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Stripping Away the Fictions: Interview with Mr. Justice Arthur J. Goldberg

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BOOK REVIEW
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Professor Wisotsky: Mr. Justice Goldberg, in the case of Washington v. Davis, a group of black applicants, unsuccessfully seeking police positions on the District of Columbia Police Force, sued alleging the entrance test, in effect, was racially discriminatory because they failed at a rate much greater than white applicants.

The Supreme Court rejected their claim, saying it wasn't enough that they failed at a greater rate; there must be some showing of an intention to discriminate against black people. Do you agree with that decision?

Mr. Justice Goldberg: No, I don't agree with it at all. The most difficult thing to do is establish the intention of local officials, including members of the state legislature. I must confess I don't know about Florida, but most states in our union keep no record of state legislative proceedings. There certainly are no transcripts kept of proceedings of local authorities.

In law we normally apply a simple rule about human conduct. We say people are presumed to intend the logical, reasonable consequences of their act. So to me the big question is "What is the effect of the official's action?" not "What is the motivation?"

I recall a dissent I wrote in the reapportionment case Wright v. Rockefeller. I discussed our inability to probe peoples' mental recesses. We have no tools to do that, and no local official would take the stand to say "I was racially motivated." So I would judge by effect.

These decisions seem to me a way of ducking the primary issue.
They resemble a situation we had when I was on the Court in *Swain v. Alabama*. There, no black person had ever served on a jury for a white defendant; blacks only served for a black defendant. This selective elimination of black jurors was done through the guise of peremptory challenges. To me it was a clear case of racial discrimination. I did not exalt the right to exercise peremptory challenges, nowhere safeguarded in the Constitution, over the right to equal treatment, which the Constitution affords.

Professor Burns: Mr. Justice, in deciding whether females, like blacks, should constitute a suspect class for equal protection purposes, we find ourselves attempting to compare the female experience in the United States with the black experience. What are your observations?

Mr. Justice Goldberg: Of course nothing can approximate the way we treated the black population of this country; they were in slavery. And our slavery, Professor Elkins reported in his book, was the worst slavery in the North and South American continents. We permitted families to be separated; children, wives and husbands were sold separately. In South America, thanks primarily to the Jesuit Church, that practice was not permitted, even though they had slavery.

On the other hand, women are grossly discriminated against to this day. As a former Secretary of Labor, I can say women are still paid substantially less than men for the same jobs. We must recognize that while for many centuries women were not held in physical bondage as slaves, there were many inhibitions against women's freedom.

It's only recently that states have begun adopting a law which should have been long obvious: a woman can accuse her husband of rape. We never allowed that before. So if you read the Forsyte Saga, you recall the famous incident where this man of property, Soames Forsyte, virtually raped his wife. He ruined his marriage by doing so.

Women have traditionally sustained substantial handicaps. They

6. Id. at 69-73.
were denied the right to vote until we had a constitutional amendment.\footnote{U.S. CONST. amend. XIX.} They were denied the right to hold property in many states. Now, much has been corrected; but there is no doubt at this very minute women are not treated on an equal basis with men.

That being so, I believe the Court should opt for a suspect classification. In our jurisprudence it is not necessary to absolutely equate the enormity of black discrimination and gender discrimination. If discrimination is substantial, the Court has a right to move. I regret the Court hasn't done that. It had a duty to say the class is suspect. This doesn't mean compelling reasons may not justify some differences: health standards and the like. But the failure of the Court to fulfill what I conceive to be its constitutional duty has resulted in the Equal Rights Amendment\footnote{U.S. CONST. proposed amend. XXVI.} and has led me to support the amendment.

Professor Burns: One controversial focus of the women's movement, shared by American blacks and Jews, among others, is the challenge to exclusionary admission policies of men's clubs. I think we can find these clubs serve as the situs for developing male friendships and ultimately impact on decision-making in business and government. Are there any viable constitutional bases for challenging these admission policies?

Mr. Justice Goldberg: I would think so. I wrote an opinion once,\footnote{Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).} trying to form a majority, in which I said one has a right to be privately prejudiced; I commented on clubs to gain support for the opinion. Right now I am engaged in an effort to overcome this prejudice in Washington's Cosmos Club, where women are only admitted as spouses rather than in their own right. Presently, a cabinet secretary like Patricia Harris cannot enter unless her husband is admitted.

What is the constitutional basis for ending such admission policies? I think several factors activate fourteenth amendment prohibitions. Most clubs enjoy tax exempt status; thus the state is involved. Moreover, clubs benefit from many municipal services, e.g., garbage collection, water service and many others; it would seem there is the requisite degree of state involvement essential for an attack on discriminatory treatment.
Professor Burns: The right of privacy, while now well established, remains unenumerated and, in the minds of some, remains all too fluid. One controversial area concerns extending the right of privacy from the traditional marriage and family context to the area of private homosexual conduct. Do you believe laws which prohibit private homosexual conduct violate the constitutional right of privacy?

Mr. Justice Goldberg: I do, for adults and consensual relationships between adults. I do not apply this rationale to children. We have many laws where special regard is paid to children, and rightly so. Children do not possess the judgment to make informed decisions.

Adults, unless they inflict harm on others, have the right to pursue privacy, to pursue their own lives. Now, homosexuality is something I personally do not favor; but I regard it as a psychological and social problem. I don’t quite agree with those who say it’s a way of life which should be endorsed, but I do agree it’s a private matter between adults.12

Professor Burns: As a Justice known for having great respect for personal individual liberties, and having a unique international perspective as a former United Nations ambassador, to what extent do you believe the recent Haitian and Cuban refugees should be afforded constitutional rights?

Mr. Justice Goldberg: I believe they have substantial constitutional rights. As always, we must refer to the fourteenth amendment which states: “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The notable thing about the fourteenth amendment, echoing the fifth amendment, is the term “any person.” When a person comes to our country we can, through the application of the immigration laws, deny admission. When a person enters illegally, we can deport the person.

Throughout our early history we have had great waves of immigration, dating back to the founding fathers, the pilgrims. We have

12. I have been told I approved of laws of this type in Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring); but I did not. I did quote John Harlan, who used the word homosexual. Id. at 499 (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961)). Often when one Justice quotes another Justice, he does it to garner votes. Harlan liked his former dissent, and he was right in result. But I merely quoted him in my opinion.
enacted amnesty laws permitting immigrants to stay if they entered before a certain date. But in modern times, the recent influx represents something *sui generis* in our country. In spite of the Coast Guard's disapproval, we have permitted Cubans and Haitians to enter; they're here. In my opinion we cannot regard them as illegal immigrants. We are in large part a nation of political refugees; it's our heritage.

Except for a hard core criminal element, who arrived through false pretenses and have been segregated, the Cubans and Haitians who have arrived are now within our jurisdiction. I would brush aside the technicality of whether they're permanent residents or not. We have admitted them; and having admitted them the fourteenth amendment applies.

I'd like to illustrate by a simple analogy. Could anybody deny that if a Cuban or Haitian were charged with a criminal offense he would be entitled to the constitutional safeguards of a fair trial, the appointment of counsel, and the other constitutional guarantees? Of course he would be entitled to them. So I believe in facing this new situation we should say, and I hope the Court would say, the immigration laws apply but are subject to the fourteenth amendment. We've allowed the people to enter and we must give them constitutional safety.

I would like to make another point. I see no basis for distinguishing between Cuban and Haitian refugees. The fourteenth amendment says no person in our jurisdiction shall be denied the equal protection of the laws. The Cubans or Haitians, once here, should be treated equally.

Professor Burns: Mr. Justice, constitutional law students, and I include myself, have never fully understood the ebb and flow in popularity of the three prongs of the fourteenth amendment. Some have suggested the equal protection clause has been stretched as far as will be tolerated, and the privileges or immunities clause is being rejuvenated. What do you think?

Mr. Justice Goldberg: Well, I take the amendment as a whole; I do not like the idea that one part is preferred to another part. Indeed I would have overruled the *Slaughter-House Cases* which virtually wrote the privileges or immunities clause out of the Constitution. That clause means something; every word in the Constitution means something. I do not prefer the clause of the fourteenth amendment which

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13. 83 U.S. (16 Wall.) 36 (1873).
says "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens" over the clause which says "persons," as I said earlier. I believe every person legally in our country, or recognized to be here, is entitled to all constitutional safeguards.

Professor Wisotsky: Mr. Justice Goldberg, the public opinion polls show a large proportion of Americans support capital punishment. In the face of that support, would you be prepared to rule the death penalty . . . unconstitutional? 14

Mr. Justice Goldberg: I think it's clearly unconstitutional. The fact that a transient majority will, from time to time, say yes or no does not determine constitutional questions. About fifteen years ago a poll showed that Americans, by an overwhelming number were prepared to repeal the whole Bill of Rights. Watergate later brought the American public to recognize the Bill of Rights is designed for the protection of all of us, against government and against majorities.

The arguments against capital punishment were pretty well developed in Great Britain by the Royal Commission. 15 Its finding was a simple one, unexpected by many advocates of abolition. After close scrutiny of Great Britain's experience, the Commission found that the death penalty neither deterred nor failed to deter people from committing crimes. The deterrent element could be neither sustained nor defeated.

This is basically what I found in my own analysis expounded in Rudolph v. Alabama, 16 the first decision where a Justice expressed doubts about the death penalty. I agree with the Commission because most murders are family murders, or are due to drunkenness, drugs or passion. Members of the criminal syndicate are rarely indicted for murder, although they are indicted for drugs or other offenses. Without conclusive, compelling proof that the death penalty actually deters murder—a basic requirement, it seems to me, in the administration of criminal justice—it should not be imposed, because of the finality of the penalty.

14. The Gallup Poll, Nov. 12-15, 1980, taken nationally, returned the following figures: In favor of the Death Penalty for murderers . . . 54%
Opposed to the Death Penalty . . . 43%
Don't Know . . . 3%

15. ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT, 1949-1953 (1953).
Also, for me, the institutionalization of taking human life by the state is a dreadful thing. It puts the state’s imprimatur upon killing. I would have thought as a result of the Vietnam War, and our reflections upon that terrible incident in American history, we have had too much killing and should follow a different path.

Professor Marsel: Mr. Justice, turning to the first amendment, just a few years ago there was a planned Nazi march in Skokie, Illinois. Do you believe this sort of thing is protected by the first amendment?

Mr. Justice Goldberg: No, I don’t, not under the precedents. In *Chaplinsky v. New Hampshire*, Justice Murphy, writing for the whole Court, said there are such things as fighting words which are not protected. He referred back to Justice Holmes’ famous statement “you shall not call fire in a crowded theater.” In *Chaplinsky*, the whole Court, including Justices Black and Douglas, decided the words “you’re a damn fascist,” and “you’re a damn racketeer” were outside the ambit of first amendment protection.

People express themselves in various ways, by words and by certain types of conduct. I regard marching with Nazi uniforms in a predominantly Jewish neighborhood consisting of a large number of refugees to be the equivalent of fighting words. But in deference to the first amendment, I say the marchers must be afforded a suitable way to express their message, benighted as it is. They don’t have to march in that particular area; they can march elsewhere. Unless we overrule *Chaplinsky*, the Court’s decision governs in spades.

Professor Marsel: Mr. Justice, you mentioned Justice Black. He said he had an absolutist view of the first amendment. Do you agree with that? How do you reconcile that view with the “time, place and manner” restrictions?

Mr. Justice Goldberg: Justice Black was my dear friend and I don’t think he had an absolutist view. He said he did, but

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17. 315 U.S. 568 (1942).
18. *Id.* at 571 n.2 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).
19. 315 U.S. at 574.
showed he did not. In *Schware v. Board of Bar Examiners*, Black recognized the right of bar associations to investigate people, but not for political reasons. The first amendment has never been construed to cover only political speech, as Dr. Meiklejohn argued. I think it was originally designed for that, but we soon recognized the difficulty of separating novels and other works from political tracts. *Gulliver's Travels* is a political document. So are Charles Dickens' books. So is John Steinbeck's work. You can find examples through the whole history of literature.

Where Justice Black and Justice Douglas asserted absolutist views most vigorously in more recent years was in the obscenity area. These Justices have, in effect, said: since Congress shall make no law, and since the fourteenth amendment applies the prohibition to the states, anything goes. Well of course, our founding fathers would shudder to discover that they, those puritans, countenanced obscenity in the Constitution. The only real justification for Douglas' and Black's position is not absolutism, as they say, because their own record in *Chaplinsky* proves otherwise; it is the inability of the Court to define the word "obscene." Most obscenity cases involve criminal statutes; people are entitled to reasonable notice of what is obscene. Justice Stewart said: I don't know how to define it, "[b]ut I know it when I see it." That's a very poor test for constitutional adjudication.

So again, we're in an area, like the homosexual area, where, like it or not, we may have to allow a large amount of freedom for adults. But not for children, who are much more impressionable than adults.

The Supreme Court muddied the waters by its so-called local community standards. With all due respect to the Court, that's absurd in my opinion. The Constitution of the United States applies throughout the country. You cannot have one constitutional rule in Fort Lauderdale and another constitutional rule in San Francisco. That would be an absurdity. And the absurdity was demonstrated with the film, *Carnal Knowledge*. The Justices were confronted with a movie which they all recognized as not obscene under any standard of the test, so they

applied a national standard.²⁶

It seems to me there can be only one standard, a national standard. Although I supported the Roth test, the "utterly without redeeming social importance" test,²⁷ today, upon more mature reflection, I would say adults should be able to do what they want in the obscenity area. But this does not apply to children.

Professor Wisotsky: Mr. Justice, continuing our inquiry about the first amendment, there is a lot of friction between members of the public and certain religious groups, such as Hari Krishnas, members of the Unification Church and others who solicit and proselytize in public places such as airports. Do you think they are within their rights or do members of the public have a right not to be disturbed?

Mr. Justice Goldberg: I have never understood this argument, to be very frank. I don't think there is a first amendment right for any religious group to solicit contributions in an airport. I think they have a right to do it on the public sidewalk. On this point we are unanimous in Cox v. Louisiana.²⁸ I said there is no constitutional right to hold a street meeting at rush hour in the middle of Times Square if another place is provided, such as Central Park or elsewhere, where any group can exercise its protest and right of free speech.²⁹

Now an airport is designed for passengers, and it is often crowded. Passengers have a right to accomplish their business; the airport has a right to conduct its business. If the Hari Krishnas have a right to solicit there, then the Catholic Church would have the right to conduct a Mass at an airport, which would run afoul of the first amendment's provisions about establishment of a religion. Or a Jewish group would have a right to assemble a minyan, a proper number of men, and conduct a prayer service. That's not what airports are for.

Let me put it another way: an airport is a government sanctioned building supported by law. There are many government buildings. I was Secretary of Labor, as I said earlier. I can see no first amendment right to have the same groups solicit in the lobby of the Department of Labor Building. That building is devoted to the business provided by

²⁷ 354 U.S. at 484.
²⁹ Id. at 554.
law, to carry on the functions of the Department of Labor, to protect working people, and to administer statutes designed for the protection of labor. Airport buildings are for air transportation. Airports have enough problems, including security problems; we shouldn't permit these solicitors to become an impediment to the flow of commerce. The last time I was in an airport I found six groups soliciting. And I found posters stating the airport disclaimed any support, but was required to allow these groups to exercise their first amendment rights.

I think this is a time, place and manner problem. As long as a reasonable place is provided for these groups to solicit and proselytize, the airport should be devoted to the business of selling tickets, processing long lines of people, and boarding passengers on the planes.

Professor Marsel: Mr. Justice, Justice Frankfurter was a great exponent of judicial restraint. What's your assessment of his philosophy?

Mr. Justice Goldberg: I never believed very much in that philosophy, because it is not a philosophy of general application. There is great room for judicial restraint in the form of non-intervention with social and economic legislation. It's not the business of the courts to decide those matters reserved to Congress and the states. As we said when I was on the Court, in *Ferguson v. Skrupka,* the Court is not a super legislature. There is a non-intervention policy beyond judicial restraint.

On the other hand, there is an area where the courts are compelled to intervene, and intervene actively, and that area is protection of the fundamental rights, guaranteed under the Bill of Rights, of those who live in our country. That's why the Bill of Rights was adopted. There's no excuse for not being an activist in protecting those constitutional rights.

The Bill of Rights is lawyers' material, judges' material. Lawyers and judges understand the legal process, the right of counsel and the right of fair trial. Essentially the Bill of Rights is a number of procedural provisions. But the Court has had trouble with the one substantive provision of the Bill of Rights, the first amendment, in obscenity cases and establishment of religion cases.

But I actually distrust judicial activism. I prefer judicial courage

to vindicate rights. The most activist Court in the history of the Supreme Court, the 1930 Court, was also the most erroneous. Among the worst decisions of the Supreme Court are those in which the 1930 Court invalidated all of the New Deal legislation until Justice Roberts switched his vote.

Professor Marsel: It sounds as if you’ve been describing the role the Supreme Court is supposed to play in the United States. Perhaps you can compare what the Warren Court did with what the Burger Court did. How do you assess the two courts?

Mr. Justice Goldberg: I would say the indicia of the Warren Court was its willingness to be forthright in protection of fundamental rights, starting with *Brown v. Board of Education*,31 *Fay v. Noia*,32 the habeas corpus decision, *Reynolds v. Sims*,33 and others. The characteristic of those decisions was not merely judicial courage. Many people, Frankfurter among them, thought the court should stay out of the political thicket on reapportionment. But we entered the political thicket; there’s nothing new about that. De Tocqueville said the judicial resolution of political questions is fundamental in our republic.34 In America there’s scarcely a question which goes to court that isn’t political in nature; that’s the nature of the Constitution. But the indicia of the Warren Court was not only courage in vindicating human rights. It was realism: Brush aside legal fictions.

For example, in *Betts v. Brady*,35 the Court said a criminal defendant in a felony case could defend himself. The result was that although theoretically everybody had the right to counsel, the poor couldn’t exercise that right. A poor defendant had to defend himself; counsel was not provided. We overruled that situation in the famous case of *Gideon v. Wainwright*.36 We said *Betts* was unrealistic.

I’ll give you another illustration of the realism of the Warren Court. The Warren Court itself decided, in *Wolf v. Colorado*,37 when evidence was tainted because the government acted illegally, the court

35. 316 U.S. 455 (1942).
would admit the evidence but would punish the constable. Some years later the Court reviewed the situation and found nobody actually punished policemen, which may be justified. The few who were punished were poor policemen who had overstepped the constitutional bounds very greatly. Therefore the Warren Court, in *Mapp v. Ohio*, 38 said the only way to hold the government to proper standards (because as Brandeis said, “Government is . . . the omnipresent teacher . . . [f]or good or evil”39) was to adopt the rule: if evidence is illegally obtained by the government, it is not admissible. That, in my opinion, is the nature of the approach of the Warren Court.

The Burger Court is a departure from that concept. The pendulum hasn’t swung all the way back; but *Fay v. Noia*40 has been emasculated. The defendant’s right to have a federal court review state court proceedings, when there is a violation of fundamental constitutional rights, has been substantially undermined by recent decisions. I regret that, because often in state court, there is not a full exploration of the case, due to the nature of the counsel employed, or because the facts haven’t come sufficiently to light. By bringing habeas corpus actions into federal court the defendant is finally afforded a full examination of his case.

I remember a case, *Townsend v. Sain*, 41 when I was on the Court. A man addicted to drugs was charged with murder. According to narcotics experts, an addict in the hands of authorities and doctors becomes quite malleable. The addict knows medical treatment can be given or withheld. This man soon confessed to several murders in Chicago, which was very convenient for the police.42 But on habeas corpus in federal court, it was demonstrated the defendant could not have committed several of the murders he confessed to. That case clearly demonstrated the great benefit of exploration of the facts by an independent federal tribunal unaffected by local considerations.

Local considerations do enter judicial proceedings; we cannot gainsay that. In Fort Lauderdale, I see judges are elected. And I see by

39. Id. at 659 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
42. Id. at 307.
their ads they also want to be reelected. Those judges cannot always provide a full safeguard of our Constitutional rights, and that is true all the way up to the highest court in the state. Federal review limited to certiorari is not always adequate because the full record may not have been developed. In *Townsend* we had the court record and we had evidence not present in state court, that the defendant was out of the state when several of the murders were committed.

The next area of difference between the Warren and Burger Courts is racial segregation. The Warren Court said, in *Brown v. Board of Education*, separate can never be equal. In the history of our country that was repeatedly demonstrated. Law schools were an early example: it was proved they were not equal. At the time Texas had no black law school and sent blacks out of the state, which is unthinkable today. The Court found such an arrangement unconstitutional.

We were always unanimous in civil rights cases during my period and during most of the Warren Court period. We thought it important to strive for a consensus, knowing racial matters create high emotions. The present court is widely divided which I regret. It means the public understandably becomes confused. For example, the issues of busing schoolchildren to the suburbs and the associated zoning and tax questions are now in confusion. Citizens' civil rights are losing their solid protection because the old unanimity which carried great weight has been lost.

One of the principal shifts in judicial policy I regret to find happening on the Burger Court is the reemergent use of legal fictions. The question of standing is a good example. When I was on the Court, a criminal died in prison. His children wanted to continue his lawsuit to vindicate the reputation of their father. Realistically, if a father has committed a crime, his reputation does reflect on the children: Whether we like it or not, the sins of the father are visited on the children. We held the children could continue the suit. The old rule, that death ended standing, was overruled. The Warren Court saw the children had

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45. *Id.* at 631-33.
a stake; they would argue vigorously against the state and thus the adversary system was served.

Now there is a resurrection of defining standing narrowly. Courts use various tests for standing, all lawyer’s jargon. To me standing should be defined as it was in the Warren period. Does the person have a real stake in the outcome of the case? Will his stake compel him to present the adversary position? There’s no need for all the other jargon.

Professor Wisotsky: A moment ago you referred to the added weight a unanimous decision carries. In the famous 1954 school desegregation case of Brown v. Board of Education,\(^47\) Chief Justice Warren was said to have lobbied the other Justices to achieve a unanimous opinion. In contrast, the fragmentation of the Burger Court is widely criticized. In another race case, Regents of the University of California v. Bakke,\(^48\) with six separate opinions, the so-called opinion of the Court by Justice Powell speaks only for himself. Would you comment upon the qualities of leadership a Chief Justice should have and compare the leadership qualities of Chief Justices Warren and Burger.

Mr. Justice Goldberg: I strongly doubt Warren did much lobbying. I was not on the Court at the time; but lobbying is generally not very effective in the Supreme Court. The Justices of the Court are pretty independent-minded people, and ought to be. I think the consensus developed in Brown v. Board of Education was not the result of lobbying. It was the result of a common realization the time had come to overrule the separate but equal rule of Plessy v. Ferguson,\(^49\) to remove the blight of racial segregation from our society.

Going beyond your question for a moment, it has been said the decision has not really been effective in integrating schools. There is some merit in that position, considering the flight to the suburbs and so on. But what is overlooked is the impact of the decision in eliminating segregation in many other aspects of our society and in various sections of the country. Interestingly enough, the impact may have been greater in the South than in the North. I have a farm in Virginia, and in the local area there was a black school and a white school. That duplication of facilities was eliminated. Since busing is natural in an agricul-

\(^{49}\) 163 U.S. 537 (1896).
tural community, everybody is now bused to one high school.

In *Watson v. City of Memphis*, we held that all public facilities must be desegregated. Today that would seem to be obvious. But the Supreme Court later heard an important case where the issue was raised again in Mississippi. I thought we decided the issue, but apparently not directly. The city desegregated all public facilities, as directed, but closed the swimming pool. Obviously the closing was racially motivated; but the city council claimed they hadn’t the money to run the pool or things like that. So the situation still exists.

There’s a lot written about *Brown*, so I would like to emphasize it hasn’t achieved the total objective. But as to racial matters, I would like to compare our country today, with all its shortcomings, with what it was when *Brown* was decided. It’s a tremendous difference and a great step forward.

As far as comparing Chief Justices Warren and Burger, I can’t judge. I’m not on the Court now and I haven’t experienced Burger’s leadership style. But the question relates to what I said about the independence of Justices. I think the public and maybe the academicians place too much stress on leadership. The Chief Justice is only first among equals. He has the same voice; he has the same vote. He can assign opinions if he’s in the majority, and he runs the building and presides over the judicial conference. Beyond that he doesn’t affect the vote or views of any member of the Court. Based on my own experience, I didn’t see any ability to affect Justices in the Warren Court, and I have the greatest admiration and affection and love for Chief Justice Warren.

Professor Marsel: You said Justices were very independent; and

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50. 373 U.S. 526 (1963). Justice Goldberg believes that the crucial difference between *Watson*, and *Brown*, is that the Goldberg opinion in *Watson* demanded desegregation for “the here and now,” 373 U.S. at 533, while the Warren opinion in *Brown* laid down the less stringent standard of desegregation with “all deliberate speed”. 349 U.S. at 301.


Justice Powell has said there are nine small law firms at the Court. When you were serving, did you get to know your colleagues well, both as men and jurists?

Mr. Justice Goldberg: Powell's assessment was right in one respect and wrong in another. I have been senior partner of a law firm with 180 lawyers, and I have run a small firm. A large firm is a conglomerate. A case revolves around a senior partner, with the aid of a junior partner and a few associates. This group handles the case throughout; consultation about the case with other partners is minimal if it exists at all.

The Court has increased the number of law clerks, creating more of a law office atmosphere. But a Justice does his work alone. He did it alone in the Warren era, he does it alone in the Burger era. Once he has an assignment, he works on an opinion and circulates it to see if he can keep his majority.

There's one great difference between a law firm and the Court which Powell overlooked: the judicial conference. In a law firm the partners don't sit down together to vote on how to handle a case. I think Powell overlooked that when he made the comparison.

Professor Marsel: Mr. Justice, I understand Florida is a state in the forefront of the movement to allow cameras in the courtroom. What do you think of this practice and what effect do you think it has on the jurisprudence of courts?

Mr. Justice Goldberg: I have been opposed to using cameras in the courtroom ever since I was on the Warren Court; all of us were opposed at that time including Chief Justice Warren. Our reason was not any hostility to television. In fact we made it clear television reporters could stand outside and interview people; we would not interfere with that. Our basic reason for banning cameras was to insure the constitutional guarantee of a fair trial.

Everybody who participates in a trial is human. Judges are human; prosecutors are human; defense lawyers are human; witnesses are human; jurors are human. The net result of permitting televising

54. FLA. CODE OF JUD. CONDUCT Cannon 3-A(7) (1973); Petition of Post-Newsweek Stations of Fla., Inc., 370 So. 2d 764 (Fla. 1979).
from a courtroom, in my opinion, is to convert a solemn trial into entertainment.

Television is essentially an entertainment industry; television officials would readily concede that. A trial is not entertainment. It's serious business.

Viewing broadcasts of actual events is interesting for the people. I am in favor of televising the legislature because that does not involve any Constitutional inhibition. But in a courtroom, we can endanger a Constitutional protection: fair trials.

We do not want to encourage people to play act; it would have serious consequences on the legal system. We want to insure that the jury is primarily a group of men and women who apply the law given them by the judge, who decide the case according to the law and the evidence. We don't sequester all juries, and jurors talk to their neighbors afterwards. Jurors don't want to look like soft-hearted knee-jerk liberals. We don't want to put them in a position where they will decide cases on the basis of neighborhood approval.

The same is true of judges. And witnesses too, once they take the stand, know, even if they have not been told, the camera is focused on them. So they also tend to act.

In my view a trial is not acting; it is serious business.

Professor Burns: Mr. Justice, which decisions do you believe were the most important of the Warren era?

Mr. Justice Goldberg: Of course, you have to start with Brown v. Board of Education56 as a landmark decision, followed by Reynolds v. Sims,57 the reapportionment case, and Gideon v. Wainwright,58 establishing the right of counsel—and injecting a concept whose scope is still unrealized: the extent to which poverty is an element in equal protection and due process.

I would say those three; and then a fourth, the Colorado River controversy.59 That case looms so large because it shows the power of the Court. Seven of us heard the case.60 I thought to myself, "this case

60. Chief Justice Warren did not participate because he had been Governor of
represents the essence of our system.” California, one of the biggest states of the union, Arizona, one of the smallest, and others, a total of eleven states were submitting to seven fallible people the question of allotment of the waters of the Colorado River. My reading, later confirmed by my international experience, showed water rights are responsible for most wars in recent times. Yet it was accepted that these seven men would determine the question. We split four to three, so four members of the Court decided it. I have always regarded that case to be symbolically one of the most important decisions of the Court.

Professor Marsel: As you look back over the many opinions you wrote, sir, which do you think was the most significant?

Mr. Justice Goldberg: I would say Griswold. I feel strongly I was right in my concurring opinion. The area of privacy is protected by the ninth amendment; it’s important to reassert that and extend it to the fundamental rights not specifically enumerated in the Bill of Rights. I think that’s right historically and right on its merits.

I think Bell v. Maryland was an important decision. I believe the right of equal accommodations for Americans rests on the Constitution. We did not need a statute to that end, although fortunately Congress did pass the statute. But I thought the whole constitutional concept of equal protection afforded every American the right to equal accommodations. And Watson v. City of Memphis, desegregating public facilities, was important.

My opinion in Kennedy v. Mendoza-Martinez demonstrated our quest for legal realities, saying “forget the symbols”. Academicians argued about what constituted a sanction. But a man was automatically stripped of his citizenship because he fled the draft; I said it was unconstitutional, a terrible sanction. If the government must act, indict the person for draft evasion, a criminal violation, and let him make a defense. I also said in that case that the Constitution is not a suicide

California; Justice White disqualified himself because his law firm had handled part of the case.

61. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).
64. 373 U.S. 526 (1963).
pact;\textsuperscript{66} it affords Americans protections even during periods of national emergency. The Court said as much in \textit{Ex parte Milligan},\textsuperscript{67} where it stopped President Lincoln from suspending the writ of habeas corpus in the District of Columbia in the middle of the Civil War.

Interestingly enough, I thought the opinion I wrote in \textit{United States v. Barnett}\textsuperscript{68} was important. I didn’t like Barnett, I felt he was a racist governor. He denied James Meredith admission to Mississippi State University, violating an injunction, and was held in criminal contempt for doing so. I said he was entitled to a jury trial, but could only get three other votes. Stripping fictions aside, my view was he would go to jail, thus the Constitutional protections should apply. I recalled some communists who jumped bail under the Smith Act and were sentenced to longer sentences for criminal contempt than they would have been under the statute for skipping bail.\textsuperscript{69} I thought it was an important distinction to make. The court has pretty well adopted it now, but they did not adopt it then.\textsuperscript{70}

Dean Lewis: Mr. Justice, we appreciate very much your willingness to share your insights with us. Thank you.

\textsuperscript{66} Id. at 160.

\textsuperscript{67} 71 U.S. (4 Wall.) 2 (1866).

\textsuperscript{68} 376 U.S. 681, 728 (1964) (Goldberg, J., dissenting).

\textsuperscript{69} Id. at 739-40.

\textsuperscript{70} \textit{E.g.}, Codspotti v. Pennsylvania, 418 U.S. 506 (1974).
Asbestos Litigation: Balancing the Interests of Insurance Companies, Manufacturers and Victims

Introduction

Asbestosis victims file approximately 300 to 400 claims each month.\(^1\) An estimated 12,000 to 20,000 pending asbestosis cases represent the largest category of claims in the area of products liability litigation.\(^2\) Reports of this disease surfaced in the United States as early as the 1930's,\(^3\) yet a variety of industries still utilize products containing asbestos fibers.\(^4\) Florida courts have numerous asbestosis cases on their dockets, and it has been predicted that the profusion of these claims will continue for several years. Dr. Irving Selikoff, director of Mt. Sinai Hospital Environment Sciences Laboratory in New York, claims tens of thousands of cancer victims have not yet realized the association of their malignancies with asbestos exposure.\(^5\) Consequently, current litigation represents a mere fraction of potential suits.

Compounding the problem are the recent decisions in *White v. Johns-Manville*\(^6\) and *Keene Corp. v. Insurance Co. of North America*\(^7\) which could dramatically increase the already overwhelming number of asbestos related lawsuits.\(^8\) In *White*, the Fourth Circuit held shipyard workers suffering from diseases caused by asbestos inhalation could bring claims under admiralty jurisdiction which the state statute of limitations would have otherwise barred.\(^9\) The court in *Keene* expanded

2. Id. at 24, col. 1; Am. Bus., Dec. 1981, at 1, col. 3.
9. 662 F.2d 234.
the liability of insurance companies, holding that the statutes of limitations in asbestos cases began to run either at the time of exposure, or the earliest manifestation of symptoms of the disease, whichever is later. Further, at least one court has suggested the application of "market-share liability" to asbestos suits. Each of these decisions lays the foundation for an onslaught of new asbestos litigation. This comment explores the basis for each decision, and examines its potential effects on future asbestos related lawsuits. An overview of the difficulties inherent in asbestos litigation is also provided.

Perspective on Asbestos

The term asbestos encompasses a diverse group of natural minerals capable of separating into fibers. There are primarily six species of these minerals, each having distinct characteristics. Durable and flexible, resistant to fire and wear, asbestos is ideal for use in over 3,000 industrial products and functions. Workers who manufacture insulation, clutch linings in cars, brake shoes, walls, tiles, floors, ironing boards and various resistant cloths frequently suffer exposure to asbestos.

Unfortunately, exposure to asbestos fibers leads to a number of serious, often fatal illnesses. The most common of these, asbestosis, is a chronic fibrotic reaction in pulmonary tissue which results in severe breathing problems. The disease usually manifests itself between ten and twenty-five years after initial exposure, and occasionally has a

10. 667 F.2d at 1041.
13. Id.
16. Id. at 915.
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latency period of up to forty years. Once inhaled, asbestos fibers remain in the lungs causing progressive, irreversible damage. As a result of the long latency period, physicians cannot determine with reasonable accuracy which of the victim’s exposures to the fibers caused the onset of illness. This feature of the disease led to the controversy regarding commencement of insurance liability in Keene.

Asbestos inhalation may also result in such malignant diseases as lung cancer, pleural and peritoneal mesothelioma, and cancer of the gastrointestinal organs. It has been estimated that at least fifty percent of workers afflicted with asbestosis develop lung cancer. Family members in contact with those directly exposed to asbestos fibers may also develop pleural and peritoneal mesothelioma. The problem has become so widespread that a number of United States Senate and House members have proposed “White Lung Bills” which would establish minimum standards for state workers’ compensation laws by providing “prompt, adequate, exclusive, and equitable compensation for occupational diseases or death resulting from exposure to asbestos.”

Insurance Company Liability in Asbestosis Cases

In all insurance litigation, the plaintiff must prove that an injury or accident “occurred” within the meaning of a liability policy. While most insurance contracts provide coverage for injuries within the policy period, carriers often contest coverage in situations involving latent

20. Id.
24. F. Netter, supra note 18, at 211.
27. Id. at 1387. The policy issued to Keene by Hartford Accident and Indemnity Company states:
disease, claiming the injury occurred beyond the time limits of the policy. 28

Advocates of the manifestation theory contend injury occurs when symptoms of asbestosis are revealed. 29 Under this approach bodily injury is deemed to occur when the disease becomes apparent or when the victim knew, or should have known, of his illness. 30 Therefore, only those insurance companies who covered the manufacturer during the period of manifestation of the symptoms are liable for damages to the victim.

In *Porter v. American Optical Corp.*, 31 the district court utilized the manifestation theory. A victim of asbestosis sued the company which manufactured a respirator he had used as protection against inhalation of asbestos fibers and dust. 32 The trial court held that determination of the onset of injury was based upon manifestation of the symptoms of asbestosis. 33 The insurer providing coverage when the plaintiff's injury became apparent was held responsible, whereas the insurers offering coverage during the victim's exposure, and during the period when the formal medical diagnosis was made, were exonerated. 34 The

[unreadable text]

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28. See supra text accompanying notes 18-20.
30. Id.
31. 641 F.2d 1128 (5th Cir. 1981). This case is distinguishable from others cited, since the filter manufacturer, rather than the asbestos manufacturer, is the party insured. However the court stated that since the respirators were specifically used to protect against the hazards of exposure to asbestos, the controlling principles in cases against asbestos manufacturers should be utilized. Id. at 1144.
32. Id. at 1130-31.
33. Id. at 1131.
34. Id. The district court decision resulted in the two appeals presented. American Optical Corp., the manufacturer of the respirators appealed its liability, and Hartford Accident and Indemnity Company appealed the decision holding it the sole insurer liable for coverage. Id.
Fifth Circuit Court of Appeals in *Porter* expressly rejected the manifestation theory. The majority held an insurance company's liability for bodily injury due to a cumulative disease should be apportioned among all insurers covering the manufacturer during the "injurious exposure" period. This reversal closely followed a decision by the Sixth Circuit Court of Appeals in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* The *Forty-Eight Insulations* Court described asbestosis as, "a series of continuing injuries to the body, [or a] continuing tort," so that companies providing insurance coverage throughout the period of exposure had to contribute to the victim's compensation. Five insurance companies had issued policies over the twenty year period involved, and for some years, Forty-Eight Insulations had been self insured. The court held liability for damages and defense costs were to be pro-rated among all the companies involved, and treated Forty-Eight Insulations as a self-insurer for the period during which it had no commercial coverage. When the same court was required to apply Ohio law in another asbestos suit, it determined that a cause of action for asbestos-related disease accrued when symptoms were manifested. This decision was in direct opposition to *Forty-Eight Insulations*.

A bold departure from these approaches occurred in *Keene Corp. v. Insurance Co. of North America*. From 1948 to 1972, plaintiff

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35. *Id.*
36. *Id.* at 1145. The case was remanded for apportionment of coverage between Aetna Casualty and Surety Company and Hartford Accident and Indemnity Company, and the judgment against American Optical was affirmed. The district court judgment absolving Continental Insurance Company of liability was also affirmed since Continental provided no coverage during Porter's exposure to asbestos fibers and his use of the respirator. *Id.* at 1145-46.
37. 633 F.2d 1212 (6th Cir. 1980).
38. *Id.* at 1217.
39. *Id.* at 1213, 1215.
42. *Id.* at 1158.
Keene Corporation manufactured thermal insulation products containing asbestos. As a result of its employees' exposure to this compound, Keene had been involved as a co-defender in over six thousand cases by alleged victims of asbestosis, mesothelioma, and lung cancer.

Throughout the period of the employees' exposure, Keene was successively issued comprehensive general liability policies by a number of insurance companies. During litigation however, each insurer denied coverage in whole or in part. Keene filed suit for a declaratory judgment and damages in order to determine the liability of each insurer with which it had contracted.

The court rejected both the manifestation theory and the exposure theory proposed by the insurers, and held "inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." The court's theory regarding time of injury was essentially a combination of theories previously accepted, and provided that each insurer be held liable for the entire loss.

When more than one policy applies to a loss, the 'other insurance' provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. The manufacturer was released from liability for any damage which may have occurred during its uninsured periods. The court attempted to

44. Id. at 1038.
45. Id.
47. Id. at 1039.
48. Id. at 1047. Additionally, the court defined bodily injury as any segment of injury encompassed by asbestosis. Id.
49. Id. at 1041, 1050. This liability includes defense costs as well as indemnification. Id. 1041.
50. Id. at 1050.
51. Id. at 1048-49. The insurance companies asserted that this decision would allow the defendant to purchase coverage for only one year, and still be covered for a long period of time. The court presented two reasons why this would not be the case: 1) the longer a company has purchased insurance, the fewer number of injuries it would be responsible for; and 2) since only one policy would apply to each injury, the insured would only be able to collect damages from one of the several policies it purchased, thereby benefitting the insurance companies. Id.
satisfy the expectations of the manufacturer when it purchased the insurance policies, and to "give effect to the policies' dominant purpose of indemnity." 52

The contracting parties for an insurance policy exchange assumption of the risk of the insured's liability, for a fixed amount of money. 53

An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. . . . . At the heart of the transaction is the insured's purchase of certainty—a valuable commodity. 54

The manifestation theory defeats this purpose, since manufacturers have been virtually uninsured after the onslaught of asbestos suits filed in recent years. 55 Insurance companies providing coverage during the exposure period, but prior to manifestation of symptoms, escape liability under this approach. Consequently manufacturers face the strong possibility of being forced out of business from damage awards against which they are not indemnified, depriving them of the freedom from liability for which they bargained.

The exposure theory is equally threatening, also defeating the purpose of the bargained-for contract. 56 Under this approach no guarantee of protection against future development of the disease exists. The court held that in purchasing insurance coverage, Keene Corporation bargained for coverage of all future liability excluding only those injuries it knew or should have known existed prior to the insurance agreement. 57 The court also determined the extent of protection provided during the policy period. The majority once again focused on the prom-

52. Id. at 1041.
53. Id.
54. Id.
55. Id. at 1045. Once it was confirmed that exposure to asbestos causes serious disease, (late 1960's-1970's), insurance companies stopped issuing policies providing adequate coverage for those injuries. Id.
56. Id. at 1044. Under Hartford's theory, the original exposure to asbestos fibers constitutes the injury, and future development of the disease is merely "a consequence of the injury." Id.
57. Id. at 1048.
ise of certainty upon which plaintiff had relied.\textsuperscript{58}

The court's interpretation of the contracts resulted in Keene being fully covered by each insurance policy, even if only part of the injury occurred during the policy period.\textsuperscript{59} The court specified however, that only one policy could be applied to a specific injury. Keene had to select the policy from its succession of coverage to provide indemnification for the injury in question.\textsuperscript{60} Since only one policy would be selected to cover each injury, the insurance companies would benefit.\textsuperscript{61} If, for example, three policies were in force throughout the victim's exposure to asbestos fibers, two companies would be free from primary liability. (Subject to the 'other insurance’ provisions.)

Finally, the court determined the method of allocating liability for each injury. The court simply concluded Keene could collect damages from any company providing coverage during the time of injury, subject to the ‘other insurance’ provisions stated in the policy selected.\textsuperscript{62}

The Keene theory exposes insurers to extraordinarily broad liability for coverage, which could cause the downfall of numerous insurance businesses.\textsuperscript{63} Paul W. MacAvoy, a Yale economist, predicts payments to asbestos victims may total up to 90 billion dollars over the next thirty years, and some insurers may have insufficient reserves to cover these costs.\textsuperscript{64} This view was criticized by Floyd H. Knowlton, a Vice-President of Travelers Insurance, who asserted that no carriers are

\textsuperscript{58} Id. at 1047-48.

\textsuperscript{59} Id. at 1048. The court holds that the policies do not provide for a reduction of liability if only part of the injury occurs within the policy period. Additionally, it states there is no authority for the suggestion that Keene is "self-insured” for periods during which no other policy was in force. “There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.” Id. at 1049.

\textsuperscript{60} Id. at 1049-50.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} Id. at 1050. The court cites as an example INA's policy which provides: When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below. \textit{Id.}

\textsuperscript{63} Wall St. J., June 14, 1982, at 1, col. 6.

\textsuperscript{64} Id. at 18, col. 1.
threatened by insolvency. Other commentators compare the predictions of doom to those which occurred when medical malpractice insurance payments soared, yet no major crisis ever materialized. Others fear that based on the Keene decision, insurers must now “reopen their books on policies that expired 10 or 20 years ago,” and will be unable to project future losses as applied to latent diseases. As a result, it may be impossible to reliably price new policies.

Asbestosis in Shipyard Workers

Statutes of Limitation:

The tolling of the statute of limitations in cases involving insidious disease depends upon determination of the onset of bodily injury. Under the laws of several states, the statute begins to run when the plaintiff knows, or should have known, of the cause of injury. This approach was followed in *In re Johns-Manville*, wherein asbestos victims were required to file their claims within two years of the time plaintiffs knew or should have known of the onset of their disease. Other states hold this identification of injury insufficient to begin running of the statute. Under the laws of Pennsylvania, the statute will not begin to run simply because plaintiff knows of his injury—he must also be able to determine a nexus between cause and injury. Virginia law dictates that the statute may begin to run prior to manifestation of symptoms if expert medical testimony can pinpoint the plaintiff’s time of injury.

Federal Courts of Admiralty may utilize equity as an alternative to formal statutes of limitations. Under the doctrine of laches, proof that a plaintiff was negligent by failing to bring a timely action is an

65. *Id.*
66. *Id.*
67. *Id.* at 18, col. 3.
68. *Id.*
70. *Id.*
affirmative defense to the complaint. Laches is premised on the assumption that one has abandoned his right to recover if the claim was unreasonably delayed, thereby causing prejudice to defendant.

Federal Court Admiralty Jurisdiction:

Pursuant to Article III, Section 2, of the United States Constitution, original jurisdiction of admiralty or maritime cases is vested in United States district courts. The definition of "maritime cases" however, has been subject to considerable controversy.

Traditionally, locality of the event determined whether a cause of action was maritime in nature. In *The Plymouth*, a shipowner's claim was given maritime status when his vessel collided with a wharf (considered land). Paradoxically the prayer for admiralty jurisdiction by owners of storehouses on the wharf was denied. The United States Supreme Court held, "the jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters where it occurred." Over one hundred years ago Justice Story held "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act," and in recent years the Court in *Victory Carriers, Inc. v. Law* upheld the locality test. The majority in *Victory Carriers, Inc.* held maritime law applicable exclusively to incidents taking place in navigable waters, thereby denying admiralty jurisdiction in an action by a longshoreman

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73. The Key City, 81 U.S. 653 (1871). The circumstances of each case must be considered to determine whether the claim may be barred. *Id.* at 660.


75. U.S. Const. art. III, § 2 provides:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ; to all Cases of admiralty and maritime jurisdiction.


77. 70 U.S. (3 Wall.) 20 (1866).

78. *Id.* at 36.


80. 404 U.S. 202 (1971). The Court reasoned that although the plaintiff was loading a ship, his injury was caused by a vehicle on land, therefore admiralty jurisdiction did not apply. *Id.*
who was injured on a pier by one of his own trucks.\(^{81}\)

The Supreme Court in *Executive Jet Aviation v. City of Cleveland* clearly explains that using the strict locality test can lead to unsound conclusions.\(^{82}\) For example, admiralty jurisdiction may at times be denied to maritime employees, whereas utilizing the strict locality test would allow swimmers colliding in water to bring their case under admiralty jurisdiction.\(^{83}\)

Courts recognize this inequity and often consider other factors when invoking admiralty jurisdiction.\(^{84}\) The court in *Executive Jet Aviation* defined the parameters of admiralty jurisdiction by enacting a two part test. The criteria established that the action must not only encompass a maritime locality but must also "bear a significant relationship to traditional maritime activity."\(^{85}\) The combination locality and maritime nexus test insures admiralty jurisdiction will be inapplicable in a situation where the cause of action fortuitously occurs in navigable waters.

**White v. Johns-Manville:**

Plaintiffs in the principal case, John W. White and four companion shipyard workers, were exposed to asbestos dust over a lengthy period of employment, and each developed asbestosis. The district court joined a number of complaints and issued three individual findings. First, the court held the injuries did not bear a reasonable relation to traditional maritime activity and consequently declined to employ admiralty jurisdiction.\(^{86}\) Pursuant to the rules of diversity jurisdiction the court applied Virginia's two year statute of limitations for personal injury.\(^{87}\) The court commenced the limitations period from the date of

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81. *Id.*
82. 249 U.S. at 255.
83. *Id.*
84. The Court in *Executive Jet Aviation* explains that in spite of the broad language in cases like *The Plymouth*, the Court has never held that locality of an action is the exclusive consideration in applying admiralty jurisdiction. *Id.*
85. *Id.* at 268.
87. *Id.* at 238; VA. CODE § 8.01-243 (1977).
White's last exposure to asbestos, thereby barring his claim.\(^88\)

Second, the court restricted damages to "injuries which occurred during the period commencing at a date two years before the institution of each plaintiff's action and ending at the date of last exposure."\(^{89}\) Consistent with its ruling the court excluded evidence of asbestos exposure prior to the commencement of this time period.\(^{90}\) Although summary judgment was granted against White and several other plaintiffs, a jury verdict of $435,000 was awarded to four employees.\(^{91}\)

The trial court's third order granted a judgment notwithstanding the verdict for the manufacturer, based upon a failure to prove injuries during the restricted two year time period. Each order was appealed before the Fourth Circuit Court of Appeals. The circuit court questioned the district court's refusal to apply admiralty jurisdiction. Determining that the criteria established in \textit{Executive Jet Aviation}\(^{92}\) had been met, the circuit court reversed. The locality requirement was fulfilled by the employees' exposure to asbestos containing materials on ships at both shipyard and dry-dock locations, as well as while working at sea. The nexus requirement was also satisfied because insulation materials are an integral part of ships, and "clearly essential to the maritime industry."\(^{93}\)

The circuit court overruled the district court's application of the Virginia statute of limitations,\(^{94}\) although in applying the equitable doctrine of laches district courts may consider state statutes of limitations.\(^{95}\) In asbestos cases the long latency period of the disease must also be considered, with the burden upon defendant to prove prejudice.

\(^{88}\) \textit{White}, at 238.

\(^{89}\) \textit{Id.}

\(^{90}\) \textit{Id.}


\(^{92}\) \textit{See supra} text accompanying note 83.

\(^{93}\) \textit{White}, at 239.

\(^{94}\) \textit{Id.} at 239-40. The manufacturers argued that applying admiralty jurisdiction in products liability cases would expand such jurisdiction to cases involving products remotely associated with maritime activities. The court, however, found that the manufacturers were able to foresee that these insulation materials would be used primarily on ships. \textit{Id.}

\(^{95}\) \textit{Id.} at 240.
by showing plaintiff inexcusably delayed his claim.

The circuit court approved the district court instruction that manufacturers were not liable for asbestosis incurred prior to the specified periods of exposure. It stated, however, the defendant may be accountable for negligent “aggravation of a pre-existing condition.” It was therefore permissible for the jury to award damages based upon exacerbation of the plaintiff’s pre-existing asbestosis. The decision of the district court was vacated and remanded for a new trial conducted under federal court admiralty jurisdiction.

Market—Share Liability

The third decision in the trilogy presented focuses upon the relatively new doctrine of Market Share Apportionment. A basic tenet of traditional tort liability demands plaintiff demonstrate a connection between his loss or injury, and defendant tortfeasors’ act or omission. Historically it has been difficult, if not impossible, to obtain damages when one is unable to clearly identify the party at fault. Three limited exceptions to the rule necessitating precise identification of the tortfeasor have evolved: concert of action, alternative liability and res ipsa loquitur. Under each of these doctrines, the presumption that the defendant is in a better position to determine who actually caused the injury shifts the burden of proof away from the plaintiff. Each defendant’s relationship to, and involvement in the injury producing activity must be demonstrated.

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96. Id. at 241.
98. Id. at 671-72.
99. Newcomb, Market Share Liability for Defective Products: Ill Advised Remedy for the Problem of Identification, 76 Nw. U.L. REV. 300 (1981). Under each of these doctrines there must be some evidence that the defendant could have been at fault, whereas under “enterprise liability” or “market-share liability” no connection between the defendant and a particular incident need be identified. It is sufficient that the named defendant was producing the injury-causing product at the time of the occurrence. Id. at 310.
Early Application:

In *Hall v. E.I. DuPont de Nemours & Co.*,\(^{100}\) and the companion case *Chance v. E.I. DuPont de Nemours & Co.*,\(^{101}\) damages were sought from a number of explosives manufacturers and their trade association for injuries incurred in eighteen accidents.\(^{102}\) Because identification of the manufacturers of the blasting caps involved in each accident could not consistently be determined, defendants were randomly selected from the six companies comprising the entire explosives industry. The existing doctrines allowing recovery under these circumstances were inapplicable since defendant’s relationship to the injury-producing activity could not be proved.\(^{103}\) In an effort to provide recovery to the victims, the court in *Hall* suggested that virtually the entire industry be held liable for injuries resulting from use of its product.\(^{104}\) This theory, referred to as enterprise liability or industry-wide liability, resulted from the responsibility of industries to compensate victims for harm typically resulting from use of its goods.\(^{105}\) The court proposed the entire industry share the burden for any member’s failure to take appropriate safety measures.

The doctrine received much publicity when in 1980, two suits were brought by women who had developed cancer and/or adenosis as a result of in-utero exposure to diethylstilbestrol, ("DES"), a drug administered to their mothers during pregnancy.\(^{106}\) Unable to identify which drug company produced the particular DES ingested, plaintiff’s in *Sindell* employed the enterprise liability doctrine in order to hold all manufacturers of DES jointly liable.\(^{107}\) The court modified the *Hall*
approach, deeming it unfair to impose liability on the approximately 200 distributors of DES, when only 6 or 7 manufacturers produced 90% of the drug then marketed.\textsuperscript{108} The court formulated a narrower application of industry wide liability:

we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose.\textsuperscript{109}

Under this theory, those companies manufacturing a substantial share of DES available at the time of distribution could be joined in the action with the liability of each equitably apportioned.\textsuperscript{110}

Market Share Apportionment Applied to Asbestos Suits:

The problem of proof encountered in \textit{Hall} and \textit{Sindell} repeatedly arises in asbestos suits. Victims of asbestosis and mesothelioma are frequently exposed to asbestos-containing products over an extended period of time. It becomes impossible to determine the precise moment of onset of the disease, therefore impossible to identify the manufacturers of the product from which they became ill.

In \textit{Hardy v. Johns-Manville Sales Corp.},\textsuperscript{111} a United States district court took a step in overcoming this hurdle, by determining that Texas courts would probably adopt some form of enterprise liability,\textsuperscript{112} thus permitting discovery based upon the theory of market share apportionment.\textsuperscript{113} Because this ruling limited itself to discovery and cross claim motions, a final adjudication of whether the doctrine applied to asbestos cases has yet to be reached.

The \textit{Hardy} decision, although narrow, has opened the door for market-share liability in asbestos cases. Some commentators will cele-
brate this extension of the *Sindell* doctrine. At first blush its applicability in asbestos cases seems directly on point. Asbestos usage abounds despite knowledge of asbestos carcinogenicity.\(^{114}\) As stated in the landmark case introducing the concept of alternative liability, *Summers v. Tice*,\(^ {115}\) when a choice exists between an innocent plaintiff and negligent defendant, the latter should bear the cost for injuries incurred.\(^ {116}\) If, through no fault of his own, a plaintiff cannot identify the guilty defendant, the manufacturers primarily responsible for distributing the dangerous product to the public should apportion damages among themselves.

Some find market-share apportionment a deplorable basis upon which to hold asbestos manufacturers liable for damages. Contrasted with victims of DES for whom it has been virtually impossible to identify the producers of the drug ingested by their mothers,\(^ {117}\) plaintiffs in asbestos cases can provide substantial information regarding the time and place of their exposure. Although it may be impossible to consistently determine which exposure caused the disease, thorough discovery procedures may lead to identification of the appropriate defendant. Furthermore, under the *Sindell* doctrine those companies not manufacturing DES during a particular plaintiff’s exposure to the drug could exculpate themselves from liability.\(^ {118}\) Because it is often impossible to determine the onset of disease in an asbestos case, manufacturers not even producing the product at the time of injury should not be prevented from avoiding liability. To hold a ‘substantial share’ of asbestos producers liable for an injury with no evidence linking them to a particular occurrence defies the foundation upon which tort theory is based.

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114. *Id.* at 1355.

115. 33 Cal. 2d 80, 199 P.2d 1 (1948).

116. *Id.*

117. Plaintiffs in the D.E.S. cases were not yet born when their injury occurred. They had no means by which to determine the brand of D.E.S. administered to their mothers. Even if medical and hospital records were available, it would be impossible to determine with certainty the manufacturer of the D.E.S. distributed by individual pharmacists at any given time.

Ramifications

The trilogy of decisions presented strongly favors plaintiff’s rights. Keene expands the liability of insurance carriers who issued policies to companies utilizing products containing asbestos. As a result, employers who are uninsured for certain time periods under either the exposure theory or manifestation theory are now fully protected. The companies are at last free from the possibility of facing bankruptcy because of asbestos injuries incurred during their uninsured periods and plaintiffs are guaranteed a source from which to recover damages.

The White decision provides access to federal court admiralty jurisdiction, allowing shipyard workers to by-pass state statutes of limitations which previously barred their claims. The potential surge of new claims by shipyard employees who constitute the majority of victims suffering from mesothelioma and asbestosis could flood our courts for years to come. Finally, the Hardy application of market-share apportionment in asbestos suits shifts the burden of proof away from victims. Defendant manufacturers must demonstrate their freedom from liability in producing the injury causing product.

The theory expanding the scope of ‘when bodily injury occurs’ can be applied to a host of latent occupational diseases (e.g., those caused by cotton dust and uranium). The application of admiralty jurisdiction to a products liability case where the substance was manufactured on land, could arguably be extended to a myriad of products which eventually find their way into a maritime environment. Although the majority in White denies this possibility, a comparable decision was handed down in the recent case of Sperry Rand Corp. v. Radio Corp. of America, perhaps indicating a trend in maritime products-liability cases. Applying the theory of market-share liability to asbestos claims indicates a growing acceptance of this relatively new doctrine, which

120. Legal Times of Wash., Feb.-8, 1982, at 5, col. 3.
121. 618 F.2d 319 (5th Cir. 1980). The court applied admiralty jurisdiction in a products liability case against the manufacturer of a gyro-pilot steering system used aboard a vessel. The defendants in this case also argued that this might expand admiralty jurisdiction to any case involving a product used in a maritime situation, which the court denied. Id. For further discussion of maritime products liability, see Comment, 52 Temple L.Q. 283 (1979).
conceivably could be expanded to any products liability case in which precise identification of the party at fault is impossible.

Steps have been taken which would minimize the effects of these decisions. Numerous attorneys have been involved in lobbying efforts for legislative action to compensate victims of asbestosis. Reactions to this effort are mixed: some legislators see it "as too much of an effort to bail out Johns-Manville," who bears the brunt of most asbestos-related lawsuits. Insurance companies are split while organized labor seems to be "taking a wait and see" stance, and trial attorneys face losing huge fees if litigation is halted.

Under a bill proposed by Senator Hart, (D-Colo.), an industry and government funded pool would be created to compensate victims of asbestosis. Under this act, asbestos victims would be prevented from filing lawsuits to obtain additional remuneration. However, Rep. George Miller (D-Calif.), who will soon introduce his own bill, states, "let the companies explain . . . how the federal government should pay out billions of dollars when there is established liability (on their part) . . . . If they want a government bailout, they're whistling in a hurricane." Rep. Millicent H. Fenwick (R-N.J.) has proposed a bill, H.R. 5224, establishing a federal trust fund which would operate through the Labor Department, although there has been some indication that she may abandon it and support Miller's bill. There has also been some indication that Senator Edward Kennedy (D-Mass.) may introduce a bill paralleling Miller's house bill, perhaps including provisions for uranium-linked disease. Attorneys representing private industries are also working on proposals which are intended for introduction through sponsors in the Senate.

122. LEGAL TIMES OF WASH., supra note 120, at 1, col. 1.
124. LEGAL TIMES OF WASH., supra note 120, at 1, col. 1.
125. Podgers, supra note 123, at 142.
126. LEGAL TIMES OF WASH., supra note 120, at 5, col. 3. Sources have indicated that Miller's bill would create a "federal workers' compensation mechanism," operating through the Labor Department, and not requiring government payments. Id.
128. Legal Times of Wash., supra note 20, at 5, col. 3.
129. Id.
130. Id. These include Kenneth Feinberg, representing Raysbestos-Manhattan Inc., William Tucker retained by Johns-Manville, and Harrison Wellford, also repre-
Defendants are also beginning to assert that they were simply following government specifications in their manufacturing process. This "government-contract defense" has not yet been ruled on in asbestos suits, but has been allowed in "Agent-Orange" cases. If successful in the asbestos arena it could dispose of thousands of pending asbestos suits. In order to utilize this defense, defendants would have to first prove a contractual relationship with the government. Since much of the asbestos manufactured was for use in naval shipyards, it might be possible for defendants to show this relationship. In order to successfully assert this defense, manufacturers would have to prove that the government established specifications for the product, the specifications were met, and the government was aware of the product's hazards.

Conclusion

Defendant manufacturers and insurance companies face a growing threat as the arsenal of support for plaintiffs in asbestos-related cases continually increases. A variety of compromises have been proposed, but a multitude of problems must be overcome before a satisfactory solution can be achieved. The necessity of reaching an equitable balance is clear. Insurance companies need protection from the threat of over-expansive liability, employers and manufacturers must be saved from the threat of bankruptcy, and above all, the victims of asbestosis must be assured adequate compensation for the debilitating injuries they have incurred.

_Ryna Ellen Mehr_

senting Johns-Manville.

132. _Id._
133. _Id._
134. _Id._
135. _Id._
136. After this article was committed to print, Johns-Manville Corp. filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. Wall St. J., Sept. 13, 1982, at 5, col. 1.
In many instances, the order indicating that a lawsuit may proceed as a class action determines whether the suit will proceed at all. This note examines the rationale behind Florida courts' treatment of orders determining class standing. Preliminarily, this note focuses on the present status of class standing orders in federal courts. Federal judges have the option of either certifying the suit as class action or refusing class action certification. In either event, the federal trial court judge's discretion in certifying or refusing to certify a class action suit is not appealable except in rare cases which will be discussed below.

In Florida the law is unsettled in this area. A Florida judge has the same option of class action certification as his federal counterpart. Differences arise, however, in that the Florida judge may order all allegations of a class suit stricken from the complaint or may dismiss the complaint entirely.

After treatment of the federal viewpoint of class action certification orders, the focus of this note will shift to the effect a Florida judge's choice of action will have on whether a class action order is appealable.


Congress, by statute, created the federal appellate court power to hear final lower court decisions on appeal. Generally, federal appellate courts hear appeals only from final judgments. However, because of the harshness sometimes associated with strict adherence to the final judgment rule, federal courts have created certain exceptions such as the collateral order doctrine.

3. Id.
[Some decisions appear] to fall in that small class which finally determines claims of rights separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.6

While this exception to the final judgment rule is approved by the United States Supreme Court, the Court specifically rejected its use regarding class standing orders in Coopers & Lybrand v. Livesay.7 The grounds for such a rejection were threefold. First, these orders are subject to revisions in the district courts as part of the federal class action rule provides for amendment or alteration of a class standing order any time prior to final judgment on the merits.8 Second, the considerations involved in determining whether a suit should proceed as a class action are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action."9 Third, review can effectively be achieved after final judgment at the behest of the named representative or intervening class members.10

The Second Circuit Court of Appeals formulated another exception to the final judgment rule dealing specifically with class action certification denials called the "death-knell" doctrine.11 This exception allowed for immediate appeal when denial of class certification would "for all practical purposes terminate the litigation,"12 thereby causing irreparable harm to the plaintiff and the class.13 Other circuits viewed the "death-knell" doctrine with mixed responses. Both the Eighth Circuit and the Tenth Circuit accepted the "death-knell" doctrine14 while

6. Id. at 546.
8. Id. at 469.
9. Id.
10. Id.
12. Id. at 121.
13. Id. In Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971), the court dropped the requirement that the class suffer irreparable harm and just looked to the named representative.
14. The death knell doctrine of the Second Circuit was accepted by the Eighth Circuit in Hartmann v. Scott, 488 F.2d 1215, 1220 (8th Cir. 1973) and the Tenth
the Third and Seventh Circuits rejected it altogether.\footnote{15}

The United States Supreme Court, however, killed the "death-knell" doctrine in Cooper\textsuperscript{s}.
\footnote{16} In that case, Coopers & Lybrand, an accounting firm, certified that financial statements contained in a prospectus were correct. Relying upon the prospectus, respondents purchased shares in a company. The company later restated its earnings reported in the prospectus by writing down its net income. Thereafter, respondents sold their shares and sustained a loss of $2,650 on their investment. Respondents brought a suit on behalf of themselves and the class of similarly situated investors. Initially, the district court certified the suit as a class action but later decertified it. The court of appeals examined the amount of respondents' claims in relation to their financial resources and the probable cost of litigation and concluded that if class certification was not given the lawsuit would terminate. Under this "death-knell" doctrine, jurisdiction was accepted and the order decertifying the class was reversed.\footnote{17}

The United States Supreme Court disagreed and reasoned that an order which either refuses to certify or decertifies the class does not force the plaintiff to abandon his claim. Since the plaintiff is free to pursue his individual claim, orders refusing to certify are not final judgments and will be appealable only if they fall within an appropriate exception to the final-judgment rule.\footnote{18}

The Court, refusing to accept the "death-knell" doctrine as an appropriate exception to the final judgment rule based its decision on five reasons. First, the formation of an appellate rule which revolves around the amount of the plaintiff's claim is a legislative responsibility.\footnote{19} Congress has made "finality" the test of appealability, and an amount in controversy rule established by the Court would be arbitrary in that "it ignores the variables that inform a litigant's decision to proceed, or not

\footnote{15} Both the Third Circuit, in Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir. 1972), and the Seventh Circuit, in King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (3d Cir. 1973), rejected the doctrine.
\footnote{16} 437 U.S. 463. Justice Stevens delivered the opinion for a unanimous court.
\footnote{17} Id. at 466.
\footnote{18} Id. at 467.
\footnote{19} Id. at 472.
to proceed, in the face of an adverse class ruling.” Second, acceptance of the “death-knell” rule would have serious debilitating effects on the administration of justice as further appeals from adverse rulings on other grounds would inevitably result. Third, the “death-knell” doctrine’s acceptance would result in indiscriminatory interlocutory review of the trial judge’s decision. Such indiscriminatory review would circumvent the purpose behind 28 U.S.C. § 1292(b) which allows for review only upon trial court’s discretion and then only in special circumstances. Fourth, since the doctrine only applies to class certification denial orders, it operates in favor of the plaintiffs even though the issues will often be of critical importance to the defendants as well. Finally, by allowing appeals that turn on the particular facts of the case, appellate courts would be thrown into the trial process in a way which defeats one of the main purposes of the final judgment rule: maintaining appropriate relationships between the various courts. Furthermore, the Court, in dicta, stated that approval of class certifications were interlocutory orders and not final judgments within the meaning of 28 U.S.C. § 1291.

While the Coopers decision settled the issue of appealing class standing orders as final judgments, such appeals were not precluded under other federal rules or statutes.

Injunctions

District court interlocutory orders concerning injunctive relief are immediately appealable under 28 U.S.C. § 1292(a)(1). In Brunson v. Board of Trustees, appeal of class certification denials were available

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20. Id.
21. Id. at 473.
22. Id. at 474.
23. Id. See also 28 U.S.C. § 1292(b) (1970).
25. Id.
26. Id.
27. This section provides: “(a) The court of appeals shall have jurisdiction of appeal from: (1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . .” 28 U.S.C. § 1292(a)(1)(1970).
under Section 1291(a)(1) on the theory that a denial of class certification would in effect narrow the scope of injunctive relief. In Brunson, an action was brought by forty-two black children and their parents against the school board as a class action suit. Upon motion, the district court struck all of the plaintiffs except Brunson who was the first named plaintiff. By forcing each individual to pursue his own claim, injunctions issued would only be directed with respect to that single plaintiff whereas if class action were successful general injunctive relief would be granted. Hence, the court concluded denial of class certification had the effect of narrowing the scope of injunctive relief.

In Gardner v. Westinghouse Broadcasting Co., the United States Supreme Court, however, refused to accept this rationale by holding an order denying class certification was not appealable under the interlocutory injunctive relief statute. The court noted the statute was created as an exception to the policy against piecemeal review and as such should not be enlarged or extended. Under Federal Rule of Civil Procedure 23, class certification orders may be reviewed by the trial judge both prior to and after final judgment. Finally, the Court concluded the class determination does not affect the merits of the representative’s personal claim nor does it pass on the legal sufficiency of any claim for injunctive relief. In the event that the order did pass on the legal sufficiency of a claim for injunctive relief or if it would effect the merits of the petitioner’s own claim, the Court left open the possibility for review.

29. *Id.* at 108. The same view has been taken in Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235, 1237 (7th Cir. 1975), and Jones v. Diamond, 519 F.2d 1090, 1095 (5th Cir. 1975). Because the district court’s refusal to certify the suit as a class action directly controlled the subsequent disposition of the request for preliminary injunction it too should be reviewable. *Jenkins*, 522 F.2d at 1237.
31. *Id.*
33. *Id.*
34. *Id.* at 480.
35. FED. R. CIV. P. 23(c)(1).
37. *Id.*
Appeal of Denial of Class Action Certification Under Federal Rule 54(b)

Federal Rule of Civil Procedure 54(b) provides an alternative way to appeal a denial of a class action certification. There have been cases where a trial judge has dismissed the action as to the absent class members and the judge certified the dismissal as a final judgment and therefore appeal was appropriately taken.

This rule may also be utilized if the action is dismissed against the parties for reasons other than lack of class standing. For example, in Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas, the trial court refused class status to private contractors. The contractors attempted to intervene in the suit but this was also denied. “Final judgment” was entered against the contractors in accordance with rule 54(b). The order denying class status was held reviewable under Federal Rule of Civil Procedure 54(b). “The general rule is [that] interlocutory orders from which no appeal lies are merged into the final judgment and open to review on appeal from that judgment.”

Since, the scope of rule 54(b) is limited to final judgment, and interlocutory orders merged into final judgments, the rule cannot extend to reviewing decisions granting status to a class.

38. FED. R. CIV. P. 54(b) states: “[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . .”

39. Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976), cert. denied, 435 U.S. 968 (1978), holding certification appropriate under Fed. R. Civ. P. 54(b) to unnamed members of class upon denial of certification and final judgment of dismissal against them. See also Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1968) (dictum). But see West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 997, 980 (10th Cir. 1977), holding putative class members were not parties to the suit and declaring judgment dismissing action on behalf of the class void.

40. Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Tex., 511 F.2d 1073 (10th Cir. 1977).

41. Id.

42. Id. at 1077.

43. Katz, 496 F.2d at 752.
Discretionary Appeal of Class Standing Determinations in Federal Courts Under 28 U.S.C. § 1292(b)

In *Coopers*, the Supreme Court held that a class action certification was not appealable under section 1291 as a final judgment, but such a motion for appeal is not precluded under section 1292(b). Under this statute, when a district court judge determines that an issue involves a controlling question of law on which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the suit, the question may be certified to the court of appeals. The court of appeals may then exercise its discretion as to whether to hear the appeal. Policy reasons for allowing these appeals under section 1292(b) include judicial economy and protection of the parties from erroneous interlocutory orders.

Due to the stringent requirements of 28 U.S.C. § 1292(b), as an interlocutory order, a class certification decision will be applicable only in special circumstances. Such special circumstances were demonstrated in *Tucker v. Arthur Anderson & Co.* The trial court, in *Tucker*, stated that the order certifying a class could be considered a "controlling question" because considerable time and expense would be saved if the issue was immediately certified since reversal would probably mean termination of the suit.

The same result was reached in *Aschul v. Sitmar Cruises*, where a passenger on a fourteen day pleasure cruise brought an action on behalf of himself and other passengers against the shipping line alleging the cruise had not stopped in all the ports announced in its itiner-

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44. 437 U.S. 463.
47. Id. This section is only used for orders that would ordinarily be immediately appealable. "In some cases such appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably." *Roper*, 445 U.S. at 336 n.8.
50. Id. at 483. While the court held this should be sufficient, the questions certified to the court of appeals were more specific. *See also In re U.S. Fin. Sec. Litig. v. Touche Ross & Co.*, 69 F.R.D. 24 (S.D. Cal. 1975) holding the same.
51. 544 F.2d 1364 (7th Cir. 1976).
ary. The trial court denied class action certification. On appeal, the court of appeals cited with approval the use of section 1292(b) in limited situations where the trial court determines that substantial grounds for difference of opinion on the class status question exists and immediate appeal may materially advance the end of litigation.52

Mandamus

The All Writs Act53 provides another possible alternative for reviewing class standing determinations. Mandamus is labeled as one of the "most potent weapons in the judicial arsenal"54 and accordingly its use is limited to cases where there has been a showing of an abuse of judicial power.55

In Green v. Occidental Petroleum Corp.,56 the Securities and Exchange Commission filed a complaint for injunctive relief against Occidental Petroleum alleging violations of specific sections of the Securities Exchange Act. Based on the allegations of the SEC complaint numerous private actions were filed. After extensive briefing, the district judge entered an order certifying a class under rule 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure.57 The district judge

52. Id. at 1369.
55. Id. at 104.
56. 541 F.2d 1335 (9th Cir. 1976).
57. Suits brought under 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure have to meet the initial prerequisites of a class action. 23(b)(1) suits will be allowed when:
   (1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

Id.
23(b)(3) suits would be appropriate where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only
refused to certify the ruling on the class certification under 28 U.S.C. § 1292(b). The Ninth Circuit addressed the latter question first and held it was an inappropriate remedy to mandamus the district judge to exercise his discretion to certify a question under section 1292(b). Relying on earlier opinions of the Second and Eighth Circuits the court concluded that to issue the writ instructing a district judge to certify a question under section 1292(b) would circumvent the statutory requirement that the district court and the court of appeals agree on the propriety of such an appeal.\footnote{58}

As to certification of the class suit the court held that mandamus was inappropriate as to the 23(b)(3) class certification. The court accepted the district court judge’s discretion in the certification. The court did, however, issue the writ as to the certification under rule 23(b)(1). After determining certification was improper the court concluded judicial efficiency required the issuance of the writ to correct the improper certification.\footnote{59}

Mandamus has also been used to review orders granting class action status to determine if the lower court acted beyond its power authorized by the rule. In \textit{Schmidt v. Fuller Brush Co.},\footnote{60} Schmidt brought an action on behalf of himself and others similarly situated alleging that they were employed by Fuller Brush Company and that Fuller Brush had failed to pay them minimum wages and overtime compensation allegedly required under the Fair Labor Standards Act.\footnote{61}

After certifying the class, the district judge directed that notice be sent to the absent class members as required by rule 23. Under rule 23(c)(2) of the Federal Rules of Civil Procedure, unless a class member comes forward and asks to be excluded from the suit he will be bound by the judgment. On the other hand, section 16(b) of the Fair Labor Standards Act provides that an employee must consent in writing to be a party plaintiff. The court concluded that these two provisions were irreconcilable and issued mandamus vacating class action

individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy . . . .” \textit{Id.}

Suits brought under 23(b)(3) have notice requirements not found in 23(b)(1) suits.\footnote{58} \textit{Green}, 541 F.2d at 1337.\footnote{59} \textit{Id.} at 1339.\footnote{60} 527 F.2d 532 (8th Cir. 1975).\footnote{61} \textit{Id.}
order. 62

The continuing viability of mandamus even in these limited situations has been thrown into question after the Supreme Court decisions of Coopers 63 and Gardner. 64 While not specifically addressing the issue of mandamus, the Court's attitude toward class actions may lead one to suspect they have closed the "back door" as well as the front one to any appeals of class action standing prior to final judgment.

Class Actions in Florida

The new Florida class action rule, 65 patterned after the federal rule, 66 went into effect January 1, 1980. While the language varies in many respects, the basic requirements for bringing a class suit are similar. The Florida rule contains detailed pleading requirements not found in Federal Rule 23. 67 Additionally, the notice requirements in Florida's rule are more explicit and stringent than in its federal counterpart. 68

Under the federal rule, a judge initially determines whether the suit may proceed as a class action. If it may, the judge certifies the class. If not, the judge denies certification and the suit proceeds. Under the Florida rule, a judge has the same option but, additionally, the judge may strike the class allegations. 69 Two questions then arise: what is the legal significance attached to striking the class representation allegations? and what prompts striking?

Prior to the adoption of the new Florida rule, the Florida Supreme Court decided Harrell v. Hess Oil & Chem. Corp. 70 That case involved a complaint in the form of a class action. The trial court dismissed the entire complaint because it was improperly brought as a class action. The Florida Supreme Court held that where the complaint stated an individual claim which could withstand a motion to dismiss, it was im-

62. Id. at 536.
68. Id. at advisory committee note.
70. 287 So. 2d 291 (Fla. 1973).
proper to dismiss the complaint. "Rather, the trial court could have treated those allegations relating solely to a class action suit as having been stricken from the complaint by ordering dismissal of the complaint insofar as a class action was asserted." 71 Other courts have repeatedly held that misjoinder of parties is not a basis for dismissal. 72 'Since an order striking class allegations is not the equivalent of a dismissal against the individual representative, that representative should not be allowed to appeal the order prior to final judgment. 73 Under the Florida Supreme Court approach, the striking of class allegations is analogous to dismissal, thus arguably a final judgment as to the absent class members. 74 However, the rule provides that orders "[m]ay be conditional and may be altered or amended before entry of judgment on the merits of the action." 75 If this language is read to mean that a judge is free to change his mind during the course of the trial and reinstate the class allegations, the order is not final as to the class but interlocutory. As an interlocutory order, it can only be appealable if it falls within the scope of Florida Rule of Appellate Procedure 9.130 or if a district court grants a common-law writ of certiorari.

Class Standing Determinations as Final Judgments in Florida

In Florida, absent a contrary statute or rule of court, appeals will lie only from final judgments or decrees. 76 Class standing orders have been held not to be final judgments under Florida law. 77

Prior to the adoption of the new Florida class action rule, the First

71. Id. at 295.
72. Id. at 294. See also Equitable Life Assurance Soc'y v. Fuller, 275 So. 2d 568, 569 (Fla. 3d Dist. Ct. App. 1973), and Gordon Fin. Co. v. Belzaguy, 216 So. 2d 240, 245 (Fla. 3d Dist. Ct. App. 1968).
73. This does not take into account remedies such as mandamus, common law certiorari, or interlocutory appeal under jurisdiction over the person.
74. Harrell, 287 So. 2d at 295.
75. FLA. R. CIV. P. 1.220(2)(1).
76. Brannon v. Johnson, 83 So. 2d 779, 780 (Fla. 1955).
District Court of Appeal decided *Cordell v. World Insurance Co.* The court held the dismissal of a class action suit with prejudice a final order even though plaintiffs were entitled to file an amended complaint and pursue claims in their individual capacity. The order was final as to the proposed class even though it did not finally dispose of the case on the merits.

With the new provision allowing the judge to strike class allegations, question arises as to whether it is permissible to dismiss an action that fails to meet the prerequisites of a class but does state an individual cause of action. While there is no authority under the new rule, the courts are likely to strike the class allegations in accordance with the rule, rather than entirely dismiss the complaint. The only time dismissal would be appropriate would be when the plaintiff has stated no claim for himself in which case dismissal would be a final judgment and appeal should be granted as a matter of right.

**Appeal of Class Standing Determinations in Florida When Multiple Parties are Involved**

There is no corresponding rule in Florida to rule 54(b) of the Federal Rules of Civil Procedure. Accordingly, there is no rule that renders final a split judgment in a case involving multiple parties.

Moreover, Florida has a strong policy against piecemeal review. Therefore, appealability of an order dismissing less than all the parties will turn on the grounds of the dismissal.

The general rule in equity is that an order that dismisses one party (or which disposes of the claims of that party) is final and appealable as to the dismissed party. The modern approach to actions at law is that these too should be immediately appealable.

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79. *Id.* at 109.
80. *See supra* pp. 8-9.
84. *Evin R. Welch & Co.*, 138 So. 2d at 394. *See also* Schneider v. Manheimere,
In Conboy v. City of Naples, Conboy brought a class action suit in equity on behalf of himself and all other ad valorem taxpayers residing in the City of Naples. The action named the City of Naples, its Tax Assessor, the State Controller, and two land development concerns as the defendants. Conboy asserted that for the year of 1966 the lands owned by these development concerns were greatly underassessed. Therefore, claimed Conboy, all lands in the City of Naples did not bear their just burden of taxation which resulted in an increase of taxes to the class. The trial judge entered a directed verdict in favor of one of the land development concerns. An order enacted "final judgment" was recorded in favor of the land concern. Six months later the entire case was disposed of against the class. The issue was whether the initial directed verdict in favor of the first land development concern was an interlocutory order or whether the directed verdict was a final judgment requiring appellate review. The Second District Court of Appeal ruled that in a class action, dismissal of one of the defendants was final as to him and appeal must be taken when the action was dismissed against that defendant and not when the entire suit was decided.

Class Standing Appeals as Interlocutory Orders in Florida

Prior to the change in the interlocutory order appeal rule, decisions on whether a suit could proceed as a class action were the subject of appeal to the Florida district courts. These interlocutory orders were appealable under Florida Appellate Rule of Procedure 4.2, which provided: "Appeals may be prosecuted in accordance with this rule from interlocutory orders in civil actions which, from the subject matter or relief sought are such as formerly were cognizable in equity . . . ." Equity has long held that one or more persons may sue or defend on behalf of others with common interests when it is impractical to

170 So. 2d 75 (Fla. 3d Dist. Ct. App. 1964).
86. Id.
88. FLA. R. APP. P. 4.2.
bring all before the court.\textsuperscript{89} Since the replacement of rule 4.2 there is no longer immediate appellate review of interlocutory orders "formerly cognizable in equity."\textsuperscript{90} As a result, to be appealable as an interlocutory order, class determinations must fall within one of the categories of non-final orders from which immediate appeal will lie.

The present rule specifically limits review on non-final orders\textsuperscript{91} to include orders involving injunctive relief,\textsuperscript{92} orders which determine the issue of liability in favor of the claimant,\textsuperscript{93} and orders which determine jurisdiction over the person.\textsuperscript{94}

A. Injunctions

The Florida rule allowing interlocutory appeal concerning injunctions\textsuperscript{95} is almost identical to the federal statute.\textsuperscript{96} As pointed out in\textit{ Gardner v. Westinghouse Broadcasting Co.,}\textsuperscript{97} the considerations for a class action are completely different from the considerations for granting or denying injunctions.\textsuperscript{98} While the denial of class certification may affect the possible scope of an injunction, it will not have any effect on whether the petitioner is entitled to such an injunction. Yet, Florida courts are free to disregard the \textit{Gardner} decision and allow immediate appeal of class standing determinations which involve the request for an injunction. The Florida rule allows interlocutory appeal of orders involving injunctive relief. When read literally, however, the rule excludes orders of class standing. Yet, as was conceded by the United States Supreme Court, such orders may indirectly affect injunctive relief.\textsuperscript{99} Whether Florida courts decide to allow such interlocutory review of class standing orders remains to be seen. If circumstances arise where the class standing determination would affect the merits of the

\textsuperscript{89} 379 So. 2d 420, 421 (Fla. 5th Dist. Ct. App. 1980).
\textsuperscript{90} \textit{FLA. R. APP. P.} 4.2.
\textsuperscript{91} \textit{Id.} at 9.130(a)(3).
\textsuperscript{92} \textit{Id.} at 9.130(a)(3)(B).
\textsuperscript{93} \textit{Id.} at 9.130(a)(3)(C)(iv).
\textsuperscript{94} \textit{Id.} at 9.130(a)(3)(C)(i).
\textsuperscript{95} \textit{FLA. R. APP. P.} 9.130(a)(3)(B).
\textsuperscript{97} 437 U.S. 478 (1978).
\textsuperscript{98} \textit{Id.} at 480.
\textsuperscript{99} \textit{Id.}
petitioner’s own claim or pass on the legal sufficiency of any claims for injunctive relief, appellate review under the injunction section should be allowed.

B. Orders that Determine the Issue of Liability in Favor of the Claimant

Florida Rules of Appellate Procedure provide that a non-final order which determines "the issue of liability in favor of a party seeking affirmative relief" is immediately appealable.\(^{100}\) In *American Heritage Institutional Securities v. Price*,\(^{101}\) appellants filed an interlocutory appeal of the trial court’s order denying appellants motion to strike and motion for judgment on the pleadings. Both motions were directed as to whether the cause of action stated in the complaint could be prosecuted as a class action. Appellants argued jurisdiction under 9.130(a)(3)(C)(iv) of the Florida Rules of Appellate Procedure which states, "Review of non-final orders of lower tribunals is limited to those which . . . determine . . . the issue of liability in favor of a party seeking affirmative relief." The Fifth District Court of Appeal rejected this contention. It held that in determining class standing, the court is judging whether a cause can appropriately be brought as a class suit or whether there are sufficient allegations to sustain a class suit.\(^{102}\) Once this determination is made, the suit will then proceed toward a potential liability which has not been determined and may never be determined.\(^{103}\)

The reasoning for this determination is sound since the subject of liability is not relevant to a class determination. Class standing determinations only decide who is participating in the lawsuit, not who is liable.

C. Orders that Determine Jurisdiction Over the Person

Thus far, the only way recognized by a Florida appellate court to appeal a class standing determination as an interlocutory order has

\(^{101}\) 379 So. 2d 420 (Fla. 5th Dist. Ct. App. 1980).
\(^{102}\) Id. at 421.
\(^{103}\) Id.
been as a non-final order which determines jurisdiction over the person. In *Kohl v. Bay Colony Club Condominium, Inc.*,104 the trial court had entered certain pre-trial orders including the determination that a class action suit could be maintained. The petitioner filed a petition for certiorari to have this ruling reviewed and the Fourth District Court of Appeal allowed an appeal. The appellate court held that since a class action was binding on all members of the class, the court obtained personal jurisdiction over them. As a result, these were orders that determined jurisdiction over the person and fell within this section of immediately appealable interlocutory orders.

The idea of interlocutory appeal based on jurisdiction over the person was emphatically rejected by the Second District Court of Appeal in *National Lake Developments, Inc. v. Lake Tippecanoe Owners Assoc.*105 The court held that orders of class determination decide the makeup of the proper class, not whether the court has jurisdiction over the members of the class.106 Court policy reasons alone were held sufficient to reject the *Kohl* view since acceptance of its rationale could lead to interlocutory appeal in all class suits.107 This was something the Second District Court of Appeal did not believe the drafters of the appellate rules would have deemed proper under orders that determine jurisdiction over the person.108

The reason that immediate interlocutory appeal for jurisdiction over the person is allowed under the appellate rules is to eliminate useless labor.109 This reason should be focused upon when trying to determine if class standing orders should be immediately appealable as interlocutory orders determining jurisdiction over the person. It is apparent that if one accepts the premise that class standing orders do determine jurisdiction over the person then all such orders are or would be immediately appealable. To allow this would create labor for the district courts as clearly the party that had the adverse class ruling may take an immediate appeal regardless of its merits. Yet, to make the parties go through the time and expense of a complete trial only to

104. 385 So. 2d 1028 (Fla. 4th Dist. Ct. App. 1980).
106. *Id.* at 593.
107. *Id.*
108. *Id.*
have the initial class determination reversed at the appellate level would circumvent the purpose of the appellate rules.

While this is a reason for allowing class standing orders to be immediately appealable, the ramifications of doing so under jurisdiction over the person will lead to both useless labor and a form of piecemeal review. Although there is always the possibility of a judge making an erroneous initial determination, such determination is subject to amendment or alteration at anytime prior to final judgment on the merits.110 In cases of clear error there may be a possibility of a writ of mandamus or common law certiorari. If neither of those remedies work then there still is appeal after final judgment.

From the standpoint of useless labor, it becomes a choice between “floodgate” review for all class standing determinations or the isolated case where an erroneous decision is initially made and remains unchanged throughout the trial with no way to rectify it until final review. In that light, policy reasons dictate that the courts of Florida reject class standing determinations as determining jurisdiction over the person.

Jurisdiction over the person is the power to determine an action because the parties are lawfully before the court.111 When defining jurisdiction over the person, Florida courts have included such things as service of process or applicability of the long arm statute to non-residents.112 In *Atreco-Florida, Inc. v. Berliner*,113 the Fourth District Court of Appeal held jurisdiction over the person to be limited to these types of considerations.114 In so holding, the court refused to review an order which determined class status.115 However, in *Kohl*, the Fourth District retreated from this limited view and extended the definition of jurisdiction over the person for purposes of the appellate rule.116

The issue to be resolved is whether approval or denial of certification of a class is an order determining jurisdiction over the person. In a

110. FLA. R. CIV. P. 1.220.
111. *National Lake Dev., Inc.*, 395 So. 2d at 593.
113. 360 So. 2d 784 (Fla. 4th Dist. Ct. App. 1978).
114. *Id*.
115. *Id*.
116. 385 So. 2d at 1029.
class action suit, all members of the class will be bound by the court’s final judgment. In this respect, the court is asserting jurisdiction over all members of the class. But, the right to challenge personal jurisdiction has traditionally been reserved to the person over whom the court is asserting jurisdiction. The Florida class action rule provides methods which allow members of the class to exclude themselves from the court’s jurisdiction. These provisions of the rule protect the absent class members. Those class members who do not exclude themselves waive their objections to the court taking jurisdiction over them.

Mandamus as a Method of Reviewing Class Standing Determinations in Florida

Just as mandamus has been extremely limited at the federal level when dealing with class standing orders, it is equally limited in Florida. The Florida Constitution and the Florida Rules of Appellate Procedure empower the courts to issue writs of mandamus. For a writ of mandamus to be issued, the act commanded by the writ must be ministerial. This writ may be used to command an officer to exercise his discretion, but not to exercise it in a particular way.

While mandamus should not lie to review all class determinations, in certain instances mandamus review should be allowed. The discretion which mandamus does not control is the one the law has vested in the judge. When the judge abuses his discretion to a point that amounts to a failure to do the act as the law requires, mandamus is proper. For example, the Florida rule requires the court to submit an order stating the findings of fact and conclusions of law upon which the determination is made. Where such findings are totally inconsistent with the class status order, discretionary abuse is apparent, and manda-
mus should be issued.

Common Law Certiorari to Review Class Standing Orders

An existing method which allows for immediate review of an otherwise non-reviewable order is the common law writ of certiorari.\(^{125}\) Certiorari is a writ issued by a superior court to a lower tribunal exercising a judicial or quasi-judicial function.\(^{126}\) Whether certiorari is a workable structure to allow review of these orders will depend on how liberally it is granted.

The general rule is that certiorari will be issued only when a lower court order, if allowed to stand, may cause material injury to the petitioner throughout the proceedings and later appeal would be inadequate.\(^{127}\) There is at least an argument that the "death-knell" rationale should be used to grant review of some denials of class certifications. For example, where the plaintiff would not pursue his claims individually, denial of class suit participation may lead to material injury.

*Kohl* came to the Fourth District Court of Appeals by way of petition for writ of common law certiorari.\(^{128}\) In rejecting the petition the court said, "[i]t has not been demonstrated either that the trial court exceeded its jurisdiction or that the essential requirements of law and due process have been violated."\(^{129}\) Implicit in this statement is the fact that if a petitioner can demonstrate either of the above prerequisites, certiorari would be granted to review class orders.

Failure to observe the *essential requirements of law* has been interpreted to mean the commission of an error so fundamental in nature as to render the judgment void.\(^{130}\) Yet in *Everglades Protective Syndicate, Inc. v. Makinney*,\(^{131}\) the Fourth District Court of Appeal granted

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126. Simmons v. Owen, 87 Fla. 485, 100 So. 735 (1924).
129. *Id.*
131. 391 So. 2d 262 (Fla. 4th Dist. Ct. App. 1980).
certiorari and quashed a motion to compel discovery. Makinney was expelled from membership in The Everglades Club, a private social club. He filed a petition for a writ of mandamus in the Palm Beach Circuit Court seeking to compel the club to reinstate his membership. Makinney served the club with written interrogatories. The club answered some but refused to answer others on the grounds they were irrelevant and immaterial to any issue in the action. A motion to compel was granted by the trial court whereupon the club filed a petition for common-law certiorari.

The Fourth District Court of Appeal held that the interrogatories neither consisted of questions relevant to the subject matter involved in the litigation nor were they “reasonably calculated to lead to the discovery of admissible evidence.” This was sufficient to depart from the essential requirements of law. While answering irrelevant questions in interrogations is an inconvenience, the answers to the questions also have no bearing on the outcome of the suit. In this respect, it appears that a liberal interpretation of departing from the essential requirements of the law has been used. In a liberal setting it appears clear that there will arise cases where a sympathetic district court could grant a petition for certiorari and indeed change a class standing determination.

To obtain review of a class standing determination by common law certiorari, the petitioner must show that the judge’s decision was erroneous when compared to the class action rule. The wasting of judicial time and expense associated with a second trial has been held insufficient justification for issuance of the writ. Indeed, mere expediency has not formed a basis for review by certiorari.

In Schever v. Wille, plaintiff sought common law certiorari after the trial court granted defendant’s motion to strike plaintiff’s prayer for punitive damages but where the case was still pending on the issue of

132. *Id.* at 263.


135. *Id.*
actual damages. In dismissing his petition, the court said: "[I]t is certainly not impossible that such a trial would finally resolve this case. Plaintiff may not prevail in the case . . . or the parties may in some fashion settle their differences and all issues will then be removed from the court's consideration." 136 The identical rationale could be used in the class action setting. If class certification is granted to the plaintiffs, there is no reason to assume that the defendant will lose the suit or decide to settle the case rather than litigate. Additionally, if defendant does lose the case, appeal will include the determination of whether the class suit was proper. Unquestionably inconvenient to the defendant to wait, review is available to him eventually. The same is equally true for the denial of class certification to the plaintiff.

It should be noted that in the commentary to the appellate rules, the advisory committee stated that they did not intend to abolish the common law writ of certiorari. 137 Yet, they recognized that due to the heavy burden on the petitioner, it would be extremely rare that erroneous interlocutory orders could be corrected by resorting to common law certiorari. 138 Perhaps, class standing orders may find their way into that extremely rare category the advisory committee had in mind.

Conclusion

Class standing determinations are not presently appealable as a final judgment. As a matter of law, this judgment is sound. Prerequisites to maintaining class actions do not theoretically address the merits of a claim. These prerequisites are a procedural device and unless the complaint is actually dismissed, a judge is free to amend or alter his or her decision at any time prior to final judgment on the merits. 139 With the new rule allowing for striking of class allegations there will be very few cases where a complaint is actually dismissed. If dismissal is granted, immediate appeal should be allowed as a final judgment.

If the judge strikes the class allegations, this order is final as to the class. Yet, it is unlikely that immediate appeal will be allowed. Since this order would not dismiss the complaint as to the individual plaintiff,

136. Id. at 1166.
137. FLA. R. APP. P. 9.130 advisory committee note.
138. Id.
139. FLA. R. CIV. P. 1.220(d)(1).
the entire lawsuit would probably have to run its course before appeal will be allowed.

While discretionary interlocutory appeals may be heard at the federal level, Florida has no comparable rule or statute. To be heard as an interlocutory appeal, an order must fall into one of the specific categories laid down by the rule. Orders concerning injunctive relief ordinarily are not allowed as a vehicle for review of class standing orders. While such class standing orders may influence the scope of the injunction, the requirements for obtaining injunctive relief do not involve the same considerations as class standing determinations. Unless the merits of petitioner's own claim would be affected or the order passes on the legal sufficiency of a claim for injunctive relief, this coat-tail review should not be allowed.

Appeal by means of non-final orders which determine the issue of liability in favor of the claimant has equally been unacceptable for review of class standing determinations. Class determinations will show who is participating in the lawsuit, not who, if anyone, is liable. In isolated situations where a class standing determination would determine liability, such appeals will obviously be allowed.

Jurisdiction over the person as a basis for immediate appeal seems unsound yet if the Florida Supreme Court wishes immediate appealability of such interlocutory determinations, this may be the only way to accomplish the task. Under that rationale all class standing determinations would be reviewable. This was a concern which led the United States Supreme Court to reject the "death-knell" doctrine. Such indiscriminate review would circumvent judicial economy and lead to piece-meal review. This, Florida courts have long been opposed to, thus it is likely the Florida Supreme Court will reject the approach.

A liberal view of the writ of common law certiorari may allow appeals of class denials under the death-knell rationale. Yet it seems probable that this liberal view will not be accepted and this writ will be unavailable in all but the most exceptional cases.

As a final resort, mandamus is available in cases where there has been a clear showing of usurpation of judicial discretion. This remedy is available for improper class certification as well as improper denial of certification.

Orders which determine whether a suit may proceed as a class action should not be immediately appealable in all cases. At the present time the Florida courts are not in a position to use their discretion. Orders of this nature will either have to be immediately appealable or none may be appealed. What would seem vital to effective class action suits in Florida is some change in the appellate policy. A revision of the Rules of Appellate Procedure incorporating Federal Statute 1292(b) is needed. Since this is a form of procedure, the Florida Supreme Court should be able to make this necessary adoption.

Such an addition to rule 9.130 could be added as (a)(3)(D) and might read . . .

(a)(3) “Review of non-final orders of lower tribunals is limited to those which.”

(D) involve a controlling question of law which there is substantial ground for difference of opinions, and an immediate appeal may materially advance the ultimate termination of the litigation. These appeals will be heard only upon the certification of a Circuit Court judge and acceptance by the District Court.

This addition would allow the Florida courts the right to hear immediate class standing appeals in cases where immediate review would effectuate Florida’s litigation policies.

Janice Seamon

142. This suggestion is patterned after 28 U.S.C. § 1292(b) (1970).
Introduction

This article consists of a six-part study into the attorney-client privilege as it applies to the modern corporate client. Parts One and Two focus on the history, purpose, effect and traditional formulations of the attorney-client privilege. Sections Three and Four analyze precedent applying the privilege to the corporate client at the national level, with a separate look into Florida state courts and former Fifth Circuit Court of Appeals applications prior to the inception of the new Eleventh Circuit. The succeeding sections involve a critical analysis of the United States Supreme Court’s decision in *Upjohn v. United States*, focusing primarily on the rationale supporting the Court’s decision and the effect *Upjohn* will have on the corporate client.

The Attorney-Client Privilege

Throughout history, man’s insatiable quest for truth has been conceptualized in two distinct procedural forums: the adversarial process; and the inquisitorial process. Excepting Frederick the Great of Prussia and Lenin, few political leaders have adopted the inquisition, preferring instead the adversary system, pitting man against man. Government officials, in the adversary system, generally have been used only as referees, maintaining a separateness from the adversary’s participation in the process.

Anglo-American jurisprudence reflects this philosophy in the strictest sense, demanding injury-in-fact between adversaries and full disclosure of all pertinent facts. The concept of a privilege against dis-

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closure apparently conflicts with this philosophy. Since the sixteenth century, however, there has existed the oldest of testimonial privileges, the attorney-client privilege, which cloaks certain communications between client and attorney with immunity from disclosure.⁴

For a privilege against disclosure to be recognized at law the following four conditions must exist:

1) The communications must originate in a confidence that they will not be disclosed.

2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3) The relation must be one which in the opinion of the community ought to be sedulously fostered. [and]

4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation⁵.

The genesis of the original attorney-client privilege embodied the purpose of protecting the honor of the attorney and his oath of secrecy to his client by not forcing him to divulge his confidential communications.⁶ By the end of the eighteenth century this underlying justification started eroding from within, however, as professional jealousies developed from the hodge-podge labeling of privileges as exclusionary rules.⁷ Consequently, the courts were convinced to disregard application of the attorney-client privilege to all of the lawyer's relationships.⁸

The attorney-client privilege is not an exclusionary rule and should

(1980); the goal secured by this philosophy is the “free and unobstructed search for the truth.” This goal must be continually balanced with “the right and absolute necessity for confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby,” before the scope of the privilege can be ascertained. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963), rev'g 207 F. Supp. 771 (N.D. Ill. 1962).

4. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961).
5. Id. § 2285, at 527.
6. Id. § 2290, at 543.
8. Id.
not be considered as such. It may, "by chance of litigation become, [an] exclusionary rule; but this is incidental and secondary. Primarily . . . it is a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping."

Recent critics of the attorney-client privilege, however, are still quick to label it as an exclusionary rule of evidence in an attempt to discredit its fundamental importance to the judicial system. Such spurious generalization, however, undermines the modern purpose of the attorney-client privilege. This purpose encourages a client's "full disclosure to his attorney by removing the . . . fear of having such confidential communication divulged under judicial compulsion." Whereas the original privilege operated as the attorney's protectionist device to insure the honor of the profession, the new theory focuses on the client's fears. Thus the modern privilege belongs to the client, not the attorney. The client may invoke the privilege to protect his confidential disclosures regardless of his relationship to the particular cause or the attorney's desire to divulge the communications.

While the privilege is "designed to secure the client's confidence in the secrecy of his communications," the purpose behind such a privilege is not thwarted by allowing for its voluntary relinquishment. Therefore the client may waive the legal protections afforded by the privilege at any juncture of the lawyer-client relationship. It is signifi-

9. Id. at 428.
10. Id.
11. Id.
12. Milstein, supra note 3, at A-1. "The lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980). The Supreme Court has recognized the purpose of the privilege "to encourage clients to make full disclosure to their attorneys." Fisher v. United States, 425 U.S. 391, 403 (1976).
14. J. Wigmore, supra note 4, § 2321, at 629. This rule is not absolute, however. See the FLORIDA EVIDENCE CODE, § 90.502(2)(e) (1979) of the Florida Statutes, which states in part that an attorney may invoke the privilege on behalf of his client.
15. J. Wigmore, supra note 4, § 2327, at 634.
16. Id.
cant to note that this right to waive "belongs solely to the client and not to the attorney."17

The conscientious advocate must keep in mind that the attorney-client privilege is not a rule excluding evidence from admission into a court record; rather it is a substantive right granting the client immunity from divulging particular confidences communicated to his attorney. This fundamental difference emphasizes that the nucleus of the privilege is the client's substantive state rights: a concept that must be understood before a logical prediction can be made concerning the application and scope of the privilege. While making decisions concerning the availability of the attorney-client privilege it is mandatory for the advocate to balance the client's right to protect his confidential communications with the procedural requirement of full disclosure.18 The adjudicative forum must be considered in this decision-making process. For example, rule 501 of the Federal Rules of Evidence requires that a federal court decide most privilege questions in accordance with "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."19 Conversely, in a civil action where state law controls the rule of decision concerning an element of a claim or defense, questions regarding privilege, "shall be determined in accordance with state law."20

General Application of the Attorney-Client Privilege

Dean Wigmore's formulation of the attorney-client privilege has gained widespread recognition.21 According to Wigmore, the following elements are prerequisites for application of the attorney-client privilege:

17. Id. See Hunt v. Blackburn, 128 U.S. 464 (1888), for an extensive discussion on the process of voluntary waiver of the attorney-client privilege by the client.
18. Radiant Burners, 320 F.2d at 324.
19. FED. R. EVID. 501. Although the federal courts will apply federal common law, they cannot agree upon the proper common-law privilege to apply. See Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).
20. FED. R. EVID. 501. See also Milstein, supra note 3, at A-2. Courts will apply federal privilege law "in civil actions involving application of federal law" (e.g. antitrust, securities, and patent suits). Id.
21. J. WIGMORE, supra note 4, § 2292, at 554.
1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client, 6) are at his instance permanently protected 7) from disclosure by himself or by the legal adviser, 8) except the protection [may] be waived.22

Another general formulation of the privilege receiving frequent citation appeared in Judge Wyzanski’s opinion from United States v. United Shoe Machinery Corp.23 In a civil anti-trust action where the defendant corporation objected to the introduction of nearly 800 exhibits on the grounds that they fell within the attorney-client privilege, the court held a matter privileged when:

(1) The asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.24

“The beginning point [in understanding the applicability of the attorney-client privilege] is the fundamental principle that the public has the right to every man’s evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional.”25 An exemption will become justified “if — and only if — policy requires it be recognized when measured against the fundamental responsibility of every person to give testimony.”26

22. Id.
The Privilege Applied to the Corporate Client

Although the Supreme Court recognized the attorney-client privilege in the 1880's, it was not judged applicable (arguably) to the corporate client until 1915. A landmark case from the Seventh Circuit Court of Appeals, Radiant Burners, Inc. v. American Gas Association, reflects the modern view toward the availability of the privilege for the corporate client. Radiant Burners was a private civil action alleging violations of the Sherman Act by American Gas Association. The court held that "based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations. . . ." 

As a keystone to predicting future application of the attorney-client privilege to the corporate client, it is important to understand the court's rationale for its holding in Radiant Burners. In the court's view, the ultimate objective of the privilege is to "facilitate the administration of justice by encouraging full disclosure by the client to its attorney." Although Radiant Burners reflects the typical balance of federal and state interests, as a federal nondiversity action the federal common law privilege was utilized instead of state law. The court in Radiant Burners declined an invitation to decide a blanket privilege for corporations, holding that the applicable privilege must be decided on a case-by-case basis by "balancing the competing goals of the free and unobstructed search for the truth with the right and absolute necessity for confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby. . . ."

Availability of the attorney-client privilege for the corporate client

30. Id. at 323.
31. Id. at 322.
32. It should be noted here, however, that there was no state law, codified or judicial, addressing the problem of applying the attorney-client privilege to corporations. Id. at 319. In other nondiversity federal actions the courts have used state law when it was available. Garner, 430 F.2d at 1100.
33. 320 F.2d at 324.
is made more complex due to choice of law problems. The former Fifth Circuit recognized this problem in *Garner v. Wolfinbarger*, where it held that "[t]he privilege does not arise from the position of the corporation as a party but its status as a client." In *Garner*, a class action suit was brought by stockholders against the corporation for alleged violations of federal and state securities laws. The court held "that the choice of law cannot be settled by reference to any simple talisman, but can be arrived at only after a consideration of state and federal interests that are inseparable from the factors bearing on the availability of the privilege itself." Those factors bearing on the availability of the privilege have become the basis for discord among the federal and state judiciaries. As a result various combinations of interests have been advocated and many have been adopted. Although the Supreme Court of the United States recognizes a need, it refuses to standardize the attorney-corporate client privilege, emphasizing that those cases can only be decided on a "case-by-case basis."

While, as stated, availability of the attorney-client privilege for the corporate client has been judicially accepted, there is much disagreement concerning the proper scope of that privilege. Recognizing that a "corporation can communicate only through its human agents, the . . . question arises: which individuals may 'be' the corporation for purposes of the attorney-client privilege?" Other courts have phrased this dilemma as "how far down the corporate table of organization [does] the privilege extend[?]"

If a corporation is deemed to communicate only through its human agents, then only those agents "deemed to personify the corporation may invoke the corporate privilege." Who, then, personifies the corpo-

34. See 2 B. BARRON & G. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 967, at 241-44 (Wright ed. 1961).
35. See generally 430 F.2d 1093 (5th Cir. 1970).
36. Id. at 1097.
37. Id.
40. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 613 (8th Cir. 1977) (en banc) (1978).
ration to the extent required to invoke the privilege? The courts are divided on this issue. Although two primary tests are used to determine the scope of the privilege, in practice they actually form only the boundaries within which the courts operate. The test used by the majority of jurisdictions, and the most restrictive of the two, is the control-group test. This test, originally authored by Judge Kirpatrick in City of Philadelphia v. Westinghouse Electric Co., held that an employee sufficiently personified the corporation for purposes of the attorney-client privilege:

if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority. . . .

In every other case “the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.”

Although the control-group test is the majority view, it is rapidly losing support, being forced to give way to less restrictive and more realistic views. One of the most striking criticisms of the control-group test is that it does not provide for privileged communications between middle-level or lower-level management and counsel. The Eighth Circuit noted this flaw in Diversified Industries, Inc. v. Meredith, holding that: “In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives.” A strict reading of

42. Id.
44. Id. at 485.
45. Id.
47. 572 F.2d 596.
48. Id. at 608-09. The ability to “glean” this information from those who are in
the control-group test, would require that such communications not be privileged.

The Supreme Court in *Upjohn v. United States* recently decided not to use the control-group test, holding that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." The Court further explained that there may be instances when the attorney's advice will be more significant to "noncontrol group members than to those who officially sanction the advice, [indicating that] . . . the control-group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." Keeping in mind that corporations, quite unlike individuals, "constantly go to lawyers to find out how to obey the law," the application of the control-group test seems to encompass an unrealistic view of the business community in general. Nevertheless, this test continues to enjoy widespread popularity in its application.

Possession of it poses a problem for the attorney as well as the client. The privilege exists not only to protect "the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390. See also the Model Code of Professional Responsibility, EC 4-1 (1980), which states: "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system." The incentive to perform this investigation might be lost were the attorney to suspect that his inquiry had uncovered confidential communications that could become the subject of discovery.

50. *Id.* at 392.
51. *Id.*
The subject-matter test is another approach receiving widespread jurisdictional support. This test, holding the content of the communication to be determinative of its status with regard to a privilege rather than the corporate rank of the communicator, found its origin in the Seventh Circuit in Harper & Row Publishers, Inc. v. Decker. In a complex civil anti-trust action alleging horizontal price fixing by twenty-three defendants, the court held certain defense memoranda privileged communications when:

an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation’s attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Another criticism of the control-group test attacks the very basis of its foundation, Judge Kirpatrick’s reasoning in City of Philadelphia v. Westinghouse Elec. Co., 210 F. Supp. 483 (E.D. Pa. 1962). Attorneys writing as amici curiae for petitioners in Upjohn condemned the control-group test and Judge Kirpatrick’s interpretation of Hickman v. Taylor, 329 U.S. 495 (1947). Brief Amici Curiae On Behalf Of The American College Of Trial Lawyers And 33 Law Firms In Support Of Petitioners; Submitted To The Supreme Court Of The United States, No. 79-886, For The Case Upjohn v. United States, 449 U.S. 383 (1981), at 19 n.16. [Hereinafter cited as Brief Amici Curiae]. The content of the brief argues that Judge Kirpatrick’s decision in City of Philadelphia reflected a misguided reliance on the United States Supreme Court’s decision in Hickman. Their position stresses that Kirpatrick found the Hickman decision to be dispositive as to the scope of the attorney-corporate client privilege by holding that when a corporate executive “communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation . . . the employee is merely a witness . . .,” and as such his statements to the lawyer are not privileged. City of Philadelphia, 210 F. Supp. at 485. The Court in Hickman, however, specifically refused “to delineate the content and scope of [the attorney-client] . . . privilege as recognized in the Federal Courts.” Hickman, 329 U.S. at 508. Any reliance upon that decision for a disposition of the scope of the attorney-corporate client privilege would be unjustified. Brief Amici Curiae at 19 n.16.

54. 423 F.2d 487 (7th Cir. 1970), aff’d per curiam by an equally divided court, 400 U.S. 348 (1971).

55. Id. at 491-92 (emphasis added).
Although the subject-matter test is considered to be more reflective of the realities of modern corporate life, its broader blanketing of communications has been limited by at least one federal circuit. The Eighth Circuit in Diversified Industries, Inc. held the subject-matter test appropriate only if:

1. the communication was made for the purpose of securing legal advice;
2. the employee making the communication did so at the direction of his corporate superior;
3. the superior made the request so that the corporation could secure legal advice;
4. the subject matter of the communication is within the scope of the employee's corporate duties; and
5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

A common criticism of the subject-matter test is its apparent conflict with the limitations imposed on the work product doctrine by the United States Supreme Court in Hickman v. Taylor. The Seventh Circuit (in Harper & Row), ingeniously averted running afoul with the Hickman limitations, explaining that the privilege does not cover "the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses. . . ."

56. 572 F.2d at 609.
57. 329 U.S. 495 (1947). The Court in Hickman recognizes that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Id. at 507. (Statements of witnesses to a tugboat accident, though the product of an attorney, prepared while acting for his client in anticipation of litigation, were subject to discovery under Federal Rule of Civil Procedure 34 only upon a showing that denial of such production would unduly prejudice the preparation of the adversary's case or cause him any hardship or injustice).

The Work Product Doctrine established in Hickman, now codified in Fed. R. Civ. P. 26(b)(3), must not be confused with the attorney-client privilege. While the privilege belongs to the client, protecting his confidential communications, the work product doctrine belongs to the attorney as a means of protecting the fruits of his labor. An attorney may be forced to disclose his work product only upon a showing of good cause by his adversary. Id. See Note, The Attorney-Client Privilege, The Self-Evaluative Report Privilege, And Diversified Industries, Inc. v. Meredith, 40 OHIO ST. L.J. 699, 701 (1979).

58. Harper & Row, 423 F.2d at 491. The subject-matter test was criticized by the Sixth Circuit in Upjohn as enabling "the corporation's management-via agents-to 'communicate' to counsel the details of transactions about which management is only
Many courts have adopted tests of their own, which are combinations of the control-group and subject-matter tests, with characteristics far less restrictive than the former. For example some federal district judges in the District of Columbia have adopted their own test, fashioned after the control-group and subject-matter tests. First authored by Judge Richey in In re Ampicillin Antitrust Litigation, the following requirements must be met before the employee communications can be claimed within the attorney-client privilege:

1) The particular employee must have made a communication of information which was reasonably believed to be necessary to the decision-making process concerning a problem on which legal advice was sought;
2) The communication must have been made for the purpose of securing legal advice;
3) The subject matter of the communication must have been related to the performance by the employee of the duties of his employment; and
4) The communication must have been a confidential one.

Another well known analysis, coined the all-employees test, was authored by Judge Wyzanski in United States v. United Shoe Mach. Corp. The court in United Shoe held: “the attorney-client privilege protects communications of any corporate employee to the corporation's attorneys where those communications otherwise meet the prerequisites for application of the privilege.” This test is the least re-

dimly aware and to have these communications protected by the attorney-client privilege.” 600 F.2d at 1227. This encouraged “senior managers purposely to ignore important information they have good business reasons to know and use.” Id. This supposedly impedes the liberal exercise of discovery which the modern procedural rules seek to foster. This argument fails to recognize, however, the “full panoply of discovery devices made available by the Federal Rules of Civil Procedure” even in jurisdictions applying the subject-matter test. Brief Amici Curiae at 19 n.16. E.g., Interrogatories submitted to an adversary under rule 33 require a response containing the collective knowledge of agents and employees; rule 34 provides for production of corporate documents; and rule 30 enables an adversary to depose employees. Id.

60. Id. at 385.
strictive of all and has been criticized as being in direct conflict with Hickman. Despite these criticisms, however, the all-employees test has found favor in other jurisdictions as well.

Former Fifth Circuit and Florida State Court Applications of the Attorney-Corporate Client Privilege

The general common law rule that an attorney cannot be forced to disclose any confidential communications made to him by a client without his client’s consent, has long been recognized in Florida. “The rule is founded on the necessity, in the interest and administration of justice, that persons seeking legal aid and counsel should be free to communicate with their confidential adviser about the subject matter of their problem without fear of disclosure.”

The attorney-client privilege has been codified in the Florida Evidence Code providing the client with a privilege of refusal to disclose those communications made to his attorney when such were intended to be confidential. The Fourth District Court of Appeal in Florida has also adopted the Radiant Burners application of the attorney-client privilege to the corporate client, but neither the Florida state courts, nor the federal judiciaries within the former Fifth and Eleventh Cir-

63. See supra note 57.
64. See Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 795 (D. Del. 1954), wherein the court seems to have adopted the all-employees test from United Shoe. See also United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978); In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975).
66. 24 FLA. JUR. 2d Evidence And Witnesses § 532, at 156, 157 (1981) (citing 81 AM. JUR. 2d Witnesses § 172 (1976)).
67. FLA. STAT. § 90.502(1)(a)-(c), (2) (1979) Florida recognizes that the privilege is not absolute and may be outweighed “by public interest in the administration of justice in certain circumstances.” Sepler v. State, 191 So. 2d 588, 590 (Fla. 3d Dist. Ct. App. 1966) (citations omitted).
68. Burnup & Sims, Inc. v. Pledger, 352 So. 2d 85, 88 (Fla. 4th Dist. Ct. App. 1977). Although this point was included in Judge Downey’s dissenting opinion, it becomes clear from a careful reading that the object of the dissent was not related to the application of the attorney-client privilege to the corporation. Judge Downey was merely stating that which he knew to be the law in Florida with regard to this issue.
circuits have explicitly adopted any particular test with respect to the scope of this privilege. In fact the Fifth Circuit specifically declined to choose between the control-group and subject-matter tests.\textsuperscript{69} A careful analysis of the precedent on this subject, however, establishes that both the former Fifth Circuit and the Florida state courts have chosen to mirror the application set forth in \textit{United States v. United Shoe Mach. Corp}.\textsuperscript{70} On more than one occasion the Fifth Circuit specifically adopted the formulation of the general attorney-client privilege from \textit{United Shoe}.\textsuperscript{71} The Fifth Circuit also recognized the importance of considering state court decisions when deciding the availability and scope of the attorney-client privilege, especially in light of the vague guidance provided by Federal Rule of Evidence 501.\textsuperscript{72}

Although Florida state court decisions do not reveal much “blanket-privilege law” concerning this issue, they do show some interesting corollaries to a less restrictive trend than that evidenced through an application of the control-group test. For example, Florida courts have consistently recognized the \textit{Hickman} work product limitations on witness' testimony.\textsuperscript{73} While inevitable conflict with \textit{Hickman} remains the most formidable criticism of the subject-matter and all-employees tests,\textsuperscript{74} Florida follows \textit{Hickman} guidelines, sometimes forcing the discovery of an attorney's work product.\textsuperscript{75}

Florida courts have also deemed the extent of the attorney-client privilege to be a matter of state law, indicating that they were not “bound to follow the [United States] Supreme Court's holding in this

\textsuperscript{69} \textit{See In re Thompson}, 624 F.2d 17, 19 (5th Cir. 1980). The Fifth Circuit's decision to pass on this issue was due to their expectation that the Supreme Court would resolve this matter once and for all in the \textit{Upjohn} decision that was then pending before that court. \textit{Id}. The irony here is that the Supreme Court also refused to resolve this issue definitively. \textit{See infra} text accompanying note 82.

\textsuperscript{70} 89 F. Supp. 357 (D. Mass. 1950).

\textsuperscript{71} \textit{See In re Grand Jury Proceedings}, 517 F. 2d 666, 670 (5th Cir. 1975). See also \textit{United States v. Kelly}, 569 F.2d 928, 938 (5th Cir. 1978).

\textsuperscript{72} \textit{In re Grand Jury Proceedings}, 517 F.2d at 670.


\textsuperscript{74} Rucker v. Wabash R.R., 418 F.2d 146, 154 (7th Cir. 1969).

\textsuperscript{75} \textit{Dupree}, 86 So. 2d 426; \textit{Nationwide Ins. Co., Pinellas County}, 276 So. 2d 547.
This adamant stance emphasizes the client's substantive state rights when balanced with the federal philosophy of full disclosure. With the statutorily guaranteed right to privileged communication receiving increased emphasis in Florida courts, the federal philosophy toward complete disclosure receives less consideration. The genesis of the subject-matter and all-employees tests, and the decisions in Harper & Row and United Shoe respectively, indicate that a need to protect the client's substantive rights was perceived as giving rise to the attorney-client privilege. Arguably this perception by Florida courts represents an intent to apply the less restrictive test when determining the scope of the attorney-client privilege.

The Upjohn Decision

In Upjohn v. United States, the Internal Revenue Service demanded production of questionnaires compiled by Upjohn counsel during an in-house investigation of questionable corporate payments to foreign government officials. The Sixth Circuit Court of Appeals applied the control-group test, ordering discovery of the documents, but the United States Supreme Court subsequently granted certiorari "to address important questions concerning the scope of the attorney-client privilege in the corporate context. . . ." The circuit court decision was reversed as the Supreme Court recognized their "task as one of choosing between two 'tests' which have gained adherents in the courts of appeals." Attorneys and clients alike awaited a decision that would finally standardize the applicability of the oldest of testimonial privileges to the corporate client. Such a decision was not forthcoming, however, as the Court, in practically the same breath that it had recognized

77. See FLA. STAT. § 90.502(1)(b) (1976), "Providing that a 'client' is any person or organization consulting a lawyer to obtain legal services or receiving them from a lawyer." 24 FLA. JUR. 2d Evidence And Witnesses § 533, at 158 (1981). This rather liberal definition of a client for purposes of the privilege seems to support this proposition.
79. Id.
80. Id. at 386.
81. Id.
its task, held not “to lay down a broad rule or series of rules to govern all conceivable future questions in this area. . . .”

Although at a glance this decision seems to carry limited potential for future application, a careful reading will reveal that the court not only fashioned a standard set of guidelines, useful during application of the privilege, but also strengthened the weakening basis of the modern attorney-client privilege. They held privileged those communications concerning “matters within the scope of the employees’ corporate duties, . . . [where] the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.” The Supreme Court in Upjohn recognized that the communications were: [1] made by Upjohn employees, [2] to counsel for Upjohn acting as such, [3] at the direction of corporate superiors, [4] in order to secure legal advice from counsel [5] within their scope of employment with the intent to be confidential.

The Court specifically rejected the use of the control-group test stating that to hold otherwise “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.” The Supreme Court clearly recognized the realities of corporate operation and management, saying that “[a]fter the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it.”

The Upjohn decision also strengthens the attorney-client privilege by recognizing the underlying purpose behind its application. That purpose is “to encourage full and frank communication between attorneys and their clients. . . .” The Court’s understanding of the purpose of

82. Id.
83. The Supreme Court specifically limited its review to a case-by-case analysis of the scope of the privilege to be applied. Id. at 396.
84. Id. at 394.
85. 449 U.S. at 394. There is striking similarity between this language and that used by the Eighth Circuit in Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc) (1978). See supra text accompanying note 56.
86. Upjohn, 449 U.S. at 392.
87. Id. (citations omitted).
88. Id. at 389.
the privilege focuses on the fears of the client, providing for a scope
determination only after a balancing of the federal philosophy of com-
plete discovery with the need to protect the client's rights. The Su-
preme Court specifically refused to decide a standard proposition of law
on this matter,\textsuperscript{89} emphasizing that "to draft a set of rules which should
govern challenges to investigatory subpoenas . . . would violate the
spirit of Federal Rule of Evidence 501."\textsuperscript{90}

Although a "case-by-case" analysis results in divergent application
of the attorney-corporate client privilege, it also guarantees its contin-
ued existence by enabling the courts to take into consideration the un-
derlying purpose of the privilege; the protection of the client's substan-
tive rights.\textsuperscript{91}

Conclusion

The \textit{Upjohn} decision, while narrowly drafted, exhibits far reaching
guidelines. Although the Court restricted application of the \textit{subject-
matter test} to the facts in \textit{Upjohn}, the basis of their decision, recogniz-
ing the principles underlying the attorney-corporate client privilege,
strengthened the precedential value of that opinion. The Court neither
expressly condemned the \textit{control-group test} nor sanctioned any other as
a matter of law; rather their reasoning reflects particular emphasis on
the need for any forum deciding privilege questions to pay particular
consideration to balancing the federal philosophy of full disclosure with
the substantive rights of the client. The product of this balance is then
to be filtered upon application through the facts of the case.\textsuperscript{92} This two-
part analysis provides first for a determination of the availability of the
privilege as a matter of law, and secondly an evaluation of its applica-
bility to the facts at issue.

By creating this two-step process, the Court has undercut the
strength of the \textit{control-group test} as a matter of law. While considering
the availability of the attorney-corporate client privilege the Court
seems to be advocating the advantages of the \textit{subject-matter test}, much
as an adversary would, to the ultimate demise of the \textit{control-group test}.

\textsuperscript{89} \textit{Id.} at 396.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{See supra} text accompanying note 18.
\textsuperscript{92} \textit{Upjohn}, 449 U.S. at 396.
Not only has the *control-group test* become less available as a matter of law, it has also become less applicable as a matter of fact. 93

While the Supreme Court refused to decide a blanket privilege applicable to all jurisdictions, 94 its adamant stance, and argumentative style seems to have sounded the death knell for the *control-group test*. 95

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93. *See In re Coordinated Pre-Trial Proceedings*, 658 F.2d 1355 (9th Cir. 1981). The Supreme Court's holding in *Upjohn* was followed as precedent with respect to the availability and applicability of the attorney-corporate client privilege. Regarding the issue of the privileged nature of corporate employee's orientation sessions, the Ninth Circuit reversed the district court's decision ordering discovery, citing *Upjohn* for the authority that the *subject-matter test* privileged those communications. The Ninth Circuit even expanded the holding in *Upjohn*, holding that "although *Upjohn* was specifically limited to current employees . . ., the same rationale applies to the ex-employees [as well]." 658 F.2d at 1361, n.7. If the *Upjohn* decision were actually to be limited to the facts in that case alone, then the Ninth Circuit's reliance upon that decision would have been unwarranted. This author is of the opinion that the realistic effect of the *Upjohn* decision will be to severely limit the application of the *control-group test* throughout the federal judiciaries. *See also*, Leer v. Chicago, Milwaukee St. Paul & Pacific Ry., 308 N.W.2d 305 (Minn. 1981). The dissent in *Leer* found the unanimity of the Court's decision in *Upjohn* to be "highly persuasive," with regard to the applicability of the attorney-client privilege to protect depositions taken from switching crew employees for a railroad company. *Id.* at 310.


95. In the interest of complete fairness; for an indication that the *control-group test* still thrives, see *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 50 Ill. L.W. 2469 (Ill. Feb. 16, 1982). The Supreme Court of Illinois applied the *control-group test*, clearly recognizing that although the United States Supreme Court in *Upjohn* found that test inadequate, the *Upjohn* decision was limited to its own facts. The Illinois court found that a broadening of the scope of the privilege beyond the control-group would be "incompatible with [their] . . . state's broad discovery policies looking to the ultimate ascertainment of the truth. . . ." *Id.* at 2470.
Incarceration as a Condition of Probation: New Limitations

In the past, Florida judges have attempted to circumvent a parole policy, which they considered to be ineffective. They withheld imposition of sentence upon a defendant found guilty of the crime for which he was charged, and imposed an order of probation with the condition that the defendant serve a lengthy term in the county jail or state penitentiary. Because the defendant was not incarcerated pursuant to a sentence, but rather as a condition of probation, he was technically ineligible for parole consideration even after he had served the statutory period of confinement. Abuse of this technicality effectively granted the trial judge the power to incarcerate the defendant for a full term rather than relinquishing the discretion to the Parole Board to grant the defendant an early release.

The authority to impose incarceration as a condition of probation is established by Florida Statutes section 948.01(4).1 The interpretation and application of this section has continually been the source of debate and controversy. It has, however, been consistently construed to permit trial courts to order incarceration followed by probation, or to withhold adjudication of the defendant’s guilt and impose probation with the condition that he serve some portion thereof incarcerated.2 The abuse of the statute arose from its failure to prescribe the reasonable lengths of incarceration which could be imposed as a condition of probation.

In its recent decision, Villery v. Florida Parole & Probation Com-

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1. **Fla. Stat.** § 948.01(4) (1981).
2. **Fla. Stat.** § 948.01(4) (1981) provides:
   (4) Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.
mission, the Florida Supreme Court attempted to quell much of the controversy by setting a maximum of less than one year for which incarceration may be imposed as a condition of probation. Furthermore, the court established a more definite framework for application of the statute than existed in the past, and articulated concrete guidelines for correcting prior decisions which are inconsistent with Villery's holding. This comment will explore the past confusion, analyze the Villery decision and review subsequent application of the statute under Villery's direction.

Probation and the Validity of Imposing Incarceration as a Condition of Probation

In discerning whether the imposition of incarceration as a condition of probation is proper and whether a probationer who is incarcerated pursuant to such an order is eligible to be considered for parole, Florida's Supreme Court first considered the rationale and authority for granting probation and imposing incarceration as a condition. Florida Statutes section 948.01(1) and (3), grants the trial court the discretion to withhold adjudication of guilt, or adjudge the defendant guilty but withhold the imposition of sentence, and place the defendant on probation with the hope that he may return to a useful life. This is generally done if the court determines that the defendant is not likely to be involved in further criminal activity and the interests of society and justice do not appear to be jeopardized. Moreover, the statute al-

3. 396 So. 2d 1107 (Fla. 1980).
4. FLA. STAT. § 948.01(1), (3) (1981) provides:
   (1) Any court of the state having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty by the verdict of a jury or has entered a plea of guilty or a plea of nolo contendere or has been found guilty by the court trying the case without a jury, except for an offense punishable by death, may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of probation of such defendant.
   (3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and with-
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allows the court to impose probation, with or without adjudication of guilt, to avoid inflicting upon the defendant the stigma of a criminal conviction and thus prevent the loss of the defendant's civil rights by virtue of the criminal conviction where such a loss may not be wholly justified.

In granting probation, however, the trial judge may feel that a sample of prison life would be extremely instructive as part of the rehabilitation process. In this regard, the Second District Court of Appeal recognized “that salutary results may be obtained by first giving one who is to be placed on probation a ‘taste of prison’ in order to graphically demonstrate what is likely to happen to him should he violate the terms of that probation.” The trial judge’s authority to impose such incarceration as a condition of probation, often referred to as the split sentence alternative, stems from Florida Statutes section 948.01(4).

During the life of section 948.01(4), however, this grant of authority has not always been well defined. Prior to July 1, 1974, the trial judge had specific authority only to impose incarceration in the county jail followed by a period of probation. Therefore, the split sentence alternative could be utilized only in the case of misdemeanor offenses. However, the Florida Legislature amended the statute effective July 1, 1974, by expanding the trial court’s authority to grant the split sentence alternative in cases involving misdemeanors and felonies, presumably encompassing orders imposing prison sentences, as well as terms in the county jail.

hold the adjudication of guilt and in either case stay and withhold the imposition of sentence upon such defendant, and shall place him upon probation under the supervision and control of the [parole and probation] commission for the duration of such probation.

8. FLA. STAT. § 948.01(4) (1971) originally provided: “(4) Whenever punishment by imprisonment in the county jail is prescribed . . . .”
10. Effective July 1, 1974, FLA. STAT. § 948.01(4) was amended by 1974 Fla. Laws ch. 74-112 to read as follows: “(4) Whenever punishment by imprisonment in the county jail for a misdemeanor or a felony, except for a capital felony . . . .” (lined-through words deleted, underscored words added). Id. at 342.
Despite the Florida Legislature's efforts toward clarity, the trial courts continued to indicate confusion in their application of the statute. Numerous sentences of probation, imposed to follow periods of incarceration were declared void and improper by the district courts. They generally recognized that the "withholding of sentence or a portion thereof is an indispensible prerequisite to entry of an order placing a defendant on probation." Further, "[there] is no authority for an adjudication of guilt and a sentence to straight probation." "[P]robation is concerned only with suspension of the imposition or pronouncement of sentence."

State v. Jones Authorizes Incarceration for Felony Offenses as Well as Misdemeanors

In 1976, the Supreme Court of Florida, in State v. Jones, recognized the inconsistency in the methods used by the trial courts in applying the split sentencing alternative. The court stated in Jones, that "[t]he District Courts have both approved and restricted these orders to the extent that it is difficult for the trial court to determine the proper procedure to use." In Jones, the defendant, after pleading guilty to "(1) possession of heroin, (2) [issuing] a worthless check, and (3) . . . a forged instrument," was ordered by the trial court to confinement in the Dade County jail for one year, to be followed by five years probation. Upon violation of the probation, the trial judge revoked Jones' probation and sentenced him to three concurrent terms of two years each in the state penitentiary. Upon review, the Third Dis-
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District Court affirmed the judgment of the trial court, but reversed the sentence stating that the maximum period for which the defendant could be incarcerated pursuant to his violation of probation could equal only that period of the original sentence withheld by the trial court at the original sentencing. 21

However, the Florida Supreme Court reinstated the amended sentence of the trial court, imposed pursuant to the probation violation. The court specifically ruled that the “trial courts have both general and specific authority for imposition of the split sentence probation alternative.” 22 Moreover, “the trial courts of this state have the general authority to require incarceration as a condition of probation for felony and misdemeanor offenses pursuant to the general condition provisions of section 948.03, Florida Statutes . . .” 23 While incarceration was generally not regarded as a condition of probation, the court’s holding in Jones expressly approved the split sentence alternative as provided by statute 24 and rejected the claim that the trial judge must withhold a

21. Id.
22. Id. at 24.
23. Id.; Fla. Stat. § 948.03 (1981) provides:
    (1) The court shall determine the terms and conditions of probationer and may include among them the following, that the probationer shall:
    (a) Avoid injurious or vicious habits;
    (b) Avoid persons or places of disreputable or harmful character;
    (c) Report to the probation and parole supervisors as directed;
    (d) Permit such supervisors to visit him at his home, or elsewhere;
    (e) Work faithfully at suitable employment insofar as may be possible;
    (f) Remain within a specified place;
    (g) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court;
    (h) Support his legal dependents to the best of his ability.
    (i) Make payment of the debt due and owing to the state under § 960.17, subject to modification based on change of circumstances.

    (3) The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper. The court may rescind or modify at any time of the terms and conditions theretofore imposed by the court upon the probationer.

24. 327 So. 2d at 25.
portion of the initial sentence for possible use in the future should the terms of the probation be violated.\textsuperscript{26} The Florida Supreme Court’s rationale in \textit{Jones} was evident in its response to the question certified to it by the Third District Court of Appeal,\textsuperscript{28} when the court stated:

that a defendant placed on probation pursuant to Section 948.01(4), Florida Statutes (1973) who subsequently violates that probation may be sentenced to imprisonment by the trial judge for the same period of years as the court could have originally imposed in accordance with Section 948.06, Florida Statutes (1973), without the necessity of establishing a term of sentence and withholding a part of it at the initial sentencing proceedings.\textsuperscript{27}

\textbf{Incarceration as a Condition of Probation Is Not a Sentence For The Purposes of Determining Eligibility for Parole}

Despite the Florida Supreme Court’s approval in \textit{Jones} of incarceration as a condition of probation, the issue arises whether such condition should be construed to be a sentence for determining a probationer’s eligibility for parole consideration. Section 947.16(1) expressly limits such eligibility to those persons incarcerated pursuant to a sentence. The Third District Court of Appeal, in \textit{McGowan v. State},\textsuperscript{28} held that incarceration does not constitute a sentence, rather it is no

\textsuperscript{25} \textit{Id.}
\textsuperscript{26} The question certified was:
Where one who could be sentenced to imprisonment in the state penitentiary for a period of years is sentenced to imprisonment in the county jail . . . , with direction that he be placed on probation upon completion of a specified period of such sentence with the remainder of the jail sentence stayed and withheld . . . , upon revocation of the probation can the court impose . . . a new sentence in the state penitentiary for a period of years, such as the court could have originally imposed . . . , or is the time to be served, following revocation of probation which has been granted pursuant to § 948.01(4), Fla. Stat., . . . limited to the unserved portion of the previously imposed jail sentence which was stayed and withheld upon placing the defendant on probation?
\textit{Id.} at 20.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} 362 So. 2d 335, 336 (Fla. 3d Dist. Ct. App. 1978).
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more than a condition of probation. Moreover, the Third District Court of Appeal recognized the distinction between a sentence and an order of probation. Probation is granted by the grace of the state in lieu of a sentence with its primary purpose to be rehabilitation. Whereas, a sentence is imposed "(a) to punish; (b) to deter similar criminal acts; (c) to protect society; or, (d) to rehabilitate."

The Third District Court of Appeal relies upon the express language of the Florida Rule of Criminal Procedure 3.790(a). The rule clearly states, "pronouncement and imposition of sentence of imprisonment shall not be made upon a defendant who is to be placed on probation regardless of whether such defendant has or has not been adjudicated guilty." By the language of the statute, the two concepts appear to be mutually exclusive since one who is sentenced may not be on probation.

Probation Conditions Requiring Excessive Terms of Incarceration Are Determined to Diminish Rehabilitative Function of Parole

Even though an order of probation is not a sentence, if an excessive prison term is imposed under the guise of probation, the order no longer serves a rehabilitative function but tends to become punitive in nature. As this inconsistency became apparent, the districts began to overturn the trial courts' imposition of probation which were conditioned on incarcerations of questionable length.

The Third District Court of Appeal considered the propriety of an

29. Id.
32. FLA. R. CRIM. P. 3.790(a).
33. Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107, 1109 (Fla. 1980).
34. Cunningham v. State, 385 So. 2d 721 (Fla. 3d Dist. Ct. App. 1980) (three years confinement in the state penitentiary as a condition of ten years probation for conviction of manslaughter); Freeman v. State, 382 So. 2d 1307 (Fla. 3d Dist. Ct. App. 1980) (five years imprisonment as a condition of ten years probation); Geter v. Wainwright, 380 So. 2d 1203 (Fla. 3d Dist. Ct. App. 1980) (ten years imprisonment as a condition of fifteen years probation); Olcott v. State, 378 So. 2d 303 (Fla. 2d Dist. Ct. App. 1979) (six years imprisonment as a condition of fifteen years probation).
excessive term of incarceration imposed as a condition of probation in *Shead v. State*. The court ruled that when the defendant received a nine and one-half year term of incarceration as a condition of probation, the trial court abused its discretion in imposing the split sentence alternative. The court’s reversal was justified by the trial court’s statement that its sole purpose in imposing such a term “was to punish the defendant by denying her any hope of parole.”

The Second District Court of Appeal in *Olcott v. State* identified the imposition of excessive terms of incarceration as conditions of probation as an attempt by the trial courts to evade what they considered to be a liberal parole policy. The defendant in *Olcott* pled guilty to one count of attempted burglary, nine counts of burglary and four counts of grand theft. The trial court ultimately imposed fifteen years probation with the special condition that the defendant serve six years in prison. In an *amicus curiae* brief submitted by the Florida Parole and Probation Commission the court believed the Commission accurately stated the problem:

The true issue . . . is one regarding the fundamental nature and relationship of and between probation and parole. The traditional concepts of parole and probation are such that the two are separate, distinct, independent and unrelated conditions. Heretofore, probation has always been accepted as something imposed in lieu of incarceration, while parole has traditionally been accepted as a measure which allows a prisoner to serve out the remainder of his sentence outside incarceration.

As noted by the Commission, parole and probation are sharply distinguishable. Parole has been defined as “the release of an offender

35. 367 So. 2d 264 (Fla. 3d Dist. Ct. App. 1979).
36. *Id.* at 267 (emphasis added); see also Freeman, 382 So. 2d at 1308, where the Third District Court of Appeal ruled that five years imprisonment to be served in the state penitentiary imposed under the guise of a special condition of ten years probation was not permissible.
37. 378 So. 2d 303.
38. *Id.* at 305.
39. *Id.* at 303.
40. *Id.*
41. *Id.* at 304.
Incarceration as a Condition of Probation

from a penal or correctional institution after he has served a portion of his sentence, under the custody of the state and under conditions that permit his reincarceration in the event of misbehavior."42 Whereas probation is "a disposition that allows the convicted offender to remain free in the community while supervised by a person who helps him lead a law-abiding life."43

The court in Olcott suggested a possible solution would be to "read Section 947.16 broadly enough to encompass a term of confinement of twelve months or more imposed as a condition of probation. But this would contemplate the possibility that a person could be on parole and probation at the same time."44 Furthermore, there exists the possible anomaly that a probationer serving a lengthy term in prison as a condition of probation may consider it advantageous to violate the terms of his probation to provoke the imposition of a sentence under which he would eventually become eligible for parole consideration.45

The court in Olcott recognized the authority of Jones, to "place the defendant on probation and include, as a condition, incarceration for a specific period of time within the maximum sentence allowed."46 The Second District Court of Appeal stated, however, it did not believe Jones addressed the issue presented in Olcott because it failed to "consider the impact on the parole process of a jail term as a condition of probation."47 Moreover, the Third District Court of Appeal, in Shead v. State,48 expressed doubt that a trial court, by imposing an excessive prison term as a condition of probation, can usurp the exclusive authority of the Parole Board to grant or deny parole to a person serving time.49 Upon this logic, the court in Olcott noted, "[t]here is much to be said for a maximum limitation of one year for incarceration as a condition of probation because it would avoid any conflict with Section

43. Id. at 176.
44. 378 So. 2d at 304 n.1.
45. Id. at 304-05.
46. Id. at 303 (emphasis added).
47. Id.
48. 367 So. 2d 264.
49. Id. at 268.
Florida Supreme Court Sets Maximum Incarceration Allowable as Condition of Probation in Villery

The validity of incarceration imposed as a condition of probation was again examined by the Florida Supreme Court in Villery v. Florida Parole & Probation Commission. Lula M. Villery previously pleaded guilty to five counts of knowingly issuing worthless checks in excess of fifty dollars. The trial court withheld adjudication of her guilt and placed her on probation, not to exceed two and one-half years. Ms. Villery subsequently violated the terms of her probation and, upon rehearing, the trial court adjudicated her guilty of the original charges. Pursuant to her violation of probation, the trial court extended her probation to five years and imposed, as a special condition, concurrent county jail terms of two and one-half years for each of the charges. Ms. Villery was given two days credit toward the jail term for time she had already spent in the Dade County jail.

The Florida Parole and Probation Commission took the position that Ms. Villery was not incarcerated pursuant to a sentence, but rather as a special condition of probation. Relying on the rule that "[e]very person . . . whose sentence . . . or cumulative sentences total 12 months or more . . . shall . . . be eligible for consideration for parole", the Commission informed Ms. Villery that she did not qualify for parole review because she was not incarcerated pursuant to a sentence. Ms. Villery asserted that incarceration imposed as a condition of probation should be considered a "sentence" for purposes of parole consideration eligibility. Thus, Ms. Villery petitioned the Florida Su-
Incarceration as a Condition of Probation

The Florida Supreme Court expressly ruled in *Villery* "that incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid. This applies to incarceration as a condition of probation as well as to incarceration followed by a specific period of probation." The court recognized that a person must be sentenced to at least one year to be eligible for parole under section 947.16(1). It construed this language to indicate a legislative intent "to limit the period of incarceration which may be imposed as a condition of probation under section 948.01(4) to a period of less than one year. If a longer period of incarceration could be imposed as a probation condition the trial judge could, in effect, negate the parole policy of this state."

The court went further to rule that *Villery* would apply retroactively and that a person who is serving a term in prison, under the split sentence alternative, which is not in accord with this decision may have

60. *Id.* at 1108.
61. Fla. Stat. § 947.16(1) (1981) (which is identical to the 1979 version) provides:

(1) Every person who has been, or who may hereafter be, convicted of a felony or who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences total 12 months or more, who is confined in execution of the judgment of the court, and whose record during confinement is good, shall, unless otherwise provided by law, be eligible for consideration for parole. An inmate who has been sentenced for an indeterminate term or a term of 5 years or less shall have an initial interview conducted by a hearing examiner within 6 months after the initial date of confinement in execution of the judgment. An inmate who has been sentenced for a minimum term in excess of 5 years shall have an initial interview conducted by a hearing examiner within 1 year after the initial date of confinement in execution of the judgment. An inmate convicted of a capital crime shall be interviewed at the discretion of the commission. As used in this section, the term "confined" shall be deemed to include presence in any appropriate treatment facility, public or private, by virtue of transfer from the Department of Corrections under any applicable law.
62. 396 So. 2d at 1111.
63. *Id.*
the illegal sentence corrected. The following guidelines were established for the correction of nonconforming decisions:

In correcting the order, the trial court has the option either of modifying the order to make it legal or of withdrawing it and imposing a sentence of imprisonment. However, unless a condition of probation is determined to have been violated, the court may not extend the term of probation either with or without incarceration, nor may the court impose a sentence of imprisonment for a period of time in excess of the original total term of probation. If a condition of probation is found to have been violated, the court may modify or continue the probation or may revoke the probation and impose any sentence which it might originally have imposed before placing the defendant on probation. In modifying probation or in revoking probation and sentencing the probationer, credit must be given for time spent incarcerated pursuant to a split sentence probation order. Thus in modifying a probation order, no additional period of incarceration may be imposed on a probationer who has already served one year or more of incarceration. And in pronouncing a sentence of imprisonment on a probationer whose probation has been withdrawn because of an illegal probation order, the time spent incarcerated pursuant to the probation order will be deemed to have been time spent in prison under a sentence.

Subsequent Applications of Villery

Since the Florida Supreme Court's decision in Villery, the Florida District Courts of Appeal have affirmed numerous pre-Villery convictions, but remanded the cases to the trial courts for resentencing in accordance with the direction of Villery. Subsequent trial court rul-

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64. Id. "[A]n error in sentencing that causes a defendant to be incarcerated or restrained for a greater length of time than the law permits is fundamental. Such an error can be corrected on appeal or by a trial court in collateral attack proceedings." Gonzalez v. State, 392 So. 2d 334, 336 (Fla. 3d Dist. Ct. App. 1981); see also Fla. R. Crim. P. 3.850 which allows a defendant, who has been incarcerated for a greater time than the law permits because of a sentencing error, to have the error corrected on appeal or by collateral attack in the trial court on the grounds that such error is fundamental.

65. 396 So. 2d at 1112.

66. See, e.g., Floyd v. State, 402 So. 2d 77 (Fla. 1st Dist. Ct. App. 1981); Good-
ings imposing the split sentence alternative, or incarceration as a condition of probation, have been carefully framed within the parameters of *Villery*.

Several issues have arisen, which involve the split sentence alternative, but are distinguishable from *Villery*. The first materialized in *Peak v. State*\(^7\) where the defendant pleaded nolo contendere to one count of attempted murder and two counts of burglary, for which the court imposed a split sentence of five years imprisonment (with a mandatory sentence of three years for use of a firearm) followed by ten years probation.\(^8\) The defendant cited to *Villery* as the authority for his claim that the order of the trial court was improper.\(^9\)

Florida’s Fifth District Court of Appeal ruled that the defendant’s sentence was the result of a negotiated plea, and it did not follow a trial and conviction, therefore they could not “give the [defendant] relief from his bargain without also offering the State the same relief.”\(^10\) The appeal was accordingly dismissed without prejudice. The defendant’s right to seek relief, if any, had to come from the trial court where he and the State would be at equal advantage.\(^11\)

The second instance in which a split sentence was imposed, but not controlled by *Villery*, occurred where the sentencing was pursuant to a conviction for multiple offenses. Florida’s First District Court of Appeal recognized that the 364 day maximum for incarceration, imposed as a condition of probation, applies only where incarceration and probation are imposed for the same offense. Such limitation does not apply, however, to a period of incarceration for a year or more followed by probation where the incarceration and probation are imposed for separate offenses.\(^12\)

Moreover, in a recent decision, Florida’s Second District Court of Appeal authorized an innovative combination of split sentences in re-

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\(^67\) 399 So. 2d 1043 (Fla. 5th Dist. Ct. App. 1981).
\(^68\) *Id.*
\(^69\) *Id.*
\(^70\) *Id.*
\(^71\) *Id.* at 1044.
viewing the sentence of a defendant convicted of two crimes.\textsuperscript{73} The court permitted a hybrid of the split sentence alternative which effectively allowed a period of incarceration which \textit{exceeded} one year to precede a period of probation. The sentence imposed was comprised of two five year terms of probation for each offense, to run concurrently, with two terms of incarceration as a condition of that probation of 364 days each, to run consecutively.\textsuperscript{74} The effect was to confine the defendant for two years (less two days) and to subsequently place him on probation for the remaining three years.

\textbf{Conclusion}

The Florida Supreme Court in \textit{Villery} expressly limited the period for which a defendant, convicted of a single offense, may be incarcerated as a condition of probation or pursuant to a split sentence order to less than one year. It has since been decided that the mandate of \textit{Villery} does not generally apply to convictions for multiple offenses or to convictions through negotiated pleas.\textsuperscript{75} Nevertheless, the court, in \textit{Villery}, has substantially clarified the application of section 948.01(4) of the Florida Statutes.

\textit{James E. Morgan, III}

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\begin{itemize}
\item \textsuperscript{73} Ellis v. State, 406 So. 2d 76 (Fla. 2d Dist. Ct. App. 1981).
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} Peak v. State, 399 So. 2d 1043 (Fla. 5th Dist. Ct. App. 1981).
\end{itemize}
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Introduction

The plaintiff in *Gulfstream Land & Development Corp. v. Wilkerson*\(^1\) sustained injuries when he fell into a hole located on the premises of Gulfstream Land & Development Corporation. His employer was Gulfstream Utilities Corporation, the wholly owned subsidiary of Gulfstream Land & Development Corporation. Following his accident, Wilkerson received worker's compensation benefits from his employer, Gulfstream Utilities. In *Wilkerson*, the plaintiff was suing the parent corporation, Gulfstream Land & Development, for owner's negligence in failing to maintain a safe premises. Wilkerson sought to recover for his personal injuries plus damages for loss of consortium. The parent corporation moved for summary judgment claiming immunity from the independent tort action because its subsidiary had already paid compensation benefits to Wilkerson. The parent and subsidiary corporations maintained a joint worker's compensation insurance policy and the parent corporation maintained that it should be immune from a tort action resulting from the same injury that the worker's compensation insurance had already paid benefits for. The Broward County Circuit Court granted the parent corporation's motion for summary judgment but Florida's Fourth District Court of Appeal reversed the lower court's decision, and the Florida Supreme Court followed the District Court's decision.

This case comment will explore the various issues raised by the *Wilkerson* decision which allowed a worker employed by a subsidiary corporation to maintain an independent tort action against the parent corporation. First, the focus will be on the background surrounding em-

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ployer immunity in exchange for worker's compensation and will examine the trend of other jurisdictions' refusal to extend immunity to parent corporations. This will be followed by an analysis and comparison of the conflicting Goldberg v. Contex Industries Inc. decision rendered by Florida's Third District Court of Appeal which extended immunity to the parent corporation.

As in Wilkerson, the plaintiff in Goldberg was an employee of the subsidiary corporation who slipped and fell while working on the premises of the parent corporation. Similar to the facts of Wilkerson, the injured employee in Goldberg collected worker's compensation benefits from a policy under which both the parent and subsidiary corporations were jointly insured. In each case, the employee then sued the parent corporation for negligence in maintaining the premises. The parent corporations in both Goldberg and Wilkerson contended that they voluntarily assumed the burden of carrying worker's compensation and were therefore protected from common law liability. The final focus of this comment will attempt to set forth guidelines a Florida court might use in rendering future decisions on this subject.

History of the Enactment of the Workmen's Compensation Act

Wilkerson cites Boggs v. Blue Diamond Coal Co., a 1979 United States Sixth Circuit Court of Appeals decision based on Kentucky law. Boggs exemplifies the modern trend of refusing to extend immunity from tort action to parent corporations in worker's compensation cases.

In Boggs, fifteen coal miners who worked for a subsidiary corporation were killed when methane gas exploded in the mine. The coal miners' widows brought an action for negligence against the parent corporation, Blue Diamond, because the parent corporation had the primary responsibility for "mine safety functions," and because it was aware of

2. 362 So. 2d 974 (Fla. 3d Dist. Ct. App. 1978), cert. denied, 370 So. 2d 459 (Fla. 1979).
3. Brief for Appellants, Wilkerson, 402 So. 2d 550; Brief for Appellants, Goldberg, 362 So. 2d 974.
4. The Workmen's Compensation Law has been revised to read "Workers' Compensation Law." It may be referred to either way within this paper.
5. 590 F.2d 655 (6th Cir. 1979).
the dangerous situation. Boggs raised a question of first impression. The court, in order to reach its decision, looked to the language of the Kentucky Workmen's Compensation Act, its history and purpose, as well as the general concepts upon which worker's compensation laws were legislated. The adoption of worker's compensation laws served to provide benefits in order "to compensate victims of industrial accidents because it was widely believed that the limited rights of recovery available under the common law at the turn of the century were inadequate to protect [workers]." With the turn of the century, the employer defenses of assumption of the risk, contributory negligence and the fellow servant rule, resulted in workers recovering compensation for less than a quarter of the work related accidents. Thus, rapid industrial and economic growth were permitted at the expense of the injured worker.

As a result of the injustices that occurred, worker's compensation laws were enacted so that employees would be able to receive compensation for injuries and employers would be able to sustain that burden in a equitable manner. The Workmen's Compensation Act created an exchange of rights between the employer and his employee. The employer received immunity from possible common law tort action by his employee in exchange for accepting limited liability, i.e., payment of insurance premiums. The employee obtained prompt relief by relinquishing his tort remedies against his employer in exchange for worker's compensation benefits. Even though worker's compensation has remedied many of the injustices that occurred at the turn of the century, the benefits have remained relatively low. "[I]n recent years serious questions have been raised concerning the fairness and adequacy of present [w]orkmen's [c]ompensation laws in the light of . . . new risks to health and safety, and increases in the general level of wages and the cost of living." Kentucky courts have responded to this concern by liberally construing the employee coverage provisions of the act and narrowly construing the employer immunity provisions.

6. Id. at 658.
8. Boggs, 590 F.2d 655, 659 n.5.
9. See Bright v. Reynolds Metals Co., 490 S.W.2d 474 (Ky. 1973); Peters v. Radcliff Ready Mix, Inc., 412 S.W.2d 854 (Ky. 1967); Cove Fork Coal Co. v. New-
pears that in Boggs the trend once again, is to protect the worker from being neglected in the momentum of economic and technological advances.

The Boggs court referred to Professor Larson’s theory in determining that the Kentucky Workmen’s Compensation Act does not extend tort immunity to a parent corporation for injuries sustained by subsidiary employees. Professor Arthur Larson’s theory states: “[T]here is no strong reason of compensation policy for destroying common law rights . . . [and] every presumption should be on the side of preserving those rights, once basic compensation protection has been assured. . . .”

When appraising the question of a parent corporation’s immunity from tort liability for injuries to its subsidiary’s employees, one cannot “ignore the development of modern business conglomerates” that own numerous and diversified enterprises. “Workmen’s compensation laws were passed before the multi-unit enterprise became the norm in the American economy” and therefore do not address themselves to the question of parent corporation tort immunity.

The employee should not have to relinquish his common law right to sue in tort merely because the parent and subsidiary corporation maintain a joint worker’s compensation insurance policy. The parent-subsidiary corporate relationship should not take precedence over the employer-employee relationship from which the grant of employer immunity has evolved. Where the parent corporation does not have an employer-employee relationship with the injured worker the theory upon which immunity from suit was developed is absent. Thus, providing the parent corporation with immunity from suit would detour the worker’s compensation laws from their intended effect.

comb, 343 S.W.2d 838 (Ky. 1961); Mahan v. Litton, 321 S.W.2d 243 (Ky. 1959); Ky. Rev. Stat. § 342.004 (1978).

12. Including such commonly known conglomerates as General Motors, International Telephone and Telegraph, Dupont, etc.
Parent Corporations: Are They Separate Entities or Do They Qualify as Employers?

There are several factors that any court must address in determining whether a parent corporation is entitled to claim immunity under the Worker's Compensation Act. The United States District Court of Tennessee identified many of these factors in *Latham v. Technar, Inc.* when it analyzed the relationship between the parent and subsidiary corporation.

Although the stock ownership of one corporation by another may serve in certain instances as an indicia of identity or commixture as between the two, for the purpose of determining who may maintain a common law action against a third party, it is not conclusive. Likewise, the presence of a common insurer as between the holding company and the wholly owned subsidiary does not automatically establish a single employer unit, nor does identity of management create identity for worker's compensation purposes.

In *Latham*, the subsidiary held its own separate charter and filed separate payroll withholding tax returns. Therefore, despite the interrelations of the parent and subsidiary via stock ownership and a common insurance policy, the court did not find the two corporations so completely integrated that they could not be viewed as separate entities. The court further expressed that the parent corporation did not show that it was an employer of the decedent. The individual who was originally hired and paid by the subsidiary corporation was transferred to work in the parent company's adjacent operation without being transferred to a new payroll. Furthermore, she was not given notice that she was working for the parent company. Based on these facts, the court concluded that the individual was not an employee of the parent company. Therefore a common law suit could be maintained against the

parent corporation.

In *Thomas v. Hycon*, a United States District Court addressed the issue of when the parent corporation's connection to the subsidiary would establish an "employer status." The court held it could not consider the parent corporation (who was the employer in this case) and its subsidiary (who was found to be a third party liable for damages due to negligence) as a "single employer" for worker's compensation purposes. This result was reached despite the existence of a joint worker's compensation insurance policy because factors indicated the businesses were separate entities; each maintained separate accounts; there was no sharing of profits and losses; and there was no proof that the corporations had joint control over the employee's conduct.

Similarly in *Mingin v. Continental Can Co.*, a Superior Court of New Jersey held that the presence of a common worker's compensation policy was not sufficient to establish a "single employer" status and thus no immunity could be granted from common law tort liability. Therefore the plaintiff, a subsidiary's employee who was injured while using a machine manufactured by another subsidiary, was not barred from maintaining a tort action against the parent corporation. This was notwithstanding the fact that the parent corporation and all subsidiaries were covered by the same worker's compensation policy.

The same conclusion was reached by the United States District Court in *O'Brien v. Grumman Corp.* The *O'Brien* court held that the plaintiff was not barred from suing the parent corporation by Georgia's worker's compensation statute "since that statute only bars an employee from suing his employer." The court found that even though the corporations were closely interrelated and were all covered by a single worker's compensation policy, they were separate and distinct corporations which could not be considered a single employer immunized from common law tort liability. In reaching its decision the *O'Brien* court acknowledged the contrary decision in *Goldberg*, but stated that "[t]he majority of the courts which have confronted the question have held that parent and subsidiary corporations must be

20. Id. at 291.
treated as separate and distinct entities for the purposes of workmen’s compensation statutes.”

The parent corporations in Goldberg and Wilkerson also claimed immunity from liability on the basis of joint worker’s compensation insurance, close interrelations of the parent and subsidiary, as well as ownership of the subsidiary’s stock by the parent corporation. In Wilkerson, however, the Florida Supreme Court did not find these factors sufficient to override the fact that the corporations had been set up as two separate legal entities. The Wilkerson court therefore held that a parent corporation is not immune from suit by a subsidiary’s employee who has been injured. This was contrary to the Goldberg decision which allowed the parent corporation to avoid the consequences of its corporate structure by barring an independent tort action by the subsidiary’s employee.

Florida: The Duty to Provide Worker’s Compensation

The Florida Supreme Court in Jones v. Florida Power Corp., determined that the basis for employer immunity from tort liability rests upon

whether the Workmen’s Compensation Act imposed upon the Corporation the duty as an “employer” to secure compensation for such employees. It is the liability to secure compensation which gives the employer immunity from suit as a third party tort-feasor.

21. Id. at 292.
23. The court in Goldberg failed to recognize the parent and subsidiary corporations as separate entities. But see St. Petersburg Sheraton Corp. v. Stuart, 242 So. 2d 185 (Fla. 2d Dist. Ct. App. 1970), where the court stated that a parent corporation’s ownership of all the stock of a subsidiary corporation does not erase the subsidiary’s identity as a separate legal entity.
24. 72 So. 2d 285 (Fla. 1954).
His immunity from suit is commensurate with his liability for securing compensation—no more and no less.\textsuperscript{25}

The Court’s interpretation of sections 440.10\textsuperscript{26} and 440.11\textsuperscript{27} in

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\item Id. at 287 (emphasis original).
\item FLA. STAT. § 440.10 (1979) states:
  \begin{enumerate}
  \item Every employer coming within the provisions of this chapter, including any brought within the chapter by waiver of exclusion or of exemption, shall be liable for, and shall secure, the payment to his employees, or any physician, surgeon or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment. A subcontractor is not liable for the payment of compensation to the employees of another subcontractor on such contract work and is not protected by the exclusiveness of liability provisions of s. 440.11 from action at law or in admiralty on account of injury of such employee of another subcontractor.
  \item Compensation shall be payable irrespective of fault as a cause for the injury, except as provided in s. 440.09(3).
\end{enumerate}
\item FLA. STAT. § 440.11(1) (1979) states:
  \begin{enumerate}
  \item The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee. The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer’s business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts,
Florida's Worker's Compensation Statute clearly bases an employer's immunity from suit on the legal obligation to furnish worker's compensation. Absent an employer/employee relationship, no legal obligation exists from which immunity can be derived.

The following analysis of section 440.04 must be viewed as an adjunct to, rather than a contradiction of, sections 440.10 and 440.11 as interpreted in Jones. In Strickland v. Al Landers Dump Trucks, Inc., the Florida Supreme Court held the owner operator of a dump truck, who was injured while cleaning his truck as required by the association of truckers, could recover worker's compensation benefits pursuant to the provisions of section 440.04 of the Florida Statutes, because the

with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.

28. 170 So. 2d 445 (Fla. 1964).
29. The association of truckers referred to was Al Landers Dump Trucks, Inc. Members pay an entrance fee and monthly dues for the right to get on the working line.
30. FLA. STAT. § 440.04 (1979) states:
(1) Every employer having in his employment any employee not included in the definition "employee" or excluded or exempted from the operation of this chapter may at any time waive such exclusion or exemption and accept the provisions of this chapter as if such exclusion or exemption had not been contained herein.
(2) When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" or whose services are not included in the definition of "employment" or who is otherwise excluded or exempted from the operation of this chapter, the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions, of this chapter with respect to such person, notwithstanding the provision of s. 440.05 with respect to notice.
(3) A corporate officer who has exempted himself by proper notice from the operation of this chapter may at any time revoke such exemption and thereby accept the provisions of this chapter by giving notice as provided in s. 440.05.
association of truckers had "voluntarily caused a policy of workmen's compensation insurance to be issued covering claimant." In carefully reviewing section 440.04 it is apparent that the employer may waive its exemption for those who do not qualify as an "employee" under the

31. 170 So. 2d at 447.
32. "Employee" is defined in Fla. Stat. § 440.02(2) (1979), which states:
   (2) (a) The term "employee" means every person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed.

   (b) The term "employee" includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous. However, any officer of a corporation may elect to be exempt from coverage under this chapter by filing written certification of the election with the division as provided in s. 440.05. Services shall be presumed to have been rendered the corporation in cases where such officer is compensated by other than dividends upon shares of stock of such corporation owned by him.

   (c) The term "employee" includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and elects to be included in the definition of employee of filing notice thereof as provided in s. 440.05.

   (d) The term "employee" does not include:

   1. An independent contractor, including:
      a. An individual who agrees in writing to perform services for a person or corporation without supervision or control as a real estate salesman or agent, if such service by such individual for such person or corporation is performed for remuneration solely by way of commission:
      b. Bands, orchestras, and musical and theatrical performers, including disk jockeys, performing in licensed premises as defined in chapter 562, provided that a written contract evidencing an independent contractor relationship is entered into prior to the commencement of such entertainment;

   2. A person whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer; or

   3. A volunteer who falls into one of the following categories:
      a. Volunteers who serve in private nonprofit agencies and who receive no compensation other than expenses in an amount less than or equivalent to the standard mileage and per diem expenses provided to salaried employees in the same agency or, in the event that such agency does not have salaried employees who receive mileage and per diem, then such volunteers who receive no compensation other than expenses in an amount less than
Worker’s Compensation Act and provide worker’s compensation coverage. The worker’s compensation coverage in *Strickland* entitled the employer to immunity from common law liability pursuant to section 440.11.

In *Allen v. Estate of Carmen*, the Florida Supreme Court again interpreted section 440.04 to enable “an exempt employer to voluntarily assume the obligations and privileges of the Workmen’s Compensation Act and thereby insulate himself from common law liability...” The ruling involved the right of an employer, who has only one employee, to choose to assume limited liability by providing worker’s compensation insurance, even though he was under no obligation to do so. The employer in *Allen* therefore was also entitled to invoke the defense of immunity from common law liability.

The facts in *Strickland* and *Allen* indicate that the interpretation of section 440.04 permitting the voluntary assumption of worker’s compensation is based on the existence of an actual employer-employee relationship. Although the employer in *Allen* did not have the minimum of three employees for which worker’s compensation is required, he chose to cover his one employee. In *Strickland*, the owner-driver was a member of the association of truckers which arranged his workload and deducted from his salary its commission and a percentage for worker’s compensation and automobile insurance. The facts in *Goldberg* and *Wilkerson*, however, are distinguishable because they fail to indicate a viable employer-employee relationship with the insured. Therefore, to broaden the application of section 440.04, from actual employers to parent corporations as presented in *Goldberg* and *Wilkerson*, would be an extension beyond the scope of that section.

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or equivalent to the customary mileage and per diem paid to salaried workers in the community as determined by the division.

b. Volunteers participating in federal programs established pursuant to Pub. L. No. 93-113.

4. Any officer of a corporation who elects to be exempt from coverage under this chapter.

33. The Florida Supreme Court held that Strickland was an independent contractor rather than an employee of the association of truckers.

34. 281 So. 2d 317 (Fla. 1973).

35. 281 So. 2d at 322.
Precedent: Goldberg or Other Jurisdictions?

Florida’s Legislature has not expressly addressed the issue of parent corporation immunity. The Goldberg decision, a brief per curiam opinion without citation to any precedent or authority, shed little light on the matter. As a result, the Fourth District Court of Appeal in Wilkerson was compelled to look at case law from other jurisdictions. Those persuasive opinions from other jurisdictions were appropriately applied to the Florida statutes. It would have been injudicious for the Supreme Court in Wilkerson to ignore this trend which militates against parent corporation immunity since the wording of the Florida Worker’s Compensation Statute does not disclose the answer and the contrary holding in Goldberg is unexplained.\footnote{Contra Brief for Appellee, Wilkerson v. Gulfstream Land & Dev. Corp., 402 So. 2d 550 (Fla. 4th Dist. Ct. App. 1981).}

Conclusion

The Florida Supreme Court wisely followed the trend established by other jurisdictions. It found that a parent corporation is not immune from a tort action by an injured subsidiary’s employee who has collected worker’s compensation benefits on a policy issued jointly to the parent and subsidiary corporation. The holding in Wilkerson deals fairly with the intended effect of the Florida Worker’s Compensation Statute by refusing to grant protection to parent corporations. It upholds the principles upon which worker’s compensation is based, as well as considering the changes stemming from multi-unit enterprises.

Given the development of large conglomerates owning several diversified businesses, the legislature should modernize the worker’s compensation statutes. This would bring the Florida statute in accord with the trend applied in Wilkerson so that it deals directly with the new situations arising in the American economy. The legislature needs to confront the issue of parent and subsidiary corporations and under what circumstances, if any, worker’s compensation laws should grant immunity from common law tort liability to parent corporations.

It is suggested that a parent corporation could substantiate an employer-employee relationship and be entitled to immunity from suit by demonstrating control of the employee’s conduct, payment of the em-
ployee’s salary, and notification to the employee that it is his or her employer. Absent proof of an actual employer-employee relationship between the injured plaintiff and the parent corporation, the legislature should treat the parent corporation as if it were a third party tort-feasor.

Heddy Muransky
Is Home Videotaping A Fair Use of Copyrighted Programs? Universal City Studios, Inc. v. Sony Corporation of America

On October 19, 1981, the United States Court of Appeals for the Ninth Circuit held that private in-home television videotaping infringes upon copyrights. The court concluded that an implied video recording exemption to the Copyright Act of 1976 did not exist and that noncommercial home videotaping of copyrighted programs is not fair use of the material. This decision reversed the lower court's dismissal of the suit and the court remanded the case in order to fashion relief for Universal City Studios and Walt Disney Productions. The result inspired the introduction of identical bills S. 1758 and H.R. 4808, designed to eliminate home videotaping liability. Subsequently, a compromise measure was introduced which would make home videotaping legal but would call for a surcharge to be added to the cost of video recorders and blank tapes. However, due to the widespread availability and acceptance of videotape equipment for home use, Congress may respond to public pressure by amending the Copyright Act of 1976. Based upon existing law, the home videotaper's liability can only be absolved by an

1. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981) [hereinafter cited as Sony II].
2. Id. at 977.

§ 119. Limitations on exclusive rights: Exemption for certain video recordings:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—

(1) the recording is made for private use; and
(2) the recording is not used in a commercial nature.

5. The Copyright Act of 1976 was codified in title 17 of the United States Code.
act of Congress since it is outside the judiciary's scope to construe the Copyright Act so as to confer an exemption. Should Congress enact an exemption for home video recording, it is probable that it would closely resemble the existing home sound recording exemption.

This comment provides a critical evaluation of the basis for copyright protection and application of the fair use defense to a charge of copyright infringement. The results of the analysis suggest that the Ninth Circuit in *Universal City Studios v. Sony Corp. of America* correctly decided under current copyright law, that home videotaping is an infringement. This decision protects the copyright holders' property rights and ensures an economic incentive for creativity in the arts and sciences.

The *Sony* Case

The controversy is caused by the availability of new technology to the public. Sony Corporation manufactures and markets the Betamax tape deck which has the capacity to record television broadcasts on videotape in the home. Universal City Studios, Inc., and Walt Disney Productions brought suit against the Betamax manufacturer-distribu-
tor, charging copyright infringement of programming transmitted over public airways and freely received by the public.

The studios claimed protection under the Copyright Act and demanded compensation. Plaintiffs argued that defendants were primarily responsible for the infringement since they produced and sold the Betamax, a device capable of taping their television programs.

At the trial level, three years passed before District Judge Ferguson dismissed the suit and ruled the studios had not met the burden of proving harm suffered. The court held that in-home videotaping was a fair use of copyrighted material and thus not an infringement upon copyrights as held by the studios. Moreover, the court held the Copyright Act of 1976 contained an implied home video-recording exemption. Thus, the corporate defendants were victorious on all counts. To fully appreciate the trial court’s ruling, it is necessary to become familiar with the purview of the copyright statutes and the cases interpreting their language.

Source of Copyright Protection

The Constitution granted Congress the power to enact copyright laws “to promote the progress of science and useful arts, by securing, for limited times, to authors... the exclusive right to their... writings.” Congress exercised this power by passing the Copyright Acts of 1909 and 1976. Copyright owners were granted various exclusive rights, subject to limiting provisions codified in the Act. Motion pic-
tures are listed as copyrightable property through the Townsend Amendment to the 1909 Act, passed in 1912,21 and are now listed in section 102(a)(6) which sets forth the general subject matter of the 1976 Act.22

Statutory Exemptions to Copyright Restrictions

Should the Home Sound Recording Exemption be Extended to Video Recording?

The Sony trial court23 ruled that although, “[t]he broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works . . . legislative history does not show this intent.”24 The court then characterized its task as a search for specific congressional intent to protect copyright holders from video recording.25

under this title . . . has the exclusive right to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion picture and other audiovisual works to perform the copyrighted works publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.


21. The text of the Townsend Amendment was codified in the 1909 Copyright Act at § 5 thereby making motion pictures copyrightable property.


24. Id. at 443.

25. Id.
In 1971 Congress limited the Copyright Act to provide an exception for home sound recording of copyright materials, provided it was done for private use. The revision committee explained that its intention was not "to restrain the home recording . . . where [it was] for private use and with no purpose of reproducing or otherwise capitalizing commercially on it." The committee concluded that although private home sound recordings was common and unrestrained, it did not pose a serious threat to producers and performers. The rationale was based on the belief that modern day copyright holders would be in a position no different from those who owned copyrights in musical works over the past two decades.

The trial court in *Sony* determined the language of section 106 of the Copyright Act was not to be strictly construed in every instance. Sony had argued that Congress did not intend to restrict any form of home taping, since unrestricted taping of phonograph records had previously been exempted in 17 U.S.C. § 107 (1976). The court recognized, however, the special treatment afforded sound recordings and construed similar legislative intent for an implied video recording exemption. The court based its opinion, in part, on the premise that a video recording exemption was implicit in the 1976 revision.

A contrary result was reached by the appellate court in *Sony*, which focused on whether Congress "intended" to withdraw copyright protection from broadcasted programs. Specifically their concern was "whether Congress ha[d] exhibited the intent to limit the rights of copyright owners in ways not specified in §§ 107-118." The court found the statute to be unambiguous and consequently found the grant of exclusive rights to be limited only by explicit statutory exceptions. The *Sony* court stated that "absent a clear direction from Congress, [the court should not] disrupt this [statutory] framework by carving out exceptions to the broad grant of rights apart from those in the stat-

27. Id. at 1572.
28. Id.
30. Id. at 443.
32. Id. at 966.
ute itself.”33 This holding was diametrically opposed to the trial court’s willingness to consider and analogize video recording to the treatment of in-home sound recording. Since the statute was deemed clear and unambiguous by the appellate court, “it would be highly improper to construe inconclusive legislative history so as to apply a statute in a manner inconsistent with its claimed meaning.”34

Obviously, limited copyright protection for sound recordings does not mandate a finding of Congressional intent to afford the same treatment to audiovisual recordings.35 A major motivation for the special Congressional treatment of sound recording is that, home recording “is common and unrestrained today.”36 The underlying rationale seems to be, “[y]ou simply cannot control it.”37 Conversely, audiovisual tape technology is less available to the average consumer because of cost. There also exists potential means of controlling video taping by electronic interference or by control of tape availability. Consider also that limitations on availability of sound recording cassettes for home taping would interfere with independent beneficial uses of sound recording, such as dictation and private notes. On the other hand, the dominant use of the Betamax and audiovisual tapes is to record television material. Therefore, limitations on the acquisition of tapes would deter the copying without disrupting independent beneficial uses.38

A distinction also exists between the effect of sound recording and audiovisual recording on the audience. Where a viewer usually will only view a videotape a limited number of times, a listener’s playing of a sound recording could entice him to purchase the record.39 This factor, although of questionable significance, was considered by the appellate court to bolster its holding that the statute is unambiguous and in-home video taping for private noncommercial use constitutes an in-

33. Id.
34. Id. at 968-69 (citing United States v. Wilson, 591 F.2d 546 (9th Cir. 1979)).
35. Id. at 966-67.
37. Sony I, 480 F. Supp. at 445 (quoting from the statement of Asst. Register of Copyrights, Barbara Ringer before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 22 (June 9-10, 1971)).
39. Id. at 65.
Video Taping of Copyrighted Programs

fringement on copyrighted material.\textsuperscript{40}

\textbf{Fair Use}

The copyright holder possesses a near monopoly over the use of his works, however, in certain situations the rights of the copyright holder are subordinated to the public good. "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."\textsuperscript{41}

"Copyright itself has been called 'the metaphysics of law'\textsuperscript{42} and fair use is one of the more elusive concepts embodied in that [area]."\textsuperscript{43} To balance the conflicting desires of the public in unrestricted use with the copyright holder in retaining control, courts have created the fair use doctrine. The doctrine previously advanced in \textit{Williams & Wilkins Co. v. United States},\textsuperscript{44} and later codified in section 107 of the Copyright Act, creates exemptions to an author's monopoly thereby allowing public access to the work.\textsuperscript{45}

Despite codification, the meaning of fair use remains amorphous. This is because fair use is an equitable doctrine and its flexible nature defies concrete definition.\textsuperscript{46} For practical purposes, however, fair use has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."\textsuperscript{47}

To apply the fair use analysis, courts examine four factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon

\textsuperscript{40} Sony II, 659 F.2d 963.
\textsuperscript{41} Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1931).
\textsuperscript{42} Barkan, supra note 8, at 60 n.42 (quoting Story, J., in Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C. Mass. 1841)).
\textsuperscript{43} \textit{Id.} at 60.
\textsuperscript{44} 487 F.2d 1345 (Ct. Cl. 1973), aff'd mem., 420 U.S. 276 (1975).
\textsuperscript{47} \textit{Id.} at 307.
the potential market for or value of the copyrighted work.”

(1) Purpose and Character of Use:

A first step in fair use analysis requires a determination of whether the purpose and character of the use “is of a commercial nature or is for nonprofit educational purposes.” It has been held that use of copyrighted matter for purposes of science, research, education and criticism constitutes fair use.

The trial court in *Sony* pointed out that the taping of home video programs was private and noncommercial. The studio had chosen to broadcast their programs over public airways and all that resulted from the videotaping was increased access to the programs. For example, the home videotaping could result in increased use by those whose viewing was curtailed by work schedules or counter programming. The court determined that enforcement of the copyrights would be intrusive on private rights, virtually impossible to administer and unwarranted “where the plaintiffs themselves chose to beam their programs into the homes.”

The *Sony* appellate court, however, considered copying video entertainment a convenience and convenience does not translate into a non-profit educational purpose, as required by section 107. Thus, “[t]he fact that the use involved does not further a traditionally accepted purpose clearly weighs against a finding of fair use.”

(2) The Nature of The Work:

There is an absence of extensive analysis in case law and legislative history regarding the second criteria, “the nature of the copyrighted work.” The inquiry should center on whether the nature of the work was such that “distribution would serve the public interest in

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50. *Williams & Wilkins Co.*, 487 F.2d at 1354.
53. *Id.*
54. *Sony II,* 659 F.2d at 972.
the free dissemination of information."

The Sony trial court refused to characterize the copyrighted material at issue as scientific or educational. Moreover, the court was hesitant to label the works solely as entertainment because, "the line between transmission of ideas and mere entertainment is much too elusive." Therefore, at the trial level, the minimal informational aspect of the programs was deemed sufficient to meet the fair use test.

To determine the nature of the work the trial court even considered whether the studios' distribution system provided free dissemination of information. It is significant to note that a finding of commercialism arguably would point toward a finding of entertainment, rather than information. While viewers of commercial television do not pay directly for the programming which they view, the copyright holders (Universal and Disney) are paid for the material by the broadcasters who earn profits by selling advertising time. The studios argued that this constant infusion of funds subsidized their business. Thus, "[t]he direct payment from broadcasters and advertisers has made the 'free' offering to the public very profitable for the plaintiffs." However, as this case only involved copyrighted material which the plaintiffs had voluntarily chosen to telescan free of direct charge to the public, the work was deemed noncommercial by the trial court. Nevertheless, the trial court's detailed discussion of plaintiffs' method of business operations was discounted by the appellate bench. While the appellate court determined that business arrangements could be considered in calculating damages, it decided that they are not indicative of "nature of the work."

Case law indicates that the scope of fair use is narrower for entertainment material than informational works. In a mass copying case, Rohauer v. Killian Shows, Inc., the court did not find "public interest in the dissemination of 'The Son of the Sheik' sufficient to jus-

56. Rosemont Enter., Inc., 336 F.2d at 303.
59. Id.
60. Sony II, 659 F.2d at 972.
61. Id.
tify the infringement. . . . [The court stated]: It can scarcely be ar-
gued here that the enduring fame of Rudolph Valentino or intrinsic
literary and historic merit of the 'Son of the Sheik' . . . serves any
public interests.\textsuperscript{63} The fictional works which were the subject of the
suit were entertainment, and absent "productive use" mass copying of
entertainment will not constitute a fair use.

(3) Scope of the Copy in Relation to the Original Work:

The third factor involved in fair use analysis is "the amount and
substantiality of the portions used in relation to the whole of the mate-
rial."\textsuperscript{64} The general rule is the more substantial the taking, the less
likely the fair use defense will succeed. The scope of the taking obvi-
ously influences the effect the copy has on the market. Thus the scope
factor intertwines with the harm factor producing a market effect on
the original which can be determinative.\textsuperscript{65}

In \textit{Leon v. Pacific Telephone & Telegraph Co.},\textsuperscript{66} the court com-
mented, "[c]ounsel have not disclosed a single authority . . . which
lends any support to the proposition that wholesale copying and publi-
cation of copyrighted material can ever be fair use."\textsuperscript{67} When \textit{Leon} was
decided in 1937, the technology of the era had little impact on copy-
right law. However, difficulties caused by scientific progress have
forced reevaluation of the copyright laws. For example, the trial court
in \textit{Sony} recognized that home videotaping usually involved copying the
entire original, depriving copyright holders of control and the "intellec-
tual property"\textsuperscript{68} of its uniqueness. The court, however, concluded such
copying caused no reduction in the market for the original work.\textsuperscript{69}
Thus, the \textit{Sony} trial court evaluated all four fair use factors, deter-
mined that the whole copying did not reduce the value of the original
work, and deemed the copying a "fair use".

Assuming the \textit{Sony} trial court's ruling on the market effect of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{63} \textit{Rohauer}, 379 F. Supp. at 733.
\item \textsuperscript{64} \textit{Williams & Wilkins Co.}, 487 F.2d at 1352.
\item \textsuperscript{65} M. \textsc{Nimmer}, \textsc{Nimmer on Copyrights} § 13.05(D) (1982). For a discussion

of the "harm factor" see \textit{infra} p. 673.
\item \textsuperscript{66} 91 F.2d 485 (9th Cir. 1937).
\item \textsuperscript{67} \textit{Id.} at 486.
\item \textsuperscript{68} "Intellectual property" is a term of art; it encompasses work traditionally

considered art as well as copyrighted and patented material.
\item \textsuperscript{69} \textit{Sony I}, 480 F. Supp. at 454.
\end{itemize}
\end{footnotesize}
videotape copying was correct, "[t]he mere absence of competition or injurious effect upon the copyrighted work will not [necessarily] make a use fair." It has been argued that absent compelling reason to the contrary, equity should render the appropriation of a copyright holder's work without consent, impermissible. However, the mere fact one desires to copy a program for his own viewing convenience should not rise to the concerned level of appropriation. Millions of private home-owners record television programs for their own private use. Modern opinion appears to be that government (and the judiciary) should impose less regulations on individuals. Despite this wave of sentiment, courts have viewed the fact that the entire work is copied against the videotaper (and the manufacturer as a contributory infringer). Thus, the scope of the copy factor "in the fair use calculus weighs heavily in [the copyright holder's] favor."71

(4) The Harm Factor:

The fourth factor in fair use analysis, "the effect of the use upon the potential market for . . . the copyrighted work"72 weaves into the fabric of the other three. Although the traditional approach to fair use considers all four factors, it emphasizes the harmful impact upon the value of the copyrighted work.73 When considering whether home recording would cause harm to the market for copyrighted works,74 the Sony trial court evaluated future detrimental effects on the potential market for the work caused by the technological advances rather than assessing the copyright holder's actual economic harm.75 The studios believed the focus should have been a determination of their property rights. The companies had payed to have writers and artists create the material, thus there was no reason for further proof of harm.

Nevertheless, Universal and Sony argued additional potential harm based on a belief that videorecording would reduce the audience.

71. Sony II, 659 F.2d at 973.
73. M. NiMMER, supra note 65, at § 13.05.
pool for original and repeat broadcasts. This belief was premised upon the proposition that home video libraries made home videotapers a less likely audience for television reruns and rereleased movies. Reduction in audience size would result in a decrease of broadcaster fees earned through the sale of advertising time. Furthermore, the revenue loss would precipitate lower royalties paid to the copyright owners. 76

The claim was also made that "time shifting", taping a program for later viewing, hurts the sale of commercial time because sponsors realize viewers now have editing capacity. Essentially, the studios sought preservation of their market share and business practices from the threat of technology. Consequently, the trial court in Sony was forced to evaluate whether the fair use doctrine was relevant when copyright protection was tested by the non-commercial use of new technology. For guidance the court utilized the approach of Williams & Wilkins Co. v. United States. 77

In Williams, the National Institute of Health (N.I.H.) and the National Library of Medicine (N.L.M.) photocopied entire articles from plaintiff's medical journals and made copies available to library users. The copying was extensive, reaching approximately 93,000 copies per year. 78 The publisher of the medical journals claimed that if readers could obtain an article from N.I.H. or N.L.M., subscriptions would decrease and they would not be reimbursed for the use of the copyrighted material.

In resolving the dispute the Williams court utilized the traditional fair use factors in addition to other relevant considerations. The key factors in the court's consideration was whether medical research would be harmed if copying was prohibited. The N.I.H. and N.L.M. motivation apparently was to make journal articles available to promote scientific progress. Both agencies made efforts to limit the distribution of articles to scientific personnel whose research would be impeded if fair use was inapplicable. The court found no substantial injury to the copyright holder. The copyright holder's claim that it is or will be substantially harmed was balanced against the risk of harm to

76. Marsh, supra note 38, at 75.
77. 487 F.2d 1345.
78. Id. at 1348.
science; the court concluded that the copying was fair use.\textsuperscript{79} The language of the opinion was not forceful and merely stated that the problem of balancing the interests of science with the publisher's property rights called for legislative guidance.\textsuperscript{80} The court demonstrated this by confining the finding of fair use to the period prior to Congressional action.

Obviously there was disagreement between the\textit{Sony} trial court and the appellate court over\textit{Williams}' persuasiveness. The trial court found\textit{Williams} value to be a "demonstration of the relevance of the fair use doctrine . . . when a copyright protection is tested by new technology and noncommercial use."\textsuperscript{81} Conversely, the appellate court felt that\textit{Williams}, "strain[d] fair use beyond recognition and undermín[e]d our traditional reliance on the economic incentives provided to authors by the copyright scheme."\textsuperscript{82} The real value of\textit{Williams} lies in its plea for Congressional action highlighting the inadequacy of copyright law as a means of resolving disputes born of technological advances. Furthermore, new technology cases pose difficult damage questions because the ramifications of the advances often are not understood. Thus, courts can only guess as to the potential harm.\textsuperscript{83}

The\textit{Sony} trial court was "hesitant to identify, the probable effects of home-use copying."\textsuperscript{84} As in\textit{Williams}, the plaintiff's allegation of injury was found to be without merit. Reasons for this reluctance can be found in the evolving marketing system and the numerous speculative assumptions upon which a finding of harm must be based.\textsuperscript{85} However, "[t]he central question in the determination of fair use is whether the infringing works tend to diminish or prejudice the potential sale of the plaintiff's work."\textsuperscript{86} Home videotapers obviously use copies for the same purpose as the original. Thus, taping decreases the economic value of

\begin{itemize}
\item\textsuperscript{79} Id. at 1354.
\item\textsuperscript{80} Id.
\item\textsuperscript{81} Sony I, 480 F. Supp. at 450.
\item\textsuperscript{82} Sony II, 659 F.2d at 970.
\item\textsuperscript{83} Calculation of damages and thorough discussion of potential remedies is beyond the scope of this article.
\item\textsuperscript{84} Sony I, 480 F. Supp. at 452.
\item\textsuperscript{85} Id.
\item\textsuperscript{86} Sony II, 659 F.2d at 974 (quoting M. Nimmer, supra note 65, at § 13.05(E)(4)(c)).
\end{itemize}
the work. Similarly, a strong correlation probably can be found between the decrease in record album sales and the increase in blank cassette sales. 87

Sony argued the harm had not occurred and there is no proof it would. The movie studios often sell their products three times, (1) to theaters, (2) as a videotape, and (3) to television networks under a royalty agreement. Thus, movie studios are compensated before home videotapes can be made. Despite Sony’s argument the appellate court remanded the case to the trial level to calculate damages. In copyright infringement cases a showing of potential damages is sufficient to support a judgment for the copyright holder and the copyright act provides minimum damages when actual damages cannot be proven. 88

The studios eventually succeeded in fixing liability on Sony Corporation, Sony Corporation of America, Doyle Dane Bernback, Inc., and the retail stores for the copyright infringement by the videotape recorder owners based on the theory of contributory infringement. Under this theory, one is guilty of contributory infringement if he, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” 89 Clearly, the corporate defendants knew and encouraged the copying of copyright works from television broadcasts. Indeed the primary selling point of the Betamax product and its primary use is to reproduce television programs. Thus, combining the knowledge element with the criteria for infringement, “[t]he corporate [defendants] are sufficiently engaged in the enterprise to be held accountable.” 90

The Supreme Court recently agreed to review the decision by the Ninth Circuit that home videotaping of television programming constitutes a violation of federal copyright law. 91 Attorneys General from twelve states have filed amici curiae petitions to challenge the appellate ruling. The thrust of their novel theory is that “[t]elevision is no longer a luxury; it has become a necessity . . . and accessibility to the full range of television programming is an essential component of the well

87. Id.
90. Sony II, 659 F.2d at 976.
91. 50 U.S.L.W. 3982 (U.S. June 14, 1982).
rounded citizen.” Therefore, since Betamax allows increased access it contributes to public welfare.

The Supreme Court should not accept this approach because the concept of fair use is grounded in the dissemination of knowledge and progress in the arts and sciences, rather than entertainment. To deal with this case the Court should either defer to the legislature or affirm the appellate courts unpopular application of the law.

Conclusion

The Courts are required to deal solely with the construction and constitutionality of statutes, not their wisdom. It seems evident that the continuing evolution of technology will strain archaic copyright law. The Supreme Court is faced with the unenviable task of steering between Scylla and Charybdis. The Scylla of enforcing a clear copyright statute which fails to anticipate the emergence of mass video reproduction capabilities and the Charybdis of judicially encroaching upon the legislative branch by liberally interpreting a statutory exception where one does not exist. Congress should act to make a distinction between commercially motivated recording and in-home videotaping. This will relieve the court of an obligation to make an unpopular decision under the present copyright act.

Howard S. Toland


Reviewed by Arthur S. Miller*

The Brandeis/Frankfurter Connection¹ is an interesting book, even an important one. It should forever bury the notion that Supreme Court Justices, as individuals as well as members of a collegial Court, are political eunuchs. We all should know that the Court as an institution is a significant part of the political process, making public policy for the nation. That is not Professor Murphy’s focus. Rather, he shows in massive and convincing detail how two highly respected and revered men, who sat on the High Bench in this century, engaged in covert political activity after becoming Justices. Murphy, a political scientist at Pennsylvania State University, relates this in highly readable style. I see two faults in the book—one minuscule, the other major. The minor fault is a number of tiny factual errors (some are listed below), which do not damage Murphy’s main message but which do bespeak some carelessness in proof reading and copy editing. The major fault is that Murphy really does not know quite what to make of his findings.

First, the message: Justice Brandeis kept Felix Frankfurter, as professor of law at Harvard, on his personal payroll from the time that Brandeis became a judge. The purpose of this was to permit Frankfurter to promote causes that Brandeis could not appropriately advocate from the bench. By this means, Brandeis kept his finger on many of the important public-policy issues of his tenure (1916-1938), including New Deal legislation. Frankfurter learned well; his pervasive personal intervention into the political arena exceeded that of Brandeis. There was little of any significance that escaped his attention. Murphy reveals much, but not all, of this.

Next, the nitpicks: Congressman Celler is not “Cellar,” as Mur-
phy writes; the destroyers-for-bases deal in 1940 could not have been rejected by the Senate, for it was never submitted to it; Lewis Strauss is Louis in the text and Lewis in the end-note; he uses the word "appeal" in a generic sense, as a synonym for certiorari; he seems to think that "fortuitous" means fortunate and that "enormity" means enormity. There are a few others, but none of substantial importance. All of this is mentioned, not to denigrate the book but to indicate that Murphy was ill-served by the editors of a quality press and by those who read the manuscript. No doubt these minor lapses will be used in efforts to show that Murphy's main conclusions are invalid. That simply is not true.

Finally, what should be made of two Supreme Court Justices being important secret political actors while on the bench? Murphy treats this question gingerly, even disingenuously. Consider this statement: "My contention that Brandeis and Frankfurter wielded, in camera, enormous political influence does not accuse either man of deciding cases before the Supreme Court to suit his own perception of political rectitude." Murphy asserts, without a scintilla of evidence, that "both Brandeis and Frankfurter should properly be classified among those justices who were best able to separate their political views from their judicial decisions." Well, maybe . . . and maybe not. Can one think of any important case other than the Steel Seizure Case, in which Frankfurter, an intense patriot and close presidential adviser, did not vote for the government? One is hard put to find any. This is not to say that he always voted for the government; but, rather, that he almost invariably did so in significant matters. One need not multiply examples: Dennis v. United States, sustaining thought control, and Kore-
matsu v. United States,\textsuperscript{13} upholding the penning up of native-born Americans of Japanese ancestry, in concentration camps, are evidence enough. His political views, that is to say, coincided almost exactly with his judicial decisions.

Sometimes Frankfurter wanted it both ways: he wanted to be a judicial self-restrainer and yet seek, secretly, to alter the vote of the Court politically. \textit{Louisiana ex rel. Francis v. Resweber},\textsuperscript{14} a case Murphy does not mention, provides the classic example. There, Frankfurter—a lifetime opponent of capital punishment—voted to uphold Louisiana’s second attempt to kill Willie Francis.\textsuperscript{15} But immediately after the vote by the Court, Frankfurter secretly tried to get Francis’s death penalty commuted by the Governor of Louisiana.\textsuperscript{16} In his concurring opinion, Frankfurter asserted that the standard to determine whether due process of law had been violated was “that consensus of society’s opinion”\textsuperscript{17}—an extraordinary statement from one who surely knew that due process and other limitations on government were placed in the Constitution precisely because the majority—the “consensus of society”—could at times be tyrannical.

Frankfurter, furthermore, espoused judicial self-restraint, while assiduously practicing the most extreme type of activism as an individual. This extrajudicial activity is by no means aberrational, as Murphy notes in his valuable appendix listing such actions by other justices from 1789 to 1916, but few had the consummate \textit{chutzpah} to do it while asserting that the Supreme Court should be likened to a monastery:

When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it’s a monastery. And this isn’t idle, high flown talk. We are all poor human creatures and it’s difficult enough to be wholly intellectually and morally disinterested when

\textsuperscript{13} 323 U.S. 214 (1944).
\textsuperscript{14} 329 U.S. 459 (1947).
\textsuperscript{15} Id. at 466.
\textsuperscript{16} L. Baker, \textit{Felix Frankfurter} 281-86 (1969). Frankfurter’s political actions were, as Murphy details, usually directed toward the federal government. The \textit{Francis} episode is an unsuccessful effort to intervene in Louisiana politics.
\textsuperscript{17} 329 U.S. at 471 (Frankfurter, F., concurring).
one has no other motive except that of being a judge according to
one’s full conscience.18

I have maintained elsewhere that Frankfurter is “the most overrated
judge in this century and perhaps in American history,”19 and see no
reason to alter that judgment. Certainly Murphy’s book gives added
evidence to buttress such a conclusion.

Professor Murphy does pose two questions: what standards about
extrajudicial activity existed when Brandeis and Frankfurter were on
the bench, and what standards should there be? The pity is that he
contented himself with asking the questions, not attempting to answer
them. Perhaps that is enough. Perhaps it is enough that he has spent
years in discovering the facts, and then letting those facts speak for
themselves.

Finally, this is, of course, a controversial book. Already one of
Brandeis’ idolators, Professor Robert Cover of the Yale Law School,
has lamented that Brandeis was “framed.”20 His diatribe in The New
Republic is at best a cheap shot at Murphy, at worst an attempt to
blacken an important contribution to the literature. Professor Murphy
has performed a genuine service, heightening our awareness of the Su-
preme Court and the judicial process. For this he should be com-
mended. This book deserves to be required reading for every student of
constitutional law as well as all concerned and thoughtful citizens. If its
minor errors are corrected in a subsequent printing, it deserves serious
consideration for a Pulitzer Prize or National Book Award.

18. Murphy, supra note 1, at 9.
19. A. Miller, In Defense of Judicial Activism, Supreme Court Activism
And Restraint 176 (1982).
at 17.
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