the Lord Chancellor) and is still responsible for the records of the Chancery of England.

The Master of the Rolls also has certain duties relating to Solicitors of the Supreme Court.
tions. They are exemplified by the struggling British lawyers who practiced the law during Lord Denning's judicial career. After World War II, many lawyers⁴ returned to practice after some seven years in the fighting services. Those who had practices before the war found that their connections had disappeared and that they were returning to a business and professional life which, whatever lip-service it might pay, found it inconvenient and uncomfortable to have them back in a world which had succeeded in doing without them. These lawyers most often came back without a business, without clients, money or a starting-point—except the necessity of taking a refresher course in ordinary professional law. Their present was bleak; their future worse than uncertain. Imagine the dismay of most of them when they read of the decision, in the depths of their general discomfiture, given by Lord Denning in Central London Property Trust Ltd. v. High Trees House Ltd.⁵ Had the doctrine of consideration ceased suddenly to exist, after the early mastery of it followed lately by its reaffirmation in refresher courses? Had it not also been learned that judges were supposed to be even stricter than students in observing principles of law which had

⁴. In England, an attorney is either a barrister or solicitor.

Barrister is the term used in England and Wales since the 15th Century and in countries with legal systems modelled on that of England for a person who has been called to the Bar, i.e. admitted to practice in the Superior Courts and entitled [in those courts] to represent a party to a cause in court. * * * The work within the ordinary scope of a Barrister’s practice is advising on questions of law, drafting pleadings, conveyances, and other legal documents, and advocacy in court. Barristers have exclusive rights of audience in the Superior Courts and in inferior courts, concurrent rights of audience with solicitors. When appearing in court, counsel [barristers] wear wigs, gown, and bands.

Id. at 115-16.

In contrast, a solicitor is a person trained in the law who prepares cases from beginning to end, drafts briefs to barristers to appear in court, sometimes drafts pleadings, consults with and carries on without exception all the business of the law. Whether connected with the courts or general practice, only a solicitor can deal with the public, run a business office, and move freely through the law’s business: “[Solicitors] are not members of the bar and are not heard in the superior courts; and the power of admitting them to practice, and striking them off the roll, has not been given the Inns of Court;” but to their professional body, the law society. As to the barrister/solicitor distinction in America, see, Ballentine’s Law Dictionary 1193 (3d ed. 1969), see e.g., In re Ricker, 66 N.H. 207, 9 A. 559 (1890).

been firmly established by precedent over the centuries? It already was
difficult enough to advise clients constructively on what they should,
and should not, do. Was one now to tell them that one simply did not
know what the law was; could not even hazard a forecast because a
judge could apparently decide what he liked quite arbitrarily? They
were hard days for war-weary, war-torn lawyers and morale was none
too high. Lord Denning's decision certainly did nothing to raise it.

The value of *The Discipline of Law* and, it may be said, of Lord
Denning's judicial career, altogether depends upon the view taken as to
the ways in which, and the principles on which, judges may properly, in
the words of the publisher's note, "mould and shape the principles of
law laid down by the judges in the 19th century to meet the needs and
opinions of today."8

So much depends on this and the personal element involved in a
wide judgment of the issues, that it is worth starting from a classical
source for serious assessment.

Sir Henry Maine in his *Ancient Law*7 writes:

> With respect to that great portion of our legal system which is enshrined
> in cases and recorded in Law Reports, we habitually employ a double
> language, and entertain, as it would appear, a double and inconsistent set
> of ideas. When a group of facts come before our English court for adju-
> dication, the whole course of discussion between the judge and the advo-
> cates assumes that no question is, or can be raised which will call for the
> application of any principles but old ones, or of any distinctions but such
> as have long since been allowed. It is taken absolutely for granted that
> there is somewhere a rule of known law which will cover the facts of the
> dispute now litigated, and that if such a rule be not discovered, it is only
> that the necessary patience, knowledge, or acumen is not forthcoming to
detect it. Yet the moment the judgment has been rendered and reported,
> we slide unconsciously or unavowedly into a new language and a new
> train of thought. We now admit that the decision has modified the law.
The rules applicable have—to use the very inaccurate expression some-
times employed—become more elastic; in fact, they have been changed.
A clear addition has been made to the precedents, and the canon of law
elicited by comparing the precedents is not the same as that which would
have been obtained if the series of cases had been curtailed by a single

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7. SIR H. MAINE, ANCIENT LAW 35 (1908).
example.

In commenting on this passage William Geldart writes in *Elements of English Law*: 8

I think that neither of these views is the whole truth .... In the absence of clear precedents which might govern a question, we find judges relying on such considerations as the opinions of legal writers, the practice of conveyancers, the law of other modern countries, the Roman Law, principles of "natural justice" or public policy. The proper application of these may be a matter of dispute or difficulty but in any case the judge is applying a standard; he shows that he is *not free to decide*, as a legislator would be, as he pleases; he is bound to decide according to principle.

There is much more in the same vein making it clear beyond any doubt that judges are not given the authority to usurp the functions of the legislature. Further support is to be found, if it were needed, in "Palm Tree Justice in the Court of Appeal," 9 an article written by Dr. Morris of Magdalen College, Oxford. Dr. Morris wrote this after the decision, *In Re Jebb*, 10 where the court including Lord Denning held that 'child' meant "adopted child." Dr. Morris went on to criticize:

By departing from the established rules of law the Court of Appeal seems to have usurped the functions of the legislature. The decision will require the rewriting of the whole of the chapter on gifts to children in the text-book on wills, unless the editor has the courage to say that it is manifestly wrong .... It is submitted that rules of law binding on the court cannot be evaded merely by calling them technical. 11

Clearly, Dr. Morris and the somewhat disillusioned lawyer returning from the wars had something in common with their feelings for judges who engaged in holy wars about what the law ought to be. In these days the legislators have quite enough to do and say in this field. "Palm Tree Justice" has a very real meaning for those who exper-

ienced the days of the British Empire. It brought to mind a young District Officer sitting under a palm tree in a trackless, sun-scorched desert trying to decide a dispute between two nomadic tribes about a well which produced a few drops of water less than once a year. He is probably little trained in law but, in his way, has to act as a judge in matters important to those around him. Soon he finds that the arguments concern systems of law of which he has no knowledge and date back to the days of the Prophet Mohammed. He has lost his way in a morass of words and, possibly, non-applicable laws. What shall he do? Why, of course, give a commonsense decision based on what he considers fair. That is palm tree justice and a very good form of justice in primitive conditions. Lawyers do not really care which system prevails—but please let them know which it is to be. And all know, in their hearts, that a sophisticated, industrialised, highly social system needs a stable rule of law so that men do not wait to pick up the pieces when something has gone wrong but are advised on, and conform to, the law as it is known at the time of their actions.

Primitive society may well need mainly advocates, courts and judges: but civilization does not. It needs the constructive legal adviser at hand in the board room, the Ministry or the testator's study. Thus the course of action proposed can be tested against the law's requirements and trouble—particularly litigious trouble—avoided by good interpretation and judgment. Without that sort of law civilization cannot properly survive—but it could—and in some ways does by turning over its disputes to Ministry officials. In Lord Denning's own words, "I would simply ask: Which method is to be preferred?" 12

This is a book about Lord Denning, for Lord Denning, by Lord Denning. That is not to decry it or to suggest that it is anything but extremely readable to the lawyer. It is beautifully written and full of vitality for those who like to picture the fast-changing face of the law in the hands of its judges. It is also, up to a point, a modest book. But there are undoubtedly, also, glimpses of self-deification:

"My protest carried some weight with Lord Radcliffe. He had the best mind of anyone of his time." 13

12. Denning, supra note 6, at 4.
13. Id. at 14.
"It was argued by Mr. Robert Fortune on the one side . . . and Mr. Ronald Hopkins on the other, a sound and sensible advocate. They argued it well but they had not the reserves at their command as I had. I delivered judgment straight off the reel with a tidying up afterwards for the Law Reports."  

"This time I had a good common lawyer sitting with me, Winn, L.J., and a Chancery lawyer who was endowed with unusual common-sense, Danchwerts, L.J."  

The book is forthrightly claimed to be an account of the author's personal contribution (no false modesty here) to the changing face of English law in this century. Thus, it leaves no margin for any reflections that it may be a dispassionate and impartial commentary on changes of that sort. It is a personal account of a Mein Kampf of a very individual sort (for a judge) and—as has been suggested before—none the worse for that as readable material.

The seven main parts or fields of law in which it is suggested that Lord Denning has made contributions towards marked changes are: the construction of documents; misuse of ministerial powers; locus standi; abuse of "Group" powers; high Trees; negligence and the doctrine of precedent.

Dealing with the construction of documents—one of the longer and, it is submitted, most interesting parts—Lord Denning summarizes the progress (as he sees it) with statutes, wills and other unilateral documents and contracts. It is reasonable, perhaps, in a work admittedly written with a personal bias to omit here and there an argument contrary to the admitted bias. Yet, in this respect, Lord Denning does seem to go much further than necessary or desirable in discussing attitudes in the construction of wills.

The developed lines of argument centre around (and this is something of an over-simplification of the complexities) the question whether it is only the words the testator has used which may be construed or whether the construction may be applied to the intention of the testator in a broader measure. The authority for the traditional view—that only the words which the testator has actually used may be

14. Id. at 12.
15. Id. at 27. By such comments Lord Denning appears to be saying: I usually have very inferior intellects with me?
construed—is *Abbott v. Middleton*\(^{18}\) which was confirmed by modern authorities in *Perrin v. Morgan*:\(^{17}\)

The fundamental rule in construing the language of a will is to put *on the words used* the meaning which having regard to the terms of the will, the testator intended. The question is not, *of course*, *what the testator meant to do when he made his will*, but what the written words he uses mean in the particular case—what are the expressed intentions of the testator.\(^{18}\)

Certainly, there is nowadays another view, expressed so freely and clearly by Lord Denning for example, *In re Jebb*\(^{19}\) in which he refers contemptuously to "technical rules [which] have only too often led the court astray . . ."\(^{20}\) This other view lays down unequivocally that technical rules may be rejected and that the court must look to see simply what the testator intended. Lord Denning went on to say:

> *Looking at this will in the light of the surrounding circumstances* it seems to me quite plain that when the testator spoke of the "child or children of my said daughter" his intention was to refer to the adopted child, Roderick, or any further adopted children that she might have.\(^{21}\)

What Lord Denning significantly omits is the background of the older view which explains it. The point is that legislation requires certain formalities which must accompany the expression of testamentary intentions. A leading example of this sort of formality is that the will must be in writing. So far as it is not in writing there is no will to construe and, in consequence, it was ordinarily felt in the past—and still is by most lawyers—that regard may be paid only to the words used by the testator and embodied in the form prescribed by the statute to the exclusion of any intention to be found otherwise than in the formal requirements.

A reference to this basis for the traditional view might have been

\(^{16}\) [1859] 7 H.L. 68.
\(^{18}\) *Id.* at ____ , [1943] All E.R. at 190 (emphasis supplied).
\(^{20}\) *DENNING*, *supra* note 6, at 27.
\(^{21}\) *Id.* (emphasis supplied).
just mentioned—indeed should have been—when the author leaves the subject of wills with this passing appearance of fairness:

So I leave the subject with this question: Are we to construe wills according to their grammatical construction as propounded in previous cases? Or are we to mould them in accordance with the intention of the testator in the particular case, irrespective of earlier precedents? 22

If the question is to be asked after reasonable enquiry surely the enquiry should necessarily include a not unreasonable argument over a century old. Principles and arguments in support of it are not necessarily wrong because they are old; nor are they necessarily right because they are new. There are times when Lord Denning hardly seems to accept this but to believe that anything new is good and all that is old is bad.

Aside from this questionable omission, this part, so far as it deals with contracts, at any rate, is recommended reading for any serious student of the law of contract. So also is the part dealing with negligence—so far as concerns the student of the law of torts. Both—and this applies to the whole book—are beautifully written in elegant English, full of scholarship and yet easy to read. The point is not whether Lord Denning has some great talents and gifts—for these he most certainly possesses—but rather whether he makes a proper use of these great qualities.

Of all the developments in 20th century jurisprudence, insofar as development can be attributed to judges, Lord Denning suggests that their greatest contribution is in the law of negligence. He refers to the old forms of action from which the rules of law were derived. Many lawyers consider that too little is known about these forms of action today and that a greater understanding of them might well have its advantages. Not so, naturally, Lord Denning. He has condemned them in court and writes here that they were "old and technical [always a bad word with Lord Denning] and expressed in Norman-French." 23 Many words and phrases still are so expressed in English common law, and Norman-French was the language of the King's Courts—although not always of reports—until about the Restoration in 1660. In any

22. Id. at 31.
23. Id. at 227.
event, the rules formulated by the judges of the 19th Century about duties in tort, Lord Denning tells us, did not satisfy the social necessities and social opinions of the 20th Century. No time is spent on discussing whether the opinions and necessities of the 1970’s are really better than those of the 1870’s—some might beg leave to doubt it—but it is certainly true that we swept on in 1932 to the tort of negligence as an independent wrong.

It is highly informative to read of the dissenting judgment in Candler v. Crane, Christmas & Co.,24 and its approval fifteen years later by the House of Lords in Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.25 as told by the inventor of the particular duty of care outlined in those two cases. Lord Denning writes:

[I] return to the sequel to Candler v. Crane, Christmas & Co. It came about in a case which has become as famous as Donoghue v. Stevenson (1952) A.C. 562. It was Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd. Whereas Donoghue v. Stevenson dealt with negligent acts Hedley Byrne dealt with negligent statements. I was invited to sit in the Lords on the appeal, but I knew that my dissenting judgment in Candler would come under review. So I declined . . . The merchant bankers (Heller & Partners) had headed their report “without responsibility.” On that account they were held not liable. But the House of Lords, in a series of obiter dicta, considered the decision in Candler. I was gratified to find that they approved of my dissent and gave reasoning on the same lines. They held that a professional man was liable for negligent statements when he knew they were going to be acted upon; and they were acted upon. I will not pause here to quote from their judgments. Their influence will be apparent from the succeeding cases. (i.e. Rondel v. Worsley (1967) 1 Q.B. 443; Saif Ali v. Sidney Mitchell (1978) 3 W.L.R. 849; Dorset Yacht Co. v. Home Office (1969) 2 Q.B. 412 and Anns v. Merton Borough Council (1977) 2 W.L.R. 1024).26

The whole story of the aftermath of Hedley Byrne is not told here—the speculations, the worries and the wild ideas. They still exist, however, and form one of the leading difficulties in the law of torts throughout the Commonwealth and not only in the United Kingdom. Many law-

26. DENNING, supra note 6, at 245.
yers seem to think that the line of reasoning developed in these cases is a sort of catch-all, in the sense that any form of wrong, if it does not fit in neatly under some approved heading of liability, will at least be caught by Hedley Byrne. Has it all been worth while starting this particular hare which every lawyer now has to chase some of his time? It is a little too early, it seems, to say with conviction that Hedley Byrne, approving the dissent in the Candler case, has truly on balance played an altogether happy part in the development of common law. As events have occurred, might it not have been better if either the new principles had been put firmly into words in legislation? Or, if the House of Lords were really going to spend all the time they did on *obiter dicta* in Hedley Byrne, might they not profitably have done a little bit more to be specific about the exact nature of the duty they had in mind?

Further mandatory reading is suggested by part five, which deals with the High Trees case. This was again very much one of the many inspirations of the Master of the Rolls. Lord Denning deliberately asks: did it abolish consideration? And, to reply, Lord Denning quotes himself at length in *Combe v. Combe* which, unfortunately, lawyers did not have before them when this dreadful question arose—now, it seems, so long ago. *Combe v. Combe* dealt with a case where a husband, through his solicitor, undertook to pay his divorced wife one hundred pounds a year free of tax. He did not pay; presumably since she had an income bigger than his. The wife sued the husband six years later, for six hundred pounds in arrears. The judge at first instance thought he should apply the principle of High Trees. The Court of Appeal, however, with Lord Denning, declined to extend the principle in this way. Lord Denning said:

Much as I am inclined to favour the principle stated in the High Trees case, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. . . .

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that

is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled the judge in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case; was there sufficient consideration to support the promise?

The mental processes in reaching the implementation of this particular kind of lawmaking are, as revealed by Lord Denning, quite fascinating. They can be traced frequently in the pages of this book and there follows a summary of the processes preparatory to the High Trees decision itself. In October 1922, Lord Denning became a pupil in chambers at No. 4 Brick Court, Temple and soon after he started came, apparently, upon a pathway which led to the High Trees case. In his commercial work one important factor seemed to him that a contract for the sale of goods of ten pounds or more in value had to be in writing. Another important factor was that no promise was binding without consideration for it. There was considerable resort to subtlety to defeat these rules which young Denning considered unjust.

While still a pupil Denning was influenced by Hartley v. Hy- mans and noted it in pencil on his Anson's Contract, adding, "Suggest estoppel." In the Hartley case, Mr. Justice McCardie reviewed many authorities and made reference to Hughes v. Metropolitan Railway Co., which had been overlooked for half a century. Hughes and Birmingham District Land Co. v. London and North-Western Railway Co. led Lord Denning along his pathway, but he found many obstacles en route. Two particular obstacles were that estoppel applies only in respect of representations of fact and that a representation, in or-

28. DENNING, supra note 6, at 207 (citing Combe v. Combe).
der to work an estoppel, must be one of fact and not of law. Lord Denning writes:

In order to leap these fences I needed a good horse. It turned up. It was the Report of the Law Revision Committee on the Doctrine of Consideration. It came out of 1937 when I was in very busy practice as a junior. I had no time to read it then. [But he read it later in life and found that] . . . it exposed the injustice of the rule that estoppel only applies to statements of fact, and of the rule that payment of a lesser sum is no consideration for the discharge of a larger sum. The Committee recommended the abolition of both those rules. They made this recommendation. It got me over the fences which obstructed the way to High Trees. 83

Another step in his path was a case in which he was engaged as a King's Counsel—Marquess of Salisbury v. Gilmore. 34 However, in this case, Lord Justice Mackinnon found the fences “too high for him” since he considered the division of the House of Lords in Jordan v. Money to be binding on the Court of Appeal—not an unreasonable conclusion for a judge. Not so Lord Denning, who, four years later, saw his chance in High Trees. 35 Quoting his very thin line of authority, 36 Lord Denning says simply: “In my opinion, the time has come for the validity of such a promise (a promise intended to be binding, intended to be acted upon and in fact acted on) to be recognized.” Fiat Justitia and the law has been changed to what Lord Denning always thought it should be since his early days in chambers as a pupil. Can that really be the way to make law?

The advice given in The Discipline of Law is on surer ground when aspirants for the legal profession are told to learn properly the tools of the trade: good English, with a full command of it, both written and spoken; be well-groomed and neatly dressed; have a pleasing voice; show respect. Lord Denning certainly does not even hint at this, but are

33. DENNING, supra note 6, at 202.
37. DENNING, supra note 6, at 205.
not a good impression, a good voice and, if possible a little charm equally important with, if not more so than, all the legal authorities in the world? In convincing a judge you are dealing with a human being who, surely, is as susceptible to human qualities as to professional skills and knowledge and perhaps more susceptible.

All in all, *The Discipline at Law* is a book to read with pleasure and instruction if you are really, really keen on the law. Some of us prefer our law a bit watered down with other draughts of life. Maybe those who cannot find the law wholly sufficient in itself do not have a vocation—only a profession. Denning says: “I sit in court every day of the week. Five days a week. I spend my weekends writing reserved judgments.” We are again reminded of the importance and majesty of the law. Those of us who are less committed will have to bear with our shortcomings and extraneous pleasures with all the cheerfulness we can find.

Two more sources throw light on the real difficulty of assessing the value of this sort of book—and this sort of principle. It is not easy to separate the two things. If you believe in the aims and objects of Lord Denning you automatically believe much more in what he writes in *The Discipline of Law*.

Mr. Jonathan Sumption writing in the *Sunday Telegraph* in a review of another legal work, *The Judge* by Patrick Devlin writes:

>Judges have such immense power that it seems to social reformers a tragedy that they cannot use it to propel the law in the “right” direction. What those well-intentioned enthusiasts really want is the enlightened despotism of some 18th-Century German princes and most 20th-Century Socialists; a despotism administered by the only people in a liberal society who have the power to command and enforce instant obedience, namely the judiciary.

>The great power of the judges would, however, be intolerable if it were not used in accordance with settled principles. Judicial power is not despotic precisely because it is bound (not hidebound) by a body of law which appears stable and permanent, greater than the individuals who administer it.

38. *Id.* at 316.

If we must be ruled by laws and not men it is important that the law should change only at a stately pace, receiving new ideas slowly and from sources other than the whim of individual judges. It is for parliament, juries, lay arbitrators and the like to inject change into the system, not judges. For them conservatism is not an unavoidable vice but the supreme judicial virtue.  

Or finally and even more appealingly, comes a profound *cri de coeur*: from Miss Frances J. Sieber:

Sir,
With the greatest respect to the Master of the Rolls, would his lordship kindly refrain from changing any more laws before the law examination in August.

Yours truly
Frances Jane Sieber
As from 1st year, College of Law.

40. ___ *The Sunday Telegraph* (London) ___ ( ).