ARTICLES
Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward a Level Playing Field
Scott W. Dunlap
Cogeneration and Small Power Production: Florida's Approach to Decentralized Generation
Jeffrey Fuller
Comparative Analysis: Agents' Personal Liability on Negotiable Instruments
Clifton Cox

NOTES
Constitutional Considerations Pertaining to Florida's Citrus Freeze Embargo: Are Due Process and Delegation of Power Problems Frustrating the Purposes of the Citrus Code?
The Current State of Termination of Medical Treatment Case Law
Recovery for Lost Parental Consortium: Nightmare or Breakthrough?
Parental Liability for the Torts of their Minor Children: Limits, Logic & Legality

COMMENT
The Shrinking of the Fourth Amendment Umbrella: Oliver v. United States
Contents

Carolyn S. Rubin: In Memoriam

Articles
1 Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward a Level Playing Field
Scott W. Dunlap
25 Cogeneration and Small Power Production: Florida’s Approach to Decentralized Generation
Jeffrey Fuller
49 Comparative Analysis: Agents’ Personal Liability on Negotiable Instruments
Clifton Cox

Notes
115 Constitutional Considerations Pertaining to Florida’s Citrus Freeze Embargo: Are Due Process and Delegation of Power Problems Frustrating the Purposes of the Citrus Code?
141 The Warren S. Henderson Wetlands Protection Act of 1984: Enough Protection?
159 The Current State of Termination of Medical Treatment Case Law
183 Recovery for Lost Parental Consortium: Nightmare or Breakthrough?
205 Parental Liability for the Torts of their Minor Children: Limits, Logic & Legality

Comment
231 The Shrinking of the Fourth Amendment Umbrella: Oliver v. United States
Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward a Level Playing Field

Scott W. Dunlap*

I. Introduction

The Florida banking market is one of the most coveted in the country.¹ The Sunshine State is one of the fastest growing states in the nation,² and this growth provides increased deposits in the State's banks. As long as this growth continues, new businesses which need funds to begin operations will be attracted to Florida. In short, the influx of people and businesses into the state assure that Florida will remain a deposit-rich state, requiring large amounts of capital to fund its continued growth. Because banks depend on both obtaining deposits and making loans for their existence, the Florida banking market is quite attractive.

Until recently, Florida excluded out-of-state banks and bank holding companiesª from its retail banking market.⁴ This did not mean that

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2. From the previous census count, April 1, 1980, to July 1, 1982, Florida's population is estimated to have climbed from approximately 9,746,000 to 10,416,000, for a percentage change of 6.9. These increases, when compared to the other states, rank Florida third in population increase and fourth in percentage increase. UNITED STATES BUREAU OF THE CENSUS 1983 FLORIDA STATISTICAL ABSTRACT 4 (F. Terhune ed.).

3. A bank holding company is presently defined as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act." 12 U.S.C. § 1841 (1983). Control is characterized by direct or indirect control or twenty-five percent or more of any class of voting securities of the bank or company, or controlling the election of a majority of directors or trustees.

such companies were prohibited from providing other financial services.\textsuperscript{5} Out-of-state companies have employed trust companies, investment advisory offices, loan production offices, EPT facilities, and other methods to establish their physical presence in Florida and other states.\textsuperscript{6} Financial giants such as Citicorp and Chemical Bank, two New York based banks, continue to expand their Florida financial operations.\textsuperscript{7} By expanding their Florida wholesale operations, these two banks, and many other out-of-state banks alike, hope to have established a foothold in Florida when national interstate banking is allowed.\textsuperscript{8}

Two recent developments, however, have opened the Florida retail banking market for a select group of banks. North Carolina National Bank Corporation (NCNB), the largest bank holding company in the Southeast,\textsuperscript{9} aggressively entered the Florida banking market in 1981.\textsuperscript{10}

\begin{itemize}
\item[5.] Financial Services Industry-Oversight: Hearings Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, Part II, 98th Cong., 1st Sess. 411 (1983) (statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice) [hereinafter cited as Industry Hearings II]. McFadden and Douglas prevent banks from providing full service retail banks outside of their home states. They have not prevented banks from providing a wide variety of banking or related financial services on an interstate basis. \textit{Id.}
\item[6.] \textit{Id.} The Florida financial market has also been penetrated in recent times by out-of-state bank holding companies. In Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980), the Supreme Court struck down a Florida statute that prohibited out-of-state companies from establishing trust companies or investment advisory services in Florida. \textit{Id.} at 53.
\item[7.] Tampa Tribune, Sept. 21, 1983, at 6B, col. 1. Citicorp, Inc., the large New York based banking organization, has established Person-to-Person in Florida, its Southeast regional headquarters for its consumer lending service. Citicorp also bases Citicorp Acceptance Corp. and Citicorp Real Estate Investments in Florida, and plans to relocate its international travelers check processing operation to Tampa. Chemical Bank of New York owns about 25 percent of Florida National Banks of Florida, Inc., in Jacksonville, of which only 4.9 percent is common stock. \textit{Id.} See also Craddock, \textit{Here Comes Citicorp's Lean, Meran Team}, FLA. TREND, May 1984, at 55 (Citicorp's aggressive strategy in the Florida financial markets).
\item[8.] See Financial Services Industry-Oversight: Hearings Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, Part II, 98th Cong., 1st Sess. 105 (1983) [hereinafter cited as Industry Hearings II].
\item[9.] At year's end 1983, NCNB had total assets of approximately $12.81 billion dollars and total deposits in excess of $8.81 million dollars. NCNB 1983 Annual Report 1 (1984).
\item[10.] \textit{Am. Banker}, June 19, 1981, at 23. Chairman Thomas Storrs warned that banks must take advantage of every opportunity to broaden their market and fit their products to their customers' needs, or they will find themselves in a bad way in the next
\end{itemize}
NCNB capitalized upon a "grandfather" clause contained in a Florida statute\textsuperscript{11} that was interpreted as an authorization for NCNB to acquire commercial banks in Florida.\textsuperscript{12} Since NCNB's initial acquisition, the company has acquired many other banks, the most recent being one of Florida's largest holding companies.\textsuperscript{13}

The second development is the Florida legislature's passage of the "Regional Reciprocal Banking Act of 1984."\textsuperscript{14} This new law authorizes bank holding companies in other southeastern states\textsuperscript{15} that pass similar reciprocal legislation to acquire or merge with Florida banks or bank holding companies. When the law takes effect,\textsuperscript{16} regional bank holding companies will eagerly enter the Florida market.\textsuperscript{17}

Both of these changes illustrate problems that arise when Board or State action is taken that allows conditional, or limited, interstate banking. After outlining the regulatory background of geographic bank restrictions, this article will first examine the interpretive issues created by Florida's grandfather statute and then analyze the equal protection issues emanating from the State's new regional banking law. The problems underlying these legal issues will also be noted. Finally, this article will explain that while limited interstate banking will be allowed for the present, and the underlying problems will be ignored, nationwide interstate banking is the inevitable level playing field.

\textsuperscript{11} FLA. STAT. § 658.29(3)(d) (1983). Generally, a grandfather clause is a provision in a new law or regulation exempting those already in, or part of, the existing system which is being regulated, or an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new regulation. BLACK'S LAW DICTIONARY 629 (rev. 5th ed. 1979).
\textsuperscript{14} 1984 Fla. Laws 42 (to be codified at FLA. STAT. § 658.295).
\textsuperscript{15} The states in the "region" are Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. Id. § 1.
\textsuperscript{16} The Act takes effect on July 1, 1985, or the date on which regional states having twenty percent or more of the total regional banks deposits, excluding Florida, have enacted and have in effect reciprocal statutes, whichever occurs sooner. Id.
\textsuperscript{17} Sun Banks and Trust Company of Georgia have announced a merger effective July 1, 1985. The banks will be run independently at first, but plans call for the merged holding company to be based in Atlanta. Other likely combinations are First Atlanta and Southeast, and Citizens and Southern Georgia. Talks and Predictions, FLA. TREND, Aug. 1984, at 24.
II. Regulatory Background

A fear of too few banks having too much power permeates American banking regulation. 18 Geographic limitations on bank operations and expansions reflect this concern. Such limitations on bank holding companies 19 were specifically addressed in the Bank Holding Company Act of 1956. 20 Section 3(d) of the Act, commonly referred to as the Douglas Amendment, prohibits Federal Reserve Board approval of an application for an interstate bank acquisition unless the acquisition of such shares of a state bank by an out-of-state bank holding company is specifically authorized by the state in which such a bank is located. The authorization cannot be implicit. 21 This exemption recognizes the historically weighty state interest in whether or not to allow local banks to be controlled by out-of-state bank holding companies. 22 Expansion across state lines is permitted only if the host state expressly agrees by statute.

The Florida legislature, in 1972, supplemented the Douglas Amendment prohibitions by enacting section 649.141 of the Florida Statutes. This legislation provided that no out-of-state bank holding company, bank, or trust company shall acquire, retain, or own the control over any Florida bank or trust company. 23 The legislature made several exceptions to this prohibition. In particular, subsection (3) excepts from the statute's restrictions any bank, trust company, or bank holding company, the operations of which are principally conducted outside this state, which, on December 20, 1972, owned all the assets of or control over a bank or trust company located within and doing business within this state. 24 NCNB based its effort to enter the Florida banking market on the effect and scope of this subsection.

18. See Haywood, Trade Groups Choose Sides, ECON. REV., May 1983, at 66, 66 (the three specific goals of banking regulation are: to insure market stability, to prevent undue concentration of market power, and to guard against unfair dealing).
19. See supra note 3.
22. Lewis, 447 U.S. at 38. The Court accepted the submission that as a matter of history and as a matter of present commercial reality, banking is a profound local concern.
III. Board Action and Interpretive Issues

NCNB applied to purchase the First National Bank of Lake City, Florida, on June 24, 1981. The Federal Reserve Board first considered the legality of the proposed acquisition under state and federal law before the proposal was evaluated based on the statutory factors contained in section 3(c) of the Bank Holding Company Act. Because the Board received comments questioning NCNB's authority under section 658.29 and under the Douglas Amendment to acquire First National Bank of Lake City, the proper interpretation of section 658.29 was put at issue. In approving NCNB's application, the Board interpreted section 658.29 to specifically authorize NCNB's acquisition of Florida banks. The history and purpose of section 658.29 provides a starting point for evaluating this administrative decision.

A. Legislative History of Section 658.29

The Florida financial market remained relatively free from out-of-state holding companies until 1971. As the desirability of the Florida market increased, ways to avoid the Douglas Amendment's prohibition surfaced. Northern Trust Company, an Illinois-based bank holding company, acquired Security Trust Company of Miami. Because interstate acquisitions of trust companies are not prohibited by the Douglas Amendment, this acquisition was lawful.

The legislature responded in 1972 by enacting section 659.141 of

25. AM. BANKER, June 26, 1981, at 3. The application was delivered to the Fifth District Federal Reserve Bank in Richmond, where the validity was to be checked. The application would then be sent to Washington for a judgment on the merits by the Board.


27. In fact, the original idea for, and basic outline of, the following argument comes from the comments received from the Florida Bankers Association, State Exchange Bank and Columbia County Bank. See Comments of Florida Bankers Association, The State Exchange Bank, NCNB, 68 Fed. Res. Bull. 54 (1982).


30. See 12 U.S.C. § 1842(d) (1983). The Douglas Amendment only prohibited the acquisitions of banks, and Florida has no further prohibitions at this time.
the Florida Statutes.\textsuperscript{31} This statute prohibited out-of-state banking organizations from owning or acquiring Florida trust companies or investment advisory businesses providing such services to banks or trust companies.\textsuperscript{32} This legislation attempted to close a loophole in federal banking law\textsuperscript{33} and keep large, out-of-state banks from entering the lucrative trust business.\textsuperscript{34} For equitable\textsuperscript{35} and legal reasons,\textsuperscript{36} "grandfather" exemptions were added to the new law. In this manner Nortrust was grandfathered in by virtue of its ownership of Security Trust, and NCNB was grandfathered in because of its pending application to buy the Northern Trust Company of Florida.

An increase in pressure on the Florida financial market opened up loopholes in the newly enacted section 659.141. The Royal Trust Company, a Canadian bank holding company, sought and received the Board's approval to acquire Inter National Bank of Miami.\textsuperscript{37} The Douglas Amendment was inapplicable because Royal Trust was neither a bank nor a bank holding company under the Bank Holding Company

\footnotesize{31. FLA. STAT. § 659.141 (Supp. 1971).}

\footnotesize{32. Id.}

\footnotesize{33. \textit{Hearings on H.B. 3784 Held Before the House Business Regulation Committee} 1 (Mar. 2, 1972) (reference to transcriptions of the tapes of the hearings on Florida House of Representatives Bill 3874, which became Fla. Laws ch. 72-96 (1970) (codified at FLA. STAT. § 659.141 (1971), and of which original tapes can be found in the State of Florida Archives) [hereinafter cited as \textit{State House Hearings}]. Representative Culbreath, the primary sponsor of the House bill related that the House wanted to keep the trust business in the State, without having the money siphoned off by out-of-state trust companies. This prohibition was designed to accomplish that purpose by closing the gap in federal law. \textit{Id.}}

\footnotesize{34. \textit{Hearings on S.B. 916 Held Before the Senate Commerce Committee}, 2-3 (Mar. 2, 1972) (reference to transcripts of tapes of hearings on Florida Senate Bill 916). [hereinafter cited as \textit{State Senate Hearings}]. Bruce Culpepper of the Florida Association of Bank Holding Companies explained that the loopholes in the law were allowing out-of-state banks to do indirectly what they were prohibited from doing directly. \textit{Id.}}

\footnotesize{35. \textit{See Whitehead, Interstate Banking: Taking Inventory}, ECON. REV., May 1983, at 4, 5. Because legislatures are usually faced with restricting activities after innovative organizations have engaged in the activity, in some cases it would be detrimental or impossible to require the organization to cease the activity, even though a general prohibition is desirable. In these cases, the equitable approach is to allow the innovative organization to continue, but not expand the questioned activity. \textit{Id.}}

\footnotesize{36. \textit{See State Senate Hearings}, supra note 34, at 5. Requiring divesture might have made the statute illegal.}

The Board also ruled that the Royal Trust acquisition did not violate Florida law because "the State's laws did not forbid a foreign trust company from acquiring control of a national bank operating a trust department." Bankers Trust New York Corporation also sought access to the Florida financial market. Bankers Trust applied to the Board for approval to establish an investment advisory business in Florida. There was no violation of federal law because an advisory business is not a bank, but rather, a permitted related activity under the Bank Holding Company Act. Florida prohibitions were avoided because section 659.141 only forbade out-of-state holding companies from acquiring such businesses that provide service to Florida banks or trust companies, and Bankers Trust planned to provide investment advice to individuals.

Before the approval of the Bankers Trust application, however, the Florida Legislature amended section 649.141 to further prohibit out-of-state organizations from acquiring Florida holding companies, banks, or any type of investment advisory business. The definition of "holding company" was also broadened so that foreign banks could be stopped from entering the Florida market. Again, as with the original enactment of section 659.141, the purpose of the law was to close loopholes in the state's ban on out-of-state entry into the Florida banking industry. In addition to noting that the new bill would close the Bankers Trust loophole, Representative Hartnett explained during the

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38. The term "bank," as defined in section 2 of the Bank Holding Company Act, does not include banks in foreign countries. 12 U.S.C. § 1841(c) (1983).
44. See Fla. Stat. § 659.141 (1973) (a version of § 659.141 as amended by Fla. Laws ch. 72-726 (1972)).
45. Id.
47. Proceedings of the House of Representatives Concerning H.B. 25-A, 4 (Nov. 30, 1972) (transcripts of Florida House floor debate concerning eventual amendment to Fla. Stat. § 659.141, available in State of Florida Archives) [hereinafter cited as Florida House Debate]. Hartnett observed that the legislators did not foresee the possibility of out-of-state organizations establishing investment advisory services. This amendment would prevent future entities from entering Florida in the same manner as
House debate that the new bill would still prohibit out-of-state financial institutions from purchasing Florida banking institutions.48

The critical change in section 659.1412 came with the amendment of the section's exceptions. The legislature added subsection (3)(g) to provide that the prohibitions and restrictions of the section shall not apply to any bank, trust, company, or holding company, the operations of which are principally conducted outside this state, who, upon the effective date of this act owned all the assets of, or control over, a bank or trust company located within and doing business within the state.49 The purpose of this subsection, the current subsection (3)(d) of section 658.29, is to prevent the bill from being unconstitutional because of its retroactive effect on existing contracts.50

B. Authorization Under Florida and Federal Law

Substantively, the Board's ruling that Florida law allowed NCNB to buy a Florida bank may be lacking in several respects. The Board ruled that since section 658.29 was clear and unambiguous on its face, legislative intent must be derived from the words.51 However, there is case law holding that legislative intent must guide the court and be given effect, even though that intent may contradict the strict letter of the statute.52 Whenever possible, the court's construction of a statute should include the statute's legislative history, the evil to be corrected, an indication of the intent of the legislature, the nature of the subject regulated, and the object sought to be obtained.53

The history of section 658.29 reveals that Florida desired to fill in the gaps of the Douglas Amendment's prohibitions and not to enlarge

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48. Id. at 5-6. Representative Hartnett explained that out-of-state organizations "cannot now, purchase a banking institution, in the stock exchange or any other form like that [sic]." Id.
52. See State v. Webb, 398 So. 2d 820 (Fla. 1981) (legislative intent is the polestar by which court must be guided, and this intent must be given effect even though it may contradict strict letter of statute).
out-of-state banking companies' rights. Legislators were forced to let in Royal Trust because it was already operating in Florida, but wanted to put a stop to such future acquisitions. To accomplish this, the grandfather clause, or current section 658.29(3)(d), had to parallel the expanded prohibitions in the main statute. The clear intent was to allow these organizations to continue to conduct business that was now unlawful under Florida law. Florida had approved ten previous acquisitions by the two other grandfathered organizations. However, each of these acquisitions involved the same type of Florida organization as the acquiring institution had owned prior to the grandfather date. Nothing in the legislative history evinces an intent to allow the grandfathered organizations to expand into businesses in which they were not then engaged.

The other half of the interpretive issue is whether section 658.29 suffices under federal law as a specific authorization for out-of-state bank holding companies to acquire Florida banks. In answering this question affirmatively, the Board relied on a Court of Appeals interpretation of a similar Iowa statute. In that case, the reviewing court agreed with a Board's ruling which implicitly accepted the sufficiency of the authorization under the Douglas Amendment of an Iowa statute. The Iowa statute provided that nothing in the statutes should be construed to authorize an out-of-state bank holding company to acquire any interest in any Iowa bank, unless such bank holding company was,

54. See supra notes 31-50 and accompanying text. See also BT Investment Managers, Inc. v. Lewis, 559 F.2d 950, 954 n.13 (5th Cir. 1977) (characterized Fla. Stat. § 659.141 as a brazen attempt to stop out-of-state competition).

55. See supra notes 37-39 and accompanying text. See also Am. Banker, Dec. 8, 1972, at 2. The bill was an outgrowth of unsuccessful efforts to keep the $1.9 billion-asset Royal Trust Company of Montreal from acquiring Inter National Bank of Miami.

56. State Senate Hearings, supra note 34, at 5. Culpepper voiced his concern that requiring divesture of something already approved is legally questionable. He felt an amendment grandfathering in the organizations would be an acceptable solution. Id.


58. Id. at 56-57 n.10. The Board also noted that nothing in the statute restricts a grandfathered company's acquisitions to the grandfathered activity. Because the statute refers to "bank and trust company" in the alternative, the Board concluded that the grandfathered company can acquire banks and trust companies. Id.


on January 1, 1971, registered with the Federal Reserve Board as a
bank holding company, and on that date owned at least two banks in
the state.62

The Board relied on the fact that the Florida statute was couched
in the same language as the Iowa statute, which is an exception to a
prohibition on interstate banking acquisitions.63 But this does not nec-
essarily mean that the Florida statute is a specific authorization. The
Iowa statute states that if certain grandfathering criteria were met,
then the statute specifically authorized that qualifying out-of-state
holding companies could acquire Iowa banks. The legislative history of
the Iowa statute makes this intent to authorize an acquisition clear.64 It
is questionable, indeed unlikely, that section 658.29 can be read the
same way. A logical reading of section 648.29(3)(2) would mean re-
moving NCNB from the section's prohibitions, but leaving no authori-
ization.65 The federal prohibitions would, therefore, still bar NCNB
from acquiring Florida banks.

C. Continuing Problems from Such Board Actions

Although NCNB probably should not have been initially allowed
to expand into the Florida commercial banking market, that expansion
is a fact.66 However, the NCNB decision, as well as subsequent deci-
sions, illustrates that problems arise from these Board actions. Board
decisions on interstate bank expansion may not always be consistent
with the relevant state policy on interstate banking. In some cases, the
Board may even believe they are constrained by the Act to approve a
proposal that potentially may undermine the Act's policies.67 In addi-

64. See Iowa Independent Bankers, 511 F.2d at 1294-95.
65. The Board also relied on the fact that Florida had treated the language in
the Board is confusing issues, because this question was not raised by the expansion
within Florida of Nortrust or of Royal Trust. Royal Trust was a foreign bank company
and not subject to the Douglas Amendment. Northern Trust's acquisitions were not
subject to Douglas because Northern acquired trust companies.
66. Laches would bar a suit if there is unreasonable delay in bringing suit, and
prejudice is caused by the delay. Independent Bankers Association of America v. Hei-
mann, 627 F.2d 486 (D.C. Cir. 1980). More important, however, is the nature of this
ruling and others like it.
tion to *NCNB, U.S. Trust* illustrates these problems.

U.S. Trust Corporation, a New York bank holding company, applied for Board approval to add the acceptance of time and demand deposits and the making of consumer loans to the activities of its Palm Beach subsidiary, U.S. Trust Company. This proposal was not prohibited by the Douglas Amendment because the Florida subsidiary would not be a bank as defined in section 2(c) of the Bank Holding Company Act. No commercial loans would be made by U.S. Trust Company. The Board recognized the possibility of abuse of the Act’s policies, but nevertheless approved the application. The dissent stated that approval would have the practical effect of allowing interstate banking without the express authorization of the state law. Therefore, the dissent viewed the Board as not being limited by the technical “bank” definition, but rather as possessing authority to deny the application by using its broad discretionary powers to prevent evasions of the Act.

Agreement or disagreement with the *NCNB* and *U.S. Trust* rulings is not the end of the problem. Inherent in these Board rulings is the decision to allow interstate banking for certain bank holding companies. These rulings are not always in accord with state policy and may threaten the efficacy of the Douglas Amendment. Additionally, banks that remain excluded from a state market, as they are from Florida’s will begin to question the legitimacy of this piecemeal approach.

68. *Id.*
69. *Id.* at 371.
70. *Id.* at 372.
71. *Id.* The Board reaffirmed its views that an institution that is chartered as a bank and accepts transaction accounts from the public should be subject to the Act’s policies.
72. *Id.* at 373. Approval was subject to three conditions that the Board felt would ensure U.S. Trust’s compliance with § 3(d).
73. *Id.* at 374 (dissenting statement of Governor Rice).
74. *Id.*
75. In addition to U.S. Trust, four more bank holding companies have received permission to operate Florida “no-bank banks,” and several hundred such applications are pending nationwide. Regulators deplore the trend of this de facto interstate banking, but believe present law provides no hurdles to the developments. State legislators are beginning to fear that, in this manner, money center banks will have dominance before a substantial number of regional banks can be established. Magnusson, *Lawmakers Gingerly Circle the Hot Non-Bank Bank Issue*, FLA. TREND, July 1984, at 23.
76. Bank of New York (BNY) applied to acquire a Connecticut bank, using
IV. State Action and the Regional Reciprocal Banking Act

Florida recently chose to expressly allow certain bank holding companies in the Southeast to enter the Florida banking market. Entry for the privileged states was provided by the passage of the Regional Reciprocal Banking Act of 1984. The Regional Act authorizes the acquisition or merger of a Florida bank or bank holding company by or with a bank holding company whose principal place of business is within the region, but only if the laws of the other state permit the reciprocal acquisition of banks or bank holding companies in that state by Florida bank holding companies. The Regional Act is similar to the regional legislation previously passed by several New England states. The relevant New England statutes have already been used to support a few New England interstate transactions, and at least one southeastern merger that will become effective on the Regional Act’s effective date has been announced.

The rationale for the Regional Act is that it will enable banks in the Southeast to merge and strengthen themselves against takeover attempts by money-center banks when nationwide interstate banking is

Connecticut’s enactment of a regional statute as authority. BNY argued that by this enactment, the Douglas Amendment’s prohibitions were lifted, and therefore that all bank holding companies could now enter Connecticut. The Board rejected this argument, saying that BNY’s position was based almost entirely on a textual analysis of the Douglas Amendment that, if accepted, would undermine state policies. See Bank of New York Co., Inc., 70 Fed. Reg. Bull. 527 (1984). But query, why other applications based on a textual analysis, such as NCNB and U.S. Trust, have succeeded.

77. See supra notes 14-17 and accompanying text.
79. This Act expressly overrides Florida’s prohibition on interstate banking for the regional status. An “anti-leapfrogging” provision is included that requires divesture of any Florida bank or bank holding company by any other bank holding company that ceases to be a regional bank.
82. See supra note 16.
83. See supra note 17.
inevitably permitted. In the effect of the Act, however, is that southeastern banks may now compete in Florida to the exclusion of banks in all of the other states. Constitutional guarantees arise, given the discriminatory nature of such a law. The issue is whether these state laws limiting entry into the states to “regional” bank holding companies are permissible under the United States Constitution. Although the issue raises questions under the Commerce Clause and the Compact Clause, this article will test the Regional Act against the Equal Protection Clause.

A. The Traditional Test for Economic Regulation

The fourteenth amendment commands that no state shall deny a person within its jurisdiction equal protection of the law. This doctrine prohibits a state’s unequal treatment of persons, absent adequate justification. Courts have articulated three justification standards: the two traditional tiers of the rational relation test, the compelling interest

84. See Graham Leads the Interstate Charge, FLA. TREND, Oct. 1983, at 26. Florida does not view the markets in those states as presenting big banking opportunities, but rather, as a chance to promote regional mergers that will strengthen Southeast’s banks.

85. The constitutionality of the New England regional reciprocal laws is presently being litigated. See infra notes 130-36 and accompanying text.

86. U.S. CONST. art. I, § 8, cl. 3. The legal evaluation under the commerce clause turns on whether the Douglas Amendment allows a state to discriminate against out-of-state bank holding companies on the basis of their location. One view is that the Douglas Amendment eliminates any commerce clause problems. See, e.g., Hawke, Are State Laws Permitting Interstate Banking Constitutional? AM. BANKER, Dec. 15, 1982, at 4, col. 1. Another view suggests that the Douglas Amendment cannot support the right of a state to burden interstate commerce by deciding which states may enter its territory. See Golembe, Massachusetts and Interstate Banking, 2 BANKING EXPANSION REP., 1, 1 (No. 2 1983).

87. U.S. CONST. art. I, § 10, cl. 3. A compact clause violation would be found if the scheme would have a tendency to increase the political power of the states in a way that would encroach upon federal supremacy. United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 471 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893); New Hampshire v. Maine, 426 U.S. 363, 369 (1976). However, Congress could consent to the legislation.


89. Id.

test, and the sliding scale of strictness test. The rational relation test is applied in the area of economic regulation when no fundamental right or suspect classification is involved. The test has been stated to mean that the statute must reasonably relate to a valid state purpose and will only be held unconstitutional in violation of the equal protection clause when the classification results in arbitrarily disparate treatment. The Supreme Court took such a deferential approach in City of New Orleans v. Duke. The Court upheld the grandfather clause to a New Orleans ordinance which excepted from the ordinance's prohibition against street vendors in the French Quarter those vendors who had continuously worked in the Quarter for eight years. The Court characterized the ordinance and its grandfather clause as solely an economic regulation, and then stated that in this area, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. The Court then applied the rationality test to the grandfather clause and found that the city's objective was legitimate, and that the city's classification rationally furthered that objective. Therefore, the ordinance was not a constitutionally impermissible denial of equal protection.

City of New Orleans illustrates the doctrine that courts will give only cursory scrutiny to purely economic regulations attacked under

93. In re Estate of Greenberg, 390 So. 2d 40, 42 (Fla. 1980).
95. Id. at 304. The two vendors who qualified under the grandfather clause had operated in the area for over 20 years, rather than eight. Id. at 305. The appellee had operated in the French Quarter for two years before the ordinance was amended. Id. at 298.
96. Id. at 303. Wide latitude is given states in the regulation of their local economies under their police powers, and rational distinctions may be made with less than mathematical exactitude. Id.
97. Id. at 304. The objective of the provision was to “preserve the appearance and custom valued by the Quarter’s residents and attractive to tourists.” Id.
98. Id. at 304-05. The Court held that the ends fo the City’s means were rational: banning all vendors who had not become part of the distinctive charm of the Quarter and who had not built up substantial reliance interests in continued operation. A step by step approach, such as this, to solving problems will be upheld. Id.
99. Id. at 305. Note, also, that the Court overruled Morey v. Doud, 354 U.S. 457 (1957) because of that case’s testing a statute’s potential irrationality. Id. at 306.
Interstate Banking Developments

the equal protection clause. But a rational relation to a legitimate governmental object must still exist. Although testing the constitutionality of state laws which discriminate in favor of a region is a novel issue, reasoning in other cases is useful to hypothesize how courts would apply the rational relation test to Florida's Regional Act.

B. Florida's Regional Act

In Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, the District of Columbia Court of Appeals evaluated an equal protection claim somewhat similar to the instant issue. Iowa Independent Bankers involved a petition by an association of over four hundred Iowa banks to set aside a Federal Reserve Board order approving the acquisition of two Iowa banks by Northwest Bancorporation. The basis of Northwest's acquisition, as well as the lawsuit, was the previously mentioned Iowa statute. This statute prohibited out-of-state holding companies from acquiring Iowa banks unless such companies had owned, since 1971, at least two Iowa banks. When the statute was raised and passed in 1972, only Northwest qualified for this exception. No other out-of-state holding company owned any Iowa banks. The Iowa association first objected to the proposed Northwest acquisition, and upon Board approval appealed, arguing that the statute violated the equal protection clause of the fourteenth amendment. The court rejected the association's argument and found

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100. See id. The Court acknowledged, however, that different principles govern even economic regulations when constitutional provisions such as the commerce clause are implicated. As to what principles apply, the Court does not say, but it seems an intermediate standard would be applied because the regulation still falls short of affecting a fundamental right or a suspect class. Id. at 304 n.5.


102. 511 F.2d 1288 (D.C. Cir. 1975).

103. Id. at 1291. Some of the Association's members were new competitors of Northwest after the Board's ruling.


105. Id.

106. Iowa Independent Bankers, 511 F.2d at 1292.

107. Id.

108. Id. at 1292-94. The legality of the statute, then, was the basic issue. The Board refused to rule on the constitutionality of the statute under the authority of Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965). Whitney allows the Board to consider the applicability and effect of State legislation, but the constitutional validity of that legislation is presumed. Object-
no equal protection violation. 109

The appeals court agreed with Iowa that the state had a legitimate interest in protecting its banking structure from outside bank holding companies. 110 The question was whether Northwest could be excepted from the general prohibition of out-of-state bank holding companies without violating the equal protection clause. The crux of the court's decision was the finding that the Iowa legislature intended Northwest be allowed to compete in the Iowa market on the same basis as other Iowa banks. 111 This allowance was due to Northwest's pre-existing stake in the Iowa banking system. 112 As the court noted, the precise intent of the Iowa legislature was to treat Northwest as a domestic bank holding company. 113 Thus, the court adopted two classifications: (1) those bank holding companies with an existing stake in Iowa banking and (2) those companies with no stake in Iowa banking. Such a classification was supported by a rational basis, and is the type of grandfathering that has been repeatedly approved by the Supreme Court. 114 *City of New Orleans* also recognized the validity of such reasoning when it stated that the city could validly grandfather in vendors who had become part of the distinctive character and charm that distinguishes the Vieux Carré. 115

109. *Id.* The petitioner's initial error, the court said, was the incorrect definition of the classes created by the statute. That the line drawn by the statute on its face, between out-of-state banks owning less than two banks and those owning two or more banks, is without consequence, because of the realities of the Iowa market. *Id.* at 1295.


111. *Iowa Bankers*, 511 F.2d at 1294.

112. The court recognized that the pre-existing state in the Iowa banking system was obtained "by virtue of past ownership of in-state banks." *Id.* (emphasis in original).

113. *Id.* The court quotes from a report by the joint legislative committee that drafted the Iowa banking legislation to pinpoint the legislature's intent. The committee stated that it was undesirable to leave the state's banking structure open to outside entry, but that Northwest had demonstrated its good standing in the Iowa community and should be treated as a domestic bank holding company.

114. *Id.* at 1295. The court observed that the legislature intended to allow all pre-existing bank holding companies, whether in or out-of-state, to compete on an equal basis, while preventing any new out-of-state entries into the Iowa banking market. *Id.* Cf., *supra* notes 33-36 and accompanying text.

115. *City of New Orleans*, 427 U.S. at 305. It is interesting to note that the
The foregoing rulings sustain the power of the states to be reasonably selective in permitting out-of-state bank holding company entry.116 But using this rationale to support the Regional Act is difficult, if not impossible. Regional reciprocal legislation, unlike the common custom of grandfathering, discriminates on a novel basis.117 The concept of reciprocity connotes some feeling of fairness, but the relationship between a state's interest in controlling its banking structure and a state's securing of reciprocal entry rights is not entirely clear.118 Reciprocity, as a basis for excluding some out-of-state banks, becomes even less credible when a state imposes further conditions, such as location within a particular region, which effectively preclude many states from eligibility.119

Similar problems exist with the regional concept. In Lewis v. BT Investment Managers, Inc.,120 the Supreme Court struck down a Florida law which contained language that prohibited out-of-state acquisitions of trust companies and investment advisory businesses. The Court reasoned that, although states are permitted to regulate matters of legitimate local concern, states may not promote economic protectionism.121 Furthermore, the Court observed that the power given to the states under the Bank Holding Company Act122 applied only to legisla-

NCNB ruling could have been susceptible to an equal protection attack. NCNB only owned one trust company in Florida; NCNB had no pre-existing stake in Florida's banking market and was neither a positive nor a negative force in that market. Hence, allowing NCNB to compete in the Florida banking market to the exclusion of other out-of-state bank holding companies was not supported by a rational basis.

116. See Hawke, supra note 86, at 18, col. 3.


118. Hawke, supra note 86, at 18 col. 3. Reciprocity has been accepted as a legitimate state interest, however, in cases involving professional licensing requirements. See, e.g., Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974) (lawyers); Fales v. Commissioner on Licensure to Prac. Heal. Art, 275 A.2d 238 (D.C. 1971) (doctors); Mercer v. Hemmings, 194 So. 2d 579 (Fla. 1967) (accountants).

119. Hawke, supra note 86.

120. 447 U.S. 27 (1980).

121. Id. (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). Whatever the test for commerce clause limitations upon the states, the Court has consistently distinguished between outright protectionism, and more indirect burdens of trade. Id.

tion operating within the commerce clause. Therefore, it is questionable whether a decision by a state as to which among the fifty states it shall allow to enter its territory is a legitimate state interest at all. Short of this stance, one could argue that a regional approach is legitimate because such an approach will maintain a responsive, local banking system. But the legitimacy of the regional approach does not seem to depend on the rational choosing of the region. The New England regional grouping illustrates that the probable result will be the careful exclusion of states, such as New York, with money-center banks. That the regions being created are based on protectionist fears and not on natural market areas is illustrated by the fact that Utah has adopted a bill creating a Western region excluding California — but including Alaska and Hawaii.

C. Continuing Problems from Regional Reciprocal Acts

The legal resolution of the constitutional questions raised by Florida's Regional Reciprocal Act will not end the issue. The underlying issue is discrimination against certain out-of-state bank holding companies. This problem will continue even if courts decide that Congress, by passing the Douglas Amendment in 1956, has cloaked state efforts to discriminate against non-regional banks with constitutional

123. Id. at 49. The Court found that although the BHC Act does reserve to the states a general power to enact banking regulations, nothing suggests the states were extended powers beyond federal law. Id. at 48-49.

124. Cf. Golembe, supra note 86, at 13 (nothing in the Douglas Amendment or the "states rights" provision of the Bank Holding Company Act supports the right of a state to burden interstate commerce by such a decision).

125. But cf. Florida Banking Study, supra note 117, at 197-98, 209 n.38. Professor Davis feels that the identity of the region must be chosen rationally, but that it would be difficult to show that the states were selected so irrationally as to violate the equal protection clause.

126. See Golembe, supra note 86, at 13. New York was excluded from the New England region, and the guess is that other states with money-center banks, such as Illinois and California, will be carefully excluded. Id.


128. See Golembe, supra note 86, at 11. Argumentation and litigation of the issue under any of the constitutional theories ultimately will be of little import, although resolution may have some impact on the timing of change.
immunity.\textsuperscript{129}

A recent United States Court of Appeals decision has, in fact, upheld the New England regional scheme against constitutional attack.\textsuperscript{130} In \textit{Northwest Bancorp. v. Board of Governors of the Federal Reserve System},\textsuperscript{131} the petitioners\textsuperscript{132} appealed from three Federal Reserve Board orders that approved mergers pursuant to sections 3 and 4(c)(8) of the Bank Holding Company Act.\textsuperscript{133} The petitioners charged that the Massachusetts and Connecticut regional statutes\textsuperscript{134} impermissibly discriminated against non-New England bank holding companies, thereby violating the equal protection clause.\textsuperscript{135} The court held that the two states may be concerned that local banks could become dominated by New York or Chicago banks, cited \textit{Iowa Independent Bankers}, and found no equal protection clause violation.\textsuperscript{136}

This decision will not be the end of the legal issue.\textsuperscript{137} It will be interesting to note whether future court decisions will give more than cursory attention to the underlying problem of such blatant state discrimination against certain out-of-state bank holding companies. If courts choose to address this problem, the equal protection clause is probably the best constitutional argument available to strike regional reciprocal legislation.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 740 F.2d 203 (2d Cir. 1984).
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} The petitioners in this consolidated action are Citicorp, Northeast Bancorp, and Northeast's subsidiary bank, Union Trust Company. \textit{Id.} at 3.
\item \textsuperscript{133} \textit{See supra} note 81.
\item \textsuperscript{135} \textit{Northeast Bancorp,} 740 F.2d at 210. Petitioners also alleged violations of the commerce and compact clauses. \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 13.
\item \textsuperscript{137} A petition for certiorari has been filed in the \textit{Northeast Bancorp.} case. \textit{See supra} note 130. Also, other regional schemes may be challenged after they are passed.
\item \textsuperscript{138} The standard for permissible, discriminatory state action under the equal protection clause is less stringent than that under the commerce clause. \textit{Bank of New England Corp.,} 70 Fed. Res. Bull. app. 385 (1984). However, finding a commerce clause violation would probably mean that no conditions at all would be tolerated. Also, any compact clause violations could be remedied by Congressional approval. The equal protection clause would be more flexible in that some entry conditions could be found rationally related to a legitimate state interest, while other conditions could be struck.
\end{itemize}
V. Toward a Level Playing Field

Apart from the legal issues raised by recent interstate banking developments in Florida, there exists the idea of a level playing field. A level playing field, as used in banking regulation, means having the same rules for all financial regulations so that competition on an equal footing exists. The level playing field concept explains why the legal and underlying problems involved with Florida's interstate banking developments have been given little thought and; therefore, why present developments will be tolerated for a time. However, the concept also commands that, ultimately, action must be taken to recognize full-scale interstate banking and to remove the discrimination against excluded out-of-state bank holding companies.

A. The Short-Term Field

Market pressures have made interstate banking substantively a reality. This de facto interstate banking has been forced by regulatory loopholes, unregulated competition, and technical innovations. Important regulatory loopholes include a bank holding company's permission to acquire no-bank subsidiaries, and the existence of loan production offices and Edge Act Corporations. Imaginative thinking, spurred largely by market pressures, will continue to uncover new ways to sidestep outdated legal barriers. Non-bank financial institutions are offering a growing array of services to their customers and are competing directly with banks in many areas. But these organizations are "unregulated" and can compete nationwide. Finally, new technologi-

140. This has led some to argue that the issue now is "interstate deposit taking." FLORIDA BANKING STUDY, supra note 117, at 220.
141. Id. at 155.
142. Id. Because non-bank subsidiaries are free to open offices on an interstate basis, bank holding companies can use them to evade interstate prohibitions.
143. Id. at 156. These offices cannot make loans or accept deposits; but they can solicit loans.
144. Id. These Corporations provide banking services related to international trade and can be used outside of a bank holding company's home state.
145. The money market mutual fund is the principal innovation used to collect retail deposits on a national level. The real significance of these funds is that they have broken down the local bank dependency of some customers. Id. at 35.
146. See Whitehead, supra note 35, at 8. Commercial banks are the only
cal forces are changing the public's banking habits and rendering geographic expansion restrictions archaic.\textsuperscript{147}

These outside forces indicate that existing geographic restrictions on banks are ineffective and, more importantly, that banks are suffering from these restrictions.\textsuperscript{148} In addition, studies show that the relaxing of interstate barriers is independently desirable in terms of public policy.\textsuperscript{149} Considerations such as convenience and needs, quantity and quality of service, small bank viability, safety and soundness, and competition and concentration will be positively influenced by interstate banking.\textsuperscript{150}

Internal and external pressures, therefore, indicate that interstate banking is both inevitable and preferable. The two interstate banking developments in Florida are recognitions of this fact. The Board expressly acknowledged the pressures and realities involved by stating in \textit{U.S. Trust} that "it would be ineffective and inequitable to impose a competitive limitation only on bank holding companies by denying this proposal."\textsuperscript{151} Such actions relax interstate prohibitions, thereby pushing banks in the right direction.\textsuperscript{152}

Board and State actions encouraging limited interstate banking seem to be the accepted short-run path to a geographically level field. Eventually, congressional consent to state laws that permit limited in-

\textsuperscript{147} An interstate retail electronic banking system is still being put together, despite the legal interpretation that an automated teller machine is a branch. Other technological developments continue to erode geographical barriers. \textbf{Florida Banking Study, supra} note 117, at 159.

\textsuperscript{148} The geographic restrictions today adversely affect banks in that the rules no longer protect banks from outside competition, but instead prevent them from following their customers or attracting new customers over the geographic range of their competitors. Eisenbeis, \textit{Regional Forces for Interstate Banking}, \textbf{ECON. REV.}, May 1983, at 24, 28.

\textsuperscript{149} See, e.g., \textbf{Florida Banking Study, supra} note 117 at 211-36.

\textsuperscript{150} See id. at 160, 222; See also Rhoades and Savage, \textit{Can Small Banks Compete?}, \textbf{Bankers Mag.}, Jan.-Feb. 1981, at 59 (the study analyzed the ability of small banks to compete with large banks by reviewing four crucial areas: growth, profitability, economies of scale, and EFT; the evidence and actual performance of small banks indicate small banks are viable competitors).


\textsuperscript{152} Since non-bank financial institutions have no geographic limitations, the "right" direction required is facing market realities and easing geographic restrictions on banks. Reversing the trend of deregulation by placing restrictions on institutions such as Merrill Lynch and Sears is not feasible. Edwards, \textit{Commercial Banking Review: Geographic Expansion}, \textbf{U.S. Banker}, March 1981, at 18, 26.
terstate expansion may be forthcoming. But the very nature of these two regulators suggests that the discrimination from such action will continue. Congressional action is needed.

B. The Eventual Level Field

Congressional inaction to date has been evident. The Depository Institutions Act of 1982, heralded as the most far-reaching federal banking law in fifty years, did almost nothing for interstate banking. Such inaction cannot continue much longer. Recent Board orders show the inadequacies of interstate banking decisions that must turn on the technical language and intent of the Douglas Amendment. Regional Acts are particularly troublesome because of their increasing acceptance and pure discriminatory effort. Congressional action would provide guidance to the Board and states that wish to allow interstate banking.

The Chairman of the Board of Governors of the Federal Reserve System has called for a fresh congressional review of interstate banking policy. The Chairman cited problems with the developing de facto interstate banking system and the movement towards regional arrangements as the major reasons a new look is needed. Other authority believes that the emerging regional systems will deliver the final shock to the nation's banking system that will rouse Congress from its advanced state of paralysis. Congress will not stand by and see the states carve up the banking system into dukedoms, all in the name of states rights and the Douglas Amendment.

153. See Competitive Equity Act Report, supra note 127, at 48. The Committee recognized that while legal arguments are not frivolous, they believe regional statutes are consistent with the constitution. Id.
155. See Hawke, supra note 86, at 4, col. 2. The only interstate provision was the one for the extraordinary acquisitions of failing banks in very limited circumstances. Id.
156. See supra notes 51-76 and accompanying text.
158. Id.
159. Golembe, supra note 86, at 11. In this sense, the author applauds the Massachusetts action.
160. Id. at 14.
Congressional action will make possible the eventual level playing field. Congress may choose to recognize regional banking as a transitional step in the right direction, but it must ultimately recognize interstate banking as the level playing field. The realities of interstate banking cannot be avoided, delayed, or arrested by action or inaction.\textsuperscript{161} Regional configurations are inadequate for the same economic reasons that state barriers are now undesirable.\textsuperscript{162} Today's financial world dictates that the answer must be nationwide banking.\textsuperscript{163} Additionally, only when nationwide banking is permitted will the underlying discrimination against the excluded bank holding companies be removed.

VI. Conclusion

Interstate banking developments in Florida illustrate both the trends of geographic deregulation and the problems associated with these trends. Board decisions will continue to open up state banking markets to those imaginative out-of-state bank holding companies that discover loopholes in existing state and federal law. Also, states dissatisfied with the pace or direction of these Board decisions will continue to enact laws that permit their own desired form of limited interstate banking. Both actions raise legitimate legal objections. However, developments will be permitted for a time because of increasing market pressures for interstate banking and congressional inaction.

Nevertheless, the underlying problems of a lack of a current national banking policy and the increasing discrimination against states with money-center banks must eventually be addressed. Ideally, the developing economic balkanization will shock Congress into a fresh review of its interstate banking policy, causing Congress to act quickly to remove the underlying discrimination by mandating nationwide banking. It is only a matter of time before the ultimate level playing field of nationwide commercial reached.

\textsuperscript{161} Florida Banking Study, \textit{supra} note 117, at 215.
\textsuperscript{162} See \textit{supra} notes 140-152 and accompanying text.
\textsuperscript{163} Golembe, \textit{supra} note 86, at 14. The inadequacies of the regional approach should be revealed after a thorough look by Congress and the banking industry.
Cogeneration and Small Power Production: Florida's Approach to Decentralized Generation

Jeffrey Fuller*

I. Introduction

The changing economics of electricity generation in the 1970's, coupled with the 1973-74 oil crisis, prompted both a legislative and societal examination of the United States' approach to decentralized electricity production. During the early 1970's, costs associated with the expansion, maintenance and replacement of generating capacity increased sharply due to inflationary pressures while the growth rate of electricity demand fell. The oil embargo sent fuel costs skyrocketing and further devastated the electric power industry, as cheap fossil fuel had molded the development and operating structure of the industry. Accordingly, every administration and Congress since 1973 has supported energy conservation to reduce capacity expansion needs and has encouraged energy supply expansion to reduce foreign oil dependence.

President Carter responded to this energy crisis by proposing a national energy plan. On November 8, 1979 President Carter signed the National Energy Act (the Act). Three parts of the Act, the Public Utility Regulatory Policies Act (PURPA), the National Gas Policy Act, and the Energy Tax Act of 1978, contain provisions relating to cogeneration and small power production.

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2. Id. Cost increases resulted from increased capital costs necessary to finance plant construction. Additionally, consumption per dollar GNP fell substantially from 1970 to 1971. See 1983 UNITED STATES STATISTICAL ABSTRACT exhibit No. 973.
3. For example, the percent price change increase measured in 1972 constant dollars of crude oil and bituminous coal for the period 1973-75 was 65.8 percent and 96.4 percent respectively. Id. exhibit No. 974.
4. Lock, supra note 1, at 707.
This legislative encouragement of decentralized electricity production is planned to yield several major societal benefits in the long run: an increased efficient utilization of energy resources with a commensurate saving of scarce oil and gas reserves, an enhanced use and development of renewable energy resources, a greater flexibility and precision in planning utility capacity because of the smaller generating units utilized in the decentralized structure and a decrease in business and financial risks associated with satisfying fluctuating or uncertain future demands on utility systems due to the faster construction times for smaller units. The realization of these benefits, however, depends on the strength of the federal incentives provided in the Act and their effective implementation by the appropriate federal and state agencies.

Congress substantially delegated the practical implementation of PURPA's provisions to the individual states' public commissions (PUCS), as PURPA establishes only broad guidelines necessary to convey legislative intent. PURPA requires these commissions to promulgate rules pursuant to the Federal Energy Commission's (FERC) regulations. Under FERC's regulations, the states must establish rates for utilities' purchases and alternatively establish rates for utili-

6. California Public Utilities Commission (CPUC) Order No. 91109,011 No. 26 (December 19, 1979) at 13-14. Cogeneration offers efficiencies by permitting the utilization of fuels in a more efficient manner when combined by cogeneration that is possible under conventional technologies. Id.
7. Certain energy resources are renewable such as wind and solar power.
8. California PUC Decision No. 91109, supra note 6. The lead time required for the construction of a cogeneration facility is estimated to be several years less than the time required for the construction of a large central station power plant. Thus, customer demand need not be projected so far into the future making demand forecasts more accurate. Id.
9. Id. Benefits to ratepayers could result because non utility owned cogenerators have to raise the required capital for construction of the cogeneration facility and these financing costs would not to be borne by the ratepayers. Further, the cogenerator's facility is not included in the utility's rate base and the cogenerator is only reimbursed for actual production, thus, the ratepayer does not have to bear the costs of any unscheduled outages of that facility.
11. 16 U.S.C. § 824a-3 (f)(1) (Supp. 1983). The provision, in part provides: "after any rule is prescribed by the Commission . . . each state regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for any electric utility for which it has ratemaking authority." Id.
ties' sales to these co-producers in a manner to effectuate and provide incentive for the development of decentralized electricity generation. However, the establishment and implementation of these rates to encourage this development of decentralized electricity generation has remained the most controversial provision of PURPA.

This article will examine Florida's recent unique implementation of decentralized power production within the scheme of PURPA. As background, the institutional barriers that long prevented the development of decentralized power production will be discussed. The scheme and purpose of PURPA will then be identified with a corresponding focus on appropriate FERC regulations. With this background, the final section will examine state implementation of the regulations and their potential implications with particular emphasis on Florida.

II. Institutional Barriers to Decentralized Electricity Production

Electricity, as an energy form, cannot be stored and, therefore, must be consumed or lost. This physical property is significant for two reasons. First, the proper distribution of electricity to potential users requires an efficient transmission system. Second, the inability to store electricity demands a sufficient generating capacity to satisfy user needs during those times of the day and year when electrical consumption peaks. Accordingly, the construction of transmission systems and productive capacity should necessarily extend beyond current demand. The necessity of this construction results in extensive plant, property and equipment investments carrying large fixed costs. Because electricity production is so capital intensive, economies of scale dominate a electric utility because costs decrease as sales increase. As production and corresponding sales increase, large fixed costs are distributed over a greater number of units (i.e., kilowatts) thus decreasing the fixed costs per unit. This economic behavior is shown in Exhibit 1:

14. 18 C.F.R. § 292.401 (a) (1983). This section provides in part: "each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C." Id.

These economies of scale and improving technologies allow the utility industry to reduce per unit costs by increasing capacity and encouraging customer sales.

Because of these scale economies, electricity during the early 1900's quickly proved to be a relatively safe, cheap and attractive power source, and its use spread to numerous industrial, commercial and residential application. As utilities continued growing, the utilities' ability to provide electricity at steadily declining rates made decentralized generation uneconomical. State and local governments began regulating production facilities as public utilities, and years of large-scale concentrated generation engendered regulatory structures which created economic and institutional barriers to decentralized electricity production. The states granted monopolies over electricity generation and distribution to these existing public utilities based on the theory that electric power production was a natural monopoly. A natural monopoly exists when the lowest cost per unit results when only one company exists in a decreasing cost industry as demonstrated in Exhibit 1. The one enterprise's fixed costs can be spread across more sales than if two firms must split the market demand. Thus, the idea of a government imposed monopoly on power production and distribution was well founded and in the ratepayers' best interest.
The distribution of power remains a natural monopoly because competition between electric utilities would require duplicate transmission and distribution systems which have sharply decreasing costs. Because of changing economies and technologies, however, the generation of power is no longer a decreasing cost proposition. Indeed, in electric generation some competition would be feasible if all generating companies could bid for the distribution systems. Notwithstanding this economic fact, the utilities' control over the distribution systems has perpetuated their monopoly over production even though smaller facilities could generate at lower costs. Generation cost efficiencies are irrelevant if the electric power can not be delivered.

The public utilities' transmission and distribution control substantially rendered small producers' sales to parties other than the utility itself virtually impossible. Because of their monopoly position, public utilities lacked incentives to purchase electric power or, further, to purchase the electricity at an appropriate market rate. In addition to the suppressed purchase price, uncertainty existed as to the treatment of these small producers as public utilities and as subject to the same regulation, public scrutiny, controlled profits and administrative burden as a public utility. Finally, public utilities could also charge discriminatory rates to smaller producers for such services as back-up and maintenance power to discourage their operation. Thus, the lack of an open market for electricity sales, coupled with the administrative uncertainty of being regulated as a public utility, discouraged potential decentralized generation. This inflexible situation existed when the oil embargo occurred. These barriers, however, prevented a receptive response which highlighted the need for a reorganization of electricity generation.

III. Federal Legislative Response—PURPA

Sections 201 and 210 of PURPA contain the primary legislative response to these institutional and economic barriers to decentralized generation. PURPA establishes broad guidelines and requires the

16. *See* L. Weiss, *supra* note 15, at 4-5. The logistics of having multiple power lines throughout the service area by competing power products would be cost prohibitive and aesthetically distasteful.
17. *Lock, supra* note 1, at 713-14.
FERC to issue explicit rules for the encouragement of cogeneration and small power production which state public utility commissions must implement. Although the FERC regulations permit state discretion, three requirements are clearly set forth by the provisions' language.

First, a public utility is required to purchase all power offered by the facility at the utility's full “avoided cost”. Thus, qualifying decentralized facilities are conceptually guaranteed a market at an economically fair price. Avoided cost represents the cost the utility would have incurred from either generating or purchasing from another supplier, to have that additional increment of power. Second, interconnection with a utility system's electric grid, which guarantees qualifying facilities a limited distribution and transmission system, is required. This interconnection provision is implicit and critical to the effective right to sell the electricity because public utilities' monopolies on distribution systems are overridden. Thus, qualifying facilities can effectively shop for a competitive price. Finally, if the qualified facility chooses, it must be permitted to purchase electricity from the utility at non-discriminatory rates. This purchase option enables small cogenerating facilities to have sufficient backup power for their own operation if their own systems fail. The successful implementation of these requirements determine the effectiveness of the Congressional incentive to encourage cogeneration and small power production.

To obtain these federal and corresponding state guarantees, a facility must qualify under the FERC provisions and under the respective state regulations. The federal regulations distinguish between

23. Lock, supra note 1, at 713. Each public utility is required to purchase energy and capacity power from each qualifying facility at the public utility's avoided cost. 18 C.F.R. § 292.303 and 292.304 (1983).
24. 18 C.F.R. § 292.101 (b)(6) (1983). This provision defines avoided cost as the "increased costs to an electric utility of electric energy or capacity or both which, but for the purposes from the qualifying facilities, such utility would generate itself or purchase from another source." Id.
25. 18 C.F.R. § 292.303 (e) (1983). This section requires electric utilities to make interconnections with qualifying facilities as is necessary to accomplish purchases or sales as required by the subpart. Id.
26. 18 C.F.R. § 292.305 (b)(1) (1983). This provision requires public utilities to furnish qualifying utilities with (i) supplementary power, (ii) back-up power, (iii) maintenance power and (iv) interruptible power upon request. Id.
27. See 18 C.F.R. § 203 (1983); FLA. ADMIN. CODE 25-17.80 (1983). There are
cogenerators and small power producers, although both facilities are regulated virtually identically. The FERC regulations define a cogenerator as a facility which produces electric energy in addition to some form of useful energy utilized for industrial, commercial, heating or cooling purposes.\footnote{28} Aside from certain efficiency standards specified in the regulations\footnote{29}, the productive capacity of the facilities is not limited. However, a facility does not qualify as a cogenerator if an electric utility owns more than fifty percent of the equity interest in the plant.\footnote{30} Alternatively, the regulations define a small power producer as an electric generating facility utilizing as its primary energy source biomass, waste, renewable resources, geothermal resources or any combination thereof. The fifty percent ownership restriction is also imposed on small power producers.\footnote{31}

Beyond these qualification criteria, the regulations delegate broad authority to the states to implement rules in accordance with the intent of PURPA. The Florida Public Service Commission (FPSC) has adopted the FERC’s qualifying criteria for cogenerators and small power producers, thus simplifying the qualifying process.\footnote{32}

\footnote{28} 18 C.F.R. § 292.202 (c) (1983).
\footnote{29} 18 C.F.R. § 292.205 (a) and (b) (1983).
\footnote{30} 18 C.F.R. § 292.206 (a) and (b). This section reads, in part:

\[A\] cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary’s ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

\textit{Id.}

\footnote{31} 18 C.F.R. § 292.204 (1983).
\footnote{32} FLA. ADMIN. CODE 25-17.80 (9-2-83). The Florida Public Service Commission adopted FERC’s qualifying criteria as their own. The Florida Commission provided, however, that those facilities failing to satisfy the adopted FERC criteria may still petition the FPSC for qualifying states for the purpose of receiving payments under the rules. \textit{Id.}
IV. State Implementation

State public utility commissions (PUCs) are required by section 210 of PURPA to implement the FERC regulations governing the purchase and sale of electric power by qualifying facilities. The rates established by the PUCs must act as a price signal to encourage the development of decentralized generation in accordance with the intent of the PURPA. The major areas of state discretion are set forth below:

A. Sales By Qualifying Facilities

Section 210 of the PURPA requires PUCs to establish rates for electricity sales by qualifying facilities (QFs) to public utilities. PURPA provides that established sales rates “shall not exceed the incremental cost to the electric utility of providing that energy.” Clarifying PURPA’s language, the FERC regulations further state that electric utilities will not be required to purchase power at rates exceeding the utility’s avoided cost. The regulations define avoided cost as the “incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source if the purchase from the qualifying facility has not occurred.” Although the regulations provide a number of criteria to consider in determining avoided costs, the rules leave considerable

33. 16 U.S.C. § 824a-3(f) (Supp. 1983). This section requires that one year following the issuance of FERC’s rules, each state commission shall after notice and opportunity for public hearing implement rules pursuant to the mandate of PURPA. Id.
34. 16 U.S.C. § 824a-3(b) (Supp. 1983). This section also provides that the purchase rates shall be just and reasonable to customers of the electric utility, in the public interest, and not discriminate against qualifying facilities. Id.
37. 18 C.F.R. § 792.304 (3). These criteria include:
1. Availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:
   a) Ability of the utility to dispatch the qualifying facility;
   b) Expected or demonstrated reliability of the qualifying facility;
   c) Contract terms or other legally enforceable coliation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;
   d) Extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility’s facilities;
   e) Usefulness of energy and capacity supplied from a qualifying facility
Florida PURPA discretion to the PUCs concerning avoided costs calculations and QF purchase rate structure. Essentially, basing payments to QFs on avoided costs merely provides that payments will be calculated on a utility's marginal costs. Marginal costs represent the additional costs a utility incurs if a customer increases power usage at any given time. Thus, if the electricity a QF supplies to a utility permits that utility to avoid the costs of purchasing or producing that electricity, the QF receives as payment the utility's avoided cost. As shown in Exhibit 2, basing utility purchases on marginal costs rates is theoretically sound because utility purchases reflect the cost consequences to that utility of supplying that incremental electricity. The shaded area represents the marginal cost that a utility would incur in producing the additional \( x + 1 \) unit of electricity. Thus, the utility pays the actual cost that would have been incurred if the utility had produced or purchased the energy from another public utility.

EXHIBIT 2

during system emergencies, including its ability to separate its load from its generation;

f) Individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

g) Smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

2. Relationship of the availability of energy or capacity from the qualifying facility to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use.

Id.
FERC regulations subdivide avoided costs into energy cost and capacity costs.\textsuperscript{38} Capacity costs represent the costs associated with the capability to deliver electricity and consist primarily of the facilities capital costs.\textsuperscript{39} Generally, capacity costs can be thought of as the physical facilities necessary to generate electricity. Energy costs, alternatively, are the variable costs associated with the production of electric energy and represent fuel costs in addition to certain operating and maintenance expenses.\textsuperscript{40} The Florida Public Service Commissions’s (FPSC) rules utilize the same distinction between capacity and energy costs in calculating avoided costs for firm as opposed to non-firm power.

B. Non-Firm Power

Non-firm power or "as available" power, as termed by the FPSC, is energy produced and sold by a QF with no contractual commitment as to the quantity, time or reliability of delivery to the purchasing public utility.\textsuperscript{41} The FPSC requires utilities to purchase as available energy from all QFs within their service area at the utilities’ avoided energy cost.\textsuperscript{42} Because as available energy lacks these crucial assurances, Florida’s rules require only energy payments and do not provide for capacity payments.\textsuperscript{43} The FPSC explicitly rejected the argument that FERC regulations require that all QFs delivering "as available energy" be compensated by a capacity payment.\textsuperscript{44} The FPSC noted that FERC does not require that all QFs delivering "as available energy" receive capacity payments but, rather, only that such delivery may confer capacity related benefits which should then be compensated.\textsuperscript{45} Further, the Commission interpreted FERC’s regulations as establishing an if-then test: "if the evidence demonstrates that a QFs delivery of as-available energy confers capacity related benefits, then compensation for capacity credits should be made."\textsuperscript{46} In the rule making proceeding, how-

\begin{itemize}
\item \textsuperscript{38} See supra note 36. This section draws the distinction between electric energy payments and electric capacity payments. \textit{Id.}
\item \textsuperscript{39} 45 Fed. Reg. 12,216 (1980).
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Fla. Admin. Code} § 25-17.825 (1) (1983).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} Florida Public Utilities Commission (FPUC), Order No. 12634, Docket No. 820406-EU (Oct. 27, 1983), at 9.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\end{itemize}
ever, the FPSC found that persuasive evidence did not exist in the record to justify such capacity payments.47

This approach reflects a realistic approach to capacity payments. The rationale underlying capacity payments can be simply stated. As the utility's service demands expand, guaranteed power is crucial to the satisfaction of customer needs. If QF production can defer the construction of a generating station by a public utility, then the QF has replaced the necessity of building additional capacity. Consequently, the QF should receive payments for this deferred capacity. If, however, power deliveries fluctuate between periods, then utilities cannot depend on these deliveries during peak periods and need to construct the necessary capacity. Public utilities must expand capacity to meet these demands which the QFs fluctuating delivery could not satisfy with sufficient certainty. In this situation, no capacity needs have been avoided, thus rendering capacity payments improper.

Many PUCs, including Florida's, apply the concept of time-of-use rates to the purchase of "as available power." Under this methodology, rates reflect the value of QF generation to the utility system at different times.48 The demand for power varies both with the time of day and the season of the year as shown in Exhibit 3:

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47. *Id.* The FPSC found that record indicated that Florida utilities included QF capacity in their expansion plans but this was an inadequate showing of what amount of this power would be sold on a firm basis. Thus, capacity payments were not supported by the record. *Id.*

Utility generating equipment can be divided into three categories: baseload, intermediate, and peaking. Baseload equipment supplies that portion of the load which remains constant, regardless of the time or season. Baseload generating units are large and substantial warm up periods. Naturally, peaking units are small and have the ability to be placed on line quickly to satisfy sharp demand peaks. Intermediate generating units can be placed on line more quickly than baseload units and may be utilized a significant portion of the time as a spinning reserve. Generally, baseload generating capacity requires the highest capital costs followed respectively by intermediate and peaking units. Because peaking and intermediate units are utilized only a portion of the time, the actual capacity recovered from the ratepayers is often in the reverse order. Thus, when the capital cost is weighted by the time that the capacity is utilized, peaking units are the most expensive.\(^{49}\)

In addition to capacity costs, fuel costs are generally higher when intermediate and peaking equipment are usually less efficient than baseload equipment. Also, baseload units usually consume less expensive fuels than intermediate and peaking units. Thus, QFs will receive the highest purchase rates for delivering power during peak demand periods when their power can reduce the utility’s need to run the more costly units.\(^{50}\) The relationship between these costs is demonstrated in Exhibit 4:

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50. *Id.*
In Florida, if the utilities do not negotiate a contractual rate with a QF in their service area, they must purchase “as available energy” at rates established in their standard contract tariff. The standard tariff rates will be predetermined by the FPSC. Additionally, these tariff rates will be based on either the utility’s actual hourly incremental costs for hours during which no economy energy transactions occur, the actual incremental costs after economy energy purchases, or the actual incremental costs before economy energy sales. Thus, Florida’s tariff rates reflect time of day usage. Alternatively, a utility may negotiate a separate contract rate with any QF either inside or outside its service area. In any case, as stated above, a utility is not required to pay for capacity costs.

C. Firm Power

The FPSC defines firm power as energy and capacity produced and sold by a QF pursuant to a contract and subject to quantity, time, and reliability of delivery contractual provisions. The FPSC has taken a unique approach in calculating firm power payments and has asserted that in evaluating firm energy and capacity payments, whether pursuant to promulgated tariffs or negotiated contracts, rates must be based on deferrable capacity related costs viewed on a statewide perspective.

To implement this statewide approach, the FPSC chose a “uniform statewide price for QF capacity based on the next planned uncertified unit wherever the need existed in the state.” This planned uncertified power plant is termed the “statewide avoided unit.” Under the standard offer, the price for capacity payments is based on the value of deferring construction of the statewide avoided unit for a period of time. Thus, if a QF provides firm power to a public utility, the utility can incorporate and utilize the contracted for electricity sales in its expansion plans. Given a sufficient level of firm power available, utilities can defer the construction of additional plants. The FPSC has adopted an approach of treating Florida as one service area. Statewide tariff rates are based on deferring the construction of this unit. Essentially,
the value of deferral is a calculation of the value of deferring the revenue requirements associated with the new generating plant by a time period, then comparing the difference in annual revenue requirements should the revenue requirements stream began in year $x$ as compared to beginning in the year $x + 1$. In order to calculate the deferral value, one must identify the deferred plant and must ascertain the anticipated in-service date along with the plant's projected costs. The FPSC has designated a jointly owned peninsular Florida base load coal plant consisting of two 700 mega-watt units with an in-service date of April 1, 1992 as the statewide avoided unit. A utility needs to know that QF capacity will not supplement an avoided unit until that unit's otherwise anticipated in-service date. Projected capacity savings, therefore, must be discounted back to present value. The FPSC believes these rules link the purchase price of QF capacity to the value of other supply side alternatives available to a utility necessary to its service obligation. This linkage ensures that cogeneration and small power production will remain a cost effective conservation measure. Thus, the value of QF capacity is linked to the statewide unit from both a timing and a cost perspective.

Although the actual capacity payment calculation is complicated, the Florida approach is very unique. First, the FPSC has included no provision for the payment of existing capacity credits but rather payments are based on deferring future capacity construction. Some states do include such a capacity payment. Under the FPSC's rules, however, capacity payments reflect the avoidance of future potential costs to the ratepayers. Second, the rules attempt to funnel cogeneration capacity to the utilities with the greatest need. The FPSC considered setting capacity prices on an individual utility basis. Under this approach, each utility would set a capacity price based on the value of deferring its next planned uncertified generating units in its service area. Because the price would vary with each utility under this methodology utilities with the earliest in-service date would probably offer the best price and QFs would pursue negotiations with this utility out of economic self interest. This approach would generate differing price and require wheeling if the utility with the greatest need was to receive the needed additional capacity. The approach adopted by the FPSC establishes a

56. Id. at 14-16.
57. Id. at 16.
Utilities are required to purchase all QF capacity in their service area. The FPSC explicitly stated, however, that it expects a utility to promptly sell unneeded QF capacity in its service area to the utility with the statewide avoided unit in its service area. Further, the Commission expects these transactions to occur at cost thus the utility without the need for QF capacity will incur no costs related to the initial purchase and these costs will not be passed on to their ratepayers. This statewide approach promotes uniformity and fairness in the development of decentralized generation. The Commission believed this approach protects the interests of all Florida ratepayers on an equal basis. This approach also recognizes that decentralized generation confers capacity related benefits on ratepayers only if QFs supply the needed capacity at a cost effective price. That is, capacity payments must be based on a forward looking approach, and decentralized generation should not be an end into itself, but should lead instead to an efficient allocation of resources. Finally, these rules are specifically geared at paying avoided costs and not the additional costs of providing cogeneration and small power production.59

The energy payments for firm power are also linked to the statewide avoided unit. Section 25-17.83(6) of the Florida Administrative Code provides that commencing with the avoided unit’s anticipated in-service date, QFs receive “the lesser of the as available energy costs of the utility planning the avoided unit or the energy cost associated with the unit itself.”60 This rule requires the payment of “the lesser” because where the planning utility’s incremental fuel costs are less than the avoided unit’s fuel costs, it is cost effective to base fuel costs on existing plants’ marginal costs.

Florida’s growth blurs the FPSC’s line between payments for energy and payments for capacity. For example, if a utility is adding large amounts of baseload capacity to satisfy growing demands then defining energy costs as the marginal operating costs may underestimate actual energy costs. Under this scenario, capacity is added to avoid the need to use peaking units. Capacity is added because the lower operating costs of base load units more than compensate for high capital costs. Thus, capital costs are incurred to provide energy, not capacity. This conclusion is based on the fact that capital can be substituted for fuel costs in the long run. Accordingly, in this situation some capacity costs are really energy costs, and some avoided capacity

59. Id. at 14.
costs are in reality avoided energy costs.

The statewide approach for both capacity and energy payments is beneficial to the State of Florida and its ratepayers for several purposes. First, the capacity related benefit of decentralized generation reflects the avoidance or deferral of additional generating capacity construction. Thus, capacity payments reflect the avoidance of future potential costs to ratepayers. This approach is also consistent with the FPSC’s approach of determining additional capacity need on a statewide basis. This consistency in policy decisions reflects and promotes a uniform reaction to Commission decisions; therefore, policy disputes are focused. Further, this approach permits Florida and its ratepayers to maximize the benefit from QF capacity by channeling geographically dispersed QF capacity to the utility with the most urgent capacity need.61 Thus, one utility’s generation expansion plans may be significantly altered by the aggregate impact of all firm QF capacity as opposed to a potentially slight impact on the generation expansion plans of many utilities by varying amounts of firm QF capacity scattered throughout their separate service areas.62

D. Purchases by QFs

Section 210(1) of PURPA requires that retail rates charges to QFs for power purchases be just, reasonable and nondiscriminatory against QFs.63 The FERC interprets the nondiscrimination provision as requiring that QFs be charged the same retail rate as another customer of power and not as a co-producer of electricity.64 Only if a utility can demonstrate on the basis of adequate data that a QF’s service costs are different from other customers, would a different rate be justified and allowed.65 This provision is particularly critical to many potential industrial cogenerators which feared that their purchase rates would increase if they competed with the utility in electricity generation.

This provision is an essential part of the PURPA scheme if the legislative encouragement of decentralized generation is to be effective. Further, this article asserts that these rates should be adjusted to reflect the load these cogenerators actually place on the system. For ex-

61. See supra note 55, at 18.
62. Id.
63. 16 U.S.C. § 824a-3 (c) (Supp. 1983).
64. 18 C.F.R. § 292.305 (a) (1983).
65. 18 C.F.R. § 292.305 (b) (1983).
ample, suppose that existing customer rates are based on marginal costs. The issue becomes whether a QF should purchase electricity on a marginal cost as any other customer. The proposed answer is not that it is necessarily in the ratepayer's interest for the QF to purchase electricity based on marginal cost. Traditionally, a class of customer's load factors permit PUCs to estimate what demands this group will place on the utility system. On the basis of this predicted behavior, costs are allocated and charged in a manner to reflect this behavior. This is why different customer classes exist for rate making purposes. Accordingly, a more equitable rate would utilize a rate structure that explicitly tracks utility costs for sales made to QFs rather than a broad structure that applies to all customers. This approach is consistent with the PURPA scheme because unjustifiable discrimination is not allowed and should be guarded against.

Moreover, the rates at which QFs can purchase power are crucial to the development of decentralized generation. For example, if average costs are higher than marginal costs at a given generation point, then it may be reasonable to base all purchase rates on average costs, or at least charge the QF a rate higher than marginal costs as shown in Exhibit 5. This approach would provide additional payments from QFs' power purchases so that QFs would contribute revenues to meet the utility's fixed costs as other ratepayers. This approach, however, may simply encourage QFs to install extra capacity and forego purchasing any electricity from the utility.
The proposed Florida cogeneration guidelines in section 25-17.84 of the Florida Administrative Code do not appear to capture the above underlying economic consequences. However, the rate setting procedure may compensate for any lack of foresight in these rules or lack of specific guidelines.

V. Effective Implementation of Florida’s Approach - A Realistic Analysis

A. Wheeling

Section 210 of PURPA does not provide QFs with an automatic right to wheel its electricity to other utilities outside the adjacent utility’s service area. Further, QFs are not granted the statutory right to request a FERC wheeling order under sections 211 and 212 of the Federal Power Act because such wheeling requests are limited to facilities defined as public utilities, and the thrust of PURPA is not to define cogenerators as utilities. The FERC unofficially has stated that the agency will not move on the issue of forced wheeling for cogenerators. The reason stated for this policy is that no party has demonstrated that forced wheeling will boost the efficiency of electricity generation or distribution. The FERC regulations, constrained by the FERC’s authority to order wheeling, do enable a QF to wheel with the consent of the adjacent utility and any other intervening utility. If every utility cooperated in wheeling, QFs could shop around for the most favorable rate throughout the utility grid.

A strong economic incentive to wheel may exist between a QF and an adjacent utility where the adjacent utility does not generate its own power, but rather purchases its power in bulk from another utility. The

68. 18 C.F.R. § 292.303(d) (1983). This section, in relevant part, provides:
   If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility.

Id.
best example of this situation is an electricity cooperative. Assume the adjacent utility buys electricity at rates based on the nonadjacent utility's average embedded cost, but that this rate is lower than the nonadjacent utility's avoided cost. Further assume that the nonadjacent utility's embedded cost rate and avoided cost rate are five and ten cents per kilowatt hour respectively. Assume also that the QF sold its electricity to the adjacent utility for purchases from the nonadjacent facility (i.e., five cents per kilowatt hour). That is, the adjacent utility's purchase price from the nonadjacent utility represents the full avoided costs. Under this scenario, an obvious incentive exists for the QF to wheel to the nonadjacent utility rather than sell to the adjacent utility. Selling QF power to the nonadjacent utility would provide ten cents per kilowatt hour payment to the cogenerator as opposed to a five cents per kilowatt hour if sold to the adjacent utility. The adjacent utility benefits because the facility can continue to purchase power from a stable source. Practically, however, the QFs' incentive may be reduced by the requirement that the transmitting utility be reimbursed for the line losses or by the burden of negotiation costs.

Some PUCs have noted the importance of wheeling to QF development, but few have made specific substantive rulings. The lack of PUC involvement in this area may be based on its position that states lack direct authority to order wheeling because of federal pre-emption. Further, a reasonable position might be that efforts by PUCs to assert direct jurisdiction over wheeling may violate the pre-emption doctrine even if the transaction takes place within the state concerned. This position is based on cases where courts have viewed utility transmission lines, which are interconnected with the grids of other states, as being essentially in interstate commerce and subject to the Federal Power Act. Extending this reasoning then, even if a QF made direct sales to non-utility end users, the utilization of a utility's transmission lines would be subject to federal jurisdiction. This conclusion would be the same regardless of whether the sale itself were a wholesale sale, subject to FERC jurisdiction, or a retail sale, usually subject to PUC jurisdiction. This position is not universal, however, and the matter has not been directly tested in the courts.69

The FPSC's rules do not follow this line of analysis, but do follow the minority view. Section 25-17.835(1) of the Florida Administrative Code requires the utility in whose service area the QF is located, and

69. Lock & Kuiker, supra note 48, at 679.
any other intervening utility, to wheel the QFs' electricity to any purchasing utility. The QF, however, must pay for all costs associated with such wheeling including wheeling charges, line losses and inadvertent energy flows. The wheeling utility may petition the FPSC to waive this wheeling requirement if the utility's ability to provide adequate service to its other customers will be impaired or will unduly burden the utility. As aforementioned, the commission believed that the maximum benefit of decentralized generation would be achieved by establishing a statewide wholesale market for QF power. This wheeling requirement again remains consistent with the statewide approach in establishing purchase rates for firm energy and capacity. With respect to firm energy and capacity, the FPSC has attempted to establish a regulatory scheme where QFs would not be concerned with the wheeling because of the established statewide price and where the QF would merely contract with the utility in whose service area it is located. This statewide price would eliminate the need for a QF to shop for the highest price because the highest price would be predetermined. The utility planning the statewide unit would then purchase QF capacity from all other utilities and thus satisfy its capacity needs. Under this regulatory plan, the contractual process is streamlined and the utility whose capacity needs have been alleviated receives the necessary electricity.

Alternatively, the FPSC provided for QFs to deal directly with the utility planning the statewide unit or to market its electrical power to other utilities. Thus, under the FPSC's integrated plan, QFs can negotiate contracts throughout the state for the purchases of their power and are guaranteed a means of delivery. This wheeling requirement should encourage decentralized generation because QFs can effectively shop around for the "best deal" in the state, if one exists.

The financial incentives of shopping around depend significantly on the wheeling charges imposed by the transmitting facility. The FPSC

70. Fla. Admin. Code § 25-17.835 (1983). This section provides in part: "Where such sales are made the utility in whose service territory the qualifying facility is located and any other intervening utility shall make arrangements to wheel electricity produced by the qualifying facility to the purchasing utility." Id.

71. Id.

72. Id.


74. Id. at 21. The FPSC believed that "since the ratepayers will experience no direct benefit as a result of wheeling of power . . . the wheeling utility absorb no costs of the transaction." Id.
has ruled that QFs be responsible for all wheeling expenses. The FPSC adopted this rule based on the equitable considerations of the transmitting utilities' ratepayors in that the wheeling utility's ratepayors will receive no direct benefit as a result of wheeling QF power; accordingly, the wheeling utility should absorb no costs of the transaction.\footnote{FLA. STAT. § 403.501-519 (1983).} The actual detrimental effect of this rule to cogeneration development varies if the electricity is wheeled from a QF to a utility in which the statewide avoided unit is located. If the purchasing utility is directly interconnected with the utility planning the statewide avoided unit and has transmission line capability, one could reasonably assert that no wheeling charges should be imposed. If, however, the purchasing utility is not directly interconnected, but must wheel the QF's electricity through a third utility whose transmission capability is not available, then affected utilities should impose wheeling charges on the QF or refuse such wheeling. Further, if the purchasing utility is not directly interconnected, and must wheel the electricity through a third utility with sufficient line capacity, the wheeling utility should impose wheeling charges to recover any resulting costs. The FPSC has adopted the above approach, but expressed doubt as to whether the commission or the FERC has the authority to establish such wheeling rates. The impact of this intrastate approach of decentralized generation depends on the ability of the FPSC to receive a favorable legal opinion from the FERC and possibly ultimately from the courts.

B. Environmental Impact

In addition to the uncertainty surrounding the FPSC's authority to order wheeling, environmental issues dampen the proposed advantages of a legislative encouragement of decentralized generation. The use of excess waste heat or certain fuels may result in severe environmental damage which would not be permitted by a public utility. Electric utilities are subject to the Florida Electrical Energy Power Plant Siting Act (the "Siting Act") in addition to various Federal environmental requirements. Although inadequate in their operation,\footnote{See Note, Florida Electrical Energy Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process, ___ U. FLA. L. REV. ___ (1984); Note, Nuclear Power Plant Siting: Additional Reducions in State Authority, 28 U. FLA. L. REV. 439 (1979).} these statutory requirements provide a framework for evaluating the environmental impact of decentralized generation.
impact of planned power plants. Moreover, the Siting Act does not even apply to facilities which produce under 50 megawatts which would include many QFs. The same framework for analyzing large power plant production would not apply to cogeneration facilities although the environmental concerns would be identical.

The development of environmental standards for QFs would be equitable to all parties included. First, the economic feasibility of QF production should be evaluated in light of all relevant costs including environmental concerns. Second, a balance must be struck between the encouragement of decentralized generation and the protection of the natural resources. Currently, the balance weighs heavily in favor of decentralized generation. Third, rate payors should not be required to pay avoided costs which include costs of complying with environmental regulations to QFs which do have to comply with the identical regulations. If ratepayors must pay full avoided costs, they should receive the same environmental protection. Finally, such protections extend the intent of the Siting Act. Therefore, current cogeneration and small power production provisions at both the state and federal levels should be modified to effectively deal with the environmental implications of decentralized generation.

C. Implications of Simultaneous Sales and Purchases

The FERC rules permit a QF simultaneously to sell its entire output to a utility at avoided cost and to buy energy from the utility at retail rates. The consequences of this approach are demonstrated in Exhibit 6. Average costs are less than marginal costs. Existing customer and QF purchase rates are based on average costs such as shown at point x. QFs can sell their output at the higher marginal cost to the utilities which are required to purchase at this avoided cost. Under this scenario, a QF will receive higher payments for electricity sold to the utility (marginal costs) than a QF must pay for electricity purchases (average cost). Thus, the QF may in fact receive a net payment from the utility even though all its output may be used on site.

77. Fla. Stat. § 403.503(7) (1983). This section provides in part: "Electric power plant means . . . except that this term does not include any steam or solar electrical generating facility of less than 50 megawatts in capacity. . . ." Id.
This approach represents a substantial policy decision and can be justified on several grounds. First, one could assert that cogenerators should not be discriminated against in the purchase of electricity simply because they are co-producers of electricity. In return for being granted a state potential monopoly and guaranteed a specific rate of return on investments, utilities owe an obligation to all customers, including QFs. Additionally, it is arguable that ratepayers are not paying more for the electricity than if the utility produced the power itself because payments to QFs are based on the utility's avoided costs. Finally, this approach provides an additional incentive to the development of decentralized generation which could benefit all parties in the long run.

Notwithstanding the above rationale, there is an inherent injustice in permitting QFs to benefit from simultaneous purchases and sales under certain instances. For example, consider an industrial plant which produces excessive waste heat. The plant had previously obtained the requisite power from the local public utility. Because of the cogeneration rules, the industrial plant installs a power production mechanism which produces electricity far in excess of the plant's needs. Moreover, the plant chooses this oversize capacity to take advantage of the simultaneous purchase and sale requirements and even purchases an inefficient boiler to reduce production costs. Under this scenario, the plant can purchase the public utility's power at the lower average cost, yet force the utility to purchase the plant's power at the higher avoided
cost. The plant benefits from receiving payments far in excess of their power production costs. It is doubtful whether the ratepayers benefit because the utility must purchase the electricity at a higher price, not for just the net amount, i.e., what the plant produced over what the plant purchased from the utility, but for the entire amount produced. That is, if the plant produced eighty megawatts, but only used two megawatts, the utility would have to purchase the full eighty megawatts and not the more logical seventy-eight megawatts. Moreover, all parties suffer if the plant’s production facilities cause more pollution than if the utility produced the incremental amount.

The FPSC has adopted both a simultaneous buy/sell approach and a net billing approach under the current rules; however, simultaneous buy/sell arrangements must be available to QFs if they choose. Given the above scenario, more flexibility should be built into the federal and state rules to permit only a net billing approach in the appropriate situation.

VI. Conclusion

Decentralized generation has many potential benefits. The realization of these benefits, however, depends on an effective implementation of the federal provision by the state PUCs. Additionally, the effectiveness of the rates imposed depend on the specific economic conditions for both the utility and the QF. Notwithstanding this limitation, Florida has adopted a unique and well-reasoned approach to implement these rules by balancing the competing interests of QF development and existing ratepayers. Ratepayers theoretically bear no additional costs under the FPSC’s rules yet are still able to reap the benefits of a decentralized generation approach. Environmental issues have yet to be adequately addressed. However, this balancing should result in a well-planned and cost effective development of decentralized generation in this state.

Comparative Analysis: Agents' Personal Liability on Negotiable Instruments

J. Clifton Cox*

I. Introduction

Negotiable instruments receive similar treatment in many developed nations. Justice Story noted one hundred and forty years ago that "[t]he law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield . . . to be in great measure, not the law of a single country only, but of the commercial world." Nevertheless, three major commercial law systems remain in the western world: the United States Uniform Commercial Code, 2 the English Bills of Exchange Act, 3 and the Geneva Conventions on negotiable instruments. 4 This article compares these systems of negotiable instruments law by discussing the formal requirements for negotiable in-

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2. This article only discusses such negotiable instruments as checks, drafts which are governed by article 3 of the Uniform Commercial Code, promissory notes, and certificates of deposit. See U.C.C. § 3-104(2). All states have now adopted article 3 of the U.C.C. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 5 (2d ed. 1980). All citations to the U.C.C are to the 1972 official text unless otherwise indicated. Scholars have written excellent treatises and commentaries analysing United States law on negotiable instruments. See, e.g., J. WHITE & R. SUMMERS, supra; Holland, Corporate Officers Beware—Your Signature on a Negotiable Instrument May Be Hazardous to Your Health, 13 IND. L. REV. 893 (1980). A thorough discussion of United States law is beyond the scope of this article. The writer will identify significant legal provisions, issues, and policies only to the extent necessary for comparison with law of foreign jurisdictions.
4. June 7, 1980, 143 L.N.T.S. 259. The Geneva Conventions are the basis for commercial practices in several civil law jurisdictions in continental Europe. See infra note 181. French legal practices will be utilized to illustrate the effects of the Geneva Conventions on the law of a ratifying country.
struments, the effects of negotiability, the rudiments of agency law, questions of conflict of laws, and proposals for reform, addressing the question: How may an agent avoid personal liability on a negotiable instrument he signs in his principal’s behalf?

II. United States

A. Negotiable Instruments

A negotiable instrument is a written and signed promise or order to pay a sum certain in money to order or to bearer on demand or at a specific time. These instruments include drafts, checks, certificates of deposit, and promissory notes. A negotiable instrument confers legal rights on a holder separate from a party’s rights on any underlying obligation. An obligor may be subject to suit either on or off the instrument. No one is liable on a negotiable instrument, however, unless

5. Whether an instrument is negotiable may determine whether a person obligated on the instrument may present personal defenses against a holder. See U.C.C. § 3-305. This note will, therefore, devote substantial attention to definition of negotiable instruments.

6. U.C.C. § 1-201(46) defines “writing” to include “printing, typewriting, or any other intentional reduction to tangible form.”

7. U.C.C. § 3-104(1).

8. U.C.C. § 3-104(2).

9. U.C.C. § 1-201(20) defines “holder” as “a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or his order or to bearer or in blank.” A holder in due course is a holder who has purchased the negotiable instrument for value (defined in U.C.C. § 3-303 as a significant economic interest), in good faith, and without notice of any claim or defense to the instrument or of any violation of its provisions. U.C.C. § 3-302.

There can only be a holder in due course if the instrument is negotiable. See U.C.C. § 3-805. A holder in due course takes the instrument free from most defenses, including failure of consideration. U.C.C. § 3-305.

The Code distinguishes between real defenses, which an obligor may assert against a holder in due course (U.C.C. § 3-305), and personal defenses such as failure of consideration (U.C.C. § 3-408), which an obligor may not assert against a holder in due course. An agent may also escape liability on the instrument if his principal ratifies the signature; the agent then may be liable to the principal. U.C.C. § 3-404 official comment 3.

10. U.C.C. § 3-301.

11. U.C.C. § 3-802 qualifies this concept of obligations both on and off the instrument: (1) unless otherwise agreed where an instrument is taken for an underlying obligation
his signature\(^{12}\) appears on the instrument\(^{13}\) or is firmly attached on an allonge.\(^{14}\)

The Code defines “signature” broadly. A signature may be “any symbol executed or adopted by a party with present intention to authenticate a writing.”\(^{15}\) The word “adopted” implies that after a mark is executed, a party may cause that mark to become his valid signature. The Official Comment advises courts to use “common sense and commercial experience” to determine whether a given mark constitutes a signature.\(^{16}\) Although a letterhead may be a signature for purposes of the Code,\(^{17}\) the finder of the fact should be loath to find a “signature” in such an improbable place.

B. Signature by Agent

Commercial practice requires, and article 3 affirms, that agents may obligate their principals without binding themselves on negotiable instruments if the agents are authorized to sign instruments and they sign according to the rigid forms prescribed by the Code. An agent may present the same defenses that his principal could assert in an action to enforce payment on a negotiable instrument. If the agent deviates from the Code’s requirements, he may find himself personally obligated and unable to assert a defense against a holder in due course.

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

(2) The taking in good faith of a check which is not post dated does not of itself so extend the time on the original obligation as to discharge of surety.

Id.

12. See U.C.C. § 3-401(2), defining “signature” broadly as “any name, including any trade or assume name . . . or by any word or mark used in lieu of a written signature.”

13. U.C.C. § 3-401.

14. U.C.C. § 3-401(1) and official comment 1, referring to U.C.C. § 3-202(2), which provides that an allonge is deemed to be part of the instrument to which it is attached.

15. U.C.C. § 1-201(39).

16. U.C.C. § 1-201 official comment 39.

17. Id.
1. Form of Signature

An agent must satisfy stringent requirements for the form of his signature in order to obligate his principal and to escape personal liability on the instrument. Professor Arthur E. Sutherland summarized the effect of these provisions on signatures executed in both proper and improper form:

3-403(2) contemplates at least three different types of signatures:

(1) X. Inc. A. E. Brown
(2) X. Inc. by A. E. Brown, V.P.
(3) A. E. Brown, Vice President

Under 3-403(2), in case (1), as Mr. Brown did not indicate his representative capacity, both he and X Inc. are bound. In case (2), only X Inc. is bound because the instrument names the representative capacity. In the third case, although the unfortunate signer added words indicating a representative capacity, he failed to disclose his principal. Under these circumstances, X Inc. not being named, is not bound; and Brown is individually bound.

The signer of a negotiable instrument generally will be personally

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18. U.C.C. § 3-403 provides:
(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in any other cases of representation. No particular form of appointment is necessary to establish such authority.
(2) An authorized representative who signs his own name to an instrument (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
   (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

Id.

The language "or other representative" in U.C.C. § 3-403 was added to show that trustees and executors or administrators of estates, in addition to technical agents, may affect legal relations between legal entities. See U.C.C. § 1-201(35).

liable unless the instrument indicates that he signed in a representative capacity and the instrument also identifies the principal.\textsuperscript{20} The introductory phrase "except as otherwise established between the immediate parties" indicates that this rule is not conclusive. An agent who appears obligated on a negotiable instrument may in some cases escape liability by presenting parol evidence showing the parties did not intend to bind him. Courts will only admit parol evidence, however, if the instrument contains an ambiguity placing the holder on notice that the intended obligor may be someone other than the person who signed. A substantial body of precedent has established that the requisite ambiguity may exist anywhere on the face of the instrument; the form of the signature need not place the holder on notice that the signer did not intend to be bound.

In \textit{St. Croix Engineering Corp. v. McLay},\textsuperscript{21} the Minnesota Supreme Court admitted parol evidence as it held that the agent was not personally obligated on the instrument.\textsuperscript{22} The court considered facts indicating that the plaintiff knew initially that the defendant signed in a representative capacity: the name, address, and logo of Mitronics, Inc., were printed in the upper left corner of each check; a check cutting machine imprinted the written sum on each check; St. Croix knew McLay did business as a corporation; St. Croix initially sued Mitronics, Inc., rather than McLay; the plaintiff complained to Mitronics after the checks were dishonored.\textsuperscript{23} The court found that section 3-403 required acknowledgement of agency on the instrument, but not necessarily in the signature.\textsuperscript{24} The opinion recognized that the fact finder may consider business practice and custom.\textsuperscript{25} The court also indicated in dicta that it would be more likely to find an agent personally liable on a corporate note than on a corporate check.\textsuperscript{26}

The Court of Appeals for the District of Columbia admitted parol

\textsuperscript{20} See U.C.C. § 3-403, \textit{supra} note 18.
\textsuperscript{21} 304 N.W.2d 912 (Minn. 1981).
\textsuperscript{22} \textit{Id.} at 915. Gerald McLay, president of Mitronics, Inc., issued checks to St. Croix Engineering Corp. St. Croix sued Mitronics when the checks were dishonored, and Mitronics entered Chapter 11 bankruptcy. St. Croix then sued the estate of McLay, who had died after Mitronics entered bankruptcy. St. Croix claimed that McLay's failure to indicate he signed on behalf of Mitronics caused McLay to be personally liable on the instrument under U.C.C. § 3-403. \textit{Id.} at 913-14.
\textsuperscript{23} \textit{Id.} at 914-15.
\textsuperscript{24} \textit{Id.} at 914.
\textsuperscript{25} \textit{Id.} at 915, citing J. White & R. Summers, \textit{supra} note 2, at 405.
\textsuperscript{26} McLay, 304 N.W.2d at 915.
evidence to exonerate the defendant in Chidakel v. Blonder.\textsuperscript{27} Plaintiff sued Harvey and Florence Blonder on a note that provided:

For Value Received Discount Car Wash Number Five, A Va. Corp. promise [sic] to pay to the order of Pauline P. Chidakel the sum of One Hundred Thousand ($100,000.00) Dollars.

Attest: __________________________ Discount Car Wash Number 5 (Initials “H.B.”) __________________________ by (signature of Florence Blonder).\textsuperscript{28}

The court found that Harvey was not bound because the face of the instrument revealed that he signed only as a witness.\textsuperscript{29} The opinion next recognized that this promissory note did not fall within any category in U.C.C. section 3-403; the note was a hybrid of sections 3-403(2)(b) and 3-403(3).\textsuperscript{30} Florence’s title did not follow her name, but her name followed the word “by” and was immediately below the name of the business. The opinion recognized that the face of the note indicated the person represented (Discount) and provided some evidence that Florence signed in a representative capacity.\textsuperscript{31} The court noted a split of authority over whether the word “by” may be evidence of representative rather than personal capacity,\textsuperscript{32} and held that parol evidence was admissible in this case to show the agent signed only in a representative capacity.

The \textit{St. Croix Engineering Corp.} and \textit{Chidakel} courts based their holdings on findings that the face of the instrument did not show clearly whether the agent signed in a representative capacity. The courts admitted parol evidence to resolve the dispute. The Alabama Supreme Court elaborated on this view in \textit{Wurzburg Bros. Inc. v. Coleman}.\textsuperscript{33} The opinion noted that the Code\textsuperscript{34} allows parol evidence to re-

\begin{itemize}
\item 27. 431 A.2d 594 (D.C. Cir. 1981).
\item 28. \textit{Id.} at 595.
\item 29. \textit{Id.}
\item 30. \textit{Id.} at 596.
\item 31. \textit{Id.}
\item 33. 404 So. 2d 334 (Ala. 1981). Defendant was president of Coleman American Moving Services, Inc. Plaintiff sold supplies to Coleman American on an open account.
\end{itemize}
solve a dispute between initial parties to the instrument if there is a partially disclosed principal, or if the instrument names the person represented, but does not indicate the agent signed in a representative capacity. The *Wurzburg Bros. Inc.* court next found it could look beyond the signature on the instrument to determine representative capacity, but noted that defendant had the burden of proof to establish he was not liable. The opinion emphasized the policy of promoting certainty and predictability in the law of negotiable instruments. Holders of instruments "should be able 'to tell at a glance whose obligation they hold'."

In their debates about the Uniform Commercial Code, the New York Law Revision Commission devoted surprisingly little attention to the policies behind U.C.C. section 3-403. The dearth of discussion may have resulted from the similarity between the New York Negotiable Instruments Law then in effect and U.C.C. section 3-403. The Coleman American paid with checks that the bank dishonored. Plaintiff's credit manager feared Coleman American would become insolvent. He therefore had defendant sign a note to secure the debt. The note provided: "Coleman American Moving Services, Inc. promises to pay . . . $44,419.68." The note was signed "James H. Coleman" and did not indicate that Coleman signed in a representative capacity. The Alabama Supreme Court admitted parole evidence and found defendant personally liable on the instrument. *Id.* at 335-37.

34. U.C.C. § 3-403(2) provides "except as otherwise established . . .," implying that parol evidence is admissible in the situations described.

35. *Wurzburg Bros., Inc.*, 404 So. 2d at 336. A person acts for a partially disclosed principal if he acknowledges the representative capacity of his signature but he does not identify the persons he represents. *RESTATEMENT (SECOND) OF AGENCY* § 4 (1958), [hereinafter cited as *RESTATEMENT*].


38. *Wurzburg Bros., Inc.*, 404 So. 2d at 336 (citing Byrd Co. v. Tolbert, 286 Ala. 465, 241 So. 2d 840 (1971)); Fanning v. Hembree Oil Co., 245 Ark. 825, 434 S.W.2d 822 (1968). Defendant failed to meet this burden; the court placed little weight on his self serving statements because another court had recently convicted him of securities fraud. *Wurzburg Bros., Inc.*, 404 So. 2d at 337.


41. See generally LAW REVISION COMMISSION REPORTS, supra note 19.

42. Section 38 of the New York Negotiable Instrument Law (1877) was adopted from section 19 of the Uniform Negotiable Instruments Law (1896). 1 LAW REVISION COMMISSION REPORTS, supra note 19 at 223 (1955). This section provided: "Signature
Law Revision Commission noted that both the U.C.C. and the Negotiable Instruments Law imposed a potentially severe burden on an agent who intended to act on behalf of another.43 The Commission concluded, however, that "[t]he requirements of certainty and definiteness of commercial paper are thought to call for this unfortunate's [the agent's] sacrifice if he has not signed in the correct form. That is the rationale of the harsh rule, as described in Comment 3 to Section 3-403."44 The Commissioners observed that New York followed the minority rule which admitted parol evidence in a suit between initial parties but refused to admit it as a defense to suit by a holder in due course.45 The Commission concluded that adoption of the U.C.C. would change this practice.46 The Code, however, may achieve a similar result in a less direct manner because an obligor may assert personal defenses, including failure of consideration,47 against anyone other than a holder in due course.48

In *Havatampa Corp. v. Walton Drug Co., Inc.*,49 a Florida District Court of Appeals noted that the presumption in favor of agent's personal liability promotes certainty and predictability in negotiable in-

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43. *Id.* at 225.
44. *Id.*
45. *Id.* at 226-27.
46. *Id.* at 227.
47. U.C.C. § 3-408.
48. U.C.C. § 3-305. The Commission recognized policies supporting the minority rule and the U.C.C.: A holder in due course should not be required to inquire what was meant by that form of signature [words of agency alone]. Such inquiry would slow up the ready transfer of negotiable instruments as a substitute for money. Hence the agent should not be allowed as against a holder in due course to show by parol evidence that he did not intend to bind himself personally. But as against a plaintiff who is the payee and who has dealt directly with the agent, it does not seem to make sense to say that the agent will not be permitted to show that such payee plaintiff knew that the agent did not intend to be bound personally, for the payee could not have been misled by such form of signature.

2 LAW REVISION COMMISSION REPORTS, supra note 19, at 227 (quoting F. WHITNEY, BILLS AND NOTES 19 (1943).

49. 354 So. 2d 1235 (Fla. Dist. Ct. App. 1978). Defendants executed a note stating "We promise to pay . . ." and signed
International Negotiable Instruments

Imposing a burden on the agent to reveal his representative capacity and to identify his principal makes negotiable instruments easier to understand by their purchasers and thereby enhances negotiability. The court refused to dismiss suit against the agent because there was an ambiguity on the face of the promissory note the agent signed.

2. Authority for Signature

An agent generally will be liable on a negotiable instrument if he signs in his principal's behalf but without the principal's authority. The Official Comment elaborates: "'Unauthorized signature'... includes both a forgery and a signature made by an agent exceeding his actual or apparent authority." In hearings in which it decided to adopt the U.C.C. for the District of Columbia, the District of Columbia Committee in the House of Representatives noted that the Code was not an abrupt change from existing law; it merely settled several questions as it codified current commercial law concepts. Principles of law and equity, including the law of principal and agent, supplement

Walton Drug Co., Inc. d/b/a Touchton

Drugs __________________ and/or __________________

(seal) __________________ (seal)

Bob Edrington, Owner

_________________________ Bob Edrington, President.

(seal)

The court refused to dismiss the suit because reasonable people could differ over whether the parties intended the agent to be bound. The opinion noted that the word "President" after Edrington's signature may have been used either to identify the signer or to show representative capacity. Id. at 1236-37.

50. Id. at 1237.
51. Id.
52. See U.C.C. § 3-404(1), which provides:
   Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
An exhaustive study of agency law is beyond the scope of this note. The author presents the following discussion as an overview to applicable law and practice.

53. U.C.C. § 3-404 official comment 1.
the Code except when these principles are clearly inconsistent with the Code's provisions.\textsuperscript{55} This is fortunate; article 3 does not delineate the possible sources of an agent's authority to bind his principal. The official Comment to section 3-403 provides some insight but does not clarify adequately the possible sources of authority.\textsuperscript{56} The Code directs the practitioner to other legal sources, particularly the common law, for interpretation of agent's authority.\textsuperscript{57}

The second Restatement of Agency recognizes five sources of an agent's power to bind his principal: express authority,\textsuperscript{58} implied authority,\textsuperscript{59} apparent authority,\textsuperscript{60} inherent power,\textsuperscript{61} and ratification.\textsuperscript{62}

a. Express Authority

Express authority is easy to recognize and, if written, is easy to prove.\textsuperscript{63} The essential requirement is a communication by the principal to the agent indicating that the agent may act on the principal's behalf.\textsuperscript{64} Courts will only consider the statement by the principal; the principal's unexpressed intent is irrelevant.\textsuperscript{65} An agent who relies on an express conferral of authority by the principal and who signs according to the form provided in U.C.C. section 3-403 will bind the principal but will not obligate himself on the instrument.\textsuperscript{66}

b. Implied Authority

The Restatement of Agency defines implied authority as actual

\begin{itemize}
  \item \textsuperscript{55} U.C.C. § 1-103.
  \item \textsuperscript{56} The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol evidence is admissible to prove it or deny it.
  \item U.C.C. § 3-403 official comment.
  \item \textsuperscript{57} See U.C.C. § 1-403.
  \item \textsuperscript{58} Restatement § 7.
  \item \textsuperscript{59} Id. at § 35.
  \item \textsuperscript{60} Id. at §§ 8, 159.
  \item \textsuperscript{61} Id. at § 8A.
  \item \textsuperscript{62} Id. at § 82; U.C.C. § 3-404 official comment 3.
  \item \textsuperscript{63} See generally Restatement § 7 at 28-29, § 26 at 100.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id. § 26 at 100.
  \item \textsuperscript{66} Id. §§ 320, 324.
\end{itemize}
authority to perform acts that are incidental to the purpose of the agency. Communications between principal and agent determine applicability of both express and implied authority. An agent should be loath to rely on implied authority in the absence of such factors as business emergencies or a principal's statements to third parties by which the principal recognizes the agent's authority to act. The Restatement clarifies the scope of implied authority. Unless otherwise agreed, authority to manage a business includes authority to make incidental or reasonably necessary contracts, to buy necessary equipment and supplies, to make necessary repairs, to employ or discharge employees as reasonably necessary, to sell products in accordance with business purposes, to receive payment on the principal's behalf, and to pay business debts.

c. Apparent Authority

A principal's statement to a third party that his agent has authority to act will confer apparent authority on the agent and will empower the agent to bind the principal, even if the principal privately ordered the agent not to act. Courts limit the scope of apparent authority by requiring the third party's reliance to be reasonable. In Taillie v.

67. "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." Id. § 35.


69. Restatement § 47 recognizes the agent's authority to do whatever he reasonably believes necessary to prevent a substantial loss to his principal in an unforeseen situation. The unforeseen situation and reasonable belief as to what is necessary may be difficult to establish. Courts, therefore, have considered relatively few cases in which agents relied on implied or emergency authority.

70. See “apparent authority,” infra notes 72-80 and accompanying text.

71. Restatement § 73.

72. Id. § 8 and comment a; § 160.

73. In Stephens v. Yamaha Motor Co., Ltd., 627 P.2d 439 (Okla. 1981), the Supreme Court of Oklahoma held that plaintiff was not entitled to rely on the appearance of an agency relation. Id. at 442. The Stephens plaintiff had the defendant repair a motorcycle tire because plaintiff believed defendant was affiliated with Conoco. The only reason for believing there was a connection between defendant's service station and Conoco was the small Conoco sign defendant displayed. When his tire deflated, plaintiff sued defendant's service station and Conoco, Inc., arguing that defendant had apparent authority to bind Conoco to express and implied warranties. Id. at 440. The Oklahoma Supreme Court affirmed summary judgment for Conoco as it noted, “Ap-
Chedester the Tennessee Court of Appeals based a finding of apparent authority on a course of dealing. The unanimous opinion found that plaintiffs were entitled to rely on apparent authority of Chedester's fiancee because of her supervision of construction and the course of changes she ordered.

Similarly, the Texas Court of Civil Appeals found apparent authority in a course of dealing in Southline Equipment Co. v. National Marine Service, Inc., but noted that estoppel is the basis for apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Id. at 441 (quoting RESTATEMENT § 8 comment c. The court quoted Rosser-Moon Furniture Co. v. Oklahoma State Bank, 192 Okla. 169, 135 P.2d 336 (1943)):

"Apparent authority" of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. And the elements that must be present before a third person can hold the principal for the acts of the agent on the theory of apparent authority are (a) conduct of the principal, (b) reliance thereon by the third person, and (c) change of position by the third person to his detriment.

Stephens, 627 P.2d at 441.

74. 600 S.W.2d 732 (Tenn. App. 1980). Chedester entered an agreement with a general contractor to build his home. Chedester's fiancee watched the work and proposed changes in plans. The contractor considered her Chedester's agent, and made all changes she proposed. When she asked to change cabinets, the contractor introduced her to plaintiffs, who were cabinet makers. She agreed to proposed plans and cost. When Chedester did not pay for the change, plaintiffs sued Chedester and the general contractor. The court rejected Chedester's argument that he had never authorized his fiancee to act on his behalf. Id. at 733-35.

75. Id. at 735. The court quoted 3 AM. JUR. 2d Agency § 73 (1962):

[S]o far as concerns a third person dealing with an agent, the agency's "scope of authority" includes not only the actual authorization conferred upon the agent by the principal, but also that which has apparently been delegated to him. Apparent authority, or ostensible authority, as it is also called, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. In effect, therefore, an agent's apparent authority is, as to third persons dealing in good faith with the subject of his agency and entitled to rely upon such appearance, his real authority, and it may apply to a single transaction, or to a series of transactions.

600 S.W.2d at 734-35.

76. 598 S.W.2d 340 (Tex. Civ. App. 1980). National sued Southline for amounts due for repair of Southline's forklift. Southline claimed its employees, Whitey and Plaunty, did not have authority to enter in a contract for Southline. Plaunty previously placed orders; Plaunty and Whitey were present while plaintiff worked on the forklift, with their employer's implicit approval. Id. at 341-42.
authority. Apparent authority exists if the principal causes a reasonably prudent person to believe the agent has authority to act. The court agreed with defendant that only manifestations by the principal are relevant; an agent may not create apparent authority by his own words or conduct. In this case, however, the court found sufficient evidence of manifestations by the principal to invoke apparent authority.

d. Inherent Agency Power

Drafters of the Restatement attempted to find a theoretical justification for judicial decisions imposing liability on the principal for acts of the agent when the principal had conferred neither actual nor apparent authority. Section 8A of the Restatement adopts the term inherent agency power which refers to "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."

Neither the U.C.C. nor the official comments mentions inherent power as a basis for freeing an unauthorized agent from liability under section 3-404. It also appears that no appellate tribunal has directly addressed the issue. The Code indicates, however, that courts should follow a traditional analysis of the law of principal and agent as they evaluate the scope of an agent's authority. In Musulin v. Woodtek, Inc., the Oregon Supreme Court suggested that inherent power, de-

77. Id. at 343.
78. Id. at 343, citing Chastain v. Cooper & Reed, 152 Tex. 322, 257 S.W.3d 433 (1953).
79. Id. at 343 (citing Bugh v. Word, 424 S.W.2d 274 (Tex. Civ. App 1968)).
80. Id. at 343.
82. RESTATEMENT § 8A.
83. U.C.C. § 3-403(1) recognizes that the agent's authority may be established as in other cases of representation.
84. 491 P.2d 1173 (Or. 1971). Charles Benert, Woodtek's general manager and vice president, signed an $80,000 promissory note on behalf of Woodtek. Id. at 1174. Woodtek defended subsequent suit on the grounds of lack of consideration and lack of actual or apparent authority for Benert to obligate the corporation. The court cited a pre-U.C.C. case, DuBois Matlack Lumber Co. v. Davis Lumber Co., 149 Or. 571, 573, 42 P.2d 152, 154 (1935), for the proposition that neither the president nor the vice president has inherent power to obligate a corporation on a negotiable instrument. See also Capital Bank v. American Eyewear, Inc., 597 S.W.2d 17 (Tex. Civ. App. 1980),
fined in the case as "power flowing from the nature of the office," may be relevant only if no other source of authority is available. A mere vice president or president may not have inherent power to bind a corporation. If the corporate officer signs an instrument without actual or apparent authority he will bind himself and the court will require a high threshold of proof to establish inherent power.

Courts are most likely to invoke inherent power to oblige the principal of a general agent. A general agent may have power to bind his principal in transactions that usually accompany, or that are incidental to, work he is authorized to perform if the third party reasonably believes the agent is authorized to act.

e. Ratification

The U.C.C. provides that a principal may ratify the unauthorized signature of his agent if the agent purported to sign in his behalf. The Official Comment recognizes that ratification is retroactive, and that it may relieve an unauthorized agent from personal liability on the instrument. An unauthorized signer, however, may be liable to the principal even after ratification. A court may find ratification in express statements by the principal or in the principal’s retention of benefits after he learns of the unauthorized signature. The Restatement would place a heavy burden on a principal. Section 43 finds ratification in a principal’s acquiescence in an unauthorized act. Section 94 suggests that failure to take active measures to repudiate an unauthorized act may

in which the court held that a bank president did not have actual or apparent authority or inherent power to sign a lease on the bank’s behalf. The Musulin court did not address the issue of agent’s liability as it affirmed judgment for plaintiff.

85. Musulin, 491 P.2d at 1177.
88. U.C.C. § 3-404(2).
89. U.C.C. § 3-404(2) official comment 3: “[T]he word ‘ratified’ is used in order to make it clear that the adoption is retroactive. . . [t]he ratification relieves the actual signer from liability on the signature.”
90. U.C.C. § 3-404(2) and official comment 3.
91. U.C.C. § 3-404 official comment 3.
92. RESTATEMENT § 43.
imply affirmance. The extent of this burden remains unclear.

f. Termination of Authority

An agent acting within the apparent scope of authority may find himself personally obligated under U.C.C. section 3-404(1) if the agency relation terminates before he signs an instrument on behalf of his principal. This result protects innocent principals and third parties and it places a substantial burden on the agent to verify his status before each representative act. The Restatement enumerates established grounds for termination of the agency relation. Actual authority ends at the time specified in the agent’s contract with the principal. If the original agreement does not provide for duration of authority, the relation will cease when the agent accomplishes the authorized act or when specified events occur. In most cases a principal may unilaterally terminate an agent’s employment or an agent may expressly or implicitly renounce the relation. However, a party who wrongfully terminates the relation may be liable in damages for breach of contract or for other grounds. Actual authority will also end if either principal or agent loses capacity to contract. This most often occurs upon death of the principal or of the agent or upon the winding up of a corporate principal or agent.

The Supreme Court of Arizona followed the majority rule in Mubi v. Broomfield as it held that death of the principal instantaneously

93. Restatement § 94 official comment a (limiting the broad ramifications of this rule). The drafters would leave broad discretion to the factfinder by basing the test for ratification on whether the principal failed to object when “according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent.” Id.

94. See Restatement §§ 105-39.

95. See supra text accompanying notes 63-66.

96. Restatement § 106.

97. Id. § 107.

98. Id. § 118.

99. Id. § 122.

100. 108 Ariz. 39, 492 P.2d 700 (1972). Petitioner's decedent sued Walter and Jane Doe Tribble for injuries he suffered in a car accident. On August 5, 1970, defendants filed an offer of judgment. Rule 68 of the Arizona Rules of Civil Procedure required any offer to be accepted in writing within ten days or it would be deemed withdrawn. Before he died on August 11, 1970, petitioner's decedent told his wife to accept the proposal but he did not file the required acceptance until after decedent's death. Id. at 40-41, 492
ends agency authority by operation of law.\textsuperscript{101} The court considered whether the attorney had authority after his client's death to carry out instructions made before death. In holding that the acceptance was not valid, the unanimous opinion noted, "[w]here there is only a naked authority, not coupled with an interest, the death of the principal without notice ends the agent's authority to act in his principal's behalf."\textsuperscript{102} 

This decision is noteworthy for two reasons. First, it does not require any notice to the agent before his authority is terminated. Second, it does not apply to a power coupled with an interest.\textsuperscript{103} The court observed, however, that courts sometimes make an exception to protect innocent third parties who deal with an agent in good faith and without knowledge of the principal's death.\textsuperscript{104}

The Supreme Court of Washington considered requirements for termination of apparent authority in \textit{Lazov v. Black}.\textsuperscript{105} The court noted the general rule protecting third parties from revocation of an agent's authority without notice, by stating that "generally, termination by a principal of an agency relationship is not effective as to the agent and third parties who have previously dealt with the agent in that capacity until notice of the termination of the relationship is conveyed to them."\textsuperscript{106} The court found the general rule inapplicable in this case because statutes required filing of a revocation of power of attorney and provided that filing was constructive notice to third parties.\textsuperscript{107}

\textit{Mubi} and \textit{Lazov} indicate that an agent's authority may terminate immediately upon the death or incapacity of the principal—even without notice to the agent or third party. An agent or third party, however, may continue to rely on an agent's appearance of authority after

\textsuperscript{101} \textit{Id.} at 41, 492 P.2d at 702.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{See infra} text accompanying notes 110-114.
\textsuperscript{104} \textit{Mubi}, 108 Ariz. at 42 n. 1, 492 P.2d at 703 n. 1.
\textsuperscript{105} 88 Wash. 2d 883, 567 P.2d 233 (1977). Spridon Lazov executed and recorded a general power of attorney naming his wife attorney in fact. He left the state and his wife purchased a home in their names from appellants. Mrs. Lazov then conveyed her husband's interest to Mr. and Mrs. Boyce. Mr. Lazov returned to the state, filed suit for divorce, and told his wife he intended to revoke the power of attorney. He accepted a quitclaim deed from Mr. and Mrs. Boyce and filed a revocation of the power of attorney. The wife then conveyed their interest in the property to appellants. The husband sued and the trial court declared the deed void. \textit{Id.} at 884-85, 567 P.2d at 234.
\textsuperscript{106} \textit{Id.} at 886, 567 P.2d at 234.
\textsuperscript{107} \textit{Id.} at 885-6, 567 P.2d at 234-5.
they have dealt together and until they receive notice that the principal has revoked the agent's authority. The *Mubi* court reconciled this apparent inconsistency; the agent's authority is derivative—if the principal does not have capacity to contract the agent can have no power to contract on his behalf.\(^\text{108}\) However, an agent claiming that his apparent authority remains does not assert a greater capacity than his principal enjoys; he merely asserts that he retains a power he once possessed. The *Mubi* opinion suggests, furthermore, that an agent whose power is coupled with an interest in the transaction may retain authority even after the principal's death or attempted revocation.\(^{109}\)

The Arizona Supreme Court clarified the doctrine of power coupled with an interest in *Phoenix Title and Trust Co. v. Grimes*.\(^{110}\) The trial court entered summary judgment for defendants and the Supreme Court reversed, holding that agency power to sell the land passed to the agent's estate because the agent had a power coupled with an economic interest in the underlying transactions.\(^{111}\) The court limited this rule by noting that personal service contracts may not be assignable if they can only be performed by the initial person employed.\(^{112}\) The unanimous opinion found that the agent's power in this case:

> was a power coupled with an interest, and is irrevocable. It is of course the general rule that the death of either principal or agent terminates the relationship. However, the exception to the rule is that if the agency or power of the agent is coupled with an interest in the subject matter of the agency, the power so coupled will survive to the personal representative of the agent upon the death of the agent.\(^{113}\)

The court found that the decedent's rights survived his death\(^{114}\) be-

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110. 101 Ariz. 182, 416 P.2d at 979 (1966). Plaintiff's decedent was a coventurer in a land development plan. He owned an undivided 7/24 interest in the property, and the other investors signed a contract giving him the exclusive right to subdivide, advertise, develop, and sell the land for a commission; the agreement explicitly provided that this right would pass to decedent's heirs or assigns. Defendants refused to permit the executor to continue performing the contract. *Id.*
111. *Id.* at 184-85, 416 P.2d at 981-82.
112. *Id.* at 185, 416 P.2d at 982.
113. *Id.* at 184-85, 416 P.2d at 981-82 (citing Commercial Nursery Co. v. Ivey, 164 Tenn. 502, 51 S.W.2d 238 (1932)).
114. *See also* Matter of Estate of Gray, 541 P.2d 336 (Colo. App. 1975), in
because the decedent was a conventurer with an economic interest in addition to his interest in the exercise of the power to manage the property.

C. Summation

An attorney advising an agent should recommend that the agent have a written statement establishing the scope of authority because the agent's subsequent attempt to prove implied authority or inherent power may be especially difficult. If an agent acts pursuant to written authorization, particularly a power of attorney, he should follow its terms strictly. The agent should show on the instrument both his representative capacity and the identity of his principal. An attorney determining who is liable on a negotiable instrument must consider several questions. Did the agent name the principal? Did the agent properly acknowledge his representative capacity? Did the agent have authority to bind the principal? If the agent did not have authority to bind the principal, then did the principal ratify his agent's conduct?

These questions are essential to determination of liability not only on negotiable instruments in the United States, but also on countries that adopted the English Bills of Exchange Act\(^\text{115}\) and the Geneva Conventions on negotiable instruments.\(^\text{116}\)

III. England

A. Negotiable Instruments

The English law of negotiable instruments is based on the Bills of Exchange Act and the Cheques Act.\(^\text{117}\) The Bills of Exchange Act was the basis for the United States Uniform Negotiable Instruments Law

which the Colorado Court of Appeals found decedent had a sufficient interest in oil wells for his power as agent to pass to his estate.

115. See supra note 3 and accompanying text.
116. See supra note 4 and accompanying text.
117. Section 1 of the Cheques Act protects bankers who pay cheques in good faith, without negligence, and in the ordinary course of business; Sections 2 and 4 protect bankers who participate in the cheque collection process. Section 5 of the Cheques Act adopts Bills of Exchange provisions for crossed cheques. Further discussion of the Cheques Act is beyond the scope of this note.
and influenced the evolution of the Uniform Commercial Code. Negotiable instruments may be transferred as readily under the Bills of Exchange Act as under the Uniform Commercial Code. If a holder takes a negotiable bill of exchange in good faith, for value, and without notice of any defect in title, he becomes a holder in due course and will hold the bill free from any personal defenses or defect of title.

The United States practitioner should feel reasonably comfortable when planning commercial transactions in any of the countries that adopted the English Bills of Exchange Act. The Bills of Exchange Act generally has the same effect as the Uniform Commercial Code. The following discussion addresses provisions under the Bills of Exchange Act that differ from commercial law in the United States.

The statute defines a negotiable bill of exchange:

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

A drawer may write a bill of exchange on anything that is not metal. A bill of exchange must be payable to order or to bearer. The Act construes a bill payable to a particular person as payable to that person's order unless the face of the instrument prohibits transfer. No one is liable on a bill of exchange unless his signature appears, but a

118. M. Megrah & F. Ryder, Byles on Bills of Exchange 3 (23d ed. 1972) [hereinafter cited as Byles on Bills of Exchange].
120. Id. § 38(2).
121. Id. § 3(1).
122. Byles on Bills of Exchange, supra note 118, at 8. The Coinage Act, 1870, 33 & 34 Vict., ch. 10, reprinted in 6 Halsbury's Statutes of England 836 (3d ed. 1968) [hereinafter cited as Coinage Act], forbids issuance of any metal as "a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon." Coinage Act. § 5.
123. Id. § 8(2).
124. Id. § 8(4). Compare United States practice requiring use of words "order" or "bearer." U.C.C. § 3-104(1)(d) and official comment 5 require the use of prescribed language or a clear equivalent, and provide that in doubtful cases courts should hold against negotiability. A statement "pay John Doe" would, therefore, be negotiable in England but not in the United States.
125. Bills of Exchange Act § 23. Compare United States under U.C.C. § 3-401(2), providing that a person may sign a trade or assumed name.
person may be personally liable if he signs a trade or assumed name.\textsuperscript{126} The signature of a partnership's name acts as the personal signature of every partner.\textsuperscript{127} The drawer of indorser may add a statement such as "without recourse to me" or "sans recours" to eliminate or limit his liability on the instrument.\textsuperscript{128}

A check is a bill of exchange drawn on a bank.\textsuperscript{129} The Bills of Exchange Act permits the drawer to "cross" the check and thereby eliminate negotiability.\textsuperscript{130} Section 83(1) defines "promissory note" as "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." The maker of a note contracts to pay it according to its tenor\textsuperscript{131} and is subject to the same liability as in United States practice.\textsuperscript{132}

The Court of Appeals clarified requirements for checks and bills of exchange and illustrated a difference from United States law\textsuperscript{133} in \textit{Orbit Mining & Trading Co., Ltd. v. Westminster Bank, Ltd.}\textsuperscript{134} In hold-

\textsuperscript{126} Bills of Exchange Act \S\ 23(1).
\textsuperscript{127} \textit{Id.} \S\ 23(2).
\textsuperscript{128} \textit{Id.} \S\ 16(1). Compare United States practice permitting a drawer or indorser to sign "without recourse" to eliminate personal liability. U.C.C. \S\S\ 3-413, 3-414. Under the U.C.C. a transfer without recourse does not eliminate all warranty liability; the transferor then only warrants he has no knowledge of a valid defense against him. U.C.C. \S\ 3-417(3).
\textsuperscript{129} Bills of Exchange Act \S\ 73. Lord Chorley defines "cheque" as follows: A cheque is an unconditional order in writing drawn by one person upon another, who must be a banker, signed by the drawer, requiring the banker to pay on demand, or at sight, or on presentation or expressing no time for payment, a sum certain in money to or to the order of a specified person or to bearer.
\textsuperscript{130} \textit{R. Chorley, Law of Banking} 44 (6th ed. 1974).
\textsuperscript{131} A check bearing two parallel transverse lines across its face is "crossed," and is not negotiable. Bills of Exchange Act \S\S\ 76-81.
\textsuperscript{132} \textit{Id.} \S\ 88.
\textsuperscript{133} U.C.C. \S\S\ 3-413(1), 3-413(3).
\textsuperscript{134} U.C.C. \S\ 3-111 provides that an instrument will be deemed payable to bearer if it indicates it is payable to "(a) bearer or the order of bearer; or (b) a specified persons or bearer; or (c) 'cash', or any other indication which does not purport to designate a specific payee." \textit{Id.} The Bills of Exchange Act does not have a comparable provision. The present court considered whether checks payable to cash could be negotiable.
\textsuperscript{134} [1962] 3 All E.R. 565 (C.A.). Epstein was a secretary and a director of Orbit Mining Company and was authorized to cosign checks with the other director,
ing for the bank, the court found that the instruments were not checks¹³⁸ and that section 4(1)(a) of the Cheques Act protected the bank from liability since the bank was not negligent in paying.¹³⁸ The court noted that the Cheques Act is to be interpreted in conjunction with the Bills of Exchange Act.¹³⁷ The Bills of Exchange Act defines a check as "a bill of exchange drawn on a banker payable on demand."¹³⁸ A bill of exchange must be payable to a particular person, to order, or to bearer.¹³⁹ Because the instruments were payable to cash rather than to order, bearer, or a particular person, they were not bills of exchange and could not be cheques.¹⁴⁰ The court noted that section 7(3) of the Bills of Exchange Act provides that "[w]here the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."¹⁴¹ The opinion construed this provision strictly, finding that "cash" was not a person so the Bills of Exchange Act was inapplicable.¹⁴² Although the instrument was not a check under section 4(2)(a), it was a document under section 4(2)(b).¹⁴³ The court found that the bank was not negligent in paying because there was nothing on the face of the instrument to place the bank on notice of a defect.¹⁴⁴

B. Signature by Agent

Over one hundred and fifty years ago Chancellor Erskine wrote, "[n]o rule of law is better ascertained, or stands upon a stronger foundation, than this; that, where an agent names his principal, the princi-
pal is responsible: not the agent: but, for the application of that rule, the agent must name his principal as the person to be responsible." 146 Contemporary practice still follows this principle.

1. Form of Signature

The Bills of Exchange Act states how an agent must sign a negotiable instrument to escape personal liability:

(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted. 148

Parliament redrafted this section in committee, and may have liberalized the strict common law presumption that the agent always was personally liable. 147 Courts even today find such terms as "agent" or "manager" following a signature as mere designatio personae. 148

The form of signature is especially important in England. 149 A person who indicates on the instrument that he signs on behalf of another and who identifies the claimed principal with reasonable certainty generally will not be liable on the instrument, even if he signs without


It is not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration for another, which are words of exclusion? Unless he says plainly "I am the scribe" he is liable.

Id.

148. CHALMERS ON BILLS OF EXCHANGE, supra note 147, at 80.
149. Compare U.C.C. § 3-404(1), which provides that a person who signs in the proper form but without authority is personally liable for the instrument.
In deciding whether a signature binds the signer or his principal, a court will adopt the interpretation most favorable to the instrument’s validity. The Court of Appeals in Ernest Scragg & Sons, Ltd. v. Perseverance Banking & Trust Co., Ltd. demonstrated the results of failing to disclose the principal on the face of the instrument. The Defendant claimed the plaintiff had actual knowledge that the plaintiff was acting on behalf of Isranyl, but the court refused to look beyond the face of the instrument as it found defendant liable for conversion. The court noted, "English law will attribute to a document its face value if the document is, or is in the nature of, a negotiable instrument. . .or if it is what is sometimes called a quasi-negotiable instrument (as, for example, a bill of lading). . .".

Maxform S.P.A. v. Mariani & Goodville Ltd. demonstrated the interrelationship between the Bills of Exchange Act and the Companies Act of 1948 and their effect on personal liability of an agent who fails to disclose his principal. Mariani appealed from the decision of the trial court, arguing that he could not be liable as an acceptor under section 17(2) of the Bills of Exchange Act because he was not the drawee, that the only possible source of liability was section 108(4)(b) of the Companies Act, which imposes personal liability on agents of corporations who sign negotiable instruments on behalf of undisclosed principals, and that because the bill of exchange never mentioned

151. Id. § 26(2).
152. [1973] 2 Lloyd's L.R. 101 (C.A.). Defendant ordered texturing machines from plaintiffs. The order said it was from Preserverance Banking & Trust Co., Ltd., and was signed "for and on behalf of the Preserverance Banking & Trust Co." Pursuant to agreement, plaintiff shipped the goods to Isranyl Ltd. in Israel. Plaintiff sent a sight draft with invoice and bill of lading to defendant in London. Defendant did not pay or accept the draft, but immediately forwarded the documents to Isranyl Ltd. Plaintiff sued for breach of contract and for conversion of documents. Id. at 102.
153. Id. at 103 (citing Building & Civil Engineering Holidays Scheme Management Ltd. v. Post Office, [1964] 2 Q.B. 430, 445).
154. [1981] 2 Lloyd’s L.R. 54 (C.A.). Italian plaintiff manufactured and sold furniture to Goodville, Ltd., d/b/a/ Italdesign. Plaintiff drew four bills of exchange for the purchase price of 4,969,080 lire; three bills totaling 4,073,680 lire were outstanding at the time of suit. Of all three bills of exchange the drawee was “Italdesign,” the registered trading name for Goodwin, Ltd. The drawer had typed “per accettazione” below the drawee’s name. Mariani signed at the bottom of the bill without any description of his status. Id. at 56.
155. Companies Act, 1948, 11 & 12 Geo. 6 ch. 38, reprinted in 5 HALSBURY’S STATUTES OF ENGLAND 110 (3d ed. 1968) [hereinafter cited as Companies Act].
156. See id.
Goodville Ltd. or Italdesign, Mariani could not have purported to sign on their behalf. The Court of Appeals affirmed judgment for plaintiff as it found that the face of the instrument revealed Mariani signed on behalf of the drawee without disclosing his representative status.\(^{157}\) The court agreed that Mariani could not be liable as acceptor, but rejected his argument that section 26(1) of the Bills of Exchange Act required the court to look only to the form of signature.\(^{158}\) The court applied section 26(2), which required the court to give the instrument the construction most favorable to its validity, and which allowed the court to look at the instrument as a whole.\(^{159}\)

In addition to disclosing the principal, the agent should avoid ambiguities on the instrument. In *Rolfe Lubbell v. Keith*,\(^{160}\) the Court accepted plaintiff's argument that the Bills of Exchange Act section 26(2) requires construction most favorable to the validity of the instrument,\(^{161}\) that because the principal, Grafton, was already required to pay, defendants' signatures purportedly binding the company would be meaningless "mercantile nonsense,"\(^{162}\) and that the court should allow parol evidence to determine the parties' intent because of the ambiguity on the instrument.\(^{163}\) The court held that the patent ambiguity permitted admission of parol evidence of a course of dealing, and previous requirement by the plaintiff of personal indorsements indicated a mutual intent that the defendant be personally bound.\(^{164}\) The court noted that the defendants did not argue that the plaintiff waived his right to hold them personally liable by his failure to object to the stamp re-
revealing the representative capacity of the signature. 165

Ernest Scrugg, Maxform, and Rolfe Lubbell demonstrate the importance of an unambiguous signature revealing a representative capacity and identifying the principal. A court may refuse to look beyond the face of an instrument to determine whether the parties intended the signer to be personally liable. An agent signing on behalf of a principal should not permit his signature to appear in more than one place on the instrument because a court may construe the second signature as a personal indorsement.

2. Authority for Signature

The Bills of Exchange Act provides that an unauthorized signature generally will be completely inoperative and will not confer any rights on the instrument. 166 An agent who signs in the proper form, therefore, will not be personally obligated on the instrument even if he signs without authority. English courts achieve results similar to personal liability on the instrument by invoking a theory of breach of warranty of authority. 167

English law provides an exception by which agents who sign negotiable instruments on behalf of principals may be liable even if they indicate their representative capacity and identify their principal. A promoter of a corporation who signs on the corporation's behalf before the corporation is formed may be personally liable on the instrument under the European Communities Act of 1972. 168

165. Rolfe Lubbell, 2 Lloyds L.R. at 78.
166. Bills of Exchange Act § 24. Cf. U.C.C. § 3-404(1), providing that an agent who signs without authority of the person he purports to obligate will bind himself.
167. See generally F. Reynolds & B. Davenport, Bowstead on Agency 378-86 (14th ed. 1976) and cases cited therein. Analysis of warranty liability arising off the instrument is beyond the scope of this article.

Where a contract purports to be made by a company, or by a person as agent for a company, at a time when the company has not been formed, then subject to any agreement to the contrary the company shall have the effect as a contract entered into by the person purporting to act for the company or as agent for it, and he shall be personally liable on the contract accordingly.

Id.
In *Phonogram Ltd. v. Lane*, the Court of Appeals applied this statute for the first time to hold a corporate promoter personally liable to repay a loan made to his corporation before its formation. Defendant's corporation was never formed. The plaintiff sued, claiming that the defendant assumed liability by signing the letter acknowledging receipt of the loan, or that the defendant was liable under the EEC Act. In affirming the judgment of the trial court, Lord Denning noted that the word "you" in the letter appeared to refer to the defendant personally, but he deferred to the determination of the trial court. The defendant argued that section 9(2) of the EEC Act of 1972 did not apply. European Economic Community Council Directive 68/151 of March 9, 1968, was the basis for the EEC Act of 1972. Defendant argued that article 7 of the EEC Directive, as written in the original French text, would only impose personal liability on a promoter of a corporation who acted while the corporation was in the process of formation. Defendant could not be liable since he acted on

170. *Id.* at 186.
171. Musicians employed defendant, Brian Lane, as business agent to obtain financing for their band and Fragile Management, Ltd., the corporation they proposed to form to manage their business. Defendant obtained a commitment from plaintiff, Phonogram, Ltd., for £12,000, payable to Jelly Music Ltd. on behalf of Fragile Management Ltd. (Defendant was a promoter of Fragile Management Ltd. and a director of Jelly Music Ltd. Plaintiff executed the checks in this way for administrative convenience. Plaintiff sent a letter to defendant with the check, in which it explained, "[i]n the unlikely event that we fail to complete within, say, one month you will undertake to repay us the £ 6000." Plaintiff asked defendant to sign the letter on a line immediately above the statement, "for and on behalf of Fragile Management Ltd." Defendant signed and returned the letter. *Id.* at 184-85.
172. *See supra* note 168.
173. *Lane*, 3 All E.R. at 185.
174. *Id.* at 186.
176. *Lane*, 3 All E.R. at 186.
177. *Id.* English was not an official language of the European Economic Community in 1968. [1981] All E.R. at 186. The EEC Directive provided:

> If acts are accomplished on behalf of a corporation while being formed but before being incorporated and if the corporation does not take back the obligations resulting from these acts, the people who have performed them will be jointly and indefinitely liable in the absence of a contrary provision.

*Id.*

The French text refers to a corporation "en formation," which implies "while being incorporated." Defendant's argument may fail because the original drafters did not use the stronger terms "en train d'être formée," or "en train de se former," which would

http://nsuworks.nova.edu/nlr/vol9/iss1/10
behalf of the corporation before taking any steps to incorporate. The
defendant next argued he could not come within section 9(2) of the
EEC Act of 1972 because he did not "purport" to act for the com-
pany.\textsuperscript{178} The defendant disclosed that the company did not yet exist.\textsuperscript{179} The Court of Appeals rejected this argument without discussion, noting
that "[a] contract can purport to be made on behalf of a company, or
by a company, even though that company is known by both parties not
to be formed and that it is only about to be formed."\textsuperscript{180}

C. Summation

The English Bills of Exchange Act influenced development of the
Uniform Commercial Code, and negotiable instruments in England
have substantially the same effect as in the United States. An agent
sued on an instrument may present the same defenses his principal
could assert. A holder in due course takes the instrument free from
personal defenses; a person signing a bill of exchange or promissory
note may wish to avoid negotiability and the possibility that a holder in
due course will sue for payment.

An agent signing a negotiable instrument on behalf of his principal
may avoid negotiability by making a bill of exchange payable to cash,
crossing a check, or failing to comply with requirements in the Bills of
Exchange Act. An agent generally will not be liable on the instrument
if he indicates his representative capacity and identifies his principal,
even if he exceeds his authority. The promoter of a corporation may,
however, be personally liable on an instrument he issues on behalf of
his corporation before it is formed.

\textsuperscript{178} \textit{Lane}, 3 All E.R. at 186.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} G. CHESHIRE \& C.H.S. FIFOOT, \textsc{Law of Contract} 462 (9th ed. 1976),
discusses Section 9(2) of the EEC Act of 1972:

\begin{quote}
[T]his provision makes no change in the position of the company, which
still cannot ratify the contract. It is clearly intended however to increase
the number of cases where the agent is personally liable. How far it in fact
does so will depend on the meaning given to the words "subject to any
agreement to the contrary" since it could be argued that words showing that
A signs as agent express an agreement that he is not to be personally
liable.
\end{quote}

\textit{Id.}
IV. Civil Law Practice and the Geneva Convention

A. Overview

The Geneva Conventions\textsuperscript{181} are the basis for negotiable instruments law in much of continental Europe.\textsuperscript{182} Commercial need led to early attempts to unify commercial law. The Association for the Progress of Social Sciences first addressed the matter in a congress in Ghent in 1863.\textsuperscript{183} In 1908 the Dutch government called an international conference at the Hague. In 1912, this conference produced the first draft of a uniform law.\textsuperscript{184} The League of Nations addressed the concern in 1928, after the first World War interrupted efforts to codify a uniform law.\textsuperscript{185} Drafters of the Geneva Conventions learned from the Hague conferences that they could only achieve some degree of unification of laws if they attempted merely to reduce the number of commercial law systems to two—the Anglo-American system and the continental system.\textsuperscript{186} Drafters modeled the form of bills of exchange after German practice and eliminated bills payable to bearer to please the French.\textsuperscript{187} Thirty-one states participated in the Geneva Conference


\textsuperscript{182}. The following nations ratified or acceded to all or part of both Conventions. For reservations and dates of ratification or accession, see UNITED NATIONS, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 581-86 (1978), U.N.Doc. ST/LEG/SER.D/11 (1978). Greece, Denmark, Norway, Sweden, Netherlands, Switzerland, Austria, Belgium, Finland, Italy, Japan, Germany, Portugal, Monaco, France, Poland, Brazil, Hungary and Luxembourg. On February 21, 1974, the Secretary-General of the United Nations received notification that the German Democratic Republic declared reapplication of the Convention beginning June 6, 1958. On January 13, 1976, the Federal Republic of Germany notified the Secretary-General that it would not recognize retroactive application of the Convention in the German Democratic Republic beyond June 21, 1973. \textit{Id}.


\textsuperscript{184}. \textit{Id}.

\textsuperscript{185}. \textit{Id}.


\textsuperscript{187}. Hamel, \textit{supra} note 183, at 276-77.
May 13, 1930, through June 7, 1930. Participants adopted conventions dealing with uniform law on bills of exchange and promissory notes, conflicts of laws in connection with bills of exchange and promissory notes, and stamp laws in connection with bills of exchange and promissory notes. On March 19, 1931, participants at a second conference adopted three conventions unanimously, proposing a uniform law on checks, conflicts of laws in connection with checks, and stamp laws in connection with checks. The following section will analyze the law of France to illustrate negotiable instruments practice in a civil law jurisdiction that has adopted the Geneva Conventions.

B. Practice in France

1. Negotiable Instruments

The Code de Commerce governs negotiable instruments in France and gives effect to the Geneva Conventions. Assignment of debts generally requires formal notice to the debtor or the debtor's notarized acceptance. Debts represented by negotiable instruments are more readily transferable and are better suited to commercial needs. Negotiability under French law is much like its Anglo-American equivalent. Unlike United States and English provisions restricting applicability of personal defenses, the French Code de Commerce and the Geneva Conventions do not distinguish between holders and holders in due course. Under the French law any holder in good faith receives a...
negotiable instrument free from defects in title of earlier parties. French law confers negotiability on a wide variety of instruments, including bonds, bills of lading, bills of exchange, promissory notes, and checks. The Code de Commerce refers to bills of exchange, promissory notes, and checks as *effects de commerce*, and commercial courts have jurisdiction over all parties to these instruments. The following sections discuss essential characteristics of *effects de commerce* under the French Commercial Code and the Geneva Conventions.

### a. Bills of Exchange

A French bill of exchange has an effect similar to its counterpart in England and to a draft in the United States. It is a signed and dated instrument in writing in which the drawer orders the drawee to pay a sum certain in money to a named payee or his order at a fixed or determinable time. Unlike its United States or English equivalents, it may not be payable to bearer and a drawer may prevent its transfer by indorsement by making it payable “non à ordre.” The drawer has the responsibility, enforced by fines and imprisonment, of supplying a “provision” or fund from which the drawee will pay. The holder may not enforce the bill of exchange until the instrument is stamped and the stamp tax paid.

A bill of exchange must contain: the term “bill of exchange” written in the text in the language used in drawing the instrument, an

197. Id. Amos & Walton, supra note 195, at 365.
198. Id.
199. Id.
200. See generally id. at 365-37.
201. C. Com. art. 110; Bills of Exchange Convention art. 2; Amos & Walton, supra note 195, at 365.
202. C. Com. art. 110.
203. Id.
204. See, e.g., Code Pénal art. 405 (Dalloz 1981-1982) which treats failure to provide funds as a type of fraud.
205. C. Com. art. 116.
206. C. Com. art. 147.
207. The drafters of the Bills of Exchange Convention required the label “bill of exchange” to provide a definite and quick way to distinguish between a bill of exchange and a check or a promissory note, and to ensure that the signer realizes he is entering a serious legal obligation. Balogh, Critical Remarks on the Law of Bills of Exchange of the Geneva Convention, 9 Tul. L. Rev. 165, 184 (1935).
unconditional order to pay a sum certain, the name of the payor (drawee), a statement of the time of payment, identification of the place of payment, the name of the person to whom or to whose order payment is to be made, a statement of the date and place where the bill was issued, and the signature of the person issuing the bill (drawer). The signature may be by hand or by any other method. A bill of exchange in which the time of payment is not specified is deemed payable at sight. In the absence of any statement to the contrary, the place designated beside the drawee's name is deemed the place of payment, and also the domicile of the drawee. A bill of exchange that does not identify the place where it was issued will be deemed to have been drawn in the place mentioned beside the name of the drawer. If the sum payable on a bill of exchange is expressed both in words and in numbers, the sum expressed in words will govern if there is a difference. If the sum payable on a bill of exchange is expressed more than once in words or more than once in numbers, the smaller amount will control if there is a difference.

All drawers, acceptors, indorsers, or guarantors by aval of a bill of exchange are jointly and severally liable to the holder. The holder has the right to proceed against all these people, individually or collectively, without being required to follow the order in which they became bound. Anyone who signs a bill of exchange and pays the holder enjoys the same right the holder possessed. Filing suit, by the holder, against one of the parties, on the instrument does not constitute an

208. Compare Anglo-American practice requiring merely that the payee be identified with reasonable certainty. U.C.C. § 3-110; Bills of Exchange Act § 7.
209. C. COM. art. 110. Compare Bills of Exchange Convention art. 1, which does not include the second clause of requirement (8).
210. Id.
211. Domicile is relevant in choice of law questions. See infra notes 417-423 and accompanying text.
212. C. COM. art. 110; Bills of Exchange Convention art. 2. Place of issue is relevant in choice of questions. See infra notes 417-423 and accompanying text.
213. C. COM. art. 113; Bills of Exchange Convention art. 6.
214. An aval is a guarantee of payment written on the bills or on an allonge. See Bills of Exchange Convention art. 31; C. COM. art. 130. A guarantor may create an aval with the signed statement "good as aval" or "bon pour aval," or any similar provision. Id.
215. C. COM. art. 151; Bills of Exchange Convention art. 47.
216. C. COM. art. 151; Bills of Exchange Convention art. 47.
217. Id. Compare the doctrine of subrogation in United States practice codified in U.C.C. § 3-415(5).
election of remedies and does not preclude later suit against the others, even if they became obligated on the instrument after the person plaintiff sued first.\textsuperscript{218}

b. Checks

France adopted the Cheques Convention into its Code de Commerce by the Decree of October 30, 1935.\textsuperscript{219} Provisions related to checks in both the French Code and the Cheques Convention are similar to those dealing with bills of exchange.\textsuperscript{220} The following discussion addresses significant characteristics of checks and differences between checks and bills of exchange.\textsuperscript{221}

A check is a written instrument by which a drawer orders a bank or a similar financial institution to pay a sum certain on demand to a specified person, his order, or to bearer.\textsuperscript{222} If a check specifies the payee it may be negotiated by indorsement.\textsuperscript{223} The drawer may be subject to criminal penalties if he does not provide the drawee adequate funds to cover the check.\textsuperscript{224}

The Cheques Convention and the French Check laws provide stricter formal requirements than the English Bills of Exchange Act or the United States Uniform Commercial Code. A check must contain the term “cheque” in the body of the instrument in the language used in the rest of the instrument, an unconditional order to pay a sum certain in money, the name of the drawee, identification of place of payment, statement of date and place that the check is drawn, and the drawer’s signature.\textsuperscript{225} The drawee will not be liable on the instrument

\begin{itemize}
\item \textsuperscript{218} C. COM. art. 151; Bills of Exchange Convention art. 47.
\item \textsuperscript{219} 1935 \textit{PERIODIQUE ET CRITIQUE} IV 467.
\item \textsuperscript{220} \textit{See generally} AMOS \& WALTON, \textit{supra} note 195, 365-68.
\item \textsuperscript{221} The following discussion will not address French use of postal checks. In 1918 the French government attacked a wartime shortage of cash by establishing a check service under direction of the postal administration. AMOS \& WALTON, \textit{supra} note 195, at 369. Depositors may open accounts at post offices and then draw checks against funds deposited in their names. The Cheque Convention does not address postal checks and postal checks are governed by laws different from those controlling checks drawn on banks. \textit{Id. See} Decree 62-273, 1962 \textit{BULLETIN LÉGISLATIF DALLOZ} 170 (Mar. 12, 1962).
\item \textsuperscript{222} Check Laws art. 1, § 3 \textit{Cf.} Cheque Convention art. 3, which provides that a check may only be drawn on a banker.
\item \textsuperscript{223} Check Laws art. 1, §§ 13, 17; Cheque Convention arts. 14, 17.
\item \textsuperscript{224} \textit{See, e.g.}, C. PÉN. art. 405.
\item \textsuperscript{225} Check Laws art. 1, § 5; Cheque Convention art. 1.
\end{itemize}
if the drawer fails to deposit adequate funds to pay the check,\textsuperscript{226} and the drawee may not accept a check.\textsuperscript{227} The Check laws add that a purported acceptance is void (deemed "\textit{non écrite}"), but the drawee may initial the check to show that the drawer has provided adequate funds to cover the check.\textsuperscript{228}

c. Promissory Note

A promissory note contains the clause "to order" or the term "promissory note" written in the text of the instrument in the same language as the rest of the instrument,\textsuperscript{229} and the following: an unconditional promise to pay a sum certain, a statement of the time of payment, a statement of the place where payment is to be made, the name of the person to whom or to whose order payment is to be made,\textsuperscript{230} a statement of the date and place where the note was issued and the signature of the person who issued the instrument (maker).\textsuperscript{231} A promissory note that does not specify the time of payment is payable at sight.\textsuperscript{232} In the absence of an explicit indication to the contrary, the place where the instrument is issued is deemed to be the place of payment and the maker’s domicile.\textsuperscript{233} A promissory note that does not state the place where it was issued is deemed to have been made at the place mentioned beside the name of the maker.\textsuperscript{234} The maker of a promissory note is liable in the same way as an acceptor of a bill of exchange.\textsuperscript{235}

2. Liability on the Instrument

Both the French Commercial Code and the Geneva Conventions permit limited disclaimers of liability. In the absence of a provision to

\textsuperscript{226} Check Laws art. 1, § 3.
\textsuperscript{227} Check Laws art. 1, § 4; Cheque Convention art. 4.
\textsuperscript{228} Check Laws art. 1, § 4.
\textsuperscript{229} \textit{Cf.} Bills of Exchange Convention art. 75, which requires "promissory note" to be written in all cases.
\textsuperscript{230} Compare Anglo-American practice requiring merely that the payee be identified with reasonable certainty. \textit{See, e.g.}, U.C.C. § 3-110, Bills of Exchange Act § 7.
\textsuperscript{231} C. \textit{com.} art. 183; Bills of Exchange Convention.
\textsuperscript{232} C. \textit{com.} art. 184; Bills of Exchange Convention.
\textsuperscript{233} \textit{Id.} The maker’s domicile and the place of issue are relevant in choice of law determinations. \textit{See infra} notes 417-23 and accompanying text.
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} C. \textit{com.} art. 188; Bills of Exchange Convention art. 78.
the contrary the indorser of a bill of exchange guarantees both acceptance and payment.236 He may prohibit any later indorsement, in which case he does not make any guarantee to the person to whom the bill of exchange is ultimately indorsed.237 The drawer also guarantees both acceptance and payment.238 He may release himself from guaranteeing acceptance, but unlike an indorser, he may not release himself from the guarantee of payment.239 The drawer of a check guarantees payment and any statement purporting to release him from this guarantee will be void.240 The indorser of a check guarantees payment in the absence of a contrary stipulation.241

The French Commercial Code’s restriction on use of personal defenses is similar to treatment of rights of holders in due course under U.C.C. section 3-305. A person sued on a bill of exchange or a check may not raise a defense based on his relations with the drawer or with previous holders unless the holder knowingly acted to the debtor’s detriment in acquiring the bill.242 These provisions are a compromise between the pre-Geneva Convention French and German rules that a plaintiff could not maintain a cause of action if he knew of the debtor’s defenses when he acquired the instrument and the stricter view that a plaintiff should prevail unless a plaintiff and the previous holder conspired to injure the debtor.243 The 1928 draft convention held that a plaintiff’s bad faith was a defense to suit on the instrument. The Geneva Convention rejected this rule as too great an impediment to negotiability.244 The Geneva Convention and the French Commercial Code in effect define bad faith.245 A majority of the delegates believed that

236. C. COM. art. 119; Bills of Exchange Convention art. 15. Compare U.C.C. § 3-414(1) which provides that “[u]nless the indorsement otherwise specifies. . . . every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor. . . .” Id.

237. C. COM. art. 119; Bills of Exchange Convention art. 15.

238. C. COM. art. 115; Bills of Exchange Convention.

239. C. COM. 115; Bills of Exchange Convention art. 9. Any provision purporting to release him from the guarantee of payment will be deemed not not written, “non écrite.”

240. Cheque Convention art. 12; Check Laws art. 1 § 12.

241. Cheque Convention art. 18; Check Laws art. 1 § 18.

242. For treatment of liability on bills of exchange, see Bills of Exchange Convention art. 17; C. COM. art. 121. For treatment of liability on checks, see Cheque Convention art. 22; Check Laws art. 1 § 22.

243. O. GILES, supra note 196, at 167.

244. Id.

245. See supra note 242 and accompanying text.
mere knowledge of defenses should not prevent a holder from asserting a claim, but knowledge and intent to injure the debtor at the time the holder acquired the instrument should be a defense.\textsuperscript{246} The French, German, Austrian, and the Italian courts of last resort have all addressed the issue: when does a holder act knowingly to the debtor's detriment by acquiring a negotiable instrument and thereby permit the debtor to assert a personal defense?\textsuperscript{247}

Several illustrative holdings indicate the scope of personal defenses. If a holder has actual knowledge of a defense at the time he acquires the instrument and he knows that he will deprive defendant of that defense if he acquires it, his suit on the instrument will fail.\textsuperscript{248} If the plaintiff knew of the business transaction between the drawer and the previous holder but did not know details of the dispute, the defendant may not assert the personal defense in an action on the instrument.\textsuperscript{249} If facts surrounding the negotiation placed the plaintiff on notice that the defendant could have pleaded fraud in defending a suit by an earlier holder and that the earlier holder negotiated the instrument to avoid that defense, the plaintiff's suit will fail even if he does not know the exact basis for the claim of fraud.\textsuperscript{250} If a holder has reason to know of defenses, and knows that he will injure the defendant by acquiring the instrument, the defendant may maintain a successful defense.\textsuperscript{251} If the defendant shows that a holder was grossly negligent in failing to take precautions that a reasonably prudent businessman should take, and if the holder had taken those precautions he would have known of a defense, a court will exercise a rebuttable presumption that the holder had actual knowledge of the defense.\textsuperscript{252}

A court generally will consider a holder's state of mind at the time he acquires a negotiable instrument. If the holder had no knowledge of a defense when he obtained the instrument but later did something closely related to the acquisition which damaged defendant, a court will find that the later action related back to the time of acquisition.\textsuperscript{253}

\begin{footnotes}
\item [246] O. Giles, supra note 196, at 167.
\item [247] Id.
\item [248] Id. at 168. For example, if the drawer of a bill of exchange sells goods to the acceptor but fails to deliver the goods, and then discounts the bill to a bank that is aware of the fraud, the acceptor may maintain a defense.
\item [249] Id.
\item [250] Id.
\item [251] Id. at 168-69.
\item [252] Id.
\item [253] Id.
\end{footnotes}
3. Rationale for Personal Liability

The French Civil Code imposes almost strict liability for injuries caused by "[a]ny act by anyone which causes any injury to another, obliges the wrongdoer to repair the injury." The phrase "any act" implies strict liability, but mention of the word "fault" suggests a more lenient standard. This provision is ambiguous and courts sometimes hold a principal liable for unauthorized acts of agents under this provision. Courts recently have turned toward application of apparent authority to avoid broad interpretation of this act. Other authorities explain that a business agent is responsible for damage to third parties caused by his fault in the execution of his contract. Reference to fault again implies less than strict liability.

In addition to personal liability for injuries he causes, an agent is liable on the instrument if he exceeds his authority in issuing a negotiable instrument. The French Commercial Code adopted article 8 of the Bills of Exchange Convention. Anyone who signs a bill of exchange as an agent for a person for whom he did not have authority to act is personally bound on the instrument, and if he pays, he will have the same rights that the claimed principal would have. This rule treats an agent who exceeds his authority in the same way as an agent who acts without authority. The Report of the Drafting Committee interprets this article to provide that an agent who executes a bill of exchange for an amount greater than he is authorized will be liable for the full amount, not just for the amount by which the bill exceeds his authorized limit. If one person without authority or capacity signs an instrument, however, other signatures on the instrument remain valid. Other authorities note that a third party may not take advantage of his own negligence in failing to discover the scope of an agent's authority when the agent signs without authority to bind his

254. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le reparer." C. civ. art. 1382.
255. See infra text accompanying notes 313-318.
257. 1 Encyclopédie Dalloz, Agent d'Affaires § 87 (1956).
259. Id.
261. C. Com. art. 114; Bills of Exchange Convention art. 7.
principal.262

In addition to liability on the instrument, if the agent exceeds his authority, he may be liable for breach of warranty of authority. If an agent's lack of authority injures a third party who in good faith relies on the agent's manifestation of authority to bind the principal, the third party may hold the purported agent liable,263 but generally will have no cause of action against the principal.264 An agent may, however, disclaim this implied warranty. An agent who exceeds his authority after giving a third party adequate notice of its proper scope will not be liable unless he is personally bound on the contract.265 The law is unclear as to what constitutes adequate disclosure but the agent should show the third party the mandat, or agreement, authorizing him to act along with all other relevant documents.

4. Signature by Agent

An agent may sign a negotiable instrument on the principal's behalf.266 If the agent is authorized to sign the instrument only the principal is bound, provided that the instrument clearly acknowledges representative capacity of the signature. If the agent's representative capacity does not appear on the instrument, even if the agent signed for the principal, the agent assumes personal liability on the negotiable instrument.267 If the third party has actual knowledge of the agency relationship; however, the principal may be liable.268 If a person claiming to represent another signs as if he were an agent, but he either has no authority or exceeds his authority, he will be personally obligated.269

An agent under the French Code may obtain authority by operation of law under a statute or court order, or by contract with the per-

262. See 1 ENCYCLOPÉDIE DALLOZ, Agent d'Affaires § 88 (1956).
266. R. RODIÈRE, DROIT COMMERCIAL 21 (7th ed. 1975) [hereinafter cited as R. RODIÈRE] For implicit recognition of an agent's authority to sign a bill of exchange on his principal's behalf, see Bill of Exchange Convention art. 8, C. COM. art. 114. For similar treatment of agents who sign checks, see Cheque Convention art. 11, Check Laws art. 1, § 11.
267. C. COM. art. 114, Check Laws art. 1, § 11.
268. C. COM. art. 114, Check Laws art. 1, § 11.
269. C. COM. art. 114, Check Laws art. 1, § 11.
son he represents. When there is a voluntary or consensual agency relation, the principal confers authority by an act termed the procuration or mandat. The procuration must follow the form prescribed by law only if the underlying transaction is one that the law was designed to govern and if the statute requires the prescribed form in the interests of the parties. The procuration does not need to be written, but the prudent legal advisor will require a written contract for evidentiary purposes. The contract creating an agency relation may be a public act or document, a simple contract, or even a letter. It may be given orally, but if there is a dispute the agency contract may only be proven according to strict limitations prescribed in the Civil Code title "Contracts or Conventional Obligations in General." Acceptance of the agency contract may be implied, and will then empower the agent to bind the principal in matters within the scope of the authority granted.

The French Civil Code prevents unjust enrichment by recognizing a principle related to the Anglo-American equitable doctrine of quasi contract. The agent may bind the principal despite absence of pre-existing authority or ratification of the agent's act benefited the principal. The principal must satisfy all obligations contracted on his behalf by his agent, and should reimburse the agent for all useful or necessary expenses the agent incurred in a properly managed business transaction. Planiol and Ripert note that by conferring representative authority on anyone who, in certain situations, acts for the benefit of another, this article supports the policy of avoiding unjust enrichment.

French businesses employ four general kinds of agents: representants salaries, voyageurs—representants—placiers (V.R.P.s. or representants statutaires), agents commerciaux, and representants mandataires. The French Labor Code governs transactions with the

274. Id. art. 1985.
275. Id.
276. Id.
277. M. Planiol & G. Ripert at 71-72, citing C. civ. art. 1375.
278. C. civ. art. 1375.
280. Hay & Müller-Freienfels, Agency in the Conflict of Laws and the 1978
representant salarie and the V.R.P. The V.R.P. enjoys special rights but he may not engage in business on his own behalf or he will lose his special status. Agents commerciaux are subject to Decree 58-1345 of December 23, 1958. The French Civil Code governs agents mandataires and defines the term as:

[A] representative who ordinarily carries on independently and professionally (and otherwise than as an employee) the activity of the negotiation or conclusion of contracts for the sale, purchase, or letting on lease or hire of goods or other property, or the provision of services, for and on behalf of manufacturers, producers or merchants.

A commercial agency contract must be written and a commercial agent may practice only after he registers in the commercial court. The National Federation of Commercial Agents prepares standard form contracts providing a statement identifying principal and agent, a statement specifying the scope of the agent’s authority, conditions for exercising authority, commission, duration of relation, amendment procedures, and dispute resolution. Professor Guyenot discussed the role of the commercial agent:

The negotiation or conclusion of a contract by a commercial agent does not involve him in liability to third parties who deal with him, provided he acts within the limits of his authority, and they can not have recourse to him if the principal does not fulfill his obligations under the contract.

287. G. Guyenot, supra note 284, at 48.
288. M. Guyenot is Chief Assistant in the Faculty of Law and Economic and Social Sciences at the University of Paris.
289. G. Guyenot, supra note 284, at 51.
The remainder of the discussion of French agency law will focus on the *mandataire libre*, or contractual agent. Because this type of agency is purely consensual, characteristics of the agency relation vary substantially. Authority may terminate by agreement between the parties, by death of principal or agent, or by the bankruptcy of the principal. The Civil Code permits the agent to continue acting on behalf of the principal until he learns that his power has terminated. The agent must continue to act even after he learns of his principal’s death if his failure to act could cause damage to the principal’s estate.

5. Scope of Authority

The French Civil Code appears initially to construe agents’ authority strictly. The need to protect innocent third parties and to further the negotiability of commercial instruments has led to a more liberal interpretation of the Code. Whereas the English language distinguishes between an agent’s “authority” to act on behalf of a principal and an agent’s “power” to bind a principal, French texts use the single word *pouvoir,* which is a vaguer term denoting “power,” or “ability to act.” This linguistic difference causes interpretation of the codes, treatises, and judicial opinions to be more difficult and causes discussion of agent’s liability to be less clear.

The Civil Code defines actual authority strictly. The agent may not exceed the authority he received in the agency agreement; authority to negotiate does not include authority to compromise the principal’s rights. The agency agreement written in general terms only empowers the agent to perform administrative acts. If the agent intends to alienate or pledge the principal’s property the agency agreement must provide expressly that the agent has such authority.

Although the scope of an agent’s actual authority may be construed strictly, the Code treats its duration broadly. An agent’s representative capacity does not begin or end until the agent has actual no-

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290. *Id.* at 148.
291. *Id.* at 63.
293. “Authority” connotes rightful conduct; “power” denotes conduct that may exceed the authority that the agent received from the principal.
296. *Id.*
tice of the fact beginning or terminating his authority,\textsuperscript{297} or until he
receives a notification required by law.\textsuperscript{298} If a principal restricts or re-
vokes an agent’s authority, even if he properly notifies the agent, he
may not assert this change in status as a defense to claims by third
parties who acted in good faith\textsuperscript{299} without knowledge of the change.\textsuperscript{300}
In order to end all powers of the agent, the principal must notify third
parties according to statutory requirements for publicizing the change
or in the manner most likely to give the third parties actual notice of
the revocation of the agent’s authority.\textsuperscript{301} The principal may require
the agent to return any document declaring the agent’s representative
authority.\textsuperscript{302} This may not, however, be adequate notice to third parties
to free the principal from liability for later contracts the agent enters
on the principal’s behalf.\textsuperscript{303} What constitutes adequate notice remains
unclear. A principal revoking or reducing an agent’s authority should
give actual notice to all people with whom the agent has dealt and
should take reasonable measures to notify those with whom the agent is
likely to deal.

French courts recognize the need for predictability in business re-
lations and, therefore, sometimes find that an agent binds his principal
even when the agent exceeds his authority or acts without any author-
ity.\textsuperscript{304} The resulting judicial interpretations of the Civil Code resemble
apparent authority in Anglo-American law and inherent power in
United States practice. French courts are willing to protect a third
party who relies reasonably and in good faith on the appearance of
authority, if the purported principal is responsible for the appearance
of authority or if the third party relied on the existence of authority
normally granted to a permanent employee in the agent’s position.\textsuperscript{305}

In some cases, statutes create an irrebuttable presumption of au-
thority. Statutes creating limited liability corporations render any con-
tractual limitation on an agent’s authority invalid as related to third
parties.\textsuperscript{306} Although the agent may have power to bind the principal he

\textsuperscript{297} C. civ. art. 2008.
\textsuperscript{298} M. PLANIOL & G. RIPERT, \textit{supra} note 264, at 69.
\textsuperscript{299} C. civ. art. 2009; M. PLANIOL & G. RIPERT, \textit{supra} note 264, at 69.
\textsuperscript{300} C. civ. art. 2005; M. PLANIOL & G. RIPERT, \textit{supra} note 264, at 69.
\textsuperscript{301} M. PLANIOL & G. RIPERT, \textit{supra} note 264, at 69.
\textsuperscript{302} C. civ. art. 2004.
\textsuperscript{303} M. PLANIOL & G. RIPERT, \textit{supra} note 264, at 69.
\textsuperscript{304} Id. at 70.
\textsuperscript{305} Id.
\textsuperscript{306} Id.
may be liable to the principal for exceeding his authority under the contract. The French Cours de Cassation Civil met in plenary assembly and extended the doctrine of apparent authority in *Banque Canadienne Nationale v. Directeur General des Impots.* The defendant relied on Civil Code provisions and earlier judicial opinions to argue that it could only be obligated on the instrument if it had acted in bad faith or given actual authority to the director to sign the instrument on its behalf. Since neither was applicable, the bank argued it should not be held liable. The Cours de Cassation, however, found the defendant liable under a new rule: an agent may bind his principal by exercise of apparent authority, even if the principal is without fault, if the third party’s belief as to the extent of the agent’s powers is reasonable and the circumstances justify the third party’s failure to verify the precise scope of the agent’s authority. It is significant that the court did not refer to any provisions of the French codes, rather it based its decision on a finding that the agent acted within the normal scope of authority for a person holding his office.

The commentator, Professor Jean Calais-Auloy, found the court in *Banque Canadienne Nationale* had abandoned earlier established law and recognized a new legal principle. The plaintiff did not assert that the defendant held out the agent as having authority, or that it relied on the defendant’s representations implying that the agent had authority. Calais-Auloy noted that the decision appeared inconsistent with the Civil Code. Public policy, however, supported the decision. Businessmen must be certain of the validity of their acts without complicated and time-consuming research. It is especially important for people dealing with a company’s agent to be able to rely on the agent’s apparent authority without painstaking study of corporate bylaws.

Professor Calais-Auloy questioned the efficacy of the holding. He noted that modern business’ need for quick decisions is not new; law

307. 1963 D. Jur. 277 (Cass. Ass. Plen. 1962). The president-director general of the Canadian National Bank signed for the bank as surety on an instrument for fr. 700,000. The president did not have authority to bind the bank; the corporation’s bylaws required two signatures. When the drawee failed to pay the instrument, plaintiff sued the bank. *Id.*

308. *Id.* The Civil Code provides that a principal is bound by contracts entered by his agent while the agent is acting within the scope of his authority; the principal is only bound by his agent’s ultra vires acts if the principal ratifies the acts expressly or implicitly. C. civ. art. 1998.


310. *Id.*
has evolved to satisfy this need since the beginning of the century.\footnote{311} Calais-Auloy noted that legislators might in the future fix the authority of all agents as they had the authority of agents of limited liability corporations.\footnote{312}

Before the \textit{Banque Canadienne Nationale} opinion, courts based liability of a principal for unauthorized acts of agents on a theory of fault.\footnote{313} Courts invoked two provisions: article 1382 of the Civil Code, which created liability for the defendant's own wrongful act and article 1384(5), which created liability for acts of defendant's managing officers and directors.\footnote{314} Courts based corporate liability on article 1382 by finding that the principal acted wrongfully by concealing from third parties the limitation on the agent's authority, and by holding that this concealment injured innocent third parties who relied on the incorrect belief that they were creditors of the principal.\footnote{315} Courts found that the most adequate compensation to third parties was to hold the principal a debtor to the contracting third party as if the agent had acted within the scope of his authority.\footnote{316} Unlike article 1382, article 1384(5) does not impose liability on a principal for his personal fault, but for the fault of an agent acting in a supervisory role. This provision has the practical and theoretical advantage of imposing liability for the clear fault of the agent rather than on the uncertain fault of the principal.\footnote{317} As in suits under article 1382, the injured third party may have the court require the principal to pay as if the agent acted within the scope of his authority.\footnote{318}

6. Ratification

An agent who is personally liable on a negotiable instrument because he exceeded the scope of his authority\footnote{319} may escape liability to a third party by his principal's explicit or implicit ratification of his
Not only will ratification cause a principal to become bound on an instrument his agent executed without authority;\textsuperscript{321} ratification will also confer actual authority to commit the act the agent already performed.\textsuperscript{322} Courts often find ratification, which relates back to the time of the act, when an agent exceeds his authority or when the court finds an apparent agency.\textsuperscript{323} Ratification is a unilateral manifestation of consent expressed by the principal or by a person authorized to act on his behalf and it may occur at any time.\textsuperscript{324} Although ratification may free an agent from liability to a third party on a negotiable instrument, his obligation to the principal is governed by a separate contract. The agent, therefore, may be liable off the instrument for breach of his employment contract.

C. Summation

The Geneva Conventions on negotiable instruments influenced commercial law in continental Europe and Japan. The French experience is typical; France adopted the rigid rules of the Convention into its Code de Commerce. The French Commercial Code and the Geneva Conventions on negotiable instruments prescribe rules similar to those governing negotiable instruments in the United States and England. An agent who signs a negotiable instrument will be personally liable unless the face of the instrument makes his representative capacity clearly apparent and he signs with authority of the person he represents. The existence and the scope of representative authority are essential issues in determination of who is liable on the instrument. The French Civil Code construes an agent’s authority strictly. The Cours de Cassation, however, appears willing to expand the statutory provisions to include representative capacity analogous to apparent authority or inherent power in United States practice.

V. Choice of Law

The essential similarity between commercial law among western nations reduces somewhat the importance of choice of law principles.

\textsuperscript{320} C. civ. art. 1998.
\textsuperscript{321} Id.
\textsuperscript{322} M. PLANIOL & G. RIPERT, supra note 264, at 71.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
However, differences in local law remain and a substantial body of legal theory has evolved to aid courts in determination of which local law to apply. Each legal system balances concerns of party autonomy and power to contract for application of a chosen law with a need for judicial predictability and fear of overreaching. The following analysis discusses the efficacy of choice of law clauses and principles for selecting local law in the absence of express provisions in the instruments.

A. United States

The Uniform Commercial Code and developing precedent further party autonomy by permitting choice of applicable law, providing that the parties select law of a state bearing a reasonable reaction to the transaction. This limitation protects parties in a weak bargaining position from overreaching by a more powerful potential adversary. It also protects an overburdened judicial system from having to research and apply the law of distant states and nations when application of the law of the foreign jurisdiction is not foreseeable—and perhaps not desired by at least one party to the transaction. Section 1-105(1) states the Code's basic choice of law principles:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

The drafting of the first sentence is unfortunate. The drafters intended to permit parties to an instrument to select the law of any state with a reasonable connection to the transaction. As written, however, if a


327. Section 1-105(2) states exceptions to the general rule that are not relevant to discussion of negotiable instruments under article 3.

328. See U.C.C. § 1-105 official comment 1.
party brings suit in a state that does not have a reasonable relation to the instrument courts of that state may not be bound by the parties' otherwise appropriate choice of law. 329

The term "agree" in Section 1-105(1) may include an implied understanding that the law of a certain state or nation should govern the transaction. 330 The Code does not define "agree," but provides that "agreement" means "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. 331 If a transaction has the closest connection with a jurisdiction other than the forum, the parties did not specify the applicable law, and the parties are most familiar with the law of the foreign jurisdiction, then courts should apply that jurisdiction's law. 332

The United States Supreme Court defined the appropriate standard 333 for a "reasonable relation" in Seeman v. Philadelphia Warehouse. 334 The unanimous opinion authored by Justice Stone found the place where the parties contracted irrelevant. 335 The Court recognized the general rule that contracts are governed by the law of the jurisdic-

330. See U.C.C. § 1-201(3).
331. Id. (emphasis added).
333. U.C.C. § 1-105 official comment 1.
334. 274 U.S. 403 (1927). In Seeman, defendant pledged canned salmon to plaintiff as collateral for a loan. Plaintiff executed a promissory note that named itself debtor and that was payable to its own order. Plaintiff indorsed the note, discounted it to its note banker, and forwarded the proceeds to the borrower—after subtracting a commission of 3% per year for its services, the brokerage fee and discount. Defendant agreed to repay the face amount of the loans at the end of one year or to pay additional charges to refinance for another year. The effective interest rate varied between 8 ½ % and 10 ½ % but the maximum legal rate for interest on loans was 6% under the laws of New York and Pennsylvania. Plaintiff sued for conversion when defendant fraudulently regained possession and sold the pledged salmon. Defendant argued that the transaction involved a usurious loan, New York law applied and New York law made the entire transaction void. Plaintiff argued that it made a loan of credit rather than of money so the usury limits did not apply; even if the transaction were a usurious loan, Pennsylvania law should apply to enforce repayment of principal and the maximum legal rate of interest. Plaintiff was a Pennsylvania corporation, had its only place of business in Pennsylvania, and required repayment of the loan in Pennsylvania. Defendant argued that New York law applied since the parties conducted negotiations in New York and plaintiff forwarded the funds to the borrower in New York. Id. at 404-07.
335. Id. at 407.
The law permitted plaintiff to lend money to borrowers outside the state and to require repayment within and according to the laws of plaintiff's state. Justice Stone noted an exception to the rule allowing parties the power to select the law governing the contract: the parties must act in good faith. The Court limited the scope of the rule:

The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject. . . . Assuming their real, bona fide intention was to fix the situs of the contract at a certain place which has a natural and vital connection with the transaction, the fact that they were actuated in so doing by an intention to obtain a higher rate of interest than is allowable by the situs of some of the other elements of the transaction does not prevent the application of the law allowing the higher rate.

The Court concluded by noting that the plaintiff contracted for payment in the forum where it was incorporated and where it conducted its business. The selection of Pennsylvania law was not frivolous, and was binding on the parties because Pennsylvania had a reasonable relation to the transaction.

In Morgan Walton Properties, Inc. v. International City Bank & Trust Co., the Florida Supreme Court held that the Louisiana usury

336. Id.
337. Id.
338. Id. at 408.
339. Id.
340. Id. at 409.
341. 404 So. 2d 1059 (Fla. 1981). Defendants argued that the Florida criminal usury statute applied and that it made the entire obligation unenforceable. See Fla. Stat. § 687.071(2) (1972). The trial court held that Louisiana law applied and that under Louisiana law there was no limit to interest chargeable to a corporation. 404 So. 2d at 1061. Defendants appealed and the Fifth Circuit certified the following question to the Florida Supreme Court:

Are notes executed and payable in a state other than Florida, secured by a mortgage on Florida real estate, providing for interest legal where made, but usurious under Florida law, unenforceable in Florida courts due to Florida's usury statute, public policy or otherwise, where (a) the interest charged or paid exceeds 25 percent and (b) where the interest charged does not exceed 25 percent, but exceeds the maximum interest rate al-
statute should govern promissory notes executed in Louisiana but secured by a mortgage on property in Florida.\footnote{Morgan Walton Properties, Inc., 404 So. 2d at 1063.} The Florida Supreme Court noted that the law of the state where the parties entered into and performed the contract traditionally governed the contract’s validity and interpretation.\footnote{Id. at 1061, citing Brown v. Case, 80 Fla. 703, 86 So. 684 (1920); Thompson v. Pyle, 39 Fla. 582, 23 So. 12 (1897); Perry v. Lewis, 6 Fla. 555 (1856).} In an earlier case decided the same year, however, the Florida Supreme Court found that this traditional rule for choice of law “is today of little practical value since these contacts are so easily manipulated in our mobile society.”\footnote{Morgan Walton Properties, Inc., 404 So. 2d at 1062, quoting Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507, 510 (Fla. 1981).} The \textit{Morgan Walton Properties} court held that Florida would apply Louisiana law to uphold the parties’ express or implied intent since Louisiana had a normal and reasonable relation to the notes,\footnote{Id. at 1062-63. The court cited Seeman as it held courts should honor the parties’ choice of law if the choice bore a reasonable relation to the transaction, “even if the parties’ purpose in making it was to avoid the restrictive effects of Florida’s usury law.” Id. at 1063.} the parties implicitly or explicitly had agreed to be bound by Louisiana law,\footnote{Id. at 1063.} and Florida did not have a sufficiently strong public policy to justify adoption of Florida law.\footnote{Id. at 1063.}

The \textit{Morgan Walton Properties} opinion relied heavily on \textit{Continental Mortgage Investors v. Sailboat Key, Inc.},\footnote{395 So. 2d 507 (Fla. 1981) [hereinafter cited as \textit{CMI}].} in which the Florida Supreme Court reversed a lower court’s holding that Florida’s usury law was applicable to a financing agreement between a Florida corporation and a Massachusetts business trust. The district court of appeal\footnote{Sailboat Key, Inc. v. Continental Mortgage Investors, 354 So. 2d 67 (Fla. Dist. Ct. App. 1977).} found that Massachusetts had no substantial connection to the transaction and that the parties selected Massachusetts law solely to avoid strong public policy expressed in the Florida usury law. On appeal the Florida Supreme Court reversed and found that Massachusetts did have a reasonable relation to the transaction.\footnote{CMI, 395 So. 2d at 513. One of the parties was a Massachusetts business trust with offices in Massachusetts, and the parties executed the agreement in Massa-
public policy against usury was not strong enough to invalidate the parties' choice of law even if they were motivated primarily be a desire to avoid Florida's usury statute.\footnote{351}

Drafters of the Code wanted to achieve as high a degree of uniformity in the law as possible. Only Pennsylvania had enacted the Code by the time the drafters finished the first revision of section 1-105,\footnote{352} and the Pennsylvania legislature may not have foreseen the nearly unanimous enactment of the Code. Because the drafters preferred to have cases decided according to the U.C.C., they provided in the second sentence of section 1-105(1), so that the forum's version of the code should govern if the parties did not select another jurisdiction's law and if the forum bore an appropriate relation to the transaction.\footnote{353} What constitutes an appropriate relation remains unclear. The Supreme Judicial Court of Massachusetts discussed this provision in \textit{Industrial National Bank of Rhode Island v. Leo's Used Car Exchange, Inc.}\footnote{354} as it held that Massachusetts law applied to a transaction in which a Massachusetts corporation drew a check on a Massachusetts bank payable to an automobile dealer in Connecticut and cashed by a bank in Rhode Island.\footnote{355} The court noted that Rhode Island, Connecticut, and Massachusetts each bore a reasonable relation to the transaction and the parties could have stipulated that the law of any of these states should apply.\footnote{356} Because the parties did not explicitly choose the applicable law and because Massachusetts bore an appropriate relation to the transaction, the Massachusetts Uniform Commercial Code governed.\footnote{357}

The Code gives preference to the forum's version of the U.C.C. if the parties fail to agree upon applicable law;\footnote{358} however, the Code does not encourage application of the forum's non-U.C.C. substantive law.\footnote{359} Courts must apply traditional choice of law rules to determine

\begin{footnotes}
\item[352] \textit{Id.} at 509.
\item[353] \textit{Id.} at 509.
\item[354] See U.C.C. § 1-105 official comment 2.
\item[356] \textit{Id.} at 800, 291 N.E.2d at 605.
\item[357] \textit{Id.} at 800 n.3, 291 N.E.2d at 605 n.3.
\item[358] \textit{Id.} at 800, 291 N.E.2d at 605.
\item[359] \textit{Id.} at 1-105 official comment 2.
\end{footnotes}
applicable law if the forum does not bear an appropriate relation to the transaction, or to select appropriate non-code law in the absence of agreement between the parties. The Restatement\textsuperscript{360} discusses choice of law principles for negotiable instruments,\textsuperscript{361} which are applicable if neither the Code nor the parties' agreement designates appropriate law. If the instrument designates a place of payment the local law of that jurisdiction governs obligations of the maker of a note or the acceptor of a draft.\textsuperscript{362} If the instrument does not designate a place of payment the local law where the maker or acceptor delivered the instrument will control his obligations.\textsuperscript{363}

The drafters of the Restatement noted the importance of predictability in negotiable instruments and, therefore, proposed that a single set of contacts govern choice of law for obligations of makers and acceptors.\textsuperscript{364} They recognized that fairness required keeping the obligations of makers and acceptors constant throughout the life of the instrument, and suggested that initial delivery or designation of place of payment fix the parties' obligations.\textsuperscript{365} Therefore, the local law of the place where a drawer or indorser delivers the instrument controls the obligations of an indorser of a draft or a note and of the drawer of a draft.\textsuperscript{366} The drafters noted the different responsibilities of drawers, indorsers, makers, and acceptors, and concluded that a different set of laws may govern the obligations of each party to the instrument.\textsuperscript{367} Therefore, the local law of the jurisdiction where presentment, payment, protest, or notice of dishonor occur governs details of each of those transactions.\textsuperscript{368} Local law of the state where a negotiable instrument is when a holder transfers his interest determines effect of the transfer.\textsuperscript{369}

In \textit{Exchange Bank and Trust Co. v. Tamerius},\textsuperscript{370} the Supreme

\textsuperscript{360} In this discussion "Restatement" refers to \textit{Restatement (Second) Conflict of Laws} (1971). Compare references to \textit{Restatement (Second) of Agency} (1958) earlier in this article.

\textsuperscript{361} \textit{Restatement} §§ 214-217.

\textsuperscript{362} \textit{Id.} § 214(1).

\textsuperscript{363} \textit{Id.} § 214(2).

\textsuperscript{364} \textit{Id.} comment b at 702.

\textsuperscript{365} \textit{Id.}

\textsuperscript{366} \textit{Id.} § 215(1).

\textsuperscript{367} \textit{Id.} comment b at 707.

\textsuperscript{368} \textit{Id.} § 217.

\textsuperscript{369} \textit{Id.} § 216.

\textsuperscript{370} 200 Neb. 807, 265 N.W.2d 847 (1978). Plaintiff sued on a delinquent
Court of Nebraska reached the result suggested by the Restatement's analysis. The unanimous court affirmed the lower court's decision that Texas law was applicable because the promissory note provided explicitly that the Texas Consumer Credit Code governed the transaction. The court then noted alternatively that Texas law would govern even if the parties did not choose Texas law. The opinion cited pre-U.C.C. cases for the proposition that the law of the place of payment governs a promissory note unless the parties clearly prefer application of law of the place where the note was made.

The Georgia Court of Appeals considered relationships among federal, Georgia, and Virginia law in *Fitzgerald v. United Virginia Bank of Roanoke*. The appellants signed the notes in Georgia and mailed them to the appellee. The notes were payable in Virginia. The United States Code permits national banks to charge the highest interest rate that state banks may charge on similar loans. The court found that Virginia law governed the interest rate because the notes were to be paid in Virginia. The court held that the place of performance prevails over the place where the instrument is executed.

promissory note bearing an interest rate of 12.83%. Defendants argued that the loan was usurious and void under the laws of Nebraska. Plaintiffs contended that Texas law governed the note and that the interest charged was valid under the applicable statute. *Id.*

371. See *Restatement* § 214.

372. *Tamerius*, 200 Neb. at 810, 265 N.W.2d at 849.

373. *Id.* at 810, 265 N.W.2d at 850.

374. *Id.* at 810, 265 N.W.2d at 850, citing *United Bank & Trust Co. v. McCullough*, 115 Neb. 327, 212 N.W. 762 (1927); *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, 202 N.W. 877 (1925).

375. 139 Ga. App. 664, 229 S.E.2d (1976). Appellee, a national bank doing business in Virginia, sued appellant on two delinquent promissory notes. Appellants argued that the notes prescribed a usurious rate of interest under Georgia law so they should only be liable for outstanding principal. *Id.* at 664-65, 229 S.E.2d at 139.

376. *Id.* at 665, 229 S.E.2d at 139.

377. *Id.*


380. *Id.* (citing *Vinson v. Platt & McKenzie*, 21 Ga. 135 (1856)); *Liberty Loan Corp. v. Crowder*, 116 Ga. App. 280, 157 S.E.2d 52 (1967). *Cf. Gulf Collateral, Inc. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976) (in which the court cited the *Restatement* § 214(2) to support the proposition that the local law of the place where promissory notes are executed governs their validity rather than the law of the state where they are payable. This section is only applicable if the parties did not designate the place of payment on the instrument).
The United States Constitution requires each state to give full faith and credit “to the public Acts, Records, and Judicial Proceedings of every other state.” In 1948 Congress enacted legislation implementing the following provision:

Such Acts, records and judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of each State, Territory or Possession from which they are taken.

These provisions balance policies favoring res judicata and uniformity of decisions with policies supporting federalism. The practitioner should consider the ramifications of the Full Faith and Credit Clause before selecting a forum for litigation. The Missouri Court of Appeals summarized the effects of the full faith and credit clause in Jennings v. Klemme. The court noted that the only defenses that may prevent entry of judgment under the full faith and credit clause are that the original court did not have subject matter jurisdiction, that the defendant did not have reasonable notice or opportunity to be heard in the original suit, or that the judgment resulted from fraud. The opinion then noted that the Full Faith and Credit Clause precludes

381. U.S. Const. art. IV, § 2. The Full Faith and Credit Clause only applies to “Acts, Records, and Judicial Proceedings” of sister states; it does not apply to international situations. See generally Restatement § 2, comment b.
383. 620 S.W.2d 403 (Mo. App. 1981). In 1967 defendants executed a promissory note to plaintiffs. The note contained a warrant of attorney to confess judgment if defendant became delinquent in payments. The note did not mention a corporation, but defendants signed the note, “Lem Klemme, Pres.,” and “Yvonne Klemme, Sec.-Treas.” The Illinois circuit court entered judgment by confession when defendants did not pay the note. Illinois law only permits garnishment of salary if defendant has been served with notice and given opportunity to appear. Plaintiff, therefore, served each defendant with a summons stating that if he failed to appear, “A judgment by confession for $39,893.68 entered against you on December 7, 1970, may be confirmed.” Defendants ignored the summonses and the Illinois court confirmed judgment. Plaintiffs then filed a petition in Missouri court for registration of the Illinois judgment pursuant to the Uniform Enforcement of Foreign Judgments Law. Defendants then sought to raise the defense in U.C.C. § 3-403(2) by parol evidence that they signed on behalf of a partly disclosed principal. The Missouri Court of Appeals affirmed the trial court’s holding for plaintiffs. Id. at 404-07.
384. Id. at 406 (citing W.B.M. v. G.G.M., 579 S.W.2d 659, 661 (Mo. Ct. App. 1979)).
consideration of the underlying cause of action, of the analysis of the foreign judgment or of the law supporting the foreign court’s decision.\textsuperscript{385}

B. England

English rules for choice of law are different from provisions of the Restatement. The Bills of Exchange Act treats each contract on the instrument separately, and applies the law of the jurisdiction where that contract was entered to determine its validity and interpretation.\textsuperscript{386} Section 72 states choice of law rules applicable to bills of exchange; section 89 applies these rules to promissory notes.

The Bills of Exchange Act distinguishes between inland or foreign bills of exchange.\textsuperscript{387} Courts treat a bill of exchange as an inland bill unless the face of the instrument shows it is foreign.\textsuperscript{388} The law of the jurisdiction where a person draws, indorses, or accepts an instrument or accepts a bill over protest generally governs interpretation of his rights and obligations.\textsuperscript{389} If a person indorses an inland bill in a foreign country, however, the courts will apply United Kingdom law to interpret the indorsement’s effect on rights and obligations of the payor.\textsuperscript{390}

For choice of law purposes a party enters a contract on a bill of exchange or a promissory note where he delivers the instrument rather than where he attaches his signature.\textsuperscript{391} If the defendant argues that an instrument is invalid according to the law of the jurisdiction where it is issued, he must prove the foreign law as a question of fact.\textsuperscript{392} The Court of Appeals has found that law governing transfer of personal property also controls negotiation of bills of exchange and checks in a foreign country.\textsuperscript{393}

\textsuperscript{385.} Id. at 406 (citing Matter of Estate of Fields 588 S.W. 2d 50, 52 (Mo. Ct. App. 1979)).
\textsuperscript{386.} See Bills of Exchange Act §§ 72(1), 72(2).
\textsuperscript{387.} Bills of Exchange Act § 4(1) defines inland and foreign bills: “An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.” Id.
\textsuperscript{388.} Id. § 4(2).
\textsuperscript{389.} Id. § 72(2).
\textsuperscript{390.} Id.
\textsuperscript{391.} CHALMERS ON BILLS OF EXCHANGE, supra note 147, at 235.
\textsuperscript{392.} Id.
The law of the place where an instrument was issued determines formal validity. The law of the place where a person accepts, protests, or indorses a negotiable instrument determines formal validity of his contract. The statute states two provisos. First, a negotiable instrument issued outside the United Kingdom will not be invalid merely because it was not stamped according to the law of the jurisdiction where it was issued. Second, if a negotiable instrument satisfies requirements for formal validity in the United Kingdom but is issued abroad, courts may treat it as valid between all people who negotiate, hold, or become parties to it in the United Kingdom.

The following illustrations reflect choice of law principles for formal validity: (1) Law of country A requires a bill of exchange to state the value received but law of B does not. A bill of exchange that does not express the value received is valid if it was drawn in B but payable in A; (2) A bill of exchange drawn and payable in A is invalid according to A's law because it fails to state the value received. If the bill is indorsed in B, where the bill is valid, a holder could sue the indorser in B's court but would have no recourse against the drawer; (3) B's law will determine whether a bill of exchange drawn in B against a drawee in A is unconditional.

The following situations illustrate the effect of section 72(2), which provides rules for interpretation of instruments that are valid under section 72(1): (1) If a negotiable instrument payable to bearer is issued in England and negotiated by delivery in a country that does not recognize bearer instruments, English courts will uphold validity of the transfer; (2) If a holder sues in England on an instrument issued in Belgium and indorsed in blank in France, French law will determine the effect of the indorsement; (3) French law governs an acceptance occurring in France; (4) A check drawn abroad on an English bank

395. Id.
396. Id.
397. See id.
399. CHALMERS ON BILLS OF EXCHANGE, supra note 147, at 235.
400. Id.
401. Id. at 236; Bills of Exchange Act § 72(2) paragraph 2.
402. CHALMERS ON BILLS OF EXCHANGE, supra note 147, at 236.
403. Id.
is stolen and the first indorsement is forged. An Austrian bank cashes the check and acquires good title under Austrian law. The Austrian bank sends the check to the drawee through the normal collection process and receives the face value from the drawee. The drawee is not guilty of conversion for improper payment.\(^{404}\)

The Cheques Act codified the result in illustration (4) by providing that a banker is not liable for paying an irregularly indorsed check if he pays in good faith and in the ordinary course of business.\(^{405}\) The Embiricos decision on which this hypothetical situation is based\(^{406}\) found choice of law rules determinative, and created broader protection for bankers than that codified in the Cheques Act.

C. Civil Law Practice and the Geneva Conventions

1. Overview

Delegates to the Geneva Conference which was held from May 13, 1930, to June 7, 1930, signed a convention to regulate choice of law problems for bills of exchange crossing national boundaries.\(^{407}\) On March 19, 1931, delegates to a second conference signed a convention regulating conflicts of law problems for checks.\(^{408}\) The Conventions were registered with the secretariat and were entered into force on January 1, 1934.\(^{409}\) The Conventions provide that the law of the state of a person's nationality governs his capacity to bind himself on a negotiable

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404. Id. (citing Embiricos, 1 K.B. 677).
405. Cheques Act § 1, supra note 97.
406. See supra note 404.
409. Cheques Conflicts Convention, 143 L.N.T.S. at 319.
instrument. If choice of law rules in his country provide for application of another’s law, that nation’s local law will determine capacity. The law of the jurisdiction where a person enters a contract arising from a negotiable instrument controls that contract’s form. The law of the jurisdiction where a bill of exchange or promissory note is payable controls the obligations of the acceptor of the bill or maker of the note. The law of the country in which any other person signs the instrument governs the effect of his signature.

The Convention’s emphasis on place of signature, domicile, and jurisdiction where the instrument is payable has the advantage of basing a person’s liability on the law with which he is generally is most familiar and which he generally expects to apply. Emphasis on a single criterion such as place of signature or payment increases predictability of effects of commercial instruments by facilitating determination of appropriate law. The Genva Conventions on Conflicts of Laws do not include any provisions permitting contractual selection of law or forum; the drafters emphasized uniformity of selection of law at the expense of party autonomy.

2. France

France did not adopt the Geneva Conventioins on Conflicts into its legal codes. Commentators deplore the lack of codification and the resulting need to follow archaic law. Conflicts of law principles applicable to negotiable instruments remains unclear. Unlike the Geneva Conventions on Conflicts of Law, France permits parties to exercise substantial discretion in choice of law. The Cours de Cassation has recognized that the law applicable for formation, conditions, or effects of

411. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415.
412. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415. Cf. U.C.C. § 1-105 (providing that the forum’s version of the Code will govern the form); Bills of Exchange Act § 72 (providing that the place of delivery after execution determines applicable law).
413. Bills of Exchange Conflicts Convention art. 2, 143 L.N.T.S. at 325.
414. Id.; Cheques Conflicts Convention art. 2, 143 L.N.T.S. at 415.
415. See, e.g., ENCYCLOPEDIE DALLOZ, Droit international- Conflicts de lois § 82 (1968).
contracts is the law that the parties expressly adopt. In the absence of a stipulation by the parties, the court considers circumstances of each case to determine which law should govern the contract. The court also presumes that the parties intend the law of the place of performance to control their obligations. A French principal and a mandataire or contractual agent are generally free to choose any nation's law to control their contract. Claims to compensation by a V.R.P. are subject to French law when the agent lives and performs the contract in France, and parties may not avoid mandatory provisions of the labor code by a choice of law provision in the contract.

The Cours de Cassation developed special choice of law principles applicable to negotiable instruments. If a party contests his obligations under a bill of exchange drawn outside France and payable within France, a French court generally will apply the law of the jurisdiction where the drawees are domiciled. If the instrument is domiciled the court will apply law of the jurisdiction where it is payable, or where plaintiff signed a protest.

D. Summation

The practitioner should advise an agent executing negotiable instruments that he expects to cross national or state boundaries to include an explicit choice of law clause. United States courts generally will uphold the provision if the parties select the laws of a jurisdiction with a reasonable relation to the transaction. What constitutes a reasonable relation remains unclear, but the domicile of one of the parties or the place of performance of some part of the transaction should have sufficient connection to satisfy U.C.C. section 1-105(1). Unlike the Uniform Commercial Code, the English Bills of Exchange Act emphasizes uniformity at the expense of party autonomy. A practitioner whose client does business with the United Kingdom should review

417. Id.
418. 3 JURISPRUDENCE FRANÇAISE, Conflit de lois § 419 (1967).
420. See supra text accompanying note 280.
422. 3 JURISPRUDENCE FRANÇAISE, Conflit de lois § 476 (1967), citing REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 116 (1939).
423. Id.
choice of law rules in section 72 of the Bills of Exchange Act. The Geneva Conventions on Conflicts of Law differ substantially from the United States approach as they base choice of law largely on the place where a party signs the instrument or where the instrument is payable. Although France acceded to the Convention, it did not adopt it into its Commercial or Civil Codes. French law remains poorly defined and allows parties to a negotiable instrument substantial direction in selecting applicable law.

VI. Proposals for Reform

A. Hague Convention on Agency

When the General Meeting of the Thirteenth Hague Session was unable to complete work on a convention on agency, a special commission of the Thirteenth Session of The Hague Conference on Private International Law convened on June 6, 1977, to draft a final agreement.\(^{424}\) France was the only country to sign the Convention when it was opened for signature in March, 1978,\(^{425}\) and France has not adopted its provisions. The Hague Convention adopts a flexible approach to choice of law in international agency relations and it may form the basis for future developments in the area.

The Hague Convention deals solely with choice of law questions; it contains no provisions prescribing standards for local law. Article 5 allows complete party autonomy by permitting principal and agent to select applicable law.\(^{426}\) Article 6\(^{427}\) indicates applicable law when the parties do not record any preference in their contract. In the absence of agreement by the parties, the courts of law of the nation where the agent has his place of business should apply the local law where the agent has his habitual residence.\(^{428}\) The local law of the place of performance applies if it is also the principal's place of business or the


\(^{425}\) Hay & Müller-Freienfels, supra note 280, at 36 n. 184.

\(^{426}\) Cf. U.C.C. § 1-105(1) (permitting express or implied selection of the law of any jurisdiction with a reasonable relation to the transaction).

\(^{427}\) Hague Convention art. 6.

\(^{428}\) Id.
principal's habitual residence, if he does not have a place of business.\textsuperscript{429} The law found applicable under the Convention determines the existence and scope of an agent's authority.\textsuperscript{430} Additionally, the applicable law also governs relations between an agent and a third party when the agent exceeds or misuses his authority.\textsuperscript{431} The Convention combines elements from several legal systems as it balances policies favoring party autonomy with a need for uniform and predictable decisions.\textsuperscript{432} The drafters placed special importance on the parties' choice of applicable law. Unlike the Uniform Commercial Code, the Hague Convention does not limit the right to choose law.\textsuperscript{433} Although they may be expected to select law with which they are most familiar, complete party autonomy allows the principal or agent to make frivolous or unfair selections that may burden courts with a need to research and apply rules from a distant jurisdiction.

The Hague Convention furthers policies for uniformity and predictability by stating objective criteria for choice of law in the absence of a stipulation by the parties. In the absence of agreement between parties as to choice of law, the Convention applies law of the state in which the agent does business:\textsuperscript{434}

because it is the law indicated by the connecting factor most closely connected with the party who performs the obligation characteristic of the agreement; secondly, because the agent's principal place of business is more likely to coincide with the place where he acts than is the principal's principal place of business; and thirdly, because this solution seems to do justice to the pivotal role of the agent, at the center of the complex of relationships arising in an agency situation. As a connecting factor, the agent's principal place of business has the advantage of being clear and readily ascertainable.\textsuperscript{435}

The Convention is particularly significant because it reflects a con-

\textsuperscript{429} Id.
\textsuperscript{430} Id. art. 8(a).
\textsuperscript{431} Id. art. 15.
\textsuperscript{432} See generally Hay & Müller-Freienfels, supra note 280.
\textsuperscript{433} Cf. § 1-105(1) (requiring selection of the law of a jurisdiction that bears a reasonable relation to the transaction).
\textsuperscript{434} Hague Convention art. 6.
cerned effort to unify choice of law rules and because the drafters were able to further competing policy concerns by borrowing from several legal systems.

B. UNCITRAL Proposal

The United National Commission on International Trade Law at its second session in Geneva in March, 1969, discussed methods for unifying law governing negotiable instruments in international commerce. The Commission noted that three competing legal regimes controlled bills of exchange and promissory notes transactions among western nations. The delegates concluded that the most effective way to achieve uniformity would be by creation of a new instrument to be used in international commerce and subject to a new uniform law. The final draft of UNCITRAL's Uniform Law on International Bills of Exchange and Promissory Notes (ULIB) allows private parties to choose whether the UNCITRAL proposal or traditional law should govern each instrument. Although eighteen nations participated in the UNCITRAL draft, the Convention has not been adopted into law.

Parties to a negotiable instrument may choose to have the ULIB govern only if the instrument satisfies requirements of article 1. The instrument must be written and must state in the text "pay against this international bill of exchange, governed by [the Convention of ____]."

437. Id. at 32.
439. Id. at 35.
It must include an unconditional order to pay a definite sum of money to a specified person or to his order, be payable on demand or at a definite time, and be signed by the drawer and dated.\textsuperscript{442} An international bill of exchange subject to the ULIB must show that at least two of the following places are in different countries: the place of payment, the place indicated next to the name of the drawee, and the place written beside the name of the payee.\textsuperscript{443} The ULIB has similar requirements for a promissory note, but the text must include the provision "against this international promissory note, governed by [the Convention of ___]", and must show that at least two of the following are in different countries; the place where the instrument was made, the place identified next to the signature of the maker or the name of the payee, or the place of payment.\textsuperscript{444}

The ULIB paraphrases Uniform Commercial Code provisions discussing an agent's liability on negotiable instruments but rejects admission of parol evidence if it is unclear whether the agent signed in a representative capacity.\textsuperscript{445} A person can only be liable on an instrument

\begin{itemize}
\item \textsuperscript{442} ULIB art. 1.
\item \textsuperscript{443} \textit{Id.}
\item \textsuperscript{444} \textit{Id.} art. 1, § 3.
\item \textsuperscript{445} (1) An instrument may be signed by an agent.
(2) The signature on an instrument by an agent with authority to sign and showing on the instrument that he is signing in a representative capacity for a named person imposes liability thereon on that person and not on the agent.
(3) The signature on an instrument by an agent without authority to sign, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity for a named person, or showing on the instrument that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on such agent and not on the person whom the agent purports to represent.
(4) The question whether a signature was placed on the instrument in a representative capacity may be determined only with reference to what appears on the face of the instrument.
(5) An agent who is liable pursuant to paragraph 3 and who pays the instrument has the same rights as the person for whom he purported to act would have had if that person had paid the instrument.
\end{itemize}

ULIB art. 30. \textit{Cf.} U.C.C. §§ 3-403 and 3-404(1), which provide rules for agents' personal liability. \textit{Compare} art. 30(5) with § 3-415(5), concerning the doctrine of subrogation.
under the ULIB if he signs it or if an agent signs it on his behalf. A signature may be by fascimile, symbols, or by any mechanical means. Furthermore, a person signing another’s name without authority is deemed to have signed his own. An agent who signs on his principal’s behalf, but without authority, is treated as a forger and is liable for any damages his signature causes.

The ULIB follows United States practice by recognizing separate classes of holder and protected holder. A protected holder takes the instrument free from any claims by any person, free from all defenses but incapacity or the signer’s excusable ignorance that his signature made him a party to a negotiable instrument, and free from any claim that the instrument was not presented for acceptance or payment, or that dishonor was not protested. A drawer, maker, or indorser may protect himself from a protected holder by writing a statement on the instrument such as “not negotiable,” “not transferable,” “not to order,” or “pay X only.” The transferee of an instrument bearing these words will become a holder only for the limited purposes of collection.

If the ULIB is adopted, it will provide practitioners greater flexibility in advising their clients. The third draft is patterned closely after the Uniform Commercial Code, and a practitioner should provide similar advice to an agent as to form of signature and necessary authority.

446. ULIB art. 22.
447. Id. Cf. U.C.C. § 1-201(39), which defines “signature” as “any symbol executed or adopted by a party with present intention to authenticate a writing.” Id.
448. ULIB art. 22. Cf. U.C.C. § 3-404(1) (providing that an unauthorized signature obligates the signer on the instrument).
449. ULIB art. 22.
450. ULIB art. 5, §§ 6-7. A protected holder has rights similar to those of a holder in due course under U.C.C. § 3-305. See ULIB art. 25(1). Compare practice under the Geneva Convention in which there is only one class of holder.
451. Cf. U.C.C. § 3-305(1) (granting the same right to a holder in due course).
452. Cf. U.C.C. § 3-305(2)(a) (providing the defense of infancy to the extent that local law provides defendant did not have capacity to obligate himself, and § 3-305(2)(b), granting a defense of incapacity to the extent that defendant’s act was void rather than voidable).
453. Cf. U.C.C. § 3-305(2)(c) (providing a defense for “fraud in the factum” or “real fraud” for misrepresentation that prevented the signer from learning the nature or essential terms of the instrument he signed).
454. These rights of a protected holder are governed by ULIB art. 25.
455. See ULIB art. 16.
456. Id.
in order to prevent his client's unintended personal liability on the instrument. Drafters of the ULIB intend its provisions to be optional. Lawyers should evaluate their clients' right if the ULIB is applied and also if the client acts under the law of another jurisdiction. The ULIB furthers both party autonomy and uniformity of law because application of the ULIB would be subject to the parties' agreement, and its application would supply substantive law rather than rules for choice of law.

VII. Conclusion

Negotiable instruments receive similar treatment under the Uniform Commercial Code, the English Bills of Exchange Act, and the Geneva Conventions. Differences remain, however, and choice of law principles become increasingly important as the size and frequency of international transactions increase. An agent signing a negotiable instrument in his representative capacity may always escape personal liability on the instrument if he has authority to sign and he signs in the proper form.

In the United States, a person who signs an instrument in another's behalf is personally liable on the instrument, if he did not have authority to obligate the person he claimed to represent. A signer may escape personal liability if he establishes that he had actual or apparent authority, or any other source of power to obligate the principal. The authorized agent should indicate on the instrument that he signs in a representative capacity, and should identify the person in whose behalf he signs.

The English Bills of Exchange Act influenced development of the U.C.C., and negotiable instruments in England have substantially the same effect as in the United States. An agent generally will not be liable on the instrument if he indicates his representative capacity and identifies his principal, even if he exceeds his authority.

The Geneva Conventions are the basis for negotiable instruments law in several nations in western Europe. France adopted these Conventions and French treatment of negotiable instruments follows their provisions. The Code de Commerce provides more stringent formal requirements for negotiability than the Bills of Exchange Act or the U.C.C. France requires the maker or drawer to indicate in the text of the instrument the kind of instrument he is executing and to state the name of the payor. An agent may obligate his principal and escape personal liability on the instrument only if he has authority to bind the
principal and he clearly acknowledges the representative capacity of his signature. The Code Civil suggests that representative authority is strictly construed in France. The Cours de Cassation, however, recognizes a source of authority similar to apparent authority or inherent agency power in United States practice.

The U.C.C. allows parties to an instrument to select the law governing the instrument provided that they choose the law of a state which has a reasonable relation to the transaction. If they do not choose applicable law the forum will apply its own version of the U.C.C., provided that the forum has an appropriate relation to the transaction. If the parties do not choose applicable law and the forum must look beyond its version of the U.C.C. to resolve the dispute, the court will apply general choice of law rules from outside the U.C.C.

The English Bills of Exchange Act treats each contract on the instrument separately, and applies the law of the jurisdiction where that contract was entered into, in order to determine its validity and interpretation. The Bills of Exchange Act furthers predictability at the expense of party autonomy. Courts will choose applicable law on the basis of objective and uniform criteria rather than on the parties' choice of law.

The Geneva Conventions on negotiable instruments include conventions on conflicts of law. These conventions emphasize objective criteria in choice of law, such as place of signature, domicile, and jurisdiction where the instrument is payable. The Geneva Conventions do not contain any provisions permitting contractual selection of law or forum. The drafters of the Conventions emphasized uniformity of selection of law at the expense of party autonomy.

Although France acceded to the Geneva Conventions it did not adopt their provisions on conflicts of laws. France permits parties to exercise substantial discretion in choosing applicable law. If the parties have not selected governing law, courts generally will apply the law with which the parties are most familiar.

Perhaps the most intriguing proposal for reform is UNCITRAL's final draft of a Uniform Law on International Bills of Exchange and Promissory Notes. If this draft is adopted, parties to an international transaction may select a comprehensive body of rules that borrows from each of the major systems of negotiable instruments. Adoption of this proposal would further potentially conflicting policies favoring party autonomy and uniform application of law. Parties to an international transaction could choose to be subject to the ULIB, and the ULIB then would provide the rules governing their rights and obliga-
tions. The transnational practitioner should consult each regime of law as he determines when an agent will be personally liable on a negotiable instrument which the agent signed on his principal's behalf.
Constitutional Considerations Pertaining to Florida’s Citrus Freeze Embargo: Are Due Process and Delegation of Power Problems Frustrating the Purposes of the Citrus Code?

I. Introduction

On Christmas night and into the early morning hours of December 26, 1983, a freeze descended upon most of Florida’s citrus groves. The most serious freeze damage was centered in the state’s northern citrus counties such as Marion, Lake and Orange. Southern portions of the State were less affected by the cold temperatures. Farms from Dade to Palm Beach counties suffered no freeze-related damage, however, some portions of the southern-most citrus district, including the Indian River production area, sustained below freezing temperatures with some reported fruit icing. Subsequent to the cold spell, the Florida Citrus Commission held an emergency meeting and public hearing on December 29, 1983. The meeting resulted in an administrative order which placed an embargo on all citrus fruit within the state. Except

4. Indian River County, as well as Brevard, St. Lucie, Martin, Palm Beach, Broward, Dade and a portion of Volusia County comprise Citrus District Five. FLA. STAT. § 601.09(5) (1983). However, the Indian River production area is not confined to Indian River County. Its boundaries travel through several Florida counties, from Volusia in the north to Palm Beach in the south. FLA. STAT. § 601.091(2) (1983).
6. Florida Citrus Commission Order No. 0-83-16 (Dec. 29, 1983). Two years earlier the Commission issued a similar embargo after a serious January freeze. New
for citrus fruit used for processing purposes, the embargo banned the preparation for market, sale or shipment of any Florida citrus for seven days.\(^7\)

Under Chapter 601, section 90(2)(a) of the Florida Citrus Code,\(^8\)

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8. FLA. STAT. § 601.90 (1983). The complete text of the statute follows:

(1) Whenever freezing temperatures of sufficient degree to cause serious damage to citrus fruit occur in any section of the citrus-producing areas of the state, the commission, upon call of the chairman and with such notice as may be appropriate under the circumstances, shall meet within 96 hours of the last occurrence of such freezing temperatures to determine whether or not such freezing temperatures have caused damage to citrus fruit as defined in s. 601.03 and, if so, the degree of such damage.

(2) If the commission, at such meeting, determines that serious damage, as defined in § 601.89(1), has occurred to such citrus fruit, it may, upon majority vote, enter an emergency embargo order providing for one or more of the following:

(a) Prohibiting the preparation for market, sale, offering for sale, or shipment of citrus fruit for a period not to exceed 10 days after commencement of the embargo period.

(b) Prohibiting the sale, offering for sale, or shipment of any citrus fruit showing "damage," as defined by § 601.89(2), for a period not to exceed 14 days after commencement of the embargo period.

(c) Prohibiting the preparation for market, sale, offering for sale, or shipment of citrus fruit for a period not to exceed 10 days after commencement of the embargo period, and further prohibiting the sale, offering for sale, or shipment of citrus fruit showing "damage," as defined by § 601.89(2), for a subsequent period not to exceed 14 additional days.

(d) Prohibiting the sale, offering for sale, or shipment, in offshore export trade channels, of citrus fruit showing any degree of internal freeze-related injury, as defined by § 601.89(3), for a period not to exceed 30 days from commencement of the embargo period.

(3) Any emergency order entered pursuant to this section shall become effective upon adoption by the commission, the provisions of chapter 120 to the contrary notwithstanding, and shall have the full force and effect of law. The embargo period shall commence at a time established by the commission in its order, but not sooner than 36 hours following adoption of the order.

(4) Emergency embargo orders shall not be applicable to any citrus fruit sold or transported to a citrus processing plant for processing purposes or to any citrus fruit inspected, packed, and certified for shipment prior to commencement of the embargo; however, any such citrus fruit not shipped within 48 hours of commencement of the embargo shall be reinspected, on a random basis, and recertified as damage-free.

(5) Any order may provide for reasonably extended packinghouse
the state Citrus Commission may issue an embargo order banning the sale and transportation of all Florida citrus when fruit in any area of the state has sustained serious damage as the result of freezing temperatures. The broad scope of this statute raises two constitutional issues which form the basis of this note. The first question explores the substantive due process rights of certain citrus businessmen who are subject to the impact of an embargo. A second constitutional consideration concerns the propriety of the legislature's delegation of power to the Citrus Commission under the embargo statute. The statutes of two other major citrus-producing states, California and Texas,9 afford very different and less drastic approaches to citrus freezes. The quarantine provision within Florida's Agricultural Code10 also represents a feasible alternative to a state-wide embargo. Under the Florida Agricultural Code's provisions, as with the California and Texas laws, no restrictions on the movement of fruit may be issued unless the fruit is known or suspected to be damaged or infested.11

The Florida Citrus Code contains the embargo statute. The state legislature enacted the Code as an exercise of its police power, to protect the health and welfare of those directly or indirectly involved in the citrus industry and to protect the State's "major agricultural enterprise."12 The Citrus Code recognizes the great public interest in the

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9. CAL. ADMIN. CODE TIT. 3, R. 1430.98 (1983), TEX. AGRIC. CODE ANN. § 71.002, 73.004 (Vernon 1984). While the Texas statute speaks of quarantines issued against crop pests and diseases it is nevertheless applicable when a citrus freeze occurs. See infra text accompanying note 121.
11. Id.
12. FLA. STAT. § 601.02 (1983). The section details the purposes of the Citrus Code as follows:
This chapter is passed:
(1) In the exercise of the police power to protect health and welfare and to stabilize and protect the citrus industry of the state.
(2) Because the planting, growing, cultivating, spraying, pruning, and fertilizing of citrus groves and the harvesting, hauling, processing, packing, canning, and concentrating of the citrus crop produced thereon is the major agricultural enterprise of Florida and, together with the sale and distribution of said crop, affects of health, morals, and general economy of a vast number of citizens of the state who are either directly or indirectly dependent thereon for a livelihood, and said business is therefore of vast public interest.
(3) Because it is wise, necessary, and expedient to protect and enhance the quality and reputation of Florida citrus fruit and the canned and
industry and the necessity of protecting its reputation. The legislature designed the Code to promote the general welfare of the citrus industry, which in turn will benefit Florida’s overall economy.

Section 601.04 of the Citrus Code establishes the Citrus Commission to create and establish within the Department of Citrus a board to be known and designated as the “Florida Citrus Commission” to be composed of 12 practical citrus fruit men who are resident citizens of the state, each of whom is and has been actively engaged in growing, growing and shipping, or growing and processing of citrus fruit in the state for a period of at least 5 years immediately prior to his appointment to the said commission and has, during said period, derived a major portion of his income therefrom or, during said time, has been the owner of, member of, officer of, or paid employee of a corporation, firm, or partnership which has, during said time, derived the major portion of its income from the growing, growing and shipping, or growing and processing of citrus fruit.

(b) Seven members of said commission shall be designated as grower members and shall be primarily engaged in the growing of citrus fruit as an individual owner, or as the owner of, a member of, an officer of, or a stockholder of a corporation, firm, or partnership primarily engaged in citrus growing, and none of whom shall receive any compensation from any
mission. The Commission is comprised of twelve governor-appointed

licensed citrus fruit dealer or handler, as defined in § 601.03, other than
gift fruit shippers, but any of said grower members shall not be disquali-
fied as a member if, individually, or as the owner of, a member of, an
officer of, or a stockholder of a corporation, firm, or partnership primarily
engaged in citrus growing which processes, packs, and markets its own
fruit and whose business is primarily not purchasing and handling fruit
grown by others, and one of said seven grower members shall be a resident
of and appointed from each of the seven citrus districts as defined in §
601.09. Five members of said commission shall be designated as grower-
handler members and shall be engaged as owners, or paid officers or em-
ployees of a corporation, firm, partnership, or other business unit engaged
in handling citrus fruit. Two of said five grower-handler members shall be
engaged in the fresh fruit business and three of the said five grower-han-
dler members shall be engaged in processing of citrus fruits. One of the
said five grower-handler members shall be appointed from Citrus District
No. 7 and the remaining four shall be appointed from the state at large
but of these four no two members shall be appointed from the same citrus
district.

(2)(a) The members of such commission shall possess the qualifica-
tions herein provided and shall be appointed by the Governor, subject to
confirmation by the Senate, for terms of 3 years each, and four members
shall be appointed each year. Such members shall serve until their respec-
tive successors are appointed and qualified. The regular terms shall begin
on June 1 and shall end on May 31 of the third year after such appoint-
ment. The members of the commission in office on July 1, 1969, shall con-
tinue to serve until the expiration of the present term of office. Beginning
with their successors, confirmation by the Senate shall be required for re-
moval from the commission.

(b) When appointments are made, the Governor shall publicly an-
nounce the actual classification and district, or state at large as the case
may be, that each appointee represents. A majority of the members of said
commission shall constitute a quorum for the transaction of all business
and the carrying out of the duties of said commission. Before entering
upon the discharge of their duties as members of said commission, each
member shall take and subscribe to the oath of office prescribed in § 5,
Art. II of the State Constitution. The qualification of each member as
herein required shall continue throughout the respective term of his office,
and in the event a member should, after appointment, fail to meet the
qualifications or classification which he possessed at the time of his ap-
pointment as above set forth, said member shall resign or be removed and
be replaced with a member possessing the proper qualifications and
classification.

(3) The commission is authorized to elect a chairman and vice chair-
man and such other officers as it may deem advisable. The chairman, sub-
ject to commission concurrence, may appoint such advisory committees or
state residents who are involved in the citrus growing, packing and processing industries. Seven of the members are “grower members,” each of whom represents one of the state’s seven citrus districts. The five remaining appointees are “grower-handler members.” Two of these five are involved in fresh fruit retailing and packing and the remaining three are citrus processors. The Commission represents not only each of the state citrus districts but also the interests of the various aspects of the citrus industry.

When the Citrus Code was enacted in 1949, section 90 detailed the power of the Commission in the event of a serious citrus freeze. The Commission was given the power to order a ban on the sale and transportation of citrus for a period of not more than seven days. Although section 90 was considerably amended in 1959 and again in 1981, the power to ban the movement of all Florida citrus subsequent to a serious freeze has remained intact during the thirty-six year history of the Code.

The 1981 amendment employed the term “embargo” for the first time and represented a substantial change in the existing law. The 1959 text gave the Commission a choice between ordering a ten-day ban on the movement of all state citrus, a fourteen-day ban on the movement of freeze-damage fruit, or a combination of the two. The 1981 amendment makes an additional provision for fruit destined to be sold in offshore trade channels. This provision bans the exportation of

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17. Id.
18. Id.
21. The 1949 version of section 90 required the Commission to meet within seventy-two hours of the freeze. Id. at 348. This was extended to ninety-six hours in the 1959 amendment. Florida Citrus Code, ch. 59-7, § 601.90(2), 1959 Fla. Laws 12. The 1959 amendment also extended the permissible length of the ban from seven to ten days and further held that the order would become effective at a time “fixed” by the Commission, compared to the twenty-four hour time limit set out in the original statute. Id. at 13.
23. Id. at 177.
fruit showing any internal freeze damage for a period of thirty days. Further, the 1981 version of the law states that any emergency order will become effective upon adoption by the Commission. But, while the order is immediately effective, the embargo period may not commence any sooner than thirty-six hours following the issuance of the order by the Commission. Despite these changes in embargo options and procedures, since its inception, the Citrus Commission has had considerable power in the event of a citrus freeze. In such a situation the Commission has been able to prohibit the sale and transportation for sale of all citrus in the state when it determines that a freeze has resulted in serious damage in any area of the citrus belt.

In view of an embargo order's harsh impact on the citrus industry, it is surprising that the constitutionality of section 601.90 has not been challenged in the Florida courts. When an embargo is ordered pursuant to section 601.90(2)(a), no Florida citrus may be prepared for market, sold, offered for sale or shipped for the length of the embargo period. This prevents growers from picking fruit and transporting it to packing houses. In turn, packing houses and retail outlets may not sell any fruit other than the fruit brought in and inspected before the embargo goes into effect. Grove owners whose entire crop escapes freeze damage, as well as the packing houses and retail outlets which primarily rely on these groves are subject to the effects of an embargo no less than those whose fruit has sustained serious freeze damage. The harshness of an embargo is somewhat minimized by the thirty-six hours which must pass between the issuance of the order and the commencement of the embargo. That time may be used to harvest quality fruit and forward it to packing houses. After Department of Citrus inspectors certify this harvested fruit, it may be shipped forty-eight hours into the embargo

26. Id.
28. Id. The immediate effectiveness of an emergency order prevents interested parties from seeking a hearing or judicial review. The statute itself notes that the remedies provided by Florida's Administrative Code, chapter 120, which include hearings and review by the courts, are not available in the face of an embargo. The non-access of these remedies to those who are adversely affected by a Commission order may present a question as to whether those parties are being deprived of their rights to procedural due process. However, that issue is beyond the scope of this note.
period. But even with this provision, for the remainder of the embargo period the citrus industry, with the exception of processors, is at a virtual standstill.

After considering the effects of an embargo, a number of constitutional questions may be raised. The remainder of this note will address two specific constitutional issues and will ultimately suggest an alternative to the present statute. It appears that an emergency embargo order, pursuant to section 601.90(2)(a), is a violation of the substantive due process rights of those in the citrus industry whose fruit or major sources of fruit remain damage-free after a serious freeze. Further, the delegation of power by the Florida legislature to the Citrus Commission in section 601.90 is inadequately defined and not sufficiently limited in scope, resulting in a failure to protect against unfair and arbitrary application. Both the Florida Constitution and state caselaw forbid such a delegation of power.

II. Constitutional Questions Raised by Section 601.90(2)(a)

The Florida embargo statute has not yet been constitutionally challenged in Florida courts. Nevertheless, there is ample Florida case law available which may be used to examine the judicial standards employed to determine whether there has been either a due process violation or an improper delegation of legislative power. This case law includes Florida Supreme Court decisions pertaining to alleged constitutional violations resulting from the administration of plant control and Citrus Code statutes. None of the laws challenged in these cases called for a state-wide embargo, as does section 601.90(2)(a); however, the issues raised by these controversies are analogous to the constitutional questions presented in this note.

A. Substantive Due Process

Both the federal and Florida constitutions afford an individual a guarantee against deprivation of rights without due process of law. It is well-settled that the dictates of the due process clause are satisfied if
there is no unauthorized or arbitrary exercise of government powers.\textsuperscript{34} The requirement of substantive due process forbids a state from depriving a person of life, liberty or property by any act which fails to bear a reasonable relationship to a legitimate government purpose.\textsuperscript{35}

Before one can claim that his or her rights to due process are threatened, it must be demonstrated that a legitimate liberty or property interest exists.\textsuperscript{36} Citrus operators who are subject to a state-wide embargo clearly suffer an interference with their business operations at the hand of a government agency, since they are forced to curtail the sale and transportation of fruit for possibly as long as ten days. It has been variously held that the right to pursue a legitimate occupation is a property right\textsuperscript{37} and therefore aggrieved people within the citrus industry meet the first hurdle necessary to successfully allege a violation of due process.

Once it has been ascertained that a right guaranteed under the due process clause has been affected, further inquiry must be made to determine whether it is a fundamental right, since if no fundamental right is involved in the controversy a much less rigorous standard of review is employed.\textsuperscript{38} In the case of Sotto v. Wainwright\textsuperscript{39} the United States Court of Appeals for the Fifth Circuit furnished a list of fundamental rights, including the right to vote, to associate, to have free access to the courts and "assorted freedoms against state intrusion into

\textsuperscript{34} Ozan Lumber Co. v. Union County Nat'l Bank of Liberty, 207 U.S. 251 (1907), relied on in Adams v. American Agricultural Chemical Co., 78 Fla. 362, 82 So. 850 (1919) and Davis v. Fla. Power Co., 64 Fla. 246, 60 So. 759 (1913).

\textsuperscript{35} State ex rel. Furman v. Searcy, 225 So. 2d 430, 433 (Fla. 4th Dist. Ct. App. 1969).

\textsuperscript{36} Thurston v. Dekle, 531 F.2d 1264, 1271 (5th Cir. 1976), \textit{vacated on other grounds}, 438 U.S. 901 (1978). It should be mentioned that while many of the parties who are adversely affected by an embargo order may be corporations, it is settled law that a corporate concern is a person for the purposes of a due process challenge. See Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282 (1914); State v. Atlantic Coast Line Ry. Co., 56 Fla. 617, 47 So. 969 (1908); Freidus v. Freidus, 89 So. 2d 605 (Fla. 1956), holding this principle is true at least where property rights are concerned.

\textsuperscript{37} \textit{See generally} State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936); State ex rel. Davis v. Rose, 97 Fla. 710, 122 So. 225 (1929); Paramount Enterprises v. Mitchell, 104 Fla. 407, 140 So. 328 (1932); Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881 (Fla. 1974).

\textsuperscript{38} Ferrara v. Handry County School Bd., 362 So. 2d 371 (Fla. 2d Dist. Ct. App. 1978). Courts employ a reasonable relationship test when no fundamental right is involved, \textit{see infra} text accompanying note 43.

\textsuperscript{39} 601 F.2d 184 (5th Cir. 1979).
family life and intimate personal decisions." Further, an early Florida case declared that under both the Florida and federal constitutions the right to pursue a legitimate occupation is also a fundamental right. If it is alleged that a state regulation has infringed on a fundamental right, the state must demonstrate a compelling interest in order to sustain the regulation. Although the right to pursue an occupation is apparently a fundamental right, a state-wide citrus embargo does not prevent citrus operators from pursuing their livelihoods. Rather, the due process problem which arguably stems from the application of a freeze embargo takes the form of an unreasonable interference with the pursuit of an occupation, which, as noted earlier, is an infringement of a property right. Therefore, the compelling state interest standard is admittedly not applicable to the problem faced by the citrus businesspeople due to section 601.90.

When a right other than a fundamental one is the subject of an alleged due process violation under the Florida Constitution, a court will employ a reasonable relationship test in order to determine if the state action is arbitrary. Under this standard of review the regulation of a trade or business will be upheld if it bears any reasonable relationship to a legitimate government purpose and is not arbitrary or discriminatory. More recently, Florida courts have employed a balancing of interests test to aid in due process decisions. Under this approach, in order to determine if a state regulation offends one's rights to due process a court must weigh the need for the protection of individual guaranteed rights against the state's interest in promoting the public welfare. After balancing the respective interests of the parties, the

40. See id. at 191.
42. Sotto v. Wainwright, 601 F.2d 184, 191 (5th Cir. 1979).
43. See supra text accompanying note 36.
44. Miami Laundry Co. v. Florida Dry Cleaning and Laundry Bd., 134 Fla. 1, 183 So. 759 (1938). See also Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938) (holding courts may not void a regulation as violative of due process if there is any conceivable, reasonable basis for that regulation); Lasky v. State Farm Insurance Co., 296 So. 2d 9 (Fla. 1974) (stating that the test to be employed is whether a statute bears a reasonable relationship to a state goal). See also Johns v. May, 402 So. 2d 1166 (Fla. 1981); United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668 (Fla. 1979); Belk-James, Inc. v. Nuzum, 358 So. 2d 174 (Fla. 1978).
45. Hadley v. Dep't of Admin., 411 So. 2d 184 (Fla. 1982) (recognizing there is no simple unchanging test to apply in due process controversies). See also City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978).
46. Hadley v. Dep't of Admin., 411 So. 2d 184, 188 (Fla. 1982).
court must decide which interests weigh heaviest in the balance.\textsuperscript{47}

It is clear that the Florida Constitution's broad prohibition of state actions which deprive an individual of guaranteed rights is not meant to hinder Florida in the exercise of its police power.\textsuperscript{48} However, any exercise of that power must be designed to promote public health, safety and morals\textsuperscript{49} and if a regulation fails to bear any reasonable relationship to the proper ends of the police power, it will be held to violate the due process clause.\textsuperscript{50} This failure to comply with the command of Florida's Constitution may be shown if an individual can demonstrate that the application of a police power regulation is arbitrary and unreasonable.\textsuperscript{51}

It is clear that the principles of due process apply to all government officers and agencies to whom power or authority is delegated.\textsuperscript{52} Therefore, a state agency such as the Citrus Commission is bound to comply with those principles. Since a primary purpose of the Citrus Code is "to protect health and welfare and to stabilize and protect the citrus industry of the state,"\textsuperscript{53} the embargo statute is at least facially valid. However, this does not preclude the possibility that the statute may be unconstitutional as applied to certain individuals.\textsuperscript{54}

Four Florida cases dealing with due process challenges against plant control and citrus regulations not only help to illustrate how the reasonable relationship standard is implemented, but also support the thesis that there are due process problems in the application of an embargo under section 601.90(2)(a). In \textit{State ex rel. Wolyn v. Apalachicola Northern R.R. Co.},\textsuperscript{55} the Florida Supreme Court held that a Florida Plant Board order "must be based upon facts sufficient to support it. . ." in order for it to be valid.\textsuperscript{56} The Plant Board had ordered a
quarantine prohibiting the shipment of sugar cane in a number of Florida counties where it was determined that the cane was likely to be infected with Mosaic disease.\(^{57}\) The plaintiff sought to ship Japanese cane, a variety known to be immune from the disease, from one of the quarantined counties.\(^{58}\) Without ruling on the constitutionality of the quarantine statute, the court held that, since plaintiff’s cane posed no threat, no proper basis existed for the quarantine order.\(^{59}\) The shipment was allowed. \(Wolyn,\) a 1921 case, clearly shows that quarantine orders are inapplicable against crops that are free of pests or pose no threat of infestation, since in such a situation the order bears no reasonable relationship to a legitimate state purpose. An extension of this reasoning suggests that an embargo order which is issued pursuant to a severe freeze should not be applied against undamaged citrus.

In \(L. Maxcy, Inc. v. Mayo,\)^{60} a Florida law banning any arsenic spraying of citrus was held a valid exercise of the police power. The plaintiffs alleged the regulation was arbitrary and unreasonable since it was possible that moderate use of arsenic was not harmful to citrus\(^{61}\) and, therefore, a total ban was unfair. The court noted that the use of arsenic did not change the appearance of the fruit, but affected its interior quality. This tended to defraud consumers and in turn injure the reputation of Florida citrus.\(^{62}\) The difficulty in facially recognizing citrus treated with arsenic led the Florida Supreme Court to uphold the regulation. The court noted that in cases where an “evil tendency” cannot be easily distinguished, the legislature may impose regulations which prohibit innocent activity, “as a means of insuring a statute’s effectiveness against the dominant evil of acts of that same general class regardless of degree.”\(^{63}\) In applying a reasonable relationship standard, the \(Maxcy\) court was able to find that the no-arsenic statute promoted the general welfare. Further, even as applied to individuals who were using arsenic in safe doses, the Florida Supreme Court sustained the regulation because of the difficulty inherent in recognizing

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57. \(Id.\) at 386-7, 87 So. at 910. Mosaic disease is an insect-vectored virus of sugarcane which causes stunting and death of the plant. It can be spread by insects. Telephone interview with Peter D. Spyke, M.S., St. Lucie County Extension Agent (Nov. 28, 1984).
58. 81 Fla. at 385, 87 So. at 909-10.
59. \(Id.\) at 393, 87 So. at 912.
60. 103 Fla. 552, 139 So. 121 (1932).
61. \(Id.\) at 574, 139 So. at 130.
62. \(Id.\) at 572, 139 So. at 129.
63. \(Id.\)
citrus that was improperly treated. Arguably, however, there is no similar problem when a citrus freeze occurs, for two reasons: first, damage will be known to occur if cold weather remains for a specified length of time, and second, inspection will readily determine if fruit is harmed. Therefore, the Maxcy reasoning, based on an inherent identification problem, is not applicable when considering the Florida embargo law.

In Corneal v. State Plant Board, a regulation resulted in the destruction of healthy as well as infected citrus trees. It was held that grove owners must be compensated for the destruction of their uninfected trees. Noting that the police power may be broadly employed, the Florida Supreme Court stressed that even the police power is subject to “constitutional limitations, and it cannot properly be exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health, safety and welfare.” The court approved the Plant Board’s treatment program aimed at eradicating the burrowing nematode in citrus groves, and further held that infected trees could be pulled and burned. However, the destruction of healthy trees in close proximity to those found to be diseased robbed grove owners of profits and exceeded the proper limits of the police power.

Corneal’s holding rests in part on the concept of eminent domain. The Court stated that “the compulsory program requires the destruction of one owner’s healthy trees for the purpose of protecting the healthy trees of his neighbors.” While a citrus embargo order fails to destroy property of unaffected grove owners to the extent it constitutes a taking without compensation, it nevertheless infringes upon the

64. Id. at 575, 139 So. at 130. The court suggested that in order to monitor a mere regulation of arsenic spraying the state would require “an army of enforcement officers” to administer the law. Id.

65. 95 So. 2d 1 (Fla. 1957), modified, 101 So. 2d 371 (Fla. 1958).

66. Id. at 6-7.

67. Id. at 4. The plaintiff in this case attacked the Plant Board order under both the Florida and federal constitutions. Id.

68. The burrowing nematode, Radolophus similis, is a worm which attacks the roots of citrus trees and is the only mobile nematode. Potential damage is greater due to the fact that a localized infestation may spread. Telephone interview with Peter D. Spyke, M.S., St. Lucie County Extension Agent (Nov. 28, 1984).

69. 95 So. 2d at 6.

70. Id.

71. Id.

72. “No private property shall be taken except for a public purpose and with full
property rights of those in the citrus business. Also, an embargo order has at least a temporary effect on profits since no sale of citrus may be made for the duration of the order. There is, therefore, some similarity between the unfair effects of the tree destruction in *Corneal* and an embargo which halts the business operations of citrus operators in possession of undamaged fruit. Since the *Corneal* court felt that the destruction of healthy trees was not reasonably related to the general welfare, it may arguably follow that an embargo order which prohibits the movement of undamaged, quality citrus would likewise be held impermissible.

More recently, in *Flake v. Department of Agriculture*, Florida's Fifth District Court of Appeal held that a Florida quarantine order was constitutionally valid since the order constituted a precautionary measure. The plaintiffs, Mr. Flake and others, had illegally imported a new strain of citrus from Texas which was susceptible to foot rot and a ringspot virus. One of the plaintiff's trees was subsequently found to be infected with ringspot and the quarantine order was issued. The court held "[i]n enacting regulatory measures which protect but do not destroy property, the law need not restrict itself to conditions actually harmful but may require precautions within the whole range of possible dangers. . . ." This reasoning might lead one to view an embargo order as a precaution and therefore within the ambit of the police power. However, Flake's trees were known to be infected with a plant disease, which rendered the quarantine reasonably related to the police power since there was a legitimate concern that other trees would become diseased. Again, an argument may be made that no such reasonable relationship exists when an embargo affects grove owners and retailers dealing in undamaged fruit since the Florida citrus industry is

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73. 383 So. 2d 285 (Fla. 5th Dist. Ct. App. 1980).
74. Foot rot, *Phytophthora parasitica*, is a fungus disease which occurs naturally in the soil. It attacks the stems, roots and fruit of citrus, causing root rot, girdling of the trunk and decay of fruit on the tree. Telephone interview with Peter D. Spyke, M.S., St. Lucie County Extension Agent (Nov. 28, 1984).
75. The Necrotic Ringspot Virus is not known in Florida. It causes lesions, stunting, and in some cases, death of the tree. Telephone interview with Peter D. Spyke, M.S., St. Lucie County Extension Agent (Nov. 28, 1984).
76. 383 So. 2d at 287.
77. *Id.* at 289 quoting *Corneal v. State Plant Bd.*, 95 So. 2d 1 (1957).
not threatened by the sale or transportation of quality citrus.

In all of the foregoing cases, only plants or crops which were diseased, susceptible to disease, or of a nature where contamination was difficult to ascertain were allowed to be regulated under the police power. This case law arguably strengthens a due process argument aimed at section 601.90(2)(a). In addition, none of these cases applied the balancing of interests test. If the test is applied to a hypothetical situation where an embargo has virtually shut down a citrus retailing operation for two weeks, additional problems with the constitutionality of the embargo law become apparent. Initially, the balance would seem to weigh heavily on the side of the state's interest in protecting those in the citrus industry and the reputation of Florida fruit. In 1915, the Supreme Court of the United States recognized that citrus is "one of the great industries of the state of Florida" and that its reputation is in need of protection in foreign markets. More recently it has been held that the citrus business is of such import to state welfare that the police power may be used to safeguard the industry. If this interest is being weighed against the property rights of a citrus operator whose fruit is freeze-damaged, the embargo statute would certainly prevail, since the sale of such fruit would injure the reputation of Florida fruit. However, if the property rights subject to this hypothetical balance are those of a retailer in possession of only quality fruit, the balance arguably shifts. When the retailer is allowed to continue to sell this undamaged fruit, the purposes of the Citrus Code are well-served since the retailer's business to some degree enhances the reputation of Florida citrus and helps the economy of the state. When an embargo forces a retailer in possession of quality citrus, and others in a similar situation, to refrain from selling or transporting fruit, the purposes behind the Citrus Code are frustrated since the nation is kept from consuming undamaged Florida fruit. Furthermore, the publicity of the state-wide ban likely has a negative impact on out-of-state consumers. Under the balancing of interests standard, the retailer should prevail, not simply because of a desire to protect individual rights that are in no way affected by the exigencies of a citrus freeze, but also because of a recognition that this result is better for the state's welfare. As the balance tips in favor of individual citrus businessmen, one may arguably sug-

78. See supra text accompanying note 44.
80. Id.
81. Dep't of Citrus v. Griffin, 239 So. 2d 577, 578 (Fla. 1970).
gest that the application of section 601.90(2)(a) in such a hypothetical situation bears no reasonable relationship to the purposes which underlie the Citrus Code.

This hypothetical situation represents what actually resulted from the embargo order of December 29, 1983. The suggested due process flaw within section 601.90 takes on greater proportions when one is reminded that people involved in the citrus industry throughout several counties were forced to comply with a state-wide embargo order despite the fact their fruit escaped any freeze damage. This potential due process problem affected more than a few isolated businesses; it forced all citrus operators throughout the southern portion of the State, except for processing plants and their suppliers, to halt the sale and transportation of citrus for the duration of the embargo period. 82

B. Delegation of Power

The Florida Constitution expressly provides for the creation of certain administrative agencies, but the Citrus Commission does not fall within this category. It is well settled, however, that legislative creation of administrative agencies is compatible with the Florida Constitution. 84 The Florida legislature provided for the creation of the Citrus Commission in section 601.04 of the Florida Citrus Code of 1949. 85 The Commission is an administrative board within the Department of Citrus and its creation is a valid legislative act. 87 In addition to creat-

82. The contribution of the counties in the southern portion of the citrus belt is not insignificant. For example, in January, 1983, the total shipments of state citrus numbered 8,157,560 4/5 bushel boxes. This was during a peak citrus shipping month in a year without a citrus freeze. Of that total, the southern citrus counties of Broward, Palm Beach, Martin and St. Lucie contributed 1,319,639 4/5 bushel boxes. Fla. Division of Fruit & Vegetable Inspection Ann. Rep. 30 (1982-3).

83. Fla. Const. art. IV, § 8(c) (creation of Parole Commission); art. IV, § 6(b) (boards to grant and revoke occupational licenses); art. IV, § 9 (Game and Fresh Water Commission).

84. Storrs v. Pensacola & A.R., 29 Fla. 617, 11 So. 226 (1982), for example, upheld the constitutionality of the Railroad Commission Act, which authorized railroad commissioners within the state to fix fair passenger and freight rates.

85. See supra note 15.


87. See supra note 80. See also Richardson v. Baldwin, 124 Fla. 233, 168 So. 255 (1936) (the state may authorize laws to protect agricultural industries and may confer authority on administrative agencies to make rules and regulations to enforce those laws); State ex rel. Davis v. Fowler, 94 Fla. 752, 114 So. 435 (1927); Milk
ing an administrative agency, the legislature may confer upon an agency the right to exercise the state police power. But while the legislature may empower an administrative body to make determinations in accord with its policy in a certain area, this type of delegation is limited by article III, section 1 of the Florida Constitution. Any statute which creates or grants power to an administrative agency is presumptively constitutional, but whenever the legislature delegates discretionary authority to an administrative agency, it must guide the agency with standards and policy. These standards must be sufficient to preclude the agency from exercising arbitrary power.

It follows that in order to make an argument that section 601.90 represents an unconstitutional delegation of legislative power, one must ask three questions: 1) whether section 601.90 grants power to an administrative agency; 2) if section 601.90 grants such power, whether the Code furnishes that agency with standards to guide it in the exercise of its power; and 3) if these standards exist, whether they suffice to prevent an arbitrary exercise of power on the part of the administrative body.

The title of the embargo statute, “Freeze-damaged citrus fruit; power of commission,” may easily answer the first question. The text of the section specifically details the extent of the power, which includes the authority to enter an emergency embargo order. An affirmative answer also exists for the second question, since the section does give the Commission standards to follow in considering whether an embargo should be issued. Particularly, the Commission must determine that se-

Comm’n v. Dade County Dairies, Inc., 145 Fla. 579, 200 So. 83 (1940).
89. FLA. CONST. art III, § 1 states in pertinent part, “The legislative power of the state shall be vested in a legislature of the State of Florida. . . .”
90. State ex rel. Atlantic C.L.R. Co. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681 (1922).
92. Barrow v. Holland, 125 So. 2d 749 (Fla. 1960). “An agency of government having the power to regulate is not permitted to arrogate to itself or to delegate to its employees the arbitrary power to determine private rights with an unbridled discretion.” Id. at 752. See also Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962).
93. See supra note 1.
rious damage has occurred to citrus fruit before it may issue an emergency order. The standard of serious damage is defined in the preceding section.94 The final question is whether the guidelines provided in section 601.90 as to “serious damage”95 are sufficient to prevent the Commission from exercising its power in an arbitrary manner. This note has suggested that an embargo order fosters arbitrary and discriminatory results when cold weather damages only a portion of the state’s citrus. In such a situation the order forces those with quality fruit to curtail business activity. This activity, if allowed to continue without interference, would actually promote the purposes of the Citrus Code. The fact that such an unfair infringement of rights96 may result when the Commission follows the present system indicates that the

94. FLA. STAT. § 601.89 (1983) provides:
   (1) Citrus fruit shall be deemed “seriously” damaged by freezing when such freezing causes:
      (a) Marked dryness to extend into the segments of oranges and grapefruit more than one-half inch at the stem end; or into segments of mandarin or hybrid varieties more than one-fourth inch at the stem end; or more than an equivalent amount by volume of dryness to occur in any other portions of the fruit.
      (b) Internal freeze-related injury, as defined in subsection (3), when such condition or combinations of conditions is determined to affect the fruit to a degree equal in seriousness to that described in paragraph (a).
   (2) Citrus fruit shall be deemed “damaged” by freezing when such freezing causes:
      (a) Marked dryness to extend into the segments of oranges and grapefruit more than one-quarter inch but less than one-half inch at the stem end; or into segments of mandarin or hybrid varieties more than one-eighth inch but less than one-fourth inch at the stem end; or more than an equivalent amount by volume of dryness to occur in any other portions of the fruit.
      (b) Internal freeze-related injury, as defined in subsection (3), when such condition or combinations of conditions is determined to affect the fruit to a degree equal in seriousness to that described in paragraph (a).
   (3) Internal freeze-related injury to citrus fruit, caused by freezing, shall consist of any of the following:
      (a) Wet cores or wet segment walls;
      (b) Water soaking;
      (c) Juice cell breakdown;
      (d) Mushy condition;
      (e) Honeycomb or open spaces in pulp; or
      (f) Other evidence of internal breakdown, decay, or moldy condition.

96. See supra text accompanying notes 35-36.
standards currently set forth in section 601.90 are insufficient.

Several Florida cases recognize that sufficiently restrictive standards are required in a valid delegation of legislative power. In *Mahon v. County of Sarasota*, the need for proper standards was emphasized when an agency regulation prohibiting the accumulation of garbage and vegetation was held invalid for failing to sufficiently limit the discretion of the county. A few years later, in *Dickinson v. State*, Florida's Supreme Court held that the legislative delegation of power to a state agency for the purpose of administering the operation of cemeteries was unconstitutional since it was not clearly defined and sufficiently limited in scope. The court held that a delegation of power is invalid if it fails to afford adequate protection against unfairness and favoritism.

Individuals alleging an over-broad delegation of power have also attacked agriculture and citrus statutes. In *Hutchins v. Mayo*, the State Supreme Court held that, under the Florida Constitution, in order to determine whether a statute unlawfully delegates legislative authority, the test is "whether or not the act defines a pattern by which the rule or regulation must be made to conform." In *Hutchins*, the plaintiffs challenged a statute which gave the Citrus Commission the power to fix various citrus standards and make regulations pertaining to grading, stamping or certifying citrus fruit as well as the power to collect assessments. The *Hutchins* court sustained the delegation of power because the powers that were delegated to the Commission were necessary to carry out the legislative policy of regulating the citrus industry. An argument may be made that allowing the Citrus Commission to order a state-wide ban on the sale and transportation of citrus when only certain portions of the state have suffered freeze damage falls short of fulfilling the purpose of the Citrus Code. As has been suggested, such a ban actually hurts legislative policy.

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97. 177 So. 2d 665 (Fla. 1965).
98. 227 So. 2d 36 (Fla. 1969).
99. See id. at 37.
100. 143 Fla. 707, 197 So. 495 (1940).
101. See id. at 496 (quoting Arnold v. State, 140 Fla. 610, 612, 190 So. 543, 544 (1939)). In this case, the pertinent portions of the Florida Constitution were article II, dealing with division of powers and article III, § 1, which vests legislative power in the state House of Representatives and the Senate.
102. See id. at 497.
103. See supra text accompanying note 77.
In *Conner v. Joe Hatton, Inc.*\(^{104}\) a statute which allowed the Commissioner of Agriculture to assess on all individuals involved in the sweet corn industry their pro-rata share of the expenses necessary to fund its marketing orders was held invalid. The statute was fatally defective since it failed to set any ceiling on the amount of money the Commissioner could spend on marketing orders as well as the amount which could be assessed against the individual members of the industry.\(^{105}\) In *Department of Citrus v. Griffin,*\(^{106}\) the Florida Supreme Court held that in determining whether a legislative delegation of authority is sufficiently restrictive, due consideration must be paid to "the practical context of the problem sought to be remedied or the policy sought to be effected."\(^{107}\) In *Griffin,* plaintiffs challenged the Orange Stabilization Act,\(^{108}\) which empowered the Department of Citrus to issue marketing orders and to fund them through limited assessments on boxed oranges. The *Griffin* plaintiffs also attacked a marketing order that had been issued pursuant to the act.\(^{109}\) Both the Act and the order were upheld. The court noted that legislative delegation of power may be permissible in situations where it is impractical for the legislature to handle administrative matters on a year-round basis.\(^{110}\) However, relying on *Dickinson v. State*\(^{111}\) the Florida Supreme Court held that even when constantly changing conditions allowed a general scheme to be delegated, statutes may not be "so general and unrestrictive that administrators are left without standards for the guidance of their official acts."\(^{112}\)

Admittedly, it may be impractical for the legislature to deal directly with the exigencies of a citrus freeze. If this is so, *Griffin* would appear to allow a general delegation of powers to an administrative body such as the Citrus Commission. Nevertheless, *Griffin* would likely demand that the empowering statute sufficiently limit the Commis-

104. 203 So. 2d 154 (Fla. 1967).
105. See id. at 155. The portion of the Florida Constitution violated in this instance of delegation was article IX, § 3, which states that "[n]o tax shall be levied except in pursuance of law."
106. 239 So. 2d 577 (Fla. 1970).
107. See id. at 580.
108. See id. at 578.
109. Id.
110. See id. at 580.
111. See supra note 94.
112. 239 So. 2d 577, 581 (Fla. 1970).
Florida’s Citrus Freeze Embargo

III. Alternatives to a State-wide Embargo and a Suggested Approach

Upon consideration of the constitutional questions raised by the existing freeze procedure, one must also consider alternatives to the present embargo system. Statutes of two other major citrus-producing states, California and Texas, provide an illuminating study of more flexible approaches to freeze emergencies. Florida may profit by using these alternative approaches as sound guides toward a more acceptable freeze procedure.

The State of California demands that its citrus be free from serious damage. A detailed inspection program has been developed to prevent damaged fruit from leaving the state. Once a freeze occurs, citrus fruit is inspected by examining the segment walls of the fruit. This method of inspection continues until a survey provides additional evidence of the extent of actual freeze damage, a point known as “date

113. Griffin states that “[e]ven where a general approach would be more practical than a detailed scheme of legislation,” constitutional limitations exist. Id. at 581.
114. See supra note 1; FLA. STAT. § 601.90(2) (1983).
A." From date A forward, inspection may be made either by inspection of the segment walls or by a transverse cut through the center of the fruit. This double method of inspection remains in effect until it is possible to make a reasonably precise determination of the full extent of freeze damage. After this point, known as “date B,” inspection is made by the transverse cut method. The determination that a citrus freeze has triggered the drying process is based upon inspection of fruit in only those areas of California where freeze damage has occurred.

The California approach focuses on inspection of fruit in areas hit by a freeze, leaving those citrus producers in other areas free from inspection or any interference with their business. This procedure avoids the constitutional problems faced by Florida’s section 601.90. First, by allowing those citrus operators who escape any freeze damage to continue to pursue their livelihood, there is no danger of an arbitrary deprivation of property rights. This eliminates any violation of substantive due process through application of the freeze statute. Second, there is a valid delegation of power to the agricultural administrative body, since the California law states that inspections shall be made only in areas of the state which sustain freeze damage. The statutes further detail the methods of inspection for freeze-damaged fruit. These precise standards sufficiently limit the discretionary power of the officials so as to prevent any arbitrary and unfair application of the law.

The Texas Agricultural Code provides another citrus freeze procedure which is worthy of examination. The damage caused to citrus as

117. Id.
118. CAL. ADMIN. CODE TIT. 3, R.1430.92(c) (1983).
120. Id.
121. Id.
122. CAL. ADMIN. CODE TIT. 3, R.1430.98 (1983) states:
The determination by the Director of the Department of Food and Agriculture as required by Section 1430.92 of the California Administrative Code, that the drying process resulting from freezing damage has been developed (a) “to such extent as to furnish additional evidence of the extent of actual damage to the fruit” and (b) “to such extent as to permit reasonably accurate determination of the full extent of freezing damage by such examination, without regard to the damage on the segment walls,” shall be based upon an investigation of the condition of orange fruits in the areas of the State where freezing damage to oranges has occurred.
123. Id.
124. See supra notes 112-117.
Florida's Citrus Freeze Embargo

the result of a freeze falls into the category of "Citrus fruit and storage rot" on Texas' list of dangerous diseases and pests.\textsuperscript{125} The Department of Agriculture may quarantine an infected area if it is determined that one of these plant diseases exists within the state.\textsuperscript{126} This quarantine procedure deals with plant diseases which are not widely distributed in the state.\textsuperscript{127} Texas also allows the Department of Agriculture to establish an emergency quarantine, without notice or public hearing, when a public emergency exists.\textsuperscript{128} While this type of quarantine may immediately extend to the state borders, it is unlikely to be used in the face of a citrus freeze. Freeze damage occurs as the result of cold temperatures, and damage may be readily predicted and discovered. Texas' emergency quarantine is aimed at controlling the "introduction or dissemination of an insect pest or plant disease,"\textsuperscript{129} indicating it is chiefly concerned with plant diseases which are of a spreading and uncertain nature. Freeze damage does not fall into this category. Therefore, the general quarantine provision of the Texas Agricultural Code\textsuperscript{130} would most likely be followed in the event of a citrus freeze.

The Texas quarantine, like the California inspection program, focuses a freeze procedure only on areas that are affected by the citrus freeze.\textsuperscript{131} Therefore, the Texas approach protects the property of people

\begin{footnotesize}
\begin{itemize}
\item[125.] \textit{TEX. AGRIC. CODE ANN.} § 73.004(27) (Vernon 1982).
\item[126.] \textit{TEX. AGRIC. CODE ANN.} § 71.002 (Vernon 1982) states:
\textit{"If the department determines that a dangerous insect pest or plant disease not widely distributed in this state exists within an area of the state, the department shall quarantine the infested area."}
\item[127.] \textit{Id.}
\item[128.] \textit{TEX. AGRIC. CODE ANN.} § 71.004 (Vernon 1982) provides:
\begin{enumerate}
\item The department may establish an emergency quarantine without notice and public hearing if the department determines that a public emergency exists in which there is the likelihood of introduction or dissemination of an insect pest or plant disease that is dangerous to the interests of horticulture and agriculture in this state.
\item The department may establish the emergency quarantine at the boundaries of the state or in other areas within the state.
\item The emergency quarantine and rules adopted in order to prevent the introduction or spread of the pest or disease are effective immediately on establishment or adoption.
\item An emergency quarantine expires 30 days following the date on which it was established unless reestablished following notice and hearing as provided by this subchapter.
\end{enumerate}
\item[129.] \textit{Id.}
\item[130.] \textit{See supra} note 122.
\item[131.] Quarantines are established against "the infested area." \textit{TEX. AGRIC. CODE}
in the citrus business whose fruit is undamaged and also sufficiently limits the Department of Agriculture's administrative power.

Florida, too, has a quarantine law. The Plant Industry Division of the Florida Department of Agriculture has the power to declare a quarantine against an orange grove if plant pests are discovered. The statutory quarantine prohibits the movement, sale or other disposal of any plant or plant product included in the quarantined area. Orders are issued "in reference to plant pests," indicating they must be premised on a plant-threatening situation. This statute ensures that the harsh effect of a quarantine only affects those plant growers and distributors whose property lies within the infested area.

Just as it is possible to determine the extent of pest infestation, freeze damage may be ascertained by monitoring cold temperatures and inspecting suspect fruit. Therefore, it is possible that Florida's quarantine laws could be modified to expressly govern a citrus freeze situation. However, this would result in placing the quarantine decision in the hands of the Plant Industry Division, not the Citrus Commission. Since the Commission fairly represents all the interests within the citrus industry it is best that that body retain power over citrus freeze situations.

Arguably, the better alternative is to correct the problems within section 601.90. The Commission should be authorized to order an embargo against any area of the state which sustains citrus damage as the result of a freeze. This would include both "serious damage" and "damage" as defined by the Citrus Code. The length of the embargo should correspond to the length of time needed for the Department of Citrus inspectors to ascertain the degree of citrus damage. Any fruit showing damage to the extent that its sale would injure the reputation of Florida citrus or pose a threat to the general welfare should be pro-

Ann. § 71.002 (Vernon 1982). Texas also allows the commissioners court of any county to request that the department investigate the possibility of a plant pest or disease within the county. Tex. Agric. Code Ann. § 71.008 (Vernon 1982).

133. Id.
137. See supra note 15.
hibited from further movement, unless that fruit is to be used for processing purposes.\textsuperscript{139} Under this system, quality fruit could continue to be packed and sold, lessening the negative impact a state-wide ban would have on consumers.\textsuperscript{140} This negative consumer attitude is thought to outlast the embargo period.\textsuperscript{141} South Florida citrus operators who were unreasonably subject to the 1983 embargo felt that a state-wide embargo ultimately resulted in consumer fear of Florida fruit.\textsuperscript{142} This consumer fear has two causes: the absence of Florida citrus in the marketplace for a period of time, and the long time needed for citrus prices to stabilize.\textsuperscript{143} The businessmen also expressed concern that the after-effect of an embargo, perhaps more than its immediate impact, hurts the industry.\textsuperscript{144}

The suggested revisions to section 601.90 would result in a freeze procedure that would be technically different from the procedures followed in either California or Texas, but would rid the current law of the serious problems created by its application. A regional embargo system would not interfere with business pursuits in an unreasonable or arbitrary manner. Further, the suggested amendment to 601.90 would limit the power of the Commission, preventing it from being used in an unfair manner. The end result would well serve the two primary purposes of the Citrus Code: to enhance the reputation of Florida citrus and to promote the state’s economy. A regional embargo would indicate to national consumers that only part of Florida’s citrus belt sustained freeze damage. This would translate into more consumer confidence when purchasing Florida citrus. Consumer confidence would

\textsuperscript{139} Under the proposed revision, § 601.901 would remain unaffected. This section enables the Commission to establish the maximum permissible degree of freeze damage in fruit to be used for processing. \textit{Fla. Stat.} § 601.901 (1983).

\textsuperscript{140} At the emergency meeting on Dec. 29, 1983 which resulted in the embargo order, four telephone messages were read from grove owners who escaped freeze damage. All four were against the embargo. One caller specifically mentioned his concern about negative media coverage. He felt widespread publicity about an embargo implies to the country that Florida is without any fresh citrus whatsoever. \textit{Emergency Meeting and Public Hearing of the Florida Citrus Commission}, Dec. 29, 1983 at 6.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.}.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}.

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result in continued sales, ultimately benefiting all those directly and indirectly concerned with Florida's greatest agricultural industry.

Nancy Perkins Spyke

I. Introduction

With the enactment of the Warren S. Henderson Wetlands Protection Act of 1984, the Florida Legislature took a first step toward comprehensive wetlands protection, joining seven other states that have enacted comprehensive wetlands legislation. While the passage of the Act is in itself recognition of the importance of wetlands to Florida, the language of the Act reflects the influence of other strong competing interests.

"Wetlands" are variously defined, typically calling for saturated soil conditions and a prevalence of vegetation adapted for life under those conditions. They are unquestionably important to the health and welfare of future generations. Wetlands are especially valuable re-

1. FLA. STAT. §§ 403.91-.929 (Supp. 1984), entitled the Warren S. Henderson Wetlands Protection Act of 1984 [hereinafter cited as the Wetlands Protection Act].


3. See FLA. STAT. § 403.817 (1983) The Vegetative Index is ratified by FLA. Stat. § 403.8171 (Supp. 1984). The Department of Environmental Regulation's (DER) dredge and fill authority is based on a Vegetative Index which identifies plant species which are indicative of wetlands. See also 33 C.F.R. § 323.2(c) (1982), which defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

sources due to their biological productivity, water storage capacity, ability to reduce flood damage, recharge aquifers, and remove organic pollutants by natural processes. With more than ten million acres of wetlands in Florida, wetlands are, as the legislature recognized through the Act, a major component of the essential characteristics that make Florida an attractive place to live, performing economic and recreational functions that would be costly to replace should their vital character be lost.

While Florida’s Wetlands Protection Act purports to regulate the uncontrolled development of wetlands, the Act may include sufficient exemptions to hamper its effectiveness. This note will chart the history of wetlands legislation in Florida leading up to the adoption of the Wetlands Protection Act, analyze this Act in light of its expressed purposes, and make recommendations for possible changes which may increase the protection of wetlands in Florida.

II. History of Environmental Protection in Florida

The Preamble to the Wetlands Protection Act reflects a historical indifference to the protection of the environment. This indifference,


8. Id. The preamble to the Wetlands Protection Act states: Whereas, the economic, urban, and agricultural development of this state has necessitated the alteration, drainage, and development of wetlands. While state policy permitting the uncontrolled development of wetlands may have been appropriate in the past, the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to the economic and recreational values which Florida’s remaining wetlands provide.

Florida Wetlands Act

however, began to change for the first time in 1968 when, as a part of a considerable Constitutional revision, the Florida Constitution was amended to include article II, section 7: "Natural resources and scenic beauty—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

During and after the period of development of the 1968 Constitutional revisions, the legislature passed legislation attempting to control air, water, noise and solid waste pollution. In addition, the legislature enacted laws to regulate water consumption and supply. Also, the United States Congress passed several laws relating to the environment whose administration were the primary responsibility of the states: the Federal Water Pollution Control Act amendments of 1972, the Clean Air Act, and the Safe Drinking Water Act.

The difficulty with efforts to protect the environment following the Constitutional amendment and the federal legislation was the lack of coordination between the various agencies of state government in the absence of comprehensive legislation. This created impediments to effective regulation and frustration for those interests being regulated. Despite efforts at reorganizing state agencies in 1969, the responsibility for environmental protection remained divided between four different agencies. With additional environmental legislation during the early

10. Florida, like many other states, found that constitutional revision was necessary in the mid-1960's to meet the shifts in power to Congress and the federal courts. Much of this revision was prompted by federal court reapportionment decisions. Consequently, in 1968 Florida made considerable revisions to its constitution, including the addition of article II, section 7.


21. Id. Responsibility for environmental protection was split between the Department of Pollution Control, the Trustees of the Internal Improvement Trust Fund, the
1970's, problems caused by overlapping agency responsibility, lack of accountability, and permit processing delays created great pressure to consolidate environmental regulation. 2

The Florida legislature made two unsuccessful efforts to consolidate control between 1971 and 1974. 23 A year later the legislature enacted the Environmental Reorganization Act of 1975. 24 This Act created the Department of Environmental Regulation (DER) by absorbing the Department of Pollution Control, with its responsibility for air, water, noise, solid waste and power plant siting, and by assuming responsibility for navigable waters permitting from the Trustees of the Internal Improvement Trust Fund, the public drinking water supply oversight from the Department of Health and Rehabilitative Services, and water management responsibilities from the Department of Natural Resources. 25

Because the widely divergent geography of Florida creates significantly different water use and management requirements, the Environmental Reorganization Act of 1975 provided that the DER delegate "to the greatest extent practicable" its water management power under Florida Statutes Chapter 373. 26 In requiring this delegation, the legislature desired to better regulate differing geographical water use demands through regional water management. While the Act made mandatory the delegation of responsibility for enforcement of Chapter 373 to the water management districts, it did not give explicit directions to the DER under section 403.812 of the Florida Statutes to delegate water quality management. The implication was that water management districts were responsible for permitting quantitative water use while the DER remained responsible for water quality, 27 unless a valid

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22. *Id.*
23. *Id.*
27. Wershow, *Legal Implications of Water Management for Florida’s Future*, 54 FLA. B.J. 527, 527-28 (1980). FLA. STAT. § 373.016(3) directs that "to the greatest extent practicable, such power should be delegated to the governing board of a water management district" and makes no reference to water *quality* standards in FLA. STAT. § 403.812. That statute provides that the water *quality* functions of the department may be delegated when the secretary determines that a water management district has the financial and technical capability to carry out these functions. Hence, the legislature seems to create a bifurcation between the functions of water quantity management...
delegation was made by the DER to those districts which the secretary determined had the financial and technical capability to carry out water quality management.28

This lack of clear delineation of responsibilities between the water management districts and the DER became apparent when water management districts began writing water quality standards into their regulations without a valid delegation of authority, creating the potential for confusion among regulatees.29 The historical concern that a bifurcated system of enforcement results in confusion to regulated interests30 continues to play a role in water management in Florida. As detailed below, some provisions of Florida's Wetlands Protection Act again raise this issue by arguably fostering this confusion.

III. The Development of Wetlands Protection in Florida

The process of recognizing the growing need for wetlands protection has been a long one. As an understanding of the impact of the loss of wetlands31 increased, so too did the need to provide measures for protecting them. In 1973, the Florida Wildlife Federation hosted a wetlands legislative conference which resulted in the development of "A Statement on Wetlands Protection."32 This Statement outlined five goals which would provide greater protection for wetlands: 1) explicit criterion to define the lands to be protected; 2) explicit specifications as to uses which are prohibited and those that are not; 3) measures for bringing lands into public ownership where necessary to carry out the purposes of the act; 4) strong enforcement sanctions, and 5) funding measures necessary to carry out the purposes of the act.33

and water quality management which has created some overlapping and confusion when water management districts adopted regulations relating to quality.

29. Wershow, supra note 27, at 528.
30. Letter from Randall E. Denker to Johnny Jones, Executive Director, Florida Wildlife Federation (May 9, 1984).
31. Address by Victoria Tschinkel, Secretary of DER, Florida Wildlife Federation Annual Meeting (Sept. 8, 1984). Florida has lost 40% of its wetlands from 1900-1973. For the period since 1952, Florida has lost 1.5 million acres of wetlands.
33. Id. at 3. In addition, the Conference stated:

[The] power to regulate should be backed up by the power to obtain the fee or lesser estate as required in wetlands by negotiation, gift, or the exercise of the power of eminent domain in cases where the regulation is held
Of these goals, the Florida legislature addressed that of compensating owners for a “taking” due to a reduction of property values caused by permit denial in 1978. The passage of Florida Statutes section 380.085 allowed, among other things, for the payment of appropriate damages. Since then, courts reviewing the taking issue have recognized that restrictions on land use which deny the highest and best use are not takings and that “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” So, while there were measures to bring lands into public ownership, and judicial determinations that limit public compensation to only that environmentally sensitive property where the regulations preclude all economically reasonable uses, there was no comprehensive legislation to address the additional identified goals geared to the actual protection of the wetlands. Not until eleven years after the Conference did the Florida legis-
lature comprehensively address the need for wetlands protection.\(^{40}\)

IV. The Warren S. Henderson Wetlands Protection Act of 1984

Undoubtedly, the passage of the Wetlands Protection Act enhances Florida’s ability to protect wetlands. Key achievements\(^{41}\) of the Act include: 1) increased jurisdiction over wetlands by the addition of over two hundred species to the Vegetative Index, the DER’s principal method of jurisdiction determination;\(^{42}\) 2) expansion of the DER’s criteria for granting or denying permits, including the ability to consider fish and wildlife habitat;\(^{43}\) 3) the clarification of the DER’s jurisdiction during times of drought;\(^{44}\) 4) consideration of the cumulative impact of projects in granting or denying permits;\(^{45}\) 5) the naming of the Ever-

\(^{40}\) FLA. STAT. §§ 403.91-.929 (Supp. 1984).

\(^{41}\) Tschinkel, supra note 31.

\(^{42}\) FLA. STAT. §§ 403.817(1)-(5) (1983) (The Vegetative Index is ratified by Fla. Stat. §403.8171 (Supp. 1984).

\(^{43}\) FLA. STAT. § 403.918(2) (Supp. 1984). In pertinent part:

(2) No permit shall be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for projects which significantly degrade or are within an Outstanding Florida Water, as provided by department rule, the applicant shall provide reasonable assurance that the project will be clearly in the public interest. (a) In determining whether a project is not contrary to the public interest, or clearly in the public interest, the department shall consider and balance the following criteria: . . . (2) Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. . . .

\(^{44}\) Id.

\(^{45}\) FLA. STAT. § 403.913(2) (Supp. 1984). In pertinent part, the Act states:

The landward extent of waters shall be determined as provided in s. 403.817 [Vegetative Index], except that the department may exert its jurisdiction to the ordinary or mean high water line of waters whenever the landward extent, if determined in accordance with ch. 17-4.022, Florida Administrative Code, occurs waterward of the ordinary or mean high water line. . . .

\(^{45}\) Id.

\(^{45}\) FLA. STAT. § 403.919 (Supp. 1984).

The department, in deciding whether to grant or deny a permit for an activity which will affect waters, shall consider:

(1) The impact of the project for which the permit is sought;

(2) The impact of projects which are existing or under construction, or
glades as waters of the state; and 6) the ability of the DER to consider mitigation in the permitting process.

The Wetlands Protection Act is long and complex. It addresses a biologically complicated issue through legislation which is, in its own right, procedurally and politically complicated. While Florida has gained much through passage of the Act, the complexities of negotiating such an Act led to the creation of statutory exemptions which may not be consistent with the express legislative intent or the public interest.

Florida’s Wetlands Protection Act clearly represents a compromise between very strong development, mining and agricultural interests on the one hand and environmentalists on the other. Despite the compromises necessary to insure the passage of the bill, the Wetlands Protection Act is largely a success. Considering the fact that the DER and environmental groups have been trying without success to win legislative passage of just one of the concepts, the fish and wildlife permit criterion, the Act’s drafters consider the comprehensive Wetlands Protection Act an extremely significant accomplishment.

for which permits or jurisdictional determinations have been sought;

(3) The impact of projects which are under review, approved, or vested pursuant to s. 380.06, or other projects which may reasonably be expected to be located within the jurisdictional extent of waters, based upon land use restrictions and regulations.

Id.


If the applicant is unable to otherwise meet the criteria set forth in this subsection, the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project. If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards. Reclamation and restoration programs conducted pursuant to s. 211.32 may be considered as mitigation to the extent that they restore or improve the water quality and the type, nature, and function of biological systems present at the site prior to the commencement of mining activities.

Id.

49. See infra notes 61, 74, 80 & 83.
50. Letter from State Representative Jon Mills, Chairman of the Committee on
Drafters of the Wetlands Protection Act set for themselves five goals, which are somewhat different from those expressed by the 1973 Florida Wildlife Federation Conference, yet similar in their desire to begin comprehensive wetlands protection efforts. Those goals were: 1) the creation of legislative intent recognizing the importance of wetlands; 2) the combining of Florida Statute Chapters 253 and 403; 3) the creation of new permitting criteria, principally the impact of proposed projects upon fish and wildlife habitat; 4) defining the Everglades as named waters of the State; and 5) the adoption of the amended Vegetative Index.

Addressing these goals is a significant accomplishment. Fully achieving wetlands protection will require additional legislative action.

A. Legislative Intent

While the Florida legislature failed to follow the lead of most other states in enacting their intent as an integral part of their comprehensive wetlands legislation, the intent is nonetheless clear. The language of the preamble to the Act recognizes the economic and recreational values of the wetlands. That language also commits the state to the establishment of reasonable regulatory programs for the preservation and protection of Florida's remaining wetlands consistent with balancing other vital interests of the state.


51. Conference, supra note 32.
52. Mills, supra note 50.
53. Id.
55. See supra notes 7 & 8 and accompanying text.
56. Id.
57. 1984 Fla. Sess. Law Serv. 84-79 (West). In pertinent part the preamble reads:

"Whereas, it is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other state vital interests. . . ."
In addition to the Act's language, the Conference Committee incorporated the legislature's intent into its report to ensure the application of the preamble to the amended legislation.\textsuperscript{58} Although this language may be clear enough to support administering agencies against challenges to their authority under the Act, the legislature's failure to enact its intent may be read by some to exhibit a lack of sincerity to provide the level of wetlands protection needed in Florida.\textsuperscript{59} While the lack of an enacted intent distinguishes Florida from the majority of other states\textsuperscript{60} that have passed comprehensive wetlands legislation, only future challenges to authority given by the Act will determine whether this omission is significant. To avoid any possibility of future difficulties related to the lack of express statutory intent, the legislature should enact its intent, making it a part of the substance of the Act.

B. The Stormwater Ditch Exemption

Section 403.913(4) exempts owners of land within a water management district that has been delegated stormwater permitting authority by the DER from obtaining a dredge and fill permit for irrigation or drainage ditches constructed in the uplands.\textsuperscript{61} This exemption extends

\begin{flushright}
\textit{Id.}
\end{flushright}

\textsuperscript{58. CONFERENCE COMMITTEE REPORT ON CS/CS/HB 1187, REPORT TO THE PRESIDENT OF THE FLORIDA SENATE AND THE SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES 2 (May 25, 1984).}

\textsuperscript{59. Interview with Johnny Jones, Executive Director, Florida Wildlife Federation, in West Palm Beach, Fla. (Aug. 29, 1984).}

\textsuperscript{60. J. KUSLER, OUR NATIONAL WETLAND HERITAGE: A PROTECTION GUIDEBOOK 21, 65 (1983).}

\textsuperscript{61. FLA. STAT. § 403.913(4) (Supp. 1984), reads: Within those areas of the state where a water management district has been delegated stormwater permitting by the department, no dredge or fill permit shall be required for the construction of, and dredging and filling in, irrigation or drainage ditches constructed in the uplands, including those connecting otherwise isolated areas owned entirely by one person and dominated by the plant indicator species adopted pursuant to s. 403.817. This exemption shall only apply to ditches where the point of connection to other waters of the state is no more than 35 square feet in total cross-sectional area and normally having a water depth of no more than 3 feet. The total cross-sectional area at the point of connection to other waters of the state shall be maintained by the landowner so as not to exceed the design limitations of this exemption. This exemption does not authorize dredging in waters of the state other than ditches as described herein. All applicable permits, except dredge and fill permits, shall be required for}
to otherwise isolated areas owned entirely by one person and dominated by those plant species which are not indicative of wetlands. The exemption is lost if the point of connection to other waters of the state is more than thirty-five square feet in total cross-sectional area and the ditch has a normal water depth of more than three feet. The legislature created the stormwater ditch exemption to reverse a 1981 administrative law decision which made artificial waterways and de minimis connections, waters of the state.

Stormwater discharges pose a potentially serious source of pollutants into Florida's waters. The difficulty with maintaining consistent enforcement is a potential problem in protecting wetlands. In some regions of the state, stormwater discharge permitting is delegated to water management districts by the DER. In other regions, stormwater permitting is retained by the DER. Because of the possibility of inconsistent regional regulation, this bifurcation has the potential to become reminiscent of the historical reasons for the original consolidation of environmental enforcement under one agency.

Sensitivity to the need for consistency is a central theme of Governor Graham's Directive to the Water Management Districts of June 4,
1984,68 relating to the implementation of programs required by the Act. The Directive mandates that there be rules established by every water management district by October 1, 1984.69 This requirement creates a "safety net" such that no major areas or activities that are currently protected by the DER and exempted by the water management districts shall be unregulated by that date.70 Specifically, the Governor directs the water management district boards to manage and protect wetlands in their agricultural regulatory program consistent with how other industries are regulated by environmental agencies.71 This Directive also requires the protection of water quality, consistent agricultural programs, including uniform rules, permitting, mitigation, enforcement and coordination efforts by all water management districts.72

While the Governor's Directive is a positive step toward consistent wetlands protection efforts, the water management districts and the DER should have been similarly statutorily mandated to develop model rules73 for the implementation of the Act so that continued consistency is assured. Furthermore, the legislature should statutorily establish guidelines or criterion applicable to both agencies to reduce the difficulties inherent in a bifurcated system of enforcement.

C. Mining Exemption

Section 403.913(8) provides an exemption for existing sand, limerock, or limestone mining activity74 from the more stringent requirements of the Act. Arguably, there is no environmental reason for this

68. OFFICE OF THE GOVERNOR, GOVERNOR'S DIRECTIVES TO THE WATER MANAGEMENT DISTRICT(S) FOR IMPLEMENTATION OF THE WETLANDS BILL (June 4, 1984).
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. Section VII requires the following: "A joint committee of water management district and DER staff shall develop 'model rules' for implementation of the bill. The DER will coordinate this effort in consultation with regulated interests and conservation groups. This rule shall be available by July 15 [1984] for presentation to the water management boards." Id.
74. FLA. STAT. § 403.913(8) (Supp. 1984) provides an exemption for those mining operations currently in compliance with department rules or for which the department previously determined no jurisdiction in areas east of the Dade-Broward levee or which holds a department permit on the effective date of the Act. These activities will continue to be regulated pursuant to the department's dredge and fill jurisdiction, as it existed prior to January 24, 1984, for a period of 10 years.
exemption. Mining activities pose great potential for contamination of groundwater supplies\textsuperscript{75} by reducing the effectiveness of the wetland’s aquifer recharge and pollution filtration capabilities. As an example, continued destruction of wetlands through mining in Dade County further exposes the Biscayne Aquifer to direct contamination from pollutants.\textsuperscript{76} The Aquifer is the sole source of drinking water for millions of people living in the south Florida area,\textsuperscript{77} and the “health” of the Aquifer is a matter of serious concern to the people of south Florida.\textsuperscript{78}

Despite the threat to the Aquifer, section 403.913(8) of the Wetlands Protection Act\textsuperscript{79} permits mining activity to continue to be regulated pursuant to the department’s dredge and fill jurisdiction as it existed prior to January 24, 1984, for a period of ten years from the effective date of the Act, provided such activity is continuous and carried out on land contiguous to mining operations existent on or before the effective date of the Act.\textsuperscript{80} Although sponsors of the Act believe that limerock mining operations pose no significant threat to the environment,\textsuperscript{81} the removal of the wetlands filtering capacity may expose south Florida’s water supply to increased pollution.\textsuperscript{82}

Until there is a clear consensus on the effect of limerock mining on groundwater supplies, with its concurrent effect of wetlands destruction, the legislature should have chosen to regulate mining interests using the same standards for existing mining operations as are applicable to new ones. Since there is no apparent environmental reason for this exemption, one may assume that its inclusion was a “tradeoff” to ensure the Act’s approval by mining and development interests. It re-


\textsuperscript{76} Goldschmidt, 506 F. Supp. at 355 (testimony of Gerald C. Parker, Sr., hydrologist).

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 354.

\textsuperscript{79} \textit{See supra} note 74.

\textsuperscript{80} FLA. STAT. § 403.913(8) (Supp. 1984): “Such sand, limerock, or limestone mining activity shall continue to be regulated pursuant to the department’s dredge and fill jurisdiction as it existed prior to January 24, 1984, for a period of 10 years. . . .” \textit{Id.}

\textsuperscript{81} \textit{See supra} notes 50 & 64.

\textsuperscript{82} Tripp and Jaffe, \textit{supra} note 75; \textit{see also} J. Kusler, \textit{supra} note 60, at 42; and \textit{see} E. Odum, \textit{supra} note 4.
mains to be seen if the people of south Florida have lost more than they have gained through the Act.

D. Agricultural Exemption

Perhaps the most serious potential problem with the Wetlands Protection Act is its exemption for agricultural interests. Agricultural practices are the principal threat to wetlands in many areas of the country, and Florida is no exception. The fact that agricultural interests in Florida are politically powerful can be demonstrated through their exemption from other environmental legislation. This influence over the legislature heightens concerns of environmentalists who see agricultural development of wetlands as a precursor to more intense and more ecologically destructive development. As the legislature considered the Wetlands Protection Act, agricultural interests actively lobbied against increased DER agricultural jurisdiction. During the course of negotiations, even with the DER willing to write special lan-

83. FLA. STAT. § 403.927(2) (Supp. 1984), states:
Agricultural activities and agricultural water management systems are authorized by this section and shall not be subject to the provisions of s. 403.087 or this part or ss. 403.91-403.929, nor shall the department enforce water quality standards within an agricultural water management system. The department may require a stormwater permit or appropriate discharge permit at the ultimate point of discharge from one or a group of connected agricultural water management systems. Impacts of agricultural activities and agricultural water management systems on groundwater quality shall be regulated by water management districts.

Id.

84. J. Kusler, supra note 60, at 41.
Drainage destroys wetland vegetation and wildlife. Diking interferes with wetland water and nutrient supplies. Other impacts include nutrient enrichment from agricultural runoff (fertilizers, manure), sedimentation from the erosion and discharge of soil into waterways, introduction of toxic chemicals from agricultural pesticides and herbicides, disturbance of wetland water supplies by agricultural pumping, and destruction of wetland vegetation and wildlife by plowing, harvesting and other practices.

Id.

85. Agricultural interests have been previously exempted from FLA. STAT. § 380.06.
86. See supra note 59.
87. Farm Bureau, Wetlands Bill Gives Ag A Cleaner Bill of Health, FloridAgriculture, May 1, 1984, at 1, col. 1.
guage into the Act, agricultural interests "bolted." They refused to consider DER regulation and expressed a desire to be regulated by water management districts with whom they were already being regulated. To salvage the Act, the DER and the water management districts developed a workable compromise. That compromise is section 403.927 of the Wetlands Protection Act.

Section 403.927 exempts agricultural activities from the provisions of the Act and directs the creation of agricultural water management systems under Florida statutes governing activities of water management districts. The water management districts are responsible for water quantity and water quality management for both surface and groundwater. The DER may only require a stormwater permit or appropriate discharge permit at the ultimate point of discharge from one or a group of connected agricultural water management systems.

Mandating responsibility for the management of agricultural activities to the water management districts under the statute governing the activities of water management districts, without first establishing similar criteria to that created for the DER, recreates the same opportunity for confusion amongst regulatees discussed earlier in this note. At the very least, this mandate creates a bifurcated system of agricultural activities whereby the water management districts regulate agricultural activities and the DER regulates discharges from those activities with no statutory assurance of compatible guidelines. The possibility that at some future time the absence of common statutory direction will provide the necessary ambiguity to permit a policy change by the executive branch, reversing the present policy, is a serious potential problem.

Therefore, the effectiveness of the water management districts in regulating agricultural water management activities will depend upon the quality of the rules promulgated by the water management districts in carrying out their mandated responsibilities. As noted earlier, Governor Graham has directed water management districts to promulgate

88. Tschinkel, supra note 31.
89. Id.
91. Id.
92. Id. The statute creating and governing the activities of the water management districts is Fla. Stat. § 373 (1983) (Florida Water Resources Act of 1972).
93. See supra note 61.
94. See supra note 29.
95. See supra note 50.
equivalent standards to those of the DER. Responses to the Directive have been varied by the water management districts, largely dependent upon how far they had progressed prior to the Act and subsequent Directive in implementing Part IV authority under Chapter 373. For example, the South Florida Water Management District had extensive Part IV implementation prior to the enactment of the Wetlands Protection Act. The impact of the Act on its regulations has been minimal. The Southwest Florida Water Management District had just begun Part IV implementation prior to the Act and as a result was required to expedite the development of their regulations, drawing largely from regulations established by the South Florida Water Management District.

On the other hand, the Suwannee River Water Management District, in reaction to the Act and the Governor's Directive has developed only interim regulations for surface water management associated with agriculture and forestry to provide the minimum required "safety net" until a comprehensive surfacewater management permitting program as contemplated in Part IV of Chapter 373 can be enacted. The disparity between the comprehensive of water management district regulation of surface water activities is in part due to the geographical difference between north and south Florida. The Suwannee River Water Management District serves an area in which the DER received only twelve permit applications per year for activities to be similarly permitted by the water management district under the Wetlands Protection Act. However the difference in the quantity of these activities should not reduce in any way the quality of enforcement efforts. The legislature failed to statutorily mandate the necessary equivalent requirements for both the DER and water management districts and equivalent requirements between and among the various water management districts.

Although the Governor's Directive provides guidelines for the development of consistent district rules, in so doing, the directive accen-

96. Interview with Irene Quincey, attorney, South Florida Water Management District, in West Palm Beach, Fla. (Aug. 29, 1984).
97. Id.
98. Id.
100. Id. at 2250.
101. Id.
102. See supra note 68.
tuates the Act's statutory deficiencies. This directive is clearly an effort to address the need for consistency among regulators which the legislature failed to address through the Act. To avoid the consequences of the kind of uncoordinated efforts which have historically plagued environmental legislation in Florida, the legislature should establish statutory guidelines under either Florida Statutes Chapter 373 or section 403.061, similar to those required in the Governor's Directive.

V. The Future of Wetlands Protection in Florida

Florida's Wetlands Protection Act is a step in the right direction. Issues relating to wildlife, pollution of groundwaters and the destruction of the environment which go to the vital character of Florida are consistently before the public.103 With the ever increasing demands placed on Florida's finite resources by a burgeoning population, there should be little doubt that further restrictions will be necessary to protect wetlands.

The Act creates a wetlands monitoring system104 to provide reliable information regarding the magnitude of the loss of wetlands in Florida. It is difficult to assess both the impact of this Act on the protection of wetlands, and the need for additional protective measures without such a system. The wetlands' monitoring system will determine the general location and acreages of wetland areas in the state105 and identify the impact to, and losses of, wetlands due to permitting practices of the DER and water management districts or from unregulated or exempted activities.106 The DER will provide this information yearly to the legislature.107 Over time, this information will become an important indicator of the need for additional wetlands protection legislation.


104. FLA. STAT. § 403.929 (Supp. 1984) establishes a wetlands monitoring system which will determine the general locations and acreages of wetlands, identify impacts to and losses of wetlands due to DER or water management district permitting as well as from unregulated or exempted activities and changes in natural conditions and report this information to the legislature annually.

105. Id.

106. Id.

107. Id.
VI. Conclusion

The importance of wetlands to Florida can not be overstated. Through the Warren S. Henderson Wetlands Protection Act of 1984, the legislature has recognized their importance and taken steps to provide for wetlands protection. In doing so, however, the legislature has allowed exemptions which may hinder the effectiveness of the Act. To strengthen the Act, the legislature should consider statutorily mandating criterion applicable to both the DER and water management districts for the stormwater ditch exemption. It should mandate consistency between the DER and water management districts as to the quality of enforcement efforts, especially in light of the agricultural exemption. Additionally, because of the great potential for damage to groundwater supplies, especially in south Florida, all mining operations should be required to comply with the more restrictive provisions of the Act.

The legislatively created wetlands monitoring system will provide the kind of information necessary to determine the need for more stringent controls over wetlands development. The question remains, however, whether prior to the time when reliable information is available irreparable damage to the environment will occur. The potential for this possibility may be lessened if the Florida legislature considers the issues raised here and responds with corrective legislation.

V. Donald Hilley
The Current State of Termination of Medical Treatment Case Law

I. Introduction

A particularly unsettled area of the law in recent years has been the sensitive and emotionally-charged subject of termination of medical treatment.¹ Until recently, the most common question presented to the courts was whether to allow the removal of a respirator² from a comatose patient existing in a chronic vegetative state.³ The 1976 landmark case⁴ involving Karen Ann Quinlan was the beginning of the evolution of case law recognizing a patient’s right to have treatment discontinued based on the fundamental right to privacy.⁵ Today, the removal of a respirator is routinely performed without judicial intervention.

A new aspect to this area of medical-legal ethics however, has re-

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¹. This discussion will focus on discontinuation of medical care, as opposed to compelling treatment. Compelling treatment involves such cases as ordering blood transfusions for a Jehovah’s Witness or surgery for a severely deformed newborn. See, e.g., United States v. George, 239 F. Supp. 752 (D.C. Conn. 1965); Wis. v. Yoder, 406 U.S. 205 (1972).

². A respirator can be inserted in one of three ways: through the mouth or through the nose into the trachea (windpipe), or if needed for a long period of time it can be surgically inserted in an incision in the throat. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1347 (25th ed. 1974).

³. Since the reader may not be familiar with some of the medical terms, they will be defined. A chronic vegetative state means “a condition in which one retain[s] the capacity to maintain some of the vegetative portions of neurological functions, such as body temperature, breathing, blood pressure, heart rate, chewing, swallowing, sleeping, and walking . . . but . . . no longer possess[es] any cognitive functions. [Such a patient has] lost the sapient functions of the brain, which control one’s relation to the outside world via the capacity to talk, see, feel, sing and think.” In re Quinlan, 70 N.J. 10, 24, 355 A.2d 647, 654 (1976).

⁴. In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). The widely publicized case of Karen Ann Quinlan was initiated when this twenty-one year old woman became comatose, following ingestion of alcohol and drugs, and was placed on a respirator. When it became apparent that she was in a chronic vegetative state, her father requested court permission to discontinue the respirator since her physicians were unsure of the state of the law. Quinlan did not die after the respirator was removed and remains alive in a nursing home hooked up to a nasogastric feeding tube and IVs.

⁵. See infra text accompanying notes 31-39.
recently come to light. This issue is whether there is a corresponding right to remove intravenous lines (IVs) and nasogastric feeding tubes which are keeping hopeless patients alive indefinitely. Until very recently this ethical issue was not even within the imagination of the legal or medical communities. However, the rapid technological advancements occurring daily in the field of medicine has left the law in a state of confusion. Medical progress has given us the ability to delay death with methods unheard of several decades ago. Arguably, when a terminally ill patient is subjected to increased pain and suffering and to a loss of dignity in exchange for a longer life span in an unconscious, irreversible state, this medical progress is not humanitarian progress. Courts have been reluctant to lay down specific guidelines for the families and doctors of such unfortunate patients. The resulting uncertainty about the legal ramifications of removing IVs and feeding devices often causes doctors to practice medicine more out of concern for the legal consequences than out of concern for the patient's well being.

This note reviews the latest developments in the area of termination of medical treatment. In particular, a recent California Court of Appeals decision, Barber v. Superior Court, provides a useful framework for analyzing the issues. It will be shown how several courts have taken the logical view that the judicial process is too cumbersome and unresponsive in this area of the law. Judicial intervention in these crucial medical decisions is often untimely. There is a pressing need for specific legal guidelines so that physicians and families can make intelligent decisions without facing potential civil or criminal liability.

After a review of the background of the medical and legal issues,
this note will focus on the most recent decisions which conclude that there is no need for routine judicial supervision to authorize ending treatment. Finally, this note outlines the logical guidelines these cases present for withdrawing life-support equipment from incompetent patients, so that appropriate decisions can be made without fear of liability.

II. The Historical Development of Termination of Medical Treatment Case Law

How society has approached the issues of death, dying, and euthanasia in the past requires some clarification in order to properly narrow the specific area covered in this note. Mercy killing is medically defined as “an easy or painless death.”11 The legal definition is “the act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy.”12 Euthanasia comes from the Greek words eu, meaning painless, and thanatos, meaning death. Active euthanasia means ending the life of an incurable patient through positive action, as by administering a drug overdose. Passive euthanasia means failure to take positive action to sustain an incurable patient’s life. Euthanasia can also be with the patient’s consent, voluntary euthanasia, or without the patient’s consent, nonvoluntary euthanasia. Euthanasia refers to mercy killing of all types. This note is restricted to discussing passive euthanasia,13 meaning the intentional withdrawal or withholding of available medical means for the prolongation of life of a patient who has little or no hope of survival.14

As medical technology becomes more sophisticated, medical and legal opinion as to when death occurs also evolves.15 Prior to 1968 the

13. The distinctions between these forms of euthanasia can mean the difference between first degree murder and legally permissible conduct. See generally Foreman, The Physician’s Criminal Liability for the Practice of Euthanasia, 27 BAYLOR L. REV. 54 (1975).
15. This medical-legal dilemma is commensurate with the medical-legal dilemma at the other end of the spectrum, determining when life begins. Justice O’Connor, dissenting in Akron v. Akron Center for Reprod. Health recognized that due to advances in medical technology, past decisions are often on a collision course with each other in the abortion context. 462 U.S. 416, —, 103 S. Ct. 2481, 2507 (1983) (O’Connor, J., dissenting).
commonly accepted standard to determine death was the permanent cessation of respiration and circulation. But advances in the medical field, such as respirators, pacemakers, and cardiac medications, have enabled physicians to generate artificial breathing and circulation when the capacity to do so naturally has been irreversibly lost. Therefore, the traditional means for determining death is no longer satisfactory when dealing with artificially maintained bodies. As a result of this inadequacy the brain-death standard for determining death emerged and is now widely accepted. Brain death has been further defined as

16. The classical definition of death is "a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc." BLACK'S LAW DICTIONARY 488 (rev. 4th ed. 1968).


18. The most frequent causes of brain death are massive head injuries, massive spontaneous brain hemorrhage secondary to complications of hypertension, or rupture of a congenital berry aneurysm, and lack of blood pumped into the brain because of cardiac arrest or systemic hypotension. Brain death occurs when the swelling is so severe that the pressure within the cranial cavity exceeds the pressure of blood flowing into the brain and the brain stem, causing cerebral circulation to cease. In this condition, there is no clinical evidence of brain function. Intense stimulation may bring no response or voluntary motor movements, and there are no eye movements at the brain stem level. Spontaneous respiration ceases because the vital respiratory centers of the brain have been destroyed. The patient depends entirely on mechanical support to maintain cardiorespiratory function. Normal cardiac functioning can be achieved, mechanically, even in the presence of total brain destruction, and can continue for as long as an hour after a patient is pronounced dead and the respirator discontinued. However, mechanical maintenance of heartbeat and circulation can be continued only for a limited period of time when the brain stem has been destroyed. It is this limited survival period that distinguishes between brain death and the persistent vegetative state. In the later state, irreversible damage occurs to the cerebral cortex, but the brain stem continues to function. Considerations involved in dealing with this condition are entirely different from these [sic] involved in brain death and require the drawing of a line between severe dysfunction and no function at all. . . . Determination of whether cessation of brain function has occurred may be made in a matter of minutes. The decision as to whether it is irreversible may require several days. Ingestion of suppressant drugs and low body temperature may cause a reversible loss of brain function, so these possibilities must be screened out before a person is pronounced brain dead.


19. Report of the Ad Hoc Committee of the Harvard Medical School to Ex-
Termination of Medical Treatment

either partial or complete.

For medical and legal purposes, partial brain impairment must be distinguished from complete and irreversible loss of brain functions or 'whole brain death.' The cessation of the vital functions of the entire brain — and not merely portions thereof, such as those responsible for cognitive functions — is the only proper neurologic basis for declaring death. This conclusion accords with the overwhelming consensus of medical and legal experts and the public.20

Even though the brain death standard is now universally accepted, often a court will authorize the withdrawal of life-prolonging equipment when, even by the brain wave criteria, the patient's brain is not dead. This was the situation in Leach v. Akron General Medical Center,21 which recognized the patient's right, through a guardian, to refuse life-sustaining treatment after four months on a respirator, artificial feeding and urinary catheter, even though she was not brain dead.22 The court addressed the medical, moral, and legal dilemma which often accompanies termination of treatment decisions. The Leach court allowed life-sustaining equipment in general to be disconnected when it is clear that a person is near certain death, but sustained by artificial means.23 Leach, however did not address the ques-
tion of whether IVs or artificial feeding are part of a life-support system.24

Passive euthanasia can be viewed as a "humanitarian easing of terminal suffering."25 The medical community acknowledges that passive euthanasia is a common occurrence, even with the ever-present threat of malpractice and criminal sanctions. As many as seventy-five percent of American physicians permit patients to die by withdrawing life-prolonging equipment, usually when so requested by the patient or a family member.26 In In re Quinlan,27 the court noted that "it is perfectly apparent . . . that humane decisions against resuscitative or maintenance therapy are frequently a recognized de facto response in the medical world to the irreversible, terminal, pain-ridden patient, especially with familial consent. And these cases, of course, are far short of "‘brain death.'"28

Courts often make a distinction between ordinary and extraordinary treatment. Ordinary measures are regarded as obligatory, but extraordinary measures are not. A more precise distinction would be to refer to the use of a respirator as extraordinary treatment, while comfort or pain relief measures would be considered ordinary treatment.29 Courts recognize that physicians distinguish between curing the ill and easing the dying. The Quinlan court acknowledged that it is a balance "particularly difficult to perceive and apply in the context of the development by advanced technology of sophisticated and artificial life-sustaining devices."30 Although such devices are valuable and even essential for the curable patient and thus ordinary treatment, they are "‘extraordinary' in the context of the forced sustaining by cardio-re-

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28. Id. at 47, 355 A.2d at 667 (emphasis original).
29. Ward, supra note 14, at 5.
spiratory processes of an irreversibly doomed patient.” As a result, many doctors “have refused to inflict an undesired prolongation of the process of dying on a patient in irreversible condition when it is clear that such ‘therapy’ offers neither human nor humane benefit.”

A. Constitutional and Common-Law Issues

The Quinlan court was the first to recognize a person’s fundamental right to privacy as justification for authorizing withdrawal of a respirator. Although there is no explicit right to privacy in the Constitution, the Quinlan court determined that the penumbra of specific guarantees of the Bill of Rights includes the right of personal privacy, including terminating medical treatment. This constitutionally-protected interest in personal privacy is often found to have its source in the language of the first, fourth, fifth, ninth and fourteenth amendments. The Supreme Court had already included such personal decisions as the right to use contraception and to receive an abortion as falling within the protection of the right of privacy. In the celebrated case of Roe v. Wade the Supreme Court extended the right to privacy to a woman’s decision to terminate a first trimester pregnancy. In Quinlan, the New Jersey Supreme Court found the fundamental right to privacy “broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances. . . .”

Although the United States Supreme Court has never addressed the specific question of an incompetent, terminally ill patient’s right to terminate treatment, some of the Justices have articulated that the right to privacy assures control over one’s own body and self-autonomy. As early as 1891 in the case of Union Pacific R.R. v. Botsford, the Court first recognized the privacy interest as the right of “every

31. Id. at 48, 355 A.2d at 668.
32. Id. at 47, 355 A.2d at 667.
33. Id. at 40, 355 A.2d at 663; see also Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (concluding that the penumbra of the first, third, fourth and fifth amendments protects privacy).
34. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (a narrow holding stressing the constitutional interest in the privacy of the home).
36. 70 N.J. at 40, 355 A.2d at 663.
38. 141 U.S. 250 (1891).
individual to the possession and control of his own person.”39 The right to be left alone as mentioned in the 1969 Supreme Court decision of Stanley v. Georgia40 appears to extend this concept. Even Justice Cardozo as early as 1914 stated that “every human being of adult years and sound mind has a right to determine what shall be done with his own body...”41

Each individual’s inalienable right to self-determination was extended into the medical field as the tort doctrine of informed consent.42 This doctrine requires that a patient must give consent to any medical procedure after the risks, alternatives and nature of the treatment have been explained. Medical malpractice suits have been initiated under various theories, such as assault, battery, negligence or trespass, but the patient’s right to bodily control remains the basis of informed consent. According to this premise, even if an individual makes decisions irrationally or incorrectly, he must nonetheless be permitted the right of choice. This is also known as the common-law right to be free from bodily invasion which is essentially a matter of private concern beyond the reach of the courts.

Consequently, the constitutionally based right of privacy and the recognized common-law right to be free of bodily invasion support a strong argument for allowing patients to assert their choice of the time of death in a natural manner without unwanted medical intervention. However, courts have not yet recognized an absolute right to discontinue life support systems. There is a limitation on such conduct if it is outweighed by public policy considerations. Courts use a traditional balancing test. If the state’s interest in protecting its citizens outweighs the individual’s fundamental right to privacy, the state may be able to deny that right. In Superintendent of Belchertown State Schools v. Saikewicz43 the court enumerated and considered the following four state interests:

1. the preservation of life;
2. the protection of innocent third parties;
3. the prevention of suicide; and

39. Id. at 251.
41. Scholendorff v. Society of New York Hospital, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).
42. See generally Cantor, A Patient’s Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L. Rev. 228-64 (1973).
(4) the maintenance of the ethical integrity of the medical profession.\textsuperscript{44}

The preservation of life is the most important of the state's interests. But courts afford it less weight when there is no reasonable possibility that the patient will return to a cognitive and sapient condition. As noted in \textit{Quinlan}: "We think that the state's interests \textit{contra} weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately, there comes a point at which the individual's rights overcome the state interest."\textsuperscript{45} This emphasis on the quality of life is at the heart of these decisions. A terminally ill comatose patient often no longer has a life he would wish to prolong. Accordingly, as in \textit{Saikewicz}, the courts should distinguish between an artificially maintained vegetative life and a valuable, curable life.\textsuperscript{46}

Joseph Saikewicz was a profoundly retarded sixty-seven year old patient afflicted with terminal, incurable leukemia. The court allowed his guardian to refuse the use of chemotherapy as in his best interests, since the disease was invariably fatal and treatment would cause significant side effects and discomfort.\textsuperscript{47} The court distinguished between curing the ill and comforting the dying:

\begin{quote}
The essence of this distinction in defining the medical role is to draw the sometimes subtle distinction between those situations in which the withholding of extraordinary measures may be viewed as allowing the disease to take its natural course and those in which the same actions may be deemed to have been the cause of death.\textsuperscript{48}
\end{quote}

B. The Physician's Liability

Any physician making a decision to terminate medical treatment faces the possibility of criminal and civil liability. The two doctrines which are applicable to the physician's liability are informed consent\textsuperscript{49} and standard of care. Without consent, a medical treatment or opera-

\textsuperscript{44} \textit{Id.} at 425.
\textsuperscript{45} 70 N.J. at 41, 355 A.2d at 664 (emphasis original).
\textsuperscript{46} 373 Mass. 728, 370 N.E.2d 417 (1977).
\textsuperscript{47} \textit{Id.} at 729-30, 370 N.E.2d at 420. This is the case most often quoted in support of a requirement of judicial intervention.
\textsuperscript{48} \textit{Id.} at 738, 370 N.E.2d at 423.
\textsuperscript{49} \textit{See supra} note 40 and accompanying text.
tion can be a technical battery, even if the results are satisfactory.\textsuperscript{50} The standard of care doctrine requires that a physician use "that skill, knowledge, and training possessed by an average member of the profession in the same or similar locality."\textsuperscript{51}

There is little precedent on the subject of criminal liability when medical treatment has been terminated without judicial approval. It appears that a physician will be protected as long as he uses good faith judgment that is not unreasonable by medical standards.\textsuperscript{52} Although the possibility of criminal actions against doctors is a deterrent to practicing good medicine, it should be noted that there are relatively few prosecutions and virtually no convictions under these circumstances.\textsuperscript{53} Juries often return verdicts of not guilty in recognition of the humanity of ending treatment, although the letter of the law may be clearly different.

This discrepancy between the written law, which considers withdrawal of treatment illegal, and the reality of what courts and juries actually do, leaves the medical practitioner in a quandary.\textsuperscript{54} Physicians are often forced to practice defensive medicine, ordering unnecessary diagnostic tests or superfluous treatment simply to avoid legal liability. As a result, terminal, comatose patients are often left in a virtual state of suspended animation, held on the threshold of death by modern machines.

C. Living Wills

It should be noted that twenty-two states have enacted natural death legislation\textsuperscript{55} which in essence legalizes passive euthanasia if there is a properly executed living will.\textsuperscript{56} As admirable as the concept of liv-

\textsuperscript{50} See generally Comment, Euthanasia: The Physician's Liability, 10 J. MAR. J. PRAC. & PROC. 148 (1976).
\textsuperscript{51} Ward, supra note 14, at 322.
\textsuperscript{55} Tifft, Debate on the Boundary of Life, TIME, April 11, 1983 at 70; see also Flaherty, A Right to Die?, Nat'l L.J., Jan. 14, 1985, at 1, col. 1.
\textsuperscript{56} A living will is "a document, similar to a will, executed by a person during his lifetime setting forth his wishes concerning medical treatment in contemplation of illness or death." Note, In re Living Will, 5 NOVA L. J. 445 (1981).
ing wills may be, however, even its proponents acknowledge that only the most motivated of individuals are likely to take the anticipatory step of preparing such a document.\textsuperscript{57} It is typical human nature to procrastinate and ignore the need for such arrangements. Therefore, the vast majority of difficult decisions involving terminating treatment will not have the advantage of a written directive to help guide the physician.

III. Recent Case Law

The courts in several states have been extremely active in recent years in handling medical decisionmaking cases. Many courts have taken new approaches and suggested rational and practical guidelines for terminating treatment. These guidelines provide caregivers and families of irreversibly ill patients some reassurance as to the propriety and legality of their decisions concerning discontinuation of medical treatment.

A. Barber v. Superior Court

The preceding background material on how termination of treatment cases have been handled in the past can be compared with the recent enlightened decision handed down in the case of Barber v. Superior Court.\textsuperscript{58} The California Court of Appeals dismissed murder charges against two doctors who had removed the feeding tubes from fifty-five year old Clarence Herbert, a man severely brain-damaged following routine abdominal surgery. After general anesthesia during an operation to remove a colostomy bag, Mr. Herbert suffered a cardiopulmonary arrest in the recovery room. Attempts to resuscitate him were successful only to the point of leaving him permanently brain-damaged and in a coma.\textsuperscript{59} His family insisted on removal of all life support devices, including IVs and nasogastric feeding tubes, stressing that Mr. Herbert had clearly stated before surgery that he did not want to be kept artificially alive.

After consultation with the family and in compliance with the

\textsuperscript{57} Barber, 147 Cal. App. 3d at 1016, 195 Cal. Rptr. at 489.
\textsuperscript{58} Id. at 1006, 195 Cal. Rptr. at 484 (1983). Los Angeles County District Attorney Robert Philibosian, in a brief to the California Supreme Court, asked them to decertify the case. Reaves, Cutting Off the IV, 70 A.B.A. J. 31 (Feb. 1984).
\textsuperscript{59} Barber, 147 Cal. App. 3d at 1010, 195 Cal. Rptr. at 486.
family's wishes, the physicians found themselves embroiled in a dramatic precedent-setting medicolegal episode when charged with murder by Los Angeles prosecutors. The court of appeals acknowledged that this case belies the commonly expressed belief that such decisions would most likely not become the subject of criminal prosecution. Many physicians in private consultation with families of hopeless patients routinely withdraw IV and nasogastric tube nourishment. The case of Clarence Herbert appears to be the first instance of a criminal prosecution for the medical decision of removing life-sustaining equipment.

The appeals court reviewed the superior court finding that although the doctor's conduct was well motivated, ethical, and sound in the eyes of the medical profession, it was unlawful under California law. The court also defined the concepts of excusable or justifiable homicide, stating that they "evolved and were codified at a time well prior to the development of the modern medical technology which is involved here, which technology has caused our society to rethink its concepts of what constitutes 'life' and 'death' ".

The Barber prosecution resulted from the gap between the statutory law and recent medical developments. In discussing this gap between technology and the law, the court clearly was aware that extremely personal and painful decisions concerning terminally ill patients are made even more difficult because of the lack of clear legal guidelines.

The Barber court recognized that although Clarence Herbert was not brain dead, the physician was left with the responsibility of allowing him to remain in a vegetative state without higher cognitive brain functions. Similarly, the Delaware Supreme Court in a 1980 case recognized the physician's dilemma and stated the issue:

60. Reaves, supra note 56 at 31.
61. Barber, 147 Cal. App. 3d at 1014, 195 Cal. Rptr. at 488.
62. Id. at 1015, 195 Cal. Rptr. at 488. Prior to the Barber case, courts were usually involved merely for the purpose of obtaining declaratory judgments or guidelines for hospitals and physicians to follow before ending treatment, and not in a criminal context.
63. Id. at 1012, 195 Cal. Rptr. at 487.
64. Id. at 1013, 195 Cal. Rptr. at 487.
65. Id. at 1015, 195 Cal. Rptr. at 488.
66. Id. at 1014, 195 Cal. Rptr. at 488.
67. Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980); Mr. Herlihy, attorney for Mr. Severns, originally asked for a court order to remove the fifty-seven year old Mrs. Severns from the respirator and artificial feeding, but the
Now, however, we are on the threshold of new terrain—the penumbra where death begins but life, in some form, continues. We have been led to it by the medical miracles which now compel us to distinguish between "death" as we have known it, and death in which the body lives in some fashion but the brain (or a significant part of it) does not.  

1. IVs and Nasogastric Feeding Tubes

As the issue of removing hydration and nourishment is sure to arise in the future, the Barber opinion will likely be quoted as the first ever to compare the removal of IVs and feeding tubes as being similar to the removal of respirators. Prior to Barber no court had ever specifically allowed the removal of IVs and artificial feeding devices. This was a very important comparison, reflecting the court's view that there is no morally relevant distinction between the two forms of mechanical devices.

In examining this issue we must keep in mind that the life-sustaining technology involved in this case is not traditional treatment in that it is not being used to directly cure or even address the pathological condition. It merely sustains biological functions in order to gain time to permit other processes to address the pathology. The question presented by this modern technology is, once undertaken, at what point does it cease to perform its intended function and who should have the authority to decide that any further prolongation of the dying process is of no benefit to either the patient or his family?  

The result of the Barber decision was that the surgeon and the request was later amended to mean only the respirator. She was weaned from the respirator in the five months it took the Delaware Supreme Court to reach a decision and remains in a vegetative state in a nursing home. The reasons given for asking only that the respirator be removed were first, the husband and family were somewhat queasy about the artificial feeding request, and second, in discussion with the doctors involved and the hospital, it was determined that the hospital personnel would have some difficulty handling such a situation. Also, the attorney recognized that by asking for an end to feeding, the decision would be going beyond Quinlan and would cause the case to be considerably prolonged. Telephone interview with Thomas Herlihy III, attorney for Mr. Severns (July 19, 1984).

68. Id. at 1344.
69. Barber, 147 Cal. App. 3d at 1017, 195 Cal. Rptr. at 490.
internist would not have to go to trial for the death of Clarence Herbert because their medical decision, "though intentional and with knowledge that the patient would die, was not an unlawful failure to perform a legal duty." The court did not consider the withdrawal of heroic life support measures as an affirmative act, but rather an omission of further treatment. Once the treatment has been proven ineffective the physician no longer has a duty to continue it. This reasoning resolved the critical issue of determining the duties owed by a physician to a patient who was extremely unlikely to have any meaningful recovery of cognitive brain function.

In this monumental decision, the court touched on what is perhaps the crux of the medical-legal-ethical dilemma involved. There is a psychological burden inherent in the thought of, as opponents of the decision may put it, starving and dehydrating a patient to death. The court was aware of "the emotional symbolism of providing food and water to those incapable of providing for themselves..." Plainly, food and water normally provide a net benefit to most patients most of the time. Naturally, if there is any doubt as to the benefit provided, feeding may be continued because of the usual moral standards and because food is symbolic of human life that is "inescapably social and communal." Treatment may be appropriate for most patients but not be suitable in a particular case because of the burdens it would place on the patient. In judging all forms of medical care, it seems proper to determine whether the particular patient will derive a net benefit.

Since hospitals routinely remove respirators from hopeless patients without fear of legal action, the court rationally extended the Quinlan standards to artificial feeding in the same type of situation. Since air provided by artificial means is allowed to be discontinued, the court also allowed food provided by artificial means to be withdrawn. It has been noted that this decision was the natural culmination of this is-

70. Id. at 1022, 195 Cal. Rptr. at 493.
71. Id. at 1016, 195 Cal. Rptr. at 490.
72. Id. at 1017, 195 Cal. Rptr. at 491.
73. Id. at 1017, 195 Cal. Rptr. at 490.
74. Id. at 1016, 195 Cal. Rptr. at 490.
For years, much of society has accepted this point of view as proper. Although it may offend many people to dehydrate a patient, the Barber decision appears to be the natural evolution in the law. The Barber case appears to reflect the feeling that "[w]here a terminally ill patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis, all means of life support may be discontinued."77

The Barber decision could have a tremendous impact on the body of case law that allows treatment to be terminated and may relieve some physicians from having their conduct viewed in a criminal context. It is important to recognize that life support decisions are essentially medical determinations with facts unique to each. As far back as the Quinlan case, the New Jersey Supreme Court stated:

[T]here must be a way to free physicians, in the pursuit of their healing vocation, from possible contamination by self-interest or self-protection concerns which would inhibit their independent medical judgments for the well-being of their dying patients. We would hope that this opinion might be serviceable to some degree in ameliorating the professional problems under discussion.79

2. Barber's Guidelines for Future Conduct

The landmark case of Clarence Herbert may give families and physicians of terminal patients additional reassurance in their decision-making. While noting that the legislature is better suited for adopting specific procedural rules, the court laid down "general guidelines for future conduct."80

Three difficult determinations to be made in each case were enumerated as follows:

(1) the point at which further treatment will be of no reasonable benefit to the patient;

(2) who should have the power to make that decision; and

77. See Reaves, supra note 56, at 31. Barry Silberman, a Los Angeles attorney, has written several articles on this issue.


79. 70 N.J. at 49, 355 A.2d at 668.

80. Barber, 147 Cal. App. 3d at 1019, 195 Cal. Rptr. at 491.
(3) who should have the authority to direct termination of treatment.\textsuperscript{81}

3. Proportionate Treatment

In discussing the issue of which life-prolonging procedures must be used and for how long, the Barber court rejected the ordinary versus extraordinary treatment approach.\textsuperscript{82} Instead the court suggested it would be more rational to determine whether the proposed treatment is proportionate to "the benefits to be gained versus the burdens caused."\textsuperscript{83} It defined proportionate treatment as that which "has at least a reasonable chance of providing benefits to the patient, which benefits outweigh the burdens attendant to the treatment."\textsuperscript{84} Although an IV or feeding tube may be minimally painful and not as intrusive as a respirator, if there is no chance of recovery, the treatment is disproportionate to the potential benefits.

Whether treatment is worth enduring depends on facts unique to each case. The Barber court follows the Quinlan standard that "the focal point of decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of [a] biological vegetative existence. . . ."\textsuperscript{85} If a patient has virtually no chance of recovery and the medical consensus is that he will remain in a chronic vegetative state, then there appears little reason to force continued IV hydration or nasogastric tube feeding, especially since the law permits a respirator to be removed without controversy. Courts in various jurisdictions continue to distinguish between artificially sustained vegetative existence and cognitive existence. Cognitive existence is the state of being able to communicate, think, feel, express emotions, and relate to one's surroundings.\textsuperscript{86} In other words prolonging life does not mean merely suspending an inevitable

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 1020, 195 Cal. Rptr. at 491; see also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment, A Report on the Ethical, Medical and Legal Issues in Treatment Decisions (Mar. 1983) [hereinafter cited as President’s Commission]. This Commission reported on an array of bioethical topics and issued eleven reports addressing issues of medical practice and public policy.

\textsuperscript{85} 70 N.J. at 51, 355 A.2d at 669.

\textsuperscript{86} See infra note 95.
death, but would at least hope to provide "a remission of symptoms enabling a return towards a normal, functioning, integrated existence." 87

4. Substituted Judgment and Best Interests Standards

The second issue the Barber court addressed was who should make the decision to end treatment. The patient, of course, should make the decision when possible. However, the most controversial cases involve patients incapable of such decisionmaking. Appropriate decisionmaking in the medical field is aided by judicial recognition of two legal standards when dealing with incapacitated patients. These are substituted judgment and best interests. 88 The substituted judgment standard allows a surrogate decisionmaker to make a choice that as closely as possible reflects the desires of the incapacitated person. The best interests standard is used when there is no evidence of what the patient would want. The latter is more of an objective criteria than the former. The substituted judgment standard reflects the incapacitated patient's individual wishes. Any concrete evidence of prior conversations or expressions of opinion as to what the patient would want should be considered. Arguably, examining a patient's earlier stated preferences should be morally and legally necessary, and honoring the person's preference should be a clear obligation. Only when a patient's preferences are unknown should it be left to the surrogate decisionmaker to make the decision that serves the patient's best interests. The decision should take into account the interest in sustaining life, the relief of suffering, possible side effects of continued treatment, as well as the quality of life. 89

5. Who has Authority to Make the Decision

The final issue addressed by the Barber court was the necessity of judicial intervention in these cases. The court's conclusion was that it is unnecessary and unwise to require prior judicial approval before with-
drawing treatment. On this issue Barber again agreed with the Quinlan court: "We consider that a practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome." 90 In other words, the courts discourage routine requests to the judiciary on these decisions. The judicial system does remain available in controversies where there is family disagreement over the incompetent's wishes or the physicians disagree as to the prognosis. A court may intervene if malpractice or wrongful motives are in evidence. Thus, the court system is a final safeguard.

B. In Re Colyer

Another recent decision, In re Colyer, examined the roles of guardians, physicians and courts, in these treatment decisions. Recognizing that determining a particular patient's prognosis is a medical decision, the Washington Supreme Court's suggestion is that a prognosis board should confirm the attending physician's diagnosis. 92 This procedure would provide protection against those who possibly may be motivated by other interests, such as an inheritance. The vast majority of physicians take their professional oaths seriously and consider their patients' interests above all others. The Quinlan court was the first to address the issue of possible impropriety in medical decision making and recommended formation of a hospital ethics committee. Such a group is composed of doctors, attorneys, social workers and theologians. The purpose of such a diverse selection is to allow the responsibility for such a momentous decision to be spread over a large component of society with divergent views. The Quinlan court held that if the recommendations of such a committee are followed, no civil or criminal liability would ensue.

The Colyer court agreed with others who have criticized such an ethics committee "for its amorphous character, for its use of nonmedical personnel to reach a medical decision, and for its bureaucratic in-

90. 70 N.J. at 50, 355 A.2d at 669.
91. 99 Wash. 2d 114, 660 P.2d 738 (1983). It should be noted that all these courts take the view that the legislature is better suited to establish these guidelines, but that in the absence of such guidance, the judiciary does suggest procedures to be followed.
92. Id. at 134, 660 P.2d 749.
Termination of Medical Treatment

It felt that a prognosis board composed of professional colleagues who have an understanding of the patient's medical condition would be adequate protection "against erroneous diagnoses as well as questionable motives." A unanimous concurrence that the patient cannot return to a sapient state within any reasonable medical probability is sufficient to allow discontinuance of life-prolonging treatment.

As to the potential criminal liability for such conduct, as long as there is good faith compliance with the court's suggested procedure, the action would not be criminal. The Quinlan court gave two reasons for not considering an ensuing death homicide. First, death would be from existing natural causes, not from stopping the treatment. Second, it would not be unlawful even if it were homicide because "the action would be based on the exercise of a constitutional right and, as such, would be protected from criminal prosecution."

93. Id. Sixty-nine year old Bertha Colyer had a zero chance of returning to any meaningful existence after a heart attack resulting in massive brain damage. She had a close family familiar with her beliefs and character.

While we do not accept the Quinlan court's view that judicial intervention is an encroachment upon the medical profession, we do perceive the judicial process as an unresponsive and cumbersome mechanism for decisions of this nature. This fact is borne out by a number of the leading cases in which arguments were heard and opinions written long after the patient had died. (Citations omitted). Obviously, the court system could not respond in a timely manner to the relief sought in those situations. Moreover, the formalities of a legal determination might chill a guardian's resolve to assert the rights of his ward.

Id. at 127, 660 P.2d at 746.

94. Id. at 138, 660 P.2d at 749.

95. An expert witness, Dr. Fred Plum, at the Quinlan trial explained vegetative and sapient brain function:

We have an internal vegetative regulation which controls body temperature, which controls breathing, which controls to a considerable degree blood pressure, which controls to some degree heart rate, which controls chewing, swallowing and which controls sleeping and waking. We have a more highly developed brain which is uniquely human which controls our relation to the outside world, our capacity to talk, to see, to feel, to sing, to think.

Quinlan, 70 N.J. at 24, 355 A.2d at 654.

96. Colyer, 99 Wash. 2d at 138, 660 P.2d at 751.

97. Id.
C. In Re Conroy

The New Jersey Supreme Court recently addressed the issue of appropriate guidelines for stopping artificial feeding in the case of In re Conroy. Conroy involved another patient who died before a final decision was handed down. Conroy was in a nursing home suffering from severe organic brain syndrome, necrotic decubitus ulcers, urinary tract infection, arteriosclerotic heart disease, diabetes and hypertension. The New Jersey Superior Court originally held that nasogastric tube feeding could be stopped, at her nephew’s request, after determining that Conroy “had no cognitive or volitional functioning.” The state won a stay of the order from the appellate court. With the nasogastric tube still in place, Conroy died of natural causes two weeks later.

Although Claire Conroy had already died, making the conflict merely hypothetical, the appellate court concluded that the issues should be resolved because of their great public importance. Even when patients have died, courts consistently agree to decide terminally ill patients’ rights to refuse life-sustaining treatment. The Conroy court decided that since the issues involved are recurring, yet typically avoid review because of the patient’s death, the case should continue; otherwise, future parties of interest would have no guidance.

The New Jersey Superior Court would not have allowed the artificial feeding to be stopped because they concluded that Claire Conroy was not comatose, not facing imminent death, nor in a chronic vegetative state. They interpreted the medical testimony to hold that since Conroy was sapient, the state’s interest in preserving life was substantial and overrode the patient’s right to privacy. This court distinguished her from the Quinlan case by pointing out that she was not subject to twenty-four hour intensive nursing care and not maintained on any mechanical devices. The fact that Conroy was awake but very confused

99. Organic brain syndrome is manifested by disorientation, intellectual and memory impairment and unstable emotional response. 1 SCHMIDT’S ATTORNEYS’ DICTIONARY OF MEDICINE B-99 (17th ed. 1984). It is not the same as senile dementia, which is “[a] chronic brain disorder caused by organic (structural) changes, associated with old age.” 3 id. at S-65.
102. Id.
103. Id. at 459, 464 A.2d at 309.
was determinative.\textsuperscript{104} She was a substantially different type of patient from the asleep, vegetative Quinlan. The court would, however, more likely have allowed termination of treatment had Conroy been incurable and terminally ill, brain dead, comatose or vegetative.

The court pointed out that withholding artificial feeding under Conroy's circumstances would violate general ethical precepts. In reviewing both sides of the ethical debate, the court noted, "[t]here is substantial disagreement among ethicists whether the provision of food and water should ever be considered extraordinary treatment. . . . To some, the natural and ordinary quality of feeding dictates that it should never be withdrawn."\textsuperscript{105} U.S. Surgeon General C. Everett Koop holds a similar view: "Withholding fluids or nourishment at any time is an immoral act."\textsuperscript{106} Others feel that if the patient is hopeless the "burden of continued feeding is disproportionate to the benefit it will effect."\textsuperscript{107} The appeals court expressly declined to resolve that particular issue, however, and the New Jersey Supreme Court decision in early 1985 provided specific guidelines which help to clarify the issue.

After discussing general ethical concepts, the Conroy appellate court then looked to the medical ethics involved. The Hippocratic Oath provides that the physician's main obligation is never to harm anyone.\textsuperscript{108} The Conroy court was convinced that removing the feeding tube would violate medical ethics as well as general ethics, since active euthanasia has always been considered unethical.\textsuperscript{109} In Conroy's situation, since she was not comatose, the appeals court felt that nourishment was an essential element of ordinary care which her physicians were ethically obligated to provide.\textsuperscript{110}

The appeals court concluded that removing the feeding tube under Conroy's circumstances amounted to active euthanasia rather than the generally accepted passive euthanasia. The court was concerned that Conroy would die from dehydration and starvation rather than from

\begin{thebibliography}{9}
\bibitem{104} Id. at 460, 464 A.2d at 310.
\bibitem{105} Id. at 463, 464 A.2d at 313.
\bibitem{106} Tifft, \textit{Debate on the Boundary of Life}, \textit{Time}, April 11, 1983 at 68, 69.
\bibitem{107} Conroy, 190 N.J. Super. at 463, 464 A.2d at 313.
\bibitem{108} The Hippocratic Oath, the ethical guide of the medical profession, states: "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death. . . ." \textit{Dorland's Illustrated Medical Dictionary} 715 (25th ed. 1974).
\bibitem{109} Conroy, 190 N.J. Super. at 464, 464 A.2d at 314.
\bibitem{110} Id.
\end{thebibliography}
her existing medical condition.\textsuperscript{111} The New Jersey Supreme Court recently reversed the appellate court and clarified the issue so that families and physicians can have some reassurance that their decisions will not result in criminal or civil liability.

\section*{IV. Proposals}

The \textit{Barber} decision in California was an important step in clarifying the law on terminating artificial feeding. When the New Jersey Supreme Court decided the issue in \textit{Conroy} it provided needed guidance to families and physicians.\textsuperscript{112} By reversing the appellate court's decision, the New Jersey Supreme Court now allows life-sustaining treatment to be withdrawn or withheld when it is clear that the patient would have refused the treatment. Since there is so little legal precedent in this narrow body of case law, many patients in other jurisdictions will be affected by the legal implications of this decision.

The crux of the problem lies in allowing courts to establish general standards for all patients, when, arguably decisions should be made based on facts unique to each case, preferably within the patient-physician-family unit. Medical intervention is normally allowed when it will improve the patient's well-being, but the benefits and burdens such treatment will afford must be judged depending on the individual patient's values and goals, and not on a court's holding that establishes as a matter of law that artificial feeding always provides a substantial benefit.\textsuperscript{113}

Allowing treatment to be stopped when the patient is unlikely to gain any medical benefit from continued treatment is a less restrictive and more satisfactory legal standard.\textsuperscript{114} A treatment appropriate for most patients may be unsuitable in an individual case where it imposes unbearable burdens.\textsuperscript{115} Courts should not be relied on to make actual treatment decisions. This often turns out to be the case when there are misunderstandings about what procedures are correct. Since the judicial route tends to be time-consuming and costly these medical decisions should remain the responsibility of physicians and family. It should be made clear that medical treatment should be judged by

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 465, 464 A.2d at 315.
  \item Id. at 456, 464 A.2d at 306.
  \item Id. at 478, 464 A.2d at 314.
  \item Id. at 466, 464 A.2d at 310.
  \item See Brief for Amicus Curiae supra note 75, at 21.
\end{enumerate}
\end{footnotesize}
whether a particular patient will benefit from it.

Medical decision-making often involves caregivers and surrogates acting on behalf of incapacitated patients. Collaboration between attending physician and family, in advancing the patient’s best interests, will eliminate the risks of self-interest and superficiality which sometimes occur. If a decision is made based on full information and deliberation, carelessness and discriminatory behavior are less likely to occur.

Because recourse to courts as a routine matter is unduly cumbersome, institutional ethics committees can still play an important role in the decision-making process. These committees can review each case in a less expensive and more suitable setting. Institutional ethics committees can act more quickly than the courts; however, the committees may still refer to the courts when intractable disagreement occurs. Even when the committee refers the matter to the judicial process, the court should rely on the ethics committee’s full report, enabling the court to make an informed decision which is less subject to error and less expensive. Of course, the court’s decision should still be limited to a question of fact whether the treatment accomplishes a medical benefit.

The judiciary has proposed many suggestions and guidelines in the years since the landmark Quinlan decision. Because of these evolving legal and medical standards, attorneys and physicians need to be aware of legal precedent as it exists today. In many states only lower court opinions exist and often are in conflict with those of other jurisdictions.116 Courts should address this pressing medico-legal problem by delegating responsibility to the patient-doctor-family unit.117 Thus,


117. The American Medical Association Judicial Council believes that courts or legislatures may not provide the best forums for discussion of issues of euthanasia or terminal illness. It recommends the following standard:

(1) The intentional termination of the life of one human being by another—mercy killing or euthanasia—is contrary to public policy, medical tradition, and the most fundamental measures of human value and worth.

(2) The cessation of the employment of extraordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent is the decision of the patient and/or his immediate family and/or his lawful representative, acting in the patient’s best interest.

(3) The advice and judgment of the physician or physicians involved should be readily available to the patient and/or his immediate family and/or his lawful representative in all such situations.
courts would be relieved from making life-and-death decisions more rationally left to the medical realm. The inconsistency of the various courts’ approaches, understandable since euthanasia is such a complex issue, points out the necessity for allowing physicians, patients and families to use their own discretion in termination of treatment decisions.

If courts set forth principled standards, it would ensure that health care professionals and families would be responsible for acting according to the patient’s desires, if known, otherwise in the patient’s best interests. The courts should also substantially defer to careful decisions made in accordance with such standards.

Mary Stetson Lingerfeldt
Recovery for Lost Parental Consortium: Nightmare or Breakthrough?

I. Introduction

Loss of parental consortium is a cause of action which allows a child to recover damages against third parties who tortiously injure a child’s parent. Specifically, it provides a method of recovery for loss of parental “care, comfort, society and . . . companionship.” The child’s recovery for loss of parental consortium is distinct from the parent’s recovery of lost wages which already provides for the child’s economic losses, such as food, clothing and shelter. The parent’s recovery from the same tortfeasor replaces the money the parent would have earned and used to support his child.

In 1976, the Florida Second District Court of Appeal declined to recognize a child’s right to recover for lost parental consortium in Clark v. Suncoast Hospital, Inc. In 1979, and again in 1982, the Third District Court of Appeal issued per curiam decisions, following Clark without analysis. In 1984, however, the Fifth District Court of Appeal, recognizing the signs of changing societal needs, and the beginnings of a trend, broke new ground in Florida by permitting a child to recover for lost parental consortium in Rosen by and through Rosen v. Zorzos. The Rosen Court certified its decision to the Florida Supreme Court since it is in direct conflict with the Clark decision. The Supreme Court has the opportunity to settle the conflict currently existing among the districts.

This note presents a general history of a child’s right to recover for

2. Id. at 360.
5. 449 So. 2d at 359.
6. The Florida Supreme Court has discretionary jurisdiction to review a district court decision “that is certified by it to be in direct conflict with a decision of another district court of appeal.” Fla. Const. art. V, § 3(b)(4).
lost parental consortium in the United States, in general, and Florida in particular. The note traces the development of other relevant Florida law as a comparison. Finally, the article will review the arguments for and against acceptance of the derivative action which were raised in Clark and Rosen.¹⁷

II. Historical Development of Children's Rights

In 1894, a child named Mary Ellen⁸ lived in New York City. Her mother and father had beaten and starved Mary Ellen routinely. An interested social worker tried to protect the child but found there were no laws against child abuse. The social worker's compassion inspired her to find a way to protect the right of the child from abuse. Appalled that New York City protected its dogs and cats better than its children, the social worker went to the Society for the Prevention of Cruelty to Animals for help. She convinced the Society that children are a specie of animal and Mary Ellen, a child, was entitled to protection as an animal from cruelty and abuse. The state successfully prosecuted the parents under then existing cruelty to animals laws. Subsequent publicity prompted the enactment of child abuse laws throughout the country.⁹ However, it was the court, not the legislature, who protected little

⁷. In addition to the parties, amicus curiae briefs have been filed by the Florida Defense Lawyers Association, the Academy of Florida Trial Lawyers, and the American Trial Lawyers Association; Marjorie G. Graham, Post Office Drawer E, West Palm Beach, Florida, 33402; Professor Michael L. Richmond, Nova University Center for the Study of Law, 3100 S.W. Ninth Avenue, Fort Lauderdale, Florida, 33315 (for defendant/petitioner); Richard A. Kupfer, Esquire, Cone, Wagner, Nugent, Johnson, Hazouri & Roth, Post Office Box 3466, West Palm Beach, Florida, 33402 (for AFTL); Richard A. Kupfer; David S. Schrager, Esquire, co-counsel ATLA President, 17th Floor, 810 Center Plaza, Philadelphia, Pennsylvania, 19103 (for ATLA).


Loss of Parental Consortium

Mary Ellen.

Common law did not recognize the legal rights of wives and children as being on par with the rights of a man. The legal relationship between parent and child was essentially that of servant to master. In fact, a man’s dominion over his family was so absolute that a woman who killed her husband was not only subject to punishment for murder, but also for petit treason. Ancient Greek and Roman fathers had the right to kill unwanted or defective children or to allow the children to die from starvation or exposure by leaving them in a field or on a hillside. At the beginning of this century, a sixteen year old American boy was sent to reform school for an infraction which would have resulted in a twenty-five cents to one dollar fine if it had been committed by an adult. His crime was swearing at a church meeting.

Common law afforded no protection to children except as property owned by the parents. Children owed their labor to their father. A child could not sue his parents for committing torts against the child. Parents had no statutory duty to support their children prior to the


11. See F. Pollock, supra note 10, at 151.

12. See, e.g., B. Grumet, supra note 8.


15. Id.

16. See, e.g., Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); but see Ard v. Ard, 414 So. 2d 1066 (Fla. 1982) and Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970), which propound the view that a parent may be liable to his children for negligently-caused injuries.
passing of the British Statute, 43rd Elizabeth Ch. 2. Similarly, modern parents have a right to the earnings of their minor children, and can even sue to recover those earnings from third parties whose wrongful conduct deprive them of the earnings. Courts recognized a man’s right to sue third parties for wrongfully causing familial loss of consortium as early as 1619 in England and 1852 in America. Society thought that a man’s right to his family’s society and fellowship was so important to his well-being that negligent or intentional interference was actionable.

American courts first protected a wife’s right to her husband’s society in 1950 in Hittafer v. Argonne Co. The Hittafer court allowed a woman to recover against her husband’s employer for negligently-inflicted injuries. In Hittafer, the court merely applied standard negligence and proximate cause tests in holding that an employer was liable for a wife’s loss of her husband’s consortium when the husband was injured by the employer’s negligence. Gates v. Foley gave the Florida Supreme Court an opportunity to recognize the right of a woman to recover for loss of her husband’s consortium in 1971. Writing for an unanimous court, Justice Adkins said, “[m]edieval concepts which have no justification in our present society should be rejected.” With that decision, Florida became the twenty-fifth state to recognize a wife’s right to recover for loss of her husband’s consortium.

17. See, e.g., Borchet v. Borchet, 185 Md. 586, 45 A.2d 463, 465 (1946); see also 1 W. Blackstone, Commentaries *449.
18. See, e.g., Lessard v. Great Falls Woolen Co., 83 N.H. 576, 578, 145 A. 782, 784 (1929); Youngblood v. Taylor, 89 So. 2d 503, 506 (Fla. 1956); Wilkie, 91 Fla. at 1064, 109 So. at 225; Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio, 343 So. 2d 1357 (Fla. 1977).
22. Id.
23. Gates, 247 So. 2d at 40 (Fla. 1971).
24. Id. at 44.
It was not until *Yordon v. Savage* in 1973 that Florida recognized that a wife's right to recover for loss of an injured minor child's consortium applied equally to the husband's. There, the parents sued for damages allegedly caused to their son by medical malpractice. The defendant moved successfully to strike the mother from the plaintiffs' complaint as an improper party. On direct appeal, the Florida Supreme Court held that either or both parents had a cause of action for loss of a child's consortium.

Today, Florida law is beginning to recognize and protect the rights of children in much the same way as the law developed rights for women. Children have the right to freedom from abuse. They are protected by child labor laws. Florida children have a statutory right to counsel in juvenile proceedings. Florida has consistently recognized children's needs for nurturing, special care and sensitivity. Children also have the right to a free public education.

Florida's legislature and its courts have expressly recognized that a


26. 279 So. 2d at 846 (Fla. 1973).

27. The *Yordon* court adopted the *Wilkie* reasoning and held that loss of parental consortium includes medical, hospital and related expenditures, costs of caring for the child, as well as loss of the child's companionship, society and services.

28. *FLA. STAT.* § 768.21 (1983); *see generally supra* note 9.


31. *FLA. STAT.* § 39.071 (1983); *see also* State ex rel Alton v. Conkling, 421 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1982) (construing *FLA. STAT.* § 39.071 (1979)).


child's need to have its parents' comfort, society and guidance to grow into a healthy adult is "crucial."\(^{34}\) Obviously, the law cannot force parents and their children to love each other. However, the beliefs expressed by the actions of the legislature and the courts clearly show their recognition of the importance of such love.\(^{35}\) Furthermore, they create a public policy which announces a desire to encourage family strength and unity.\(^{36}\) Consequently, a spouse has a cause of action against third parties for loss of consortium\(^{37}\) even though a spouse could not get a mandatory injunction for love and affection or involuntary services. In addition, parents can sue third parties for tortiously causing a loss of their children's services and consortium, even though they cannot sue their child for a mandatory injunction to enforce such right to services.\(^{38}\)

### III. Modern Law Developments

There are more laws today than ever before which recognize and protect children's rights.\(^{39}\) Every state has laws against child abuse.\(^{40}\) Nevertheless, twenty-nine states have not even considered the issue of whether a child should have the right to recover for lost parental consortium against third parties.\(^{41}\) Seventeen states have refused to recognize a child's right to recover for tortiously caused loss of his parents'

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34. Finn v. Finn, 312 So. 2d 726 (Fla. 1975). Fla. Stat. § 23.131 (1983). The Legislature finds and declares that the early childhood years are crucial to the mental, physical and emotional development of children, and that the experiences of early childhood years are highly significant with respect to later development, including educational and vocational success. The Legislature further recognizes the primary role and responsibility of the family for the development of children and the importance of strengthening the family members' abilities to foster the development of young children.

35. See supra note 34.
36. See supra note 34.
37. See, e.g., Gates, 247 So. 2d 40.
38. See, e.g., Fox v. City of West Palm Beach, 383 F.2d 189 (5th Cir. 1967).
39. See generally supra note 9.
40. Id.
41. States which have not yet decided the issue are: Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Maine, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming.
Loss of Parental Consortium. The District of Columbia also refused to recognize the child's right based on statutes which have since been repealed. An Iowa court recognized the cause of action, but the Iowa decision was later overruled in Audubon-Exira Ready Mix, Inc. v. Ill. Central Gulf R.R. Co. As a result of statutory construction, the Audubon court decided that the Iowa legislature already granted the right. The Iowa court did not disturb the reasoning of its previous case, however. Iowa now recognizes the cause of action as a derivative, but not an independent, cause of action. Federal courts sitting in Alaska, Nebraska and South Carolina rejected the cause of action, but none of the state courts in those states have specifically addressed the issue. In each of those three states, the Federal courts presumed that those states would probably reject the cause of action if they had to address the issue.


45. 335 N.W.2d 148 (Iowa 1983).

46. IOWA CODE ANN. § 611.22 (West 1983) (permitting the cause of action as a derivative claim only).

47. Early v. United States, 474 F.2d 756 (9th Cir. 1973).


50. Early, 474 F.2d at 758; Hoesing, 484 F. Supp. at 478; Turner, 159 F. Supp. at 590.
The three federal court decisions were in 1973, 1980 and 1958. Of the cases which rejected the cause of action, five were decided in the 1950's, six in the 1970's, two in 1980, three in 1982, one in 1983, and one in 1984. The District of Columbia last addressed the issue in 1958.

Of the seventeen states which rejected a cause of action for a child's loss of his parents' consortium, seven did not recognize the wife's right to consortium at the time, either. Recognition of the wife's cause of action seems to be almost a prerequisite for recognition of a child's right to recover for the loss of parental consortium. Every state which recognized the child's cause of action first recognized the wife's cause of action for loss of her husband's consortium. Some of these courts rejected only an independent cause of action for loss of parental consortium, fearing double recovery. In this context, double recovery means that the child would recover once when the child's economic, and arguably, non-economic, damages are recovered in the parent's cause of action, and a second time when the child recovers for his own cause of action for loss of parental consortium.

52. *Jeune*, 77 Ariz. at 226, 269 P.2d at 723; *Turner*, 159 F. Supp. at 590; *Halberg*, 41 Hawaii at 634; *Gibson*, 75 Ohio L. Abs. at 413, 144 N.E. 2d at 310.
54. *Koskela*, 91 Ill. App. 3d at 568, 414 N.E. 2d at 1148; *Morgel*, 290 N.W. 2d at 266.
55. *Schmeck*, 647 P.2d at 1263; *Salen*, 322 N.W.2d at 736; *Northwest*, 631 P.2d at 1377.
57. *Bremer*, 169 Ga. App. at 115, 312 S.E.2d at 806. Florida's Fifth District Court of Appeal recognized the child's cause of action in *Rosen*, 449 So. 2d 359. However, it would be inaccurate to say that the State of Florida has recognized the action, since the Florida Supreme Court has not yet resolved the issue.
58. *Pleasant*, 262 F.2d at 471.
59. These states are Arizona, Hawaii, Ohio, Washington, Connecticut, Louisiana and Kansas. See supra note 42.
60. See supra note 25, which lists the cases from Iowa, Michigan and Wisconsin. The Massachusetts case recognizing the wife's right is Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973).
61. The states rejecting the cause of action for fear of double recovery are: California, Washington, D.C., Hawaii, Kansas, New Jersey and Washington. See supra note 42.
Five states have recognized a child’s right to recover for loss of a parent’s consortium. In *Weitl v. Moe*, a pregnant mother of three children suffered permanent brain damage and permanent blindness as the result of medical malpractice. Her fetus was stillborn. In allowing her three children to maintain a cause of action for loss of parental consortium, the court reviewed Iowa law which already allowed causes of action for spousal loss of consortium and for parental loss of a child’s consortium and found that loss of parental consortium is consistent with these holdings. In addition, the Iowa court made a thorough analysis of the reasoning for and against the child’s cause of action which was later presented in *Rosen*.

In *Berger v. Weber*, the court analyzed the arguments that damages were too speculative, that double recovery would result from recognition of the cause of action and that any changes should be made by the legislature instead of the court. In *Berger*, the mother of a mentally retarded girl was severely injured in an auto accident. The court held that the child’s damages were comparable to pain and suffering, intangible losses in wrongful death actions and spousal loss of consortium. The court went on to say “[e]valuating the child’s damages is no more speculative than evaluating these other types of intangible losses.” Addressing the issue of double recovery the court held that recognition of the child’s cause of action would lessen the possibility of double recovery, since the jury would be required to consider the child’s loss separately from the parent’s loss.

Finally, the *Berger* court noted that other loss of consortium claims were developed by the judiciary, and the child’s claim was appropriately decided there, too. In recognizing the child’s cause of action for loss of parental consortium, the *Berger* court said “[c]onvinced as we are that we have too long treated the child as [sic] second-class citizen or some sort of nonperson, we feel constrained to remove the disability we have imposed.”

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63. 311 N.W.2d at 259.
64. *Id.* at 265-70.
65. 303 N.W.2d at 424.
66. *Id.* at 427.
67. *Id.*
68. *Id.*
69. *Id.* But cf. *id.* (Levin, J., dissenting), for a thorough analysis of the reasoning
The Supreme Court of Wisconsin addressed the issue in 1984 in Theama by Bichler v. City of Kenosha.\textsuperscript{70} Robert Theama was severely and permanently injured as the result of a motorcycle accident. Allegedly, a pothole in a negligently maintained road was the proximate cause of the accident. The Theama court adopted the cause of action for a child's loss of consortium primarily because the court perceived an increasing recognition and protection of children's rights throughout society.\textsuperscript{71} The Theama court also analyzed arguments similar to those propounded in Weitl\textsuperscript{72} and Berger, and approved the reasoning of those courts.\textsuperscript{73}

In Ferriter v. Daniel O'Connell's Sons, Inc.,\textsuperscript{74} a father was negligently injured while at work. The court recognized the children's right to recover for loss of parental consortium where the children could show that their dependence was not only economic, but also rooted in "filial needs for closeness, guidance and nurture."\textsuperscript{75} The Ferriter court analyzed the traditional arguments similarly to the Weitl, Berger and Theama courts, reaching the same conclusion that a minor child has a cause of action for lost parental consortium where the parent is tortiously injured.\textsuperscript{76}

In Rosen by and through Rosen v. Zorzos,\textsuperscript{77} a negligently caused automobile collision killed a young mother and severely injured her husband. The parties settled before trial and the settlement included damages for the children's loss of consortium for their deceased mother, which is a recognized cause of action under Florida's Wrongful Death Act.\textsuperscript{78} After settling with Michael Zorzos on the other claims, Stephen Rosen filed a lawsuit on behalf of his children for their loss of his companionship, guidance, love and the like.\textsuperscript{79} The lawsuit for the children's loss of Mr. Rosen's consortium was dismissed for failure to state a cause of action.\textsuperscript{80} On appeal, the Florida Fifth District reversed,
adopting reasoning similar to *Weitl, Berger and Ferriter*.81

The most recent case addressing the issue whether a child should be permitted a cause of action for lost parental consortium is *Ueland v. Pengo Hydra-Pull Corp.* 82 In *Ueland*, the court held that the child's cause of action is consistent with other Washington law, which permits a husband's cause of action for loss of his wife's services, a wife's cause of action for loss of her husband's consortium and Washington's wrongful death statute, which permits a cause of action for intra-family loss of consortium. The *Ueland* court cited *Rosen, Theama, Berger* and *Ferriter* and held that "the emerging trend is to recognize the child's cause of action."83 In permitting the cause of action, the *Ueland* court held that the child's claim must be joined with the parent's claim unless there is just cause not to join the child's claim.

In contrast to the older cases rejecting the cause of action the cases recognizing the child's right are relatively new. 84 Arguably, this contrast indicates the beginnings of a trend toward recognizing a minor child's right to recover from third parties for tortiously caused loss of parental consortium when the parent is injured but does not die. Perhaps those courts which have recognized the cause of action are judicial renegades, as some charge. 85 On the other hand, it is at least equally probable that they are the leading edge of the American judicial system in this area. They do comprise almost forty percent of the states which have addressed the issue in the last five years. These recent cases, together with the increasing number of judicial decisions and statutes recognizing and enforcing children's rights, suggest an increasing legal recognition of children as persons. In addition, there is an apparent heightened public interest in children's rights in general, as evidenced by the almost daily media coverage of programs and events concerning the needs and rights of children.

IV. Analysis of Arguments Against Recognition

There are eight reasons generally offered in opposition to recogniz-

81. *Id.*


83. *Id.*

84. Cases which rejected the cause of action are an average of more than twelve years old. In contrast, those decisions which recognize the action were written, on an average, less than four years ago. In Florida, *Clark* was decided nine years ago (1976), whereas *Rosen* was decided only last year (1984).

ing a child’s right to recover for lost parental consortium. They are: 1) The child has no enforceable claim for the parents’ services; 2) Absence of precedent; 3) Speculative nature of damages; 4) Double Recovery; 5) Multiplicity of litigation; 6) Possible upset of settlements with parents; 7) Fabrication of claims; 8) Increased insurance costs. 86 These reasons also form the basis of the petitioner’s position in Rosen, 87 and are the same arguments used in opposition to recognizing a wife’s right to recover for lost consortium in Gates. 88

In Florida, the Clark court rejected a claim for lost parental consortium based on the above eight reasons. In addition, the Clark court held that public policy as announced by the so-called heart balm statute proscribed the child’s cause of action. 89 This statute abolished the torts of alienation of affection, criminal conversation, seduction and breach of contract to marry. The express legislative intent in the heart balm statute was to stop the harassment, embarrassment, blackmail and other abuses which resulted from the torts. The Clark court did not analyze the reasons it listed. It merely accepted them. However, even the Clark court held that the argument for recognizing a child’s right to recover against third parties for lost parental consortium could have merit from a public policy viewpoint if the “[c]laims asserted by the plaintiffs were properly circumscribed.” 90

A. The Argument That A Child Has No Enforceable Claim for His Parents’ Services.

It is true that a Florida child cannot obtain an injunction to force his parents to love him and care for him. 92 On the other hand, a child in Florida does have an enforceable right to physical support. 93 That right is based on either parentage or contract. 94 By way of analogy, it should be noted that Florida’s Wrongful Death Act 95 does create the

86. See, e.g., Clark, 338 So. 2d at 1117.
87. 449 So. 2d at 359.
88. 247 So. 2d at 40.
89. FLA. STAT. § 771 (1983) (originally enacted as Ch. 23138, LAWS OF FLA. (1945)).
90. Clark, 338 So. 2d at 1119.
91. Id.
92. See, e.g., Fox v. City of West Palm Beach, 383 F. 2d 189 (5th Cir. 1967).
95. FLA. STAT. § 768.21(3) (1983).
right of a child to recover for lost parental consortium when the parent dies. A child certainly could not enforce that right against his dead parent, but can recover against third parties.

B. Absence of Precedent.

"Every public action which is not customary, either is wrong or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time." While precedent is an important factor in considering the wisdom of a decision, it should not be controlling. If everyone failed to act until a precedent was set, there would be no great legal decisions. On the other hand, previous landmark decisions by the Florida Supreme Court such as abolition of contributory negligence and lex loci conflicts of law, and the recognition of products liability causes of action and the seat belt defense show that lack of precedent is not a sufficient reason to fail to make a sound judicial decision. Even if lack of precedent were a valid argument, it cannot be applicable when the Florida Supreme Court decides Rosen. When Clark was decided, there were no states that recognized the derivative action. At this time five states judicially recognize such recovery for the minor child. Nonetheless, at this time there are clearly more states against a child's right to recover for loss of parental consortium than are in favor of the cause of action.

C. Speculative Nature of the Award

The third argument is that damages for loss of consortium are too speculative. One would expect that a jury would decide damages based upon evidence of the parent-child relationship, viz: time spent together, closeness, overall quality of the relationship. Admittedly, it is impossible to put an absolute value on a father's or mother's love for a child. However, the same valuation problem exists in measuring punitive damages, physical and mental pain and suffering, diminished capacity.

96. THE OXFORD DICTIONARY OF QUOTATIONS, 162.23 (1979).
97. Gates, 247 So. 2d at 40; Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (abrogation of contributory negligence); Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) (abrogation of lex loci conflicts of law doctrine); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976) (adopting strict product liability); Ins. Co. of North America v. Pasakarnis, 451 So. 2d 457 (Fla. 1984) (seat belt defense).
98. See supra note 62.
99. See, e.g., Berger, 303 N.W.2d at 424.
to earn, parents’ loss of a child’s consortium and spousal loss of consortium. The courts have for several years permitted recovery for these damages and, in fact, have found them necessary to insure fair and adequate compensation.\(^{100}\) The real issue is whether the speculation can be reduced to tolerable levels.\(^{101}\) Arguably, our country and our judicial system have been modernized by allowing such noneconomic damages. It is hard to see how loss of parental consortium is radically different. Proper jury instructions and other safeguards, such as an elemental definition and special verdicts, would keep speculation within tolerable limits.

D. Double Recovery

A major concern with permitting a child’s right for loss of parental consortium is that the minor child will recover again for damages which are already included in the parents’ verdict for lost wages when the child sues the same defendant.\(^{102}\) This could, and probably would, happen if the tort were to be recognized as an independent cause of action. A child’s loss of parental consortium, however, is more properly classified as a derivative action. Requiring the child to join his claim with the primary claim,\(^ {103}\) along with a limiting jury charge on the child’s claim and perhaps a special verdict, will obviate the problem. Double recovery is a potential problem in any complicated or multiple plaintiff case, but just as with the problem of speculation, courts are sophisticated enough to deal with the complexities of each case to avoid the occurrence of double recovery. The jury should always be alert to guard against double recovery.\(^ {104}\)

E. Multiplicity of Litigation

The opponents of the child’s cause of action for lost parental consortium fear that each child will bring separate suits and further tax the already overburdened court system. Multiplicity of litigation was a legitimate concern of the Gates court as well when that court recog-

\(^{100}\) See generally Fla. Stat. § 768.21 (1983).

\(^{101}\) See, e.g., General Rent-A-Car, Inc. v. Dahlman, 310 So. 2d 415 (Fla. 3d Dist. Ct. App. 1975); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977).

\(^{102}\) See, e.g., Halberg v. Young, 41 Hawaii 634 (1957).

\(^{103}\) This notion is consistent with the requirement for spousal loss of consortium claims and claims under Florida’s Wrongful Death Act, Fla. Stat. § 768.21 (1983).

\(^{104}\) See, e.g., Berger, 303 N.W.2d at 427.
nized a wife’s cause of action for lost spousal consortium.\textsuperscript{105} The Gates court addressed the problem by requiring the spouse to join her claim in the primary complaint. The Rosen court could take the same approach with the child’s claim for lost parental consortium. The Florida legislature has also addressed this concern in a similar context. In enacting Florida’s Wrongful Death Act,\textsuperscript{106} the legislature addressed the issue by requiring all parties who have claims arising out of the death to raise them in a single complaint through the personal representative of the estate. The same process of compulsory joinder will work effectively in Rosen and its progeny. The children should be required to join their claims for loss of parental consortium with the parent’s claim.

F. Red Tape

Because a Florida statute requires court approval of all settlements in excess of $5,000, made on behalf of minors, opponents of a cause of action for a child’s loss of parental consortium argue that the cause of action will increase red tape.\textsuperscript{107} The statute would require approval in loss of parental consortium cases as well as others. However, such approval does not preclude the child’s claim for loss of parental consortium in wrongful death cases. Arguably, there would be an increased burden on the courts, but its impact would be minimal. Moreover, the very existence of this statute illuminates Florida’s public policy of recognizing and protecting the rights of its minor citizens. In enacting such a safeguard, the Florida legislature demonstrated its recognition of the vulnerability of children and its desire to guard their best interests.

G. Upset of Previous Settlements

The opponents of recognition of a child’s right to recover for lost parental consortium argue that such recognition will upset previous settlements.\textsuperscript{108} Unquestionably, retroactive recognition would cause such results. The same concern arose in Gates v. Foley,\textsuperscript{109} but the court stated that “[t]he problem has not troubled other courts seriously and

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105. Gates, 247 So. 2d at 40.
106. FLA. STAT. § 768.21-.27 (1983).
108. Brief for Petitioner at 32, Rosen, 449 So. 2d at 359. Oral argument was heard January 10, 1985 (case no. 65239).
109. 247 So. 2d at 40.
\end{flushleft}
may be easily resolved." The court allowed the wife's claim to be joined with the husband's claim only if the wife's claim was not time-barred and the husband's claim was still pending. Where the husband's claim "has been terminated by adverse judgment on the merits, this should bar the wife's cause of action for consortium." In Rosen, the children brought their claim for loss of their father's consortium after all other issues were settled out of court. However, the Rosen family has had the willingness to pursue the issue. In addition, the Florida Supreme Court has the unquestioned authority to recognize this cause of action in Rosen and pending and prospective cases only. Arguably, this is the only logical approach to take since it would avoid reopening cases already settled. This method would also be consistent with the court's decision in Gates, giving direction and stability to Florida jurisprudence. In any case, the child's cause of action is only for lost consortium, and not for anything the parent recovered. In addition, a jury instruction will clarify the fact that recovery for the children should not include loss of financial support, which is already covered in the parent's settlement or verdict.

H. Fabrication of Claims

Fabrication of claims is a traditional argument in opposition to causes of action arising from intra-family relationship. The Florida Supreme Court addressed the argument in Ard v. Ard, when it partially abrogated parent-child tort immunity. The Ard court held that the possibility of fraud does not constitute a valid justification to reject the child's cause of action for negligent torts of the parent, since the court can capably guard against fraud. The court went on to reason

110. Id. at 45.
111. Id.
112. See, e.g., Lawrence v. Florida East Coast Ry. Co., 346 So. 2d 1012 (Fla. 1977) (prospective application of new rule requiring special verdicts in all comparative negligence cases); In re Beverly, 342 So. 2d 481 (Fla. 1977) (change in standard of proof for civil commitment prospective application only); State ex rel Dade County v. Nunzum, 372 So. 2d 441 (Fla. 1979) (prospective only application of revenue sharing court order); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (declaration of unconstitutionality of medical malpractice act prospective only).
113. 247 So. 2d at 40.
114. Ard v. Ard, 414 So. 2d 1066 (Fla. 1982).
115. Id.
116. Id. at 1069.
that the testimony of the family members would be extremely vulnerable to impeachment and that juries are fully able to use their common sense to arrive at the truth.\textsuperscript{117} The \textit{Ard} court plainly discounted the possibility of fraudulent claims as a good reason to bar a cause of action or to grant relief.\textsuperscript{118} The opinion seems to state the court’s feeling in general, unrestricted to the \textit{Ard} decision.

I. Insurance Rates

The final argument made in opposition to recognizing a child’s right to recover for lost parental consortium is that recoveries will raise insurance rates. The argument is that society cannot afford to pay for all types of losses. Assuming that recognition of the derivative action would impact on insurance rates, a conflict of public policies arises. On one hand, members of society want to be able to afford insurance. On the other hand, they should be able to seek recovery for certain losses, including insured losses. The issue then becomes whether recognition of the derivative action would have a prohibitively adverse effect on insurance rates.

Arguably, every insured loss affects insurance rates. Examples include a burning house, a destroyed car, appendicitis and thousands more. Insurance rates are an important concern to the public, as are all expenses. On the other hand, the public, through its purchase of numerous types of non-required insurance coverages has arguably demonstrated that it is far more interested in having insurance coverage in the event of a loss than it is concerned about increased rates. The child’s right to recovery for lost parental consortium is consistent with other allowable losses. The only reason to deny the action is that some demarcation should be made to limit a wrongdoer’s liability, and here is where public policy draws the line.\textsuperscript{119}

There is no reported or available evidence that the child’s cause of action will have a significant impact, if at all, on insurance rates. It is a matter of common knowledge that rates differ according to risk categories. Drivers with bad driving records will pay higher rates than those

\textsuperscript{117} Id. (citing Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972)).

\textsuperscript{118} \textit{Ard}, 414 So. 2d at 1069.

\textsuperscript{119} Last year, the Florida Medical Association sponsored Proposition 9, a constitutional amendment which would have limited recovery for non-economic damages to $100,000.00. However, it did not meet the constitutional requirements to be allowed on the ballot.
with good records, and they should. There is no credible argument that children should be denied full and fair compensation merely to maintain insurance rates for negligent wrongdoers.

The Florida Supreme Court has reviewed and rejected each of the arguments raised in opposition to the child’s cause of action in Clark\(^\text{120}\) and repeated in Rosen,\(^\text{121}\) at one time or another and rejected them.\(^\text{122}\) While some of these arguments present valid concerns, they are not, individually or in aggregate, sufficient to bar a child’s right to recover for lost parental consortium.

V. Analysis of Arguments in Favor of Recognition

There should be a rational, positive basis to recognize a cause of action. The reasons given in favor of the action in Rosen are: 1) Recognition is consistent with Florida legislative enactment which recognizes the claim when the parent dies;\(^\text{123}\) 2) Recognition is consistent with Florida law which recognizes a claim for loss of a wife’s consortium;\(^\text{124}\) 3) Recognition is consistent with Florida law which recognizes a parent’s right to recover for loss of a child’s consortium;\(^\text{125}\) and 4) Recognition is required by the Florida Constitution.\(^\text{126}\)

A. Legislative Enactments Recognize The Cause of Action

The Florida Wrongful Death Act\(^\text{127}\) allows minor children of the decedent to “[r]ecover for lost parental companionship, instruction, and guidance and for mental pain and suffering . . . .”\(^\text{128}\) The legislative intent is clearly stated in the statute. “It is the public policy of the State to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. . . .”\(^\text{129}\) Turlington v.

\(^{120}\) 338 So. 2d at 1117.
\(^{121}\) 449 So. 2d at 359.
\(^{122}\) Gates, 247 So. 2d at 40; Rosen, 449 So. 2d at 359.
\(^{123}\) FLA. STAT. § 768.21 (1983).
\(^{124}\) Gates, 247 So. 2d at 40.
\(^{125}\) See Wilkie, 109 So. at 225.
\(^{126}\) Rosen, 449 So. 2d at 359. The Florida Constitution declares that: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art. I, § 21.
\(^{127}\) FLA. STAT. § 768.16-.27 (1983).
\(^{128}\) FLA. STAT. § 768.21(3) (1983).
\(^{129}\) FLA. STAT. § 768.17 (1983).
Tampa Electric Co.\textsuperscript{130} stated similar public policy. In Tampa Electric Co. the court stated, "[w]here, by virtue of the relationship toward each other existing between parties, the law implies a duty from one to another, a breach of that duty that proximately causes or contributes to causing a substantial injury to another may constitute" an actionable wrong. Thus, the legislative and judicial view in Florida is wholly consistent with the general view that a person is responsible for all the injuries that he negligently inflicts upon others.\textsuperscript{131}

Some argue that consortium always includes the husband-wife sexual relationship and, therefore, excludes children.\textsuperscript{132} However, Florida's Wrongful Death Act lists each of the elements of consortium recoverable by minor children and, of course, omits conjugal relations.\textsuperscript{133} Logically, if the legislature allows the recovery, then it certainly recognizes the real injury to a child who is deprived of his parents' "companionship, instruction and guidance."\textsuperscript{134} Any material disruption of the parent-child relationship causes injury to the child. Providing a remedy for the child whose parent is injured, but not killed, is consistent with Florida public policy as stated in the Wrongful Death Act.

B. Florida Recognizes Loss of Spousal Consortium

The issue of a wife's claim for loss of her husband's consortium which was presented in Gates\textsuperscript{135} is parallel to the issue of lost parental consortium in Rosen.\textsuperscript{136} The Gates court recognized that societal changes in the woman's status required recognition of her right to recover for loss of her husband's consortium. Like Rosen, the Gates court referred to Florida Constitution Article I Section 21, as well as Sections 2 and 9. Unlike Rosen, Gates went on to discuss the wife's rights under the United States Constitution and various federal statutes.\textsuperscript{137} The Gates court reasoned that, in addition to state law and public policy, the federal constitution and federal laws against discrimination\textsuperscript{138} mandated recognition of the wife's claim. The court held that discrimi-
nation on the basis of sex by not allowing a wife's cause of action for loss of her husband's consortium was against federal law and was unconstitutional.

Florida's recognition that a loss of a husband's consortium injures a wife supports the view that loss of parental consortium injures a child. Whereas a wife is supposedly a mature adult, the minor child does not have the benefit of life's experience. The child is far more dependent for guidance and nurture than the wife. Since the law recognizes that a wife's loss of her husband's consortium is a real loss, a fortiori, the child's loss of parental consortium is cognizable also for the same reason.

C. Florida Recognizes A Parent's Right to a Child's Consortium

In Florida, a parent has the right to sue for loss of a child's consortium. In Wilkie, the court noted that such right was not a common-law right, but it decided that, "[t]he father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father." This cause of action was independent of the injured child's right to recover for his direct injuries.

Arguably, an adult, who is also a parent, is far better equipped to deal with emotional and financial crises. Yet Florida recognizes that the injury of one's child creates a palpable loss in the parent. The same reasoning leads to the conclusion that a child's injury caused by the loss of parental consortium would be no less than a parent's loss. Recognizing the child's right to recover for lost parental consortium is consistent with recognition of the parent's right to recover for loss of a child's consortium. It is equivalent to recognizing a child as a complete person.


The Rosen court held that recognition of a child's right to recover

139. Wilkie, 109 So. at 225.
140. Id.
141. Id. But see petitioner's brief, Rosen, 449 So. 2d at 359, which asserts that recovery is limited to economic damages.
for loss of parental consortium is required by the Florida Constitution. Article I, Section 21, states “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” The article’s simplicity seems to defy any attempt to interpret away the right insured by the provision.

The Constitution guarantees such an opportunity of redress for any injury. Therefore, the question is whether the Florida Supreme Court will decide that a child’s loss of parental consortium is an injury. If the decision is yes, then the court seems bound to affirm Rosen. Arguably, the Florida Constitution does not require recognition if public policy is better served by rejection of the child’s cause of action. Of course, if the court decides there is no injury as a matter of law, public policy or otherwise, then it will not recognize the cause of action anyway. The court could probably recognize the injury but limit recovery without violating the Florida Constitution.

Conclusion

Studies demonstrate conclusively that parents’ love, society, support, training, role model and the like are essential to the physical, mental and emotional health of children. The incidence of juvenile delinquency and psychological problems increases when there is a reduced functioning of the family unit. This increased awareness and scientific knowledge should contribute to the recognition of a child’s right to recover for loss of parental consortium.

By affirming the Fifth District Court of Appeal in Rosen, the Florida Supreme Court can write another important chapter in the history of Florida jurisprudence. Recognition of the child’s natural right to his

142. FLA. CONST. art I, § 21 (1968).
143. Id.
145. See, e.g., Abdin v. Fischer, 374 So. 2d 1379 (Fla. 1979) (statute limiting liability of owners and lessees who provide public park areas does not violate the constitutional provision that the courts shall be open to every person for redress of any injury).
146. See generally id.
148. Id.
parents' love, companionship, education and protection, will signal the Court's continued belief that government is a servant of the people rather than people the servants of government. Affirmance will be consistent with the court's policy of protecting the rights and needs of Florida's fast changing society. This policy was previously laid down in cases where the Court abrogated the contributory negligence rule,\(^{149}\) where it abrogated the obsolete doctrine of \textit{lex loci delecti},\(^{150}\) where it adopted strict liability in tort and product cases,\(^{151}\) and where it adopted the seat belt defense,\(^{152}\) to name a few.

When little Mary Ellen had nowhere to turn, the courts protected her natural rights, even though previous law did not. The case of "Mary Ellen" was a social breakthrough in 1894.\(^{153}\) Now, the Florida Supreme Court is presented with the opportunity to make another positive social breakthrough. By affirming \textit{Rosen}, the court will continue society's movement toward recognizing and protecting the rights and needs of its children.

\textit{Rodney Guy Romano}

\footnotesize
\begin{itemize}
  \item 149. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).
  \item 150. Bishop v. Fla. Specialty Plant Co., 389 So. 2d 999 (Fla. 1980).
  \item 151. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).
  \item 152. Pasakarnis, 451 So. 2d at 457.
  \item 153. See supra note 8.
\end{itemize}
Parental Liability for the Torts of Their Minor Children: Limits, Logic & Legality

I. Introduction

Throughout history, children have had a tendency to cause mischief, damage and often injury to people and the property of others.¹ Under common law, minors are personally responsible for their torts.² However, children rarely possess the means to compensate their victims.³ This creates a dilemma: Either the children's victims are left without a remedy, or the children's parents must be held liable for the damages.

At common law, the mere existence of the parent/child relationship was not a sufficient basis to invoke liability upon parents for the torts of their minor children.⁴ The growth of modern tort law, however,


Section 8951 of the second Restatement of Torts provides: “One who is an infant is not immune from tort liability solely for that reason unless the liability depends upon the enforceability of a contractual promise that the infant is privileged to disaffirm.” RESTATEMENT (SECOND) OF TORTS § 8951 (1979).

Comment (a) clarifies this general principle, adding that
[i]n intentional torts, the state of mind of the actor is an essential element. For example, an intent to bring about a harmful or offensive physical contact is essential to battery. . . A child may be of such tender years that he. . . is in fact incapable of the specific intent that is required. It may thus be found that the tort has not been committed. . . .

RESTATEMENT (SECOND) OF TORTS § 8951 comment a (1979).

has generally acknowledged the fact that parents, more than anyone else, have the ability and opportunity to regulate the conduct of their children. It has even been postulated that "[t]here are no delinquent children; there are only delinquent parents." Thus, with this ability and opportunity to control has come a duty to exercise this control over one's child; and a breach of this duty can result in liability.

The final acceptance of a policy establishing parental liability requires the resolution of numerous issues. Three questions are foremost among these: 1) When should this duty arise? 2) What will constitute a breach of this duty? and 3) What should the legal consequences be for a breach?

Focusing on the law in Florida, this note will discuss these and other related questions and will offer resolutions to the dilemma presented. An examination of the family's role in the causes of juvenile delinquency will exemplify the need for this parental duty. Moreover, a survey of existing case law and legislation will demonstrate how Florida and other jurisdictions have dealt with this sensitive issue. With specific attention given to a case presently certified to the Florida Supreme Court, this note will present alternatives for clarification and modification of existing law.

II. Juvenile Delinquency - The Family's Role

Although legal use of the term was not established until 1899, juvenile delinquency has plagued civilization throughout history.
Studies have attempted to determine the causes of and solutions to this problem; with sociologists, psychologists, theorists and commentators all submitting opinions as to the causes of the maladjusted child. Summarizing these philosophies, one commentator noted that "widely accepted theories of causation fall into . . . [five] basic categories: (1) personality factors (including biological, psychological, character and behavior); (2) companions and peer group influence; (3) economic, cultural and environmental conditions; (4) . . . home and family conditions . . . [and] (5) opportunity as evoked by the victim himself. . . ."

As a primary source for the inculcation of one's morals and values, the family has perhaps the greatest influence on the development of a 'good' or 'bad' child. The mixture of affection and discipline received in the home has a great effect on a child's ability to deal with authority. Studies reflect the fact that children from homes in which parents are consistent and fair in their means of discipline are less likely to become delinquents; whereas homes in which parents are inconsistent or use extreme measures of corporal punishment are subject to a greater risk of turning out a recalcitrant, unbalanced and often delinquent child.

This risk intensifies when there is a lack of affection present in the home combined with an aura of parental apathy and acquiescence. The cumulative effect of these elements is crucial as "[r]ejected or neglected children who do not find love and affection, as well as support and supervision, at home, often resort to groups outside the family; frequently these groups are of a deviant nature." While the state cannot mandate familial love and harmony, arguably these studies evidence a need to encourage, if not demand, parents to act responsibly in raising

13. See President's Commission Report, supra note 5, at 188-221; R. Trojanowicz & M. Morash, supra note 9 at 38-132.
15. President's Commission Report, supra note 5, at 199.
16. Corporal Punishment is defined as "physical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body." Black's Law Dictionary 306 (5th ed. 1979).
17. See H. Sandhu, supra note 1 at 53.
18. Id. at 53, 54.
19. R. Trojanowicz & M. Morash, supra note 9 at 90.
their children.

III. Snow v. Nelson: A Question is Raised

Randall Snow was seriously injured while playing a game with Mark Nelson. The game, which Mark had invented, was played in the street and required "the use of two croquet mallets, two tennis balls and 'speed.'" With each player continuously hitting his ball down the street, racing toward a pre-designated target, the younger and faster Randall gained the lead. In an effort to catch up, Mark took a "'fast swing' . . . [despite the fact] that he saw 'a person' the whole time . . . ." Mark's errant swing struck Randall in the eye causing the loss of his eye, as well as the permanent loss of his senses of taste and smell.

Randall's parents sued Mark's parents for negligent supervision of their son. At trial, evidence indicated that Mark had a history of playing roughly with other children. Testimony of Mark's neighbors and playmates revealed that he was "a bully," that he "push[ed] . . . kids together . . . to make them fight," and that he "hit little kids because 'they did not listen to him.'" Other neighbors, including Randall's father, testified "that they had never complained to Mark's parents . . . [about] Mark's activities." Apparently, Mark's father did have some prior notice of Mark's aggressive behavior, although through testimony he characterized this notice as "normal kids tattling type things . . . [such as] 'Mark's playing too rough,' or one of the

22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. at 2, 3.
28. Id. at 3.
29. Id.
30. Id.
31. Id.
33. Id. at 1.
other kids are [sic] playing too rough..."\textsuperscript{34}

The trial judge granted a directed verdict in favor of Mark's parents, the Nelsons, finding them totally free from negligence as a matter of law.\textsuperscript{35} The Snows appealed that decision to the Third District Court of Appeal of Florida, which reluctantly affirmed the trial judge's decision.\textsuperscript{36} Although the court of appeal appeared sympathetic with the Snow's circumstances, it was bound by prior case law.\textsuperscript{37} The Supreme Court of Florida had ruled on this issue in 1955\textsuperscript{38} in the case of \textit{Gissen v. Goodwill}.\textsuperscript{39} That decision established very narrow requirements\textsuperscript{40} for the finding of parental negligence, and the Snows did not fall within those requirements.

The Third District Court of Appeal, in a strongly worded \textit{Snow} opinion, urged a modification of these rules, leaving no doubt that \textit{Gissen} was the only barrier between an affirmance and a reversal of the trial court's directed verdict.\textsuperscript{41} Finding an issue of great public impor-
tance, the district court of appeal certified the following question to the Supreme Court of Florida: "To what extent and in what manner may parents be held legally responsible for injuries inflicted by their minor children upon third parties?"\(^{42}\)

Under the Florida Rules of Appellate Procedure, the state Supreme Court is not compelled to answer a certified question from a district court of appeal. A query of this type falls within the Supreme Court’s discretionary jurisdiction.\(^{43}\) In *Snow v. Nelson*, however, the Florida Supreme Court has granted certiorari, scheduling oral argument for early 1985.

## IV. Judicial Expansion of the Common Law Standard

### A. Florida

The necessity of the *Snow* certified question is a product of the confusion arising out of *Gissen v. Goodwill*.\(^{44}\) Involving the claim of a Miami Beach hotel employee against the parents of a child-tortfeasor, *Gissen* established specific criteria in Florida for the determination of parental liability.\(^{45}\) The Supreme Court of Florida delineated these standards as follows:

> It is basic and established law that a parent is not liable for the tort of his minor child because of the mere fact of his paternity. However, there are certain broadly defined exceptions wherein a parent may incur liability: 1. Where he intrusts his child with an

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\(^{42}\) *Id.* at 275 (emphasis supplied).
\(^{44}\) 80 So. 2d at 701.
\(^{45}\) *Id.* at 703.
instrumentality which because of the lack of age, judgment, or experience of the child, may become a source of danger to others. 2. Where a child, in the commission of a tortious act, is occupying the relationship of a servant or agent of its parents. 3. Where the parent knows of his child's wrongdoing and consents to it, directs or sanctions it. 4. Where he fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence.46

Mr. Julius Gissen, the plaintiff, asserted in his complaint that eight-year-old Geraldine Goodwill and her parents were "business invitees"47 at a Miami Beach hotel where Gissen was employed when the claimed tort took place.48 His complaint further alleged that Geraldine was a constant source of turmoil for the hotel's guests and employees,49 and that these tantrums continued without any attempts by her parents to exercise restraint.50 This conduct culminated in Mr. Gissen’s injury when Geraldine slammed a hotel door, violently severing a portion of a finger from his hand.51 Alleging parental negligence in the "exercise of needful parental influence and authority," Mr. Gissen sued Geraldine's parents, claiming that their acquiescence was, in effect, a "sanctioning, ratification, and consenting to the wrongful act . . . [thus causing] injury to another . . . [to be] a probable consequence. . . ."52

The Gissen court looked to the language of section 316 of the second Restatement of Torts53 and to prior decisions from seven other jurisdictions54 for guidance in its ruling. From these cases, the court

46. Id.
47. Id. at 702.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. RESTATEMENT (SECOND) OF TORTS § 316 (1965) states:
A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
(a) knows or has reason to know that he has the ability to control his child, and
(b) knows or should know of the necessity and opportunity for exercising such control.
54. See Bateman v. Crim, 34 A.2d 257 (D.C. 1943) (affirmed directed verdict in
found “[o]ne common factor . . . [to be] salient in the assessment of liability to the parents, . . . [this being] that the child had the habit of doing the particular type of wrongful act which resulted in the injury complained of.”  

This holding, creating what has since been referred to as the “particular acts rule,” precluded Julius Gissen from obtaining compensation for his injury. The Florida Supreme Court entered judgment against him because he had not claimed that Geraldine “had a propensity to swing or slam doors at the hazard of persons using such doors.”

In the absence of an assertion of such particular acts, his petition failed to allege actionable negligence.

At first blush, this holding appeared to logically follow from the rule which the court set down. A discrepancy, however, surfaced when the opinion apparently contradicted this particular act requirement with the subsequent declaration that “a wrongful act by an infant which climaxes a course of conduct involving similar acts may lead to favor of defendants as there was no evidence to indicate that boys who injured plaintiff while playing football in street “had previously played with a football on the public streets or had conducted . . . [themselves] in other than an orderly manner.”  

Id. at 258.; Steinberg v. Cauchois, 249 A.D. 518, 293 N.Y.S. 147 (N.Y. App. Div. 1937) (parents were not liable as evidence was not sufficient to show that they had notice that child who hit plaintiff with bicycle on sidewalk was accustomed to riding on sidewalk); Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944) (parents who had been notified of their child’s “habit of mauling, pummeling, assaulting and mistreating smaller children,” were negligent in failing to exercise reasonable care so to control . . . [him and] prevent him from intentionally . . . [assaulting the plaintiff’s child and throwing him] down a steep and precipitous embankment.”  

Id. at 351, 39 A.2d at 52.; Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929) (child with “habit of striking smaller children in the face with sticks . . . struck [plaintiffs’ child] in the eyeball with a stick . . . and parents encouraged her in her habit.”  

Id. at 241, 281 P. at 991); Martin v. Barrett, 120 Cal. App. 2d 625, 261 P.2d 551 (1953) (see infra notes 102, 103 and accompanying text); Ellis v. D’Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (“‘parents negligently . . . failed to warn . . . [babysitter of their] child’s . . . [habit of] ‘violently attacking and throwing himself forcibly . . . against other people’ . . . and shortly after plaintiff entered . . . [their] home the child attacked her to her resultant injury.”  

Id. at 317, 261 P.2d at 679.; Ryle v. Lafferty, 45 F.2d 641 (D. Idaho 1930) (child with “habit of persuading and inveigling smaller boys into secluded places . . . and of beating, bruising, maiming, and punishing [them] . . . persuaded and inveigled the plaintiff . . . to go with him to a secluded place . . . and . . . beat . . . him . . . [Defendant P]arents had knowledge of . . . [this habit] and had failed to take steps to restrain him from continuing. . . .”  

Id. at 641-643).

55. Gissen, 80 So. 2d at 705.
56. See, e.g., Snow, 450 So. 2d at 274 (emphasis supplied).
57. Gissen, 80 So. 2d at 705.
the parents' accountability.”58 A question arises as to the specific effect of this additional “similar acts” language: Whether the decision actually established a “particular acts rule” or a “similar acts rule” for the state of Florida. From the result in Gissen it would appear that a particular act rule is the standard.59 Arguably, Mr. Gissen's claim did demonstrate a course of conduct involving similar acts by Geraldine Goodwill.60 However, that showing was insufficient for the court to impose liability.61

At least one Florida district court of appeal has followed the narrow interpretation of the Gissen standard. In the 1972 case, Spector v. Neer,62 the Third District Court of Appeal held that the plaintiffs failed to establish negligence on the part of the parent/defendants63 because the plaintiffs did not allege that the defendant's child “had a habit of doing the particular type of wrongful act which resulted in the injuries. . . .”64 A review of other case law, however, indicates that Gissen has been subject to various interpretations.65 In Seabrook v. Taylor,66 for example, the Fourth District Court of Appeal stated:

58. Id. (emphasis supplied).

59. The Third District Court of Appeal in Snow was convinced of this fact, Judge Jorgenson emphatically stating:

[W]e feel that as the rule was applied to the facts in Gissen even fact patterns where the injury should reasonably have been foreseen to flow, under the similar acts rule, as a natural and probable consequence from the child's course of conduct involving similar acts would be insufficient to survive a legal preclusion of submission to the factfinder. If the facts in Gissen were not sufficient for a determination that the child's course of behavior would naturally and probably result in injury, what facts could be?

Snow, 450 So. 2d at 274.

60. Mr. Gissen's complaint alleged that prior to the door slamming incident, Geraldine Goodwill "committed . . . [other acts] about the hotel premises, such as striking, knocking down and damaging objects of furniture . . . disturbing and harassing the guests and employees . . . [as well as] striking . . . [them] so that . . . [her] persistent course of conduct would as a probable consequence result in injury to another." Gissen, 80 So. 2d at 702.

61. Id. at 705-706.


63. Id. at 690.

64. Id.

65. The Snow court made this assertion in harsher terms. See infra, text accompanying note 76.

66. 199 So. 2d 315, (Fla. 4th Dist. Ct. App.), cert. denied mem., 204 So. 2d 331 (Fla. 1967).
The latter part of this language was subsequently cited with approval in *Southern American Fire Insurance Co. v. Maxwell*\(^{68}\), a case falling within the dangerous instrumentality exception\(^{69}\) asserted in *Gissen*. Also coming within this exception was *Bullock v. Armstrong*\(^{70}\), where the Second District Court of Appeal looked to the states of Georgia\(^{71}\) and North Carolina\(^{72}\) for guidance. From these states *Bullock* quoted case law which effectively held that parental liability is to be determined by "the ordinary rules of negligence and not upon the relation of parent and child."\(^ {73}\)

While these Florida cases do not expressly disaffirm the holding in *Gissen*\(^ {74}\), the Third District's opinion in *Snow v. Nelson*\(^ {75}\) stated the following:

Implicit in these holdings is a rejection of the rule expressed in *Gissen*, both in its broader, similar acts, and narrower particular acts, senses and an adaptation of what we here characterize as the reasonable care in the circumstances rule: a determination based upon the unique facts of each case and an application of the lan-

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\(^{67}\) Id. at 317.

\(^{68}\) 274 So. 2d 579 (Fla. 3d Dist. Ct. App.), cert. dismissed mem., 279 So. 2d 32 (Fla. 1973) ("trial judge was correct in submitting . . . case to the jury to conclude whether or not . . . [defendants] failed to exercise the . . . parental duty to ascertain if the[ir five year old] child was competent to control [a] bicycle without supervision." Id. at 581.)

\(^{69}\) See the exceptions enumerated in *Gissen*, supra text accompanying notes 45, 46.

\(^{70}\) 180 So. 2d 479 (Fla. 2d Dist. Ct. App. 1965) (the negligence of a "parent entrusting a [five year old] child . . . with a stroller, with instructions to push it in a crowded department store without supervision [was] . . . a jury question rather than one of law . . ." Id. at 481.)


\(^{73}\) *Bullock*, 180 So. 2d at 481 (quoting *Langford*, 258 N.C. at 139, 128 S.E.2d at 213.

\(^{74}\) 80 So. 2d at 701.

\(^{75}\) 450 So. 2d at 269.
guage of [section 316 of] the Restatement [(Second) of Torts].

It is apparent that confusion does exist within the state of Florida as to not only what the standard is, but also what it should be. A survey of the laws of other jurisdictions will be helpful in achieving an objective resolution of these controversies.

B. The Law in Other Jurisdictions

Most courts recognize, as a general rule, the common law caveat that parents cannot be held liable for their children's acts simply because of the parent-child relationship. In fact, any such vicarious liability, imposed as an exception to the general rule, occurs only when provided by statutes, which allow limited monetary damages, or when the family relationship is not a determining factor. For example, when the parent and the child maintain a master/servant relationship, the laws of agency and respondeat superior govern their acts and the parent/master will be vicariously liable for the child/servant's torts.

Parental liability, in most cases, is based on the parent's own negligent conduct which has caused or at least allowed the child's wrongful acts to occur. Parental liability is, therefore, direct rather than vicari-

76. *Id.* at 274.
77. *See supra* note 4.
78. Vicarious liability is defined as "[i]ndirect legal responsibility; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent." BLACK'S LAW DICTIONARY, 1404 (5th ed. 1979).
79. *See infra* note 115.
80. As defined in the Restatement of Agency:
   (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
   (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
   RESTATEMENT (SECOND) OF AGENCY § 2 (1958).
81. An agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* at § 1.
82. *Respondeat superior* is a maxim meaning "that a master is liable in certain cases for the wrongful acts of his servant. [This d]octrine applies only when relation of master and servant existed between defendant and wrongdoer at time of injury sued for, in respect to very transaction from which it arose." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979). (citation omitted).
ous. For example, parents have been held responsible for damage which results from the accessibility or entrustment of dangerous instrumentalities to their children. These devices are either inherently dangerous, or they become so due to the young age or lack of experience of the child. The parental indiscretion in making these instruments available to the child is the basis for liability in these cases. In fact some jurisdictions impose a duty on parents to be aware of their child's inability to use certain instruments responsibly. Direct liability is also levied on parents who consent to, ratify or direct the delin-

83. See supra note 78.
84. See, e.g., Seabrook, 199 So. 2d at 315 (parents who kept loaded pistol in unlocked place were not negligent as a matter of law as case was properly submitted to jury). But see Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (intentional shooting of plaintiff's son by defendant's son was an independent criminal act intervening between the defendant's negligence and the injury and thus could not have been foreseen by the defendant).
85. See Gissen, 80 So. 2d at 703. The Second Restatement of Torts describes under what circumstance a person is liable for negligent entrustment:
One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. RESTATEMENT (SECOND) OF TORTS § 390 (1965).
See also W. Prosser & W. Keeton, supra note 2, at 914; Comment, Liability of Negligent Parents for the Torts of their Minor Children, 19 ALA. L. REV. 123 (1966).
86. An inherently dangerous object is defined as one "which has in itself the potential for causing harm or destruction, against which precautions must be taken. Dangerous per se, without requiring human intervention to produce harmful effects; e.g., explosives." BLACK'S LAW DICTIONARY 703 (5th ed. 1979).
87. See infra note 91; see also Southern American Fire Insurance Co. v. Maxwell, 274 So. 2d 579 (Fla. 3d Dist. Ct. App. 1973); Gudzewski v. Stemplesky, 263 Mass. 103, 106, 160 N.E. 334, 335 (1928) (question of defendant's son being fit to possess and use an air gun was for the jury); Wilbanks v. Brazil, 425 So. 2d 1123 (Ala. 1983) (mother was not liable for entrusting golf clubs to eight year old son. "If it is found to be negligent to entrust golf clubs to an ordinary eight-year-old, then parents would have to keep the golf clubs and similar sports equipment. . . under lock and key and never allow a child to play with them except when he or she is under some sort of expert supervision." Id. at 1125; Thibodeau v. Cheff, 24 Ont. L.R. 214 (Div. Ct. 1911) (child with habit of lighting matches destroyed plaintiff's property—father liable for failure to control upon notice).
88. See supra note 87.
89. See, e.g., Ryle v. Lafferty, 45 F.2d 641, 642 (D. Idaho 1930); Gissen v. Goodwill, 80 So. 2d at 703; Langford v. Shu, 258 N.C. 135, 139, 128 S.E.2d 210, 212;
quent acts of their minor children.

This note focuses upon the most controversial type of direct parental liability: Parental negligence for the failure to control one’s child. Such negligence stems from the parental duty to exercise restraint and control over the child. Recognizing this “guiding role of parents in the upbringing of their children” the Supreme Court of the United States declared:

[D]eeply rooted in our Nation’s history and tradition, is the belief that the parental role implies a substantial measure of authority over one’s children. Indeed, ‘constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.’

Thus, it is clearly established that parents must exercise some degree of control over the conduct of their children. However, questions still exist as to when this duty should be imposed and how its breach should be treated. Arguably, the best method for determining these questions is to apply the same test necessary to establish a prima facie case in any other negligence action, i.e. a failure to exercise reasonable care

W. Prosser & W. Keeton, supra note 2, at 914.

90. See, e.g., Ryle, 45 F.2d at 642; Gissen, 80 So. 2d at 703; Hulsey v. Hightower, 44 Ga. App. 455, 458, 161 S.E. 664, 666 (1931); W. Prosser & W. Keeton, supra note 2, at 914.

91. See, e.g., Gissen, 80 So. 2d at 703; Seabrook, 199 So. 2d at 317; Ryle, 45 F.2d at 642; W. Prosser & W. Keeton, supra note 2, at 914.

92. When imposed, this duty is based on the parents’ opportunity and ability to control the child, as was stated by the Supreme Court of Arkansas in Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961):

[H]ere we are not concerned with the negligence of a child but with the negligence of the parent in permitting, either actively or passively, a minor willfully or negligently to commit such acts which could reasonably be expected to cause injury to another. It is within reason and good logic to say that the parent has a responsibility to control minor children while they are in their formative years. For while they are not in the custody of the parents, absent any official action to the contrary, no other source of control may be found.

Id. at 99, 350 S.W.2d at 524. See also W. Prosser & W. Keeton, supra note 2, at 914.


94. Id. at 638.

95. See, e.g., Lane v. Chatham, 251 N.C. 400, 402, 111 S.E.2d 598, 601 (1959); Hulsey v. Hightower, 44 Ga. App. 455, 460, 161 S.E. 664, 667 (1931); Langford v.
under the circumstances.96 This seems to be the true essence of the language which is found in section 316 of the second Restatement of Torts. Moreover, it is also the standard applied in the Florida cases of Seabrook v. Taylor,97 Bullock v. Armstrong98 and Southern American Fire Insurance Co. v. Maxwell99 and advocated by the Third District Court of Appeal in Snow v. Nelson.100

As an alternative to this general negligence approach, some courts require specific criteria to be present before this parental duty arises and its breach occurs. The most restrictive of these alternatives is found in states which hold parents liable only if their child has had a propensity or habit to commit the same exact wrongful act as that being alleged.101 The narrower, particular act interpretation of Gissen would bring Florida within this category of states.

In Martin v. Barrett102 a California district court of appeal established such a rule by affirming the dismissal of a complaint against the parents of a twelve-year-old boy who shot the plaintiff's child in the eye with an air rifle. The court found that the defendant/father was unaware of any prior misuse of the gun or that his boy was using it on the occasion of the injury. Although the boy's mother was aware of the gun's use on this occasion, she had no previous notice of any prior misuse of the gun by her son.103 In Bieker v. Owens104 the Arkansas Supreme Court found that the defendants had knowledge of their two sons' habits of "striking, beating and abusing other younger men less physically endowed than themselves. . . ."105 Despite this knowledge the parents took no action to correct this behavior. Thus, the parents

96. See supra note 53.
97. See supra notes 66-67 and accompanying text.
98. See supra notes 70-73 and accompanying text.
99. 274 So. 2d at 581; see supra note 68.
100. See supra text accompanying note 76.
103. Id. at 628, 261 P.2d at 553.
104. 234 Ark. 97, 350 S.W.2d 522 (1961).
105. Id. at 98, 350 S.W.2d at 523.
were held liable for the injuries when their sons dragged the plaintiff from a car and severely beat him. In *Caldwell v. Zaher*\(^{106}\) the Supreme Court of Massachusetts found that a cause of action was stated against the parents of a child with a "tendency and propensity toward assaulting, accosting, tormenting, and molesting young children."\(^{107}\) This cause of action was predicated on the fact that they had received notice of this conduct.\(^{108}\)

The general negligence approach to the resolution of this issue is a fairly broad means of determining liability while the particular acts approach, on the other hand, is highly restrictive, with liability imposed in a very limited scenario. A compromise or middle ground can be found between these two extremes in the 'similar acts' or 'course of conduct' approach. This latter method, employing features of the other two,\(^{109}\) is the less restrictive interpretation of the standard set down in *Gissen*.

While these various applications of parental negligence contain different degrees of notice requirements, it seems that the failure to attempt some type of restraint over the child is fundamental to the finding of liability under each theory. This is reflected in cases in which the plaintiff has failed to establish this point.\(^{110}\) In *Ross v. Souter*,\(^{111}\)

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107. *Id.* at 591, 183 N.E.2d at 706.
108. *Id.* at 591, 183 N.E.2d at 706-07; cf. Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598 (1959) (mother with prior knowledge of son's misuse of air rifle found liable, while father with no such knowledge was not liable).
109. See, e.g., Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982). In this case the Supreme Court of North Carolina declared:

Before it may be found that a parent knew or should have known of the necessity for exercising control over the child, it must be shown that the parent knew or in the exercise of due care should have known of the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences. This does not mean that the particular injury occurring must have been foreseeable, but merely that consequences of a generally injurious nature might have been expected.

*Id.* at 624, 295 S.E.2d at 440. (citations omitted).
110. See, e.g., Horton v. Reaves, 186 Colo. 149, 526 P.2d 304 (1974). In that case plaintiff's infant was severely injured when assaulted by the defendant's two children. Testimony indicated that the defendant/mother had "reprimanded her children for . . . previous assault-like behavior." The Supreme Court of Colorado found this "testimony [to] indicate . . . that [the mother] . . . exercised due care in watching over [her sons] . . . ." Thus the Court of Appeals decision that the "issue of . . . [defendant/mother's] negligence should not have been submitted to the jury . . ." was
for example, evidence indicated that the parents of a minor tortfeasor had knowledge of their child’s “disposition to engage in fights and injure other children.” However, the plaintiff’s case did not demonstrate a failure to act by the defendants. In fact a school principal testified that the defendant/mother had reprimended her son in the school office. Thus, New Mexico’s Court of Appeals, in *Ross*, held that the defendants were not responsible for the injuries sustained by the plaintiff’s child.

While these various theories hold parents directly liable for their own negligence, modern tort law has seen a movement among American states to hold parents vicariously liable, at least to a limited extent, for some torts committed by their minor children.

V. Statutory Vicarious Liability

As previously indicated, common law did not allow the imputation of parental liability from the mere existence of the parent/child relationship. Today, however, every American state has statutorily im-

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<th>MAX RECOV.</th>
<th>PI COV?</th>
<th>AGE LIMITS</th>
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posed some type of vicarious liability upon parents for their children's acts. Legislatures give consideration to numerous issues when composing these statutes. For example, twenty of the fifty states permit redress for property damage only, while the remainder redress personal injury as well.  

Age of the tortfeasor is often a consideration, with some states establishing a minimum age and all setting a maximum. Other criteria for recovery include a requirement in most states that the child's actions be willful, wanton or malicious.  

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<tr>
<th>State</th>
<th>Age Limit</th>
<th>State of Mind</th>
<th>Max Recov.</th>
<th>PI Cov?</th>
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**MAX RECOV.** = Maximum amount recoverable from tortfeasor's parent(s).  
**PI COV?** = Personal Injury Covered by statute.  
**AGE LIMITS** = Limits on age of tortfeasor.  
**STATE OF MIND** = Tortfeasor's state of mind at time tort was committed. 

M = Malicious; W = Willful; Unlaw = Unlawful; Int = Intentional; R = Reckless; Pur = Purposeful; Crim = Criminal; Del = Delinquent; T = Tortious; * = Statute does not refer to state of mind.

116. See table of statutes in note 115.  
117. *Id.*  
118. *Id.*
Florida enacted a Parental Liability Statute in 1965.\textsuperscript{119} In its current form it provides victims with recovery of "actual damages . . . not to exceed $2,500."\textsuperscript{120} This is characteristic of all such statutes which usually reward the victim a limited sum, no matter how great his or her loss.\textsuperscript{121} These limits are fairly low, ranging from $250 to $15,000, depending on the jurisdiction.\textsuperscript{122} The imposed cap on these rewards indicates that the legislative intent of such statutes is to punish parents and discourage juvenile delinquency, while compensation of victims seems to be a secondary consideration.\textsuperscript{123}

If the legislative goal in enacting these laws is indeed the prevention of juvenile delinquency through parental responsibility, one commentator suggests that a barrier might exist to the fulfillment of this objective.

An underlying assumption of the legislation is that parents, indif-
different to the current activities of their children, have a sufficient interest in the law to be familiar with the limitations of the existing rules concerning their liability for consequences of those activities. It is further assumed that those indifferent parents, informed of the change made by the legislature, will undertake their responsibilities of instruction and supervision of their children.124

While this may often be the case, it is submitted that the parent who is penalized for his or her child's activities will have no choice but to take notice of such laws and act accordingly. With this threat, perhaps the parent will begin to undertake these responsibilities in a more serious manner.

These statutes have been the subject of other types of criticism as well.125 For example, it has been contended that many states have passed laws which are inherently vague.126 The main assertion is that statutes which purport to apply to "parents" do not specify as to the scope of this word. In Florida this question was raised in Wyatt v. McMullen127 with the First District Court of Appeal holding that "[t]here is no difference, so far as common law tort liability is concerned, between one in loco parentis128 and a natural parent."129

In a number of cases these statutes have been challenged as unconstitutional.130 However, in only one instance has a statute been ad-

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126. Note, supra note 121 at 1044.
128. One who is in loco parentis is said to be "[i]n the place of a parent; charged, factitiously, with a parent's rights, duties and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).
129. Wyatt, 350 So. 2d at 1117.
judicated as such. In Corley v. Lewless, the Georgia Supreme Court held the Georgia parental liability statute void because the statute violated both state and Federal due process requirements. However, the Georgia statute was distinguishable from other state statutes because Georgia's contained no limits on recovery. It sought to provide full redress for both personal injury and property damage. Since the 1971 Corley ruling, the Georgia General Assembly has adopted a new statute, omitting the defects which plagued its predecessor. This new legislation expressly states an intention to control delinquency as it places a limit on parental liability. In 1982 this new statute withstood a constitutional challenge in Hayward v. Ramick. The Georgia Supreme Court declared:

We hold that this statute, intended to aid in reducing juvenile delinquency by imposing liability upon parents who control minors is neither unreasonable, arbitrary nor capricious. We further hold that the state has a legitimate interest in the subject (controlling juvenile delinquency), and that there is a rational relationship between the means used (imposing liability upon parents of children who wilfully or maliciously damage property) and this object.

This language was quoted with approval in Stang v. Waller, the Fourth District Court of Appeal of Florida ruling "that the better view [of Florida's Parental Liability Statute] supports constitutionality. . . ."

Other challenges to statutory constitutionality have been unsuccessful. In General Insurance Company of America v. Faulkner, for example, the Supreme Court of North Carolina held that these statutes


132. Id. at 751, 182 S.E.2d at 770.
133. Id. at 749-750, 182 S.E.2d at 769-770.
137. 248 Ga. at 841, 285 S.E.2d at 697.
138. Id. at 843, 285 S.E.2d at 699.
139. 415 So. 2d 123, 124 (Fla. 4th Dist. Ct. App. 1982).
140. Id.
141. 259 N.C. at 317, 130 S.E.2d at 645.
fall within the state's police power. A unique assertion of unconstitutionality was made in the case of *Watson v. Gradzik* in 1977 when the defendant parents of a child tortfeasor claimed that Connecticut's parental liability statute "interfered with the fundamental right to bear and raise children." The court found the challenged statute to be constitutional, stating that:

[We] cannot accept the defendant's premise that the fundamental right to bear and raise children has been interfered with merely because a parent is held responsible for his child's torts. With the right to bear and raise children comes the responsibility to see that one's children are properly raised so that the rights of other people are protected.

While beyond the scope of this note, it bears mentioning that the Civil law jurisdictions of Louisiana and Hawaii have statutory laws which are unhampered by common law principals. These statutes hold parents strictly liable, with certain exceptions, for their child's wrongs. In these states, such liability is based solely on the familial relationship.

VI. Proposed Direction for Parental Liability in Florida

*Snow v. Nelson* provides Florida's Supreme Court with the opportunity to take another look at the issue of parental liability for the acts of minor children, specifically in the area of negligent parental supervision. The 1955 decision in *Gissen v. Goodwill* created confusion in this area of Florida tort law. As the Third District Court of Appeal said of *Gissen* in *Snow*, "the Supreme Court's holding in *Gissen*, purporting to adopt the similar acts rule, . . . instead creat[ed] a 'particular acts' rule." The Snows, in their Petitioner's brief to
Florida's Supreme Court have emphatically asserted that "[t]here exists in this state no 'particular acts' rule!"\textsuperscript{150} The Nelsons, on the other hand, stated in their brief to the District Court of Appeal that "[a]bsent the specific type of notice that is set out in \textit{Gissen}, no liability can be found as a matter of law."\textsuperscript{151} The Third District Court of Appeal examined the various alternatives and stated that the "broader rule, . . . a requirement of reasonable care in the circumstances, short of some form of vicarious liability, is the better rule."\textsuperscript{152} This is similar to the position advocated by the \textit{Snow} petitioner.

It is submitted that the particular acts rule, if it indeed exists, should be modified. Currently, under this type of law the parents of a chronic but creative delinquent can dodge serious liability with a total disregard for their parental duties.\textsuperscript{153} It is inconsistent with the tort principle of accountability that the parental duty to exercise restraint and control arises only upon notice of a child's habitual performance of a single wrongful act. For that matter, a requirement that the child's actions constitute a course of conduct containing 'similar acts' is not without its problems either. How many acts make up a course of conduct? Three? Ten?

Arguably, the better rule would allow the jury to consider the seriousness of the child's previous act or acts to determine the need, in each situation, for parental action. As previously submitted, the underlying question is: When does this parental duty to exercise control arise? It appears that the Florida Supreme Court has already answered this question in the general negligence case \textit{Stevens v. Jefferson},\textsuperscript{154} by stating, "[t]he extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others."\textsuperscript{155}

\textsuperscript{150}. Brief for Petitioner at 21, Snow v. Nelson, No. 65,391 (Fla. filed June 4, 1984) (emphasis in original).
\textsuperscript{151}. Brief for Appellee at 10, Snow v. Nelson, 450 So. 2d 269 (Fla. 3d Dist. Ct. App. 1984).
\textsuperscript{152}. \textit{Snow}, 450 So. 2d at 272-73.
\textsuperscript{154}. 436 So. 2d 33 (Fla. 1983).
\textsuperscript{155}. \textit{Id.} at 35, (quoting with approval Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th Dist. Ct. App. 1981)). The full summary of state negligence law was stated as follows:

An action for negligence is predicated upon the existence of a legal duty
Thus, the parents of a child who maliciously beats another child on one occasion might have a greater duty to reprimand him than the parents of a child who has played roughly on a few occasions. This general negligence approach would allow each case to be examined on its merits, with the ultimate determination of negligence being made by the jury. Logically, the requirements for parental negligence should be commensurate with the requirements of any other negligence action. Upon receiving notice of their child's scurrilous disposition, parents are to protect the world at large by deterring continuance of this activity. The extent of this duty will depend on the severity of the child's misdeeds and the probability that others will be harmed if such actions continue. With this duty the parent should at least make an effort to exercise restraint over the child. It is the parents' failure to act which is the basis for liability. Parents who try but fail to control their child's conduct should not be accountable for this failure. However, those parents who merely acquiesce to the actions of their mischievous offspring effectively sanction the resulting consequences.

Considering the unique procedural posture in Snow, the first issue in resolving this case under a general negligence approach should be whether the notice received by Mark Nelson's parents was of such a nature that it imposed on them the duty to reprimand their son. If in fact they were told only that "Mark plays too rough," the sufficiency of this notice is questionable. The threshold question is whether Mark's prior conduct, as conveyed to his parents, was severe enough to warrant his reprimand. To determine this severity, the necessary inquiry is whether his 'rough play' would expose others to an unreasonable risk of harm. If so, was the type of harm suffered by Randall Snow "within

owed by the defendant to protect the plaintiff from an unreasonable risk of harm. The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others. In order to prevail in a lawsuit, the plaintiff must demonstrate that he is within the zone of risks that are reasonably foreseeable by the defendant. The liability of the tortfeasor does not depend upon whether his negligent acts were the direct cause of the plaintiff's injuries, as long as the injuries incurred were the reasonably foreseeable consequences of the tortfeasor's conduct. If the harm is within the scope of danger created by the defendant's conduct, then such harm is a reasonably foreseeable consequence of the negligence. The question of foreseeability and whether an intervening cause is foreseeable is for the trier of fact.

Id. (citations omitted) (emphasis in original).

156. See supra note 35.
157. See supra text accompanying note 34.
the zone of risks . . . reasonably foreseeable by [Mr. and Mrs. Nelson]?

Arguably, this foreseeability requirement has not been met in this case. It appears that the Snows have attempted to show that Mark's previous actions constituted a pattern such that a subsequent incident and injury was a foreseeable consequence of his prior conduct. A close examination of this pattern reveals that all prior alleged conduct was intentional. It is submitted that Mark Nelson's behavior which resulted in Randall's injury, amounted to negligence. The Snows have not contended that Mark willfully, maliciously or intentionally struck Randall with the croquet mallet.

A distinction should be made between injuries which a minor inflicts intentionally versus those inflicted negligently. While plausible, it does not seem likely that a child's negligent conduct becomes reasonably foreseeable upon notice that he has committed prior wrongful acts which were intentional. Of course, these are considerations which go towards proximate cause and foreseeability, and as such they are questions for the trier of fact. The Snow trial judge granted a directed verdict in favor of the Nelsons, but still allowed the jury to reach a verdict for judicial economy. In that jury's determination, Mark Nelson's parents were negligent in the supervision of their son.

VII. Conclusion

While minors inflict large amounts of damage, they rarely compensate their victims. The common law rules which disallowed vicarious liability from being imputed on parents have been relaxed to allow such liability on more occasions. In fact, every American state has passed a parental liability statute, holding parents vicariously liable, to a limited extent, for their children's torts. With a single exception, these statutes have withstood constitutional challenges. Some courts have held that these statutes promote valid public interests and are thus within the state's police power. Their provisions for limited recovery indicate that redress of the victim is not always the 'interest' being promoted. In fact some courts have acknowledged that these statutes are

158. See note 155 for full summary of state negligence law.
159. See supra text accompanying notes 29-31.
160. See supra note 35.
161. See supra note 35.
162. See supra note 35.
163. See table of statutes in note 115.
164. See supra notes 130-45 and accompanying text.
more punitive in nature than they are compensatory.\textsuperscript{165}

Florida’s statute, providing limited vicarious liability for property
damage, has been held constitutional.\textsuperscript{166} However, its common law
based counterpart, providing unlimited liability for negligent parental
supervision, has been characterized by an intermediate state appellate
court as “harsh doctrine from a distant and dissimilar era.”\textsuperscript{167} Thus,
the Supreme Court of Florida has an opportunity to give new consider-
ation to this sensitive issue. While faced with various alternatives, the
state should treat this type of negligence action as it does all negligence
actions. It is a parental duty to protect the world at large from unrea-
sonable risks of harm which become foreseeable upon notice of their
child’s wrongful conduct. The extent of this duty shall rise as the mag-
nitude of the threatened harm becomes more severe.

\textit{Robert Charles Levine}

\textsuperscript{165} See \textit{supra} note 123 and accompanying text.
\textsuperscript{166} See \textit{supra} note 139 and accompanying text.
\textsuperscript{167} See \textit{supra} note 41.
The Shrinking of the Fourth Amendment Umbrella:  
*Oliver v. United States*

I. Introduction

Recently the United States Supreme Court was called upon to determine the size of the fourth amendment umbrella. In *Oliver v. United States*, the Court was asked whether a search warrant was required, "for the search of a highly secluded field from which the public is excluded when a reasonable expectation of privacy can be shown to exist in that field." By granting the writ of certiorari, the Court agreed to settle a question which has plagued lower courts for over fifteen years. In order to understand the Supreme Court's decision in *Oliver*, this comment will begin with a cursory glance at the origin of the fourth amendment. The evolution of the "open fields" doctrine as developed in five landmark decisions: *Hester v. United States*, *Olmstead v. United States*, *Katz v. United States*, *Air Pollution Variance Board v. Western Alfalfa Corporation*, and *Marshall v. Barlow's Inc.* will be

3. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. *Hester v. United States*, 265 U.S. 57 (1924), is generally recognized as the case responsible for the creation of the "open fields" doctrine. The Court held "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. Therefore, if a search is conducted in an open field, the courts will not apply fourth amendment protection from unreasonable search and seizure and any evidence obtained as a result of this warrantless search will be admissible at trial.

5. *Id.*
reviewed. This comment will focus on the analysis employed, as well as that not employed, by the Court in Oliver. In conclusion, this comment will examine the Court's decision in light of the constant tension which exists between effective law enforcement and an individual's right to be free from governmental intrusion.

II. Origin of the Fourth Amendment

Just as American attention is currently focused on volatile issues such as protecting the environment, preventing the occurrence of a nuclear disaster, and reducing the national debt, so were there issues in the latter half of the eighteenth century which were of equal importance to the people of this country. One issue more compelling and immediate than any other in the eighteenth century was America's determination to be free from the dictates of the British Government.

One particularly loathsome practice of the British was the use of writs of assistance, a device considered to be a major cause of the American Revolution, and also credited with inspiring the Framers to include the fourth amendment in the Bill of Rights. The British, by utilizing a procedure known as a writ of assistance, were able to subject the colonists to search and seizures without first showing probable cause. The Framers, keenly aware of the abuses a government could subject its people to, constructed the fourth amendment with an aim to prevent the new American government from continuing the British practice of warrantless searches. As Justice Field explained in his discussion of the fourth amendment, it is essential to the peace of mind of every American citizen that he have confidence in his government to protect his right to keep his private affairs beyond the scrutiny of others.

11. Id. at 58-9.
13. In Boyd, the Court explained that writs of assistance "authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid; and to enter into and search any suspected vaults, cellars, or warehouses for such goods." Boyd, 116 U.S. at 623.
the decades which followed, the courts struggled to determine the bounds of fourth amendment protection from unreasonable search and seizures.\textsuperscript{16} Although that struggle began over 200 years ago, courts continue to wrestle with issues that require them to balance the demands of effective law enforcement against the preservation of personal liberties.

III. The Evolution of the “Open Fields” Doctrine

The open fields doctrine evolved as a result of one of the Supreme Court’s endeavors to determine the extent of fourth amendment protection. \textit{Hester v. United States}\textsuperscript{17} is the case generally recognized as the source of this doctrine. The open fields doctrine asserts that the fourth amendment does not protect activities which take place in the open fields, i.e. grasslands, ranges, cow pastures or woods.\textsuperscript{18}

In \textit{Hester}, revenue agents hiding on Hester’s father’s land, saw Hester hand a bottle to a man named Henderson.\textsuperscript{19} When a warning was given Hester took a gallon jug from a nearby car and he and Henderson ran.\textsuperscript{20} The officers followed and a pistol was fired.\textsuperscript{21} The jug carried by Hester was dropped and the one by Henderson discarded.\textsuperscript{22} The officers retrieved the discarded bottle and jug which had contained

\begin{quote}
Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.
\end{quote}

\textsuperscript{16} The continuous development in this area of the law is evidenced by the long evolution of the “exclusionary rule.” \textit{E.g.}, \textit{Weeks v. United States}, 232 U.S. 383 (1914) (origin of the exclusionary rule which held evidence seized in violation of a person’s fourth amendment rights can not be used against that person in federal court); \textit{Mapp v. Ohio}, 367 U.S. 643 (1961) (the Court determined the exclusionary rule applied to the states via the fourteenth amendment); \textit{United States v. Leon}, ___U.S.____, 104 S. Ct. 3405 (1984) (the Court held that the exclusionary rule does not bar the use of evidence obtained in reasonable reliance on a defective search warrant).

\textsuperscript{17} \textit{Hester}, 265 U.S. at 57.

\textsuperscript{18} An open field is defined as “any unoccupied or undeveloped area outside of the curtilage. An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.” \textit{Oliver}, ___ U.S. at ___, 104 S. Ct. at 1742, n.11.

\textsuperscript{19} \textit{Hester}, 265 U.S. at 58.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.}
illicitly distilled moonshine whisky. Since a warrant for search or arrest had not been obtained by the revenue officers, Hester claimed that the police violated his constitutional rights under the fourth amendment. Justice Holmes, in delivering the opinion of the Court, stated that "the special protection accorded by the fourth amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." The Court noted that even though the revenue officers had committed a technical trespass, the fourth amendment protection did not extend to the area referred to as the open field since Hester's own acts had disclosed the evidence. In essence, Hester stands for the proposition that government agents can trespass on property from which the public was not excluded during a warrantless search, and without violating the fourth amendment, could view that which was exposed to the public.

Three years later in Olmstead v. United States, the Supreme Court addressed the issue of whether the tapping of telephone wires by federal officers constituted an illegal search and seizure. The government submitted recorded conversations as evidence to prove the defendants had engaged in activities prohibited by the National Prohibition Act. A closely divided Court determined that there could not be a violation of a defendant's fourth amendment rights, "unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." The significant point of the Court's analysis is that certain areas are to be considered "constitutionally protected" and unless a search and seizure

23. Id.
24. Id. at 57-8.
25. Id. at 59.
26. Id. at 58.
29. The wire taps were not done on the property belonging to the defendants. Id. at 457.
30. Curtilage is a common-law term which describes buildings subject to burglary. See W. LaFave & A. Scott, Criminal Law 712-13 (1972). Curtilage is defined as "the inclosed space of ground and buildings immediately surrounding a dwellinghouse." Black's Law Dictionary 346 (5th ed. 1979).
31. Olmstead, 277 U.S. at 466.
took place within those specified areas, the fourth amendment could not be invoked.\textsuperscript{32} This decision made actual physical intrusion into the defendant's house or within the curtilage a prerequisite to a fourth amendment defense.\textsuperscript{33} For many decades, \textit{Olmstead}'s per se rule allowed law enforcement personnel to conduct arbitrary warrantless searches of the area beyond the curtilage. This locational approach to defining the reach of the fourth amendment became the subject of criticism\textsuperscript{34} and was eventually overruled in \textit{Katz v. United States}.\textsuperscript{35}

\textit{Katz} is credited with dramatically altering fourth amendment analysis employed in determining whether an illegal search and seizure took place. In \textit{Katz}, the defendant was convicted for transmitting illegal gambling information from a public phone booth.\textsuperscript{36} The government introduced evidence of these conversations, overheard by F.B.I. agents who had placed electronic listening and recording devices on the outside of a telephone booth.\textsuperscript{37} The Supreme Court held that Katz's fourth amendment rights had indeed been violated because the government had invaded an area in which Katz had a reasonable expectation of privacy.\textsuperscript{38} The Court rejected the locational approach to fourth amendment protection employed in \textit{Olmstead}.\textsuperscript{39} Instead, the Court determined that the focus of the application of fourth amendment protection centers on one's right of privacy.\textsuperscript{40} The Court held, that the "fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of fourth amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\textsuperscript{41}

The Court concluded that the common-law property concepts of

\begin{itemize}
\item \textsuperscript{32} Id. at 466.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} E.g., Silverman v. United States, 365 U.S. 505 (1961) (the Court held that conversations can be the subject of fourth amendment violations even without a technical trespass); Warden v. Hayden, 387 U.S. 294 (1967) (the Court refused to restrict the concept of unlawful search and seizures to the limitations of common-law property rights and held the spirit of the fourth amendment was to protect the privacy rights of individuals).
\item \textsuperscript{35} \textit{Katz}, 389 U.S. at 350.
\item \textsuperscript{36} Id. at 348.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 353.
\item \textsuperscript{39} Id. at 352-53.
\item \textsuperscript{40} Id. at 353.
\item \textsuperscript{41} Id. at 351.
\end{itemize}
trespass and curtilage were to be considered only as factors in determin- 
ing if a fourth amendment violation had taken place. Writing for 
the majority, Justice Stewart stated that the activities of the F.B.I. had 
indeed "violated the privacy upon which . . . [Katz] had justifiably re-
lied while using the telephone booth and thus constituted a 'search and 
seizure' within the meaning of the fourth amendment." The Court 
then had to determine whether the governmental activities met with 
constitutional standards. Failure of the officers in Katz to obtain the 
approval of a neutral magistrate, prompted the Court to clarify its pol-
icy on the warrant requirement. The Court viewed the warrant require-
ment as a necessary safeguard to assure that independent judicial re-
view determines whether there is probable cause to issue a search 
 warrant. Acknowledging that the officers believed that their activities 
would produce evidence of a particular crime and that they carried out 
their investigation by utilizing the least intrusive means, the Court, 
nevertheless, held the warrantless search to be unlawful. The Court 
concluded, "that searches conducted outside the judicial process, with-
out prior approval by judge or magistrate, are per se unreasonable 
under the fourth amendment—subject only to a few specifically estab-
lished and well delineated exceptions."

Another major contribution of Katz to fourth amendment analysis 
was the two-pronged test set forth in Justice Harlan's concurring opin-
ion. Designed to further define the standard of review applicable in de-
termining when the fourth amendment's protections should be ex-
tended, the test requires: "first that a person have exhibited an actual

42. Id. at 353.
43. Id.
44. Id. at 354.
45. See, e.g., Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); United 
See Johnson v. United States, 333 U.S. 10, 14 (1948) which contains Justice Jackson's 
classic explanation of the rationale behind the fourth amendment warrant requirement: 
Its protection consists in requiring that those inferences be drawn by a 
neutral and detached magistrate instead of being judged by the officer en-
gaged in the often competitive enterprise of ferreting out crime. . . . 
When the right to privacy must reasonably yield to the right of search is, 
as a rule, to be decided by judicial officer, not by a policeman or govern-
ment enforcement agent. 

Johnson, 333 U.S. at 14.

46. Warrantless searches have been considered unlawful regardless of probable 
47. Katz, 389 U.S. at 357.
(subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”48 That this test was readily adopted by courts throughout the country and, is in fact frequently quoted in other Supreme Court majority opinions, perhaps accounts for the particularly powerful impact of Justice Harlan’s concurrence.

The next major case to amplify the Court’s application and interpretation of the “open fields” doctrine was Air Pollution Variance Board v. Western Alfalfa Corporations.49 A State Board of Health Inspector entered the outdoor premises of the defendant’s business, from which the public was not excluded, and conducted visual pollution tests.50 The evidence obtained from this daylight test proved that the emissions from the business’ chimneys violated state statutes.51 The business claimed that the inspector’s failure to obtain either a search warrant or the consent of the owners violated its fourth amendment right to be free from unreasonable searches.52 The Court observed that the inspector did not enter the plant or offices, and in fact had “sighted what anyone in the city who was near the plant would see in the sky—plumes of smoke.”53 Justice Douglas then noted the Hester decision and Justice Holmes’ refusal to “extend the fourth amendment to sights seen ‘in the open field.’”54 In essence, the Court held that it did not constitute an illegal search and seizure, within the meaning of the fourth amendment, for a government agent to trespass upon land from which the public is not excluded and to submit as evidence anything exposed to the public view.55

Justice Douglas did not clarify whether the decision would have been different, had the inspector entered land in which the owners had exhibited a reasonable expectation of privacy. Yet the Court’s emphasis on the fact that the inspector was on premises open to the public, arguably implies that this fact affected the Court’s conclusion.56 Also noteworthy is the language chosen by Justice Douglas in quoting the Hester decision. Douglas speaks of Holmes’ refusal to extend constitu-

48. Id. at 361 (Harlan, J., concurring).
49. Air Pollution Variance Board, 416 U.S. at 861.
50. Id. at 862-63.
51. Id. at 863-64.
52. Id. at 864.
53. Id. at 865.
54. Id.
55. Id.
56. Id.
tional protection to "sights seen 'in the open field.'" \textsuperscript{57} This language will be significant in the later examination of \textit{Oliver} since in that case the police had to trespass on highly secluded, fenced and posted land before they were in a position to view the \textit{sights seen} in that so called "open field." \textsuperscript{58}

The Supreme Court refined the definition of a permissible warrantless search in \textit{Marshall v. Barlow's, Inc.}\textsuperscript{59} In \textit{Marshall}, a businessman refused to allow a warrantless search by an Occupational Safety and Health Administration inspector who was looking for safety hazards and regulatory violations.\textsuperscript{60} The Court upheld the district court's decision, which held that statutory authorization for warrantless searches were unconstitutional.\textsuperscript{61} The Court determined that a government inspector "[w]ithout a warrant stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspection as well."\textsuperscript{62} At this phase of evolution the open fields doctrine appeared to relegate a government agent, minus a search warrant, to exactly the same position as any other member of the public.

In order to clarify the case law development of the open fields doctrine under the fourth amendment, the following is a brief summary of the previously discussed cases:

1. \textit{Hester} (1924): Fourth amendment protection does not extend to the open fields.\textsuperscript{63}

2. \textit{Olmstead} (1928): Actual physical intrusion into the house or surrounding curtilage is required before one's fourth amendment rights could be violated.\textsuperscript{64}

3. \textit{Katz} (1967): a. This is a shift from the locational approach of \textit{Olmstead}, to the reasonable expectation of privacy test: "Fourth Amendment protects people, not places."\textsuperscript{65}

b. Harlan's test for determining whether the privacy expectation is reasonable "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that

\begin{itemize}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Oliver}, 686 F.2d at 358.
\item \textsuperscript{59} \textit{Marshall}, 436 U.S. at 307.
\item \textsuperscript{60} \textit{Id.} at 310.
\item \textsuperscript{61} \textit{Id.} at 325.
\item \textsuperscript{62} \textit{Id.} at 315.
\item \textsuperscript{63} \textit{Hester}, 265 U.S. at 59.
\item \textsuperscript{64} \textit{Olmstead}, 277 U.S. at 466.
\item \textsuperscript{65} \textit{Katz}, 389 U.S. at 351.
\end{itemize}
society is prepared to recognize as 'reasonable.' "

c. Warrantless searches are per se unreasonable under the fourth amendment (subject to a few exceptions).

4. *Air Pollution* (1974): Warrantless searches are permitted in areas from which the public is not excluded.

5. *Marshall* (1978): Without a warrant a government official is in no better position than any other member of the public and conversely anything exposed to the public is observable by the police.

The years between 1924, when Justice Holmes first articulated the "open fields" doctrine in *Hester*, and 1978 when the Court issued its ruling in *Marshall*, produced many changes in the doctrine. A considerable amount of confusion resulted from this evolutionary process and courts were uncertain whether *Hester* remained viable in light of *Katz*. This is evidenced by the varied interpretations and applications of the open fields doctrine in courts throughout the country. Many courts allowed warrantless searches only of areas from which the public was not excluded and where a reasonable expectation of privacy, as measured by the two-prong test, was absent. This method of application of the open fields doctrine, constituted a rejection of the per se approach of *Hester*, and an adoption of the reasonable expectation of privacy test developed in *Katz*. Other courts, however, continued to apply the locational analysis of the *Olmstead* decision to the holding in *Hester*. Under this latter view, the area labeled as the open field was beyond the zone of fourth amendment protection or outside of the constitution-

66. *Id.* at 361 (Harlan, J., concurring).
67. *Id.* at 357.
68. *Air Pollution Variance Board*, 416 U.S. at 865.
70. See, e.g., United States v. Lace, 669 F.2d 46, 50 (2d Cir. 1982), where the court referred to the "Hester-Katz rationale" as determinative in cases involving the "open fields" doctrine. This combined rationale considers activities observable by the general public to be observable by government agents without a warrant, and conversely, that which is excluded from public view can not be used as evidence by the police without a warrant; see also United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981) (government agents observed illegal aliens working in fenced scrap metal yard); United States v. Mullinex, 508 F. Supp. 512, 514 (E.D. Ky. 1980) (court rejected a per se approach to the "open fields" doctrine and held a reasonable expectation of privacy, Justice Harlan's two-pronged test, to be controlling); United States v. Swart, 679 F.2d 698, 702 (7th Cir. 1982) (The analysis used in *Katz*, prohibits a rule determining an activity which takes place a particular distance from the house or curtilage to be, as a matter of law, denied fourth amendment protection).
ally protected areas. Due to the uncertainty concerning the scope of the open fields doctrine in the wake of Katz, the Supreme Court granted the writ of certiorari in Oliver.

IV. Statement of the Case

Without the aid of a clear ruling from the Supreme Court, lower courts have been required to determine on their own if and when the open fields doctrine applies as a viable exception to the fourth amendment warrant requirement. The divergent lower court holdings of United States v. Oliver and State v. Thornton are representative of the problem which has existed in courts across the country. The problem is dramatically underscored by the contrary decisions reached in these two cases which possess almost identical facts. The question presented in each of these cases was whether the open fields doctrine allows government agents to trespass upon and search for marijuana fields without a warrant, where the fields are secluded, surrounded by no trespassing signs and clearly exhibit the landowner's subjective ex-

71. See, e.g., United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc) (the Court held that Hester applied to a field that was fenced and posted); United States v. Williams, 581 F.2d 451 (5th Cir. 1978) cert. denied, 440 U.S. 972 (1979) (Hester still considered viable in light of Katz analysis); Ford v. State, 264 Ark. 141, 569 S.W.2d 105 (1978), cert. denied, 441 U.S. 947 (1979) (applied “open fields” doctrine to posted land which was fenced and had a locked gate).

72. The inconsistency which resulted from different interpretations and applications of the “open fields” doctrine prompted the Supreme Court to first grant certiorari in State v. Brady, 406 So. 2d 1093 (Fla. 1981), cert. granted, 456 U.S. 988 (1982), cert. dismissed in part, vacated in part U.S. ____, 104 S. Ct. 2380 (1984). In Brady, the Florida Supreme Court determined that the fourth amendment prohibited application of the “open fields” doctrine when contraband was seized in a warrantless search of land posted, surrounded by barbed wire, and secured by locked gates. However, due to procedural difficulties, the viability of the case became questionable. This comment assumes the Court granted the writ of certiorari in Oliver as a result of these procedural developments in Brady.


74. 453 A.2d 489 (Me. 1982).

75. In Oliver, tried before the United States Court of Appeals for the Sixth Circuit, the court found the warrantless search of Petitioner’s fenced and posted property was not a violation of the fourth amendment rights. Yet in Thornton, heard before the Maine Supreme Judicial Court, the court held that entry by government agents onto defendant’s fenced and posted land was a violation of his fourth amendment rights.
pectation of privacy.

In United States v. Oliver, the defendant, Ray Oliver, was a retired farmer living with his wife and daughter in the Commonwealth of Kentucky on a two hundred acre farm which he owned. Oliver used a portion of his farm to raise hogs, and the rest he leased to third parties. In the summer of 1980, the Kentucky State Police received an anonymous tip that marijuana was being grown on Oliver's farm. Without attempting to secure a search warrant or to obtain Oliver's consent, the police proceeded to the farm to investigate. They drove down Oliver's private road past several "No Trespassing" signs, until a locked gate blocked their path. At this point the agents abandoned their car and slipped through a gap in the gate on a path clearly marked with a "No Trespassing" sign. The narcotics agents proceeded to walk three-quarters of a mile down the road and past a barn and truck camper. After the police had walked approximately one quarter of a mile beyond the barn and camper, a man appeared near the camper and requested the agents to turn around and come back. The officers stated that they were Kentucky State Police and did in fact begin to walk back toward the camper. However, the person who had requested they leave the property was no longer present. The officers continued with the investigation proceeding through a wooded area until they came upon two fields of marijuana. The fields were located at the rear of the farm in a secluded area surrounded by a natural barrier of trees, banks and fences. The facts clearly indicate that one could not view these marijuana fields unless he were standing on Oliver's land and had gone to the same trouble to view the fields as the agents had.

The government charged Oliver with manufacturing marijuana.

76. Oliver, 686 F.2d at 356.
77. Id. at 358.
78. Id. at 361 (Keith, J., dissenting).
79. Id. at 358.
80. Id. at 362 (Keith, J., dissenting).
81. Id. at 358.
82. Id.
83. Id.
84. Id.
85. Id. at 362 (Keith, J., dissenting).
86. Id.
The Kentucky District Court found that the state police had violated Oliver's fourth amendment rights and granted the defendant's motion to suppress the marijuana evidence. The Sixth Circuit applied Justice Harlan's two-prong test to determine first, if Oliver exhibited an actual expectation of privacy, and second, if the expectation was one that society is prepared to recognize as reasonable. Under this standard the Sixth Circuit court found that Oliver possessed a reasonable expectation of privacy sufficient to require a search warrant. However, on rehearing the Sixth Circuit, sitting en banc, reversed and found that any expectation of privacy in an open field is, as a matter of law, unreasonable.

In State v. Thornton, the companion case of Oliver, the Maine police received an anonymous tip that marijuana was being grown on property located off of the Davis Corner Road. The officers proceeded to the Davis Corner Road and following the directions given by the informant entered the Thornton property by walking between a mobile home and an adjacent house until they came upon an "overgrown tote road." The officers continued on this path and discovered two clearings fenced in with chicken wire which contained marijuana. Due to the density of the woods, it was not possible to see the patches of mari-

Under title 21:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to man-

ufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute,

or dispense, a counterfeit substance.

21 U.S.C. § 841 (1981); Under title 18:

(a) Whoever commits an offense against the United States or aids, abets,

counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly per-

formed by him or another would be an offense against the United States, is

punishable as a principal.


88. United States v. Oliver, 657 F.2d 85, 88 (6th Cir. 1981). Circuit Judges Keith and Lively, and District Judge Rice, sitting in designation, made up the panel in the original decision.

89. Oliver, 686 F.2d at 360.

90. Thornton, 453 A.2d at 489.

91. Id. at 490.

92. Id.
juana from any significant distance whatsoever.93 The Thornton property was surrounded by an old barbed wire fence, an old stone wall, and numerous "No Trespassing" signs. The officers left the area once they determined that the plants were marijuana.94

Three days later the state trooper involved in the initial search of the Thornton property, filed an affidavit and obtained a warrant to search the defendant's land.95 The trooper relied on three factors to substantiate his claim of probable cause: 1) he had seen marijuana growing on the defendant's land in 1980; 2) his observations from the warrantless search three days earlier; and 3) the information given by the anonymous informant.96 A warrant was granted based on the affidavit and the trooper returned to the Thornton property and confiscated the marijuana. Thornton was subsequently charged with unlawfully furnishing scheduled drugs in violation of state law.97

Thornton moved to suppress both the evidence seized and the observations of the government agents. The Superior Court of Somerset County granted the order to suppress upon finding: 1) that the District Attorney had abandoned any attempt to prove the informant's tip justified the issuance of the warrant; 2) that the information gathered in the state trooper's 1980 search was stale and possibly obtained during an unlawful search; and 3) that the sole remaining ground for substantiating the validity of the warrant rested entirely on the observations of the

93. Id.
94. Id.
95. Id.
96. Id. at 491.
97. Id. at 490. Thornton was charged with unlawfully furnishing scheduled drugs which is a violation of 17-A M.R.S.A. § 1106. That section provides:

1. A person is guilty of unlawfully furnishing scheduled drugs if he intentionally or knowingly furnishes what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such furnishing is either:
   A. Expressly authorized by Title 22;
   B. Expressly made a civil violation by Title 22.

2. Violation of this section is:
   A. A Class C crime if the drug is scheduled W drug; or
   B. A Class D crime if the drug is scheduled X, Y, or Z drug.

3. A person shall be presumed to be unlawfully furnishing a scheduled drug if he intentionally or knowingly possesses more than 1 ½ ounces of marijuana.

state trooper.\textsuperscript{98} According to the trial judge, the central issue was whether the initial warrantless search of the police qualified as an exception to the warrant requirement. Taking into consideration the nature of the land searched, that it was secluded, had been fenced in and that signs were posted, the court concluded that Thornton had a reasonable expectation of privacy and that the initial search was unlawful.\textsuperscript{99} The Maine Supreme Court affirmed, upholding the trial court’s determination that the initial search violated Thornton’s reasonable expectation of privacy and that the open fields doctrine did not apply.\textsuperscript{100}

Consequently, the evidence obtained in Thornton constituted the fruit of an unlawful search and seizure and, therefore, was inadmissible. However, in Oliver a contrary decision was reached, allowing the evidence to be introduced at trial even though it was obtained under almost identical circumstances. As stated, both cases used different but presumptively valid Supreme Court cases to arrive at different results. It, therefore, became necessary for the Supreme Court to clarify the fourth amendment standard for search and seizures in the open fields.

\textbf{V. Analysis of Case}

Because the Court consolidated the cases of Oliver v. United States\textsuperscript{101} and State v. Thornton\textsuperscript{102} this comment will also focus on the issues raised by these cases as though they were one. The Court in Oliver concluded that fourth amendment protection does not extend to posted and fenced fields which clearly manifest the property owner’s expectation of privacy.\textsuperscript{103} In reaching this decision, the Court first declared that the Framers of the Constitution did not intend an intrusion by government agents onto land located beyond the curtilage to be proscribed by the laws against unreasonable search and seizure.\textsuperscript{104} Second, the Court stated that in light of Hester, “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”\textsuperscript{105}

In determining whether the defendants had a justifiable expecta-
tion of fourth amendment protection, the Supreme Court specifically stated that no single factor was to be determinative. Rather, a number of components were to be considered: 1) the intentions of the Framers of the Constitution; 2) the use made of the area by the defendants; and 3) the understanding of society that certain locations require fastidious protection from government intrusions.

The Court reasoned that the Framers' substitution of the word "effects" in place of "property," which James Madison had in his proposed draft of the fourth amendment, is evidence of their intent to limit the protection of the fourth amendment to personal rather than real property. Therefore, the Court concluded, "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the fourth amendment." This narrow interpretation of the fourth amendment is sharply divergent from the path taken in past Supreme Court decisions. For example, this new interpretation of the Framers' intent is inconsistent in light of the Court's holding in *Katz* that a conversation in a public phone booth is worthy of fourth amendment protection; as well as with the Court's holding in *Marshall* that an office or commercial establishment, that excluded the public, is protected from warrantless searches. It is also at odds with the Court's prior attitude toward constitutional interpretation as demonstrated in the cases of *Boyd v. United States* and *Weems v. United States*.

Cases such as *Boyd* represent the method of constitutional interpretation utilized to guard values traditionally deemed worthy of the Supreme Court's protection. In *Boyd*, Justice Bradley warned that a strict construction of the fourth amendment will result in a gradual loss of the personal rights the amendment was created to protect. Clauses

106. *Id.*
107. *Id.*
108. *Id.* at ___, at 1740.
109. *Id.*
110. 389 U.S. 347.
111. 436 U.S. at 310.

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction of them deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in

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designed to protect the individual from governmental abuses of power, were also the focus of the Court's attention in *Weems v. United States*. Justice McKenna emphasized that it is better to read the Constitution liberally, for although a particular wrong might have inspired the creation of an amendment, in order for the underlying principle to remain vital it "must be capable of wider application than the mischief which gave it birth." 116 In the dissent in *Oliver*, Justice Marshall's style of Constitutional interpretation is in harmony with that employed by Justice Bradley in *Boyd* and Justice McKenna in *Weems*. In *Oliver* Justice Marshall stated that "[t]he fourth amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with 'precision' permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from governmental intrusion." 116 Only if the Constitution is liberally construed to allow the courts to effectuate the purposes of the Framers, will our individual liberties be protected.

Although the Supreme Court purported to use the reasonable expectation of privacy test, in effect the *Oliver* Court injected a threshold question into the second prong of Justice Harlan's test: "whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment?" By determining that the Framers never intended that fourth amendment protection should extend to the area beyond the curtilage, the Court did not need to proceed any further with an examination of Justice Harlan's test. For once the Court decided that the Framers would not accept the defendants' expectation of privacy in an open field as reasonable, it followed that society, too, was not prepared to recognize an expectation of privacy as reasonable, which was not based on a right protected by the Constitution. Although it appears that the *Oliver* Court is using a fresh ap-

sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and guard against any stealthy encroachments thereon. 115. *Weems*, 217 U.S. at 373.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. 116. *Oliver*, ___U.S.____, 104 S. Ct. at 1745 (Marshall, J., dissenting).
proach it was actually in *Olmstead* that the Supreme Court first declared that certain areas were to be considered "constitutionally protected." Both Courts based their decisions upon a literal construction of the fourth amendment and determined that unless a search and seizure took place within those specified areas, the fourth amendment did not apply.

Arguably, the decision by the Court in *Oliver*, is a retreat back to the period of constitutional interpretation which existed prior to *Katz*. Although *Katz* overruled the *Olmstead* "constitutionally protected areas" method for application of fourth amendment protection, the *Oliver* decision appears to draw once again upon that antiquated locational approach. By ruling that constitutional prohibitions forbidding warrantless searches and seizures do not apply to specific areas, i.e. open fields, no matter what the individual's subjective expectation of privacy might be, the Court appears to be utilizing pre-*Katz* analysis. Regardless of the approach taken, a direct result of the Court's decision in *Oliver* is that police officers will no longer be required to prove probable cause to an impartial magistrate before conducting a "search" of that portion of a citizen's property which lies beyond the curtilage. Far from carrying out the intentions of the Framers, the Court's narrow interpretation of the fourth amendment actually impedes protection of the fundamental values which it was designed to safeguard.

Additional factors examined by the Court include: the use made of the areas by Oliver and Thornton, and whether society requires fastidious protection from government intrusion of clearly marked privately owned property.\textsuperscript{117} As an example of a use which has historically received fastidious fourth amendment protection, the Court discussed the "sanctity of the home."\textsuperscript{118} Writing for the majority in *Oliver* Justice Powell contrasted activities which take place in the home with those that occur in open fields, and concluded that the level of intimacy for activities in open fields was insufficient to warrant "an expectation [of privacy] that 'society recognizes as reasonable.'"\textsuperscript{119} Three reasons were given by the Court for reaching this conclusion: 1) "open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be,"\textsuperscript{120} 2) posting and fencing "do not

\begin{itemize}
\item \textsuperscript{117} *Oliver*, ___U.S.____, 104 S. Ct. at 1741.
\item \textsuperscript{118} *Id.*
\item \textsuperscript{119} *Id.* The cultivation of crops was an example, given by Justice Powell, of activities that take place in open fields.
\item \textsuperscript{120} *Id.*
\end{itemize}
effectively bar the public from viewing open fields," and 3) "the public and police lawfully may survey land from the air."

Arguably, in making the determination that any expectation of privacy a landowner might have in an open field is per se unreasonable, the Oliver Court did not fully utilize the test as outlined in Katz. According to Justice Harlan's test as outlined in Katz, the inquiry should have been whether the defendants had a reasonable (subjective) expectation of privacy which society is prepared to recognize as reasonable.

Although the premise that only property interests limit the power of the government to conduct warrantless searches has been rejected by the Court, common-law property concepts are still relied on to help determine whether the expectation of privacy in the area in question is reasonable. As Justice Powell observed in his concurrence in Rakas v. Illinois, "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." Accordingly, the common law has long recognized the right to exclude others as an incident of property ownership. It is this right to exclude which creates a legitimate expectation of privacy.

The steps taken by both Thornton and Oliver to exclude the public from their land clearly manifest a subjective expectation of privacy. It was not possible to see either field from any direction of public access. Nor was it the government's contention that the police had probable cause for the warrantless search, or that exigent circumstances existed which would have done away with the warrant requirement.

121. Id.
122. Id.
124. Id. at 353.
125. See, e.g., Rakas v. Illinois, 439 U.S. 128 at 143, 144 n.12 (1978) (Powell, J., concurring): ("the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interest protected by [the Fourth] Amendment"); and Marshall, 436 U.S. at 312 (1978) ("if the government intrudes [upon] a person's property, the privacy interest suffers. . . .").
127. Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of property rights").
129. Oliver, 104 S. Ct. at 1738 n.1.
Court in *Katz* found the warrant requirement a necessary safeguard to assure that an impartial tribunal determines whether there is probable cause to issue a search warrant.\(^{130}\) A warrantless search is justified only under the strict guidelines established as exceptions to the warrant requirement. The five basic exceptions\(^ {132}\) include: incident to a lawful arrest;\(^ {132}\) probable cause and exigent circumstances;\(^ {133}\) suspect consents to the search;\(^ {134}\) hot pursuit;\(^ {135}\) and stop and frisk.\(^ {136}\) These exceptions apply where the general welfare of society, balanced against the individual’s privacy interest, warrant government action. It was clearly established in *Katz*, that searches which are conducted without the prior approval of a magistrate, are per se unreasonable under the fourth amendment.\(^ {137}\)

In the lower courts, resolution of the inquiry as to whether a warrantless search was justified according to the open fields doctrine involved an objective appraisal of surrounding circumstances, in particular the existence of gates, signs, fences, and locks.\(^ {138}\) The fact that both Oliver and Thornton owned the land lends additional credence to their assertion of a justifiable expectation of privacy. It is also important to note that in both Kentucky and Maine, violation of the property rights

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130. *Katz*, 389 U.S. at 357. The purpose of the fourth amendment’s warrant requirement is to protect citizens from arbitrary intrusion by the government into their private domain.


137. *Katz*, 389 U.S. at 357.

138. Compare, e.g., *United States v. Lace*, 669 F.2d 46 (2nd Cir. 1982) (held a warrantless search was justified because the property was not posted and the public could enter at will), *United States v. Balsamo*, 468 F. Supp. 1363, 1379 (D. Me. 1979) (search justified because the land was not posted or fenced), and *United States v. Miller*, 589 F.2d 1117, (1st Cir. 1978) (warrantless search allowed since outsiders could enter at will); *with United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982) (fenced property is protected), *vacated ___U.S.____*, 104 S. Ct. 2380 (1984) and *State v. Brady*, 406 So. 2d 1093 (Fla. 1981) (property protected where posted and fenced), *cert. granted*, 456 U.S. 988 (1982), *cert. dismissed in part, vacated in part ___U.S.____*, 104 S. Ct. 2380 (1984).
of others is considered a criminal offense. In determining whether a defendant's asserted privacy expectations were justifiable, the Supreme Court, prior to the Oliver decision, inquired as to whether the defendant "took normal precautions to maintain his privacy." If such precautions were taken by the defendant, the Court usually determined that without a warrant a government official was in no better position than any other member of the public. In Oliver, had a private citizen entered the property concerned, he would clearly have been trespassing and therefore committing a criminal offense.

The Court in Oliver makes it clear that violations of a citizen's property interest by a government agent will not, in and of itself, create a fourth amendment problem. Although the majority does not specifically address the issue of criminal trespass, that the Court is unwilling to suppress the evidence means, in essence, that the only remaining remedy for the defendants is to sue the officers for trespass. Needless to say this remedy falls short of being of any real assistance to either Oliver or Thornton. Ultimately the only remedy that truly counts is application of the exclusionary rule.

Apparently the approach, developed in Marshall, has now been rejected by the Court. In Oliver, the Court supported its decision that a trespass by a government agent upon an open field is not necessarily a violation of the fourth amendment, stating that Katz determined that property interests do not control the right of the government to search and seizure. It is important to note, that the purpose behind Katz in discarding the Olmstead "constitutionally protected areas" approach, was to shift the focus away from the place being intruded upon by government officials and to place it on the person being subjected to the warrantless search. Presumably, the objective of the Court in Katz, was to increase the size of the fourth amendment umbrella and thereby broaden constitutional protection.

The third rationale offered by the Oliver Court to show that the defendants' expectation of privacy was unreasonable, was that aerial surveillance could have been used to gather sufficient evidence to obtain

142. Id.
143. Oliver, U.S., 104 S. Ct. at 1743.
a search warrant or to justify a warrantless search.\textsuperscript{144} The utilization of sophisticated technology which makes this type of wide-ranging, arbitrary search for crime possible, threatens the basic constitutional right to be free from unreasonable search and seizures.\textsuperscript{146} As one writer stated, "[i]judicial implementations of the fourth amendment need constant accommodation to the ever-intensifying technology of surveillance."\textsuperscript{146} The cases of \textit{Olmstead} and \textit{Katz} demonstrate that there are times when fourth amendment interpretation has lagged behind rapidly developing technologies of surveillance, and thus newer techniques which invade privacy may go temporarily unrecognized as "searches" and "seizures."\textsuperscript{147} In this era of ever-increasing surveillance capabilities, care must be taken to ensure that tomorrow's sophisticated surveillance devices, do not go so far as to deprive Americans of the right to privacy recognized by the Supreme Court as existing within the "sanctity of the home."\textsuperscript{148}

VI. Justice Marshall's Dissent

Justice Marshall, joined by Justice Brennan and Justice Stevens dissented in \textit{Oliver}. These Justices listed three factors traditionally used to determine whether a person's expectation of privacy in a physical space is reasonable: 1) whether the defendants' expectation of privacy was recognized by positive law; 2) the potential uses of the open fields on defendants' property; and 3) whether the defendants had clearly manifested to the public, in a manner likely to be understood, their intent that the land in question was private.\textsuperscript{149}

To determine whether the defendants' privacy expectations were grounded in positive law, the dissent reflected upon the Court's statement in \textit{Rakas},\textsuperscript{150} that one who lawfully possesses property, coupled

\begin{itemize}
\item \textsuperscript{144} \textit{Id.} at \_\_\_, 104 S. Ct. at 1741.
\item \textsuperscript{145} \textit{Granberg, Is Warrantless Aerial Surveillance Constitutional?} 55 CAL. ST. B.J. 451, 454 (1980).
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Oliver}, \_\_\_.U.S.\_\_, 104 S. Ct. at 1741.
\item \textsuperscript{149} \textit{Id.} at \_\_\_, 104 S. Ct. at 1747 (Marshall, J., dissenting).
\item \textsuperscript{150} \textit{Rakas}, 439 U.S. at 153.
\end{itemize}
with the right to exclude, will probably have a justifiable expectation of privacy. The dissent noted that the defendants could subject an intruder to criminal liability, under local law, for violation of their property rights. Taking into consideration that Oliver and Thornton both owned the property concerned, the dissenters concluded that the defendants’ expectations of privacy were of the type that society has traditionally accepted as reasonable.

The *Oliver* dissenters speculated upon the numerous ways the defendants could have enjoyed their secluded property which society would recognize as deserving of privacy. Solitary walks, lovers tryst, and religious services were but a few of the potential uses to which the defendants’ could have put their property. “Our respect for the freedom of the landowners to use their posted ‘open fields’ in ways such as these” accounts for the gravity with which the positive law considers intentional trespass.

Finally, the dissent explained that it is essential to a strong claim of privacy to clearly manifest an intent to exclude. Justice Marshall stated that although a property owner need not execute his right to exclude the public, if and when he does exercise this entitlement, he bears the burden of clearly communicating his intention to passersby. Both positive law and social convention consider undeveloped land to be open to the public unless the landowner has clearly indicated a contrary intent. Justice Marshall concluded that if the property had been properly fenced and posted, and the intentional intrusion of a private citizen would expose him to criminal liability, then “[I] see no reason why a government official should not be obliged to respect such unequivocal and universally understood manifestations of a landowner’s desire for privacy.”

The dissent expressed concern that not only will the *Oliver* ruling pave the way for a variety of distasteful investigative activities, but also that society will gradually become accustomed to law enforcement agencies routinely engaging in this type of invasive “search.” The dissent warns, that even the most repugnant of activities can become

151. *Oliver*, ___ U.S. at ___, 104 S. Ct. at 1748.
152. *Id*.
153. *Id.* at ___, 104 S. Ct. at 1748-49.
154. *Id.* at ___, 104 S. Ct. at 1749.
155. *Id*.
156. *Id*.
157. *Id.* at ___, 104 S. Ct. at 1750.
158. *Id.* at ___, 104 S. Ct. at 1751.
common place and thereby lose their power to offend.159

VII. Effect of the Oliver Decision

Arguably the Oliver decision demonstrates that the Court is shifting away from the protection of civil liberties. Perhaps the government’s interest in combating crime is replacing its fundamental concern for personal liberty. Judicial attention appears to reflect society’s concern with the rising crime rate. The Court, it appears, is prepared to sacrifice rights protected by the Constitution in an effort to aid law enforcement personnel in apprehending and prosecuting criminal suspects. No longer does the Court place a higher value on guarding personal rights than on detecting criminals. Justice Holmes, once faced with a decision similar to the Court in Oliver, said “[w]e have to choose, and for my part I think it is a less evil that some criminals should escape than that the government should play an ignoble part.”160

If the pendulum continues to swing in this direction, and the courts grow increasingly preoccupied with “fighting” crime, there is yet another danger threatening the preservation of our fourth amendment rights. Professor Amsterdam warns that the danger of requiring an actual expectation of privacy is that the government could conceivably manipulate the public’s expectations so that no legitimate subjective expectation could exist.161 In effect the Oliver Court determined, using the objective standard as defined in the second prong of Justice Harlan’s test, that society would not recognize the defendant’s expectation of privacy in an open field as reasonable. Although the Court grounded the Oliver decision on the objective prong of Justice Harlan’s test, Professor Amsterdam points out that the subjective prong can also be used as a device to limit fourth amendment protection.162 In his examination of Justice Harlan’s two-pronged test Professor Amsterdam focuses upon the potential for governmental abuse.163 To reiterate, Justice Harlan required the Court to determine whether the defendant possessed an expectation of privacy and whether this expectation was

159. Id. at __, 104 S. Ct. at 1751, n.21.
160. Olmstead, 277 U.S. at 470.
163. Id.
one that society is prepared to recognize as reasonable.\textsuperscript{164} As noted by another commentator, "each element of Justice Harlan's test, if taken to its logical extreme, might eliminate the right to have expectations of freedom from governmental intrusions, thereby nullifying the safeguards of the fourth amendment."\textsuperscript{165} In \textit{Oliver}, for example, the Court determined that an individual can not possess a justifiable expectation that open fields will be free from warrantless intrusion by agents of the government.\textsuperscript{166} If the government of the United States "can condition citizens to expect that certain intrusive searches and seizures will occur, then those searches and seizures, by definition, would not be unreasonable."\textsuperscript{167} Therefore, regardless of the measures taken by an individual, i.e. electric fencing, posting, ten foot high brick walls etc., no action will be deemed sufficient to create a reasonable subjective expectation of privacy in property which lies outside the curtilage.

Arguably, by defining the open fields doctrine in this manner, the \textit{Oliver} Court has reduced the protection of personal privacy traditionally guarded by the fourth amendment. Indeed, there is little doubt that by concluding that any expectation of privacy an individual might have in an open field is per se unreasonable, the Court has removed numerous barriers from the path of law enforcement personnel. By eliminating the necessity of obtaining a warrant, the police are no longer required to convince an impartial magistrate of sufficient probable cause before beginning a search of that portion of a citizen's property, considered by the police to be an open field. Therefore, the police are free to conduct arbitrary, persistent, and indiscriminate searches on private property in an effort to discover criminal activity. In essence, the \textit{Oliver} decision marks a return to a pre-\textit{Katz} approach to fourth amendment analysis. By determining that constitutional protection from warrantless searches and seizures does not apply, as a matter of law, to open fields, regardless of the individual's subjective expectation of privacy, the Court has apparently returned to the once disfavored locational approach of \textit{Olmstead}.

The Court justified its decision in \textit{Oliver} by claiming that an ad hoc case-by-case determination of whether or not a defendant possessed a reasonable expectation of privacy was not a workable solution to an-
swer the needs of law enforcement. Yet the dissent offered a solution which is not only workable and can easily be applied, but which continues to offer protection against unreasonable search and seizure. The dissent suggested that "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."169

The Court in Oliver held that, "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."170 This is an excellent question posited by the Court but never satisfactorily answered. Constitutional interpretation is the method the Supreme Court uses to discover which values the Framers intended to protect by the creation of the fourth amendment. The Oliver Court chose a close and literal interpretation of the language in the fourth amendment. Judicial history, however, demonstrates what past Supreme Courts have considered values protected by the fourth amendment.171 In Boyd Justice Bradley, in his discussion of the fundamental principles of constitutional liberty, stated, "[i]t is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property . . . ."172 Justice Brandeis, in his well known dissent in Olmstead, stated that the Framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."173

Even in 1984, Orwellian projections of doom174 can still be kept at bay. By remembering Justice Frankfurter's graceful phrase, "[t]he course of true law pertaining to searches and seizures . . . has not . . .

168. Oliver, — U.S. at —, 104 S. Ct. at 1743.
169. Id. at 1750 (Marshall, J., dissenting).
170. Id. at 1743.
171. Id.
172. Boyd, 116 U.S. at 630. Justice Brandeis called Boyd, "a case that will be remembered as long as civil liberty lives in the United States."
173. Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).
174. Amsterdam, supra note 165, at 384.
run smooth,"¹⁷⁵ one can hope that *Oliver* is but one more bump in the road.

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