Nova Law Review

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Nova Law Review Full Issue
Welcome to Dean Roger Abrams

ARTICLES
Eighteen Years in the Judicial Catbird Seat .......................... Justice James C. Adkins with Leonard R. Samuels and Paul Hampton Crockett

Looking Back on Eighteen Years as a Justice of the Supreme Court of Florida .......................................................... Justice Joseph A. Boyd, Jr.
The Efficient Delivery of Arbitration Services Through Use of the Arbitration Firm .............................................................. Roger I. Abrams and Dennis R. Nolan

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The Fair Housing Act and “Discriminatory Effect”: A New Perspective ................................................................. Frederic S. Schwartz
The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida .......................................................... James T. Miller
Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary ................................................................. John Tiedemann

NOTES
Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions
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Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law—Proposal for Reform
The Preservation of Florida’s Public Trust Doctrine

BOOK REVIEWS
The Constitution in the Supreme Court: The First Hundred Years 1789-1888  Reviewed by Johnny C. Burris
Law’s Empire ................................................................. Reviewed by Fred L. Rush Jr.
NOVA LAW REVIEW

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# TABLE OF CONTENTS

Welcome to Dean Roger Abrams

**ARTICLES**

Eighteen Years in the Judicial Catbird Seat ........................................ Justice James C. Adkins with Leonard K. Samuels and Paul Hampton Crockett 1

Looking Back on Eighteen Years as a Justice of the Supreme Court of Florida ........................................ Justice Joseph A. Boyd, Jr. 25

The Efficient Delivery of Arbitration Services Through Use of the Arbitration Firm ........................................ Roger I. Abrams and Dennis R. Nolan 45

Lessons Learned: A Reflection Upon Bowers v. Hardwick ........................................ Abby R. Rubenfeld 59

The Fair Housing Act and “Discriminatory Effect”: A New Perspective ........................................ Frederic S. Schwartz 71

The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida ........................................ James T. Miller 97

Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary ........................................ John Tiedemann 139

**NOTES**

Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions ........................................ 145

Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk? ........................................ 165

Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law—Proposal for Reform ........................................ 201

The Preservation of Florida’s Public Trust Doctrine ........................................ 227

**BOOK REVIEWS**

The Constitution in the Supreme Court: The First Hundred Years 1789-1888 Reviewed by Johnny C. Burris 251

Law’s Empire Reviewed by Fred L. Rush, Jr. 271
Welcome to Dean Roger I. Abrams

The *Nova Law Review* is pleased to welcome Dean Roger I. Abrams to Nova Law Center.

Dean Abrams received his undergraduate education at Cornell University and graduated with honors from Harvard Law School. After graduation he clerked for Judge Frank M. Coffin of the United States Court of Appeals for the First Circuit. For several years Dean Abrams worked for a large Boston law firm, during which time he served as one of the plaintiff’s counsel in the lawsuit which desegregated Boston’s school system. Dean Abrams received what he views as his greatest professional honor, the NAACP General Counsel’s Advocacy Award, for his efforts in this lawsuit. Dean Abrams then moved on to academia, teaching at Case Western Reserve University School of Law from 1974 till 1986.

Dean Abrams has taught courses on torts, labor law, sports law, administrative law, and collective bargaining and labor arbitration. His articles have appeared in many law reviews, including those at Harvard, Michigan, Cincinnati, Duke, Maryland, Ohio State, Syracuse, Case Western Reserve, Florida, Toledo, Minnesota, and California at Davis. An excerpt from Dean Abrams’ work-in-progress (with

Dennis Nolan) on American Labor Arbitration appears in this issue of the *Nova Law Review*. This treatise will soon be published by West Publishing Company.

Dean Abrams’ first months at Nova have shown him to be a strong leader. His bold plans for the future have brought new energy to the campus. The *Nova Law Review* and the entire law school community welcome Dean Abrams, his wife Frances, and their sons, Jason and Seth. We look forward to a long and happy relationship with them.
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* Photograph by Kenneth James Potis
EDITOR'S NOTE

The *Nova Law Review* is honored to publish the following articles by former Florida Supreme Court Justices James C. Adkins and Joseph A. Boyd, Jr. Each gentleman served on the court for eighteen years with honor and distinction.

The Review is grateful to Jeff Peters for his assistance on this special undertaking.
Eighteen Years in the Judicial Catbird Seat

Justice James C. Adkins,* with Leonard K. Samuels** and Paul Hampton Crockett***

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>II. MOVING TORT LAW INTO THE TWENTIETH CENTURY</td>
<td>3</td>
</tr>
<tr>
<td>A. Access to Courts: The Foundation of Democracy</td>
<td>3</td>
</tr>
<tr>
<td>B. Equal Rights for All Includes Women</td>
<td>4</td>
</tr>
<tr>
<td>C. Comparative Negligence: Why Wait for the Legislature?</td>
<td>6</td>
</tr>
<tr>
<td>D. West and Strict Liability in Tort</td>
<td>8</td>
</tr>
<tr>
<td>E. The Impact of the &quot;Impact Rule&quot;</td>
<td>10</td>
</tr>
<tr>
<td>III. CRIME AND PUNISHMENT</td>
<td>11</td>
</tr>
<tr>
<td>A. The Harmful Effect of Harmless Error</td>
<td>11</td>
</tr>
<tr>
<td>B. Dixon: Bringing the Death Penalty Back to Life</td>
<td>13</td>
</tr>
<tr>
<td>IV. SEPARATION OF POWERS</td>
<td>15</td>
</tr>
<tr>
<td>A. Apportionment: The Legislature Knows Best</td>
<td>15</td>
</tr>
<tr>
<td>V. THE CHALLENGES OF LIFE IN A MODERN SOCIETY</td>
<td>17</td>
</tr>
<tr>
<td>A. Lieberman: Seeking a Balance Between Peace and Dissent</td>
<td>17</td>
</tr>
<tr>
<td>B. The Sunshine Law in the Sunshine State</td>
<td>18</td>
</tr>
<tr>
<td>C. Defining the People’s Right to be Let Alone</td>
<td>22</td>
</tr>
<tr>
<td>VI. CONCLUSION</td>
<td>24</td>
</tr>
</tbody>
</table>

I. Introduction

My legal career began with the Florida Supreme Court in September of 1938 as the sole law clerk for the court's six justices.\(^1\) While I learned much from and enjoyed my clerkship, the experience convinced me that I would never wind up as a Justice of the Florida Supreme Court. The last thing I wanted to be was a judge. It was indeed a long road back to Tallahassee. A long road, but a meaningful and fun one.

The best thing that ever happened to me was getting involved in a general country practice in Gainesville, Florida, beginning in 1941. You learn very quickly that in a small town people want their lawyer to do a little bit of everything. You learn or starve. I don't like the attitude fostered by the Florida Bar these days that a lawyer who is unfamiliar with a certain area of law should decline to represent a client in that area. I became an expert in quite a few areas of law by boning up day and night for three or four days with the lawbooks. I have defended and prosecuted criminal cases, handled divorces, civil negligence cases, real property title work, county bond issues, and represented clients before the Public Service Commission, among other things. My experience allows me to understand where a lawyer is coming from and what he is arguing for. It is an ongoing process; during the last seventeen years on the court I have tried to set out the law for the benefit of the bench and bar just as so many judges and lawyers took the time with me over the course of my legal career to make sure I understood what was going on.

After twenty years of general practice I felt it was time to move on. I remember long ago speaking to a very prominent trial lawyer and asking him how many years of trial practice it would take before I stopped getting those butterflies in my stomach. He replied, "I don't know; I've only been doing this thirty-five years, and Jim, if they ever do go away, I believe it's time to get out of the courtroom." By the mid-sixties, I had been in the courtroom so constantly that the butterflies had gone away, and I knew I wasn't preparing as well as I once had. I had set up the Alachua County Court of Record, and was asked to be its first judge in 1959, but resigned after two years so I could make money as a plaintiff's lawyer in negligence cases. I did, and became a circuit judge in 1964. I was not really thinking of serving on the supreme court, but in the back of my mind I always thought it would be fun to run a state-wide campaign.

While serving as a circuit judge, I had to find some demonstrators and send them to jail for trying to influence the grand jury. When I refused to set an appeal bond, my house was firebombed. Because of this and my widely-distributed criminal law book\(^4\) I had to resort to the use of a habeas corpus petition. I have tried to make what I call "Levy County law," based on Levy County logic. To me, that means down-to-earth and common-sense thinking rather than drilling into legal abstractions. The cases I have chosen to discuss in the article are those which I view as the most significant. I have tried to write opinions to clear, in plain language, that every judge and lawyer in every small town in Florida could clearly understand every word. That has been my goal.

II. Moving Tort Law into the Twentieth Century

A. Access to Courts: The Foundation of Democracy

My decision in \(Kluger v. White\)^\(^6\) is one of my most cited cases. In \(Kluger\), the trial court had dismissed the plaintiff's action on the grounds that she was "between the cracks" of Florida's no-fault insurance law.\(^6\) The trial court held that since she had not chosen to purchase property damage insurance, and had suffered legally recognizable damages of only $26, the statute left her without recourse in the courts for her damages. I did not like the whole statute, but felt that this particular section violated article I, section 21 of the Florida Constitution, which mandated a policy of access to the courts.\(^5\)

To my mind, the courts fail in a basic task if they fail to provide a forum in which injured citizens can seek redress for their injuries. The statute is question clearly violated that principle, as anyone in Ms. Kluger's position lacked any resource whatever. The law was well-
would be fun to run a state-wide campaign.

While serving as a circuit judge, I had to find some demonstrators in contempt and send them to jail for trying to influence the grand jury. When I refused to set an appeal bond, my house was firebombed. Because of that and my widely-distributed criminal law book I had some state-wide notoriety and was encouraged to run for a seat on the supreme court. During my time on the court I have tried to make what I call “Levy County law,” based on Levy County logic. To me, that means down-to-earth and common-sense thinking rather than drifting into legal abstractions. The cases I have chosen to discuss in the article are those which I view as the most significant. I have tried to write opinions so clear, in such plain language, that every judge and lawyer in every small town in Florida could clearly understand every word. That has been my goal.

II. Moving Tort Law into the Twentieth Century

A. Access to Courts: The Foundation of Democracy

My decision in Kluger v. Whiten is one of my most cited cases. In Kluger, the trial court had dismissed the plaintiff’s case on the grounds that she fell “between the cracks” of Florida’s no-fault insurance law. The trial court held that since she had not chosen to purchase property damage insurance, and had suffered legally recognizable damages of only $250, the statute left her without recourse in the courts for her damages. I did not like the whole statute, but felt that this particular section violated article I, section 21 of the Florida Constitution, which mandated a policy of access to the courts.

To my mind, the courts fail in a basic task if they fail to provide a forum in which injured citizens can seek redress for their injuries. The statute in question clearly violated that principle, as anyone in Ms. Kluger’s position lacked any resource whatsoever. The law was well-

5. Article I, section 21 of the Florida Constitution provides that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”
settled that whenever the legislature abolished a cause of action, it had to establish an alternative form of protection to the injured party, unless public policy allowed otherwise. In the Kluger case, the supreme court sought to balance the legislature's duty to produce laws evolving with society and the courts' duty to ensure a forum protecting the injured. The balance struck was stated as follows:

We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, of where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.  

Although the decision was a close one, I felt gratified that this plaintiff would, upon remand, be given an opportunity to have her claim determined in court.

B. Equal Rights for All Includes Women

In the early 1970's, the women's right movement was picking up steam and moving full speed ahead. Coincidentally, in 1971, the court was presented with the question of whether a wife may maintain a cause of action for loss of consortium resulting from injuries to her husband proximately caused by another party. The wife was treading against the common law rule that only a husband, and not a wife, could sue for loss of consortium as a result of injuries to a spouse. Florida law was in accordance with the common law. Consequently both the trial

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6. See Kluger, 281 So. 2d at 4.
7. Id.
8. Id. at 5. Justices Adkins, Roberts, Ervin and McCain composed the majority, while Chief Justice Carlton, Justice Dekle and Justice Boyd would have found the statute a proper exercise of the legislature's power. Id. at 10.
court and the district court dismissed the wife’s complaint. We quashed the decision of the district court of appeal and held that a wife may also maintain a cause of action for loss of consortium. This holding fits in well with my general philosophy that women are entitled to full equality under the law.

Damages for loss of consortium are intended to compensate for the loss of companionship and fellowship of husband or wife and the aid of the other in every conjugal relation. Consortium is far more than sexual relation. Admittedly, it is very difficult to place a monetary value on loss of consortium. I found that out the hard way as a trial lawyer in Ocala, when I got a little carried away in explaining the concept of loss of consortium. Horse breeding is a major industry in Ocala. During closing argument I explained to the jury that “consortium is a nebulous concept, but please bear in mind the stud fees that are paid to race horses.” The jury awarded my client a tremendous verdict. My strategy worked a little too well; the judge felt obligated to order a remittitur.

Gates presented me with an opportunity to discuss the propriety of a court rejecting outmoded common law doctrines. The common law is at the foundation of American jurisprudence, for which I have great respect. Stability in the law is important, and a court should not reject or alter the common law without good reason. Nevertheless, I believe that a court is obligated to alter the common law when the reason behind the rule is outmoded because of progress in civilization, the rule is court-made, and the rule frustrates justice and deprives people of their right of access to courts. Courts should not hesitate to alter the common law when the original reason for the rule no longer exists. Thus, the law develops as a living and viable forum for justice and does not stagnate into mere ritualistic obeisance to forgotten rules. The common law rule forbidding a wife from suing for loss of consortium, according to my criteria, needed to be abolished.

12. Gates, 247 So. 2d at 45.
13. Id. at 43.
14. Id.
15. In a similar vein, I find it unfortunate that the court has refused to abolish the common law doctrine of interspousal immunity, which prevents a person from suing their spouse in tort. Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979), cert. denied, 449 U.S. 886 (1980). See also Snowten v. U.S. Fid. and Guar. Co., 475 So. 2d 1211 (Fla. 1985).

In Raisen, I coauthored a dissent with Chief Justice England and Justice Sundberg explaining that a majority of jurisdictions have abolished the doctrine of inter-
C. Comparative Negligence: Why Wait for the Legislature?

Hoffman v. Jones, in which the court overturned the doctrine of contributory negligence and adopted that of comparative negligence, is my most widely cited opinion. It is certainly the opinion that I am most proud of and has affected more people than perhaps any decision rendered by the court during my tenure.

Hoffman reached this court in an unfortunate procedural setting. In the decision under review, the Fourth District Court of Appeal had overturned well-established Florida Supreme Court precedent by replacing contributory negligence with comparative negligence. Negligence trials became chaotic. Judges were wondering whether the rule of comparative negligence was the law in the Fourth District or throughout the entire state. I was forced to remind the district court that only the Florida Supreme Court may overturn its own precedent. District court judges who disagree with the law as set forth by the Florida Supreme Court are free to express their disagreement with the law and certify a question to us, but must rule in accordance with supreme court precedent. Consequently, Hoffman is often cited in district court opinions by judges who wish to stray from supreme court spousal immunity and that this court should do likewise because the reasons for the common law rule no longer exist. With the recent resignation of Justice Alderman and the retirement of Justice Boyd, only two justices, Overton and McDonald, are on record in support of retaining the outmoded doctrine of interspousal immunity. I am confident that the Florida Supreme Court will abolish the doctrine of interspousal immunity at the next opportunity.


17. Hoffman, 280 So. 2d at 438. Contributory negligence bars recovery for a negligent plaintiff, while comparative negligence merely takes such negligence into consideration by proportionally reducing the damages which the plaintiff may recover. Id. at 436.


19. Id. at 533. Contributory negligence was the law in Florida. See Hoffman, 280 So. 2d at 433 (citing Louisville and Nashville Railroad Co. v. Yniestra, 21 Fla. 700 (1886)).

20. Hoffman, 280 So. 2d at 436.

21. Id. at 434. Judge Gerald Mager, a good friend of mine, authored the decision under review and we still joke about the stinging reminder I gave him in Hoffman.


23. Hoffman, 280 So. 2d at 434.
precedent but realize that only the supreme court itself may do so. 24

The most difficult question in Hoffman was whether the court was empowered with the authority to replace the common law rule of contributory negligence with comparative negligence. My initial reaction was that the rule of comparative negligence could be established only by the legislature. 25 However, the more I researched the issue, and the more old English decisions I read discussing contributory negligence, the more convinced I became that the court was empowered and in fact obligated to abolish the common law rule of contributory negligence. 26 Contributory negligence, after all, was initially created by the courts, 27 the justifications for the theory had vanished, 28 and the doctrine fostered unjust results. 29

From a practical standpoint the adoption of comparative negligence in Florida has greatly enhanced the administration of justice. The major problem with contributory negligence was that it virtually halted all forms of settlement. In a typical negligence case, the insurance company would dig until they found something the plaintiff had done wrong, no matter how minor, and then end all settlement negotiations. The adoption of comparative negligence has therefore enhanced settlement. Another problem with contributory negligence lay in the jury's routine practice of ignoring a plaintiff's negligence and allowing a contributorily negligent party to recover. 30 The adoption of comparative negligence has allowed the jury to at once abide by the law and do justice.

25. See Hoffman, 280 So. 2d at 440-43 (Roberts, J., dissenting). Other courts have refused to abolish contributory negligence in the absence of an express statutory provision providing for comparative negligence. See, e.g., Baab v. Shockling, 61 Ohio St. 2d 55, 15 Ohio Op. 3d 82, 399 N.E.2d 87 (1980).
27. Hoffman, 280 So. 2d at 434 (citing Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809)).
28. Hoffman, 280 So. 2d at 437. Contributory negligence was adopted to protect industry. Modern society requires protection of individuals rather than industry. Id.
29. Id.
30. Id. (quoting Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U. FLA. L. REV. 135, 151-52 (1958)).
D. West and Strict Liability in Tort

I may have put my greatest effort into writing the decision of West v. Caterpillar Tractor Co., in which we adopted the doctrine of strict liability in tort as Florida law. Although the case was a labor of love, it presented some very difficult questions, and resolution of the issues raised involved a reconciliation of quite a bit of inconsistent case law. A showing of privity had historically been required in products liability cases. Florida's courts had strained so long in so many different ways to allow recovery for damages in the absence of privity that this court was left with a mess to clean up. As noted in West, "[t]hese theories of recovery have been refined and consolidated to such an extent that the distinctions frequently have more theoretical than practical significance." In fact, the task before the court could be linked to a cleaning of the Aegean stables. The case took quite a while to research and draft; it was originally assigned to another justice in May of 1975 while I was Chief Justice. I finally took the case when the others had reached a standstill on it, and by the time the opinion was issued on July 21, 1976, I was no longer Chief Justice.

But a real problem was presented by the case. Injured plaintiffs in Florida faced great difficulty in establishing their cases against manufacturers. Consequently, manufacturers had no true incentive to make products safe, and retail and wholesale distributors bore the brunt of the litigation. The issues presented in West intrigued me, because I had been involved in such litigation before I became a judge. If you bought something and loaned it to someone, there was no privity between the person you loaned it to and the manufacturer. That was the general law, but the courts had begun to stretch the theory of privity beyond recognition in order to allow the plaintiffs to sue.

One of the products liability cases I handled as an attorney involved an electric blanket. The man who had bought it shortly thereafter found that he had to enter the service, so he gave it to his sister. She used it one night, and then gave it to a friend. The blanket then malfunctioned and burned the lady very badly. She came to me and

32. West, 336 So. 2d at 87. See Restatement (Second) of Torts § 402 A (1965).
33. West, 336 So. 2d at 84.
wanted to sue, but how in the world could I find privity between Sears, Roebuck Company and the ultimate injured user? I finally had to settle. The amount was much smaller than I would have gotten in a jury verdict. As I explained it to the Sears lawyer, I would just have to take a chance that the supreme court would stretch that privity. The court seemed to look at each situation and extended the privity rule if they felt someone ought to recover. I told that lawyer, “You have to face the possibility that the court will do that, because if I get to court I'm gonna get one hell of a big verdict.” We finally got a pretty fair settlement; my client was satisfied even if I was not.

That is why I was especially interested in this case; I did not want to see others caught in the same situation. I am very proud of the decision because it has held up, in spite of some minor attacks.\textsuperscript{35} I also felt it was important to resolve the questions raised in the case “head on,” because bad law results when the courts must stretch the law in order to reach a just result. Privity is privity, and you ought not to extend it or make exceptions to it as long as the requirement is to be made at all in a case. I believe clear rules, set out for the benefit of the bench and bar, are much preferable to decisions based on a judge's feeling on a particular case. That is why I do not like the harmless error rule to be applied so as to muddy the waters of clear constitutional rights such as the right of the accused to keep silent.\textsuperscript{36}

I recall the election case of \textit{Boardman v. Esteva},\textsuperscript{37} for example, as one in which applicable principles of law desperately needed to be set out. I attempted to set forth in that opinion reasonably clear standards by which trial courts could evaluate the validity of challenged absentee ballots.\textsuperscript{38} Prior to the opinion, the law could be twisted so as to reach any result.\textsuperscript{39} This was dangerous because, frankly, the law was so messed up that the supreme court could make its ruling on validity or invalidity of the ballots depending on whom the justices wanted to see in office. Similarly, the adoption of strict liability in tort in \textit{West} allowed the courts to stop straining the concept of privity in seat-of-the-pants decisions in order to do justice. I have never believed that courts ought to be able to sit back and decide cases without any basis but

\textsuperscript{35} See Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551, 554 (Fla. 1986) (Adkins, J., dissenting).
\textsuperscript{36} See infra notes 52-60 and accompanying text.
\textsuperscript{37} 323 So. 2d 259 (Fla. 1975).
\textsuperscript{38} Id. at 269.
\textsuperscript{39} Id. at 270 (Overton, J., concurring).
their own feelings.

E. The Impact of the “Impact Rule”

My dissent in Gilliam v. Stewart10 illustrates my strong faith in the jury’s ability to distinguish between injuries crying out for compensation and efforts to flim-flam the jury. The case came up in 1974, when Justice Drew was on the court. He was a strong believer in the “impact rule.” The rule prohibited plaintiffs from recovering damages for the physical consequences of a mental or an emotional disturbance caused by a negligent act, in the absence of physical impact.41 I took the position that actual touching was not necessary. Gilliam was an interesting case, in which a woman laying in bed heard one of the cars involved in a collision strike a tree in her yard and the other crash against her home.42 Within fifteen minutes after the incident, she went back to bed with chest pains.43 Two hours later, she entered the intensive care unit of a nearby hospital.44 The woman was diagnosed as having had a heart attack, which eventually led her to suffer a stroke.45 Although her physician testified that her injuries resulted from the fright she experienced upon the car’s impact on the house, the trial court granted summary judgment based on a lack of physical impact.46 The Fourth District, citing my observation in Gates v. Foley47 that “the law is not static . . . [and] must keep pace with changes in society,”48 rejected the impact rule.

I felt that this was the kind of situation where we should allow recovery even in the absence of impact, and then I got into researching it. After examining the common law, I determined that we were dealing with a court-made rule and that we ought to recede from it. While I felt that appropriate limitations could be put on the cause of action,
and set these out in my dissent,\textsuperscript{49} the majority of the court could not agree with me and sat solid on the necessity of impact. I felt that the cause of action should be recognized so that justice could be done instead of ruling people out on bare technicalities. It seemed odd to me that if even one brick had touched the plaintiff she could have recovered. Still, only Justices McCain and Ervin joined in my dissent.

Today things are getting a little bit better; people are beginning to understand that these injuries should not go without compensation and that proper limitations can be put on those seeking to recover. Twelve years later we have partially receded from the historical impact rule,\textsuperscript{50} and I believe that eventually the rule will be completely done away with.\textsuperscript{51} The jury has been and will remain the best evaluator of damages in these situations.

III. Crime and Punishment

A. The Harmful Effect of Harmless Error

No right of individuals is more important to society than the right of an accused to be tried before an impartial tribunal in accordance with full due process of law.\textsuperscript{52} Citizens must remember that a person is not a criminal until he is convicted in accordance with the rules. Unfortunately, in certain instances a person who committed a crime will walk free because, under the rules, the prosecutor could not get a conviction. Our system of justice is not flawless. However, if we disregard those fundamental rules of court which are guaranteed by the Constitution of the United States simply to convict an accused criminal, we risk allowing law enforcement officers to sweep up all of humanity and then to determine in their discretion who goes to jail and who goes home. As a justice of the Florida Supreme Court, I have worked diligently to ensure fair prosecution as opposed to persecution of the accused.

It is with these principles in mind that I developed my opinion that a prosecutor's comment on a defendant's right to remain silent or failure to testify always constitutes reversible error. While I was a research

\textsuperscript{49} Gilliam, 291 So. 2d at 596. See also Comment, Outmoded Impact Rule Retained by Florida, 28 U. MIAMI L. REV. 705, 708-09 (1974).

\textsuperscript{50} Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Brown v. Cadillac Motor Car Division, 468 So. 2d 903 (Fla. 1985). See Adkins, supra note 2.

\textsuperscript{51} Champion, 478 So. 2d at 21 (Adkins, J., concurring).

\textsuperscript{52} FLA. CONST. art. I, § 9. Due process is guaranteed by the fifth amendment to the United States Constitution and article I, Section 9 of the Florida Constitution.
assistance at the Florida Supreme Court in 1939, I worked on an opinion which the court rendered in \textit{Simmons v. State}.\textsuperscript{83} That decision held that a prosecutor's comment on a defendant's failure to testify constitutes \textit{per se} reversible error. Unfortunately, twenty-eight years later, in \textit{State v. Hines},\textsuperscript{84} the court overruled \textit{Simmons} and held that a comment on the defendant's failure to testify may constitute harmless error and not warrant a new trial.\textsuperscript{85}

The issue arose again in \textit{Willinsky v. State},\textsuperscript{86} and I authored an opinion which receded from \textit{Hines} and reaffirmed the rule in \textit{Simmons}.\textsuperscript{87} Unfortunately, in \textit{Clark v. State},\textsuperscript{88} over my strong dissent, the court held that a contemporary objection is required in order to attack,

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53. 139 Fla. 645, 190 So. 756 (1939). Justice Adkins recounts his early involvement with the case as follows:

[Justice James Whitfield] asked me to write a memorandum affirming a conviction for rape. After reading the testimony I had real doubt about the defendant's guilt and decided to discuss it with Justice Whitfield. He was in the rocking chair. When I entered he laid the yellow pad on his desk and put on his glasses. He never wore them while writing.

"Judge, there are some peculiar things in the record," I said, "and this man's guilt has not been proved. For example, she said he dragged her across the grass, but there were no grass stains or dirt on her clothes."

He smiled pleasantly and said, "The jury heard the facts, James, and found him guilty." Calling me "James" was in keeping with his air of stateliness and made me feel more important.

After checking the record again, I returned to his office. "Judge," I said, "this woman was sitting on the front seat of the automobile with the defendant when he stopped at a restaurant and went inside, leaving her alone. If she was in fear, she could have escaped. I just don't think he did it."

Once again he gave me a pleasant smile, but spoke with a more positive tone. "The jury decides the facts, James."

The third time, I said "Judge, I hate to bring this case back to you again, but the prosecutor commented on the failure of the defendant to testify at a \textit{habeas corpus} hearing. That is reversible error."

This time he did not move the pad or put on the glasses, nor did he smile. Speaking in a soft tone, he said, "the defendant has been a naughty boy, James, but we will give him another chance. Fix a memorandum reversing the judgment."

Adkins, supra note 1, at 8.

54. 195 So. 2d 550 (Fla. 1967).
55. Id. at 551.
56. 360 So. 2d 760 (Fla. 1978).
57. Id. at 765.
58. 336 So. 2d 331 (Fla. 1978).
on appeal, the impropriety of a prosecutor's comment on the defendant's right to remain silent at the time of arrest. In another step backwards, this court recently held that a comment on the defendant's right to remain silent or failure to testify is subject to the reversible error rule and does not constitute per se reversible error. Thus, the court has now accepted Hines and rejected Simmons and Williams. Nevertheless, I remain confident that the court will once again return to the better rule set forth in those areas.

Application of the harmless error rule to a comment on a defendant's failure to testify or right to remain silent is tragic for two reasons. First, the harmless error rule invites overzealous prosecutors to make prejudicial comments. When I was a practicing attorney the per se reversible rule was in effect, everyone knew the ground rules, and very few comments were ever made. Second, the harmless error analysis invites numerous appeals. In all of these appeals, the appellate courts will ultimately decide that the error was harmless if they want the defendant to go to prison and harmful if they want the defendant to walk. Appellate law will become increasingly full of inconsistencies as courts attempt to apply the harmless error analysis to the forthcoming flood of cases.

B. Dixon: Bringing the Death Penalty Back to Life

In Furman v. Georgia, the United States Supreme Court struck down the death penalty in several states. Consequently, the death penalty in Florida was non-existent. However, Furman did not abolish capital punishment per se. Immediately following Furman, the Florida Legislature enacted a new death penalty with the hope that it would pass constitutional muster under Furman. In State v. Dixon,

59. Id. at 335.
61. 408 U.S. 238 (1972).
62. Id. at 256-57.
64. Furman, 408 U.S. at 257. Only Justice Brennan and Marshall expressed the view that the death penalty is unconstitutional under all circumstances.
we were asked to decide whether that death penalty statute was constitutional.

I spent many sleepless nights pondering the various arguments raised by the numerous parties challenging the validity of capital punishment. Furman had failed to clearly enunciate the requisites of a constitutionally valid capital sentencing scheme and the total lack of precedent made our job all the more difficult. This lack of guidelines, coupled with the fact that the majority of the court, myself included, favored capital punishment, allowed us to uphold the statute. I became convinced that the legislature had drafted a constitutional death penalty statute and authored a majority opinion so stating.

Florida's death penalty statute requires the jury and judge to weigh relevant aggravating and mitigating factors and then decide whether the death sentence is appropriate. In Dixon we stated that "when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." I had to fight hard to keep this interpretation of the statute in the opinion and I am thankful that this is still the law. As a result, the judge and jury must now make a reasoned evaluation of all the circumstances surrounding the case rather than merely adding and subtracting aggravating and mitigating circumstances.

I support capital punishment because it is a deterrent to future murders. I do not mean a deterrence in the traditional sense. If a man is going to commit a murder, I don't think he is going to think about the chair and then decide not to carry out the act. However, capital punishment is a strong deterrent to the individual who is electrocuted. Many killers have "murder in their heart," as country people used to say, and would enjoy murdering again. Electrocution prevents these people from murdering again, whether the next victim would be an ordinary citizen or a fellow inmate. There is nothing better to do with these people than execute them. After all, as I learned while growing up, rattlesnakes should be killed and not kept as pets.

Admittedly, the system is far from perfect. It is far too complex and we are not getting the results that we would like. Not enough peo-
ple sentenced to death have been executed. Even opponents of the death penalty agree that if we are going to have the death penalty, inmates should not sit on death row for ten or more years. The rush of last minute appeals and stays of execution has become very frustrating. I must qualify this by adding that I am not at all frustrated by defense attorneys pulling every angle they can to save a man from the chair. I am proud to say that in all my years defending people I never lost anyone to the chair. I can’t blame attorneys for doing whatever it takes to match my record. However, I am extremely frustrated by the great number of last minute stays of execution entered by the federal courts.

This frustration stems from the fact that the United States Supreme Court and other federal courts have failed to clearly delineate federal constitutional rights in relation to capital punishment. Federal courts are constantly changing the rules, keeping other federal courts and state courts in a state of perpetual uncertainty. Of course, no one should be executed until all available remedies have been exhausted. Florida law so provides. The federal courts can learn a lot by looking at Florida law, which sets out for everyone what the rules are.

IV. Separation of Powers

A. Apportionment: The Legislature Knows Best

It was a privilege to author In re Apportionment Law,71 which upheld the validity of the legislative reapportionment plan of 1972 for a number of reasons. First and foremost among these reasons is that the decision straightened out the law on reapportionment, which had previously been a nightmare. Every attempt the Florida Legislature made at reapportioning itself between 1955 and 1966 was invalidated by the federal judiciary.72 As a result, the Federal District Court for the

71. 263 So. 2d 797 (Fla. 1972).
72. In Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962), the court held that the then existing provisions of the Florida Constitution and statutory provisions pertaining to legislative apportionment were invidiously discriminatory. Nevertheless, the case was continued to permit the state to come up with a valid reapportionment plan prior to the convening of the regular legislative session in 1963. The legislature met in special session in August of 1962 and drafted a proposed constitutional amendment to be submitted to the voters in the November, 1962, election. In a supplemental opinion dated September 5, 1962, and found at 208 F. Supp. 316, the United States District Court for the Southern District of Florida held that the proposed constitutional amendment as well as the two statutes enacted to implement the proposed amendment would allow the Florida Legislature to reapportion itself in accordance with the United States
Southern District of Florida was forced to judicially reappor tion the Florida Legislature in 1967. Needless to say, prior to our 1972 decision the law regarding reappor tionment in Florida was in total chaos.

The 1972 reappor tionment plan presented this court with a golden opportunity to clarify the law on reappor tionment in Florida. I am proud to say that my opinion approving the 1972 reappor tionment plan did just that. For the first time, we took the bull by the horns and set out the proper rules and procedures for future legislatures to follow when reappor tionment time comes around. Consequently, our decision approving the legislative reappor tionment plan of 1982 was relatively...

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Constitution. The court retained jurisdiction, however, in the event that the proposed constitutional amendment was rejected.

The proposed constitutional amendment was rejected by the voters on November 6, 1962. The Florida Supreme Court then advised the Governor that he had the power to call recurring extra sessions of the legislature until the legislature enacted a reapportionment plan which conformed with the fourteenth amendment to the United States Constitution. In re Advisory Opinion to the Governor, 150 So. 2d 721 (Fla. 1963).


In 1965, a special session of the Florida Legislature passed a statute relating to apportionment. Once again, a federal court held that an apportionment plan devised by the Florida Legislature did not meet the requirements of the equal protection clause of the federal constitution. Swann v. Adams, 258 F. Supp. 819 (S.D. Fla. 1965). Nevertheless, the court modified the plan presented by the legislature and approved the modified plan of apportionment as an interim plan for a period ending sixty days after the adjournment of the 1967 legislative session. The United States Supreme Court reversed the district court's decision to approve the modified plan of reapportionment on an interim basis and remanded the cause to the district court. Swann v. Adams, 382 U.S. 210 (1966).

The Florida Legislators passed another reapportionment plan during a special session commenced in March, 1966. Upon remand, and in a supplemental opinion also found at 258 F. Supp. 819 (1965), the United States District Court for the Southern District of Florida held that the reapportionment plan of March 1966 met federal constitutional standards. The United States Supreme Court once again reversed the district court and found the March 1966 reapportionment plan unconstitutional. Swann v. Adams, 385 U.S. 440 (1967). A final attempt by the Florida Legislature to reapportion itself was declared unconstitutional and the federal district court was forced to judicially apportion the Florida Legislature. Swann v. Adams, 263 F. Supp. 225 (S.D. Fla. 1967).

73. Swann, 263 F. Supp. at 225.
simple and noncontroversial.\textsuperscript{74}

The 1972 reapportionment decision provided the perfect forum for me to espouse my strong belief in the doctrine of separation of powers.\textsuperscript{78} The plan was far from perfect. For example, the reapportionment plan provided for several multi-member districts, which I personally find repulsive. Nevertheless, my philosophy is that reapportionment is a legislative program and that we should abide by the wishes of the legislature unless these wishes are in flagrant violation of the United States Constitution.

A few of my brethren did not share my strong beliefs in the doctrine of separation of powers. In fact, certain members of the court had already begun drafting their own reapportionment program prior to our approval of the legislature's plan.\textsuperscript{76} These justices decided that the best thing to do was let the court reapportion the legislature. That was the last project I wanted to undertake.

When I first became a justice on the Florida Supreme Court, I was frightened with the power I possessed. We can go far in taking power away from the other two branches of government and get away with it. For that very reason, courts must exercise restraint and fully recognize the authority of the other coordinate branches of government.\textsuperscript{77} I am equally adamant about an independent judiciary. When members of the legislature or governor's office stepped over here and put their foot on us while I was chief justice, they didn't keep it over here very long.

V. The Challenges of Life in a Modern Society

A. Lieberman: Seeking a Balance Between Peace and Dissent

I was new on the court when presented with Lieberman v. Marshall,\textsuperscript{78} and that is probably why the opinion is so long. It was an excit-

\textsuperscript{74} \textit{In re} Apportionment Law, 414 So. 2d 1040 (Fla. 1982), appearing as Senate Joint Resolution 7E, 1982 Special Apportionment Session: Constitutionality Vel Non.

\textsuperscript{75} Following the jurisdictional statement, the opinion begins as follows: "At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination." \textit{In re} Apportionment Law, 263 So. 2d at 799-800.

\textsuperscript{76} The Florida Supreme Court may reapportion the legislature under certain circumstances. \textit{Fla. Const. art. III, § 16(f).}

\textsuperscript{77} See Harden v. Garrett, 483 So. 2d 409 (Fla. 1985).

\textsuperscript{78} 236 So. 2d 120 (Fla. 1970). See Comment, University Regulation of Students: An Uncompleted Exercise in Constitutional Law, 25 U. MIAMI L. REV. 515
ing case, arriving during the aftermath of the campus demonstrations which were occurring all over the nation. The president of Florida State University had secured an *ex parte* restraining order to prevent an occupation of part of the student union by the campus chapter of the radical organization, Students for a Democratic Society (SDS). After the trial court denied the students' motion to dissolve the temporary injunction, the students appealed that decision to the Florida Supreme Court. The SDS, headed by Jack Lieberman, the nominal party representing the students, had raised so much hell that then-sheriff Hamlin had his deputies place bayonets on their rifles and had them out there "keeping order."

The case was an important one. The university had established, to the trial court's satisfaction, the possibility of violence if the SDS were allowed to occupy the student union. It was our task to resolve the question in such a manner as to avoid violence without depriving the students of their constitutional rights of free speech and association. We found the injunction valid under the circumstances of the case, in light of the traditional deference paid to school administrators in conducting academic affairs, the threat of disruption and possible violence raised by the rally, and the availability of the school grounds rather than buildings for the protests. Fortunately, after we set up the rules here we never had any more trouble with the campuses. The whole purpose of the opinion was to let people know where they stood in this respect. Although it didn't appear in the record, I knew about the bayonet business and that these old country sheriffs were almost at the point of killing these students.

I wrote this opinion to draw the line on how far the protesters could go. I am a firm believer in dissent; I don't think we can exist without it. In fact, I have recently expressed concern that nobody disents anymore, and that people too readily resign themselves to the status quo.

B. The Sunshine Law in the Sunshine State

I had great fun with the "Sunshine Law" cases. I have always

(1971).
79. *Lieberman*, 236 So. 2d at 123-24, setting out the four factors constituting the clear and present danger test.
80. See id. at 128.

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendency towards secrecy in public affairs have been the subject of intense criticism.

12. See *Tuck v. Richards*, 47 So. 2d 547 (Fla. 1951) (en banc) (Fla. 1950).
13. 234 So. 2d 695 (Fla. 1970).
14. In *Tuck*, the court defined "all meetings of the council...as we were required to hold for the transacti...
been a great believer that better government results when public officials know that their performances will be scrutinized by the public, and have never seen any reason why meetings should not be conducted “in the sunshine.” During the years that I practiced law, it was a common policy of all city commissions to have secret meetings just before the groups convened for their formal meetings. Every board seemed to have a couple of people on it who were educated and sharp, but each also seemed to have a couple that were just plain dumb. Through these secret meetings the more capable commissioners were able to educate the others and reach a real agreement prior to the formal meeting. Before the sunshine law, all that was necessary was to conduct the final vote in public. Surprisingly, history and tradition established no basic requirement that government in this country be conducted in the open. In colonial days, everything was secret. It was my aim, when deciding these cases, to allow the public to determine which officials were qualified and which were being “educated” in secret meetings held before open voting procedures.

In Board of Public Instruction v. Doran, we affirmed the statute's constitutional validity and determined that it contained sufficient standards to put public officials on notice of what behavior was proscribed. I felt it important to interpret the statute, enacted for the public benefit, in a manner most favorable to the public. Accordingly, we departed from Florida’s historical narrow reading of “public meetings” and determined that the legislature’s “obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board.”

During the course of writing that opinion, I told my secretary that I was dictating one paragraph for the benefit of the press. That’s probably the most quoted paragraph I have ever written. It reads:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies towards secrecy in public affairs have been the subject of extensive criticism.

82. See Turk v. Richard, 47 So. 2d 543 (Fla. 1950) (constituing Fla. Stat. § 165.20 (1941)).
83. 224 So. 2d 693 (Fla. 1969).
84. In Turk, the court defined “all meetings’ to have reference only to such formal assemblages of the council... as we were required to hold for the transaction of official municipal business.” 47 So. 2d at 544 (emphasis added).
85. Doran, 224 So. 2d at 698.
Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with “hanky panky” in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.86

They loved that “hanky panky” line. I also inserted into that paragraph referring to the people’s “inalienable right” to be present and attend these hearings. No one noticed until years later that I had raised this right almost to the level of a constitutional right.

In City of Miami Beach v. Berns,87 we reaffirmed the statute’s application to informal as well as formal meetings. After that decision — in which we noted that “[i]t is the law’s intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly”88 — one of the city attorneys arguing the case told the Miami Herald in an interview that he had advised his city commissioners to go to the bathroom separately rather than together so that no communication could take place. There was a great deal of resistance to these cases until people got used to the law and realized that public meetings were not so bad. The requirements only applied to business arising in the foreseeable future; officials were not prohibited from discussing speculative future projects.

Some time after I had worked on the Doran and Berns decisions, Governor Askew caught me at some reception and just chewed me out terribly. I told him that he didn’t have to pay any attention to the Sunshine Law, as the legislature lacked power to require openness in the executive branch and could not tell him what to do. The next time he came up to me, he told me his wife had mentioned that he had been awfully hard on me at that reception, and apologized. I turned to his wife, and said to her, “Don’t you ever worry, your husband can say whatever he wants to about me but just remember one thing — I always have the last say.” We all laughed as I walked away.

Although the legislature could not impose openness on the courts, I would like to see this court subject to the Sunshine Law, and once

86. Id. at 699.
87. 245 So. 2d 38 (Fla. 1971).
88. Id. at 41.
made a motion that we open up all aspects of our conferences to the public eye except discussions of pending cases. I still advocate that position.

Our later decision of Town of Palm Beach v. Graddison** illustrated my philosophy that no matter how smart public officials may think they are, they can always benefit from the input of the public that it is their duty to serve. I have repeatedly insisted that any exemptions to the Sunshine Law be provided by the legislature and not the courts.**

More recently, I have found myself dissenting to the court's narrow interpretations of the Sunshine Law.** The case of Tolar v. School Board of Liberty County** especially disappointed me; the makeup of the court had changed again and had basically returned to the old rule of merely requiring the final votes to be in public. That was the very thing that the Sunshine Law was originally meant to overcome. I think generally, though, that this court raised so much hell with public officials at the beginning that most municipal and county areas hold open meetings on everything. As I wrote, though, I thought that Tolar represented a sad day, when “the bright rays of the sunshine law have not been dimmed, they have been obliterated.”** The opinion destroyed everything that had been done. The majority's observation that the initial secret discussions were "rendered sunshine bright" by the corrective open, public vote which followed,** I felt, flatly conflicted with our earlier observation in Berns that “[a]n informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance.”** Ceremonial acceptance alone should not satisfy the Sunshine Law; I don't think the court will stay with that particular opinion.

89. 296 So. 2d 473 (Fla. 1974).
90. See, e.g., Doran, 224 So. 2d at 699; Berns, 245 So. 2d at 41.
92. 398 So. 2d 427 (Fla. 1981).
93. Id. at 432.
94. Id. at 429 (quoting Basset v. Braddock, 262 So. 2d 425, 428-29 (Fla. 1972)).
95. Berns, 245 So. 2d at 41.
C. Defining the People’s Right to be Let Alone

Winfield v. Division of Pari-Mutuel Wagering\(^\text{96}\) may be one of the most important cases I have worked on during my tenure, because in my view the case boils down to the basic and crucial question of whether the individual is to be properly protected from the overwhelming power of the state. Another case had come before the court earlier raising the right of privacy set forth in article I, section 23 of the Florida Constitution\(^\text{97}\) in a rent control case. An opinion was drafted in which the court engaged in a balancing test between the state’s police power and the individual’s right to privacy. The court planned to utilize the right of privacy established in federal jurisprudence, which did not require a compelling state interest before interfering with an individual’s right to privacy.\(^\text{98}\) I felt it was this court’s duty to provide a greater degree of protection to the individual under our state constitution. So I raised a real ruckus and held up the case for a long time, and they finally agreed to release the case only after all references to Florida’s right of privacy had been removed.

I felt that Florida’s privacy amendment would mean nothing unless the court went the route of requiring a compelling state interest prior to allowing the state to intrude upon an individual’s privacy, and ensuring that the state accomplished its goal through the use of the least intrusive means possible.\(^\text{99}\) When Winfield came along, I finally got an opportunity to establish these standards, and surprisingly got a majority of the court to go along with me. The United States Supreme Court had made clear that “the protection of a person’s general right to privacy — his right to be let alone by other people — is, like the

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\(^\text{96}\) 477 So. 2d 544 (Fla. 1985).

\(^\text{97}\) The section provides as follows: “Right of privacy — Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” Fla. Const. art. I § 23. See Cope, To Be Let Alone: Florida’s Proposed Right of Privacy, 6 Fla. St. U.L. Rev. 671 (1978).

\(^\text{98}\) Compare United States v. Miller, 425 U.S. 435 (1976) (The United States Supreme Court held that bank records did not fall within a protected zone of privacy and were not private papers protected by the fourth amendment); with Roe v. Wade, 410 U.S. 113 (1973) (which held that a compelling state interest is required before interfering with an individual’s right to privacy).

\(^\text{99}\) Winfield, 477 So. 2d at 547. See Cope, supra note 97, at 744. “The most important single issue in the interpretation of the proposed privacy right is a technical one: what standard of review will be applied by Florida courts in construing it?” Id.
protection of his property and of his very life, left largely to the law of the individual states." 100 I felt it to be this court's duty to do so in the strongest of terms.

Today, when politicians are trumpeting "law and order" and various authorities are wielding unprecedented power, I believe that is important to ensure that every single "little guy" receives more protection than ever. I was raised with the belief that the greatest thing about this country was that the smallest, most significant citizen had the same rights as the president, to approach his congressmen, or to petition the supreme court, or, in short, to make a difference. I feel that as time has passed we have headed more and more towards the "herd mentality," where the majority rules and the minority is either despised or ignored. But this country has survived on the idea that each individual is pretty damn important and has the right to be left alone. That's a basic element of my philosophy.

My views on privacy, I believe, have at times led me to differ from the majority of the court. I find it essential to accord judicial protection to that zone of privacy surrounding adult citizens' homes which is so essential to our individual and collective dignity and quality of life. In attempting to breathe life into the observation that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men," 101 I have argued that adults should be allowed to possess and use marijuana within the home, 102 and that an adult who chooses to purchase pornography should be able to do so. 103 I realize that these are serious issues, but I also take very seriously each individual's right to conduct his own life in his own way, as long as he is not harming anyone else. Laws infringing on a person's zone of privacy, in my estimation, do far more real damage to society as a whole than an individual who chooses to relax with marijuana rather than alcohol after a hard day at work.

My views on privacy are not inconsistent with my approach to government in the sunshine. While I respect the rights of public officials as individuals, when individuals become public officials and act as such

they enter a forum in which openness as to those public aspects is crucial. Good government requires a free exchange of ideas and individual accountability, and these things are made possible only by exposing current events to the sunshine.

VI. Conclusion

Every decision of the Florida Supreme Court requires four concurring justices. During my eighteen years in Tallahassee I have served with nineteen justices, each with a different philosophy and many with views in direct conflict with my own. We met about once a week in conference to reconsider these differences and exchange our views. The opinions I authored were the result of a hearty exchange of ideas and suggestions with the other justices.

Sid White, our clerk, is the only person I know of who was capable of getting along with all nineteen justices. I have never heard a justice harshly criticize Sid. I have great admiration for his skillful diplomacy.

I have also had the benefit of the views and philosophy of twenty-eight aides and many interns from the College of Law at Florida State University. My written opinions have been flavored with ideas furnished by all the justices, aides, and interns.

This was an ideal time to serve. Chief Justice B. K. Roberts gave me the responsibility of bringing the judiciary into its own under the newly adopted article V of our constitution. I worked with court clerks, the backbone of the judiciary, and county judges, its picture window.

Today the courts are more accessible to the people. God has answered my daily prayer that I be given the ability to use every talent I possess for the benefit of others.

Looking Back on Eighteen Years as a Justice of the Supreme Court of Florida

Joseph A. Boyd, Jr.*

As I approach retirement after three six-year terms on the Florida Supreme Court, it seems natural to look back over the years to try to assess to some extent the experience I gained and the contributions I made to the development of the law in Florida. The purpose of this paper is to share with the reader some of the highlights of my career as a lawyer and as a supreme court justice.

I. Personal Background

I have had a strong interest in government for almost as long as I can remember. When I embarked upon my legal career, I was naturally drawn to public affairs and served as Hialeah City Attorney and as a member of the Zoning Board before seeking election to the Dade County Commission in 1958. I served on the Commission for ten years before running for the supreme court in 1968.

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Looking Back on Eighteen Years as a Justice of the Supreme Court of Florida

Joseph A. Boyd, Jr.*

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¹ Associate Justice, Florida Supreme Court 1969-1987, Chief Justice, 1984-
1986. Although I will retire from the court in January, 1987, I have no plans to retire in the sense of abandoning or curtailing an active working life. I plan to resume the private practice of law with my son Joseph R. Boyd and Susan Thompson in the firm of Boyd & Thompson in Tallahassee.
tution of government by the rule of law: the writ of habeas corpus. My
dad told me that any imprisoned person could write a letter to a
judge and that the judge could order the sheriff to bring the arrested
person to court and explain the reason for the arrest. Thus, I was
assured, an arrested person who had done no wrong would be immedi-
ately released by order of the judge. I have treasured this Great Writ
ever since.

My early fascination with the righteous power of the rule of law
was given another boost when a local plantation owner had a tenant
farmer arrested for taking some cotton when the farmer moved without
giving the landowner his share. The value of the cotton was minimal
but the owner was offended by an act which he considered to be an
affront to his authority. The bookkeeper at the plantation store was
the justice of the peace and the farm superintendent was the constable.
After the arrest, a preliminary hearing was set to be held at the planta-
tion store. My father contacted a lawyer named Joe Quillian. Mr. Quill-
lian was later to serve as a justice of the Georgia Supreme Court.

My father took my brothers and me to the hearing. We waited in
front of the store and we witnessed Joe Quillian’s arrival into town. To
our eyes he was dressed “like a Spanish ambassador.” He was a most
impressive sight as he drove his gleaming black Ford with red wheels
through the muddy roads of north Georgia. The mere presence of Joe
Quillian was enough to prompt the landowner to dismiss his complaint
against the sharecropper. The experience of observing this played a
great part in my decision to dedicate my life to law and government.

The sheriff of our rural north Georgia county was a figure who
inspired both fear and fascination to me as a boy. He was tall and 

one day, the sheriff came to our house to see my father. I was
afraid that his purpose was sinister and I recall telling my brothers that
our father was going to the chain gang. I followed the sheriff to the
barn and watched as he approached my father. There I saw the sheriff
offering my father a drink of illegal, confiscated moonshine liquor. I soon
realized that the sheriff was merely campaigning for votes. My relief
was mingled with a sense of moral outrage in the knowledge that the
sheriff had probably jailed the moonshiner but was freely using the
illegal whiskey himself. When I told my father how I felt about the
sheriff, he explained that when I grew up I could vote to put the sheriff.
out of office or even run for sheriff myself. In retrospect, the local sheriff was probably a good sheriff by the standards of that day.

These childhood experiences formed the basis of early learning in my life about concepts that were to run like a continuous thread throughout my career: the rule of law, fairness and due process, and democratic government through elections.

After graduation from high school I attended Piedmont College in Demorest, Georgia, paying my way through by working various jobs. After Piedmont, I attended Mercer University Law School for a year. During college and law school I sold Bibles, brushes, cleaning equipment, and automobiles. In my college dormitory I dealt in used appliances and clothing. After I departed Georgia and came to Miami, I sold bread and cakes on a bread-truck sales route, worked as a hotel night clerk and sold real estate. I still have an active real estate license.

In 1938, I married Ann Stripling of Hialeah. She was assistant city clerk of the City of Hialeah and a realtor. She would later be the office manager of my law practice and manager of all my political campaigns.

During World War Two I served in the United States Marine Corps. I attained the rank of sergeant and was stationed during most of the war in the South Pacific and the Far East. I served in the army of occupation after the Japanese surrender. I was among the first to enter the atomically devastated city of Nagasaki.

After my discharge from the Marines, I returned to Miami and finished my law studies, receiving my law degree from the University of Miami in February 1948. I immediately opened my own law office, and conducted a law practice from 1948 to 1969 specializing in real property, probate, and corporate law. From 1951 to 1958 I was City Attorney for Hialeah. From 1958 to 1968 I was a Dade County Commissioner, including a term as Chairman and Vice Mayor of the Metropolitan Dade County government.

When I was considering whether to seek election to the supreme court in 1968, there were numerous obstacles, some of which appeared nearly insurmountable. Nearly forgotten by the Floridians of today is the fact that there had traditionally been a strong sense of sectionalism in Florida, which manifested itself in a powerful animosity toward candidates from Miami seeking statewide political office. In the one hundred twenty-three years since statehood, only one United States Senator, George Smathers, had been elected from Dade County. No governor or cabinet member had been elected from Dade. Only two supreme court justices from Dade County — Armsted Brown (1925-
1946) and Paul Barnes (1946-1949) — had served in the long history of the Court.

I overcame sectionalism and was elected in 1968. Two years later a majority of the cabinet was elected from Dade County and in 1978 Bob Graham became Florida’s first governor from Dade County. I was reelected overwhelmingly in 1974 and in 1980 won a third term through the merit-retention election process.

Life in Tallahassee and working in the supreme court building were drastically different from the style of life and work my family and I had known in the international cosmopolitan setting of Miami. Having no prior judicial experience and being denigrated by some people as just a Miami politician, I felt I had to show my new colleagues that I could fit in and perform court work successfully. At that time the style, manner, and attitudes of a Miamian were so culturally different from those of Tallahassee that I sometimes felt from people’s reactions that they regarded me as they would a visitor from a foreign nation.

II. The First Term: 1969-1974

During the beginning of my first term I quickly learned about the operation of the court and the process of making judicial decisions. The supreme court is a collegial body which must discuss issues and arrive at a consensus, ultimately making decisions by majority vote. I found that my experience as a county commissioner was very helpful in this regard because I know how to communicate with people. On the other hand, the work of a county commission is done very much in the open. Public pressures and community demands are an acknowledged part of the process. Judicial decision making is much more insulated from political pressures. The touchstone is analysis and application of the law rather than the preferences of the public.

Although the court is a collegial body, much of the day-to-day work on cases must be carried out by individual members working alone. Cases are assigned for evaluation and preparation of proposed opinions. This individual phase of the work is followed by voting and, if necessary, discussion in conference. In a difficult case, the process of reaching a majority decision expressed by an agreed majority opinion can require a special kind of leadership and persuasive ability. It is very different from the kind of leadership that makes for success in the legislative or executive branches of government. It was a very rewarding experience for me to feel that I had performed this leadership role successfully and well.
Needless to say, I was not always able to persuade a majority to agree with my views. Although the Earl Warren era was coming to a close when I came on the court, the trends that had been set in motion at the United States Supreme Court were continuing to influence the Florida judiciary. On several occasions, my views were more in tune with the theme of protection of civil liberties than were those of my colleagues. Early in my first term, there was a question of the extent of the applicability of *Gideon v. Wainwright*\(^2\) to state trials of misdemeanor charges. In *State ex rel. Argersinger v. Hamlin*,\(^3\) the Florida Supreme Court was squarely confronted with the issue of whether an indigent person accused of a misdemeanor was entitled to court-appointed counsel. In the absence of a definitive requirement of same, from the United States Supreme Court, the Florida Supreme Court followed the guidance found in existing precedents at that time. The court reasoned that any application of *Gideon* to misdemeanor trials "would apply to the right-to-counsel rule the same principles applicable to a determination of the right to a jury trial, namely, that this right extends only to trials for non-petty offenses punishable by more than six months imprisonment."\(^4\) The court thus held "that an indigent defendant accused of a misdemeanor is entitled to court-appointed counsel only when the offense carries a possible penalty of more than six months imprisonment."\(^5\) Because the maximum term available for the offense of which the petitioner had been convicted was six months and the record showed he had been sentenced to three months, the court held there was no right to court-appointed counsel.

I concurred in part and dissented in part, noting that the court's decision was a step in the right direction but insisting that it had not gone far enough.\(^6\) I found that the degree or severity of the possible incarceration was immaterial under the sixth and fourteenth amendments. I concluded that court-appointed counsel should be available to any indigent accused person facing possible incarceration for any period of time whatsoever. Chief Justice Richard W. Ervin and Justice James C. Adkins, Jr. concurred with my opinion.

On certiorari, the United States Supreme Court reversed and held that an accused is entitled to court-appointed counsel whenever "one's

4. *Id.* at 443.
5. *Id.* at 444.
6. *Id.* (Boyd, J., concurring in part and dissenting in part).
liberty is in jeopardy," Thus there was inaugurated the practice, still followed today, of determining in advance of an indigent accused's trial whether any incarceration is contemplated in the event of conviction. The court by drawing this line where it did was able to remedy the spectre of "assembly-line justice" where the defendant's personal liberty is at stake while leaving the states with a relatively free hand when dealing with many petty offenses not involving the threat of jail.

Another significant civil liberties case was Smith v. State. There the Florida Supreme Court answered a challenge to the validity of Florida Statutes section 856.02, commonly referred to as the Vagrancy Law. The court adhered to precedent, finding nothing "to persuade us to recede from our previous conclusion respecting the validity of Section 856.02." Joined by the late Justice E. Harris Drew, I dissented, expressing the following opinion:

I must dissent to the majority opinion. The statute in question was designed long ago to prevent idle and irresponsible persons from living on the income of those who earned their living by the sweat of their brows.

In our time a large portion of our population retires at an early age and is encouraged to relax in the Florida sunshine. Hundreds of thousands of tourists visit Florida. They should not be required to prove they have a lawful purpose. It would be a contradiction of our basic understanding of constitutional rights to jail persons in this State for "wandering around without having a lawful purpose." Specifically the requirement that persons who wander around must have a lawful purpose is too vague to notify the public as to what standard of conduct the State requires. It seems logical to conclude that to prove an accused person has no lawful purpose the State must show the defendant was engaging in an unlawful purpose. The burden must be upon the State to prove one is doing an unlawful act.

Vagrancy statutes have been widely used by police authorities to hold people remotely suspected of crimes while investigations were conducted. Modern interpretations of individual civil rights under state and federal constitutions clearly prohibit this now. If

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11. Smith, 239 So. 2d at 251.
one is engaging in unlawful conduct the State should charge the person with violating a specific law. There is certainly no shortage of criminal laws.18

As the majority had noted, the issue of the constitutionality of the statute and similarly worded municipal ordinances was at the time pending before the United States Supreme Court. In due course the Court rendered its decision in Papachristou v. City of Jacksonville.19 There the Court noted the Vagrancy Law’s derivation from the so-called “Poor Laws” enacted during the Elizabethan era in England. The Court struck down the statute on the ground of vagueness, but with a general overtone of substantive due process, that is, that there was no rational basis to support the law’s criminalization of such behavior as idleness and wandering about without any purpose. The Florida Supreme Court’s Smith decision was vacated and remanded for reconsideration in light of Papachristou.14

Later the Florida legislature reformed the vagrancy statute to create the “loitering and prowling” statute, Florida Statutes section 856.021.16 I registered the same objections I expressed about the vagrancy law by concurring with the dissenting opinion of Justice Ervin in State v. Ecker.18 I took the view that the law improperly allows police to approach and question people without any reasonable ground to believe they are doing anything wrong. The Florida Supreme Court recently reaffirmed its upholding of Florida Statutes section 856.021 in Watts v. State.18 I reaffirmed my dissenting view.19

A significant case involving the first amendment was Tornillo v. Miami Herald Publishing Co.20 In Tornillo, the court upheld the constitutionality of Florida Statutes section 104.38,21 which required each newspaper to publish upon request the “reply” of any political candi-

12. Id. at 251-52 (Boyd, J., dissenting).
18. 463 So. 2d 205 (Fla. 1985).
19. Id. at 207 (Boyd, J., dissenting).
20. 287 So. 2d 78 (Fla. 1973).
date whose "personal character" or record had been "assailed" in the "columns" of the newspaper. The Florida Supreme Court majority reasoned that the effect of the law was to enhance rather than abridge the freedom of the press because it guarded against abuse of the power of the press. The court relied heavily on the observation that modern newspaper publishing is an extremely difficult field in which to become and remain established, with the result that many newspapers have a monopoly in the markets they serve. The court also provided a limiting construction which it believed overcame the statute's vagueness problems.

I dissented, noting the problems of vagueness, but primarily on the ground expressed as follows:

Since these constitutional provisions [the first amendment to the U.S. Constitution and article I, section 4 of the Florida Constitution] prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will. 23

In Miami Herald Publishing Co. v. Tornillo, 24 the United States Supreme Court reversed the Florida Supreme Court's decision. The Court found that any rule of "forced access" to the use of the newspaper publisher's medium would require some kind of enforcement mechanism. Governmental enforcement must necessarily operate as a command to the publisher that certain matters be published. Such a command was the equivalent of "a statute or regulation forbidding" the publication of "specified matter." 25

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the pa-

22. Tornillo, 287 So. 2d at 89.
24. Id. at 256.
per, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.25

III. Second Term: 1974-1980

In my second term, I continued to be very much concerned about constitutional rights. A noteworthy case was McArthur v. State.26 There the appellant argued, among other things, that the evidence presented at her trial was legally insufficient to support her first-degree murder conviction. The state's case was based essentially on circumstantial evidence. It was undisputed that Mrs. McArthur had held the gun that had fired the bullet that had killed her husband. What was questionable was whether she had intentionally pulled the trigger. The court found merit in the appellant's argument that the evidence was not incompatible with all reasonable hypotheses of innocence. Although it thus found that the state had not carried its burden of proof, the majority nevertheless directed that the state be allowed to seek conviction in a second trial. I dissented to this portion of the court's decision on the ground of double jeopardy.27

The state did indeed mount a second prosecution on the same charge, and when the defendant sought to block the trial, the Florida Supreme Court, in a decision in which I did not participate, denied her petition for writ of prohibition.28 On certiorari29 the United States Supreme Court vacated the judgment and remanded "for further consideration in light of" Greene v. Massey30 and Burks v. United States.31 On remand the five-man court that had denied prohibition found, in accordance with Greene and Burks, that reversal for insufficient evidence is the equivalent of a judgment of acquittal so that a second trial

25. Id. at 258.
26. 351 So. 2d 972 (Fla. 1977).
27. Id. at 978.
was prohibited by the Double Jeopardy Clause.32

During my first term the United States Supreme Court had decided Furman v. Georgia,33 striking down numerous state death penalty laws. The Florida legislature adopted a new death penalty law before the year was out.34 Review of capital convictions and sentences was to become one of the heaviest burdens placed on the Supreme Court of Florida.

There was much litigation over the procedure by which death sentences were imposed. In Gardner v. State,35 the court affirmed a murder conviction and death sentence. I concurred with Justice Ervin's dissenting opinion which expressed the view that it was improper for the trial judge to consider a presentence investigation report without providing the contents thereof to the defendant before sentencing.36 The United States Supreme Court vacated the death sentence, holding that any such report must be provided to the defendant for the purpose of allowing responsive explanation or argument before sentencing.37

In 1979, Florida carried out its first execution of a capital sentence since 1964. The offender's name was John Spinkellink. In 1975, I had authored the opinion on Spinkellink's initial appeal, affirming his conviction for first-degree murder and the sentence of death.38 There were numerous post-conviction proceedings filed in the case in 1979, and as author of the original opinion I was obliged to defend the court's original decision on the appeal to my colleagues. This process continued right up until the moment of execution as lawyers for Spinkellink and death-penalty opponents filed pleading after pleading to try to block the execution.

The adjudication of death penalty cases, including evidentiary, procedural, and constitutional issues, has always been a very heavy burden for me. I have expressed numerous times, in court opinions and elsewhere, my personal views about capital punishment. Although I have mixed emotions concerning it, both on religious and on practical grounds, the vast majority of Floridians favor death as a punishment in certain instances. As I believed I had no authority to substitute my

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33. 408 U.S. 238 (1972).
35. 313 So. 2d 675 (Fla. 1975).
36. Id. at 677 (Ervin, J., dissenting).
judgment for that of the people on this policy question, I was obliged to follow and apply the law to the cases that came before me. No justice has been more consistent in affirming death penalties than I have.

At the same time, however, I have always tried to be very conscientious about reviewing the evidence of guilt in capital cases to be certain that the conviction is justified. I have frequently clashed with my colleagues over the standard to be applied when judging the legal sufficiency of the evidence to support the verdict of guilt. 39

IV. Third Term: 1981-1986

In my third term I continued to provide maximum possible protection to the fundamental constitutional rights of individuals. I authored the opinion in Department of Education v. Lewis, 40 where the court held that a proviso in an appropriations bill was unconstitutional. The proviso, found in the general appropriations bill that became chapter 81-206, Laws of Florida, 41 purported to withhold state funds from any state-supported college or university, and from its students, “that charters or gives . . . assistance to or provides meeting facilities for any group or organization that recommends or advocates sexual relations between persons not married to each other.” 42 The proviso was struck down on two grounds. 43 First, it was a violation of article III, section 12 of the Florida Constitution, which provides:

Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject. 44

The second ground of unconstitutionality was that the proviso was an infringement on the freedoms of expression and association. 45 We reasoned that students cannot be made to surrender their constitutional rights at the campus gate and that schools making meeting rooms and facilities available to some student groups could not deny these benefits

39. E.g., Thompson v. State, 494 So. 2d 203 (Fla. 1986); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).
40. 416 So. 2d 455 (Fla. 1982).
41. Id. at 458.
43. Id. at 463.
44. Fla. Const. art. III, § 12.
45. Department of Education, 416 So. 2d at 462.
to other groups on the ground of the views and beliefs expressed. “The
right of persons to express themselves freely is not limited to statements
of views that are acceptable to the majority of people.”46 The opinion
concluded:

Those who fought in the American Revolution and adopted
the Constitution and the Bill of Rights included persons of widely
varying religious, political, and moral views. They were moved by
the desire to establish limited government and to enshrine certain
fundamental personal rights as immune from governmental in-
fringement. In order to secure to all the liberty they had gained,
the framers of the First Amendment wrote it in broad, liberal
terms. The history of the interpretation of the First Amendment
shows a steady movement toward protecting the free-speech rights
of persons of all political and moral views. Ours is a nation rich in
diversity, and our strength has been in our practice of allowing free
play to the marketplace of ideas. We consist of many divergent
associational groups, and “[a]s to each group, there are sectors of
the community to whom its values are anathema.” Gay Students
Organization v. Bonner, 509 F.2d 652, 658 (1st Cir. 1974). Never-
theless, “[t]o permit the continued building of our politics and cul-
ture, and to assure self-fulfillment for each individual, our people
are guaranteed the right to express any thought, free from govern-
ment censorship.” Police Department v. Mosely, 408 U.S. 95, 96,
92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

We therefore hold that the proviso violates the freedom of
speech under the First Amendment and article I, section 4 and is
unconstitutional.47

I authored the court’s opinion in Odom v. Deltona Corp.,48 which
held that the State of Florida was estopped to deny the validity of
deeds executed by the Board of Trustees of the Internal Improvement
Fund and that the Marketable Record Title Act operated to perfect the
title of landowners as against the claims of the state that title to sover-
eignty lands had not passed.

In Coastal Petroleum Co. v. American Cyanamid Co.,49 the court
distinguished Odom and held that the Marketable Record Title Act did
not operate to cut off state claims to sovereignty lands. The court also

46. Id. at 461.
47. Id. at 463.
48. 341 So. 2d 977 (Fla. 1976).
49. 492 So. 2d 339 (Fla. 1986).
found that deeds given by the Trustees one hundred years ago did not include sovereignty lands encompassed by the legal descriptions and that the state was not estopped to deny that such lands were included. I dissented, finding that the conveyances conveyed what they said they conveyed, that the state was estopped to assert otherwise and that in any case, MRTA perfected the title of the private landowners.\textsuperscript{60} I said:

Much has been written and spoken, in the communications media and elsewhere, concerning the legal issues in this case and the related political issues. Many have suggested that the courts are being asked to give away state-owned lands. The truth is that the lands in question here, as well as other lands, were legally conveyed by authorized state officials. It may very well be the case that in doing so, public officials failed to exercise care and diligence on behalf of the public. But the fact that decisions of former officials were unwise is no reason to now penalize innocent purchasers who paid market value and relied upon state officers’ authority to sell. I can see no constitutionally permissible basis for the state to recover such lands except by purchase or by eminent domain based on a public purpose and the payment of just compensation.

There has also been much public discussion of the effect of the Marketable Record Title Act. I agree with the district court’s holding that MRTA applies with the same force to land claims of the state as to those of private claimants. The law was intended to apply and should apply to all real estate claims without any exception for those of the state. Under MRTA, the claims of the state in these cases are asserted too late and cannot be revived. If private claimants were to seek to call into question the deeds of an ancestor given one hundred years ago, based on mistakes, reservations or infirmities not preserved by re-recording under the statute, such claims would be barred under MRTA. The same rule should apply against the state because of the overriding interest in the stability and marketability of land titles.

Constitutional protection of private property rights is an essential feature of our form of government and our society. Whenever the awesome power of government is used to extract from people their lives, liberties, or property, their only refuge is in the courts. The circuit court orders in these cases correctly preserved the vested rights of real property owners against attempted state confiscation. The district court was in my view correct in affirming those circuit court judgments. I would approve the district court deci-

\textsuperscript{50} Id. at 345-49 (Boyd, J., dissenting).
sions. I therefore respectfully dissent.\textsuperscript{44}

Some people take the view that property rights are not as important as other personal rights and therefore hold the government to a lower standard of justification when property rights are infringed upon than when the rights of life, personal liberty, or other personal freedoms are concerned. This is a fallacy because rights of property are crucial to an individual's ability to construct a decent and secure life.

In \textit{Roush v. State}\textsuperscript{45} I dissented from the court's decision to allow the closure of a business and seizure of its property without proof that the owner had done anything wrong. The court approved such "remedies" imposed through a summary procedure with only an inference of wrongdoing by the owner, because the penalties provided by the law were deemed to be civil rather than criminal. I said that a closure of a business and seizure of its property were severe penalties regardless of what they were called. There had been no proof, and none had been required in the court's view, that the owner of the business had knowingly and intentionally done anything wrong. In dissent I said:

The concept of due process, the presumption of innocence, the requirement that only those shown to have violated published laws may be subjected to penal sanctions — these are principles that the founders of this Republic found so important that they insisted on their being written into the basic charter as the Bill of Rights. They were intended as protections against arbitrary and oppressive governmental action. The framers of the Bill of Rights knew from history and from personal experience that without such protections, the rights of individuals are commonly trampled upon by kings and governments as they go about the business of promulgating and enforcing "public policy."\textsuperscript{46}

In 1984, the court decided the appeal of the notorious Ted Bundy, who had been convicted of the sorority house murders that took place in Tallahassee in 1978. By random assignment I was given the task of evaluating the briefs and record and preparing a proposed opinion. The record on appeal was voluminous because the tax-paid, court-appointed public defenders and other lawyers who helped Bundy provided every conceivable kind of defensive tactic through discovery, pretrial motions,

\begin{itemize}
\item[51.] \textit{Id.} at 349 (Boyd, J., dissenting).
\item[52.] 413 So. 2d 15 (Fla. 1982).
\item[53.] \textit{Id.} at 23 (Boyd, J., dissenting).
\end{itemize}
trial motions and objections, and post-trial motions. The issues raised on appeal were difficult, some of them novel and highly complex. The court's opinion was very long compared with other capital cases. The unanimous decision of the court was to affirm the convictions and sentences.

Other noteworthy cases I authored in the 1980's included First American Title Insurance Co. v. First Title Service Co. In this case, the court receded from the long standing rule that the liability of a land title abstractor for negligent performance extends only to one in contractual privity with the abstractor. At the same time we resisted the demand for a ruling that the abstractor is liable to anyone foreseeably damaged. We chose a carefully crafted middle position and held that the abstractor's duty of care extends not only to one in privity but also to known third-party users of the abstract. Thus, we gave protection to persons for whose benefits abstracts are prepared without exposing abstractors to indefinite and perpetual contingent liability.

The effect of our holding in this case will be to change the law of abstractor's liability, but not so drastically as the petitioners would have us change it. Where the abstractor knows, or should know, that his customer wants the abstract for the use of a prospective purchaser, and the prospect purchases the land relying on the abstract, the abstractor's duty of care runs, as we have said, not only to his customer but to the purchaser. Moreover, others involved in the transaction through their relationship to the purchaser - such as lender-mortgagees, tenants and title insurers - will also be protected where the purchaser's reliance was known or should have been known to the abstractor. But a party into whose hands the abstract falls in connection with a subsequent transaction is not among those to whom the abstractor owes a duty of care.

I also authored the majority opinion in Chase Federal Savings & Loan Association v. Schreiber. In Schreiber, the majority held that a

55. 457 So. 2d 467 (Fla. 1984).
56. Id. at 469.
57. Id. at 471.
58. Id. at 473.
59. Id. at 473.
60. 479 So. 2d 90 (Fla. 1985).
deed, to be effective to convey title to real property, was not required to be supported by consideration.\textsuperscript{44} Consideration was a matter of form in land transfers and it had become a formal requirement in deeds quite by accident.\textsuperscript{45} We found no valid prohibition in Florida law against a person giving real property by deed to a non-relative and no reason for such a prohibition. Thus we rejected the attempt of an estate to set aside the gratuitous deed of a decedent, where there was no allegation or showing that the deed was not made voluntarily, intentionally, and without duress or undue influence.

In \textit{Nodar v. Galbreath},\textsuperscript{46} the court affirmed the doctrine of qualified privilege to hold that a parent could not be held liable for slander based on statements made to a school board about the performance of his child's teacher. We found that the parent had a privilege to speak and had not abused the privilege.\textsuperscript{47} At the same time we rejected the request of the news media to declare that a teacher was a public official\textsuperscript{48} for purposes of the "actual malice" standard of \textit{New York Times Co. v. Sullivan}.\textsuperscript{49}

In \textit{Department of Transportation v. Nalven},\textsuperscript{50} I wrote for the majority to adhere to the traditional, constitutionally required rule that a taking of property by eminent domain requires the payment of full compensation measured by market value at the time of the taking.\textsuperscript{51} The State of Florida was forthrightly trying to erode that constitutional right based on the argument that the planning of a road project had itself enhanced the value of the property.\textsuperscript{52}

\section{Chief Justice: 1984-1986}

When I first came on the court, I learned that the official seal of the court bore the motto "Sat cito si recte," which means "soon enough if correct." I have believed ever since that the court seal should be changed. Cases should be decided carefully, but litigants and the public are also entitled to have them decided with reasonable timeliness. If the

\begin{itemize}
\item 61. \textit{Id.} at 101.
\item 62. \textit{Id.} at 99.
\item 63. 462 So. 2d 803 (Fla. 1984).
\item 64. \textit{Id.} at 809.
\item 65. \textit{Id.} at 808.
\item 66. 376 U.S. 254 (1964).
\item 67. 455 So. 2d 301 (Fla. 1984).
\item 68. \textit{Id.} at 307.
\item 69. \textit{Id.} at 304.
\end{itemize}
judiciary cannot provide timely resolution of cases, society will turn increasingly to the use of administrative tribunals to resolve cases more efficiently.

When I became Chief Justice in 1984, I finally got an opportunity to do something about court delay. I organized a committee to study court efficiency and by administrative order I promulgated standards setting maximum time periods for the conclusion of various specific classes of litigation including a six-month limit for appellate cases. My efficiency committee formed the basis for the later creation of the Florida Judicial Council, which makes recommendations on a broad range of judicial management matters. The time standards I announced by administrative order were later promulgated as rules of judicial administration on the recommendation of the Judicial Council. These efforts attracted attention throughout the nation, including a commendation from Chief Justice Warren Burger.70

Another consequence of becoming Chief Justice was that I had the responsibility of communicating on behalf of the court with numerous entities within and without the court system. One of the most difficult jobs was the responsibility of informing the Governor of Florida on request that no order of the court provided any basis for blocking a scheduled execution.

On the day of a scheduled execution, the justices would arrive at the court building at around 6:00 a.m. in order to be ready to review any petitions that might be filed seeking a stay of execution. The clerk's office would be open for the purpose of receiving any such petitions. Telephonic communication would be established between the Governor's office and the Chief Justice's office at about one hour before the scheduled execution and would remain open until the scheduled time of 7:00 a.m. At that point, I, as Chief Justice, would inform the Governor that nothing had been filed that would legally stand in the way of his carrying out the execution. Having received such information, the Governor would tell the warden to proceed. Several minutes later the Governor would inform the Chief Justice that the execution had been carried out. I performed this difficult function as Chief Justice on several occasions during 1984-86.

VI. Conclusion

Beginning in the 1920's and greatly increasing during the depression of the 1930's, large numbers of indigent, transient men came to South Florida. They rode freight trains, hitchhiked, or drove old automobiles. They came for the warmth and the easy lifestyle. Many lived on handouts or petty thievery and slept wherever they could find a dry place.

It was common practice in those days for criminal court judges to resolve prosecutions of petty criminal cases by suspending sentences on criminals from other places if they would agree to leave Florida. There was a general feeling in favor of getting such "bums" out of town and that this was preferable to sheltering and feeding them at public expense. Of course, some such defendants agreed to leave but then came right back. On occasion, those persons who had been "banished" and were brought into court a second time would be punished for their earlier offense as well as for the second infraction.

This kind of criminal sanction was still being used when I started practicing law in 1948. My very first court appearance was on behalf of a plumber whose life was complicated by the simultaneous existence of a wife, a girlfriend, a drinking problem, and bad teeth.

My client had saved three hundred dollars and had been planning to use the money to pay a dentist to fix his teeth. He did not trust his wife and he had left the money with his girlfriend. She lived with her mother in a small white frame house. My client was accused of having gone to her house drunk, saying that he wanted his money to buy a swamp buggy. She refused, saying that he needed the money for dental expenses.

It was alleged that my client then flew into a rage, physically attacked the girlfriend and her mother, threw red paint all over the house, and then began demolishing the house with an axe. My client was arrested by an off-duty policeman, taken to jail, and released on bail.

The judge knew that it was my first court appearance and said he preferred not to send my client to jail. He said that if my client would leave Miami on the four o'clock train for New York he would hold the charges in abeyance. This appeared to be a reasonably favorable outcome to my client and me in view of the evidence and the possible punishment. My client left town as directed and I never heard from him again.

It was somewhat ironic — and was the kind of thing that makes a
long career in the law very interesting — that twenty years later one of
the first court opinions I authored as a Florida Supreme Court Justice
declared that the indefinite suspension of sentence with a condition of
"banishment" was legally improper under Florida law.71 In State ex
rel. Baldwin v. Alsbury,72 the petitioner had been convicted of shoplifting
in 1964 and sentenced to sixty days in jail. The sentence was sus-
pended on condition that the defendant leave Miami Beach. In 1969 he
was arrested again in Miami Beach, charged with shoplifting and
found not guilty. However, the municipal court ordered that he be re-
quired to serve the remainder of the 1964 jail sentence. A unanimous
panel of the court concurred in my opinion holding "that the court was
without power to indefinitely suspend a sentence in return for peti-
tioner's promise to stay out of town. The maximum sentence authorized
... has long since expired."73 While I had believed the procedure was
lawful when it seemed to benefit my client, I was instrumental in put-
ting an end to the procedure, which was inherently discriminatory and
susceptible of being abused.

Whatever success I have enjoyed I owe largely to the efforts of my
family. My parents were of modest means but they gave me the disci-
pline and encouragement I needed to do well in school and achieve my
goals.

As I stated previously, in 1938 I married Ann Stripling of Hi-
aleah. She managed my law office while conducting her own real estate
business. She managed all my political campaigns and provided crucial
support, encouragement, and business expertise. I could never have suc-
cceeded in achieving my goals were it not for this lasting partnership.

Our five children are all grown now and are all embarked on their
own professional careers.74 They always helped me in my political cam-

72. Id.
73. Id. at 547.
74. Our eldest child, Joanne Goldman, is a former United States Naval Intelli-
gence officer. She is now a teacher and lives in Rockville, Maryland, with her husband
Robert Goldman, also a former naval officer, and their two sons James and Thomas.
Our second child is Betty Jean Jala, a realtor, who is married to David Jala of
Atlanta, where they live with children Jason and Joanne.
Our elder son is Joseph Robert Boyd who practices law in Tallahassee in the firm
of Boyd and Thompson. His wife is Sue Boyd (she is also his officer manager). He has
two sons, Joseph Robert, Jr., and Jonathan.
Our younger son is James Boyd, a certified public accountant who lives in Tal-
ahassee and has two children, Stacy and Lindsay.
paiges and always conducted themselves according to the high standards befitting the family of a public official.

Finally I express my thanks to the people of Florida who supported, encouraged and voted for me. They did me the supreme honor of letting me serve them on their supreme court.\textsuperscript{79}

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Our youngest child is Jane Boyd, who recently graduated from Florida State University College of Law and is employed by The Florida Bar.

75. I am deeply indebted to Nancy Shuford, who has worked with me with the utmost loyalty and patience as my secretary for the last twelve years. I also express my gratitude to all the justices and court personnel with whom I worked for the past eighteen years, including all the young lawyers who have worked for me as research aides, especially including James Logue and Randall Reder.
The Efficient Delivery of Arbitration Services Through Use of the Arbitration Firm

Roger I. Abrams* and Dennis R. Nolan**

I. Introduction

When a company and a union negotiate a collective agreement, they anticipate that disputes will arise during its term. For that reason, they almost always include a grievance and arbitration procedure in the agreement. At each step of the grievance procedure, management can deny the union’s claim. The final step of that procedure brings the matter before a neutral arbitrator jointly selected by the parties.

The procedures followed in appointing a neutral arbitrator and conducting an arbitration proceeding are well known.1 In many instances, those procedures operate as intended, providing an efficient way to resolve disputes. Other times, parties may wait many months for their case to be heard and decided. Extreme delay in the resolution of grievance disputes ill-serves the parties who agreed to arbitration because they expected it to be expeditious. Delay also disserves national labor policy, which depends upon efficient arbitration to maintain labor peace.2 “Justice delayed does not necessarily result in justice being de-

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2. In John Wiley & Sons v. Livingston, 376 U.S. 543, 558 (1964), Justice Harlan expressed concern that judicial interference might “entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy.” Id.; see generally United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
nied, but delay is a justifiable cause of employee resentment and friction."  

It would be easy to blame some over-burdened labor arbitrators for the delay, but that would be aiming at the wrong target. Employers and unions select these experienced neutrals with full knowledge of their busy schedules, preferring them to neophytes. Perhaps the fault lies with the parties themselves. It is not our purpose to fix blame, but to propose a new method of delivering arbitration services to supplement existing procedures, an alternative that would diminish the delay inherent in the present systems.  

The procedures of labor arbitration can be improved and many have suggested ways of doing so. Their proposals usually attempt to improve the process by eliminating some of its components, such as a full arbitration opinion. We propose to expedite arbitration not by truncating the process contemplated by the parties, but by supplementing the established ways of selecting an arbitrator. We suggest that arbitration firms could streamline the arbitration process and help it fulfill its promise of speed and efficiency.

II. The Present System of Delivering Arbitration Services Through the Appointing Agencies

When selecting an arbitrator to serve for a particular dispute, em-


5. “Parties who insist on experienced arbitrators must answer to their constituents for scheduling difficulties.” Davey, supra note 3, at 222.


7. The American Arbitration Association (AAA) “is a private nonprofit organization founded in 1926 to foster the study of arbitration and other forms of alternative dispute resolution, to perfect the techniques of this method of dispute settlement under law and to administer arbitration in accordance with the agreement of the parties.” AMERICAN ARBITRATION ASSOCIATION, LABOR ARBITRATION: PROCEDURES AND TECHNIQUES 23 (1975) (booklet). Congress created the Federal Mediation and Conciliation Service (FMCS) in the Taft-Hartley Act of 1947 “to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and media-
ployers and unions generally use one of the two appointing agencies, the American Arbitration Association (AAA), or the Federal Mediation and Conciliation Services (FMCS). The two agencies follow similar procedures. They supply the parties a list of neutrals selected from the agency’s roster of labor arbitrators. The employer and union then choose the person who will be appointed to resolve their dispute, usually by alternate striking or by ranking the listed names. If they are unable to agree on an arbitrator, the appointing agency may select the person to serve.  

Selecting an arbitrator through an appointing agency takes considerable time — an average of almost three and one half months from the request for a panel to the appointment of an arbitrator. A mutually acceptable arbitrator may not be selected from the first list supplied by the agency. A second list — and sometimes a third — would then be needed.

Once the arbitrator is appointed, a date for the hearing must be set. The average period of time from appointment of a FMCS arbitrator until the hearing in fiscal year 1985 was approximately four months, but parties may have to wait as long as six months if they have selected a very popular arbitrator. The parties may decide not to wait that long and may begin again the process of arbitrator selection. That decision, of course, may not shorten the wait for an available hearing date from an acceptable arbitrator.

Under the current system of delivering arbitration services through the appointing agencies, on the average well over seven months elapses from the initial request for a list of neutrals until the arbitration hearing is held. It is not surprising then that employers and unions com-


9. FMCS reported that in fiscal year 1985 an average 102.57 days elapsed between the request for the panel and the appointment of the arbitrator. It took only 5.80 days for the FMCS to submit a panel to the parties, but 96.77 days for the parties to select a name and for that selection to be communicated to the arbitrator. FMCS Automated Information Systems (fiscal year 1985) (memorandum distributed to members of FMCS labor panel by the agency, containing statistics to appear in 38th FMCS Annual Report (1985)).

10. Id. (120.56 days).

11. Id. (223.13 days).
plain about delays in arbitration.  

III. Current Alternatives to the Use of Appointing Agencies

Frequent users of arbitration have adopted other systems of arbitrator appointment. The three most commonly used systems are: a permanent umpire, a permanent panel, and direct appointment. Each alternative has its advantages and disadvantages.

Under a permanent umpire system, a single individual is selected to resolve all unsettled grievances during a specified period, usually for the duration of the contract. This approach eliminates much of the delay, especially if the umpire sets aside certain days each month to hear pending matters. It is not risk or cost free, however. A poor choice of an ad hoc arbitrator jeopardizes a single case; a poor choice of a permanent umpire risks the integrity of the entire dispute resolution system. The collective bargaining agreement may allow either party to terminate the umpire, but this creates other problems, such as instability. The permanent umpire system also presents the risk that the neutral might abandon the role of adjudicator and contract reader and substitute his judgment for that of the parties, thereby assuming managerial functions.

Parties sometimes select a permanent panel of arbitrators to hear all matters arising during all or part of the term of the collective agreement. Arbitrators are then appointed from this preselected list to resolve individual disputes. Unless the panel members are more readily available than ad hoc arbitrators, the panel system would simply replicate the problem of delay:

The panel . . . is usually made up of arbitrators who may well be individually and collectively in a chronic state of overcommitment.

Thus, employers and unions who jointly desire prompt hearings


may be no better off than those who use a single permanent arbitrator or take pot luck on ad hoc panels from AAA or FMCS. ¹⁸

The parties may agree that the panel arbitrator with the first available date will hear the matter, but this necessitates contacting all the arbitrators. Alternatively, the parties may select a date and then contact the panel arbitrators to find one available on that date. Either alternative involves significant transaction costs. Moreover, as with the permanent umpire, the parties risk appointment of a poor arbitrator with whom they may be burdened for the contract’s duration.

The other common alternative to selection through appointing agencies is direct appointment by the parties. Experienced parties may agree to use a particular neutral for a specific case and then contact him directly. Even assuming they can make a choice more quickly on their own, parties still face the problem of obtaining an early hearing date. Direct appointment may be worse in this regard than appointment from a list, because parties would be likely to agree only on the most experienced arbitrators — the very ones least likely to be available immediately. If they cannot quickly settle on an individual, the appointment process will be further delayed.

The alternatives to the use of an appointing agency in the selection of arbitrators provide some significant advantages to the parties. The parties can select exactly who they want to serve as their arbitrator without relying on the agency to place acceptable persons on a randomly selected list. The alternatives also reduce delay. These benefits come at a high cost, however. Parties forfeit flexibility and risk a commitment to an unsatisfactory choice by using a permanent umpire or a permanent panel. Direct appointment is impossible if they cannot agree, or it may be as time consuming as appointment through an agency. As we shall see, the arbitration firm offers an alternative to present selection systems that combines the best qualities of the permanent and direct appointment methods while diminishing the costs involved in using those systems.

IV. A Proposal for the Delivery of Arbitration Services

We propose a supplementary method of delivering arbitration services — the arbitration firm. Firms of arbitrators could dramatically speed up the arbitration process while providing the highest quality of

services. Arbitration firms make sense both for the parties and for the arbitrators who will form them.

Today almost all arbitrators operate as individual entrepreneurs — as full-time or part-time neutrals acting as sole proprietors.\(^{16}\) The appointing agency notifies the arbitrator of an appointment to hear a case. The arbitrator checks his calendar and supplies the parties with available dates. Only after selecting an arbitrator do the parties learn how long they will have to wait for a hearing and a decision. Arbitration has operated this way for decades.

\section{The Law Firm Analogy}

At one time, most attorneys also were sole practitioners, with only a few in small partnerships. About a century ago, considerations of efficiency, specialization, and the need to service large enterprises prompted lawyers to form larger firms.\(^ {17}\) A firm of lawyers could share overhead costs, such as office space, libraries and clerical help. As a firm grew in size, attorneys could specialize in particular areas of the law. Over time, the law firm developed an institutional reputation in the lawyer market which differentiated it from other firms and from sole practitioners in terms of the type, quality and cost of services. Both law firm members and their clients benefited from economies of scale.

By comparison with the legal profession, labor arbitration is still a cottage industry. Law firms present a useful model for some arbitrators to follow. Labor arbitrators can form small arbitration firms and improve their services at the same time they increase their income.

\section{The Arbitration Firm: A Proposal}

The arbitration firm could be a partnership formed by three or four experienced labor arbitrators.\(^ {18}\) Carrying their individual “practi-

\footnotesize{\(^{16}\) A very few arbitrators join in small firms, which often are little more than office-sharing arrangements. Some arbitrators serve as mentors, training future arbitrators while their “students” help research and prepare awards. Neither of these alternatives presents all the advantages of the arbitration firm, as we shall discuss below.\(^ {17}\) See Hobson, Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1914, in The New High Priests: Lawyers in Post-Civil Law America 3 (G. Gawalt, ed. 1984).\(^ {18}\) There is no reason why a formal partnership must be established in order to achieve the efficiencies in arbitral selection suggested here. The key element, discussed below, is a pool of available hearing dates, which can be used without the other account-}
tices” with them, the partners would at first continue to receive most of their appointments through current channels of arbitrator selection. They would no doubt remain listed on the AAA and FMCS arbitrator rosters. The creation of the firm would only increase, not decrease, their individual caseloads.

The firm should be able to deliver arbitration services more expeditiously than present selection methods because parties could obtain the first available hearing date of any of the arbitrator-partners. Employers and unions would agree that the firm would provide the arbitration services, much as a law firm provides legal services and an accounting firm supplies accounting services. Upon first contact, the hearing coordinator at the firm — a good secretary could perform this function — would offer the parties the earliest available hearing for any of the arbitrator-partners. 19

The arbitration firm would reduce delay because busy arbitrators experience a high incidence of late cancellations of scheduled hearings. It is common for parties to notify an arbitrator shortly before a scheduled hearing that they have settled the case or need to postpone the hearing. An arbitrator in sole practice would find it difficult to schedule another hearing for that date on short notice. In a firm of three or four busy arbitrators each scheduling two or three hearings a week, such a cancellation would provide an available day to be used by any of the firm’s clients. A firm with three or four times the normal arbitrator’s caseload would be much more likely to make use of the cancelled hearing day, much to the advantage of the arbitrator and parties who wish to have a matter heard expeditiously.

C. The Arbitration Firm in Operation

The following hypothetical illustrates how the firm system would operate. Arbitrators Able, Baker and Carey practice their profession in a major metropolitan area. They are well-known neutrals, who are members of the National Academy of Arbitrators and serve on numer-

19. Alternatively, parties may wish to have a particular member of the firm serve as their arbitrator. That would certainly be possible, as it is under the present system. In that case, the parties must, of course, be willing to wait until that arbitrator has an available date. The clients would still benefit from the lower costs associated with the firm.
ous permanent panels. They are generally acceptable to most employers and unions for most cases.

Auto Supply, Inc., a local manufacturer, discharges an employee and the United Auto Workers (UAW) local representing the production unit processes the matter through the contract’s grievance procedure. The union then demands arbitration. Auto Supply and the UAW agree that the firm of Able, Baker and Carey will provide the arbitration service. The company and the union contact the firm and request that the partner with the earliest available date hear the matter. Able and Baker have no available dates for three months. Since Carey has a day free in a few weeks, he is appointed to resolve the dispute.

V. Advantages of the Arbitration Firm Model

The arbitration firm model could reduce substantially the delay inherent in the present system of selection of arbitrators through the appointing agencies. First, it eliminates the time necessary to obtain a list of neutrals from an agency and to select the arbitrator from that or subsequent lists. In addition, the arbitration firm system should reduce the period between the arbitrator’s appointment and the hearing. The parties would be offered the first available hearing date of any member of the firm.

How does this model differ from methods presently available? The arbitration firm might be seen as a variation of the ad hoc direct appointment system. Nothing prohibits parties from contacting a number of experienced arbitrators on an individual basis to determine who has the earliest available hearing date. The transaction costs of such an alternative are high, which explains why it is rarely undertaken. The arbitration firm model virtually eliminates these costs.

In some ways, the arbitration firm operates as a permanent panel for the ad hoc appointment of neutrals. Parties enjoy all the advantages of a panel — the expeditious selection of arbitrators and the “earliest date” concept sometimes used under a panel system. At the same time, parties using the arbitration firm would experience few of the disadvantages of a permanent panel. A party is not stuck with a “lemon” panel member for the duration of his term. A party not pleased with the product of an arbitration firm may reject a member of the firm or go some other route (or to some other arbitration firm) the next time arbitration services are needed. This flexibility is not possible under a permanent panel system.

In addition, use of the arbitration firm would not entail the costs normally involved in establishing and maintaining a permanent panel. Some parties — the unionized coal industry, for example — employ attorneys to administer their panel system. The process of contacting each of the individual panel members to ascertain their earliest date (where that is part of the parties’ panel system) would be eliminated.

The internal pressure created by firm partners might also shorten the delay following the close of the hearing and the issuance of the arbitrator’s decision. Returning to our hypothetical firm of Able, Baker and Carey, if Arbitrator Carey were to unduly delay his award, the firm’s reputation, not just his, would be jeopardized. Each member of the firm will thus have an interest in ensuring that the others promptly render their awards. Peer pressure would be more effective than the haphazard sporadic pressure of parties or appointing agencies.

Why would experienced, acceptable arbitrators join an arbitration firm? Numerous advantages would flow to individual arbitrators. First, partners would share support services, such as secretaries, word processors, and research facilities. The economies of scale are readily apparent. Second, arbitrators in a firm setting would enjoy a measure of collegiality rare in the profession outside of annual meetings of the National Academy of Arbitrators. The interdiction of fellow arbitrators on difficult issues would benefit neutrals and parties alike. Third, as the firm becomes known for its quality and efficiency, it would attract more business than its individual members would on their own, a form of synergy.

VI. Potential Disadvantages of the Arbitration Firm Model

There are potential disadvantages in adopting the arbitration firm model. One problem might be that employers and unions would not use the firm. Parties currently select a particular person, not an organization, to serve as arbitrator. The parties generally know a good deal about the neutral they select; often he or she will have served them previously. They trust the arbitrator’s integrity, ability, fairness and clarity of thought. They may be reluctant to contract with a firm to provide arbitration services.

There are a number of responses to this potential problem. There is good reason to believe that parties experienced in arbitration, especially those represented by counsel, would take advantage of the firm because they would appreciate its advantages. In many geographic re-
normally involved in establishing and maintaining a permanent panel. Some parties — the unionized coal industry, for example — employ officers to administer their panel system. The process of contacting each of the individual panel members to ascertain their earliest date (where that is part of the parties’ panel system) would be eliminated.

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There are a number of responses to this potential problem. There is good reason to believe that parties experienced in arbitration, especially those represented by counsel, would take advantage of the firm because they would appreciate its advantages. In many geographic re-

gions, there are a number of experienced neutrals fully acceptable to employers and unions for almost any case. Typical parties would be satisfied to have any one of those persons resolve their dispute. Why should that change because those acceptable arbitrators have formed a firm and might now be able to offer a pool of available early dates for hearings? If Able, Baker and Carey are equally acceptable for a discharge case and Auto Supply, Inc. and the UAW want a matter resolved quickly, there is no reason why they would not contact the firm to provide the arbitration — and provide it quickly and expertly.

The arbitration firm model presents labor and management with a system they can adapt to their own purposes in any given case. In a particular dispute, a party may decide that one or more of the firm partners is unacceptable. In that case, the firm could provide the earliest available dates of the remaining partners. The firm model remains useful. Parties need not be required to accept all partners for all cases.

While it is true that employers and unions have no experience in choosing a firm to provide arbitration services, using an appointing agency is not very different. When parties follow the AAA's Voluntary Labor Arbitration Rules, they agree that the agency may make a direct appointment of an arbitrator if they cannot agree on a selection.21 Under FMCS regulations, the agency may make a direct appointment "when the applicable collective bargaining agreement authorizes . . ."22 Thus at times parties have selected an organization — the appointing agency — to provide arbitration services. Selection of an arbitration firm is but a small step.

There is another potential problem: one party may not want the dispute resolved expeditiously. For one example, an employer might be reluctant to have an arbitrator rule on an exercise of an asserted managerial right. In such instances, the existing selection processes provide ready opportunity for delay. That is rare though — most parties want the quickest possible resolution. We emphasize that the firm would be an option available to those who want it. Parties new to arbitration will find the traditional appointing agency method more suitable because it would introduce them to more arbitrators and because they are unable to evaluate a firm's expertise without some practical experience. When the parties want a quick resolution of their dispute and are sufficiently experienced in the ways of arbitration, the arbitration firm model will

22. 29 C.F.R. § 1404.13(c).
fulfill their needs better than existing systems.

A third potential problem is the lack of suitable partners for the arbitration firm. The success of the firm concept depends upon the presence of a critical mass of experienced, highly acceptable arbitrators in one geographic area. In some areas of the country, there may be too few arbitrators of this caliber to form an arbitration firm. On the other hand, such firms could probably be created in most major metropolitan areas. Where there are a number of such arbitrators, we would expect them to be interested in the firm concept because it is almost a no-risk proposition. Even if parties do not choose to use the full advantages of the firm, arbitrator-partners would suffer no loss. They will continue to receive appointment through current channels. It may take time for parties to begin to make use of the firm, but in the interim the arbitrator-partners will enjoy economies of scale and collegiality.

Some might be concerned that the firm mode of delivering arbitration services would be so efficient that there would be less need — or perhaps no need — for the appointing agencies. That seems quite unlikely. Appointing agencies will always be needed by parties inexperienced in arbitration or unwilling to use the arbitration firm or alternative methods. Arbitration firms would supplement, not supplant, the appointing agencies.

One other potential impact of the arbitration firm should be mentioned. There is the possibility that a partnership of the generally acceptable arbitrators in any geographic region would enjoy substantial market power and might use that power to increase their per diem rates. Some arbitrators might find the prospect of enhancing their rates to be sufficient reason for creating the arbitration firms. More costly arbitration is hardly a goal worth advocating publicly, however. The fear is likely to prove groundless in any event, because the availability of other firms and arbitrators will limit the power of a single firm. Even assuming the demand for arbitration services is very price elastic — an assumption not born out by the empirical evidence — parties would be free to use present selection devices if they found the arbitration firm’s members too costly. If there were an increase in per diem charges, the parties might nevertheless decide that improvements in

23. The firm model also appears better suited for full-time rather than part-time arbitrators, but there is no reason why a fully acceptable part-time arbitrator should be excluded from such an arrangement.

speed and efficiency justified the higher rates of the arbitration firm.

VII. Stages of Development of the Arbitration Firm

We have seen that initially the arbitration firm would combine in one office the practices of a small number of experienced, acceptable arbitrators who would retain their prior practices and enjoy the economies of scale that flow from combining their offices. In addition, arbitrator-partners would enjoy a potential for collegiality rare in the lonely profession of the labor arbitrator. One would think these benefits alone would be sufficient to encourage full-time arbitrators to consider the firm model. Once formed, the firm could then provide the additional service of supplying early hearing dates for parties who seek speedy resolution of their disputes. Here the efficiencies of the firm model would begin to benefit both the arbitrators and the potential purchasers of their services.

At its second stage of development, the firm might hire associates — persons who aspire to join the profession — to assist arbitrator-partners in the research and drafting of arbitration opinions. The final opinions would remain the responsibility of the appointed neutral, but opinion-award writing would be made more efficient. An individual arbitrator might not be able to afford to hire a full-time associate; a firm of three or four neutrals certainly could hire one or more.

At this stage, the arbitration firm could serve the additional role of providing systematic training for new arbitrators. There are no institutions in this country for training labor arbitrators. Arbitrators who are not yet fully employed might argue that there is no need for more arbitrators, but there have been many complaints of a shortage of qualified arbitrators. The arbitration firm could train the arbitrators that are needed in the future.

At an advanced stage of development, the arbitration firm might


follow the pattern set by law firms. The firm might grow in size as it developed an institutional reputation. Arbitrators might develop specialties in particular types of cases — for example, in pensions or job rating cases, in public sector interest arbitration, or in mediation. Parties could contact the firm seeking an arbitrator with expertise in a particular area. Clients might be able to choose from a variety of arbitration firms, differentiated in terms of price, experience, specialties, and reputation.

VIII. Conclusion

Companies and unions choose arbitration in part because of its promised speed. What they often receive instead is a ponderous process. In some instances, labor arbitration does not fulfill its promise because of the inherent delays of the present procedures for arbitrator selection. The arbitration firm has the potential of decreasing much of this delay. Arbitration firms may be the best way to achieve the benefits for which the parties bargained when they agreed to an arbitration system for resolving their disputes.
Lessons Learned: A Reflection upon Bowers v. Hardwick

Abby R. Rubenfeld*

Abby R. Rubenfeld is the Legal Director of the Lambda Legal Defense and Education Fund. On October 30, 1986, Ms. Rubenfeld spoke at Nova Law Center on the significance and implications of Bowers v. Hardwick, 106 S. Ct. 2841 (1986), in which the Supreme Court upheld the constitutionality of the Georgia sodomy statute as applied to private consensual homosexual acts. In addition, Ms. Rubenfeld spoke of a planned challenge to Florida's sodomy statute, based upon the Privacy Amendment to Florida's Constitution. Fla. Const. art. I, section 23. The following is an edited version of Ms. Rubenfeld's remarks.

I

First I want to explain why Bowers v. Hardwick is important. Twenty-five states and the District of Columbia still have sodomy laws. These laws criminalize private, consensual sexual behavior be-

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For some reason all of the "M" states in the country, except Maine, have sodomy laws.
tween adults. They are not concerned with sex with minors, coercion, prostitution, or any kind of commercial sex. They affect both men and women. By and large these laws affect gay and nongay people alike.

In effect, they criminalize the sexual activity of most of the people in this country. The Georgia law upheld in Hardwick was in many ways a good one to bring to the Supreme Court, because it criminalizes every kind of sexual activity other than married heterosexual missionary position sex. Think about that and the number of people in Georgia who are made criminals by the statute. It is a law that, like those of many other states, carries major criminal penalties. Georgia’s law carries with it a twenty year sentence. While here in Florida consensual sodomy is a second degree misdemeanor carrying a penalty of up to 60 days in prison and a $500 fine, the range of penalties in other jurisdictions is from 30 days to 20 years in prison and from $50 to $50,000 in fines.

These laws exist all over the country. This is not just a Southern phenomenon. True, the entire Southeast has sodomy laws, but so do two of the states in the Northeast, Massachusetts and Rhode Island. Many of the Western states have them also—Nevada, Utah, Arizona.

It is important to remember that Michael Hardwick was arrested in his bedroom. He was engaging in sexual activity with another person in his own bedroom, and saw a police officer standing in his door. Think about a police officer at the foot of your bed when you are in bed with someone. Keep that in mind when you are talking about this subject. That is what happened to Michael Hardwick.

Sodomy laws are the basis of all discrimination against gay men and lesbians. As long as these laws exist, gay men and lesbians are labeled as criminals because they are violating the law whenever they engage in the very acts that define them as gay men and lesbians. The sodomy laws can be and are used against gay men and lesbians any time they come in contact with the legal system in a state that has a sodomy law. They are used in lesbian mother-child custody cases, in

3. There are still people who say that to commit sodomy one has to have a penis. It is true that the laws of Henry VIII did apply strictly to sexual activity between men, but state laws have been interpreted to include lesbian acts. For example, in Young v. United States, 298 F. Supp. 1054 (S.D. Miss. 1968), the court held that the statute was constitutional because it did not apply to consensual sexual acts between women. However, it is clear that the statute remains in effect in many states and is being actively enforced.


5. Id. at 16-6-2(b).


probating the will of a gay person, and in contract disputes.

In my own experience in private practice in Tennessee, I had a few experiences with the importance of sodomy laws and access to the legal system. In my very first solo trial as an attorney, I represented a lesbian mother in a child custody case. I don’t recommend that you start your trial practice this way. The trial was in Cleveland, Tennessee, a small rural community on the border of Tennessee, Georgia, and Alabama. I was a bit scared, and kept watching my watch. I wasn’t sure if I was more afraid because I am a woman, or because I am Jewish, or because I am a lesbian.

I was a young lawyer, well prepared, and had a great case. There was a five year old child with cerebral palsy who could get all the services and physical therapy he needed in the public school system in Nashville, where his mother lived. The father and the grandparents wanted to bring the child back to Cleveland, Tennessee, and put him in a private school that could not offer the child any of the therapy that he needed. The school was not accessible to the handicapped, so the child could not even get into the school. To me it looked like an easy case. It turned out to be anything but easy.

I put on my case, and the other lawyer stood up and said, “But your honor, this woman is a criminal.” This was basically true. She was a violator of the state’s sodomy law. While status is not a crime, the fact is that gay men and lesbians violate the law by their sexual activity, and they are engaging in criminal acts. We are criminals in the eyes of the law, and that is used against us. That is why these sodomy laws have to go; they are the nails in the closet doors. Until we get rid of sodomy laws, it does not matter how many of us can escape to New York or San Francisco. We are going to be labeled as criminals and we are going to be attacked in the legal system. It doesn’t matter how many $200 a person gay rights dinners are held at the Waldorf—we have to start with basics and get rid of sodomy laws.

After coming to Lambda Legal Defense and Education Fund, I was amazed by how far the gay rights movement had progressed and the types of cases that were being pursued in various “progressive” ju-

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dissenting from denial of certiorari: “the issue posed in this case [concerning a university’s recognition of a gay student group] is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws.”).

risdiction—things like gay people adopting their lovers, gay people adopting children, and gay spousal benefits. I came from a different perspective, from Tennessee, a state with a felony sodomy law, where I represented a client trying to gain her parole after serving two and a half years in prison. Her crime: engaging in private consensual sex. In my view we cannot concentrate on things like spousal benefits until we put considerable resources into ridding ourselves of sodomy laws.

II

This is the background and context in which the Hardwick case arose. People frequently ask why the gay rights movement pushed the Hardwick case. Would we do it again? I would do it again without hesitation. It was a great case to bring. We had a good shot at winning. It has been reported that at the vote after the oral argument, we had the case won. This case presented the best factual pattern. We may never get another one like it. It is not very common that a police officer barges into someone’s bedroom and arrests him for engaging in private sex. Also, the Supreme Court is not getting any more liberal. Antonin Scalia is probably not going to be any improvement over Warren Burger on our issues.

The day after the decision I was getting my hair cut, and my hairdresser is a gay man. He said to me, “Why did Michael Hardwick do this, why did he have to push this? If he just stayed quiet we would all be OK. Now we have this decision and this is terrible.” I think that this is an attitude that many people had after the Hardwick decision. I absolutely disagree. This was the right case, at the right time, and it was right to pursue it. There was a good chance that it could be won. You do not achieve social progress without taking some risks. This was a calculated risk and we lost, but that is the way things get started. I hope that the energy that has been generated from Hardwick, all that led up to it and all that has followed, will continue, and we will be able to keep the movement for desibilization going. We can still achieve some law reform, even though we were not able to get a quick fix in the federal courts. But I think it was a wise decision to pursue this case.

III

So given this context, and given that there is some hostility to the fact that the case was brought, what does the defeat mean? Where do we go from here? How can any of us that are interested in the issues be involved in doing something about it?

To me, the one word I used in almost all of the press interviews was that the decision was “devastating.” It was a devastating defeat and a terrible blow to our movement. It is something that we have to cope with and do something about. But on the other hand, let me tell you what it was not. It was not a reversal of anything we already had. We did not lose any sort of definitive ruling that the right to privacy included sexual acts. We did not lose anything. It was not like Roe v. Wade being overturned. We tried to get more than we already had and we were not successful. It doesn’t reverse any of the laws that we already had in other areas, such as first amendment rights or free speech and child custody cases. We still have our victories and lay on the books. We have continued to gain victories since the Hardwick case. Within months of the Hardwick decision we won an employment discrimination case in the Sixth Circuit involving a gay man. We are thus not in worse shape than we were before Hardwick.

However, we still have the twenty-six sodomy laws, and we have a problem now a giving access to the federal courts. It is ironic that traditionally the federal courts have been where people went for relief on their civil rights. The black civil rights movement after all we found that the federal courts were the only forum open to black people as many state courts were not sympathetic to civil rights cases. This trend continued through the 1960s and gradually...
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However, we still have the twenty-six sodomy laws, and we have a problem now in gaining access to the federal courts. It is ironic that traditionally the federal courts have been where people went for recourse to protect their civil rights. The black civil rights movement after the civil war found that the federal courts were the only forum open to black people, as many state courts were not sympathetic to civil rights issues. This mood continued through the 1960’s and maybe into

\(^{13}\) 410 U.S. 113 (1973).


\(^{16}\) Dorr v. First Kentucky Nat’l Corp., 796 F.2d 179 (6th Cir. 1986). However, a rehearing en banc was later granted, thereby vacating the panel decision.
the 1970's. This is not true anymore.

It is so ironic to now be considering bringing gay rights lawsuits in state courts, and to have basically written off the federal system. It is so different from everything I learned in law school and everything I geared my career towards. There is a scramble now to read articles about and learn how to use state constitutions and state courts.17

IV

What does the decision mean? You are in law school and can make your own conclusions about the legal reasoning of the Court. I want to suggest three political lessons we can take from the Hardwick decision.

First, Hardwick is a warning to all of us—not just gay men and lesbians—how fragile our civil rights are, particularly in the Reagan, Meese, Rehnquist era. It is no coincidence that the Department of Justice opinion18 about AIDS and Section 504 of the Rehabilitation Act of 1973 came out exactly one week before the Hardwick decision. That was an advisory opinion from the Department of Justice that attempts to restrict the scope of the one federal law that covers disability discrimination so that it basically will not cover any kind of AIDS-based discrimination. To me this is all part of the Reagan administration's philosophy of restricting, curtailing and ultimately ending civil rights protections in this country. We see what is happening with the Civil Rights Commission under the Reagan administration and Clarence Pendleton. It is all part of a pattern, and Hardwick is one of the most vicious examples. Gay people happen to be the most vulnerable. People, and not just gay men and lesbians, should learn from it. What happened to us in Hardwick can happen to any other minority group.

The second lesson that I have chosen from Hardwick is that the case is a reminder how our political system works. It does not matter if you have the law on your side or justice on your side. The courts in this country are political. The vote in the Hardwick case was political. This is also illustrated by the vote in Baker v. Wade,19 in which a gay man

challenged the constitutionality of the Texas sodomy law. The case was in the lower courts the same time as Hardwick. In Baker, a federal district court judge held that the Texas statute was unconstitutional.20 The Fifth Circuit Court of Appeals, en banc, reversed the lower court and upheld the sodomy law.21 One vote made the difference in the en banc decision; that is, it was a nine-seven decision, and a one vote change would have resulted in a tie, affirming the decision below. It was clearly a political vote. The Republican appointees voted one way and the Democratic appointees voted the other way. That was not how I understood the legal system was supposed to work when I went to law school. Nonetheless, that is something that those of us who litigate in these areas—who do gay rights work, or do civil rights work in general—have to accept: this is a political system, and you have to know the politics of it and you have to have political power.

The third lesson that I have taken from Hardwick is that it is a very powerful statement on the powerlessness of the gay community. Hardwick is the decision that Justice White would like to write about abortion rights, but for which he does not have the fifth vote. It is a decision about the extent of the right to privacy, or in Justice White's mind, the absence of the right to privacy. It was only when gay men and lesbians were involved that he was able to get the fifth vote on this issue. Newspapers reported that Justice Powell switched his vote. He listened to Professor Tribe at oral argument, he read our briefs, and he was pursued—until pressure was put on him and he switched his vote. It has not happened yet in the abortion context, but it says something about the power that lesbians and gay men have, and that which we do not have.

The decision teaches us what we need to do in the post-Hardwick world. We need to organize. We need to do grass roots organizing. We need to have people register to vote. We need to change the political system. We need to change which judges sit on the bench. By the time Reagan leaves office, he will have appointed more than half the federal judges in this country. But we can still make a difference in the states where judges are elected. We need to go out and vote and educate our gay rights. We have to be aware of how judges feel and we have to vote

17. E.g., Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982); State Constitutional Law, Nat'l L.J., Sept. 29, 1986 (special section, including bibliography).
19. 769 F.2d 289, reh'g denied, 774 F.2d 1285 (5th Cir. 1985), cert. denied, 106 S. Ct. 3337 (1986).
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accordingly. The system is political; we must accept that and participate in it to make a difference.

V

The implications of the **Hardwick** decision are far-reaching, but I suggest that there are both positive and negative implications. On the negative side, of course, the decision is a danger signal about sexual privacy for anyone, gay and nongay, and for civil rights issues in general. The decision says to me something terrible about this Supreme Court and the type of reasoning it brings to these issues. In **Hardwick**, Justice White's majority opinion and former Chief Justice Burger's concurrence opinion are outrageous to read. The legal reasoning is ridiculous. If we are, as former Chief Justice Burger suggests, to base our constitutional law on the "millenia of moral teaching," then we would never have rid ourselves of miscegenation laws, or other laws that discriminate on the basis of race or sex. It is ridiculous to base constitutional analysis on the Justices' sense of the "millenia of moral teachings."

**Hardwick** also has negative implications in terms of the tone and message it sends to state courts. The **Hardwick** decision is based upon federal constitutional concepts of privacy. It does not preclude arguing state privacy claims, which hopefully will be the basis of a challenge here in Florida. However, it does send a message to state courts about the reasoning and thoughts of the United States Supreme Court.

Indeed, within two weeks of the **Hardwick** decision there was a state court decision in Missouri that upheld that state's sodomy law. It too was a devastating decision, although somewhat expected given the historical treatment of gay rights cases by the Missouri Supreme Court. That the law had been declared unconstitutional by a Missouri trial court was a chance event. The case involved a man who was arrested for semi-public, quasi-private sexual acts—that is how we try to describe these arguably public sex cases. His lawyer was reported to be a noted right-to-life advocate, and not a gay rights spokesman. The lawyer went into court and made a routine motion to dismiss, saying that the statute was unconstitutional. The motion was granted, probably much to the lawyer's surprise. The judge, a progressive woman, granted the motion even though it was not very artfully drafted and was seemingly based on an allegation of equal protection rights being violated because of sex discrimination.

Our amicus strategy in the Lambda brief filed with the Missouri Supreme Court was to focus attention on the right to privacy and the forthcoming decision in **Hardwick**. We did not want the court to deal with the equal protection issues, since the facts of the case were so bad. But the court did analyze the equal protection claim, and held that the sodomy law was not sex discrimination. According to the court, if two women were involved, that was illegal, and if two men were involved, it was illegal, so it could not be sex discrimination. They sort of missed the point that it would be legal for a woman to engage in the sexual act with a man, but it would be illegal for a woman to engage in the same act with another woman. They were not ready for that in Missouri.

The frightening thing about the Missouri decision is that it was so soon after **Hardwick** and that it brought up AIDS, which is the issue of the '80s. All types of gay rights litigation, and certainly sodomy law cases, must now respond to a purported AIDS issue. In the **Hardwick** case itself, the American Public Health Association submitted an amicus brief on our side arguing in particular on the AIDS issue, because it was always there beneath the surface of the issues actually presented. The AIDS issue was on everybody's mind. While the Justices probably do not read the *Journal of the American Medical Association*, they probably do read *Newsweek*, or even the *National Enquirer*. They probably know about AIDS, so the issue was there and a response needed to be made. The APHA brief argued that sodomy laws are basically the worst way to try to contain the spread of AIDS, since criminalizing behavior will not encourage people to seek help. Justice Blackmun cited to the APHA brief in his dissent.

There are, however, some positive aspects of the **Hardwick** decision. The reaction to the decision has universally been negative—it has been on our side. We still have the loss, needless to say, but this is a beginning in terms of coalition building. The American Public Health Association is on our side on this issue. In addition, in **Hardwick** we had a religious brief on our side, while the State of Georgia did not.

24. Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986).
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This did not help us, it turned out, but it is good for the future that we are beginning to gain these kind of allies. We are starting to make the issue more mainstream. The Hardwick decision has brought the issue of sodomy law reform, and the more general issue of privacy rights, to the forefront of people's consciousness in this country. It has made non-gay people aware that in a lot of jurisdictions their sexual behavior is illegal. I'm not saying that the vast majority of non-gay people are now in support of gay rights; they're not. But they do understand that there is an issue of sexual privacy here, and once they start along that road I hope that they can be educated about other issues and that we can enlist their support for other issues. We certainly can use their support in trying to get rid of the sodomy laws.

The most important positive implication, or what I choose to view as a positive development from the Hardwick decision, is that it teaches us that we have to go back to grass roots organizing. Litigating is one thing. There will always be lawyers in any movement. There are a lot of gay rights lawyers, and at Lambda, we have been organizing these lawyers for three years around the issue of sodomy law reform. We have been bringing together representatives of all the gay and lesbian legal groups to strategize about discrimination, in a group called the Ad Hoc Task Force to Challenge Sodomy Laws. That group will continue. There will still be litigation. But litigation will not be enough. There are twenty-five states and the District of Columbia that have sodomy laws. There are many places where it is going to be very difficult to litigate. I would not want to argue a sodomy case in the Mississippi Supreme Court. We have to start educating people, we have to start changing voting patterns, and changing elected officials. We have to be in it for the long haul. We tried for the quick fix in the Hardwick case, we tried for a federal decision that would have made a difference, and we did not get it. But that does not mean that the issue ends and it does not mean that our movement ends. It simply means that we need to shift gears and to a large extent shift our focus. We need to focus on education, we need to focus on political organizing.

VI

There are not many paid, full-time positions available for openly gay and lesbian attorneys. Many people make career choices about what they can do for gay rights, and how out of the closet they can be in their work. I understand that a lot of people (particularly those in states with sodomy laws) are not able to make the decision to come out of the closet. But no matter how you decide that issue, you can still be involved in the movement for sodomy law reform. Actually, you do not have to be or identify yourself as a gay man or a lesbian to be involved in the movement. You can go in the voting booth—which is a closet, I might add—and you can pull down the correct lever and nobody will know how you voted. You can write checks to gay organizations like Lambda Legal Defense or to nongay organizations like the American Civil Liberties Union. The ACLU has a gay rights project. Your check does not have to show anything about your sexuality, or even that you support gay rights. But you do have to support these organizations that are doing the work. You have to support those of us who are able to do this work, because the work cannot get done without the money. If we are going to repeal the twenty-six sodomy laws that exist in this country, it will have to be a group effort. It has to involve grass roots support all around the country. It has to involve both gay and nongay people. All of us have to play a part in it. We have to keep the issue in the forefront of people's consciousness. The issue has to stay in the newspapers so that people know that what they are doing in their bedroom is a constitutional act, and that they could go to prison for it. Then people will want to do something about these laws.

VII

Finally, we are not the first civil rights movement to have suffered a major defeat. I think every civil rights movement, somewhere along the way, has had a major defeat. In the black civil rights movement, the first major defeat was in 1954 in the Supreme Court decision in which the Court upheld the separate-but-equal doctrine. It was a terrible decision and is painful to read. It is awful to think that our Supreme Court would have upheld those sorts of laws under our Constitution. Yet it did. Despite that decision, the black civil rights movement continued and ultimately succeeded in overturning Plessy. It took our fifty years, and I hope that we do not have to wait that long, but the civil rights movement succeeded. That is what we have to keep in mind.

Attorney General Ed Meese recently said that we do not have to turn to the Supreme Court. Maybe we shouldn't worry about
of the closet. But no matter how you decide that issue, you can still be involved in the movement for sodomy law reform. Actually, you do not have to be or identify yourself as a gay man or a lesbian to be involved in the movement. You can go in the voting booth—which is a closet, I might add—and you can pull down the correct levers and nobody will know how you voted. You can write checks to gay organizations like Lambda Legal Defense or to nongay organizations like the American Civil Liberties Union. The ACLU has a gay rights project. Your check does not have to show anything about your sexuality, or even that you support gay rights. But you do have to support these organizations that are doing the work. You have to support those of us who are able to do this work, because the work cannot get done without the money. If we are going to repeal the twenty-six sodomy laws that exist in this country, it will have to be a group effort. It has to involve grass roots support all around the country. It has to involve both gay and nongay people. All of us have to play a part in it. We have to keep the issue in the forefront of people's consciousness. The issue has to stay in the newspapers so that people know that what they are doing in their bedroom is a criminal act, and that they could go to prison for it. Then people will want to do something about these laws.

Finally, we are not the first civil rights movement to have suffered a major defeat. I think every civil rights movement, somewhere along the way, has had a major defeat. In the black civil rights movement, the one most analogous to Hopwood is Plessy v. Ferguson, in which the Supreme Court upheld the separate-but-equal doctrine. It was a terrible decision and is painful to read. It is awful to think that our Supreme Court would have upheld those sorts of laws under our Constitution. Yet it did. Despite that decision, the black civil rights movement continued and ultimately succeeded in overturning Plessy. It took over fifty years, and I hope that we do not have to wait that long, but the civil rights movement succeeded. That is what we have to keep in mind.

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the *Hardwick* decision. Maybe that is what he had in mind when he made those comments. But we have that decision, and we have to realize that we can change it, and we should want to change it in our lifetimes. There has to be an explosion of energy within the gay community and among our supporters. That is the lesson that I bring to you from the *Hardwick* case: organize and energize. Everyone has to do something about it in their legal careers and in their political careers. Whatever kind of work you do, you have to help change these laws.

The Fair Housing Act and “Discriminatory Effect”: A New Perspective

Frederic S. Schwartz*

I. Introduction

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits discrimination in housing. The Act provides that it shall be unlawful:

To refuse to rent or sell after the making of a bonafide offer or to refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

In one type of case, the defendant is a landlord or owner of property who has refused to rent or sell on the ground that the prospective tenant is of a race other than his own. In such cases, the plaintiff is usually a member of the majority group who has been denied the opportunity to buy a house within the bounds of the defendant’s property. The question is whether the defendant, in refusing to rent or sell to the plaintiff, is engaging in the type of conduct prohibited by the Fair Housing Act. This is the type of case in which the defendant is a landlord or owner of property who has refused to rent or sell on the ground that the prospective tenant is a member of a minority group. In such cases, the plaintiff is usually a member of the minority group who has been denied the opportunity to buy a house within the bounds of the defendant’s property. The question is whether the defendant, in refusing to rent or sell to the plaintiff, is engaging in the type of conduct prohibited by the Fair Housing Act.

*Note:* The author of this document is not specified within the text.
The Fair Housing Act and "Discriminatory Effect": A New Perspective

Frederic S. Schwartz*

I. Introduction

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968,1 prohibits discrimination in housing. The Act provides that it shall be unlawful:

To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.2

In one type of case, the defendant is a landlord or seller of property who has refused to rent or sell to the plaintiff. In another type of case (referred to as the "project cases" in this Article), the defendant is a municipality which has, in one way or another, prevented the construction of a housing development — usually a low-income project — within its borders. This article will be concerned primarily with the cases in the second category. A housing developer's inability to build his project can result from either an act or a failure to act by the municipality. Most commonly, a municipality changes its zoning to exclude the type of housing proposed or refuses to change its zoning to permit the housing. In other cases the municipality withdraws funds or support for a publicly-funded project. (For the sake of convenience, in all such cases the municipality will be said to have "rejected" the project.)

One way of establishing a violation of the Act is by showing a "discriminatory effect." This paper will discuss the meaning and appli-


2. 42 U.S.C. 3604(a) (1982). Also prohibited is discrimination in "terms, conditions, or privileges or sale or rental," "provision of services or facilities" and a number of other practices. 42 U.S.C. 3604(b) (1982).
culation of the theory of discriminatory effect in the context of the project cases. In part II the elements of a violation of the Act will be outlined, followed in part III by a discussion of the meaning of “discriminatory effect” adopted in the project cases. Part IV will point out the difficulties with that meaning. Part V will propose that a different approach to discriminatory effect be taken in the project cases.

II. Establishing a Violation of the Fair Housing Act

Most obviously, the Act is violated by what is usually called discriminatory “intent” or “motive.” If the defendant refuses to rent to the black plaintiff because the defendant dislikes blacks, clearly the plaintiff is denied housing “because of his race” and the statute is violated. Although liability based upon discriminatory motive has occurred most often in the cases involving discrimination by individual, private defendants, it has been recognized in the project cases as well.3

However, the courts have given the Fair Housing Act an interpretation that goes beyond racial motive: the Act is violated by “discriminatory effect” even if there is no discriminatory intent.4 Two forms of “discriminatory effect” have been recognized. First, the defendant’s action may have “a greater adverse impact on one racial group than on another.”5 Second, an action is said to have a discriminatory effect “if it perpetuates segregation and thereby prevents interracial association,” even if it does not produce “a disparate effect on different racial groups.”6

The “greater adverse impact” analysis had its genesis in cases brought under the employment discrimination statute, Title VII of the Civil Rights Act of 1964.7 Title VII, like the Fair Housing Act, prohib-

6. Id.
its discrimination "because of race." In *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII is violated by effect as well as by intent. In *Griggs*, the defendant employer required job applicants and present employees who applied for job transfers to possess a high school diploma or pass a standardized general intelligence test. Although the employer had no intent to discriminate against blacks, the tests had a discriminatory effect because they "operate[d] to disqualify Negroes at a substantially higher rate than white applicants." That effect constituted a violation of Title VII, which "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." The defendant could avoid liability, however, by demonstrating a "business necessity" for the challenged tests.

The courts in several housing cases reasoned that the objectives of Title VII and Title VIII are similar. These cases held, on the basis of *Griggs*, that the Fair Housing Act is violated by a discriminatory effect even in the absence of any intent to discriminate on the basis of race. Like the Title VII cases, the housing cases found that interpretation to be consistent with the "because of race" language and with the legis-

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8. Title VII states in Section 703(a):

> It shall be an unlawful employment practice for an employer —

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


10. Id. at 426.

11. Id. at 431.

12. Id. In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), the Court said that an employer can justify the use of a job requirement that imposes a disparate impact by showing that it serves "the employer's legitimate interest in 'efficient and trustworthy workmanship'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).


14. E.g., Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1289-90. In United States v. Housing Auth. of Chickasaw, 504 F. Supp. 716, 726-27 (S.D. Ala. 1980), the court stated that the language prohibiting practices that "make unavailable or deny" housing to any person because of race "is as broad as Congress could have made it and it reaches every private and public practice that makes housing more difficult to obtain on prohibited grounds."
lative history.\textsuperscript{16}

Thus, the Fair Housing Act is broader in its proscription than the fourteenth amendment. The Supreme Court had held that a denial of housing does not constitute a violation of equal protection under the fourteenth amendment unless there was an intent to discriminate on the basis of race. "Discriminatory effect" is not enough.\textsuperscript{16}

There has been some difference of opinion on the exact role played by discriminatory effect. In \textit{Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II)},\textsuperscript{17} the Seventh Circuit Court of Appeal said that "at least under some circumstances" discriminatory effect is sufficient to establish a violation of the Act even though discriminatory intent is absent.\textsuperscript{18} To determine whether in a particular case the discriminatory effect is sufficient to show a violation, the court must consider four "critical factors."\textsuperscript{19} Those factors are:

(1) how strong is the plaintiff's showing of discriminatory effect;  
(2) is there some evidence of discriminatory intent . . . ;  
(3) what is the defendant's interest in taking the action complained of; and  
(4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.\textsuperscript{20}

\begin{enumerate}
\item An amendment to the Act which would have required proof of discriminatory intent was rejected by the Senate. 114 \textit{Cong. Rec.} 5221-22, 5216 (1968).
\item 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).
\item Id. at 1290 (emphasis added). In a subsequent case, the Seventh Circuit characterized \textit{Arlington Heights II} as saying that "statistical disproportion [discriminatory effect] alone was not enough, but neither did a plaintiff have to prove discriminatory intent" to establish a violation. Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 189 (7th Cir. 1982).
\item By contrast, in United States v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978), \textit{Arlington Heights II} was cited for the proposition that "a significant discriminatory effect flowing from the rental decisions is sufficient to demonstrate a violation of the Fair Housing Act."
\item Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1290.
\item Id. The court seemed to interpret the third factor to mean, in cases where the defendant is a governmental body, merely that the act be lawful; if such a defendant acts "outside the scope of its authority or abuses its power, it is not entitled to the deference which courts must pay to legitimate governmental action," but if it acts "within the ambit of legitimately derived authority, we will less readily find that its action violates" the Act. Id. at 1293.
\end{enumerate}

A few courts have endorsed the \textit{Arlington Heights} "four factors" test.\textsuperscript{21} In other cases, however, a showing of discriminatory effect is said to establish only a "prima facie case." The defendant will still be able to escape liability if he can show that the effect is justified by some other interest which his action promoted. There is no agreement on how strong an interest must be in order to justify a discriminatory effect. For example, in one case of private discrimination, the court required that the defendant show "a business necessity sufficiently compelling to justify the challenged practice,"\textsuperscript{22} a test borrowed from \textit{Griggs}.\textsuperscript{23} On the other hand, the Eighth Circuit Court of Appeals has stated that a governmental defendant can justify a discriminatory effect only by a "compelling governmental interest."\textsuperscript{24} To determine whether an interest is compelling, the Eighth Circuit looks to several factors:

\begin{enumerate}
\item whether the ordinance in fact furthers the governmental interest asserted;  
\item whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and  
\item whether less drastic means are available whereby the stated governmental interest may be achieved.\textsuperscript{25}
\end{enumerate}

The "compelling governmental interest" test is the same as the test under equal protection analysis where a fundamental right or a suspect classification is involved and will be very difficult to meet.\textsuperscript{26}

But the Third Circuit, also in a case which involved a governmental defendant, rejected both the "business necessity" test and the "compelling governmental interest" test.\textsuperscript{27} Instead, in its view "[a] justification must serve, in theory and practice, a legitimate, bona fide interest in the Title VIII defendant, and must show that no alternative course of action could be adopted that would enable that interest to be served

\begin{enumerate}
\item \textit{E.g.}, Smith v. City of Parmelee, 661 F.2d 582 (4th Cir. 1981).
\item \textit{Boyes v. Turtle Creek Associates}, 736 F.2d 983, 984 (4th Cir. 1984).
\item See supra text accompanying notes 9-12.
\item United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1975),  
\item cert. denied, 422 U.S. 942 (1975).
\item Id. at 1186-87 (footnotes omitted).
\item The commentator described the test as "vague in theory and fatal in fact."  
\item Boston, 554 F.2d at 148.
\end{enumerate}
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\textsuperscript{21} E.g., Smith, 682 F.2d at 1065; United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).
\textsuperscript{22} Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984).
\textsuperscript{23} See supra text accompanying notes 9-12.
\textsuperscript{24} United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).
\textsuperscript{25} Id. at 1186-87 (footnotes omitted).
\textsuperscript{26} One commentator described the test as “‘strict’ in theory and fatal in fact.” Gunther, Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection, 86 HAR. L. REV. 1, 8 (1972).
\textsuperscript{27} Rizzo, 564 F.2d at 148.
with less discriminatory impact." 28 "[T]he test for Title VIII liability... involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." 29 This test, too, may be difficult to satisfy; the "no alternative course of action" test "may prove difficult for many defendants to satisfy unless they have actively engaged in politics to achieve integration." 30

III. The Meaning of Discriminatory Effect

While it may be clear that "greater adverse impact" on one race constitutes a violation of the Act, what that means is not so clear. In Part A of this section, the meaning given to discriminatory effect in Griggs will be summarized. In Part B, the varying meaning of discriminatory effect in the housing cases will be discussed. The particularly confused treatment of discriminatory effect in a recent district court case, In re Malone, 31 will be the subject of Part C.

A. Discriminatory Effect in Griggs

In the employment discrimination cases, the "effects" analysis is clear and consistent: it is disproportionate impact along racial lines that violates Title VII. Thus, in Griggs, the employer's requirement that applicants have a high school diploma or pass an intelligence test had an unlawful disproportionate effect, because the percentage of blacks in the general population who could not meet that requirement was larger than the percentage of whites who could not meet it. 32 The disproportionate effect in Griggs could also have been described by

28. Id. at 149.
31. 929 F. Supp. 1335 (E.D. Mo. 1994). For a different approach, see Rabin, Fair Housing and the Law of Employment Discrimination, 42 U. Chi. L. Rev. 190, 217 (1975). The Court noted that blacks were disqualified at "a substantially higher rate than white applicants." 401 U.S. at 426. The Court quoted statistics showing that in North Carolina, the defendant's place of business, 34% of white males and 12% of black males had completed high school. Id. at 430 n.6. Similarly, of the whites who took a battery of standardized intelligence tests, including the tests administered by the defendant, 58% passed, but only 6% of the blacks taking the test passed. Id.

29. In Griggs the court said that a "disproportionate number" of blacks were ineligible, but he meaning of this disproportion was not made clear. Id. at 429.
31. The two comparisons may indicate different apparent magnitudes of disproportion; however. See supra text accompanying note 34.
looking at the group it produced. Under this method, a comparison
would be made of the racial composition of the group who could not
meet the employer’s requirement with the racial composition of the
general population; blacks would make up a larger proportion of the
former than of the latter.\textsuperscript{33}

The first comparison has been said to show “disproportionate ad-
verse effect” and the second, “disproportional representation.”\textsuperscript{34}
But it
should be emphasized that these two comparisons are two ways of say-
ing the same thing: a case of disproportional representation can only be
produced by disproportionate adverse effect, and disproportionate ad-
verse effect will always result in disproportional representation.\textsuperscript{35}

Three points should be made about the meaning of “discrimina-
tory effect.” First, it must be emphasized that the proper comparison is
\textit{not} of the absolute numbers of persons of each race affected. A com-
parison of that kind would falsely indicate that a neutral decision pro-
duced a “disparate impact” on the majority group.

Second, the “discriminatory effect” need not actually be produced
in order to conclude that the plaintiff’s rejection was a violation of the
statutes prohibiting discrimination in employment or housing. It should
be enough to show that the reason for which the plaintiff was rejected
\textit{would} have produced disproportional representation if it had been ap-
plied to a large number of applicants. Thus, for example, if the plaintiff
is denied an apartment because he did not meet the landlord’s mini-
mum income requirement, and if income is correlated with race, a vi-
olation should be found. This should be the case even if the plaintiff was
the only person who applied for an apartment.

Third, lack of evidence, of the reason for the plaintiff’s rejection,
should not prevent him from establishing a violation. In that situation,
the plaintiff should prevail simply by showing that the defendant’s eval-
uation of a large number of applicants produced disproportional repre-
sentation. That evidence should raise a presumption that the method of
evaluation which produced that result was the reason for the plaintiff’s

\textsuperscript{33} In \textit{Griggs} the court said that a “disproportionate number” of blacks were
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\textsuperscript{34} Lamber, Reskin, & Dworkin, \textit{The Relevance of Statistics to Prove Discrimi-
nation: A Typology}, 34 \textit{Hastings L.J.} 553, 590, 598 (1983). \textit{See also} Comment, \textit{A
Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory

\textsuperscript{35} The two comparisons may indicate different apparent \textit{magnitudes} of dispro-
portion, however. \textit{See supra} text accompanying note 34.
B. Discriminatory Effect in the Housing Cases

The treatment of discriminatory effect in the housing cases has been very confusing. Some of the housing cases have followed Griggs in viewing a prohibited discriminatory effect as a disproportionate adverse effect. That is, the group analogous to the non-graduates in the Griggs courts are those persons who were injured by the loss of the proposed housing: the low-income persons who would have been eligible to reside there. Thus, disproportionate adverse effect can be shown if a larger percentage of blacks meet the low-income qualifications for residency than do whites.37

For example, in Smith v. Town of Clarkston,38 the Fourth Circuit Court of Appeals found a discriminatory effect from the municipality's action in preventing the construction of low-income housing. The court noted that "69.2% of all black families in Bladen County are presumptively eligible for low income housing, while only 26% of the white population is so qualified."39 The district court had found that the loss of the low income housing "fell 2.65 [apparently 69 divided by 26] times more harshly [on] the black population than on the white."40 The appellate court similarly found a discriminatory effect from these figures, stating that "the black population of Bladen County was adversely affected by the termination of the housing project, as it is that population [which is] most in need of new construction to replace substandard housing, and it is the one with the highest percentage of presumptively eligible applicants."41 Thus, the court's figures show a disproportionate adverse effect.

36. Interestingly, under this view of discriminatory effect it is possible to view the intent or motive theory as simply one subcategory of the discriminatory effect theory. A defendant's racial animus can be presumed to affect his evaluation of applicants for employment or housing. The racial animus or motive is, therefore, a "criterion" which is correlated with race and which will therefore produce a discriminatory effect, exactly as the high school diploma criterion in Griggs did. The effect in the motive case, if there are many applicants, is indistinguishable, for purposes of the Act, from the effect in a Griggs-type case. Analysis would be simpler and more logical if the case of racial motive were viewed as one special kind of discriminatory effect case.

37. If the racial proportion of the population on the waiting list for the housing of this type is different from those eligible, then the former should be used.

38. 682 F.2d 1055 (4th Cir. 1982).

39. Id. at 1061.

40. Id. at 1064 (quoting the district court).

41. Id. at 1065 (emphasis added).
adverse effect.

In *United States v. City of Black Jack*, a district court referred to the plaintiff's statistics showing that 32% of the black population (in the standard metropolitan statistical area) and 29% of the white population fell within the income guidelines for the rejected project. Therefore, the court concluded, "the percentage of each race that Park View Heights is designed to serve is very close to the same, and the effect of excluding this class is not racially discriminatory." The Eighth Circuit reversed, however, finding a violation based (apparently) on motive and segregative effect.

The Second Circuit in *Citizens Committee for Faraday Wood v. Lindsay* similarly held that there was no discriminatory effect because there was no disproportionate effect. The court found that most of the project was reserved for middle-income persons and that blacks were not disproportionately represented in this group. Thus "the assumption used in the typical public housing case is not valid here." The court distinguished *Kennedy Park Homes Association v. City of Lackawanna* and similar cases. In *Kennedy Park*, "the housing projects were designed only for low-income persons. In such cases it was possible to say that nonwhites were disproportionately affected since only low-income persons were involved and since a disproportionate number of nonwhites are low-income persons."

43. 372 F. Supp. at 330.
44. *City of Black Jack*, 508 F.2d at 1188.
46. *Faraday Wood* involved an equal protection claim, not a claim under the Fair Housing Act. The case was decided before the Supreme Court held in *Washington v. Davis*, 426 U.S. 229 (1976), that racial intent is necessary to prove a 14th amendment violation; discriminatory effect in *Faraday Wood* would be relevant to a Fair Housing Act claim as well.
47. 507 F.2d at 1069.
49. 507 F.2d at 1069. A leading commentator on the Act has concluded that the courts will decline to find a violation of the Act when the black representation in the project population would not have been disproportionate. "By way of contrast [to the cases finding a violation], the two appellate decisions that have rejected exclusionary zoning claims under Title VIII have concerned projects where minorities would not have accounted for a disproportionately high percentage of the eligible tenants." *Schwemm, Housing Discrimination Law 141* (1983). Schwemm cites Joseph Skilken & Co. v. City of Toledo, 528 F.2d 867, 878 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (1977) ("percentage of whites and blacks eligible for public
Other housing cases have determined discriminatory effect on an entirely different (and erroneous) basis. In those cases, the courts compare the absolute numbers of blacks and whites in the disadvantaged groups. Since the number of blacks in the general population is less than the number of whites, there can be a disproportionate effect on blacks even though the absolute number of blacks adversely affected is less than the number of whites so affected. Whatever the merits of looking at the disproportion in the project population — and that approach is criticized below — there is even less justification for a measure based on a comparison of absolute numbers. As we have seen, the proper comparison is between the proportion of blacks (or whites) in the disadvantaged group and the proportion of blacks (or whites) in the general population. Of course, the smaller number of blacks in the general population means that there will be a disproportionate effect whenever the absolute number of blacks adversely affected exceeds the number of whites adversely affected. But some courts have indicated that it is the difference in absolute numbers, rather than the disproportion, which constitutes discriminatory effect.

Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II) is the leading example of the view that a comparison of numbers is the more significant of the two measures of discriminatory effect. The Seventh Circuit Court of Appeals stated that one kind of "racially discriminatory effect" occurs when there is "a greater adverse impact on one racial group than on another." The court first conceded that there was a disproportionate adverse effect: "It is true that the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area." Then the court switched to discussing disparate representation:

But it is also true that the class disadvantaged by the Village's action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white. The argument for racial discrimination is therefore not as strong as it would be if all or most of the group adversely affected was nonwhite.

The court ascribed significance to the fact that there are more whites in the class of rejectees than blacks. But the comparison should have been between the 60% white proportion of the disadvantaged group and the white proportion of the Chicago-area population.

Apparently to emphasize the importance of the absolute-number comparison, the Arlington Heights II court distinguished the case of Resident Advisory Board v. Rizzo. Since ninety-five percent of the individuals on the waiting list for public housing in Philadelphia [in Rizzo] were members of minority groups, the failure to build public housing had a much greater adverse effect on nonwhite people than on white people. But the relevant comparison in Rizzo should have been between the 95% representation of black people in the disadvantaged group with their representation in the general population.

Several cases have followed Arlington Heights II by finding discriminatory effect in a comparison of absolute numbers of blacks and whites affected. Thus, in Keith v. Volpe, the municipality prevented the construction of low-income housing for persons displaced by the construction of a freeway. Because two-thirds of the persons who would have occupied the housing were members of an ethnic minority, the court concluded that the municipality's action affected minority displaced "twice as hard" as it affected white displaced, and therefore a racially discriminatory effect was shown. Presumably, if the population displaced by the freeway had been composed of equal numbers of whites and minority members, then the failure to build the housing would have affected the races "equally as hard," and no racially dis...
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\textsuperscript{56} Id. at 1291.
\textsuperscript{57} Id. (emphasis in original).
\textsuperscript{58} 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).
\textsuperscript{59} 558 F.2d at 1291.
\textsuperscript{60} 618 F. Supp. 1132 (C.D. Cal. 1985).
\textsuperscript{61} Id. at 1130.
criminatory effect would have been established. There was no harm in the erroneous comparison, because a 66% black representation in the disadvantaged group exceeded the black representation in the population. But the statement that the disparate impact was "twice as hard" on minority displaces is an invitation to other courts to make the same kind of mistake.

Similarly, in Arthur v. City of Toledo, the district court twice used the wrong measure to find an absence of disparate impact. Since 84% of the households eligible for the rejected housing were white and 16% were minorities, the court found that there was a greater impact on whites by a five to one ratio (84% divided by 16%). The plaintiffs, on the other hand, argued in favor of a comparison of households actually on the waiting list for rejected housing, of which 50% were white and 50% minorities. Even if that were the correct comparison, the district court said, the whites and minorities were affected equally. The court of appeal generally agreed with the district court's analysis. The proper inquiry, of course, is something quite different: if the general population was less than 16% black (using eligible households) or less than 50% black (using the households on the waiting list), then an unlawful disproportionate impact should have been found.

Another example is Joseph Skilken & Co. v. City of Toledo, where the Sixth Circuit noted the fact, without clearly explaining its importance, that "there are more than three times as many whites who need public housing than there are blacks needing housing." However, according to the court's figures, the white population in the region was more than six times the black population. Thus the percentage of

62. 782 F.2d 565 (6th Cir. 1986).
63. The district court's unreported opinion is quoted in the opinion of the court of appeals.
64. 782 F.2d 565, 576 (6th Cir. 1986).
65. "Although the district court should have focused on the waiting list for the Turnkey III projects, rather than on the general population, we conclude that plaintiffs-appellant presented, at best, only relatively weak disparities figures .... Id.
66. The counting of households rather than persons is an error as well. Although the number of white households on the waiting list exceeded the number of black households, it appears that the number of black individuals exceeded the number of white individuals. Id. There is no apparent reason to base effect on households rather than persons, however, and the district court thus underestimated the effect on blacks.
67. 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068, on
68. Id. at 878.
70. Housing and Community Development Act of 1968, 42 U.S.C. § 1801 et seq. (West Supp. 1966). Under the Section 8 program, a Housing Authority was authorized to enter into a contract with a developer to provide and finance housing for persons who were "financially limited" individuals; a contract was entered into with the defendant.
73. 492 F. Supp. at 1160.
74. The court's discussion was at the center of a dispute over the "hardcore" case in the opinion of the court suggesting the same analysis of discriminatory effect
75. 528 F.2d at 867.
76. 492 F. Supp. at 1160.
blacks needing public housing, and affected by the municipality's refusal to permit it, exceeded the percentage of whites in the same position. The court failed to find a disparate impact, apparently giving greater importance to the numerical comparison than to the percentage comparison.

C. In re Malone

Confusion regarding the meaning of discriminatory effect reached new heights in In re Malone. The defendant municipality had refused to rezone the plaintiff's property for multifamily housing, thereby preventing the construction of an apartment complex which would have included low-income residents under the "Section 8" program. The evidence given by the plaintiff showed that "the percentage of all black persons in the St. Louis area who qualify for § 8 housing is higher than the percentage of all white persons in the St. Louis area who qualify for § 8 housing." As we have seen, this is the disproportionate adverse effect which most of the housing cases (and Griggs) used. Therefore, a finding of discriminatory effect should have been made. But the court did not do so.

The judge in Malone began by discussing Village of Arlington Heights v. Metropolitan Housing Development Corp. (Arlington Heights I). As in Malone, the defendant in Arlington Heights I was a municipality which had refused to rezone the plaintiff's land to a multiple-family classification. The rezoning would have permitted the construction of housing for low and moderate-income persons. The United States Supreme Court stated that the impact of the defendant's decision "does arguably bear more heavily on racial minorities. Minorities

72. The court's discussion was in the context of claims under the fourteenth amendment and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1983 (1982); but later in the opinion the court adopted the same analysis of discriminatory effect for purposes of the Fair Housing Act. 592 F. Supp. at 1166.
constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for the new housing. Thus, the 40% figure is the ratio between the number of blacks eligible for the housing that was rejected and the number of persons of all races so eligible, i.e., the ratio of the number of blacks adversely affected by the municipality’s decision to the number of all persons so affected. This is simply the “disproportional representation” measure discussed above. Although the finding of disparate impact in Arlington Heights I was based on disproportional representation, and the evidence produced in Malone showed disproportionate adverse effect, those two measures of disparate impact are equivalent. The discussion and holding in Arlington Heights I, then, are entirely consistent (and are precedent for) a finding of disparate impact in Malone.

But the court in Malone misstated the meaning of the numbers in Arlington Heights I. According to Malone, the Supreme Court in Arlington Heights I “compared the percentage of blacks in the Chicago area population (18%) to the percentage of blacks who qualified for the type of housing that was excluded (40%).” The court’s characterization of the 40% figure was in error. That figure was the ratio of the number of blacks eligible for the rejected housing in Arlington Heights I to the number of persons of all races so eligible, but the court in Malone seemed to characterize the 40% figure as the ratio of the number of blacks qualifying for the housing to the number of blacks in the Chicago-area population.

Given the Malone court’s characterization of the 40% figure, the comparison made in Arlington Heights I is meaningless. Yet the Malone court persisted. It stated that, under the Arlington Heights analysis, there is no discriminatory effect if the percentage of the population that is non-white (18% in Arlington Heights I) is the same as the percentage of the non-white population that is eligible for the housing project (according to Malone, 40% in Arlington Heights I). Although the court had information on the first ratio (“12.5% of the St. Louis area population is non-white”) it did not have any figures for the second ratio, which it assumed had been considered in Arlington Heights I (“there is no evidence of what the precise percentage of non-whites who qualify for § 8 housing is”). Thus, based on the evidence in this case, this Court is unable to make the statistical comparison that the Arlington Heights Court found relevant. But the comparison which the court tried unsuccessfully to make is meaningless, and it was not the comparison that Arlington Heights found relevant.

Finally, the Malone court concluded that absolute numbers were more important anyway. There was no discriminatory effect because in terms of numbers there are more whites than blacks in the St. Louis area who qualify for § 8 housing. It follows from this fact that the percentage of persons qualifying for § 8 housing who are white is greater than the percentage of persons qualifying for § 8 housing who are black.

The Court added that in its opinion, this evidence was the “most probative” on the question of whether the defendant’s action bears more heavily on one race than another.

IV. Problems with the Current View of Discriminatory Effect

The Malone case and the other cases considered above illustrate the difficulty that some courts have had in applying a Griggs-type analysis of discriminatory effect to the housing project cases. But there are other problems in making that analogy. Those problems are discussed below.

A. The Distinction between Initiation and Abandonment of Public Projects

The first problem is that, with respect to public housing, the courts’ view of discriminatory effect requires a distinction between a municipality’s failure to initiate steps to create such housing and a municipality’s abandonment of efforts that have once begun. That distinction, however, lacks a theoretical basis. The discriminatory effect is the same in either case.

Where public housing projects are involved, the consequence of focusing on the discriminatory effect of a municipality’s rejection of a single proposed project is to ignore the effect of municipal actions which are not tied to a particular project. If the municipality never

74. Id. at 269.
75. See supra part III(A).
77. Id.
78. Id. at 1161.
79. Id.
case, this Court is unable to make the statistical comparison that the Arlington Heights Court found relevant.\textsuperscript{77} But the comparison which the court tried unsuccessfully to make is meaningless, and it was \textit{not} the comparison that Arlington Heights found relevant.

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\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1161.
\textsuperscript{80} Id.
even considers building any public housing, or if the municipality's consideration of a project never passes a certain point of definiteness, no discriminatory effect will be found. Thus, there is an arbitrary limitation on the kinds of municipal actions that "count" in the calculus of discriminatory effect. But clearly the loss of a potential housing project that was rejected at the very first stages of consideration produces just as much a discriminatory effect as rejecting that project once it has been formally proposed. The result of the distinction is that a municipality whose liberal attitude towards low-income projects leads it to consider them seriously will more likely be found in violation of the Act than a municipality whose illiberal attitude prevents even the slightest consideration of a project.

It is true that the Act is said not to impose any affirmative duty on municipalities to provide housing. But that principle does not solve

81. In Acvedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974), the County and the Town of Hempstead formulated plans to include housing for low, middle, and upper income families on a recently acquired site. Later those plans were abandoned. In rejecting the plaintiffs' Fair Housing Act claim, the court stated that the Act "does not impose any duty upon a governmental body to construct or to 'plan for, approve and promote' any housing." Id. at 1082.

In Angel v. Town of Manchester, Eq. Opp. Hous. (P-H) ¶ 15, 398 at p. 15,998.276 (D. Conn. 1981), the court said that it was "not prepared to hold that Title VIII liability could result solely from discontinuance of a voluntarily undertaken program if the effects on housing do not go beyond loss of the program itself... . [I]t would be an anomalous result to find that the mere loss of a voluntarily undertaken program could itself constitute a discriminatory effect violative of Title VIII."

See also Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1283, where the court said that one factor in deciding whether the Act has been violated is the nature of the relief which the plaintiff seeks. The courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction. To require the defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy.

Id. at 1293. Accord Smith v. Town of Clarkson, 682 F.2d 1055 (4th Cir. 1982).

In addition, it has been held that the fourteenth amendment's equal protection guarantee does not require affirmative measures. In Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), cert. denied, 421 U.S. 948 (1975), the court distinguished previous cases because there a city acted to thwart a private developer's attempt to construct housing for low-income persons. The cities involved had no financial or other con-

section with the project. However, in this case, the governmental body that decided not to proceed with the project was the same one that initiated it and that was going to finance it.

Id. at 1069. Therefore, the court concluded, it would be inappropriate to order the defendants to acquire a site for construction of a low-income housing project. There is no obvious reason why the Fair Housing Act should receive a different interpretation.

82. 682 F.2d 1055 (4th Cir. 1982).
83. Id. at 1061.
84. Id. at 1065-66.
85. Id. at 1069.
the problem. The "no affirmative duty" reasoning seems to be grounded, not on any theoretical basis demonstrating the absence of a discriminatory effect, but on a court's unwillingness to order a municipality to spend its funds. A municipality will nevertheless incur costs for projects which it does not directly finance, in the form of increased public services and lower property tax revenues compared to other developments that might have located on the site instead. Moreover, the courts' unwillingness to order the municipality to spend its own money would not support a distinction between a municipality which seeks public funds elsewhere (e.g., from the federal government) and then abandons its efforts and a municipality which makes no such efforts in the first place. In Smith v. Town of Clarkston, the town formed a joint housing authority with two neighboring municipalities to seek funds from the Department of Housing and Urban Development (HUD) for the construction of public housing. HUD approved their application and appropriated $85,000 which was used to purchase a site. An architect was employed, who "substantially completed preliminary pre-construction sketches and site layouts." When opposition to the project was voiced, the town withdrew from the joint housing authority and thereby ended the project. The Fourth Circuit Court of Appeal found that the town's conduct had a discriminatory effect and was a violation of the Act, even though there was no affirmative duty to provide housing. Although it was improper for the district court to have ordered the town to construct public housing from its own funds, it was proper to fashion an order which would "place the project at the point of realization achieved prior to the [town's] violations . . . [and to require the town] to reimstitute the procedures and plans in place prior to the time of their termination due to the proven violations and require[e] it to aggressively and in good faith pursue those plans." The remedy was "aimed at placing the parties in the positions they occupied before the
violations occurred." The court’s decision means that a municipality has a duty not to backtrack from whatever steps it has once taken along the path to creating housing. But does not a municipality which fails even to start along the path create a discriminatory effect as well? The courts’ understandable reluctance to order a city to spend public funds does not provide a theoretical explanation, based on the absence of discriminatory effect, for this distinction.

B. The Self-Selection Problem

A similar problem arises with respect to projects that are privately initiated and privately funded. Private developers will be less likely to attempt to build in a municipality which has a reputation for refusing to rezone land to accommodate them than in a more liberal municipality. But the effect of a municipality’s housing practices in discouraging developers from proposing projects at all is simply not taken into account. This “self-selection” problem has been acknowledged in the context of employment discrimination. In *Dothard v. Rawlinson,* the United States Supreme Court noted that an inspection of the percentages of applicants of different sexes who were offered jobs will understate discriminatory effect if those who know of the defendant’s discriminatory hiring policies were discouraged from applying. No housing case, however, has applied this analysis.

Thus, the consequence of focusing on the single project which is the subject of litigation has the result of overstating the discriminatory effect caused by a municipality which has made some efforts to provide housing and to ignore the discriminatory effect of discouraging project proposals in the first place. This narrow view of effect gives municipalities an incentive to do as little as possible to provide for low-income housing. It is the municipalities that make some effort to do so and then fall short of their original goals that are most open to liability.

C. The “Weeding Out” Problem

Even for projects which do reach the proposal stage, there is another kind of “self-selection” that takes place. If a municipality rejects a project whose population is not disproportionately black, no discriminatory effect is shown. But the absence of disproportion may simply be the result of the developer (or the municipality itself in the case of publicly-initiated projects) reducing the number of blacks at some earlier time in order to increase the project’s chances of acceptance. If this weeding-out process takes place before the project reaches the stage at which the court evaluates discriminatory effect, the loss of those residents is not taken into account in the calculation of disproportion.

An example of this phenomenon is seen in *Citizens Committee for Faraday Wood v. Lindsay.* The case concerned a claim under the fourteenth amendment, but the Second Circuit’s discussion of the discriminatory effect claim is relevant for cases brought under the Fair Housing Act. New York City had begun plans for a publicly financed housing project. The initial plans called for half of the housing units in the project to be for low-income families and half for middle-income families. After public hearings, however, the project was changed to accommodate 80% middle-income and 20% low-income residents. Finally the city abandoned the project completely. The court found that the abandonment of the project did not produce a discriminatory effect because for the most part only middle-income persons were affected and that group was not racially disproportionate. The court explained:

Since plaintiff had no complaint with the city’s actions until August, 1969, the project under consideration then — the 80%-20% project — is the proper measure against which the effect of the termination should be measured. The 50%-50% plan was never more than a tentative suggestion of how the site might be used.

Thus, the persons who were “denied” housing before the project reached the court’s arbitrary dividing line were left out of the court’s calculation of discriminatory effect. The anomalous result is that a municipality which produces its discriminatory effect in stages will more likely escape liability than a municipality which produces its effect all at once.

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86. *Id.* at 1065 n.9.
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89. The case was decided before the Supreme Court held in Washington v. Davis, 426 U.S. 229 (1976), that a showing of discriminatory effect is insufficient to establish a violation of equal protection.
90. *Faraday Wood*, 507 F.2d at 1068 n.6.
91. Indeed, the dissenting judge in *Faraday Wood* called attention to this problem. Id. at 1076 (Oakes, J., dissenting).
come component to satisfy a perceived (but unspoken and unproven) discriminatory motive on the part of municipal officials. It follows that the more discriminatory a municipality is (or the more discriminatory it is perceived to be by a private developer), the more likely a developer (or the municipality itself) will reduce the black population at an early stage in order to make it more acceptable. It will therefore be the more literal municipalities which are most open to liability for rejecting a project with a disproportionately black population.

VI. The Two Models of Discriminatory Effect

What the courts have not realized is that application of the discriminatory effect theory to the project cases is possible under two different models, called here the “intrinsic” and “extrinsic” models. It is the intrinsic model which has been applied by the cases discussed so far in this Article. But the Author believes that analysis of the project cases under the extrinsic model is more appropriate and would avoid the problems previously discussed.

A. The Intrinsic Model

In the cases discussed above (at least in those cases that compared percentages and not absolute numbers), the rejection of the housing project was viewed as analogous to the employer’s adoption and use of the diploma requirement in Griggs. In the project cases, the courts view the municipality’s action as imposing a disadvantage on potential residents of the project (persons who have sufficiently low income) in the same way that persons without diplomas were disadvantaged in Griggs. If the percentage of blacks who qualify for residence in the project is greater than the corresponding percentage of whites, the effect in the project cases is similar to that in Griggs.

This way of looking at the municipality’s action is called the “intrinsic” model here because the discriminatory effect is “proved” by inspection of the racial proportions of the one project at issue. The effect is, in a sense, “inside” the one project (or, intrinsic to the project’s potential population). This means, of course, that actions of the municipality other than the rejection of the one project at issue are irrelevant to a showing of discriminatory effect.

B. The Extrinsic Model

There is another view, however. The Author believes that the re-

ction of one project is conceptually closer to the rejection of one applicant for employment by the employer in a Griggs-type case (or the rejection of one applicant for an apartment in a similar housing case). Thus, the discriminatory effect is "external" or extrinsic to the population of the particular rejected project. Under the extrinsic model, the racial composition of that population is simply one datum which, together with other actions of the municipality, may show a disparate impact viewed from the level of the entire municipality.

The difference between the two models is made clearer by a closer look at a typical housing discrimination case where a private individual is the defendant. If on a particular day a landlord rejected one black applicant for an apartment, we do not conclude that there is "discriminatory effect." It is true that the landlord's conduct adversely affected proportionately more blacks than whites. But it would be inappropriate to base a finding of discriminatory effect on the landlord's rejection of this one applicant, simply because the "sample" is too small to make an accurate finding of disproportionate adverse effect or disproportional representation.** If discriminatory effect were found in the rejection of a single black applicant, then discriminatory effect would be found whenever any person of any race were rejected, and a landlord who rejected blacks and whites in equal proportions would be liable for a series of discriminatory effects following one upon the other. As discussed earlier, however, a violation can be proved either (1) by showing that the reason for which the plaintiff was rejected is correlated with race (i.e., it would produce a disproportionate adverse effect/ disproportional representation if applied to many people) or (2) by showing that the defendant evaluated a large number of applicants, producing a disproportional representation, and then presuming that the same rule was applied to the plaintiff.

Under the extrinsic model, a violation of the Act cannot be established solely from the rejection of a housing project and the racial disproportion among the persons eligible for residence there, any more than a case of discriminatory effect can be established from the rejection of one applicant for a job, or an apartment. Rather, the municipality's action is viewed as one of a number of actions which affect the types of housing which locate within its borders: rezonings, refusal to rezone, construction of public housing, requests for federal funds for public housing, and even the informal production of a "reputation" that

discourages private developers from proposing a project. Thus, the municipality’s action affecting the one housing development at issue is analogous to the landlord’s acceptance or rejection of one applicant. If the municipality rejected a particular project for a racially correlated reason, a violation is established. It is usually difficult to prove what the reason was. But, as in the individual discrimination case, the municipality’s use of a racially correlated reason can be proved (or at least presumed) from the “results” of the municipality’s housing practices. If the municipality’s previous actions with respect to housing have produced racially disproportionate results, and if a presumption is made that the municipality has applied the same kind of criteria to the project at issue as it applied in its previous housing decisions, then a violation should be established. Here, “disproportionate results” means that the present population in the municipality is a racially disproportionate group, when compared with the (larger) area from which the municipality would be expected to draw its residents.

In short, the present racial mix of the municipality’s population is perhaps the most important factor when assessing the lawfulness of the municipality’s rejection of the particular project at issue. In this way, the effect of the municipality’s actions beyond the rejection of the particular project are taken indirectly into account: the lack of affirmative action in creating low-income housing and the phenomena of “self-selection” and “weeding out” (the problems discussed above) will be reflected in the present housing mix.

Of course, a municipality has nowhere near the control over who lives within its borders that a landlord has over who becomes a tenant. A racial disproportion among a municipality’s residents would be much less probative of a violation than a racial disproportion among a landlord’s tenants. Nevertheless, a disparity between the percentage of minorities in a municipality and their percentage in the metropolitan region should strongly favor the finding of a violation.

The two models are not mutually exclusive methods of proving a violation: a violation of the Act should be established if either model shows a discriminatory effect. The problems with the extrinsic model have not been fully recognized. As a result, the courts have put more emphasis on it — and less on the extrinsic model — than the accuracy of the former in measuring discriminatory effect would justify.

93. See supra part IV.

94. In addition, in both cases the present racial mix may be the result of past discrimination and not reflective of present practices.
Fair Housing Act

C. Segregative Effect and Its Incorporation of the Extrinsic Model

The interesting thing about the theory of “segregative effect” endorsed by the courts is that it comes very close to adopting the analysis just suggested. The legislative history of the Act indicates that one of its purposes is to promote integration in housing. Accordingly, it is said that a violation of the Act is shown when a municipality’s action in excluding a housing project interferes with that integration.

The segregative effect theory appears to be an application of the extrinsic model. In the first place, the segregative effect of the loss of a project does not depend on a racially disproportionate project population. If the project was expected to include as residents a substantial number of blacks, their exclusion from a predominantly white municipality should be seen as promoting segregation. The theory of segregative effect thus represents a rejection of the intrinsic model. Second, a finding of segregative effect depends on the present population of the defendant municipality being disproportionately white.

The theory of segregative effect, then, “automatically” takes into account previous housing actions by the municipality, as reflected in

95. “The reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns.’” Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting Senator Mondale, 114 Cong. Rec. 3422 (1968)).


98. City of Black Jack, 508 F.2d at 1186 (“There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white.”); Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1291 (the village “remains overwhelmingly white at the present time.”). In Arlington II, the court noted that in both City of Black Jack and Kennedy Park Homes Ass’n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), there was a strong argument supporting racially discriminatory impact in the second sense [segregative effect]. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white. . . . Thus, the effect of the municipal action in both cases was to foreclose the possibility of ending racial segregation in housing within those municipalities. Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1291 (footnote omitted).
the present racial mix. The segregative effect theory is thus an example of looking at the "results" of a municipality's actions with respect to a number of housing decisions in order to infer that the project at issue was evaluated on the basis of impermissible criteria. This is the extrinsic effect analysis.

VI. Conclusion

The intrinsic model — measuring discriminatory effect by the disproportionate population expected in a housing project — is unsatisfactory for a number of reasons. There are two main alternatives to the intrinsic model.

First, an increased attention can be given to the theory of discriminatory intent or racial motive.99 Racial motive on the part of municipal officials100 or the electorate101 has been a factor in a number of project cases. Moreover, in the individual discrimination cases, the plaintiff has been able to satisfy his burden of production with respect to racial motivation merely by showing that he is a member of a minority group and that there were no objective reasons for his rejection.102 If a similar rule were applied to the project cases, then the plaintiff should be able to discharge his burden of production by showing that the project was expected to contain a significant black population, not necessarily a disproportionately black population.103

Second, the extrinsic model is suggested as an alternative. Because it does not confine the inquiry to the particular project at issue, it avoids some of the shortcomings of the intrinsic model. The courts have adopted the essence of the extrinsic model in their use of the theory of segregative effect.

99. It was suggested earlier that racial motive itself is a racially correlated criterion. Viewed in this way, cases of racial motive are instances of the extrinsic theory.

100. E.g., Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1283.


102. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Title VII); Robinson v. 12 Lofs Realty, 610 F.2d 1032 (2d Cir. 1979) (Title VIII). It is said that the plaintiff must show, in addition, that the employer or housing provider continued to seek applicants of the plaintiff's qualification. See McDonnell Douglas Corp., 411 U.S. at 802.

103. In addition, because income and race are correlated, motive against the poor by municipal officials should be sufficient to show discriminatory effect.
Granted, even under the extrinsic model, no suit can be brought unless there is a particular project which has been excluded; a general claim of exclusionary practices would be insufficient to satisfy the federal standing rules. If a municipality is successful in discouraging any projects from being proposed, then it will escape liability, even under a theory of segregative effect or other variations on the extrinsic model.

The ultimate solution to the problems raised in this article would be a “fair share” theory like that adopted in New Jersey. In Southern Burlington County NAACP v. Mount Laurel (Mt. Laurel I), the New Jersey Supreme Court held that municipalities have a duty to provide an opportunity for building lower income housing “at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.” As the court explained in a subsequent case, that duty is created by the New Jersey Constitution:

The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare — in this case the housing needs — of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations ... that do not provide the requisite opportunity for a fair share of the region’s need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.


106. Id. at 174, 336 A.2d at 736.


In Mt. Laurel II, a detailed judicial system for the adjudication of Mt. Laurel claims was created. At the same time, the court rather pointedly invited the New Jersey legislature to produce a statutory solution, and in 1985 New Jersey’s Fair Hous-
New Jersey's approach to low-income housing thus avoids the problems previously discussed in this article. It does so by stating a municipality's housing obligation in terms of ends rather than means. A municipality is judged, not by reference to norms of proper behavior towards housing projects or proposals, but by reference to whether it has actually met its share of an equitably apportioned need for low-income housing.

It would be extremely difficult, to say the least, to extract a "fair share" theory from the federal Fair Housing Act. Barr ing a drastic reinterpretation of the Act or an equally drastic expansion of federal constitutional guarantees, the extrinsic model is proposed here as the fairest way to measure the extent to which a municipality has helped to achieve the congressionally declared policy of providing for fair housing throughout the United States.108

The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida

James T. Miller*

I. Introduction: The Scope of This Article

When a court considers constitutional challenges to a criminal law, it should logically begin its task with the selection of the appropriate standard of review. A standard of review is a set of rules of construction, presumptions, and a balancing mechanism designed to interpret the Constitution and the challenged law.1 Which standard of review will be applied in a given situation depends on the nature of the constitutional problem and the challenged law.

A review of criminal cases in Florida reveals a lack of consistency or uniformity. Courts seem to reach a decision and then search for a particular standard to fit it. Sometimes a court will even announce a decision without using a particular standard of review. The correct standard of review should inexorably lead to a particular result and not be merely the post hoc justification for a desired result.2 Attorneys, judging from the arguments described in the case law, have also selectively used standards of review.

Florida courts have unconsciously implemented one of Marshall McLuhan's axioms—"The Medium is the Message."3 McLuhan's theory was that the presentation of an idea may be as important as the idea itself and that the method of presentation can have significant im-


2. Compare: State v. Ault, 452 So.2d 201 (Fla. 1984); Ault v. State, 117 So.2d 475 (Fla. 1961) (voiding a statute based on an equal protection theory without mentioning the due process clause).

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2. Compare Husk v. State, 453 So. 2d 153 (Fla. 1st Dist. Ct. App. 1984), with State v. Wershaw, 343 So. 2d 605 (Fla. 1977), and self-serving the use of the presumptions of constitutionality/invalidity.

tact upon its acceptance by an audience. Courts and lawyers have manipulated the media (standards of review) to produce a desired message (the decision to uphold or invalidate a law). The medium has arguably subsumed the message in Florida criminal constitutional law cases.

The author will discuss the major standards of review and the most significant attendant rules of construction. The author will then discuss the standards used to invalidate unconstitutional laws. An examination of the historical use of the standards of review will illustrate the correct use of standards of review for certain situations as well as provide examples of the self-serving misuse of standards of review. The author will then discuss the significant consequences of the manipulation of standards of review common to challenges to vague and overbroad laws. Lastly, the author will suggest guidelines for Florida's courts and attorneys to follow so that they might properly apply a standard of review to a given case.

II. Methods of Upholding Criminal Statutes: The Presumption of Constitutionality and Attendant Rules of Construction

A. The Presumption of Constitutionality

Florida courts often invoke one particular standard of review to uphold a law: the presumption of constitutionality. The presumption of constitutionality has rarely been specifically defined by courts using it. The most common citation of the rule is an incantation of support for the decision to uphold a statute. A statute is presumed to be constitutional; therefore, a court must uphold it.

For example, in Hawk v. State, the First District Court of Appeal considered a challenge to a statute which authorized the involuntary commitment of a person who was acquitted of a crime by reason of insanity. The Hawk court invoked the presumption of constitutionality without explanation and noted that Hawk had cited no authority to overcome it. This use of the presumption demonstrates the misapplica-

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7. Hawk challenged the finding he was manifestly dangerous and met the criteria for involuntary hospitalization as a person acquitted of a crime by reason of insanity. Hawk argued the criteria for involuntary hospitalization were vague. The Hawk court described this argument as spurious and implied that Hawk would have met any criteria to judge manifest dangerousness. Therefore, the incantation of the presumption of constitutionality masked this probable explanation for the decision. See Hawk, 453 So. 2d 113.


9. See Notes 10-18, 54-56 and accompanying text.

10. 345 So. 2d 724 (Fla. 1977).

11. Id. at 725.

12. 396 So. 2d 1360 (Fla. 1981).

13. Id. at 1363. Although the Kinner court did not specifically define strong presumption, it invoked two additional standards: difficulty resolved in favor of constitutional and an act will not meet the declared unconstitutional unless it is determinative of a substantial question. C. A. App. 1983), and Fulford v. Graham, 418 So. 2d 2204 (Fla. 1st Dist. C. App. 1983).
Appellate courts have produced several subtly different expressions of the presumption. The different expressions of the same standard suggests it is merely a personal philosophical gloss for an already decided case. For example, some courts have stated that a court should indulge every presumption in favor of validity. However, the courts have not specifically defined the nature of "every presumption." The presumptions could involve inferences of fact, legislative intent, or interpretations of language that render a law constitutional.

In *Powell v. State*, the Florida Supreme Court used the presumption of validity to uphold a law which prohibited reflective or mirror-like materials on motor vehicle windows. The court used the term "every presumption" to mean that all factual inferences were drawn to justify the use of the police power in such a case.

Another view taken by the courts is that a "strong presumption of constitutionality exists." The Florida Supreme Court used this presumption in *State v. Kinner* to uphold a law permitting the involuntary hospitalization of the mentally retarded. The court did not define the phrase "a strong presumption of constitutionality," and the patent ambiguity of this standard renders it virtually meaningless. A "strong

7. Husk challenged the finding he was manifestly dangerous and met the criteria for involuntary hospitalization as a person acquitted of a crime by reason of insanity. Husk argued the criteria for involuntary hospitalization were vague. The Husk court described this argument as spurious and implied that Husk would have met any criteria to judge manifest dangerousness. Therefore, the inattention of the presumption of constitutionality masked this probable explanation for the decision. See Husk, 453 So. 2d 133.
9. See Notes 10-18, 54-56 and accompanying text.
10. 345 So. 2d 724 (Fla. 1977).
11. Id. at 725.
12. 398 So. 2d 1360 (Fla. 1981).
13. Id. at 1360. Although the Kinner court did not specifically define strong presumption, it invoked two additional standards: all doubts resolved in favor of constitutionality and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. See State v. Perkins, 436 So. 2d 150 (Fla. 2d Dist. Ct. App. 1983), and Fullford v. Graham, 418 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1982), for other uses of the strong presumption of constitutionality.
presumption of constitutionality" is more an expression of subjective belief than a normative standard of conduct. In State v. Bales, the supreme court used this "strong presumption" to uphold a law requiring the licensing of persons who gave massages for a fee. The strong presumption apparently included a rebuttable presumption of the existence of the necessary factual support for a law. However, the Bales court did not otherwise define the meaning of a "strong presumption."

In other decisions, the Florida Supreme Court has said that a reviewing court must resolve all doubts in favor of validity. For example, in Falco v. State, the supreme court used this standard to uphold a manslaughter statute against a vagueness challenge. In State v. Lick, the supreme court used this standard to uphold an anti-prostitution statute although the court admitted there was doubt about the statute's constitutionality. Thus, it appears that some Florida courts will use this standard even when they have a real doubt about a statute's constitutionality.

Florida courts have also held that if a statute lends itself to two possible constructions, one unconstitutional and the other constitutional, the court has a duty to choose the constitutional construction. The Lick court used this principle to resolve the doubts about the prostitution statute, namely, whether the statute applied only to women and not men. The more balanced view is that a court should only construe a law to uphold it if doing so is consistent with the constitutional rights of the litigants. This view at least acknowledges the need to balance an interpretation to uphold a law with the exercise of constitutional rights. The supreme court in Delmonico v. State held the duty to enforce the Constitution is greater than the duty to uphold a law.

These subtle differences involving the presumption of constitutionality cogently illustrate the doctrinal inconsistency in the use of standards of review. Furthermore, a comparison of the facts and circumstances of these cases reveals no logical reason to invoke different standards in similar cases. Instead, the different expressions of the pre-
sumption appear to represent the idiosyncratic and subjective philosophical frame of mind of courts which desire to uphold a statute. Consequently, the presumption of constitutionality is predominantly a philosophical instrument used by courts to express the need to uphold a statute.

The presumption of constitutionality does serve one practical function, however. It expresses the axiom that the party challenging a law has the burden of proof. However, the quantum of proof needed to overcome the presumption is unclear under Florida law. In constitutional challenges in civil cases, some courts have used the beyond-a-reasonable-doubt standard. Two courts have even used this standard in criminal cases. Subsequent courts have not followed this approach, however, and the “beyond a reasonable doubt” standard appears to be an anomaly in criminal cases. In general, the majority of courts have chosen not to define the level of proof necessary to rebut the presumption of constitutionality in criminal cases. Therefore, while the presumption of constitutionality has had little pedagogical use for courts, it has provided a strong symbolic medium for a desired message.

The principle that a court presumes the Legislature has enacted constitutional laws has led to an important corollary of the presumption of constitutionality: the doctrine of avoiding constitutional issues if a court can dispose of the case on other grounds. Under this doctrine, a reviewing court does not explicitly use the presumption of validity to uphold a law. The court instead implicitly uses the presumption to avoid deciding a constitutional question.

All courts have an unequivocal affirmative duty to uphold the Constitution. Therefore, if a court is presented with a law that may vio-

22. State v. Kinner, 398 So. 2d 1360 (Fla. 1981); Davis v. State, 146 So. 2d 892 (Fla. 1962).
23. The author has found only the two cases cited above that have used the beyond a reasonable doubt standard. Most courts have not defined the quantum of proof necessary to uphold/validate a law. Many courts have invoked a presumption of constitutionality or exception to it without weighing the level of proof on both sides of the constitutional questions. See supra notes 4-18 and accompanying text.
24. See, e.g., State v. Dye, 346 So. 2d 538 (Fla. 1977); Wooten v. State, 322 So. 2d 551 (Fla. 1975); Peoples v. State, 287 So. 2d 63 (Fla. 1973).
25. See Delmonico v. State, 155 So. 2d 368 (Fla. 1963), and State ex Rel. West
late the Constitution, the court should not try to avoid its duty by invoking the presumption of constitutionality doctrine. A reviewing court should hear the case on its merits. By refusing to address a constitutional issue and deciding the case on other grounds, the reviewing court has indirectly held that the law is otherwise presumptively constitutional.

The avoidance of constitutional questions can also constitute the preferred medium to prevent undesirable or unpopular messages. For example, in Walsingham v. State, the Florida Supreme Court used this principle to avoid deciding the validity of the state abortion statute. The Walsingham opinion exhaustively discussed the controversial and emotional aspects of the abortion issue. It also acknowledged the societal significance of the constitutional issues of the case. However, the majority avoided deciding the constitutional issues by reversing the case because of erroneous jury instructions. Thus, the supreme court's decision implicitly upheld the abortion statute and left it in effect.

This approach directly ignores the affirmative duty of a court to uphold the Constitution. When the supreme court invokes this doctrine and ignores important constitutional issues, innocent people may suffer the effects of an unconstitutional law until the "right" constitutional case reaches the court.

The use of presumption as an idiosyncratic philosophical tool has created a rule of construction with limited substantive meaning. A presumption that merely states a law is presumed constitutional offers little help on how a court can interpret what a law means and then apply that interpretation in a way that upholds a law and the constitution. Therefore, courts have developed other media to support the message of upholding a law. The rules of construction attendant to the presumption of constitutionality, unlike the symbolic and philosophical nature of the presumption itself, embody practical rules of construction and interpretation. However, these practical rules share the same philosophical raison d'être with the presumption of constitutionality — uphold a law at all costs. The basic goal of these rules of construction is to give statutory language a constitutional meaning.

III. Rules of Construction Attendant to the Presumption of Validity

After selecting an appropriate standard of review, the task of a court reviewing a constitutional challenge is to determine the literal meaning of the statutory or constitutional language. The solutions to any constitutional questions must logically come from the language of a statute or constitution. Florida courts have developed several rules of construction designed to either give definite meanings to unclear statutory language or, more importantly, to give constitutional judicial interpretations to challenged statutory language. The desired message has not often dictated the precise use of any particular rule of construction. In the use of rules of construction, the medium is sometimes the message. A court desiring to uphold or invalidate a law will invoke the rule(s) of construction which will produce a constitutional law while ignoring all other applicable rules of construction.

A. The Determination of Legislative Intent

Many constitutional challenges involve the use of vague or overbroad language in a statute. The constitutional challenge will focus on language that: 1) is not clear on its face; or 2) could result in unconstitutional applications. The primary ancillary rule of construction to resolve questions of statutory meaning is the determination of legislative intent. If the facial language of the law is unclear, the legislative intent in the meaning of the law will prevail unless the law as construed violates other constitutional principles. Some courts have stated that legislative intent is the touchstone for a reviewing court and the intent must

v. Butler, 70 Fla. 102, 69 So. 711 (1914), for a discussion of the affirmative duty of a court to uphold the constitution.

26. 250 So. 2d 857 (Fla. 1971).
27. Id. at 860-62.
28. Id.
29. Id. at 862.
30. The Walsingham opinion unquestionably suggested that the Legislature rewrite the abortion statute to eliminate the constitutional problems. Justices Ervin and Adkins, concurring only in the judgment, decided the statute was unconstitutional. However, the reversal on the grounds of erroneous jury instructions left the statute in effect. The Supreme Court seemed to prefer that the Legislature instead of itself deem the law unconstitutional. Id. at 859-64.

31. See, e.g., City of Pembroke Beach v. Caplinco, 451 So. 2d 440 (Fla. 1984).}

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31. See, e.g., City of Pompano Beach v. Capalbo, 455 So. 2d 468 (Fla. 4th Dist. Ct. App. 1984), review denied, 461 So. 2d 113 (Fla. 1985), cert. denied, 106 S. Ct. 80 (1986). The majority and dissent each selected various standards of review to support their respective positions while ignoring the manifest applicability of other standards. See also White v. State, 330 So. 2d 3 (Fla. 1976); State v. Mayhew, 288 So. 2d 213 (Fla. 1974).

be given effect even though it may contradict the strict letter of the statute.\textsuperscript{33}

If the Legislature has expressly stated its intent or specifically defined the statutory terms, the task of answering a constitutional challenge will be easy.\textsuperscript{44} However, the Legislature often does not specifically define statutory language or express its intent. An express declaration of intent or specific definitions would help to eliminate most constitutional deficiencies. However the use of an express declaration of intent or definitions in any particular statute appears to be entirely a matter of legislative discretion and Florida courts rarely criticize the Legislature for failing to provide specific expressions of intent or definitions with a statute.\textsuperscript{50}

Ambiguous statutory language or unexpressed intent has led to various rules of statutory construction. The primary goal of these rules is to uphold a law. The first rule is that a court can rebut a challenge of vagueness by divining legislative intent; the law will be constitutional unless the legislative intent otherwise violates the Constitution.\textsuperscript{56} The second rule is that a court can determine legislative intent by examining: the whole act and the evil to be corrected; the language of the act, including the title; and the history of the act from enactment to the present state of the law on the subject.\textsuperscript{67}

33. Speights v. State, 414 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982); Parker v. State, 406 So. 2d 1089 (Fla. 1981); State v. Webb, 398 So. 2d 820 (Fla. 1981); In re D.F.P., 345 So. 2d 811 (Fla. 4th Dist. Ct. App. 1977). These cases also held that the initial task of a court is to determine legislative intent, and if the statutory language is clear, then there is no need to resort to the rules of statutory construction. The plain language of the statute will be given effect.

34. E.g., State v. Eash, 367 So. 2d 662 (Fla. 2d Dist. Ct. App. 1979), in which the court had to interpret the meaning of Section 944.025, Fla. Stat. (1978) (prostitution lewicitation programs). Section 944.01(2) clearly stated the legislative intent and the Eash court happily noted it was not "forced to glean legislative intent solely from the operative portions of the law or from such bits and pieces as may have been preserved of the legislative proceedings. . . ." 367 So. 2d at 663-64.

35. The closest a Florida court has come to directly criticizing the legislature was in State v. Llopis, 257 So. 2d 17 (1971). In Llopis, the court considered whether a law regulating the business conduct of state employees was vague. The Llopis court noted, "While we acknowledge a special sympathy for legislation of this nature, which is intended to safeguard the public and insure honesty and integrity in government, our sympathy cannot be allowed to impair our judgment. This statute is vague beyond redemption." Id. at 18.

36. See supra notes 18, 32-33.

37. Parker v. State, 406 So. 2d 1089 (Fla. 1981); Foley v. State, 50 So. 2d 179 (Fla. 1951).

38. 398 So. 2d 820 (Fla. 1981).


40. 463 So. 2d 1141 (Fla. 1985).


42. 463 So. 2d at 1143.

This broad subject area gives the court the opportunity to select only certain media to reach desired messages. A court wishing to uphold a law or give it a particular interpretation can send this message by selecting the media designed to determine legislative intent.

A good example of a court using the title to interpret a statute is State v. Webb.\textsuperscript{58} The Webb court used the title to decide Florida's "stop and frisk" statute, Florida Statutes section 901.151.\textsuperscript{59} The court held that the statute did not give greater constitutional protection to a person stopped and frisked in Florida than was enunciated by the United States Supreme Court in its decisions on this subject. In Webb, the title expressly stated the legislative intent and the Florida Supreme Court merely gave effect to the obvious intent of the Legislature.

The Florida Supreme Court has ignored the effect of a title, however, when the title suggests that a law may be unconstitutional. In State v. Bussey,\textsuperscript{60} the court considered the constitutionality of Florida Statutes § 817.563,\textsuperscript{61} which prohibited the sale of an uncontrolled substance in lieu of an offer to sell a controlled substance. The constitutional challenge centered on whether the statute was an act relating to fraud or controlled substances. The district court of appeal found the statute to be a fraud law because of its title and placement in Chapter 817, Fraudulent Practices. The Florida Supreme Court decided that the law was an act dealing with controlled substances and the title and placement in a certain chapter were not conclusive on legislative intent.\textsuperscript{62}

The Bussey opinion amply illustrates the subjective nature of the use of a title to determine legislative intent; the title can be the expression of intent used to uphold a law or a court can ignore the title because it is not conclusive evidence of intent. The question in Bussey remains, despite the ex cathedra declaration of the Supreme Court, if the Legislature did not intend section 817.563 to be an anti-fraud measure, why did section 817.563 appear in chapter 817, Fraudulent Practices? The Florida Supreme Court noted that a reviewing court must look at the other established principles of statutory construction, in addition to the title, to determine legislative intent. However, the Florida Supreme Court did not use these established principles. The court
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38. 398 So. 2d 820 (Fla. 1981).
40. 463 So. 2d 1141 (Fla. 1985).
42. 463 So. 2d at 1143.
merely substituted its own belief on intent for that of the Legislature. The Bussey decision may prove the title to a law is simply what the court decides it means and has no other practical effect.

A review of the legislative and case law history of a statute is a better way to determine legislative intent than subjective extrapolation of intent from a title. The First District Court of Appeal in Speights v. State reviewed the history of an act which prohibited the unlawful burning of wild lands by a non-owner of the land to determine if the issue of ownership was an element of proof for the State. Reviewing the law’s history back to 1879, Justice Ervin concluded that ownership of the burned land was indeed an affirmative defense based upon the history of the statute. The Speights court suggested that courts should feel free to consider all relevant history surrounding a statute, including repealed acts or subsequent sessions of the Legislature.

A review of the legislative history of an act can remove most of the judicial subjectivity associated with judicial determination of legislative intent. However, many statutes do not have an adequate expression of intent or legislative history from which a court can objectively divine intent. The General Index to the Florida Statutes (1985) contains a delineation of statutory construction rules of many different laws. However, few of the listed statutes with expressions of statutory construction or intent are criminal laws. Furthermore, some of the listed expressions of intent on construction of criminal laws are vague. For example, Florida Statutes section 812.037, dealing with the construction of theft, robbery and related crimes, states, “notwithstanding Florida Statutes section 775.021, Florida Statutes sections 812.012-812.037 shall not be construed strictly or liberally, but shall be construed in light of their purposes to achieve their remedial goals.” This type of express statement of intent gives a court the opportunity to impose its own subjective interpretation by attempting to achieve “remedial goals.”

If the language and title of a statute do not solve the problem of ambiguity, a court may then examine the contents of similar statutes. The doctrine of in pari materia attempts to give meaning to one statute by examining the known meaning of other similar legislative enactments. If a conflict ostensibly exists between two statutes, a reviewing court will also construe the challenged law to reconcile the conflicts. The doctrine of in pari materia is based upon common sense but it assumes that the Legislature intended consistent meanings in different sections of laws covering a single field or related subject areas. The doctrine of in pari materia clearly gives courts the opportunity to impose a judicial form of consistency and uniformity on laws which appear to have an ambiguous meaning or intent.

Courts and attorneys should whenever possible ascertain legislative intent before defining statutory language. A review of only the statutory language will not always disclose intent because the legislature may give special meaning to words of ordinary meaning. For example, in Guddard v. State, the First District Court of Appeal upheld a statute as applied to a particular situation, by giving the statutory language its plain and ordinary meaning. The Florida Supreme Court quoted that decision because the legislative history indicated an intent to give the language a meaning different than the ordinary meaning. Although the general rule is that statutory language has its common and ordinary meaning, the meaning intended by the Legislature will always prevail.

The problem with ascertaining legislative intent is that most criminal statutes do not have specific expressions of legislative intent. Research of the legislative history or comparison of similar statutes may provide clues on legislative intent. However, the determination of unclear legislative intent gives courts and attorneys the tempting opportunity to substitute their own subjective intent for the unexpressed intent. It is a choice to select a media expressly tailored to a desired message. The judicial interpretation of intent may also result in judicial lawmaking and the frustration of the true legislative intent.

In Brow v. State, a case dealing with the public profanity law, Justice Sontberg described the evils of re-writing by judicial interpretation to determine legislative intent and give a law a constitutional meaning. He noted that judicial reconstruction of a law could result in two evils: (1) if the legislative intent is not apparent from statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent; and (2) doubts about judicial construction to authoritatively construe legislation are warranted because a statute has neither the legislative fact-finding machinery nor the experience with the particular statutory subject matter to authoritatively con-
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In *Brown v. State*, a case dealing with the public profanity law, Justice Sundberg described the evils of re-writing by judicial interpretation to determine legislative intent and give a law a constitutional meaning. He noted that judicial reconstruction of a law could result in two evils: (1) if the legislative intent is not apparent from statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent; and (2) doubts about judicial competence to authoritatively construe legislation are warranted because a court has neither the legislative fact-finding machinery nor the experience with the particular statutory subject matter to authoritatively con-

46. 458 So. 2d 230 (Fla. 1984).
47. 358 So. 2d 20 (Fla. 1978).
true a statute.48

B. The “Avoiding Absurd Results” Doctrine for Determining Legislative Intent

If a court cannot uphold or construe a law by examining the title or legislative history or by using the in pari materia doctrine or other rules of construction, it may resort to the “avoiding absurd results” doctrine. This doctrine is illustrated when a court subjectively determines a particular interpretation would lead to an absurd or objectionable result. The reviewing court then tautologically determines that the Legislature would never intend to produce an absurd or objectionable result. Consequently, such result cannot be what was intended. Courts most often use this doctrine to correct overbroad laws or drafting mistakes by the Legislature. For example, in Dorsey v. State,49 a statute required a warrant to listen to wire communications made in whole or in part through the use of facilities for transmission or communications by wire. The language of the statute could have included all forms of broadcast communications. The court decided this was an absurd result.

The courts have also used this doctrine to save provisions of statutes that were changed by later similar statutes.50 The new statutes would omit a portion of the prior statute and the omission would produce an absurd or unreasonable result. Therefore, the reviewing court construed the new statute to contain the omitted provision.

In Simmons v. State51 the supreme court used the absurd results doctrine to save a statute which stated that “the presiding judge shall charge the jury . . . and must include in said charge the penalty fixed by law for the offense for which the accused is on trial.”52 The court held that the word “shall” meant “may” because a mandatory statute would violate the power of the judiciary and would produce an objectionable result. Thus, the Simmons court concluded that the Legislature could not have intended to intrude upon judicial power.

46. Id. at 50.
49. 402 So. 2d 1178 (Fla. 1981); See also In re J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982).
50. See e.g., Drury v. Harding, 461 So. 2d 104 (Fla. 1984); Miller v. State, 297 So. 2d 36 (Fla. 1st Dist. Ct. App. 1974).
51. 160 Fla. 626, 36 So. 2d 207 (Fla. 1948).
52. Fla. STAT. § 918.10 (1945).
the ultimate decision in Simmons is probably correct, the reasoning is faulty because the Legislature clearly intended to force the judiciary to give penalty instructions. The correct use of this doctrine is to eliminate interpretations or overbroad language that would conflict with known legislative intent or other similar statutes. However, the "avoiding absurd results" doctrine is a potentially dangerous tool. No other rule of construction is as intrinsically subjective.

Once a court identifies the absurd result, it will then replace it with a result that it feels is not absurd. This doctrine allows blatant judicial re-writing of statutory language. On the one hand, courts have acknowledged that the legislature is presumed to know the meaning of the words it chooses for statutes and that statutory language is to be given its plain and ordinary meaning. On the other hand, this standard of review ignores the possibility that the Legislature actually intended the result the court considers absurd. If the result is absurd because it would violate the Constitution, the court has a duty to prohibit such results. A reviewing court should then invalidate the law or eliminate the objectionable language. The court should not merely reject an absurd result and then substitute its own desired result to uphold a law. The true legislative intent should be given effect, even if it results in the invalidation of a law.

C. The Determination of a Factual Predicate to Support Legislative Intent

Most laws embody solutions to problems based on historical experience or special factual findings. Criminal laws address problems perceived by the Legislature to be serious enough to justify penal sanctions. Courts have developed a powerful rule of construction designed to uphold laws against challenges that the law: (1) does not address a significant problem worthy of criminal sanctions; or (2) does not achieve its stated purpose. The rule of construction is that a court will presume a factual predicate exists to support the purpose and intent of a law. Even if the statute does not contain an expression of the fac-

tual predicate, a court must presume the necessary facts were before the legislature when it enacted the law. However, there must be facts based on common experience to support the law.

The factual predicate for a law must actually exist and not be speculative or hypothetical. For example, in *Rollins v. State*, the supreme court invalidated a law which prohibited certain minors from playing billiards in a pool hall without parental permission. The ostensibly purpose of the law was to prevent the exposure of minors to gambling and alcohol. However, the law exempted all military personnel, regardless of age. Furthermore, the statute did not prevent minors from playing pool in other places where alcohol and gambling were possibly present. Consequently, the supreme court held the law violated equal protection and had no justifiable purpose.

The presumption of the necessary facts to support a law is usually a good principle. Often a court is incapable of making the factual findings necessary to determine if a law is based on factual reality. However, all criminal laws must be a valid exercise of the police power and must not violate equal protection by discriminating against other individuals in similar situations. Therefore, a court must be able to test whether a law is based on verifiable data or common experience. The lack of express legislative factual findings in many laws make this a difficult task. Many courts, to achieve the desired message of upholding a law, have used the doctrine that a court cannot question the wisdom, need or appropriateness of particular legislation. This view absolves the court of having to determine whether a law is based on fact or does not discriminate.

If the factual basis for a law is not within the common experience of the citizens of the state, courts should require the legislature to make specific factual findings to support the law. Reviewing courts and counsel arguing a case should always consider whether the factual basis for a law is merely hypothetical, based upon common experience, or based upon specific findings by the Legislature.

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55. 354 So. 2d 61 (Fla. 1978).
56. Id. at 63-64.
57. *Id.* *See also* *State v. Bussey*, 463 So. 2d 1141 (Fla. 1985); *State v. Yu*, 400 So. 2d 762 (Fla. *appeal dismissed*, 454 U.S. 1134 (1981); *Carroll v. State*, 361 So. 2d 144, 146 (Fla. 1978); *Powell v. State*, 345 So. 2d 724, 725 (Fla. 1977).
58. *See e.g.* *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978); *Tatzel v. State*, 356 So. 2d 787, 790 (Fla. 1978); *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977).
D. The Selected Media for a Desired Message: the Upholding of a Law

The above description of the standards of review and rules of construction demonstrates that courts can selectively use the standard of review to achieve desired results. Instead of following a standard which is applicable to a given problem and dictates a particular result, some result-oriented courts have used the standard which best supports the desired outcome. Most courts uphold a law against a constitutional challenge and consequently will choose a standard of review that best fits the message of constitutionality. Courts wishing to invalidate statutes use the same method via different means. The message of unconstitutionality has created several exceptions to the presumption of constitutionality: media designed to uphold constitutional rights and invalidate laws.

III. Methods of Invalidating Unconstitutional Laws: Strict Scrutiny, Unconstitutional as Applied, and First Amendment Cases

Florida courts have developed several exceptions to the presumption of constitutionality. Unlike the oftentimes symbolic nature of the presumption of constitutionality, these exceptions are functional rules designed to protect constitutional rights. However, these rules can also represent post hoc support for a decision to invalidate a law. Appellate courts have misused the exceptions in the same manner as the presumption of constitutionality: doctrinal support for a particular decision instead of a process that leads logically to a given conclusion.

The media of unconstitutionality can properly invalidate a law because: (1) the constitutional principles embodied in them outweigh the interests advanced by the law, or (2) even if the statutory interests are substantial, the law cannot operate without violating constitutional rights. Any constitutional case must consider the exceptions to the presumption of constitutionality. A court or lawyer who ignores them does not perform a complete analysis of the constitutional problem. A consideration of only the presumption of constitutionality will inordinately focus on the need to uphold a law while neglecting the need to uphold constitutional principles. On the other hand, a review of the several exceptions to the presumption of constitutionality may convince an undecided or divided court to hold a law unconstitutional. These exceptions also provide psychological and instructional counterbalances to
the mind-set of upholding a law at all costs.

A. **Strict Scrutiny**

The most common media for a message of unconstitutionality is the rule which mandates the strict construction of criminal statutes. The Florida Supreme Court in *State v. Wershaw* stated the rule as: If there is doubt about the meaning of a criminal statute, a court must resolve all doubts about the meaning of a criminal statute in favor of the citizen and against the state. This strict scrutiny standard does not exist to invalidate ambiguous or vague statutes. It supplies a rule of construction to clarify unclear statutory language. The strict scrutiny standard is diametrically opposite from the presumption of constitutionality. The resolution of doubts in favor of the citizen will almost invariably result in a finding of unconstitutionality due to vagueness or unconstitutional application. Doubts resolved in favor of the citizen would theoretically result in a constitutional law but courts have not used strict scrutiny in this manner.

Under the strict scrutiny standard, the reviewing court will construe language according to its common, ordinary meanings. If a word or phrase has multiple or ambiguous meanings, a court will not construe the law to uphold it. The attendant rules of construction developed by courts invalidating laws are that a court will neither supply missing essential elements to a law nor amend or change the plain meaning of the words used by the Legislature.

Florida Statutes section 775.021 codifies the strict scrutiny standard. It states: "The provisions of this code [Title XLVI - Crimes] and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Florida Statutes section 775.021 directly conflicts with the "resolve all doubts in favor of constitutionality" standard as well as the "if there are two interpretations of a law, a court must choose the constitutional interpretation" standard. Only a few courts have used Florida Statutes section 775.021 despite its obvious applicability to this area.

The strict scrutiny standard also embodies a significantly different philosophical viewpoint than the presumption of constitutionality. The practical difference is mainly one of attitude in a close case; should a reviewing court resolve doubts in favor of the state (constitutionality) or in favor of the individual (unconstitutionality). The actual use of these two standards will ultimately depend upon whether the court's decision is to uphold the law or invalidate it. The historical use of the "strict scrutiny" and "presumption of validity" standards illustrates that Florida courts have merely selected the medium that fits the desired message. How else could these courts develop two dialectically opposite rules of construction to resolve doubts about meaning or constitutionality? One rule which states "resolve all doubts in favor of constitutionality" coexists with another which declares "resolve all doubts in favor of the citizen and against the state."

A court, under current practice, could use either rule whenever it desires, about the meaning of constitutional right. The rules are not mutually exclusive. The rules can be used together to resolve specific cases. However, the two standards do not coexist in a single case. If a court decides about the meaning of a law, a court should construe strictly in. Strict scrutiny is necessary because of the laws, the meaning of a law is not to be treated as ambiguous or overbroad and unconstitutional on its face. If there is no unconstitutional doubt, a court can construe the law to uphold it. No reported case has discussed the applicability of both rules in a particular case and only a few cases have recognized the presumption of constitutionality and then rejected it. The case law on the use of the two rules is inextricably inconsistent. The only rational explanation for this inconsistency is that the Florida courts have chosen the appropriate standard to fit the desired message.

This inconsistency is present when courts use strict scrutiny to justify a decision of unconstitutionality instead of as a tool of construction. For example, the Florida Supreme Court has used the standard to invalidate laws prohibiting abortions except when they are necessary to preserve the life or health of the mother, as well as to define malpractice in public offices when state officials or employees accept employment.
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A court, under current practice, could use either rule whenever there is doubt about the meaning or constitutionality of a statute. The rules are not compatible and a court cannot logically apply both in a single case. However, a court should initially consider the two standards and decide which is applicable. If there is doubt about the meaning of a law, a court should strictly construe it. Strict scrutiny is necessary because if there is doubt about the meaning of a law, it is probably vague or overbroad and unconstitutional on its face. If there is no constitutional doubt, a court can construe the law to uphold it. No reported case has discussed the applicability of both rules in a particular case and only a few cases have recognized the presumption of constitutionality and then rejected it.\textsuperscript{64} The case law on the use of the two rules is intractably inconsistent. The only rational explanation for this inconsistency is that Florida courts have chosen the appropriate standard to fit the desired message.

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\textsuperscript{64} E.g., Marrs v. State, 413 So. 2d 774 (Fla. 1st Dist. Ct. App. 1982).

\textsuperscript{65} State v. Barquet, 262 So. 2d 431 (Fla. 1972).
which might impair their independence of judgment in their public
duties. In each of these cases, the Florida Supreme Court refused to
construe the statutes to uphold some of the laws by placing limiting
constructions on them. The opinions in these cases discuss and ulti-
mately reject such constructions to uphold the statutes. The supreme
court has also used the standard to hold that a statute did not apply in
a particular situation.

The decision to invalidate a law has given rise to principles
designed to justify a court's refusal to construe a law in order to uphold
it. Strict constructionists do not impart special legalistic or common
law meanings to statutory language to uphold a law. They merely in-
voke the doctrine of separation of powers and conclude that such lin-
guistic machinations effectively re-write a law and violate the separa-
tion of powers. The question then arises: is it the higher duty of the
court to construe a law to uphold it or avoid re-writing a law to uphold
it? Another factor also enters into this calculus. Judicial re-writing of
a law ignores the doctrine of criminal notice from the plain and ordinary
language of the statute.

Courts have usually avoided these conflicts by invoking one stand-
ard to support a desired result while ignoring the manifest applicabil-
ity of other appropriate standards. Although strict scrutiny is suppos-
edly a threshold rule of construction, reviewing courts have invoked it
as symbolic support to invalidate a law. Virtually every time the Flor-
da Supreme Court uses strict scrutiny it does so to uphold a trial
judge's finding of unconstitutional vagueness. Occasionally, courts
discuss the standard and reject it because the law is not vague or the
presumption of constitutionality and its rules of construction are more

66. State v. Wershow, 343 So. 2d 605 ( Fla. 1977); see also State v. Llopis, 257
So. 2d 17 ( Fla. 1971), and State v. Buchanan, 191 So. 2d 33 ( Fla. 1966), for examples
of the use of the strict scrutiny standards.

67. See Wershow, 343 So. 2d at 607; Barquet, 262 So. 2d at 435-38; Llopis, 257
So. 2d at 18-19.

68. E.g., Negron v. State, 306 So. 2d 104 (Fla. 1974); Nell v. State, 277 So. 2d 1
(Fla. 1973).

69. The following cases held it was improper to re-write a law to uphold it:
Brown v. State, 358 So. 2d 16 (Fla. 1978); State v. Egan, 287 So. 2d 1 (Fla. 1973);
Barquet, 262 So. 2d at 431. However, in White v. State, 330 So. 2d 3 (Fla. 1976), the
supreme court substantially re-wrote the breach of peace/disorderly conduct statute by
adding three new elements to the statute to uphold it against first amendment
challenges.

70. See, e.g., Barquet, 262 So. 2d at 431.

71. E.g., Drury v. Harding, 461 So. 2d 104 (Fla. 1984).

72. See White v. State, 330 So. 2d 3 (Fla. 1976).

73. See State v. Ecken, 311 So. 2d 104 (Fla. 1975).

74. Glenn v. State, 255 So. 2d 675 (Fla. 1971).


76. See Wershow, 343 So. 2d at 608-9, quoting Screws v. United States, 323
important. The sometimes subjective and idiosyncratic decision on whether there is doubt about the statute also gives a court the opportunity to reject strict scrutiny.

Logically, a reviewing court should use strict scrutiny every time there is a legitimate claim of doubt about the meaning or scope of a criminal statute. However, in the following areas of admitted significant doubt about statutory meanings—breach of the peace, loitering, lewd and lascivious conduct, or profane language—the supreme court did not use strict scrutiny. The court had already decided to uphold the statutes and the use of strict scrutiny would have invalidated most of these laws.

The policy rationale for strict scrutiny is that the state should not deprive a person of his liberty under ambiguous or vague laws. When there is doubt about the meaning of a law, a court must resolve the doubt in favor of liberty because a doubt resolved in favor of the state will result in a conviction under a law which a court has explicitly admitted was previously ambiguous. Therefore, strict scrutiny should be an indispensable adjunct of the prospective notice requirement of criminal laws.

Courts could sometimes avoid the conflict between strict scrutiny and the presumption of constitutionality by applying strict scrutiny only to the litigants before the court. The court could then either hold the law unconstitutional on its face or construe it to uphold and apply it prospectively only. This view would exonerate the litigants before the court. This procedure would eliminate the conflict between strict construction and the presumption of constitutionality and promote the notice requirements of criminal laws. However, when a court ignores the strict scrutiny standard, changes the meaning of a law to uphold it and applies it retrospectively, it becomes both a de facto legislative and ad hoc tribunal. Under the present system, appellate courts effectively make new rules and then apply them to individuals who did not beforehand know about them. A review of the use of unconstitutional as applied standard does not reflect a use of the standard to promote the

71. E.g., Drury v. Harding, 461 So. 2d 104 (Fla. 1984).
72. See White v. State, 330 So. 2d 3 (Fla. 1976).
73. See State v. Ecker, 311 So. 2d 104 (Fla. 1975).
74. Chesebrough v. State, 255 So. 2d 675 (Fla. 1971).
76. See Wershof, 343 So. 2d at 608-9, quoting Screws v. United States, 325 U.S. 91 (1944), and United States v. Reese, 92 U.S. 214 (1876).
notice requirement. Courts have instead used the unconstitutional as applied standard as a medium to uphold laws of circumstantial meaning.

B. Unconstitutional as Applied

The unconstitutional as applied standard, as historically used, is an adjunct of the rule of upholding a law by judicial construction. This rule produces individual justice but also permits a court to uphold a law. A court can leave a statute in operation by declaring a law unconstitutional only as applied to a limited set of facts.

The Florida Supreme Court first adopted this principle in In re Fuller.77 The court upheld the disorderly conduct statute but also held the state could not apply the law to the facts of that case.

The supreme court repeated this approach in Gonzalez v. City of Belle Glade.78 Gonzalez was a protest marcher who made threatening and annoying comments to police officers. The majority opinion referred to the common law definition of breach of peace/ disorderly conduct, found it did not apply to Gonzalez’ conduct and upheld the statute. Justice Boyd wrote a sagacious dissent, joined by Justice Ervin, which criticized the majority’s disposition of the case.79 Justice Boyd noted that the problem with the disorderly conduct statute was that the determination of whether or not a particular act was disorderly depended upon the facts of that particular case. Consequently, a citizen would not know beforehand if a criminal violation had occurred. Courts should seek to enforce specific laws which cover particular conduct, according to Justice Boyd.80

The Florida Supreme Court also has used the unconstitutional as applied standard in other cases where the meaning of statutory language depends on the attendant factual circumstances. In B.A.A. v. State81 and State v. Ecker,82 this approach was used to uphold the loitering law but exonerate individual defendants. The supreme court apparently uses this standard to ameliorate definitional problems with certain statutes. The loitering, breach of the peace and disorderly con-

77. 255 So. 2d 1 (Fla. 1971).
78. 287 So. 2d 469 (Fla. 1973).
79. Id. at 671-77.
80. Id. at 676.
81. 356 So. 2d 304 (Fla. 1975).
82. 311 So. 2d 104 (Fla. 1975), cert. denied, 423 U.S. 1019 (1975).
duct laws do not have fixed and categorical meanings. Therefore, courts must give the statutory language meaning on a case-by-case basis. The case-by-case linguistic development of a statute does not necessarily advance the goal of informing all citizens of prohibited criminal conduct. An ordinary citizen must read the reported decisions on these statutes to avoid criminal conduct. The unconstitutional as applied standard does somewhat protect the litigants before it but is too easily used as a medium to uphold vaguely worded statutes. Courts could use this standard to uphold a law by refusing to convict those citizens it decides were unconstitutionally arrested. A citizen convicted under a law later ruled unconstitutional as applied may receive little solace from this decision after an arrest, conviction and several years of appellate litigation. However, courts should not abandon the unconstitutional as applied standard because it is proper when the facts do not fall within the scope of a facially valid statute or the court creates a new statutory definition.

The expansive use of the unconstitutional as applied standard could result in the perpetuation of facially vague statutes. The case-by-case construction of a vague or overbroad law may result in the chilling or deterring of the exercise of fundamental rights. Such laws may impinge upon the exercise of first amendment rights because citizens do not know the line between innocent and criminal conduct. Courts have, therefore, developed another exception to the presumption of constitutionality.

C. First Amendment Cases

Florida courts have developed special rules of construction for cases involving the exercise of first amendment rights. In *State v. Elder*, the Florida Supreme Court stated that because of the transcendent value of constitutionally protected speech, statutes regulating expression must be narrowly tailored to further only a legitimate state interest. The *Elder* court acknowledged the usual presumption of constitutionality, but used the stricter standard because of the possible infringement of first amendment rights.

Other courts have also carefully construed laws that potentially prohibit free speech rights. The First District Court of Appeal in *C.C.B. v. State*, invalidated a city ordinance prohibiting begging be-

83. 382 So. 2d 687 (Fla. 1980).
cause the law intruded upon first amendment rights. The begging ordi-
nance did not advance legitimate government interests in the least in-
trusive manner.** In State v. Eckert,** the supreme court construed the
loitering statute and held that the exercise of fundamental rights re-
quired a "delicate balance" between the protection of individual rights
and the protection of the public.

The use of special rules of construction reflects a policy of great
deferece to the exercise of first amendment rights. In first amendment
cases, a court will not resolve doubts in favor of the state or constitu-
tional. Under this rule, a court should weigh doubts in favor of the
first amendment and balance the possible exercise of rights with the
methods used by the criminal statute to prohibit certain conduct. First
amendment rights often outweigh even legitimate state interests and
preclude the state from prohibiting certain conduct. Attorney courts
should always review a statute for the potential exercise of first
amendment rights. The possible deterrence of first amendment activi-
ties may invalidate an otherwise constitutional statute.

D. The Media for Invalidating a Statute in Conflict with the
Media for Upholding a Statute

Courts have selectively chosen certain media to justify a holding of
unconstitutionality. Many of these rules logically conflict with the rules
designed to uphold laws. The conflict manifests itself most often in
cases of vague or ambiguous statutory language. A court wishing to
uphold a law will remove the ambiguity by using one set of standards
of review. A court wishing to invalidate a law will use another set of
standards. The self-serving use of the standards of review has created
significant doctrinal inconsistency and confusion. The selection of cer-
tain media for desired messages has also created a problem unique to
criminal law; special judicial interpretations of laws that are theoreti-
cally designed to give notice to ordinary citizens.

The selective use of standards of review has not fulfilled the doctrin-
ial reasons for standards of review: to help a court interpret the Con-
stitution and statutory language in light of a particular factual situa-
tion. The inherent ambiguity of the English language, coupled with the

85. See, e.g., State v. Askcraft, 378 So. 2d 284 (Fla. 1979); State v. Keaton, 371
So. 2d 86 (Fla. 1979); McCall v. State, 354 So. 2d 869 (Fla. 1978).
86. 311 So. 2d at 104.

self-serving use of standards of review, has created inconsistent deci-
sions and belittled the doctrine of prospective criminal notice. In their
almost limitless zeal to uphold laws, courts have used the rules of con-
struction designed to uphold laws to create legalistic definitions that are
often beyond the ken of ordinary citizens. A review of the attempts to
interpret vague statutory language demonstrates that the medium com-
pletely becomes the message, and the message is often understandable
only by the legal profession.

IV. Conflict Among the Presumption of Constitutionality,
Strict Scrutiny and the Notice Requirement of Criminal Laws

A. The Notice Requirement of Criminal Laws

All criminal laws must give notice to ordinary citizens of common
intelligence.** The language of a statute must clearly describe prohib-
ited conduct so citizens can avoid criminal behavior before they act in a
particular situation. Florida courts have often ignored the notice re-
quirement of criminal laws by manipulating standards of review. A
court wishing only to uphold a law will reconstruct or manipulate the
language of a statute to make it constitutional. The law which the
court has "saved" will probably be applied to the litigants before it.
However, the litigants making the constitutional challenge may not
have known of the new judicially-created definition at the time of the
alleged criminal act. Courts invalidating laws as applied also ignore the
notice requirement by defining a statute on a case-by-case basis. These
courts exonerate the litigants before it but do little to give prospective
violators guidance on the definition of prohibited criminal conduct.

Courts must ultimately determine the meaning of statutory lan-
guage to decide whether a law is constitutional. Explication of the Eng-
lish language is unavailable in constitutional cases. Standards of re-

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88. See, e.g., Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Lee v. State, 397
So. 2d 884 (Fla. 1984); Slaughter v. State, 301 So. 2d 762 (Fla.), cert. denied, 420
self-serving use of standards of review, has created inconsistent decisions and belittled the doctrine of prospective criminal notice. In their almost limitless zeal to uphold laws, courts have used the rules of construction designed to uphold laws to create legalistic definitions that are often beyond the ken of ordinary citizens. A review of the attempts to interpret vague statutory language demonstrates that the medium completely becomes the message, and the message is often understandable only by the legal profession.

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Courts must ultimately determine the meaning of statutory language to decide whether a law is constitutional. Explication of the English language is unavoidable in constitutional cases. Standards of review, if correctly used, balance the need of the courts to construe statutory language with the doctrine of fair notice to citizens. If statutory language was always clear and legislative intent was “known,” the conflict between standards of review and the notice requirement would rarely exist. The cardinal rule of construction of statutory language is, appropriately, that unless otherwise defined or limited by intent, statu-

tory language is given its plain and ordinary meaning. However, a review of the history of statutory construction in criminal constitutional cases demonstrates statutory language is rarely plain and ordinary.

B. The Ambiguous and Synomic Nature of the English Language and the Attempt to Give Language Its "Plain and Ordinary" Meaning

The initial task of a court considering a constitutional challenge is to determine the literal meaning of statutory language regardless of the standard of review. The standards of review embodied in the presumption of constitutionality, strict scrutiny and other special rules of construction are to help courts in the task of statutory definitions. The inherent ambiguity and synomic nature of the English language make the job of determining the literal meanings of words a difficult task. The manipulation of standards of review, coupled with the difficulty of defining English, results in special judicial definitions. These judicial definitions are often not the plain and ordinary meanings of words.

1. Judicial definitions of statutory language

The manipulation of standards of review to support a desired outcome often accompanies judicial defining of words to uphold a statute. Constitutional challenges often involve vague or overbroad statutory language. A court wishing to uphold the law must construe it to remove the vagueness of overbreadth and comply with other applicable constitutional provisions. Courts will then select a standard of review to justify the desired definition. This linguistic machination often results in special judicial definitions. For example, in *City of Pompano Beach v. Capalo* the majority and dissent engaged in a battle of standards of review to justify a particular definition which either upheld or invalidated a law. The court considered the constitutionality of a city ordinance which prohibited sleeping or lodging in a vehicle on public property or streets. Judge Glickstein reviewed the various standards of review for vague or overbroad statutes, and then concluded that under those standards the ordinance was overbroad and gave the police unbridled discretion to make arrests. The ordinance could have also punished innocent people sleeping or napping in a vehicle, moving or stationary, on public property.

Judge Hurley dissented and noted that the court could have avoided the constitutional issues by using other traditional principles of statutory construction. He argued that the majority should have construed the ordinance to remove the constitutional deficiencies. The standards of review invoked by the dissent were: 1) the presumption of rationality of an ordinance, 2) "where a literal interpretation leads to an absurd result, the strict letter of the law should yield to the obvious intent of the legislature," and 3) a court should read the entire statute to determine legislative intent.

Judge Hurley construed the ordinance to prohibit only sleeping with the intent to reside or establish living quarters in the vehicle. There was, however, no legislative history or linguistic etymology to support this definition. The City of Pompano Beach did not expressly state its intentions in the ordinance. Judge Hurley, in his determination to uphold the ordinance, re-wrote the law to give special meaning to words of ordinary meaning. The common meaning of sleep is simply not to rest or sleep with the intent to reside or establish living quarters.

On a motion for rehearing, Judge Glickstein responded to Judge Hurley's arguments. He invoked two additional tenets of statutory construction: a court should not distill legislative intent from pure form, and legislative history is an important aid to construction. The majority found no legislative history and refused to engage in the speculative construction used by Judge Hurley. They decided they had no choice but to invalidate the law because the plain language of the ordinance prohibited sleeping in a vehicle.

The definitions created by Judge Hurley in his dissent clearly illust

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88. See State v. Wereshow, 343 So. 2d 605 (Fla. 1977), and *supra* note 53.
89. See *Modern Guide to Synonyms* (Hayakawa 2d ed. 1968), where S. I. Hayakawa notes that "English has the largest vocabulary and the most synonyms of any language in the world."
90. 455 So. 2d 468 (Fla. 4th Dist. Ct. App. 1984), review denied, 461 So. 2d 113 (Fla. 1985).
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92. **Id. at 471** (Hurley, J., dissenting).
93. See State v. McDonald, 357 So. 2d 405 (1978).
94. State ex rel. Register v. Safer, 368 So. 2d 620 (Fla. 1st Dist. Ct. App. 1979);
    Foley v. State ex rel. Gordon, 50 So. 2d 179 (Fla. 1951).
96. See, e.g., **WEBSTER'S NEW COLLEGIATE DICTIONARY** 1083 (1980).
97. 455 So. 2d at 472-73.
98. **Id. at 472.**
trates the use of special judicial definitions created by manipulation of the standards of review. Such judicial re-writing of a statute may violate the doctrine of separation of powers. Similar to the use of the standards of review, Florida courts have consistently applied the separation of powers doctrine. As the Florida Supreme Court stated in Hanson v. State, a reviewing court has a duty to uphold a law “rather than apply a rule of strictness which defects and makes meaningless the fundamentals of legislative power.” In one opinion, the supreme court noted that only the legislature has the power to enact substantive law under the Florida Constitution. Consequently, it is the duty of courts to enforce such substantive law when constitutional. Some courts have perhaps misinterpreted this principle and have re-written laws to make them constitutional.

Another school of thought has decided that this type of judicial revision violates the law-making function of the legislature. The supreme court in Brown v. State directly considered this doctrine. In Brown, the court considered the constitutionality of Florida Statutes section 847.04, the public profanity law. The supreme court had upheld the law five years earlier in State v. Mayhew. The Mayhew court created special judicial definitions by constraining the language to prohibit only language which tended to incite a breach of the peace or inflicted injury. The Brown court subtly acknowledged it had invaded the province of the legislature when it re-wrote the law in Mayhew.

Justice Sundberg noted that the Florida Constitution requires a precision of language defined by the legislature, not articulated by the courts. He noted that judicial revision of vague laws could additionally frustrate the true intent of the legislature. The invocation of the separation of powers doctrine will depend on the decision to uphold or invalidate a law; a court wishing to uphold a law will re-write it if necessary, a court wishing to invalidate a law will not intrude upon legislative power.

In addition to the manipulation of standards of review to produce judicial definitions, courts have upheld statutory language which embodies legalistic phrases. For example, in State v. C.H., the Fourth

99. 56 So. 2d 129, 131 (Fla. 1952) (en banc).
100. Johnson v. State, 336 So. 2d 93 (Fla. 1976).
101. 358 So. 2d 16 (Fla. 1978).
102. 288 So. 2d 243, 251 (Fla. 1973).
103. Brown, 358 So. 2d at 20-21.
104. 421 So. 2d 67, 64 (Fla. 4th Dist. Ct. App. 1982).

...
District Court of Appeal explicited the terms, “consanguinity” and “affinity” in a statute prohibiting aid to a fugitive unless the aider was a relative related by blood or marriage. The trial court had consulted Black's Law Dictionary and found several definitions of the terms. The trial court then decided the statute was vague.106

The Fourth District Court of Appeal reversed the trial court’s holding and upheld the law because the appellate court found the terms had common, ordinary meanings: consanguinity relates only to blood and affinity relates only to marriage.106 The court held that the statute was not vague because ordinary persons would understand these definitions.

The primary definition of affinity in the dictionary, however, is a close relationship.107 The dictionary’s secondary definition is that a key relationship exists via marriage. Affinity is simply not the common definition of one’s in-laws.

It is also doubtful whether the average person would know the definition of consanguinity. Affinity and consanguinity are Latin derivatives selected by legislators and lawyers to replace the common phrases, related by marriage or related by blood. Uncommon, specialized words which may also have common meanings may be understandable to courts but may not be within the vocabulary of the average citizen.

The ardent desire to uphold laws by special judicial definitions has led to the rejection of actual interpretations of statutory language by laypersons. For example, in Gardner v. Johnson108 the supreme court considered the varying definitions given to a statute by different police officers. The different definitions were simply a product of the ambiguity of the words used and the various definitions appeared to be prima facie evidence of ambiguous language. The Gardner court summarily dismissed the evidence of different definitions and noted “[s]mall variances in the understanding of individual[s] . . . do not necessarily show vagueness.”

The multiple definitions that accompany many words could be the basis for a constitutional challenge of vagueness. Yet Florida courts have not often sympathized with the notice problems with words of multiple meanings. For example, in City of Daytona Beach v. Del

105.  Id. at 63-64.
106.  Id. at 64.
108.  451 So. 2d 477, 478 (Fla. 1984).
2. Common Meanings of Words and Special Judicial Definitions: Whether Ordinary Citizens are Aware of or Can Anticipate Special Legalistic Definitions

Courts may violate the doctrine of notice for criminal laws by manipulating standards of review to create special judicial definitions. Courts rely upon the legal fiction that all persons are presumed to know the law. If a law is clear and would be understandable to ordinary citizens, a person cannot claim that he was unaware of that particular law. However, judicial construction of literal statutory language may create an esoteric set of knowledge known only to courts and lawyers.

Standard dictionary definitions are reliable sources for plain and ordinary language definitions. However, reviewing courts only occa-

[Text continues on the next page]
sionally use dictionary definitions. Courts sometimes use standard dictionary definitions, but then alter the standard definition to uphold a law. For example, in *State v. Brown*\(^{112}\) the Fourth District Court of Appeal construed a law which prohibited the disposal of nonconsumable government property without competitive bidding. The court used a dictionary definition of nonconsumable: the dictionary defined consume as “to do away with completely or to spend wastefully or to use up.”\(^{113}\)

The *Brown* court then upheld the law by changing this ostensibly “common and plain” meaning by defining nonconsumable as capable of being used up or extinguished for its intended purpose. The statute, as construed, was not vague and put all ordinary citizens on notice, according to the court.\(^{114}\) In reality, the court gave the phrase this definition to limit the scope of the law to criminal activities. The judicial definition is at least narrower than the statutory definition. However, citizens reading the statute alone may forego certain legal activities because of the broad statutory definition.

In *Graham v. State*,\(^{118}\) the Florida Supreme Court altered the simple definition of “molest” in a law prohibiting molestation of stone crab traps. The common definition of molest is to interfere, annoy or meddle with a thing so as to injure or disturb it. The court accepted this definition but added the phrase an “act done with the intent to molest.” As in *State v. Brown*,\(^{118}\) this definition is more limited than the plain definition. The problem with such limiting constructions is: (1) it may frustrate legislative intent; (2) ordinary citizens may not be aware of the limiting construction and therefore may obey the overbroad statutory language which may include innocent activities; and (3) the defendant before the court may face punishment under the newly-created judicial interpretation.

Although standard dictionary definitions could possibly eliminate the problems caused by judicial interpretations, many courts do not use

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Tsavaris, 394 So. 2d 418 (Fla. 1981) (cresote defined as substance harmful or injurious to health); Graham v. State, 362 So. 2d 924, 925 (Fla. 1978) (defining “molest” in law prohibiting molestation of stone crab traps); State v. Llopis, 257 So. 2d 17, 19 (Fla. 1971) (phrase “might” defined in law prohibiting state employees from accepting outside employment which might impair their independent judgment).

\(^{112}\) 412 So. 2d 426 (Fla. 4th Dist. Ct. App. 1982).
\(^{113}\) *Id.* at 428.
\(^{114}\) *Id.*
\(^{115}\) 362 So. 2d 924 (Fla. 1978).
\(^{116}\) 412 So. 2d at 426.
them. Some courts simply pronounce, ex cathedra, that certain language is not vague. Dictionary definitions do not always solve definitional problems. Generic statutory language without specific delineations of prohibited conduct also causes problems. Some statutory language has multiple definitions or numerous synonyms. For example, in *State v. Beasley*, the supreme court construed the riot statute. Like many criminal statutes, the section has no specific definitions of the operative terms. The court, instead of resorting to definitions according to common usage, examined the common law definition of riot.

The “common law” does embody historical and evolutionary meanings of words judicially developed by case decisions. However, the “common law” does not necessarily coincide with the operative vocabulary of the common citizen. In *Beasley*, Justice Overton construed the law to prohibit three or more persons acting with a common intent to mutually assist each other in a violent manner to the terror of the people and breach of the peace. Accoring to Justice Overton, common people would understand a riot to mean a group of people acting defiantly in a violent manner. He also noted the term riot probably has a better understanding by citizens than the terms “disorderly conduct” or “loitering.”

The problems with statutes prohibiting riots or loitering is the many definitions of the operative language. The dictionary entry for riot includes five definitions as a noun and three as a verb. Riot also has several recognized approximate synonyms: tumult, unruliness, commotion, disorder, revolt, loudness, uproar, arise, debauch, ratchet, rollick. The *Beasley* court used a common law definition to assist it in choosing from the various definitions of riot; however, this legalistic construction does not comport with the common understanding of riot.

While judicially-created definition is narrower than the common one, this judicial definition does not give good notice because the broader common definition of riot may cause citizens to avoid certain conduct because they fear punishment for “rioting.”

In instances where words like “riot” offer a broad statutory inter-

118. 317 So. 2d 750 (Fla. 1975).
119. Id. at 753.
120. Id.
121. WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 1564 (1978).
122. See RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 1235-36 (1967); ROGET’S THESAURUS 3456 (1977).
pretation, courts often create drastically limiting definitional changes to make the laws judicially precise and constitutional. Most of these definitional dilemmas would disappear if the Legislature would specifically outline the prohibited conduct. The use of generic descriptive phrases like "riot" is a poor substitute for the intended definition: three or more persons acting with a common intent to mutually assist each other in a violent manner to the terror of the people and breach of the peace. \(^{123}\)

Generic statutory phrases used in lieu of specific descriptions of conduct give courts the opportunity to manipulate selected media to achieve a given result. Moreover, generic statutory language is not the most egregious example of judicial interpretation of language resulting in violations of the principle of notice to ordinary citizens. The Legislature has created some laws whose meanings inherently change under differing circumstances. These laws require judicial interpretation on an \textit{ad hoc} basis to give them any substantive meaning.

3. \textit{Words of circumstantial or relativistic meaning}

The most difficult problem with statutory construction and the notice doctrine is words of circumstantial or relativistic meaning—that is, words whose meanings change with the context. One example is "to breach the peace." If one yells a certain word in a noisy bar it probably will not breach the peace. On the other hand, the same word yelled in a quiet church, courtroom or police station may be a breach of the peace. The meaning of the breach of peace statute invariably depends upon the time, place or situation. \(^{124}\)

As Justice Boyd noted in \textit{City of St. Petersburg v. Waller}, \(^{125}\) "It is the context within which the word is used which determines its import. ‘For everything there is a season and a time for every matter under heaven.’ " \(^{126}\) The situational meaning of the breach of peace statute has produced several dissenting opinions in cases upholding the law. \(^{127}\) These dissenters have questioned the need for such a vague and ambiguous statute when the questionable conduct could have been prohibited by more specific laws. The same struggle has occurred in cases involv-

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123. \textit{Beazley}, 317 So. 2d at 752-53.
125. 261 So. 2d 151 (Fla. 1972).
126. \textit{Id.} at 156.
ing the loitering/prowling laws.128

The breach of peace/loitering laws, due to the relativistic nature of the statutory language, produced special rules of construction. Florida courts have developed special media to produce the message of ultimate constitutionality for laws of circumstantial meaning. Courts have upheld the laws but found the statute unconstitutionally applied to certain factual situations. In these instances, the reviewing courts found that the circumstances did not fall within the constitutional ambit of the statute. None of these courts addressed the question of notice — whether the defendants arrested or the police who honestly believed they were making valid arrests should have known a particular factual situation did not come within the law. The court’s findings of unconstitutional as applied implicitly admit that the statute, on its face, does not give adequate notice.

The supreme court in City of St. Petersburg v. Waller129 stated that the fact that “marginal” factual situations may arise under a statute or ordinance does not, in itself, render an enactment vague. Some other courts have held that it is not necessary to furnish detailed plans of a statutory scheme.130 This doctrine is borrowed from civil cases where there is no criminal notice requirement. Criminal statutes, on the other hand, should be detailed so that citizens, police, and courts can act in a constitutional manner.

The Florida Supreme Court in State v. Dye131 cynically stated that the prohibition of generic terms would effectively nullify most legislation. The court did not appreciate the intrinsic irony of imprecise language providing sufficiently definite warnings and upheld the challenged law.

These candid admissions of imprecise statutory language may simply reflect the inherent ambiguity of the English language and the impossibility of covering all possible factual situations. However, police, defendants, trial courts, district courts of appeal judges and supreme court justices often disagree with the dispositive definition created by a majority of the supreme court. Language is either precise enough so that most people of common understanding can agree on its meaning or it is so ambiguous that reasonable people could differ on its meaning. If reasonable people could differ on the meanings, the supreme court should construe the law to comply with the Constitution; it should then apply the new definitions prospectively. Occasionally the language is not susceptible to a limiting construction and the reviewing court must invalidate the entire statute.132 Florida courts have rarely admitted that the language chosen by the Legislature is so vague it is beyond judicial repair.133 Most courts readily attempt to give vague or generic terms specific judicial meanings. In the area of public morals and sexual crimes, for example, Florida courts have practiced substantial linguistic engineering.

Sexual practices or public morals present unique problems of circumstantial relativistic meaning. Statutes prohibiting sexual conduct often illustrate the conflict between notice to possible violators and the duty to uphold a law in a pluralistic society with many different notions of morality. In Witherspoon v. State,134 Justice Adkins wrote for the supreme court that the ordinary citizens could easily determine the meaning of the phrase “unnatural or lascivious act.”135 This position is debatable because the phrases unnatural and lascivious are value-laden terms whose meaning depends on the moral proclivities of any particular group or individual. Ironically, the same supreme court found the phrase “crime against nature” to be vague. In Franklin v. State,136 the phrase was found to lack a specific meaning in light of contemporary understanding.137

In Chesnborogh v. State,138 the Supreme Court attempted to define the terms “lewd and lascivious.” The court noted that the phrases were clear because they were words of common usage. This fact alone does not give specific meaning to words. “Art,” “beautiful” and “good” are all words of common usage. However, their meanings inherently depend upon the understandings of the authors and audience. Justice Adkins defined the phrase lewdness as the unlawful indulgence of lust, signifying that form of immorality which has a relation to sexual

129 261 So. 2d 151 (Fla. 1972), cert. denied, 409 U.S. 989 (1972).
130 See Scullock v. State, 377 So. 2d 682 (Fla. 1979); Smith v. State, 237 So. 2d 139 (Fla. 1970).
131 346 So. 2d 538, 542 (Fla. 1977).
132 See, e.g., Marrs v. State, 413 So. 2d 774 (Fla. 1st Dist. Ct. App. 1982); Franklin v. State, 257 So. 2d 21 (Fla. 1971).
133 See, e.g., State v. Llopis, 257 So. 2d 17 (Fla. 1971).
134 278 So. 2d 611 (Fla. 1973).
135 Id. at 612.
136 237 So. 2d 21 (Fla. 1971).
137 Id. at 23-24.
138 255 So. 2d 675 (Fla. 1971), cert. denied, 406 U.S. 976 (1972).
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133. See, e.g., State v. Llopis, 257 So. 2d 17 (Fla. 1971).
134. 278 So. 2d 611 (Fla. 1973).
135. Id. at 612.
136. 257 So. 2d 21 (Fla. 1971).
137. Id. at 23-24.
impurity. The problem with this definition of lewdness is the necessity to redefine it in relativistic, moral terms. This definition also raises the problems of determining the definitions of immorality, unlawful indulgence of laws and sexual purity. The desire to uphold these morality laws has caused judges to use their own individual senses of morality in place of words whose meaning are universally understood. The supreme court in Tatsel v. State repeated this approach and upheld a statute prohibiting “licentious sexual intercourse without hire.” The court used the “plain and ordinary” dictionary definition of licentious: disregarding accepted rules and standards, morally unrestrained. The court also consulted Black's Law Dictionary and then limited the definition to sex in violation of the law. Fornication, sexual intercourse between unmarried persons, or between a married person and an unmarried person, are examples of licentious sex, the court noted. Justice Atkin further stated that while fornication is common today, it was not the province of the law to vary legislative intent merely because of its own belief as to the lack of wisdom of the law.

Justice Boyd dissented because the statute provided no specific guidelines on what sexual conduct was licentious sex. The change in sexual morals from the origin of the “licentious sex without hire” statute could have produced the approach taken in Franklin v. State, with the “crime against nature” statute. The term “licentious sex without hire” lacks specific meaning given contemporary understanding, experiences and customs, Justice Boyd wrote.

General notions of lewdness or immorality change from generation to generation. This change produces the problem of whether an arcane criminal law gives adequate notice in light of changed sexual practices. If an ordinary citizen can easily define such terms as lascivious or licentious, the Legislature should be able to specifically outline these acts. The legalistic phrases used by the court are probably not within the common vocabulary of most citizens. However, the supreme court has steadfastly refused to define specifically these sexual terms.

139. Id. at 677-78.
140. 356 So. 2d 787 (Fla. 1978).
141. Id. at 793.
142. Id. at 790.
For example, in *Bell v. State*, the court declined to state the specific acts prohibited by a statute banning lewd and lascivious acts. The court did not decide that sodomy was an unnatural and lascivious act. The court instead took a "we know it when we see it" approach. The court noted it was not necessary to furnish detailed plans and specifications of conduct prohibited by a law. However, such a general rule is inappropriate if the statutory language fails to give notice of all the prohibited acts to citizens of common intelligence.

Despite the *Bell* court's confidence in the linguistic acumen of common citizens, the phrases such as unnatural, deviate, lewd, lascivious, immoral, and licentious have caused other state courts significant definitional problems. Some courts have construed such statutes to prohibit specific conduct. Other state statutes specifically delineate the prohibited conduct to eliminate the definitional problems experienced by Florida courts.

The definitional problems inherent in obscenity laws are even greater than in the "lewd and lascivious" statutes. A community-based and *ad hoc* definition of obscenity as described in *Miller v. Califor-

144. 289 So. 2d 388 (Fla. 1973).
145. *Id.* at 390.
A review of the statutes of the 50 states reveals few states define prohibited sexual conduct in terms of lewd, lascivious or licentious sex. *See, e.g.*, Criminal Codes of Alabama, Georgia and Mississippi. These states have statutes prohibiting lewd behavior.
nia, and the Florida obscenity statute only exacerbates the problem of notice to ordinary persons. A finder of fact, through the use of community standards, must judge each work individually to determine whether it is obscene. Until a trier of fact makes a decision based on community standards, it is unclear how a defendant could know a particular work was obscene. Courts have relied on the fiction of a presumption of knowledge of obscenity to solve this problem of notice.

If the state attempts to enforce morality through the criminal law, it must give notice of the prohibited acts to ordinary citizens of common intelligence. Statutes prohibiting immoral or lascivious conduct may not necessarily give notice because of the ambiguous meaning of these words. Conduct that is lascivious and grossly indecent to one person may be only mildly scintillating to another. Specific definitions of the prohibited acts could solve this problem. Specific delineation will fairly give notice to all segments of society and didactically inform individuals of conduct the state wishes to promote and punish.

Attorneys and courts attempting to define statutory language must consider the common historical meaning of words. Common law legal definitions may significantly differ from common usage. The notice requirement of criminal laws mandates statutory definitions that are within the understanding of the average citizen. The contemporary usage associated with statutory language can be determinative in laws dealing with sexual relations or public morals. Public morals have historically changed and attorneys and courts must be aware of changing contemporary sexual customs and morals.

Statutory language that includes words of circumstantial or relativistic meaning give lawyers and courts an opportunity to argue that a given factual situation, not previously defined, falls within a circumstantial meaning. This creates the opportunity for a court to manipulate the media to fit the messages of constitutionality. The decision on whether the novel factual situation fits within the circumstantial meaning necessarily involves judicial re-writing of the law. A court construing such laws essentially re-writes the law each time it decides whether

151. See Miller v. California, 413 U.S. at 32-37, and State v. Aiuppa, 298 So. 2d 391 (Fla. 1974).
a new fact pattern fits within the law. Laws of circumstantial meaning provide the ultimate malleable media for courts and lawyers to produce desired messages. These laws significantly violate the doctrine of separation of powers and notice in criminal law. Courts should invalidate them as being vague and overbroad. Such decisions would instruct the Legislature to perform its duty and write constitutional laws understandable to the common citizen.

V. Conclusion: Guidelines for Courts and Counsel

This article has attempted to describe the multitudinous expressions of the standards of review and rules of construction in criminal cases. The only trend in the case law is the lack of a specific trend or precedential uniformity. The author believes the greatest problem in the field of constitutional standards of review is the lack of doctrinal consistency. Appellate courts often appear to be ad hoc super-trial courts who decide a case only on the facts of that case without considering either constitutional principles or precedent. Courts seem to reach a decision and then search for a standard of review to fit it. Often, a court reviewing a constitutional issue does not even use a standard of review. Attorneys arguing constitutional and criminal statutory construction cases add to this confusion by only arguing standards of review or rules of construction that comport with their selected arguments. This article will now propose guidelines for courts and attorneys on the use of standards of review and rules of statutory construction. These guidelines will hopefully: (1) help to eliminate subjective decisions; (2) clarify the substantive constitutional and statutory law; (3) provide precedential uniformity so that attorneys and courts can better predict trends and directions in the law; (4) help attorneys and courts apply established principles to new factual situations; (5) assist courts and counsel in creating new substantive law by using an established doctrinal approach to a novel situation and (6) create consistency in standards of review and rules of construction commensurate with the doctrine of notice in criminal laws.

A. Guidelines for the Courts

1. Avoid selecting the medium merely to fit the message

Courts must resist the temptation to reach a certain result and then select a standard of review to fit it. Courts should use the standard of review appropriate to the facts of a case and the nature of the consti-
2. **Enunciate the appropriate standard of review or rule of construction**

Decisions that simply pronounce a constitutional decision without explanation do not necessarily advance the public's or attorneys' understanding of the case. The articulated thought processes of a court help clarify the decision, assist in the parties understanding of the decision and provide guidance for the future. An unexplained decision may lead to future litigation because of uncertainty over the reasons for or methodology of the decision. Courts should always articulate the standard of review or rule of construction used to reach a decision unless previously articulated in a similar case. Similarly, attorneys should always propose a standard of review or rule of construction to the court; failure to raise a standard of review or assuming the court will use the appropriate rule could lead to a lost cause.

3. **Establish uniform expressions of the standards of review**

The myriad expressions of the presumption of constitutionality lead to decisional confusion. Other standards of review and rules of construction also have several, disparate definitions. The Florida Supreme Court should define these standards in the appropriate case. Appellate judges should resist the temptation to re-formulate the standards in their own idiosyncratic prose each time they decide a case.

Appellate courts should unequivocally establish the burden of proof inherent in these presumptions and rules. The presumptions and rules merely require acceptance of a fact unless rebutted by other evidence. The questions remain: Who must establish the accepted fact? Who must rebut it? What is the quantum of proof necessary to overcome the accepted fact? The presumptions will have only symbolic meaning unless courts assign and define the respective burdens of proof. Courts should remember that in certain cases involving fundamental rights the burden is on the State, and not the challenger of the law.

4. **Avoid substituting judicial intent for unexpressed legislative intent: Determining legislative intent and the avoiding absurd results doctrine**

Some appellate courts, in their boundless zeal to avoid invalidating a law, have unquestionably substituted judicial intent for an unexpressed legislative intent. These courts have either re-written poorly drafted laws or supplied “legislative intent” to make a law constitutional. The “avoiding absurd results” doctrine has permitted the courts to engage in judicial legislation. If the legislature has not expressed its intent or the plain language of the law or its history does not evince the intent, courts should not substitute its judgment for that of the legislature. Appellate courts should not correct the drafting mistakes of the legislative process; the “absurd result” may be exactly what the legislature intended. The “avoiding absurd results” doctrine is significantly subjective and is too easily used to achieve a certain desired result. Appellate courts should not re-write a law and become a “super legislature” that corrects the mistakes of the legislature or alters a law achieving absurd results. The courts should interpret the law as written and hold the Constitution if they doubt requires the overruling of a law, the courts should not hesitate.

5. **The specific historical definitions of words and retrospective application of new definitions to satisfy the now requirement of criminal law**

Many courts have mistakenly ignored the now requirement of criminal law in an attempt to uphold a statute. Courts should use those non-ordinary, common meanings of words. Criminal laws must give notice to ordinary, common citizens. Citizens must know the nature of criminal conduct before they act in a particular way. Dictionary definitions will help to ensure the use of common meanings. The use of common law or decisional definitions often embodies legislative or citizens definitions beyond the knowledge of ordinary citizens. The greatest violation of the notice requirement is the retrospective application of new definitions. If a court interprets the meaning of a law and creates new definitions to uphold it, it should not apply the new definitions to the litigants before it. It is logically inconsistent to create a new definition and then apply it to an individual who was previously unaware of it.
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5. Use specific historical definitions of words and prospective applications of new definitions to satisfy the notice requirement of criminal law

Many courts have blithely ignored the notice requirement of criminal laws in an attempt to uphold a statute. Courts should use the common, historical definitions of words. Criminal laws must give notice to ordinary, common citizens. Citizens must know the nature of criminal conduct before they act in a particular way. Dictionary definitions will help to insure the use of common meanings. The use of common law or decisional definitions often embodies legalistic or elitist definitions beyond the knowledge of ordinary citizens. The greatest violation of the notice requirement is the retrospective application of new definitions. If a court interprets the meaning of a law and creates new definitions to uphold it, it should not apply the new definitions to the litigants before it. It is logically inconsistent to create a new definition and then apply it to an individual who was previously unaware of it.
6. **Avoid judicial re-writing of vague laws**

Courts have sometimes substantially rewritten or added new elements to vague laws to uphold them. This judicial reconstruction blatantly violates the principle of the separation of powers. If a law is vague and overbroad and a court cannot limit or construe the language to uphold it, the court should not re-write it or add to it. A refusal to re-write poorly drafted laws will honor the notion of separation of powers and inform the legislature that it must pass laws that give adequate notice of prohibited conduct. Courts should also not use the un-constitutional as applied standard to uphold vague and ambiguous laws.

**B. Guidelines for Counsel**

Attorneys should pay close attention to the above-described guidelines for the courts. Counsel can use these rules to select the appropriate standard of review, anticipate the direction a court might go and shape arguments to fit the court and the case. In addition to these rules, the following guidelines should help lawyers locate and argue the appropriate standards of review.

1. **Select the standard of review or rule of construction first**

Once an attorney has identified the substantive issues in a case, she should begin research on the standard of review or rule of construction. The standard of review will thereafter direct and mold the research of the substantive issues. If a lawyer researches the substantive issues first and then attempts to find the appropriate standard of review, he will probably use the type of *post hoc* and deterministic reasoning often used by the appellate courts. The standard of review should lead to the answer in the substantive law and not be merely a way to present the answer.

2. **Determine the burden of proof embodied in the standard of review or rule of construction**

Lawyers would rarely neglect to argue the burden of producing evidence or persuasion on a substantive issue. The burden of proof in arguing the standard of review should also never be overlooked. For example, a party defending the constitutionality of a law should inform the court that the challenger has the burden of going forward and persuading that the law is unconstitutional. The quantum of proof, if known, could be the difference in a close case.

3. **Know the exceptions to the presumption of constitutionality**

Attorneys challenging the constitutionality of a law must use the exceptions to the presumption of constitutionality. The proper use of the exceptions can inexcusably lead a lawyer and a court to the conclusion of unconstitutionality. Any challenge to the precision of statutory language must begin with strict scrutiny if first amendment rights are affected. Strict scrutiny can lead a court away from the predisposition toward upholding a law by judicial reconstruction.

4. **Use plain and ordinary meanings commensurate with the doctrine of criminal notice**

The case law reviewed in this article amply demonstrates that statutory language and subsequent judicial interpretations are often not within the understanding of common citizens. Challengers and defendants of vague laws must begin with the prosaic, rather than legally esoteric, definitions of words. Lawyers should consult dictionaries and linguistic studies for definitions in addition to statutory and case law sources.
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Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary

John Tiedemann*

I. Introduction

Preserved for posterity in the *Southern Reporter* are the following assurances from the Florida Supreme Court:

[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of [a judge] to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his courtroom speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the courtroom should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.¹

Most judges have honored these commands. This article deals with two types of judges who have not.

II. Bad Decisions

Some judges make bad decisions, whether they are judging sport-

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The author dedicates this article to his wife Marilyn, and his daughters Katie and Laura.

¹ State *ex rel.* Davis v. Parks, 194 So. 613, 615 (Fla. 1939).
ing contests or lawsuits. In the present context, a “bad” decision means one unfaithful to the written law. The United States Supreme Court, in writing that litigants have “no [constitutional] entitlement to the luck of a lawless decisionmaker,” has tacitly admitted that bad legal decisions occur. The experience of the judiciary with ethically difficult issues, such as the death penalty, has yielded numerous such decisions.

In fully one-half of those cases which involved state court affirmed death sentences, the Eleventh Circuit Court of Appeals has ruled favorably to the defense. This is about par for the course. This necessarily suggests two possibilities: either that the state courts are so inapt at detecting preserved constitutional infirmities in such cases that they can do no better than meet the law of averages, or that the federal appellate courts second-guess the judgment of the state courts much too frequently. Rose Bird, former Chief Justice of the California Supreme Court, reportedly has voted against affirming sentences of death at every opportunity. This necessarily suggests an indulgence in outcome-oriented jurisprudence by either a large number of lower court California judges or by the Chief Justice herself.

One may certainly invoke the spectre of the decline and fall of the Roman Empire or the Holocaust of Nazi Germany to persuasively argue that adherence to a higher moral law justifies reaching results in such cases at variance with the command of the written law. There are indeed times when, in the immortal words of Charles Dickens, “the law is a[n] ass.” Even allowing for honest differences of opinion, however, one may not convincingly deny that some judges in the foregoing cases have refused to properly apply this written law. If the law meets our

10. C. Dickens, Oliver Twist 520 (U.S.A. ed. 1941).

moral disfavor the remedy should ultimately be to seek democratic legislative modification, not autocratic judicial nullification.

Our courts write, aspirationally, that “[j]udges are required to follow the law. . . . No judge is permitted to substitute his concept of what the law ought to be for what the law actually is.”11 But when judges violate this lofty creed, whether for reasons of conscience or malice or simple ineptitude, there is little that lowly litigants can do. Refusal to comply with the court’s mandate, in a kind of counter civil disobedience, is out of the question.12 It is very difficult to impeach judges even for gross improprieties such as accepting bribes,13 let alone for debatably refusing to correctly apply the law.14 Such will not reverse the result in a given case. Recourse to a higher court, though often problematic and a long shot under the best of circumstances, offers the only realistic possibility for relief.

III. Bad Judging

This article now shifts its focus away from American judges who make bad legal decisions, toward Florida judges who make bad legal decisions. The focus is now on judges who, in the words of Harry S. Truman, “don’t understand the power of [public officials] to hurt” people through impolite dealing.15 Alan Dershowitz has observed that some judges betray a “meanness of spirit . . . beneath the[ir] robes.”16 A small minority of Florida’s judges violate the spirit, if not the letter, of Canon 3(A)(3) of the Code of Judicial Conduct, which declares that “[a] judge should be patient, dignified, and courteous to litigants . . . and lawyers . . . with whom he deals in his official capacity.”17 Are judges who judge badly as impervious to oversight as those who make bad decisions?

Unfortunately, such judges are far too often insulated from effec-

11. In re Taunton, 357 So. 2d 172, 179 (Fla. 1978); see also Hoffman v. Jones, 20 So. 2d 431 (Fla. 1972); State ex rel. Sagonias v. Bird, 67 So. 2d 678, 681 (Fla. 1953).
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12. Turner v. Department of Professional Regulation, 460 So. 2d 395, 396 (Fla.
13. See generally Two and Two Equal not Guilty, TIME, February 14, 1983, at
66.
14. But see Bird Hunting in California, supra note 8.
17. FLA. CODE OF JUDICIAL CONDUCT Canon 3(A)(3).
tive rebuke, particularly if they are appellate judges. Veteran appellate practitioners commonly trade “war stories” regarding abusive treatment that they or their colleagues have received at the hands of certain notorious federal and state appellate court judges. Such treatment has occurred during oral arguments and in written opinions. Of course there are times when either oral or written appellate judicial condemnation of attorneys or litigants is warranted. However, such condemnation loses all meaning when it is not reserved for instances of clear and substantial illegitimate conduct. This is especially true considering that the Florida appellate courts seldom praise lawyers for performing well. There are no reported cases of such courts either so much as apologizing to the parties or chastising themselves or lower appellate courts for abusive behavior.

Florida’s trial judges have been called upon to pay a greater price for injudicious behavior than that exacted from their appellate overseers. For example, one trial judge was infamous for his repeated instances of “irascibility and intemperate, irrational behavior,” which included detaining a delivery truck driver for blocking his reserved parking space. He was found unfit by the Florida Supreme Court “due to his tendency to lose his temper when confronted by the human failings and shortcomings of others” and was ordered removed from the bench. Another judge equally notorious for being “rude and inconsiderate of attorneys and court personnel” escaped with a public reprimand for his conduct and went on to become a United States Representative, only to be imprisoned for accepting bribes. Yet another judge also known for “repeated instances of arrogance, and a lack of courtesy, dignity and patience to litigants, witnesses, lawyers and others” was publicly reprimanded for such conduct. Despite his re-

19. Id. Crowell, 379 So. 2d 107, 109 (Fla. 1979).
20. Id.
21. Id. at 110.
22. Id.
26. Id. at 1147.
pentance he was voted out of office by the public shortly thereafter.\textsuperscript{97} Recently, still another judge, who "misused his judicial authority in threatening litigants who complained about his conduct," was removed from office for this and numerous other transgressions.\textsuperscript{98} Florida jurisprudence has known many fine moments; the foregoing are not among them.

Obviously, a judge should not be removed "from office on the grounds that he possesses an unpopular philosophy, has offensive idiosyncracies, has rendered unpopular decisions or is too compassionate."\textsuperscript{99} Nor may lawyers or litigants bait a judge into displaying justifiable anger towards them and then successfully demand his recusal in a given case.\textsuperscript{100} But by and large, a judge must not let "his emotions instead of his judgment get in the driver's seat."\textsuperscript{101} As the Florida Supreme Court has stated:

We canonize the courthouse as the temple of justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal — in fact every category of social rectitude and social delinquent — may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. Such a pattern for administering justice inspires confidence. The legend on the seal of this court — "sat cito si recte" (soon enough if right or just) — embossed on the floor in the rotunda of this building, encourages devotion to such a pattern. Litigation guided by it makes the courthouse the temple of justice. When judges permit their emotions or the misapplication of legal principles to shunt them away from it, they must be reversed. The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or


\textsuperscript{28} In re Damron, 487 So. 2d 1, 7 (Fla. 1986).

\textsuperscript{29} In re Taunton, 357 So. 2d at 177-78.


\textsuperscript{31} Williams v. State, 143 So. 2d 484, 488 (Fla. 1962).
IV. Conclusion

The Florida Supreme Court has stated that "[a] judge is required to conduct himself under standards which are much higher than those required of an attorney"32 or, presumably, of a litigant. Although this is the case with regard to many matters, it is certainly not the case with regard to fidelity to the letter of the law or demeanor in the courtroom.33 Lawyers and the public have no short-range and precious little long-range protection against judicial lawlessness and temper tantrums absent the self-restraint of judges themselves. Fortunately, most of Florida's judges nonetheless treat those appearing before them with the impartiality and the respect that they deserve both as taxpayers and as human beings.

32. Id. at 488. See also State ex rel. Davis v. Parks, 194 So. at 615.
33. In re La Motte, Jr., 341 So. 2d 513, 517 (Fla. 1977).

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Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions

I. Introduction

In May 1982, as the Davises strolled through the Johnsons' home, they thought they had found the house of their dreams. Little did they realize, however, that the contract they were about to enter into would form the basis for a nightmare of litigation. The Johnsons, fully aware of their home's defective condition, readily accepted the Davises' initial deposit, thereby setting the stage for one of the most important and controversial decisions in Florida real property law within the past several years.

In Johnson v. Davis4 the Florida Supreme Court recognized that, in some instances, a vendor of real property may be held liable for the nondisclosure of a material defect that affects the value of the property and, which is not readily discoverable by the purchaser. Though an increasing number of jurisdictions now permit redress for the injured homebuyer, this was not always the case.

This Note presents an historical review of the rule of fraudulent nondisclosure, and an analysis of Florida's most recent pronouncement on the subject — Johnson v. Davis. The supreme court's decision, as well as holdings in other jurisdictions reveal that, while a remedy now exists where traditionally there was none, concepts of materiality in this context remain confusingly intermingled with those of good faith and fair dealing.

Lastly, this author will offer a prediction on the impact such vague and amorphous concepts may have on the future course of this body of law.

II. Historical Development of the General Rule and Its Exceptions

A. Generally, No Liability for Mere Silence

Traditionally, absent an affirmative misrepresentation by a seller, there was no liability grounded in fraud. Actionable fraud required,
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\(^1\) 480 So. 2d 625 (Fla. 1985).
among other elements, an affirmative act by the wrongdoer. The act may consist of words or conduct as long as another party, by relying upon such an act, was induced to do something to his detriment. Thus, notwithstanding special circumstances, a mere nondisclosure of a fact, however material, would not sustain such a claim for fraud. At that time there was simply no legal duty to disclose facts, no matter how "morally censurable" their nondisclosure may have been. This rule when applied to undisclosed yet patent defects seems just, since both parties to the transaction often appear to be on equal footing with respect to an obvious defect. A difficult situation arises, however, where a defect is latent or undiscoverable through reasonable inspection. Should vendors repeatedly escape liability through their silence because archaic case law condones such advantageous behavior? It appears that an increasing number of jurisdictions now hold that they may not.

The rationale behind the nondisclosure rule, however questionable, was based upon the dated business ethics of the older common law and the distinctions which old tort law made between nonfeasance and misfeasance.

At early common law, the distinction between nonfeasance and misfeasance was essentially the same as exists between action and inaction. During that era, liability would not be imposed for merely failing to protect another from harm, since the courts were fully occupied with other more glaring forms of misconduct. Thus, one could only be held liable for actions that either worsened another's position or resulted in a situation which was likely to cause harm.

Not surprisingly, this era was characterized by a societal attitude that was staunchly opposed to any governmental interference with the economic sector. Many felt that business and society would flourish only by allowing individuals to act unchecked, in their own self-interests. The doctrine of caveat emptor exemplified the attitude of the

3. Id. at 403.
6. PROSSER & KEETON, supra note 4, § 56, at 373-75.
7. Id.
8. Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1171 (1931). This article provides an excellent account of the history behind the doctrine of caveat emptor.
9. In full, the Latin maxim reads, "Caveat Emptor, qui ignorare non debuit
day: laissez faire economics and individualism.

Originally, caveat emptor applied to transactions involving both personal and real property. The sale of personal property and consumer goods, however, lost its inclusion to this rigid standard with the enactment of the Uniform Sales Act and, subsequently, the Uniform Commercial Code. Unfortunately, the law of real property has been slow to follow the lead set by these progressive bodies of law.

The rationale frequently given in support of real property's steadfast adherence to the doctrine of caveat emptor has been that vendors and purchasers deal at arms lengths and, therefore, they each have an equal opportunity to investigate for themselves the bargained for property. This questionable rationale dates back to a time when parties to land transactions were quite often neighbors and dealt with each other in face to face transactions. Buyers were usually well acquainted with the seller's property, since they often lived in the same small community. Thus, buyers were able to inspect the land throughout all of the negotiations.

Furthermore, during this time it was not uncommon for the purchaser to make two separate contracts, one with the owner of the land and another with the builder constructing the home. If a defect were discovered in the dwelling, the builder would then be liable to the purchaser for breach of an implied warranty of workmanlike quality. As a result, the law currently governing the sale of real estate gathers bits

quod jus alienum emit," meaning let a buyer beware, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution. H. BROOK, LEGAL MAXIMS 768 (7th ed. 1874).
10. Hamilton, supra note 8, at 1186 ("Not until the nineteenth century, did judges discover that caveat emptor sharpened wits, taught self-reliance, made a man an economic man — out of the buyer, and served well its two masters, business and justice."))
11. Id. at 1133.
12. UNIFORM SALES ACT (1960).
15. DUNHAM, VENDOR'S OBIGATION AS TO FITNESS OF LAND FOR A PARTICULAR PURPOSE, 37 Minn. L. Rev. 108 (1953).
16. Id. at 110.
17. Id. at 111.
18. Id.
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pose, 37 MINN. L. REV. 108 (1953).
¹⁶. Id. at 110.
¹⁷. Id. at 111.
¹⁸. Id.
and pieces of implied warranty, negligence, fraud and strict liability to construct a remedy for the distressed or injured purchaser.\textsuperscript{19}

B. \textit{Some Circumstances Giving Rise to a Duty to Disclose}

There are several widely held exceptions to the no duty to disclose rule. Perhaps one of the most common sense caveats has been described as the half truth. If one chooses to speak at all then the whole truth must be disclosed. This prevents misleading the recipient by selectively communicated facts.\textsuperscript{20}

Another common exception has been labeled the continuing representation.\textsuperscript{21} A duty to disclose arises when a statement which is true when spoken later becomes false, either by subsequently acquired knowledge or a change in the spoken facts.\textsuperscript{22} Using this approach, a speaker may be held liable for failing to disclose the newly acquired information, because the recipient has relied upon the prior representation and the speaker was subsequently presented with an opportunity to prevent this reliance, which he failed or refused to do.\textsuperscript{23}

Furthermore, if one party to a transaction attempts to conceal a defect or prevent the other party from discovering it by some trick or artifice, an action for fraud will lie.\textsuperscript{24}

Another exception arises in the context of a confidential or fiduciary relationship.\textsuperscript{25} A fiduciary relationship exists "where confidence is reposed by one party and a trust is accepted by the other."\textsuperscript{26} For instance,

\begin{enumerate}
\item \textsuperscript{19} Note, \textit{When the Walls Come Tumbling Down — Theories of Recovery for Defective Housing}, 56 St. John's L. Rev. 670 (1982).
\item \textsuperscript{20} See Stackpole v. Hancock, 40 Fla. 362, 24 So. 914 (1898); Smith v. Pope, 103 N.H. 555, 176 A.2d 321 (1961); Newell v. Randall, 32 Minn. 171, 19 N.W. 972 (1884); Elsey v. Lamkin, 156 Ky. 836, 162 S.W. 106 (1914) (disclosure of one grave-yard on property but not the existence of another on the same property).
\item Keeton, \textit{Fraud — Concealment and Non-Disclosure}, 15 Tex. L. Rev. 1, 6 (1936).
\item Id.
\item Id.
\item Id.
\item Southern v. Floyd, 89 Ga. App. 602, 80 S.E.2d 490 (1954) (defendant's painting over crack in furnace to prevent its discovery held to be fraud by concealment).
\item PROSSER & KEETON, supra note 4, § 106, at 738-39; see Ramel v. Chasebrook Const. Co., 135 So. 2d 876, 882 (Fla. 2d Dist. Ct. App. 1961) (absent a fiduciary relationship, mere nondisclosure is not actionable).
\item Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 421 (Fla. 1927) (quoting and adopting definition in 2 POMEROY'S Eq. Jur. § 947, at 956).
\end{enumerate}

confidential relationships are often said to exist between, principle and agent, attorney and client, and husband and wife.\textsuperscript{27} Fiduciary relationships are exempt from the rule of caveat emptor. Instead, a duty of loyalty and full disclosure has been imposed upon these relationships which, by their very nature, demand the utmost trust and fair dealing between the parties.

Traditionally, however, the law has refused to consider the vendor-purchaser relationship to be fiduciary in character.\textsuperscript{28} An examination of the confluence of cases and other authority that discuss the vendor-purchaser relation aptly demonstrates this statement.\textsuperscript{29} However, at least one commentator suggested that if one accepts the rationale that a fiduciary relationship may exist "in fact" as well as "in law," then the vendor-purchaser relation might, under some circumstances, be classified as fiduciary in nature.\textsuperscript{30} This reasoning is also based upon the premise that vendors and purchasers do, "in fact," rely upon each other for full and fair disclosure.\textsuperscript{31} The acceptance of this logic, however, has been extremely limited.

As courts have been reluctant to find the existence of a confidential relationship between vendors and purchasers, so too have they been hesitant to extend duty to disclose beyond those exceptions previously mentioned. The obvious explanation for this reluctance is that courts are, ostensibly, bound to concepts of law, though not necessarily those of morality.\textsuperscript{32} Nonetheless, imposing a duty to disclose upon a vendor initially had to be premised upon moral and ethical considerations as, until recently, the law simply did not recognize such a duty.\textsuperscript{33} Indeed, some commentators have actually suggested that courts should be guided by those considerations which the "ordinary ethical person" would disclose.\textsuperscript{34} At the same time, and despite justifications to the
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27. Farmers State Bank v. Lamar, 132 Wash. 369, 231 P. 952, 953 (1925) (The list of fiduciary relationships include: "trustee and cestui que trust, principle and agent, attorney and client, physician and patient, priest and penitent, partners, tenants in common, husband and wife, parent and child, guardian and ward, and many others of like character.").


29. Id. at 39-40.

30. Id.

31. Id.

32. Id. at 9.

33. Id.

34. Konston, supra note 21, at 37. See also Comment, Is the Duty to Disclose a
contrary, others contend that these are precisely the vague standards upon which many courts continue to base their holdings. 48

Despite the somewhat modern trend to impose a duty of disclosure upon real property vendors, some states maintain a steadfast hold upon traditional notions of fraud. In those jurisdictions, a purchaser remains solely dependent upon his own diligence in conducting inspections of the property he intends to purchase.

Those cases that hold a vendor to have no duty to reveal known material defects have justified their holdings upon various grounds. For instance, purchasers have been denied recovery because: (1) the purchaser had an equal opportunity to inspect for material impairments or to obtain an expert for such purposes; 49 (2) the vendor's mere silence does not constitute fraud if no representation was made concerning the defect; 50 (3) there is normally no relationship of trust or confidence between vendor-purchaser, thus no special duty is imposed to disclose; and (4) the transaction was conducted at arms length, thereby obviating the need to disclose, since ordinary principles of contract law apply. 51

III. Florida's Approach to the Cause of Action

A. The Law Prior to Johnson v. Davis

Prior to Johnson, 52 a Florida real estate purchaser could obtain relief only upon a showing of fraudulent representation and resultant injury. The elements of fraud require a false statement regarding a material fact, knowledge of the fact to be false, the intent that the representation induce another to act on it, and injury resulting from the party's reliance upon the statement. 53 Additionally, the purchaser was required to make his own investigation of the premises, not only to discover undisclosed defects, but also to ascertain the veracity of any representations made by the sellers. 54 To be actionable, a misrepresentation must be considered one of fact rather than opinion. 55 Therefore, a purchaser could not justifiably rely upon a seller's statements, as they might be deemed to be statements of opinion. 56 In effect, the entire risk of the transaction was placed upon the purchaser, with Florida courts thereby telling prospective purchasers of real estate to "Hesitate."

In Benett v. Blumen, 57 the Florida Supreme Court seemingly relaxed its caveat emptor position in the context of fraudulent misrepresentation. The buyers in Benett failed to investigate the seller's statements concerning the size of the land offered for sale. The court held that absent a buyer's knowledge of the statement's falsity, the buyer was justified in relying on the veracity of a seller's statements even though their falsity might have been ascertained upon reasonable inspection. 58 In mitigating the buyer's duty to investigate, the court recognized that "a person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor." 59 Therefore, a Florida vendor may no longer escape liability for intentional false misrepresentations by merely claiming that the purchaser should have investigated their trustworthiness.

However, at this time, and irrespective of Benett, if the seller had made no representations and simply remained silent, the purchaser's duty to conduct a reasonable investigation for undisclosed defects still remained intact. Indeed, prior to the Johnson decision, at least two Florida cases 60 specifically held that a seller was not under an affirmative duty to reveal material facts that affected the value or desirability of the property.

In Banks v. Salina 61 the Fourth District Court of Appeal reversed a purchaser's award for swimming pool repairs, despite evidence which indicated that the sellers knew that the swimming pool was in extreme disrepair before they signed the contract for sale. The court concluded that, absent an express warranty in the contract for sale or a material

41. Davis v. Dunn, 58 So. 2d 539 (Fla. 1952).
43. Davis, 58 So. 2d at 542.
44. 389 So. 2d 995 (Fla. 1980).
45. Id.
46. Id. at 997.
47. Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982); Ramsey, 135 So. 2d at 876.
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  \item \textsuperscript{43} Davis, 58 So. 2d at 542.
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  \item \textsuperscript{46} Id. at 997.
  \item \textsuperscript{47} Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982); Ramel, 135 So. 2d at 876.
  \item \textsuperscript{48} 413 So. 2d at 851.
\end{itemize}
misrepresentation by the seller, "there is no duty to disclose when the parties are dealing at arms length." 49

Similarly, in Ramel v. Chasebrook Construction Co. 50 the Second District Court of Appeal decided that "[i]n the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arm's length transaction is ordinarily not actionable misrepresentation . . . ." 51

B. The Facts and Holding in Johnson v. Davis

In Johnson, the Davises entered into an executory agreement to purchase the Johnsons' three year old home. The agreement required an initial deposit of $500, to be followed by an additional $26,000 within five days. The contract contained a standard roof inspection provision 52 that entitled the Davises to obtain, at their expense, a roof inspection to ensure that the roof was in watertight condition. After the initial $5000 deposit had been made but before the additional $26,000 payment was remitted, the Davises noticed some buckling and peeling plaster around a window frame, as well as some stains on the ceiling in the family room. The Davises inquired as to the cause of these discolored areas, but were assured by the Johnsons that there had been only minor problems with the window and that the ceiling stains were caused by a combination of wallpaper adhesive and shifting ceiling beams. The Davises then paid the remaining deposit and took possession of the home. However, after a heavy rain a few days later, Mrs. Davis entered the home to find water actually "gushing" from the ceiling, lighting fixtures, window frame and kitchen stove. 53

After three of the Davises' roofers had all determined that the roof was inherently defective, 54 the Davises brought an action against the

49. Id. at 852.
50. 135 So. 2d at 876.
51. Id. at 882.
52. Johnson, 480 So. 2d at 626. The provision stated:
F. Roof Inspection: Prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to fascia or soffit, seller shall pay for said repairs which shall be performed by a licensed roofing contractor.  
53. The facts have been taken from the opinions of the Third District and the Florida Supreme Court. Johnson, 449 So. 2d at 344, aff'd, 480 So. 2d at 625.
54. Johnson, 480 So. 2d at 626. The roofers hired by the Davises found that the roof was actually "slipping" and that the only way to make it watertight would be to construct a new roof, at an estimated cost of $15,000. Id.
Johnsons for breach of contract, fraud and misrepresentation and sought rescission of the contract with a return of both deposits.\textsuperscript{55}

The trial court stated no factual findings but simply awarded the Davises their $26,000 deposit and awarded the Johnsons the initial $5000 as liquidated damages. Apparently, the trial court reasoned that, since there were no affirmative misrepresentations by the Johnsons prior to the initial $5000 deposit, the Davises were not entitled to a return of these monies in an action that was based upon fraud.\textsuperscript{56}

On appeal, the Third District Court of Appeal affirmed the trial court’s decision as to the $26,000 award, but reversed that portion of the holding which had awarded the $5000 to the Johnsons as liquidated damages. Germane to the appellate court’s holding was the fact that the Johnsons’ own testimony revealed their awareness of the roof’s shortcomings some time prior to any negotiations with the Davises. Although this evidence was intended to disprove allegations of affirmative misrepresentations, it served rather as an “unrebutted admission” that the Johnsons were completely aware of serious roofing problems that were never disclosed to the Davises.\textsuperscript{57} Based upon this evidence, the district court held that the Johnsons had an affirmative duty to disclose the known roofing problem prior to receipt of any deposit whatsoever and, consequently, the failure to do so was equivalent to fraud.\textsuperscript{58}

Though the Third District Court acknowledged the authority expressed in \textit{Ramel} and \textit{Banks}, it held that those cases “represent[ed] an offensive view of societal duties and fail[ed] to embody the ideals which the law should always strive to reflect . . . .”\textsuperscript{59} Additionally, the court stated that the relevant decisions of neighboring jurisdictions represented a better view and that fair dealing and good conscience demanded their acceptance.\textsuperscript{60}

Beyond those vague justifications, the opinion is devoid of a ratio decidendi. It seems that the court simply decided that the time had come to set caveat emptor aside in the vendor purchaser relationship, and that fair dealing and good conscience would be a better guide for future cases of this nature.

On review, the Florida Supreme Court affirmed the district court’s

\begin{enumerate}
\item Johnson, 480 So. 2d at 625.
\item Johnson, 449 So. 2d at 347.
\item Id. at 350.
\item Id.
\item Id. at 347-48.
\item Id. at 348-49.
\end{enumerate}
holding and stated that, "[t]hese unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing." 61

While the evolution of the disclosure rule in most jurisdictions was incremental, Florida has achieved through one case what had taken other states many years and many decisions to accomplish. 62 For Florida sellers, innocent nondisclosure became fraudulent nondisclosure, overnight.

One of the objectives of this article is to hypothesize, in light of the Johnson decision, the future course of this body of law. It therefore becomes necessary, at this point, to examine the development of this rule in other jurisdictions, as well as the justifications those states have advanced in support of its usage. A brief overview of what other jurisdictions have done in this regard may clarify and lend credence to this commentator’s predictions.

IV. The Duty to Disclose in Other Jurisdictions

A comparison of those jurisdictions that presently require vendors to disclose material defects reveals great inconsistency among the justifications each advances in support of its holdings. Though this lack of continuity has contributed to much of the confusion in this area of the law, a clear-cut rule concerning disclosure seems unrealistic, as concepts of materiality are inherently dependent upon the individual circumstances of each transaction. Furthermore, it often seems that the determination of whether a vendor’s silence is fraudulent depends on little more than the degree to which the court’s conscience is stirred. 63

Admittedly, there is no consistent thread of logic that is common to all those cases which have held a nondisclosing seller liable to an injured purchaser. There are, however, identifiable factors which frequently appear to have a considerable impact upon a court’s determination of whether or not to impose a duty on a silent seller. These consist of the nature of the defect, in conjunction with its latency or discoverability.

A. The Latency Factor

When a material defect is considered latent, in contrast to one that is discoverable upon a reasonable inspection, the courts often side with the purchaser and impose the somewhat subjective duty to disclose. 64

For instance, defects which are discoverable only at night may be considered latent and, if found to be material, would require the seller to disclose. In the Tennessee Supreme Court case of Simmons v. Evans, 65 an inspection of the premises during normal business hours did not reveal that the water supply to the subject residence was discontinued from 7 p.m. to 7 a.m. and, as a result, the court found that the sellers were under an obligation to disclose this fact to prospective purchasers. In support of its holding, the court acknowledged that the undisclosed fact was so contrary to ordinary experience that it would have been ridiculous to expect a purchaser to either inquire about it or to make a nighttime inspection of the premises. 66

In a similar case, which involved the nondisclosure of a serious cockroach infestation, 67 the Supreme Court of New Jersey took judicial notice of the fact that cockroaches are by nature nocturnal creatures and that a nighttime inspection would have been the only way to have discovered their presence. In holding that the seller had a duty to speak, the court implied that one’s sense of fair dealing and justice required disclosure of a fact that became apparent only when the lights had been turned off. 68 Implicit in the court’s reasoning was that regardless of the purchaser’s diligence in inspecting the premises, this defect would not have been discoverable under ordinary circumstances and, therefore, a duty must be imposed. 69

Though latencyness is a threshold inquiry, it should be noted that recovery in some situations involves a confusing balancing test. In other words, the degree of latencyness is often weighed against the degree of materiality, with concepts of fair dealing and good conscience tipping the scale in those instances where the call is close.

61. Johnson, 480 So. 2d at 638 (emphasis added).
62. As will be discussed in Section IV(B), infra, jurisdictions which have long since adopted the disclosure doctrine began by requiring full disclosure only when the defect was considered dangerous to the general health or safety of the purchaser. In other words, materiality was defined by the degree of danger associated with the defect. Eventually, courts interpreted materiality in terms of the decrease in the property’s market value.
63. See Keeton, supra note 21, at 6; Goldfarb, supra note 28, at 43-44.

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\(^{64}\) Goldfarb, supra note 28, at 19.

\(^{65}\) 185 Tenn. 282, 206 S.W.2d 295 (1947).

\(^{66}\) Id. at 287, 206 S.W.2d at 297.


\(^{68}\) Id.

\(^{69}\) Id.
Materiality is, of course, a principle element of any action based upon a fraudulent misrepresentation.70 This concept seems to apply with equal force to those cases involving fraudulent nondisclosures as well. In either context, two reasons are given in support of a materiality requirement.

The first reason relates to the element of causation.71 The materiality of a fact often provides circumstantial evidence of whether the plaintiff was actually induced into the transaction. This is true because if the undisclosed defect is determined to be relatively insignificant, it would be unlikely that its disclosure or nondisclosure would have affected the buyer's choice in one way or the other.72 Therefore, the requirement of a particular fact being material to a transaction is essential before the concealment or misrepresentation of that fact will be considered a vital part of the agreement.

The second reason given in support of a materiality requirement relates to a policy consideration that opposes the avoidance of contractual obligations.73 To permit a denial of contractual obligations for insubstantial reasons would, essentially, render all business transactions unpredictable to the point of absurdity.

B. Varying Concepts of "Materiality"

1. Potentially unsafe or unhealthy defects

When the undisclosed defect is considered dangerous to the general health and safety of the residents, the courts have quite often been willing to consider such a defect as material. Furthermore, the more dangerous the defect, the more likely the court will impose upon the seller a duty to disclose. For instance, in the Pennsylvania case of Shane v. Hoffman,74 the vendor and real estate brokers were held jointly liable for failing to disclose a condition that had the potential for materially affecting the health of the purchasers. The court found that “[t]he inunction of the basement with human excrement and other waste material involves such a clear hazard to the health of the occupants of this residence, that the duty to disclose said condition is evident . . .”75 In doing so, the court adopted Section 353 of the Restatement (Second) of Torts,76 which recognizes a duty to disclose any dangerous condition to life, limb or to the general health or safety of the purchaser or his family. However, in the absence of a serious threat to the occupant’s health or safety, Pennsylvania courts have made it clear that no such duty shall be imposed.77

Similarly, a Colorado court allowed a purchaser to rescind a contract because the seller failed to disclose that the house was constructed on filled ground and that this had resulted in the house tilting, sinking, and developing significant cracks in the walls.78

Other jurisdictions have allowed recovery for undisclosed defects such as a buried cesspool,79 structural problems,80 and uranium mine tailings under the home;81 all on the grounds that such defects were deleterious to human habitation and, therefore, material.

Termite infestation is an excellent example of a defect that may be both latent and ultimately dangerous to the home's structure and occupa-

70. See PROSSER & KEETON, supra note 4, at § 108; Keeton, Actionable Misrepresentation, 2 OKLA. L. REV. 56, 59 (1949).
71. Keeton, supra note 70, at 59-60.
72. Id.
73. Id.; PROSSER & KEETON, supra note 4, § 108, at 753.
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73. Id. at 182, 324 A.2d at 538.
74. Id. at 181, 324 A.2d at 537. The applicable part of the Restatement reads as follows:
(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others . . . if
(a) the vendee does not know or has reason to know of the condition or the risk involved, and
(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
Restatement (Second) of Torts § 353 (1965).

75. Quashnock v. Frost, 447 A.2d 121 (R.I. 1982). Under holding that the vendor had a duty to disclose the termite infestation, the court emphasized that "[i]t is important to remember that the defect has to be dangerous in order for the duty of disclosure to exist. For example, termite infestations are dangerous because the structural soundness of the building is affected . . . . [whereas] . . . [other] infestations and defective water wells are not." Id. at 125 n.4 (citing Weiner, 64 N.J. 445, 517 A.2d 68 (1994)).
77. World v. Stamos, 142 R.I. 513, 134 S.W. 908 (1911).
pants. It has also been the subject of an enormous amount of litigation in this area.**

In a Washington case, Obde v. Schlemeyer,** the sellers/defendants had originally purchased an apartment building that was infested with termites. Defendants, however, knew of this infestation and the price was adjusted accordingly. Later, after purportedly but not actually eradicating the problem, the sellers/defendants placed the property back on the market. Because the plaintiffs did not inquire into the existence of a termite condition beforehand, the defendants argued at trial that there was no affirmative duty to speak of the supposedly past infestation. However, in holding that the sellers had a duty to disclose this past condition, the court recognized that "termite infestation . . . is manifestly a serious and dangerous condition . . . " and, if known to the vendor, it must in good faith be disclosed.**

Additionally, evidence presented at trial revealed that the sellers in Obde employed experts to repair and actually hide the damage caused by the past termite infestation. In Washington, as well as most other states, this conduct would have clearly established active concealment, and as such constituted actionable fraud. However, instead of drawing upon traditional fraud concepts to justify a recovery by the buyers, the court seemed to rely upon notions of justice and fair dealing in imposing a duty to disclose upon the sellers.** In doing so, the court summarized its position by quoting from Professor Keeton's renowned article:

[II] either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent.

The attitude of the courts toward non-disclosure [sic] is undergoing a change . . . [I]t would seem that the object of the law in these cases should be to impose upon parties to the transaction a duty to speak whenever justice, equity and fair dealing demand it.**

82. As one court has stated, "[o]f the forms of animal life known to modern science, few, if any, classifications other than Homo sapiens have been the subject of so much legal controversy as the members of the order Isoptera [termites]." Hughes v. Stusser, 415 P.2d 89, 90 (Wash. 1966).

83. 56 Wash. 2d 449, 333 P.2d 672 (1960).

84. Id. at 452, 333 P.2d at 675. One of the vendor's own witnesses testified that "if termites are not checked in their damage, they can cause a complete collapse of a building . . . [T]hey would simply eat up the wood." Id.


86. Kastenbaum, supra note 21, at 31 (emphasis added).
Thus, honesty and good faith require a seller to speak of material defects, even though past precedent may not.

Curiously, these rationalizations sound strikingly parallel to those espoused by the Third District Court of Appeal and the Florida Supreme Court in Johnson. They are also quite similar to the justifications espoused by various other jurisdictions that impose a duty to disclose material defects upon vendors of real property.

2. Impairment of Value

The broadest interpretation of materiality has been applied to situations in which the undisclosed defect merely decreases the value of the subject property. Notably, this is the position taken by an increasing number of jurisdictions\(^87\) including Florida.\(^88\) For instance, in various jurisdictions defects that have been found to materially affect a property's value and thus warrant their disclosure include: occasional sewer problems,\(^88\) basement flooding and roof leakage,\(^90\) and the failure to reveal a planned tennis court that would be adjacent to property which the sellers knew was being sought for its solitude.\(^91\)

In Johnson, the contract for sale provided for a roof inspection as well as repairs, if the inspection revealed a problem. Perhaps more important, though, the court acknowledged that the sellers had conveniently failed to disclose that there had been roofing difficulties two years earlier. The Johnson court implicitly held that the sellers' failure to reveal this fact prior to signing the agreement was a material nondisclosure.\(^88\)

Logically, a history of roofing problems goes to the very essence of a real estate contract; without a watertight roof, the house no longer serves its basic function of sheltering the occupants. Though the materiality issue was not specifically addressed in Johnson, an overview of relevant case law among the various jurisdictions reveals the issue to be a primary source of confusion and litigation within this body of law.


\(^88\) Johnson, 480 So. 2d at 625.


\(^90\) See Posner, 76 Ill. App. 3d at 638, 395 N.E.2d at 133.


\(^92\) Johnson, 480 So. 2d at 625.
Therefore, any forecasts concerning the future direction of this rule within Florida should include an examination of the possible consequences of applying a subjective interpretation of materiality to those cases involving fraudulent nondisclosure. Relatively, this prediction should also take into account the possibility of holding a seller responsible for constructive knowledge as well as actual knowledge of a defects existence.

V. The Future of Nondisclosure as a Cause of Action

A. Materiality: Objective vs. Subjective

The desired predictability in this body of law can only be attained by basing materiality upon an objective standard. The Second Restatement of Torts defines a fact as material if “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question. . . .” By utilizing this standard, the parties to any given transaction can usually determine what must be disclosed, and thereby avoid much potentially costly confusion.

A close examination of the disclosure cases, however, indicates that in practice the courts apply a subjective standard of materiality. For instance, at least one California court has held that there are many factors which may affect the value of real property, including the buyer’s personal feelings and beliefs concerning the estate’s reputation and history. In Reed v. King, a California seller was held liable for failing to disclose that the property had been the scene of a mass murder several years before. The elderly buyer in Reed argued that as a result of the incident the value of the property had been so diminished that it should be considered a material defect warranting disclosure. The court agreed and announced several factors to be considered in defining materiality, such as the gravity of the harm, the fairness of imposing a duty of discovery on the buyer, and the overall impact upon the stability of contracts if rescission was permitted.

Despite these criteria, the Reed court, like so many others, implied that any determination of materiality must turn upon whether the nondisclosure amounted to bad faith and was against standards of fair dealing. Additionally, though the court’s holding was ostensibly intended to prevent “the floodgates to rescission [from opening] on subjective and idiosyncratic grounds,” at least one commentator has suggested that the vague standards which were applied, in reality, permit the exact opposite to occur.

Though the Reed case appears to be a high watermark in determinations of materiality, the processes utilized in reaching the decision are, in the long run, perhaps more important than the decision itself. In other words, though the Reed court permitted an “elderly” buyer to rescind a contract due to the nondisclosure of a fact of dubious and subjective materiality, the logic supporting this holding is quite consistent with the majority of cases in this area.

For instance, as the court in Reed pointed to concepts of “good faith” and “fair dealing” in defining materiality, so too did the Johnson court speak in terms of “elementary fair conduct” in justification of a duty to disclose.

Subjective terms such as “morally right,” “good faith,” “good conscience” and “fair dealing” continue to highlight the parameters of materiality and the concomitant duty to disclose in these transactions. One can only ponder what direction these vague concepts will lead courts next.

Will the permissible grounds of rescission evolve from the nondisclosure of a decade-old mass murder to that of a fatal slip and fall? Though perhaps taking this example to an extreme, it is illustrative of the gross unpredictability which plagues concepts of materiality within this context.

As long as courts continue to confuse traditional notions of materiality with those of moral correctness, this body of law will remain fraught with confusion. Practitioners should realize that materiality in

94. In one case a court recognized that a minor condition of cockroach infestation “would clearly not call for judicial intervention.” However, in the case at bar, the court admitted that because the roach infestation was “of such magnitude and was so repulsive” to these buyers that disclosure was required. Weintraub, 64 N.J. at 451, 317 A.2d at 74.
95. Reed, 145 Cal. App. 3d at 267, 193 Cal. Rptr. at 133.
96. 145 Cal. App. 3d at 261, 193 Cal. Rptr. at 130.
97. Id. at 267, 193 Cal. Rptr. at 132.
98. Id.
99. Id. at 268, 193 Cal. Rptr. at 134.
102. Johnson, 480 So. 2d at 628.
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\textsuperscript{97} Id. at 267, 193 Cal. Rptr. at 132.
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\textsuperscript{99} Id. at 268, 193 Cal. Rptr. at 134.
\textsuperscript{100} Note, Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction, 45 U. Pitt. L. Rev. 877, 890 (1984).
\textsuperscript{101} Reed, 145 Cal. App. 3d at 267, 193 Cal. Rptr. at 132.
\textsuperscript{102} Johnson, 480 So. 2d at 628.
the context of nondisclosure may not be judged against concepts of "reasonableness" but instead against those of "moral and ethical reasonableness."

B. Knowledge: Actual vs. Constructive

For the present, at least, it seems that the majority of jurisdictions, including Florida, only require disclosure of facts which are actually within the seller's knowledge.103 However, though the Johnson court only required disclosure of facts deemed to be within the seller's actual knowledge, an extremely critical dissent predicted that this may not always be the case. Dissenting, Justice Boyd cautioned that this "is the first step toward making the seller a guarantor of the good condition of the property."104 He also predicted that the net impact of such a trend would be to "significantly burden the alienability of property because sellers [would] have to worry about the possibility of catastrophic post-sale judgments for damages sought to pay for repairs."105 Finally, he argued that this trend will, in effect, place the entire duty of inspection upon the seller, leaving the buyer dutiless.106

In fact, those practitioners actually involved in this landmark decision also agree that because Florida courts "are not interested in delving into the exact mental state of a seller at the time of sale," the development of some sort of constructive knowledge theory of recovery is "inevitable."107 The nature of the defect would, therefore, provide circumstantial evidence as to whether the seller knew or should have known of its existence.108

Given the pervasiveness within this area of law of decisions that are based upon concepts of morality and fair dealing, it seems only a

103. Id. at 629.
104. Id. at 631 (Boyd, C.J., dissenting).
105. Id.
106. Id. This is a point well taken, in that acceptance of the disclosure doctrine effectively abolishes the remaining affirmative duty that is required of a purchaser, namely, the duty to inspect. Under this rule, the purchaser may justifiably rely upon the seller's silence to the extent that he would rely upon an affirmative representation. Indeed, the only remaining issue for the court to decide is whether the defect, upon which the purchaser relied, should be deemed sufficiently deplorable to justify rescission of the transaction.
108. Johnson, 480 So. 2d at 631.
109. Holcomb, 365 N.W.2d at 512.
110. Id.
111. Id.
112. Change All Your "Sales Agreements" For Real Estate, supra note 107, at 107.
113. Young, Use of an "As Is" Clause in Residential Real Estate Transactions, 216 B. U. L. REV. 88 (1984), at 27. See also Wofford v. Freeman, 140 Okl. 580, 21 N.W.2d 94 (1946) (emphasizing that the purchase of property "as is" does not bar rescission grounded on fraudulent conduct by the seller). Id. 150 N.W. at 542, 365 N.W.2d at 103; see also Lingsch v. Savage, 213 Cal. App. 2d 279, 29 Cal. Rptr. 201 (1963), in which the court acknowledged that an "as is" clause may be effective to relieve a seller of liability for a clearly observable defect (dilapidated stairway), but in so doing the court stated "that such a view...not only makes good sense but equates sound law with good morals." Id. at 269, 29 Cal. Rptr. at 260.
matter of time before a Florida court is confronted by a set of circum-
stances that will prompt it to reply: “Seller, if you didn’t know of this
defect then you should have.”

Additionally, at least one jurisdiction currently holds that a real
property vendor may be charged with both actual and constructive
knowledge of material defects.\footnote{Holcomb v. Zinke, the Supreme
Court of North Dakota recognized that, though the vendor purchaser
relationship is not characterized as fiduciary in nature, “it is marked by
the clearly superior position of the seller \textit{vis-a-vis} knowledge of the con-
tdition of the property being sold.”\footnote{Furthermore, the court reasoned
that a duty to speak imparted no undue hardship upon sellers of real
property.}}

This commentator approves of the general trend in this body of
law but also feels that a great deal of future litigation will be generated
by the vague standards upon which courts consistently base their hold-
ings. For instance, how does one consistently and accurately determine
when a fact is material enough to warrant its disclosure? More objective
standards must be developed and put into practice before the confu-
sion that characterizes these legal concepts begins to subside.

Some have suggested that, for the time being, a real property vend-
or may avoid some of the uncertainty in this area by inserting “as is”
clauses into all real estate contracts.\footnote{However, others also contend
that no matter how cleverly worded such clauses might be, they only
provide a defense against a breach of contract action, and not to those
well grounded in theories of fraudulent misrepresentation or nondisclosure.} Perhaps the worst possible scenario that a future property vendor

\footnote{Holcomb, 365 N.W.2d at 512.}
\footnote{Id.}
\footnote{Id.}
\footnote{Change All Your “Sales Agreements” For Real Estate, supra note 107, at
108.}
\footnote{Young, \textit{Use of an “As Is” Clause in Residential Real Estate Transactions},
Wis. B. BULL., Oct. 1984, at 27. \textit{See also Wolford v. Freeman}, 150 Neb. 537, 35
N.W.2d 98 (1948) (emphasizing that the purchase of property “as is” does not bar
rescission grounded on fraudulent conduct by the seller). \textit{Id.} 150 Neb. at 542, 35
N.W.2d at 103; \textit{see also Lingsch v. Savage}, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201
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relieve a seller of liability for a clearly observable defect (dilapidated stairway), but
ineffective as to a latent defect known yet undisclosed by the seller. In support of its
position the court stated “that such a view . . . not only makes good sense but equates
sound law with good morals.” \textit{Id.} at 737, 29 Cal. Rptr. at 209.}
might envision would be that of a court applying subjective notions of materiality, in conjunction with theories of constructive knowledge. Though Florida and a majority of jurisdictions that recognize nondisclosure as actionable have yet to reach this point, this author feels that it is only a matter of time and, probably, not much time at that.

VI. Conclusion

Traditional notions of fraud aside, it now appears that the cause of action for material nondisclosure in real property transactions will become a firmly entrenched maxim within our legal society. Furthermore, while the overall trend is undoubtedly beneficial, it is nonetheless unfortunate that current notions of “justice, equity and fair dealing” continue to be intermingled with traditional legal standards like materiality. Courts must practice the application of materiality in its objective sense, or the disparity between those cases granting, and those denying recovery, will only increase.

Renee D. Braewig

114. Keeton, supra note 21, at 31. In a subsequent article Professor Keeton admitted that “[p]erhaps this is too general and vague to use as a precept or standard of law, but it is a better guide to use in forecasting how a court will decide a particular case than is the caveat emptor maxim.” Keeton, Rights of Disappointed Purchasers, 32 Tex. L. Rev. 1, 6 (1953).

Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?

I. Introduction

On November 27, 1971, Alyosia Wood was driving a miniature race car at the Grand Prix Raceway in Walt Disney World when she was injured after another car driven by her fiancé struck hers. As a result, she sued several defendants, including Walt Disney World. During the trial, she settled with some of the defendants. The jury found for the other defendants. The plaintiff appealed. The appellate court affirmed the decision regarding the remaining defendants, but reversed the decision concerning Walt Disney World, ordering a new

Modification of the Doctrine of Joint and Several Liability: Who Bears the Risk?

I. INTRODUCTION .......................................................... 165
II. BACKGROUND ............................................................ 168
    A. Development of Comparative Negligence in the U.S. .............. 168
    B. Definition and Development of Joint and Several Liability ...... 173
    C. Contribution Among Tortfeasors ..................................... 174
    D. Absent and Insolvent Tortfeasors .................................. 177
III. SHOULD JOINT AND SEVERAL LIABILITY BE ABOLISHED? .......... 179
    A. Judicial Positions ................................................... 179
    B. Legislative Positions ............................................... 184
    C. Options .................................................................. 185
IV. FLORIDA'S STATUTORY PROPOSALS ................................ 187
    A. Insurance Rates ....................................................... 189
    B. Economic Impact ...................................................... 191
    C. Fairness .................................................................. 193
V. THE TORT REFORM AND INSURANCE ACT OF 1986 ............... 193
VI. CONCLUSION ............................................................... 198

I. Introduction

On November 27, 1971, Aloysia Wood was driving a miniature race car at the Grand Prix Raceway in Walt Disney World when she was injured after another car driven by her fiance struck hers. As a result, she sued several defendants, including Walt Disney World. During the trial, she settled with some of the defendants. The jury found for the other defendants. The plaintiff appealed. The appellate court affirmed the decision regarding the remaining defendants, but reversed the decision concerning Walt Disney World, ordering a new

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trial. On retrial, the jury found the plaintiff to be 14% at fault; her fiancé 85% at fault; and Walt Disney World only 1% at fault. Nevertheless, the trial court entered judgment against Walt Disney World and its insurers for the full 86% of the plaintiff’s damages under the doctrine of joint and several liability. Under Florida law at that time, Walt Disney World was liable for the entire 86% of the damages. Once it satisfied that judgment, it could then turn to the fiancé for contribution of his 85% of the judgment. However, in the event he was insolvent or judgment proof, Walt Disney World would bear the burden of the entire amount.

While the particular facts of this case present an extreme example of the inequitable consequences resulting from the doctrine of joint and several liability, it does serve to illustrate the controversy between the plaintiff and defense bar. Indeed, the defense bar and special interest groups such as insurance companies used this case to argue for the abolition of joint and several liability while the Tort Reform and Insurance Act of 1986 was pending. A major criticism of joint and several liability is that a negligent tortfeasor remains jointly and severally liable for the entire amount of the damages, regardless of his particular degree of fault.

The conflict, simply stated, is that between a negligent plaintiff and a negligent defendant, who should bear the risk of the other defendant being insolvent? When a plaintiff is injured, and one defendant is more able to pay than the other, why should the one who can afford to pay not bear the burden, even if he ends up paying more than his proportional share? After all, his negligence was the proximate cause of the plaintiff’s injuries. Conversely, why should a defendant found to be only one percent at fault bear the burden of compensating the plaintiff in an amount far greater than his share of the damages, merely because he has more resources than the other, more negligent defendant?

Walt Disney World wondered the same thing, and on appeal to the Fourth District Court of Appeal argued that the reasons behind the doctrine “have all evaporated.” It asked the court to abolish the doctrine, but the court declined to do so. The court cited precedent and stated that such a change in the law was best left to the supreme court or the legislature. The Florida legislature, in response to public pressure for tort reform, modified the doctrine with the passage of the Tort Reform and Insurance Act of 1986.

2. Id. at 770-71.
3. Walt Disney World had filed a counter claim against the fiancé, alleging that his negligence contributed to the plaintiff’s injuries.
5. Linenberg v. Issen, 318 So. 2d 386 (Fla. 1975) (holding that multi-party defendants remain jointly and severally liable for the entire amount of damages).
6. FLA. STAT. § 768.31 (1985) (allows contribution among joint tortfeasors based on their relative degrees of fault). The following excerpts from the statute are provided:
   (2) RIGHT TO CONTRIBUTION—
   (a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
   (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make a contribution beyond his own pro rata share of the entire liability. . . .
   (3) PRO RATA SHARES—In determining the pro rata shares of tortfeasors in the entire liability:
   (a) Their relative degrees of fault shall be the basis for allocation of liability.
9. Id. at 62.
10. Id.
11. Id. They did, however, certify a question to the supreme court, asking whether the holding in Linenberg v. Issen, 318 So. 2d 386 (Fla. 1975), mandated an affirmation of the trial court’s decision. Linenberg involved a plaintiff who was entirely blameless, where the plaintiff here was not. Further, Linenberg was decided based on a version of the Florida statutes which allowed allocation of liability only in pro rata shares. FLA. STAT. § 768.31(6) (1975) reads: “In determining the pro rata shares of tortfeasors in the entire liability (a) Their relative degrees of fault shall not be consid- ered.” The current statute, on the other hand, allows contribution based on the defendant’s relative degree of fault. See supra note 6. While the Tort Reform Act of 1986 modifies joint and several liability, this case is still important for several reasons. First, the Tort Reform Act applies only to cases which arise after July 1, 1986, so this case must be decided according to previous law. Also, while Linenberg raised the issue of contribution instead of the issue of contribution among tortfeasors. Further, the court gives the court the opportunity to clarify its position on joint and several liability.
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9. Id. at 62.
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This article will examine the historical perspective and current status of joint and several liability, including the related issues of contributory negligence, comparative negligence, comparative fault, and contribution. The article will focus specifically on the multiple tortfeasor situations, especially where one or more of the negligent tortfeasors are absent or insolvent, and the plaintiff is also negligent. Particular scrutiny will be given to the doctrine of joint and several liability, as modified by the Tort Reform and Insurance Act of 1986.4 The history and background of the new bill will be examined, along with an analysis of its positive and negative aspects.

II. Background

A. Development of Comparative Negligence in the United States

According to some historians, the doctrine of comparative negligence has its roots in the law of ancient Rome and thus actually preceded the doctrine of contributory negligence.14 Comparative negligence originated as a defense in 1809 in the case of Butterfield v. Forrester,15 and became widely accepted throughout America and England.16 The Butterfield court failed to provide a rationale for its ruling that a plaintiff cannot recover from a negligent defendant if he himself negligently contributed to his own injuries.17 The concept, however, arises from several common law policies.18 These include the concepts

Serv. 660 (West).

13. Id.
15. In Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809), the defendant was found negligent in leaving a pole across the road. However, since the plaintiff failed to use due care in avoiding it, the court denied recovery to him, stating "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not himself use common and ordinary caution to be in the right." Id. at 61, 103 Eng. Rep. at 927.

that a plaintiff must come into court with clean hands,19 since a plaintiff who is himself at fault cannot be rewarded,20 that a plaintiff's intervening negligence actually became the proximate cause of his injuries,21 and that the defense exists to punish plaintiffs for their own lack of due care.22

As the doctrine of contributory negligence fell into disfavor,23 courts developed exceptions to it.24 Eventually the federal government and the states25 began to recognize the doctrine of comparative negligence.26 Today, only six states adhere to the doctrine of contributory negligence.27

States which have adopted comparative negligence use one of three forms of the doctrine. The most commonly recognized form, and the one chosen by most legislatures, is the "modified form."28 There are

23. The main problem with contributory negligence was the injustice of having a plaintiff, who in many instances was much less negligent than the defendant, bearing the burden of the entire loss. See Prosser, supra note 16, at 469. It was considered much more fair to allow the injured plaintiff to recover for his harm, rather than punishing him by denying him any recovery, merely reduce the amount of his recovery by the percentage of fault he bears.
24. Wade, supra note 18, at 300.
25. Florida was the first state to judicially adopt the doctrine: Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).
26. For an excellent history on the development of the doctrine, see V. Schwartz, supra note 14, Chapter One: See also Wade, supra note 16; Prosser, supra note 16; Fla. Senate Comm. Report, supra note 17; and Terrebonne v. Turner, 322 So. 2d 757 (Fla. 1975).
28. Out of many right states which apply the modified form of comparative negligence, only West Virginia judicially adopted the doctrine: Prosser, supra note 17, at 66-67.
Joint and Several Liability

that a plaintiff must come into court with clean hands, since a plaintiff who is himself at fault cannot be rewarded; that a plaintiff's intervening negligence actually became the proximate cause of his injuries; and that the defense exists to punish plaintiffs for their own lack of due care.

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28. Out of twenty eight states which apply the modified form of comparative negligence, only West Virginia judicially adopted the doctrine. Fla. Senate Comm. Report, supra note 17, at 85-86.
two types of the modified form recognized by most states. Each of the modified types allows recovery if the plaintiff’s negligence is judged to be below a certain point in comparison with the defendant’s negligence, but reduces the amount a plaintiff will recover in proportion to his degree of fault.96

Nine states97 adhere to the “49%” rule98 which allows recovery for plaintiffs only if their negligence is less than that of the defendants. Some states compare the plaintiff’s negligence with each individual defendant’s, and allow recovery only if the plaintiff’s negligence is less than any of the defendant’s alone.99 Other states aggregate the defendants’ negligence, allowing recovery only if the plaintiff’s degree of fault is less than all of the defendants’ combined.100 To illustrate, imagine that plaintiff A’s share of liability is 40%. Defendants B and C are each 30% at fault. Thus, in some 49% jurisdictions, A would be allowed to recover 60% of his damages since his share of liability is less than B’s and C’s combined. However, other 49% states would bar any recovery for A since his liability is greater than either of the individual defendants. Similarly, if each party is found equally at fault (i.e., A, B, and C are all 33 1/3% liable), then A will be unable to recover any of his damages. The rationale for the 49% rule is that it is not fair to allow a party who is more at fault to recover from those who are less culpable.101

The 50% variation of comparative negligence allows recovery for a plaintiff if his negligence is not greater than that of the defendant. The difference, of course, is that in these states, a plaintiff who is equally at fault with the defendant or defendants is not completely barred from recovery. This difference may seem negligible, but in states which do not allow the jury to have knowledge of the effect of an equal verdict, it can be quite devastating.102 For example, a jury that is having trouble apportioning liability may decide to split fault down the middle, intending for the plaintiff to collect 50% of the damages. In a 49% state, the plaintiff would be barred from all recovery. Thus, a majority of states have opted for the 50% variation,103 evidently believing that this is a fairer approach.

The last recognized form of comparative negligence is the so-called “slight/gross” variation. There, the plaintiff can only recover when his fault is “slight” compared to the greater negligence of the defendant. Perhaps the reason that only two states have adopted this version104 is that its vagueness places too much of a burden on plaintiffs and is open to too much confusion.105

The last type of comparative negligence recognized is the “pure” form. The rationale behind comparative negligence is to apportion “damages between mutually negligent parties according to their proportionate share of causal fault.”106 States which have adopted the pure

94. Id. at 168.
97. Timmons and Silvis, supra note 26, at 743 n.24.
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The least recognized form of comparative negligence is the so-called “slight/gross” variation. There, the plaintiff can only recover when his fault is “slight” compared to the greater negligence of the defendant. Perhaps the reason that only two states have adopted this version\textsuperscript{47} is that its vagueness places too much of a burden on plaintiffs and is open to too much confusion.\textsuperscript{48}

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\textsuperscript{44} Fleming, Foreward, supra note 32, at 246; Fleming, Report, supra note 32, at 1468.

\textsuperscript{45} Fleming, Report, supra note 32, at 1468; V. Schwartt, supra note 14, at 77.


\textsuperscript{48} Hess v. American Greetings (Supreme Court of Nevada 2007).
form" must agree with the Florida Supreme Court’s opinion in Hoffman v. Jones. There, the court found the pure form "to be the most equitable method of allocating damages in negligence actions."

In the pure form, the plaintiff is barred from recovery only if the court finds him to be totally responsible for all the damages. The pure form allows courts to apportion liability among each party, with the plaintiff receiving whatever damages he suffered, minus his proportionate share. Thus, theoretically, a plaintiff who is 90% negligent can recover 10% of his damages from the negligent defendant. Opponents of the pure form argue that it is unfair to require a less responsible party to compensate a party who was more at fault. In cases where the less responsible defendant was more severely injured, the defendant can actually end up recovering from the plaintiff. But, as the court in Hoffman v. Jones pointed out, liability should depend on the amount of damages caused, not on the injuries suffered. Proponents of the pure form point to the inequity of barring a plaintiff's recovery if he is 49% or 50% responsible, but allowing him recovery under the same set of facts if he is found 51% responsible. As the Wisconsin Chief Justice once asked, "What is so magical [sic] about being less than, greater than, or equally negligent, that justice must depend on it?"

Since Florida adheres to the pure form of comparative negligence, the discussion to follow will focus only on that form. As evi-


41. 280 So. 2d 431 (Fla. 1973).

42. Id. at 438.

43. Timmons and Silvis, supra note 26, at 745 n.29.

44. Id.

45. Hoffman, 280 So. 2d at 439.

46. FLA. SENATE COMM. REPRT, supra note 17, at 19 (quoting Vincent v. Pabst Brewing Co., 177 N.W.2d 513, 520 (Wis. 1970) (Hallows, C.J., dissenting)).

denced, by *Walt Disney World*, complications arise when there are multiple parties to an action. In multiple tortfeasor situations, it is necessary to consider the doctrine of joint and several liability and the issue of contribution among tortfeasors.

B. *Definition and Development of Joint and Several Liability*

A discussion of joint torts is helpful in understanding the doctrine of joint and several liability. Prosser found that the term “joint tortfeasor” had a different meaning in almost every court. Originally, the term encompassed situations where two or more defendants acted in concert towards a common end. Since there was concert of action and joint responsibility, the plaintiff had only one cause of action, and thus could recover only one judgment from either or all of the defendants. In early American cases, defendants were joined in one action only if they acted in concert. Eventually concurrent tortfeasors and even successive tortfeasors were allowed to be joined as well. Thus, the term “joint tortfeasor” now applies to any defendant whose negligence combined with that of another to produce a common injury. The unfortunate result, as Prosser pointed out, “has been to confuse joinder of parties with liability for entire damages.”

The idea that all the joint tortfeasors are each liable for the entire amount of the damages caused to the plaintiff “grew out of the com-

52. *Id.*
53. *Id.* at 420.
55. The first case in Florida to recognize joint and several liability where the defendants did not act in concert was *Louisville & N. R.R. v. Allen*, 67 Fla. 257, 65 So. 8 (Fla. 1914), where the court held that “although concert is lacking, [when] the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.” *Id.* at 269, 65 So. at 12 (citation omitted).
57. *Id.*
mon law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong. 58 With the advent of comparative negligence, courts began to allow damages to be apportioned among the joint tortfeasors. However, as one court pointed out, this did not relieve the co-defendants of the entire liability because their individual negligence was the proximate cause of the entire indivisible injury. 59 Thus, plaintiffs who receive a judgment against two or more co-defendants may choose to enforce the entire judgment against one, some, or all of the defendants, 60 and they all remain liable to the plaintiff until the entire judgment is completely satisfied. 61 This situation naturally causes consternation among defendants who fear possible collusion between the plaintiff and one or more of the co-defendants. Also of great concern is the possibility that other tortfeasors will be immune or insolvent, leaving one hapless defendant to bear the burden of the entire liability. This was the situation in Walt Disney World, 62 where Walt Disney World, although responsible for only 1% of the plaintiff's injuries, was nonetheless held liable for the entire 86% of her damages.

C. Contribution among Tortfeasors

The concept of contribution is sometimes confused with the doctrine of joint and several liability. Under joint and several liability, each defendant is individually and jointly responsible for the entire amount of the judgment, regardless of his individual degree of fault. Thus, a plaintiff who chooses to enforce the judgment against only one tortfeasor is entitled to receive the entire judgment from that defendant. The concept of contribution among tortfeasors gives to the defendant against whom the plaintiff is attempting to collect the entire judgment the right to look towards his co-defendants for their share of the responsibility. The proportional amount of contribution to be received from co-defendants, and the problem of absent or insolvent

tortfeasors, 63 are issues to consider in discussing contribution.

The common law rule prohibiting contribution among joint tortfeasors originated in the case of Merryweather v. Nix. 64 While the case involved an intentional tort, it came to stand for the proposition that in any negligence action, a wrongdoer could not profit from his own wrongful act. 65 Until 1975, Florida adhered to the common law rule, and did not allow for any contribution. As a result, plaintiffs were able to "pick and choose" from among all of the defendants. They could place the burden for the entire loss on the party who was the sole financially able to pay, or, depending on the circumstances of the relationship with the other defendants, use personal or quasi-personal reasons in their decision. 66 Thus, through their lack, some defendants who were found liable for the damages managed to escape without paying their share, while other defendants had to bear the burden for all the damage. Similarly, plaintiffs took their chances in choosing one defendant above the others in seeking their total damages. They faced the possibility that the chosen defendant may not really have the available resources to pay a judgment. 67

Recognizing the injustice of allowing one tortfeasor to bear the entire burden of an accident for which he alone was not solely responsible, 68 Florida abrogated the harsh common law rule with the passage in 1975 of the Uniform Contribution Among Tortfeasors Act. 69 For a defendant to seek contribution under the 1975 Act, the following requirements must be met: 1) two or more persons must be jointly or severally liable in tort for the same injury to a person; 2) the tortfeasor must not

63. Henceforth, the terms "absent" and/or "insolvent" tortfeasors should be used to include those tortfeasors who are judgment proof, or immune from liability through some relationship with the plaintiff (e.g., employer/employee, husband/wife, parent/child).
66. For a detailed discussion of the rationale and results of contribution, see Comment, The Allocation of Loss Among Joint Tortfeasors, 41 S. Cal. L. Rev. 728, 730 (1968).
67. Id. at 731-12.
68. Prosser, supra note 49, at 427.
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\textsuperscript{67} \textit{Id.} at 731-32.

\textsuperscript{68} Prosser, \textit{supra} note 49, at 427.

have intentionally caused or contributed to the injury; 3) the tortfeasor must have paid more than his pro rata share of the common liability; and, 4) the recovery must be limited to the amount paid by a tortfeasor of his pro rata share of the common liability. In determining their pro rata shares, the 1975 Act did not consider the relative degrees of fault of the joint tortfeasors. Therefore, since the doctrine of comparative negligence was accepted prior to the 1975 Act, a defendant could actually collect more than his proportionate share from his joint tortfeasors.

To illustrate, assume that Plaintiff A was found 10% liable for damages totaling $100,000; Defendant B was found 80% negligent; and Defendant C only 10% negligent. Defendant B's share of the damages is $80,000, while Defendant C's share is $10,000. Under the doctrine of joint and several liability, Plaintiff A can elect to collect the entire $90,000 from either B or C. Assume that Plaintiff A chooses to collect the entire amount from Defendant C, whose proportionate share of the liability is really only $10,000. Since, generally, pro rata shares are calculated "by dividing the number of joint tortfeasors into the amount of the judgment," if Defendant C then attempts to receive contribution from Defendant B under the 1975 Act, Defendant C can receive $45,000 from B (assuming B is not insolvent). This means that Defendant B, who was originally found liable for $80,000, has paid $35,000 less than his share, while Defendant C, who was only found liable for $10,000, ends up paying three and a half times more than he should.

Another example is to consider Walt Disney World under the 1975 version of the Contribution Act. Walt Disney World, who was only 1% liable, is responsible for 86% of the total damages under the doctrine of joint and several liability. For illustrative purposes, assume that the plaintiff's total damages were $100,000. Walt Disney World was thus liable for $1,000, and the fine was liable for $85,000. Assuming that Walt Disney World would be liable to collect its pro rata share from the fine, Disney would receive only $43,000 in contribution, thus paying $42,000 more than its share. Similarly, the fine, who originally was liable for $85,000, would have paid only $42,000. Where all the tortfeasors are present and solvent, the inequity in this situation is obvious. Perhaps that is why the Florida legislature took only one year to modify the rule. Now, the law allows consideration of each tortfeasor's degree of relative fault. As a result, each defendant can recover any amount he paid over his percentage of fault. To illustrate, consider the example given above with Plaintiff A 10% negligent; Defendant B 80% negligent; and Defendant C 10% negligent with damages totaling $100,000. Plaintiff A can still collect $90,000 from Defendant B, but Defendant C can recover $80,000 from Defendant B. Similarly, with Walt Disney World, while Walt Disney World is still liable for 86% of the damages under joint and several liability, it can now collect the full 85% from the fine. This assumes, of course, that the co-defendants are all present and solvent.

D. Absent and Insolvent Tortfeasors

With the retention of joint and several liability, the present and solvent tortfeasors bear the risk of their co-defendants being absent or insolvent. In that case, the available tortfeasors would have the responsibility of initially paying for the entire damages. They would be unsuccessful in their attempts to collect contribution from their co-defendants, which would leave them financially burdened with the entire amount. With the abolition of joint and several liability, the plaintiff bears that risk. Under those circumstances, the jury would apportion the damages between all the parties, leaving the plaintiff with less than the jury awarded him initially. Assume, for example, a case where the plaintiff and three co-defendants are each found 25% negligent, with

share from the fiancé, Disney would receive only $43,000 in contribution, thus paying $42,000 more than its share. Similarly, the fiancé, who originally was liable for $85,000, would have paid only $42,000. Where all the tortfeasors are present and solvent, the inequity in this situation is obvious. Perhaps that is why the Florida legislature took only one year to modify the rule. Now, the law allows consideration of each tortfeasor's degree of relative fault. As a result, each defendant can recover any amount he paid over his percentage of fault. To illustrate, consider the example given above with Plaintiff A 10% negligent; Defendant B 80% negligent; and Defendant C 10% negligent with damages totalling $100,000. Plaintiff A can still collect $90,000 from Defendant C, but Defendant C can recover $80,000 from Defendant B. Similarly, with Walt Disney World, while Walt Disney World is still liable for 86% of the damages under joint and several liability, it can now collect the full 85% from the fiancé. This assumes, of course, that the co-defendants are all present and solvent.

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74. 1976 Fla. Laws ch. 76-168 (codified at Fl. Stat. § 768.31 (3)(a) (1985)).
76. DiMento, supra note 75, at 7; Fleming, Foreward, supra note 32, at 250-59; McNichols, supra note 75, at 12-16; Note, supra note 75, at 346.
two of the defendants insolvent. With joint and several liability retained, the one remaining tortfeasor is responsible to the plaintiff for 75% of his damages, despite the fact that originally he was only 25% negligent. With the abolition of joint and several liability, the remaining tortfeasor is liable to the plaintiff for only 25% of his damages, leaving the plaintiff unable to collect the other 50% of his damages, to which he is entitled. This again raises the question: between a negligent plaintiff and a negligent defendant, which is the more appropriate risk-bearer? Since most people agree that an innocent plaintiff should not have to bear the risk of an absent or insolvent defendant, the discussion to follow will focus most often on situations where the plaintiff is negligent.

One suggestion is that the defendants are the more appropriate parties to bear this risk. Their negligence resulted in harm to another, while the plaintiff's negligence was "merely [a] lack of self care." Of course, when the plaintiff is not negligent at all, it would be unfair to deny that plaintiff full recovery from any defendant. A better solution would be to retain joint and several liability with the accompanying comparative contribution statute. However, some say that in a one plaintiff/one defendant situation, the plaintiff (negligent or not) always bears the risk that the defendant might be insolvent or judgment proof. Therefore, why should the risk shift to the defendant just because more tortfeasors are involved?

In any negligence action, two distinct, but often conflicting goals exist: (1) insuring fair but adequate compensation to injured victims, and (2) providing fair allocation of responsibility among wrongdoers. To ensure adequate compensation to plaintiffs, joint and several liability must be retained. Conversely, for fair allocation of responsibility among wrongdoers, joint and several liability must be abolished. The entire debate over abolishing joint and several liability can be condensed into one question, that is: Between a negligent plaintiff and negligent defendants, who should bear the risk of one or more defendants being absent or insolvent? Advocates for the retention of joint and several liability generally favor the defendants bearing the risk, while those who say that plaintiffs should bear the risk advocate for the abolition of joint and several liability. There are persuasive arguments for both positions.

III. Should Joint and Several Liability Be Abolished?

Advocates of joint and several liability point out that one of the major goals of tort litigation is to insure adequate compensation of a plaintiff's injuries. The abolition of joint and several liability would decrease the probability that injured plaintiffs will be adequately compensated. Critics of joint and several liability argue that the original reasons for applying the doctrine of joint and several liability do not exist anymore. Originally, the reason for requiring that both parties remain liable for the entire damages was that there was no basis upon which to divide the damages. Also, as one court stated, "the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant." Opponents of joint and several liability point out that, with the advent of comparative negligence, there is a basis for dividing damages. Further, comparative negligence allows even a negligent plaintiff to recover.

A. Judicial Positions

The Supreme Court of California rejected arguments favoring the abolition of joint and several liability in American Motorcycle Association v. Superior Court. The appellate court had interpreted the holding in Li v. Yellow Cab Co. (which judicially adopted comparative negligence in California) as requiring the elimination of joint and several liability in cases involving multiparty defendants. The supreme court disagreed, retaining joint and several liability. It stated "our adoption of comparative negligence . . . does not warrant the abolition.

82. Fla. Bar, supra note 78, at 71-72.
84. Id. at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.
85. 20 Cal. 3d 578, 588 P.2d 899, 146 Cal. Rptr. 182 (1978).
86. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
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\begin{itemize}
\item \textsuperscript{81} \textsl{Fla. Senate Comm. Report}, \textit{supra} note 17, at 51.
\item \textsuperscript{82} \textsl{Fla. Bar, supra} note 78, at 71-72.
\item \textsuperscript{83} \textit{American Motorcycle Ass’n v. Superior Court}, 20 Cal. 3d 578, 588, 578 P.2d 899, 905, 146 Cal. Rptr. 182, 188 (1978) (quoting Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950)).
\item \textsuperscript{84} \textit{Id.} at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.
\item \textsuperscript{85} 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
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\end{itemize}

https://nsuworks.nova.edu/nlr/vol11/iss1/15
of the established 'joint and several liability' doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury." The supreme court felt that abandoning the rule would reduce the ability of injured plaintiffs to receive adequate compensation. They further pointed out that the majority of jurisdictions which adopted comparative negligence also retained a joint and several liability doctrine.

Florida courts agreed with the California Supreme Court and retained joint and several liability in cases involving multiparty defendants. In Walt Disney World, the Fourth District Court of Appeal refused to abolish the doctrine, but certified a question to the Florida Supreme Court, asking whether the holding in *Linencberg v. Issen* (requiring that multi-party defendants remain jointly and severally liable for the entire amount of the damages) mandated an affirmation of the trial court's decision.

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87. *American Motorcycle Ass'n*, 20 Cal. 3d at 582, 578 P.2d at 901, 146 Cal. Rptr. at 184.

88. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.


91. *Id.* at 386 (Fla. 1975).

92. To understand the court's ruling in *Walt Disney World*, a brief discussion of *Linencberg v. Issen* is warranted. In *Linencberg v. Issen*, 318 So. 2d 386 (Fla. 1975), the plaintiff, Mrs. Issen, was a passenger in a car owned and driven by the defendant, Mr. Linencberg. Linencberg's car collided with another car, causing injuries to Mrs. Issen. At trial, Issen was found free of any contributory negligence. The jury found Linencberg 100% negligent, and the owners of the other car 85% negligent, with damages totaling $210,000. The trial judge was unsure whether he should enter the judgment in favor of the plaintiff in the above stated percentages, or whether he should charge damages in full against all the defendants. Therefore, he certified a question to the Third District Court of Appeal, asking whether it was proper for him to allow a jury to apportion fault between the negligent defendants. *Id.* at 338.

The appellate court decided that the doctrine of comparative negligence was not applicable between a defendant and joint tortfeasors. The appellate court further pointed out that at that time, Florida did not allow contribution among tortfeasors. The
It will be interesting to see how the Florida Supreme Court rules

Florida Supreme Court granted certiorari to review the conflict between the appellate court’s decision in Linckenberg and its decision in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

In Hoffman, the supreme court stated, “[w]hen the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.” Hoffman, 280 So. 2d at 437. The petitioner in Linckenberg asked the supreme court to “adopt a rule of apportionment among joint tortfeasors whereby the jury would determine the proportional percentage of causal negligence of each of the joint tortfeasors,” Linckenberg, 318 So. 2d at 389, since there was no contribution allowed among joint tortfeasors at that time.

While the decision in Linckenberg was pending, the Florida Legislature passed the 1975 Uniform Contribution Among Joint Tortfeasors Act, Fla. Stat. § 768.31 (1975) (see supra note 11 for a description of the statute), which allowed for contribution based on pro rata shares, not on the proportion of fault of each of the joint tortfeasors. In Linckenberg, the supreme court emphasized its ruling in Hoffman that “when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of total damages which he has caused the other party.” Linckenberg, 318 So. 2d at 391. The court used that to justify the abolition of the “no contribution” rule. The court stated that:

There is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants. Courts in other states which have eschewed the doctrine of no contribution have emphasized the unfairness and injustice of placing the entire burden upon the one who happens to be called upon to pay the entire damages where such payment should in justice be shared by another who shared the responsibility for the injury.

Thus, on the one hand, the court recognized that where two or more joint tortfeasors contribute to the damages, each should only pay for the damages in proportion to his degree of fault. On the other hand, the court accepted the 1975 version of the Florida Contribution Act and determined that “[t]he trial court by allocating damages on the basis of percentage of fault acted inconsistently with the new law since said act specifically provides for contribution on a pro rata basis with the relative degrees of fault to be considered.” Linckenberg, 318 So. 2d at 393 (emphasis in original).

Therefore, had this case been decided one year later, after the Florida legislature had modified the Uniform Contribution Among Tortfeasors Act to allow contribution based on the relative degrees of fault of the joint tortfeasor, Fla. Stat. § 768.31(3)(a) (1985), the Linckenberg decision would have been quite different. As it stands, the Linckenberg court never resolved the issue of its conflict with the Hoffman ruling. The court in Hoffman emphasized that one of the purposes of the comparative negligence rule was “[t]o apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.” Hoffman, 280 So. 2d at 439, but the ultimate decision in Linckenberg allowed contribution based on pro rata shares, with the tortfeasor’s relative degrees of fault not being the basis of allocation.
on *Walt Disney World*, in light of the court's decision in *Lincenberg*. Since the *Lincenberg* court based its decision on an outdated version of the Contribution Act, the supreme court is in a position to revisit that decision. The current Contribution Act allows allocation based on the relative degrees of fault of each joint tortfeasor. The new Tort Reform Act of 1986, which partially abolishes joint and several liability, took effect July 1, 1986. Thus, the supreme court may choose to review its previous decisions and reconsider its position on joint and several liability.

The Supreme Court of Oklahoma did that, and modified joint and several liability in *Laubach v. Morgan*. The court considered the rulings in *American Motorcycle Association v. Superior Court* and found the rationale of the California Court of Appeal more persuasive than that of the California Supreme Court. Thus, the *Laubach* court ruled that holding multiple tortfeasors liable for the entire amount, when their share of the liability was determined to be less than that, was "inconsistent with the equitable principles of comparative negligence." The court decided that juries should apportion fault as they see fit and that they should only retain joint and several liability in circumstances where damages cannot be apportioned. While the *Laubach* decision was made in part because Oklahoma did not allow contribution at that time, the supreme court later ruled that the passage of Oklahoma's contribution statute did not require reversal of the ruling that abolished joint and several liability. Later decisions established that the *Laubach* doctrine only applies where the plaintiff is comparatively negligent and not in situations where the plaintiff is free of negligence.

93. 588 P.2d 1071 (Okla. 1978).
97. Id.
98. Id. at 1074.
The Supreme Court of Kansas made a similar determination in *Brown v. Keill*. There, the court considered the comparative negligence statute, which did not specifically address the question of joint and several liability. The court concluded that in passing the comparative negligence statute, the legislature intended to forbid contribution among joint tortfeasors, but abolish joint and several liability. The court decided that the legislature intended to "relate duty to pay to the degree of fault." The court discussed the concept of fairness, and concluded that it was not fair to force a defendant who is 10% negligent to pay 100% of the damages. Of course, the court was considering joint and several liability in light of the "no contribution" rule. However, the court also considered the question of who is the more appropriate risk bearer, and concluded that:

Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.

The Supreme Court of New Mexico discussed decisions made in other jurisdictions regarding joint and several liability. Considering their state's pure comparative negligence system, it refused to retain joint and several liability on the basis that a plaintiff must be favored. The court addressed the arguments raised in *American Motorcycle*, and rejected them. Specifically, the court rejected the argument that a plaintiff's injury is "indivisible." It found the concept of one indivisible wrong to be obsolete, and ruled that it does not apply in comparative negligence cases. The court also rejected the argument

104. 224 Kan. at 202, 580 P.2d at 874.
105. Id.
106. Id.
107. Id.
110. Bartlett, 98 N.M. at 158, 646 P.2d at 585.
that joint and several liability must be retained in order to favor plaintiffs. The court found nothing wrong with a plaintiff bearing the risk of being unable to collect his judgment. \textsuperscript{111} It asked, "[b]etween one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?" \textsuperscript{112}

Kansas and New Mexico are the only two states to have judicially abolished the doctrine of joint and several liability. \textsuperscript{113} Oklahoma is the only state to have judicially modified it. \textsuperscript{114} Minnesota judicially abolished joint and several liability in 1974, \textsuperscript{115} except in cases where the plaintiff was entirely free from negligence or unless the defendants were engaged in a joint venture. \textsuperscript{116} However, accepting the "indivisible injury" argument, the court later reversed its position, retaining the doctrine. \textsuperscript{117} The majority of states which have judicially considered the issue have retained joint and several liability. \textsuperscript{118}

B. Legislative Positions

Legislatures have not considered the question of whether joint and several liability should be abolished as often as courts have. There are only six jurisdictions where the doctrine of joint and several liability has been statutorily retained in all comparative negligence cases. \textsuperscript{119} Four states have abolished the rule in favor of several liability. \textsuperscript{120} Seven

\begin{footnotes}


\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Kowalske v. Armour & Co., 300 Minn. 301, 220 N.W.2d 268 (1974).

\textsuperscript{115} McNichols, Complexities, supra note 100, at 207.

\textsuperscript{116} Ruberg v. Skelly Oil Co., 297 N.W.2d 746 (Minn. 1980).

\textsuperscript{117} Note, The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act, 36 U. Fla. L. Rev. 288, 297 (1984). For a list of decisions retaining joint and several liability, see id. at 297 n.47.


\textsuperscript{121} Granelli, supra note 113, at 62.

\textsuperscript{122} See supra note 36.


\end{footnotes}
have modified it. 121 Those states which modify the rule generally limit it to those cases where the plaintiff is less negligent than the defendant. Where the plaintiff is more negligent than the defendant, several liability applies. 122 Of interest is that ten of the eleven states which have legislatively abolished or modified the doctrine adhere to the “50% variation” of comparative negligence. 123 Louisiana is the only state which follows the “pure” form of comparative negligence to have legislatively modified the joint and several liability doctrine to limit liability in cases where the plaintiff is more negligent than the defendant. New Mexico is the only state which follows the “pure” form to have judicially abolished the doctrine.

Thus, in general, states which recognize the modified form of comparative negligence have been more likely to change the joint and several liability doctrine than states which adhere to the “pure” form of comparative negligence. This seems strange, considering that those states which adopted the “pure” version accepted the notion that the goal of comparative negligence was to apportion fault equally among all the negligent parties. As the New Mexico court pointed out, one of the goals of comparative negligence is to consider the fault of each party when apportioning damages. 124 Therefore, it would seem more likely that those states which have embraced the “pure” form of comparative negligence would be more inclined to recognize that the only way to insure that damages are apportioned according to the relative degrees of fault of each party is to eliminate joint and several liability.

C. Options

Courts or legislatures can modify the doctrine of joint and several liability in a variety of ways. One method is to abolish joint and several liability altogether. This would result in the plaintiff alone bearing the burden of any absent or insolvent tortfeasors, regardless of his degree

123. See supra note 36.
of fault. Another method is to repeal the doctrine for only non-economic damages. This would result in each defendant remaining jointly and severally liable for all the plaintiff's actual damages, while limiting the defendants' liability for damages such as pain and suffering and punitive damages. In this situation, the plaintiff would be assured of receiving full compensation for the actual damages he suffered. The only risk the plaintiff would bear is the burden of any absent or insolvent tortfeasor's share of the non-economic damages.

A third option is to limit the doctrine so that it applies only where the plaintiff is less negligent than the defendant. If the defendant is less negligent than the plaintiff, several liability will apply, and the defendant will only be liable for his proportionate share. A fourth option is to limit the doctrine so that it applies only if the defendant is less than 50% at fault. Defendants who are more than 50% at fault would be liable for the entire amount of the damages, while those who are less than 50% negligent would bear only the responsibility for their proportionate amount of the damages.

One more option is to retain joint and several liability in only non-comparative negligence cases. Where the plaintiff is entirely blameless, joint and several liability would still apply. If the plaintiff is comparatively negligent in any degree, the defendants would only be responsible for their proportionate share. Another option is to adopt a system of modified comparative negligence. This would not change the joint and several liability doctrine, but would abolish the current “pure” system of comparative negligence in favor of one of the modified forms. Its possible benefits would be to decrease the total number of cases filed, thus indirectly affecting the cost of insurance in a positive direction. A final option would be to adopt a form of the Uniform Comparative Fault Act. This is a system of reallocating damages among all the parties, if one of the party's share is uncollectable. In essence, it abolishes joint and several liability, making defendants responsible for only their proportionate share of the damages.

IV. Florida's Statutory Proposals

The Florida legislature considered changing Florida's tort reform system for many years. During the 1984 legislative session, the legislature considered various proposals for tort reform, but did not act on any of them. In 1985, Florida Senator George A. Kirkpatrick introduced a bill (which was later withdrawn) which would have abolished joint and several liability altogether. The Florida Senate subsequently proposed legislation which would have eliminated the doctrine of joint and several liability in causes of actions where comparative negligence applied. While that bill died in the House, the groundwork was laid for future tort reform proposals.

The Florida legislature considered various proposals regarding joint and several liability during the 1985 legislative session. It narrowed them down to five proposals, representing six different variations. Most have already been discussed above. The proposals were: 1) abolish joint and several liability completely; 2) adopt the Uniform Comparative Fault Act; 3) modify the doctrine by adopting the “percentage of a percentage” approach, which distributes the absent or


126. Id. at 72.
127. Id. at 72-73.
129. Id. at 73.
130. Id. at 74.

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132. Fla. Senate Comm. Report, supra note 125, at 74-75. For a detailed discussion of the Act, see Note, supra note 118.


134. Note, supra note 118, at 289 n.5.

135. Id. at 288. For a thorough discussion of the bill, see id.

136. Id. at 289.

137. See DiMento, Harrison and Belsky, Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine (December 1985) (unpublished manuscript) (available from University of Florida College of Law) [hereinafter DiMento]; Fla. Senate Comm. Report, supra note 125; and Fla. Bar, supra note 133. They also received input from many professional groups and associations, such as the Florida Academy of Trial Lawyers, the Florida Defense Attorneys Association, the Florida Bar, the Florida Medical Association, various insurance agencies, and lobbyists.


139. As mentioned previously, the question of which party is the more appropriate risk bearer permeates the whole discussion of joint and several liability. Rather than require either the negligent plaintiff or the defendants to bear the risk of a joint tortfeasor being absent or insolvent, the percentage of a percentage compromise spreads the loss among all the negligent parties, including the negligent plaintiff.
insolvent defendant's share to the other parties in a proportionate share; 4) apply joint and several liability only when the defendants are more at fault than the plaintiff; 5) apply joint and several liability only if the plaintiff is entirely blameless; and 6) adopt the "percentage of a percentage" approach, which provides for proportional liability, but allows immediate reallocation of the absent or insolvent tortfeasor's share among the plaintiff and remaining defendants.140

Imagine a typical comparative negligence scenario with a negligent plaintiff who has his damages reduced by his percentage of fault. Assume that Plaintiff A is involved in an automobile accident with defendants B and C. The jury finds Plaintiff A to be 20% negligent, and Defendants B and C 40% negligent each. Plaintiff A sustains $100,000 worth of damages. Defendant B is insolvent. First, Plaintiff A's recovery is diminished by $20,000, in recognition of his comparative negligence. A is now entitled to recover $80,000 from Defendants B and C. However, instead of being able to force either defendant to pay the entire amount, A is only entitled to $40,000 from B and $40,000 from C. Since B is insolvent, the question arises as to which party will bear the burden of his share. Under the "percentage of a percentage" approach, after a good faith attempt by A to collect the $40,000 from B, A can file a motion to modify his judgment against C and require that C pay a portion of B's judgment. Since C was 40% at fault, he would have to pay 40% of B's 40%, or $16,000. Prior to the modification of joint and several liability, C would have ended up paying the entire $80,000. If joint and several liability were abolished completely, the plaintiff would have recovered only $40,000. Under the percentage of a percentage approach, C pays his $40,000 plus 40% of B's $40,000, for a total recovery to the plaintiff of $56,000. Therefore, the plaintiff recovers more than he would have had joint and several liability been abolished, and the defendant does not bear the burden of paying the entire amount of the damages.

To consider another example for illustration purposes, let's revisit Walt Disney World. There, the plaintiff was 14% negligent. Again, assume for discussion purposes that the total damages are $100,000. The plaintiff is entitled to collect $86,000 from the joint tortfeasors. However, the doctrine of joint and several liability is abolished, so the plaintiff is only entitled to recover 1% from Walt Disney World, and must seek the remaining 89% from her fiancé. Assuming that the fiancé (husband at the time of the trial) is either insolvent or immune, under the doctrine of joint and several liability, Walt Disney World would be liable for the entire 86% of the damages. With the modification of joint and several liability, however, the court would enter judgment for the plaintiff in the amount of $8,500 against her fiancé, and only $1,000 against Walt Disney World. Since we are assuming that the fiancé is immune or insolvent, Walt Disney World is required to pay a percentage of his liability. Using the "percentage of a percentage" approach, Disney World, which was 1% negligent, would be required to pay 1% of the fiancé's 86%, or $850. Therefore, instead of paying $86,000 under joint and several liability, Disney World would only be liable for $850 under the "percentage of a percentage" approach. Obviously, this makes a great difference in the amounts of awards, for both plaintiffs and defendants.

140. FLA. SENATE COMM. ON HEALTH CARE AND INSURANCE, PCB 86-100 Amend. Summary Series No. 65 (April 28, 1986).

141. Id.

142. Id.

143. FLA. SENATE COMM. REPORT, supra note 125, at 36; DiMento, supra note 137, at 3; Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Fla. Sess. Law Serv. 660, 668 (West).

144. FLA. SENATE COMM. REPORT, supra note 125, at 36.


146. FLA. SENATE COMM. REPORT, supra note 125, at 36.

147. Id.

148. Id. at 37.

149. Id. at 39-40.

150. Id. at 41; Granelli, supra note 113, at 61.

151. FLA. SENATE COMM. REPORT, supra note 125, at 41-42.
The various proposals the Florida legislature considered during the 1986 legislative session can be divided into three groups: those which recommended the total abolition of joint and several liability; those which favored retaining the doctrine; and the majority, which proposed certain modifications to the existing doctrine. The Senate Committee on Health Care and Insurance identified three main issues surrounding the controversy. They are insurance rates, economic impact, and fairness.

A. Insurance Rates

Many people in Florida believe that the state is in the midst of an insurance crisis. The "crisis" concerns the availability and affordability of commercial liability insurance, especially for professionals, businesses, and governmental agencies. Many groups have been unable to secure liability insurance. Those who have gotten insurance complain of excessive rates and decreases in coverage limits. Insurance industry personnel blame the "crisis" on an increase in losses reported by property and casualty insurers over the past three years, much of which the insurance companies blame on the existing tort system. Some groups believe that the "crisis" has been manufactured by the insurance companies as a means of justifying the abolition of joint and several liability, which would save them millions of dollars. Other groups believe the "crisis" is real, but that the insurance companies themselves, and not the tort system, are responsible for the current situation.

Those who argue that joint and several liability imposes an unfair burden on defendants assume that the parties themselves will be paying

141. Id.
142. Id.
147. Id.
148. Id. at 37.
149. Id. at 39-40.
150. Id. at 41; Granelli, supra note 113, at 61.
for the damages. More likely, their insurance carriers will bear the burden. Advocates for the retention of joint and several liability believe that the insurance fund, and not the victims, is better able to absorb the many contingencies which would otherwise be borne by plaintiffs, particularly those who are uninsured or underinsured. They feel that "deep pocket defendants" such as insurance companies can more easily handle the burden of paying damages than can the injured victims. Also, they believe that compensating accident victims is a desirable social goal. This can best be accomplished by spreading the loss through the conduit of liability insurance, which would pass the cost to the consumer public.

On the other hand, those who advocate the abolition of joint and several liability argue that the price of lawsuits, and thus the cost of liability insurance, will be decreased if joint and several liability is abolished.

One study investigated the possibility that the abolition of joint and several liability would lead to a decrease of the insurance "crisis." It compared states which abolished the doctrine with those that retained it, and found no conclusive evidence that states with several liability were any less affected by the "crisis." While the data is not conclusive, the study did find that insurance expenditures did not increase any more often in joint and several liability states than in states which have abolished the doctrine.

The Florida legislature believed that the insurance "crisis" was real, and passed the Tort Reform and Insurance Act of 1986 in response. A discussion of the entire Act is beyond the scope of this article, but the act does make certain changes to existing insurance laws as well as modifying the current tort system.

B. Economic Impact

In discussing the economic impact and fairness issues, once again, the ultimate question is, who should bear the risk of one or more of the joint tortfeasors being insolvent? As mentioned before, retaining joint and several liability increases the plaintiff’s chances of being fully compensated for his losses while abolishing the doctrine increases the possibility that he will have to look elsewhere for compensation. As the authors of one study point out, when joint and several liability is abolished, it is more likely that public assistance will be relied upon and less likely that the contributing agency will receive any recovery from the party or parties at fault. Thus, the incidence is shifted from insurers and their insurers to taxpayers in general. Therefore, if the abolition of joint and several liability ultimately increases the demand for public assistance, then either the funds must be increased or some current users must be denied assistance. Either way, society ends up paying, either as a result of increased insurance costs, or through reliance on social services.

Advocates of joint and several liability also maintain that the doctrine motivates corporations and governmental agencies to be more safety conscious. They argue that a decrease in their liability will have a negative effect on their risk management processes. A plaintiff’s negligence results in harm to himself only, whereas a defendant’s negligence results in harm to others. Society places a greater emphasis on deterring conduct that is harmful to it, as opposed to conduct that is对面 regulatory system. This act is a remedial measure and is intended to cure the current crisis and to prevent the recurrence of such a crisis. It is the purpose of this act to ensure the widest possible availability of liability insurance at reasonable rates, to ensure a stable market for liability insurers, to ensure that injured persons recover reasonable damages, and to encourage the settlement of civil actions prior to trial.

152. Fleming, Report, supra note 32, at 1469.
153. Id.
154. McNichols, supra note 75, at 15.
155. Grant, supra note 133, at 63.
158. DiMento, supra note 137, at 3.
159. Id.
160. Id.
161. The Tort Reform and Insurance Act of 1986 begins, “WHEREAS, the Legislature finds that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance . . . .” Tort Reform and Insurance Act of 1986, supra note 143, at 668.
162. Section 2 of the Tort Reform and Insurance Act of 1986 reads: The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insur-
163. For a summary of the changes, see infra note 182.
164. DiMento, supra note 137, at 12.
165. Id. at 17.
166. Id.
167. FLA. SENATE COMM. REP., supra note 125, at 95.
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\textit{Id.} at 670.

\textsuperscript{163} For a summary of the changes, \textit{see infra} note 182.

\textsuperscript{164} DiMento, \textit{supra} note 137, at 12.

\textsuperscript{165} \textit{Id.} at 17.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} FLA. SENATE COMM. REPORT, \textit{supra} note 125, at 55.

\textsuperscript{168} \textit{Id.}
harmful only to individuals. Therefore, the abolition of joint and several liability would not increase deterrence. Conversely, it could be argued that corporations and agencies would continue to use adequate risk management procedures, because even with the abolition of joint and several liability, they would still be liable for their proportionate share of the damages. Further, this would give plaintiffs an added incentive to take precautions and minimize their risk of incurring damages.

A final economic impact of the abolition of joint and several liability can be found in the tort system itself. The Tort Litigation Review Commission considered the current and future status of the Florida tort system and concluded that the abolition of joint and several liability would have several effects on the current tort system: 1) It would lead to an increase in the number of parties in each case, since each of the parties would try to get every possible defendant before the court; 2) Defendants would fight among themselves, attempting to minimize their degree of fault by testifying against each other, rather than by presenting a joint defense; 3) The use of proximate cause as a defense against the plaintiff’s negligence will be intensified; and 4) Vicarious liability would be affected, even abrogated, possibly necessitating an increase in the amount of liability insurance purchased. The above would result in increased litigation, with resulting increase in expenses, as well as placing an increased administrative burden on the courts.

The abolition of joint and several liability also has an impact on settlements. With joint and several liability retained, the “deep pocket” defendant (e.g., the insurance company) has no bargaining power to settle. He is more likely to settle for an amount which would exceed his proportionate share to avoid having to pay more after the judgment is entered. Similarly, the plaintiff is less likely to settle with the deep pocket defendant if he is concerned about the other joint tortfeasor’s ability to pay. With the abolition of joint and several liability, one of two possibilities may occur. Plaintiffs may be less likely to settle, preferring to join all possible defendants in the suit. Conversely, plaintiffs may be more likely to settle, since they could better predict the potential liability of each defendant. While hard data is lacking on this issue, the Florida legislature believed that modifying joint and several liability would have a positive impact on the rate of settlements in Florida.

C. Fairness

This article has already discussed the issue of fairness. To summarize, the basic question is, where the plaintiff is also negligent, who is the more appropriate risk bearer in the event that one or more of the joint tortfeasors are absent or insolvent? With the advent of comparative negligence (and the finding that fault can be divided and apportioned) it is no longer valid to argue that injuries are indivisible and that there is no way to determine each individual’s tortfeasor’s degree of negligence. The conflict remains that it is unfair to require a defendant to pay more than his proportionate share of the damages, but it is also unfair to require an innocent plaintiff to incur the loss. Most people agree that the fairness argument is only valid where the plaintiff is comparatively negligent. Where the plaintiff is free from negligence, the plaintiff should be allowed to seek full recovery from any defendant. The issue of fairness would then arise among the defendants. While there are still some groups which advocate for either the total repeal or the total retention of the doctrine, most seem to recognize that a compromise is in order.

V. The Tort Reform and Insurance Act of 1986

As mentioned previously, the Florida legislature, in response to what it perceived as a “crisis” in the insurance industry, passed legislation which modified tort and insurance law in Florida.

169. Id. at 60; D’Messo, supra note 137, at 26.
170. Id., supra note 137, at 28.
171. The introduction to the Tort Reform and Insurance Act of 1986, the legislature stated that one of the purposes of the new Act is to “encourage the settlement of civil actions prior to trial.” Tort Reform and Insurance Act of 1986, supra note 143, at 670.
172. FLA. SENATE COMM. REPORT, supra note 125, at 49.
173. Id.
174. FLA. BAR, supra note 133, at 72.
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179. FLA. SENATE COMM. REPORT, supra note 125, at 49.
180. Id.
181. FLA. BAR, supra note 133, at 72.
The section of the Tort Reform Act of 1986 which modifies joint and several liability is entitled “Comparative Fault.” This section codifies Florida’s common law comparative negligence rule, retaining the “pure” version as adopted in Hoffman v. Jones. It retains joint and several liability in cases where the total damages do not exceed $25,000. For cases where the award is greater than $25,000, “liability for damages is based on each party’s proportionate fault, except that each defendant who is equal to or more at fault than the claimant is jointly and severally liable for all economic damages.”

Thus, where the total amount of the damages does not exceed $25,000, the doctrine of joint and several liability is alive and well. In those cases, the defendants bear the risk of an absent or insolvent tortfeasor, and the plaintiff is assured of receiving his total compensa-

injury giving rise to the cause of action.

(2) EFFECT OF CONTRIBUTORY FAULT.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded an economic and noneconomic damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.

(3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) APPLICABILITY.—

(a) This section applies to negligence cases. For purposes of this section, negligence cases includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, breach of warranty and like theories. In determining whether a case falls within the term “negligence cases,” the court shall look to the substance of the action and not the conclusory names used by the parties.

(b) This section does not apply to any action brought by a person to recover actual economic damages resulting from personal injuries based upon an intentional tort, or any action of the doctrine of intentional tort, or any action for the willful violation of the constitutional rights of another as defined in section 46.19, Florida Statutes.

(c) This section applies to all claims for economic and noneconomic damages, whether or not based upon an intentional tort, in any cause of action arising from personal injuries.

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(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed $25,000.


184. 280 So. 2d 431 (Fla. 1973).

tion. It is unknown why the legislature picked that amount, as opposed to $20,000, or $100,000. Perhaps they felt that $25,000 was the maximum amount that in good faith they could require defendants to pay. How much of an effect this change in the current system will have depends on the percentage of tort cases in which damages exceed $25,000.

The Administrative Office of the Courts in the Eleventh Judicial Circuit of Florida (Dade County) conducted a Tort Litigation Study in 1986 to update a previous study that was done in 1983. From the thirty judges in the General Jurisdiction Division, they selected six sections at random. They reviewed all tort cases disposed of in 1984 by these six sections; all tort cases which were closed by either jury or bench trials for every section for the first six months of 1985; and a 20% sample of all tort cases closed by all the sections during 1985, for a total of approximately 3500 tort cases studied.

In the majority of cases settled by a jury or bench trial in the Eleventh Judicial Circuit, the damages awarded to the plaintiff were $25,000 or less. If this is representative of other circuits, then, in the majority of cases, the doctrine of joint and several liability will continue to exist. Plaintiffs can be assured of receiving adequate compensation for their injuries from whichever defendants are present and solvent. Critics of the new legislation argue that this solution deprives those plaintiffs who need compensation the most. Plaintiffs who are the most severely injured (those who were awarded damages in excess of $25,000) must bear the risk of the absent or insolvent tortfeasor.

However, a counter argument is that the new legislation only abolishes joint and several liability for non-economic damages where the plaintiff is more at fault than the defendant. Non-economic damages include pain and suffering, and punitive damages. These are the areas in which critics of the current tort system believe excessive awards are being given to plaintiffs. However, as can be seen by the study conducted in the Eleventh Judicial Circuit, the majority of awards given are not in excess of $25,000. Economic damages include past and future lost income; lost support and services; medical and funeral expenses; and replacement value of lost personal property. Those who are concerned about the plaintiff receiving adequate compensation for actual damages suffered should not object to the new legislation, since joint and several liability is still available for economic damages unless the plaintiff is more at fault than the defendant.

As mentioned previously, most people agree that a plaintiff who is entirely blameless should not bear the risk of an absent or insolvent defendant. Under this legislation, the innocent plaintiff is protected, for economic damages anyway. The innocent plaintiff will still run the risk of not being adequately compensated for his non-economic damages. However, this approach does represent a fair compromise between the two positions. Indeed, this is the approach taken by most of the other states which have modified the joint and several liability doctrine. Also, this legislation protects not only the entirely blameless plaintiff, but any plaintiff whose fault is equal to or less than that of the defendant. Therefore, the only plaintiffs who will not be able to benefit from joint and several liability are those who are more at fault than the defendant.

Under Hoffman v. Jones, Florida adopted the "pure" form of comparative negligence, recognizing that a negligent plaintiff is not barred from collecting damages from one or more negligent defendants unless his negligence is 100%. Therefore, a law which abolishes joint and several liability for plaintiffs who are found 51% or more at fault.

187. Id. at 134-67.
188. Eight-hundred twenty cases were disposed of in 1984. Of those, one-hundred six cases were disposed of by either a bench or jury trial. The jury found for the plaintiff in seventy-two of those cases, and for the defendant in thirty-four of them. In fifty out of the seventy-two cases where the plaintiff was awarded damages, the amount awarded was $25,000 or less. Thus, in almost 70% of the cases, the plaintiff received damages of $25,000 or less. Id.
189. Two-hundred seventy-seven cases were disposed of in the first six months of 1985 for all sections, two-hundred six of which were resolved following a jury or bench trial. Of those, the plaintiff was successful in one-hundred thirty-four of the cases; the defendant won seventy-two of them. In eighty-two of the one-hundred thirty-four cases which the plaintiff won (approximately 60% of the cases), the damages awarded were less than $25,000. Id.
190. Seven-hundred ninety-six cases were studied in the 20% sample of all sections in the general jurisdictions for 1985. Of those, only sixty-three cases were resolved following a jury or bench trial. The majority were dismissed, or resolved by some other disposition. The plaintiff was successful in forty-eight of the cases; the defendant in sixteen. Thus, thirty-five of the forty-eight cases (approximately 73%) resulted in an award to the plaintiff of $25,000 or less. Id.
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190. Fla. Bar, supra note 133, at 72.
191. See supra text accompanying notes 85-124.
192. 280 So. 2d 431 (Fla. 1973).
seems inconsistent with the Hoffman principles. Also, considering the viability of the “percentage of a percentage” approach, a better alternative would have been to utilize that solution for non-economic damages, rather than abolish joint and several liability altogether for those types of damages. However, in general, the Tort Reform Act of 1986 does result in a fairer approach to the allocation of damages in situations where the joint tortfeasors might be absent, insolvent, or immune from litigation.

VI. Conclusion

Originally, contributory negligence barred any recovery for plaintiffs in a negligence action. With the advent of comparative negligence (in its “pure” form in Florida) plaintiffs are able to recover damages, regardless of their amount of fault. Their total damages are merely reduced by the percentage of negligence they bore. Under the doctrine of joint and several liability, plaintiffs can receive a settlement from any of the defendants against whom they received a judgment. Defendants often paid more than their fair share, but plaintiffs could collect their entire loss. Under the common law rule of no contribution, this was particularly difficult for the defendants, for they could not receive any compensation from their joint tortfeasors if they happened to get charged with the total amount of the damages. With the passage of the Uniform Contribution Among Tortfeasors Act, defendants were able to seek contribution from their joint tortfeasors. Originally they were only able to receive the amount based on their pro rata shares, but eventually they were able to receive (theoretically, anyway) the entire amount they were required to pay over the amount of their proportionate fault. Of course, if any of the joint tortfeasors were absent, immune, or insolvent, the remaining defendant(s) remained liable for the entire amount.

Critics of the system maintained that this placed a great burden on the “deep pocket” defendants, particularly insurance companies. They blamed the tort system for the insurance “crisis” which resulted in many groups not being able to get, or afford, adequate liability insurance. Responding to the perceived “crisis,” the Florida Legislature passed the Tort Reform and Insurance Act of 1986. Among other things, the bill modifies the insurance and tort law.

The doctrine of joint and several liability created much of the controversy, and was the focus of this article, along with the question of who should bear the risk of the joint tortfeasors being unable to contribute their fair share of the damages.

Florida’s new legislation modifies the doctrine considerably. Now, joint and several liability exists in its entirety only in cases where damages do not exceed $25,000. For those cases which do exceed that amount, both economic and non-economic damages are affected. Joint and several liability is abolished for all non-economic damages in excess of $25,000. Where economic damages exceed $25,000, joint and several liability is retained only if the plaintiff is equally or less negligent than the defendant.

Since the majority of cases that are tried will probably have verdicts of less than $25,000, most plaintiffs should not be affected by the new law. However, for those cases with excess damages, the plaintiff will bear the risk of the absent or insolvent tortfeasor. A better solution would be to adopt the “percentage of a percentage” approach, which spreads the risk of the insolvent or absent tortfeasor among the remaining parties. Further, in light of Florida’s “pure” comparative negligence stance, it would have been more consistent to limit the doctrine only if the plaintiff was entirely blameless, and not if the plaintiff is equally or more negligent than the defendant. That solution is more appropriate to those “modified” comparative negligence jurisdictions.

However, in general, the new law represents a good compromise between the two positions. Retaining joint and several liability completely places an undue burden on defendants; abolishing it is unfair to plaintiffs. The result of the new law is an attempt to provide fair and adequate compensation to plaintiffs, while also considering a more fair type of allocation of responsibility among the defendants. Thus, the new law comes close to meeting the two distinct and conflicting goals of tort law.

Stephanie Arma Kraft
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Stephanie Arma Kraft
Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law — Proposal for Reform

I. Introduction

A fair trial requires the participation of an impartial judge. ¹ In the unfortunate instance when a litigant encounters a prejudicial or biased judge, the litigant must rely upon protective mechanisms which may or may not operate effectively. Recusal is a remedy by which a litigant seeks to disqualify a judge, or the judge disqualifies himself from hearing a case, because of some personal bias or interest in the litigation.²

Under current Florida law the challenged judge must determine if the facts alleging prejudice are legally sufficient thereby warranting an order of recusal.³ Florida law places a heavy burden upon an individual judge by forcing the jurist to determine whether personal prejudices are present and violate a litigant’s right to the “cold neutrality” of an impartial judge.⁴ The dilemma facing a judge is that to accede to a request for recusal runs contrary to his position of judicial authority calling for total impartiality. The Code of Judicial Conduct states that a judge who possesses personal biases or prejudices in a case should disqualify himself from the proceeding.⁵

This note presents an overview of the procedural mechanisms available in Florida to protect a litigant’s right to a fair trial before an impartial judge. This note exposes the inherent inadequacies of those mechanisms and proposes specific reforms of the controlling rules.

II. Mechanisms of Judicial Disqualification

At common law, a litigant facing a prejudicial judge generally had no recourse but to stand trial before that presiding judge.⁶ Congress

4. State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).
6. Aetna Life Ins. Co. v. Lavio, 106 S. Ct. 1580, 1584 (1986). For a thorough discussion of the historical development of recusal on grounds of bias or prejudice see
and state legislatures, in an attempt to protect the litigant's right to a fair trial, have enacted statutes which allow for the recusal of a judge for reasons of bias or prejudice. In Florida, there are four sources describing the necessity of a judge for reasons of bias or prejudice: (1) Florida Constitution; (2) Code of Judicial Conduct; (3) Florida Statutes; (4) Florida Rules of Court.

Frank, Disqualification of a Judge, 56 Yale L.J. 605 (1947); Note, Disqualification of a Judge for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience, 48 Ore. L. Rev. 311 (1969).

9. Code of Judicial Conduct, Canon 3(C) (1986). Canon 3(C)(1) provides:
   (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
      (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
      (b) he is a lawyer in the matter in controversy, or a lawyer with whom he has practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
      (c) he knows that an individual party or as a fiduciary, his spouse or minor child resides in his household has a significant interest in the subject matter in controversy in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
      (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
         (i) is a party to the proceeding, or an officer, director, or trustee of a party;
         (ii) is acting as a lawyer in the proceeding.
10. Fla. Stat. § 38.10 (1986). Section 38.10 provides:
    Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws or the state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transfered is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is a fact that he does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial between the parties and their respective interests, he shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.
   (a) The State or the defendant may move to disqualify the judge assigned to try the cause on the ground that the judge is prejudiced against the defendant or in favor of the adverse party, that the defendant is related to the defendant by consanguinity or affinity within the third degree, or that said judge is related to an attorney or counselor of record for the defendant, or the State by consanguinity or affinity within the third degree, or that said judge is a material witness or is against one of the parties to said cause.
   (b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the ground for disqualification, and a certificate of counsel of record that the motion is made in good faith.
   (c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.
   (d) The judge presiding shall examine the motion and supporting affidavits to determine prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged or adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed to further action. Another judge shall be designated as the manner provided by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.
12. Fla. R. Crim. P. 1.432. Rule 1.432 provides:
   (a) Grounds. Any party may move to disqualify the judge assigned to the action on the grounds provided by statute.
   (b) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.
   (c) Time. A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification.
   (d) Determination. The judge against whom the motion is directed shall determine the order of disqualification and proceed no further in the

Criminal Procedure 3.230. Rule 3.230 provides:
   (a) The State or the defendant may move to disqualify the judge assigned to try the cause on the ground that the judge is prejudiced against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is a fact that he does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial between the parties and their respective interests, he shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.
   (b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the ground for disqualification, and a certificate of counsel of record that the motion is made in good faith.
   (c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.
   (d) The judge presiding shall examine the motion and supporting affidavits to determine prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged or adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed to further action. Another judge shall be designated as the manner provided by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.
   (e) Grounds. Any party may move to disqualify the judge assigned to the action on the grounds provided by statute.
   (f) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.
   (g) Time. A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification.
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Criminal Procedure 3.230; Florida Rule of Civil Procedure 1.432. Each of these sources proposes in some respect to protect a

ferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial as between the parties and their respective interests, he shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

11. FLA. R. CRIM. P. 3.230. Rule 3.230 provides:

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity within the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

12. FLA. R. CIV. P. 1.432. Rule 1.432 provides:

(a) Grounds. Any party may move to disqualify the judge assigned to the action on the grounds provided by statute.

(b) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.

(c) Time. A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification.

(d) Determination. The judge against whom the motion is directed shall determine only the legal sufficiency of the motion. The judge shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the
litigant's right to a fair trial by calling for disqualification of a judge
who espouses personal prejudice to a litigant.

The Code of Judicial Conduct, as formulated by the American
Bar Association, was adopted by the Supreme Court of Florida on July
25, 1973.14 The Code of Judicial Conduct outlines various principles of
how a judge should conduct his judicial activities.15 Specifically, Canon
3(C)(1) requires a judge to disqualify himself from cases in which his
impartiality may reasonably be questioned.16 Canon 3(C), therefore,
imposes upon a judge an individual responsibility of assuring that his
personal prejudices will not affect a litigant's right to a fair trial. Under
Canon 3(C), the judge initiates the motion for disqualification and ulte-
riately decides whether recusal is appropriate.18

In contrast, court rules of practice and procedure as well as the
Florida statutes allow a litigant to initiate a challenge to the partiality
of a presiding judge.17 The technical requirements under each of these
sources are basically the same. A litigant must first submit a statement
of the facts showing some prejudice as grounds for disqualification.19
The motion for disqualification must be timely made.20 Under all three
sections the challenged judge must determine whether the motion is
legally sufficient and he is not allowed to pass on the truth of the facts
alleged.21 Both Florida Statutes section 38.10 and Florida Rule of
Criminal Procedure 3.230 require the movant to submit two affidavits:
one alleging his inability to receive a fair trial because of the judge's
prejudice; and a second affidavit swearing that the motion for recusal
was made in good faith.22

It is important to note that under all four sources it is the chal-

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26. See also Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); Hayslip v. Douglas,
400 So. 2d 553, 556 (Fla. 4th Dist. Ct. App. 1981).
priate. Therefore, under Florida law a litigant who feels threatened by the prejudices of a trial judge must make his motion for recusal pursuant to one of the three applicable sources. Such a motion is then reviewed by the alleged "biased" judge for his determination of whether or not disqualification should be granted.

These rules require a judge to determine whether the motion is legally sufficient. The term "legal sufficiency" is certainly broad on its face but the Florida courts have refined its meaning in several opinions. In Brewton v. Kelly, the Second District Court of Appeal held that the term "legal sufficiency" means more than compliance with the technical requirements of section 38.10. The judge must determine, if the facts alleged, "[w]ould prompt a reasonable prudent person to fear that he would not receive a fair trial." In State ex rel. Brown v. Dew- ell, the Supreme Court of Florida emphasized that the test of the sufficiency of the affidavits calling for disqualification must be viewed from the movant's perspective. The court stated:

The test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling.

In Raybon v. Burnette, the Second District Court of Appeal, in clarifying this test of legal sufficiency, held that the facts alleging prejudice must be taken as true with the judge limited to passing only on the sufficiency of the motion. The rationale for allowing the challenged judge to determine the legal sufficiency of the motion relies on the principle that since a judge is compelled to perform his judicial duties impartially, personal biases would not affect his ability to decide

23. 166 So. 2d 834 (Fla. 2d Dist. Ct. App. 1964).
24. Id. at 836.
25. Id.
26. 131 Fla. 566, 568, 179 So. 695, 697-98 (1938).
27. Id.
28. Id. at 568, 179 So. at 697.
29. 135 So. 2d 228 (Fla. 2d Dist. Ct. App. 1961).
30. Id. at 229. See also Turner v. State, 100 Fla. 1078, 1081, 130 So. 617, 620 (1930).
whether recusal is warranted. This standard espoused by the Florida courts seems theoretically sound in protecting a litigant’s right to a fair trial. However, the difficulty of its application appears obvious in that when a judge accedes to a request for recusal, he is admitting his personal prejudices. Such an admission is totally inconsistent with his professed position of impartiality.

III. Case Law Analysis

It is interesting to note that early Florida case law supported the position of allowing non-challenged members of the court to rule on the legal sufficiency of the request for recusal. However, recent decisional law holds that each individual judge must determine his qualification to sit on a given case. In 1979, the Supreme Court of Florida in Estate of Carlton v. Rogers held that each individual challenged judge must determine the legal sufficiency of a request for recusal and whether disqualification is appropriate. Subsequent decisional law in Florida has upheld this position.

Florida law holds that prejudice against a party’s attorney may also constitute grounds for recusal. In Ginsberg v. Holt, the Supreme Court of Florida held that judges may be disqualified because of some bias or prejudice directed towards a party’s attorney. In 1983, the Supreme Court of Florida reaffirmed Ginsberg stating: “Prejudice against a party’s attorney can be as detrimental to the interests of that party as prejudice against the party himself.” In Hayslip v. Douglas, the petitioner, Dr. Hayslip, moved for recusal against a judge who stated to Hayslip’s attorney at a pretrial conference that the attorney should not be in the case. Dr. Hayslip was not present at the pretrial conference; nevertheless, the Fourth District Court of Appeal held that the movant does not have to have personal knowledge of the facts alleged in the motion in order to successfully challenge a judge’s partiality.

The Florida courts and legislature have outlined rules regarding waiver of the right to recusal. Generally, a litigant waives any right to recuse a judge if the request is not filed within a reasonable period of time after discovery of the facts constituting prejudice. Florida Rule of Criminal Procedure 3.230 requires the motion to be filed ten days before the case is called for trial. However, rule 3.230(c) states that if good cause is shown for a late filing, the motion may still be made. Florida Rule of Civil Procedure 1.432 states that the motion of recusal must be made within a reasonable time after discovery of the facts alleging prejudice. Although Florida Statutes section 38.10 does not specify any time restraints for the filing of the motion for recusal, Florida Statutes section 38.02 states that unless the motion is filed within thirty days after learning of the grounds for disqualification, the party waives his right to recusal.

The Florida courts have generally adhered to these time restrictions. The following serves to illustrate the soundness of this adherence. In a scenario where a party knows the facts regarding possible prejudice but does not file a motion for recusal until after an adverse decision has been rendered, waiver of the right to recusal has been strictly enforced. The Florida courts’ strict adherence to the waiver of recusal under such circumstances is rationalized on the sound grounds that waiving a right to recusal is a significant loss of procedural rights.
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42. Id. at 555.
43. Id. at 556.
46. Id.
50. Estate of Carlton v. Rogers, 378 So. 2d 1212, 1218 (Fla. 1979) (petitioner filed motion for recusal eleven months after acquiring knowledge of grounds for disqualification and after an adverse decision was rendered by the Supreme Court of Florida).
of protecting the other litigant who was victorious in the original suit.\textsuperscript{51} To allow for recusal under such circumstances would be to give the losing party an additional opportunity to achieve a favorable result while denying a similar opportunity to the other party.\textsuperscript{52}

The Florida courts have recognized limited situations where a late filing of a motion for recusal will not constitute a waiver of that right. Courts will look for facts sufficient to establish a sound reason for the late filing. In \textit{Gieske v. Grossman},\textsuperscript{53} the movant attempted to file a motion for recusal pursuant to Florida Statutes section 38.10.\textsuperscript{44} The trial court denied the motion because it was not filed within the recognized time restraint.\textsuperscript{48} The Fourth District Court of Appeal allowed the motion to be heard when the petitioner submitted facts showing that the grounds for prejudice did not arise until after a certain date, making it impossible for her to comply with the requirement.\textsuperscript{58} Therefore, a litigant who does not become aware of the facts constituting prejudice until after the expiration of the time for filing the motion should be able to show the requisite "good cause" for the late filing and avoid the harsh sanction of a waiver.

Florida case law includes some governing rules concerning orders issued by such challenged judges. A widely accepted rule is that once a judge has recused himself, any order issued subsequent to the recusal is void.\textsuperscript{59} However, Florida law holds that a judge who disqualifies himself does still possess the power to render a final judgment on issues already tried.\textsuperscript{60} Further, the disqualified judge may also continue where limited jurisdiction is retained.\textsuperscript{61} Florida's position has engendered criticism.

51. \textit{Id.}
52. \textit{Id.}
53. 418 So. 2d 1055 (Fla. 4th Dist. Ct. App. 1982).
54. \textit{Id.} at 1056.
55. \textit{Id.}
56. \textit{Id.} at 1057.
59. \textit{See, e.g.,} State ex rel. Cobb v. Bailey, 349 So. 2d 849, 850 (Fla. 1st Dist. Ct. App. 1977). Where parties acquiesce, a judge may disqualify himself from participating in the disposition of the case while reserving power to adjudicate other questions among the parties. Here, the judge disqualified himself from consideration of the case while reserving power to act immediately on questions of temporary alimony and child support. Id. The parties acquiesced in this form of limited jurisdiction and when the judge attempted to exceed his scope of authority, a writ of prohibition was issued on appeal.

61. \textit{Id.}
62. \textit{Id.}
63. \textit{See generally} State ex rel. Bank of America v. Rowe, 96 Fla. 277, 117 So. 5, 6 (1928) (P. Howes & Assoc. v. Hutt, 411 So. 2d 266 (Fla. 1st Dist. Ct. App. 1982); Mobil v. Trask, 463 So. 2d 389 (Fla. 1st Dist. Ct. App. 1982); Lorenzo v. Morphy, 189 Fla. 639, 35 So. 2d 421, 424 (1947) (claiming prohibition to be the proper remedy to restrain a tribunal from acting in excess of its power). It is also recognized that a litigant may wait for a final determination of the proceedings and then appeal, seeking a review of any order regarding judicial disqualification. \textit{See In re} Florida Conference An'rs of Seventh Day Adventists, 725 So. 715, 724 (Fla. 1975). A motion for recusal is generally recognized remedy to change an interlocutory order. However, courts are very reluctant to grant a motion for reconsideration. \textit{See, e.g.,} \textit{Florida Practice and Procedure} \textit{\$ 154 (1958).} The Florida courts, recognizing the importance of challenged judges to grant a motion for reconsideration, have held the petition for a writ of prohibition as the effective means for the litigant to prevent the judge from granting the petition.

64. \textit{State ex rel. B.F.Goodrich Co. v. Thompson}, 305 So. 2d 388, 389 (Fla. 1975).
70. \textit{State ex rel. B.F. Goodrich Co. v. Thompson}, 305 So. 2d 388, 389 (Fla. 1975).
icism. For example, opponents often challenged a “biased” judge’s entry of a final judgment on issues already tried. The major thrust of their argument is that since the issues were tried before a biased judge, any determination of those issues violated the litigant’s right to a fair trial. To be sure, this leaves the litigant in a very uncertain position.

The remedies available to a litigant whose motion for recusal is denied are considered in the following material.

IV. Writ of Prohibition — Adequate Protection?

Florida law has long held that a writ of prohibition is the appropriate mechanism available to a litigant to prevent judicial action when a judge has denied a litigant’s motion for recusal. Procedurally, a litigant whose motion for recusal is denied must petition the appropriate appellate court for review of the motion. The litigant must assert that he has no adequate remedy at law and that a delay of appellate review until after final judgment may result in excessive harm. Through this support Id. The parties acquiesced to this form of limited jurisdiction and when the judge attempted to exceed his scope of authority, a writ of prohibition was issued on appeal. Id. 60. Schwartz v. Schwartz, 431 So. 2d 716 (Fla. 3d Dist. Ct. App. 1983).

61. Id. 62. See generally State ex rel. Bank of America v. Rowe, 96 Fla. 277, 118 So. 3, 6 (1928); R. P. Hewitt & Assoc. v. Hurt, 411 So. 2d 256 (Fla. 1st Dist. Ct. App. 1982); Mahl v. Trask, 463 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985); Lorenzo v. Murphy, 159 Fla. 639, 32 So. 2d 421, 424 (1947) (claiming prohibition to be the proper remedy to restrain a tribunal from acting in excess of its power). It is also recognized that a litigant may wait for a final determination of the proceedings and then appeal, seeking a review of any order regarding judicial disqualification. See In re Florida Conference Ann. of Seventh Day Adventists, 175 So. 715, 718 (1937). However, such a route of appeal is rarely successful. See Note, Disqualification of Federal District Judges — Problems and Proposals, 7 Syracuse L. Rev. 612, 624-26 (1956). A motion for reconsideration is the generally recognized remedy to change an interlocutory order. However, courts are very reluctant to grant a motion for reconsideration. See Transue, Florida Practice and Procedure § 15-4 (1993). The Florida courts, recognizing the reluctance of challenged judges to grant a motion for reconsideration, have held the petition for a writ of prohibition as the most effective method of reviewing an order of disqualification. The rationale for allowing the petition for the writ is that this mechanism provides a litigant with an immediate attempt at relief before engaging in the expenditures of trial. See Livingston v. State, 441 So. 2d 1083, 1089 (Fla. 1983).

63. Fla. R. Civ. P. 1.650. See Transue, supra note 62, § 36-1. 64. State ex rel. B.F. Goodrich Co. v. Transue, 140 Fla. 500, 192 So. 175, 176

(1939).
writ of prohibition the unsuccessful litigant seeks to have the appellate court prevent the trial judge from presiding in an action. Writs of prohibition are considered an extraordinary route of appeal because appellate courts traditionally possess discretionary power to accept the petition for review. Therefore, a litigant lacks assurance that his motion will even merit review.

Appellate review of petitions for writ of prohibition filed upon denial of a motion for disqualification yield apparent inconsistencies. In Bundy v. Rudd, the petitioner was a criminal defendant charged with two counts of murder in the first degree, three counts of attempted murder, and two counts of burglary. The petitioner filed a motion for recusal pursuant to Florida Rule of Criminal Procedure 3.230. The trial judge denied the motion for recusal and, within his order of denial, controverted several allegations asserted in the affidavit. The petitioner filed a formal petition for writ of prohibition after denial of his motion for reconsideration. The Supreme Court of Florida accepted the petition for review on the jurisdictional grounds that a death sentence might ultimately be imposed. On review, the Supreme Court of Florida held that a trial judge cannot pass on the truth of the alleged facts. The court further held that when a judge seeks to refute the charges of partiality, he has exceeded his scope of judicial authority. The motion was granted and the case assigned to another judge within the circuit. By this action, the Supreme Court of Florida reaffirmed the principle that once a litigant establishes a basis for recusal, prohibition is both an appropriate and necessary remedy. In criminal cases of this magnitude, the courts are very protective of ensuring total impartiality.

65. See, e.g., State ex rel. Bank of America v. Rowe, 96 Fla. 277, 118 So. 5 (1928).
67. 366 So. 2d 440 (Fla. 1978).
68. Id. at 441.
69. Id.
70. Id.
71. Id.
72. Id. See Reino v. State, 352 So. 2d 853, 855 (Fla. 1977); Fla. Const. art. V, § 3(b)(4).
73. Bundy, 366 So. 2d at 442.
74. Id.
75. Id.
76. Id.
77. 97 So. 2d 181 (Fla. 1957).
78. Id. at 182.
79. Id.
80. Id. at 182-83.
81. Id. at 183.
82. Id.
83. Id. at 184.
84. Id.
86. Id. at 390.
87. Id.
88. Id.
89. Id.
90. Id.
In *Crosby v. Florida*, the appellant was charged with attempted robbery. At trial, the defendant entered a guilty plea pursuant to a plea bargain agreement that would entitle him to probation rather than imprisonment. After the appellant had testified as a witness for the state, the trial judge said, "I don't want to put a man like that on probation. I am not going to waste any more time with him. . . . I am punishing him for telling a lie. . . . I think he is a liar from the word 'go'." The defendant subsequently sought disqualification of the judge pursuant to Florida Statutes section 38.10. The motion for disqualification was denied. On review, the Supreme Court of Florida held that the trial judge clearly exceeded his scope of judicial authority and should have recused himself from the proceedings. The judgment and sentence were reversed with the case remanded to a different judge. Again, this case illustrates the court's strong concern of ensuring total impartiality.

But consider an applicable appellate review of a recent civil case. In *Mobil v. Trask*, the petitioner was an employer/carrier of a gas station. An employee was injured in a shooting incident that occurred at the gas station. At an administrative hearing for compensation benefits, the deputy commissioner stated to the employer/carrier's attorney, "I don't see how you can't find this accident compensable. If I was sitting at my desk and a man came in here with a gun and shot me, it is an on-the-job accident." At trial, the employer/carrier made a motion for recusal pursuant to Florida Statutes section 38.10, claiming that the deputy had prejudged the case. The motion for recusal was denied and the employer/carrier filed a petition for writ of prohibition. The First District Court of Appeal recognized that the writ of

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77. 97 So. 2d 181 (Fla. 1957).
78. *Id.* at 182.
79. *Id.*
80. *Id.* at 182-83.
81. *Id.* at 183.
82. *Id.*
83. *Id.* at 184.
84. *Id.*
86. *Id.* at 390.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
prohibition is the appropriate mechanism to prevent judicial action when a judge or deputy has wrongfully denied a motion for recusal. However, the court denied the petition, holding that a judge does not have to refrain from forming mental impressions and opinions during the presentation of evidence, and that these remarks did not show that the deputy had prejudged the case. The court distinguished Bundy on the grounds that the deputy commissioner did not controvert any of the alleged facts.

These cases present different lines of rationalization. In Bundy and Crosby the Supreme Court of Florida adhered to a stricter standard of determining the applicability of the writ of prohibition. Certainly the possibility of an imposition of the death penalty and loss of liberty calls for such close scrutiny. However, such close scrutiny is also required where a judge or deputy commissioner indicates that he has already reached a final decision on the merits of a case before all evidence has been submitted.

The above analysis illustrates that the appellate courts apply different standards of review when determining the applicability of a writ of prohibition based upon a denial of a motion for recusal. In criminal cases the appellate courts adhere to a strict standard when considering the applicability of the writ. In contrast, appellate review of civil cases embraces a more lenient standard of review when considering the applicability of the writ.

A uniform standard of review also is lacking in appellate review of civil cases based upon a denial of a motion for recusal. In LeBruno Aluminum Co. v. Lane, an employee was injured and sought workers’ compensation benefits. At an administrative hearing, the deputy commissioner stated that he had already decided to award benefits to the claimant before the employer presented any evidence. Specifically, when counsel for the employer asked to put on witnesses, the deputy commissioner answered, “You can put them on if you want to take up the court’s time.” The First District Court of Appeal held that such remarks violated the employer’s right to a fair and impartial hearing. It is difficult to distinguish LeBruno from Mobil. In Mobil the court stated that the remarks did not indicate that a final decision had been made, as in LeBruno. Such results further evidence the inconsistent treatment given to appellate review of cases dealing with judicial disqualification. The impartiality of trial judges is so fundamental to the judicial system that petitions for writ of prohibition should all be examined with the utmost circumspection.

The writ of prohibition, therefore, presents to the litigant a very uncertain vehicle for protecting his right to a fair trial before an impartial judge. The discretionary nature of this route of appeal, as well as the sometimes inconsistent standards of review by Florida’s higher courts, leaves the concerned litigant in a precarious situation.

V. Judicial Disqualification—Strict Technical Compliance?

What happens where prejudice of a trial judge is present but a litigant files his motion for recusal pursuant to an inappropriate procedural source? What results if a litigant properly files his motion for recusal under the applicable rule or statute, but fails in some respect to comply with all of the technicalities? The Florida courts have recently addressed these questions. The following progression of cases illustrates the Florida courts’ resolution of these conflicts.

91. Id. See also State ex rel. Bank of America v. Rowe, 96 Fla. 277, 118 So. 5 (1928); R.P. Hewitt & Assoc. v. Hurt, 411 So. 2d 266 (Fla. 1st Dist. Ct. App. 1982).
92. Mobil, 463 So. 2d at 391. See City of Palatka v. Frederick, 128 Fla. 366, 174 So. 826, 828 (1937).
93. Mobil, 463 So. 2d at 391.
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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
In Pistorino v. Ferguson, the trial judge stated to the petitioner's attorney, "Dick, your client [petitioner] is not playing with a full deck. Personally, I think she is crazy and I will recuse myself anytime you want me to." The petitioner moved for disqualification pursuant to section 38.10 (1979). The trial judge denied the motion for recusal on the grounds that section 38.10 was not complied with because the motion was filed late; was not supported by corroborating affidavits; and was not accompanied by a certificate of good faith. On review, the Third District Court of Appeal faced an important issue: Must the petitioner comply with all the technicalities of the disqualification statute before relief will be granted through a writ of prohibition? The court held that where such "patent prejudice" is present, relief by writ of prohibition will be granted even in the absence of strict technical compliance.

In Jackson v. Korda, the petitioner was a criminal defendant who filed a motion to disqualify the trial judge pursuant to Florida Statutes section 38.10. The trial judge denied the motion, holding that the petitioner failed to comply with the statutory requirement of submitting two affidavits from unrelated parties. Petitioner then filed a petition for writ of mandamus regarding the denial of his motion for recusal. The Fourth District Court of Appeal held that prohibition was the appropriate avenue of appeal but nevertheless treated the petition for mandamus as one for prohibition. The predominant issue facing the appellate court was whether a technically insufficient motion for recusal filed pursuant to Florida Statutes section 38.10 governs the

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102. 386 So. 2d 65 (Fla. 3d Dist. Ct. App. 1980).
103. Id. at 66.
104. Id.
105. Id.
106. Id.
108. Pistorino, 386 So. 2d at 67.
110. Id. at 1363.
111. Id.
112. Id. The court treated the petition for mandamus as one for prohibition in that both are considered an extraordinary route of appeal. Mandamus generally compels a lower court to do an affirmative act. See Trawick, supra note 62, § 36-4.
113. Jackson, 402 So. 2d at 1363.
114. Id.
procedure for disqualification of a judge in criminal cases. The court held that procedures for the recusal of judges in criminal cases are governed by Florida Rule of Criminal Procedure 3.230, not Florida Statutes section 38.10. Under this holding, petitioner's motion for writ of prohibition was granted because his original motion for recusal did in fact comply with Rule 3.230.

In *Livingston v. State*, the defendant was convicted of first-degree murder, and on appeal sought review of his denial of a motion for recusal which he made at the trial court level. At trial, the defendant filed a motion of recusal pursuant to section 38.10. The trial judge denied the motion as legally insufficient, specifically on the grounds that the motion was filed pursuant to section 38.10 and not under the applicable Florida Rule of Criminal Procedure 3.230. On review, the Supreme Court of Florida held that section 38.10 does give litigants a substantive right to seek disqualification of a trial judge. However, the court further held that the actual process of disqualification is procedural and, therefore, Florida Rule of Criminal Procedure 3.230 controls the disqualification process. In remanding the case for a new trial, the court emphasized that "technical requirements" of the affidavits need not be strictly applied. The test, as emphasized by the court, is whether the movant has a reasonable fear that he will not receive a fair trial in a particular case.

This progression of recent cases suggests that the Florida courts look more to substance than technical compliance when reviewing petitions for writ of prohibition based upon a denial of a motion for disqualification. Recognizing the judiciary's emphasis on substance rather than technical compliance, the Supreme Court of Florida in 1984 held that the statutory requirement of submitting supporting affidavits as expressed in Florida Statutes section 38.10 was constitutionally inva-

115. *Id.*
117. *Jackson*, 402 So. 2d at 1363.
118. 441 So. 2d 1083 (Fla. 1983).
119. *Id.* at 1084.
120. *Id.*
121. *Id.* at 1085.
122. *Id.* at 1087.
123. *Id.*
124. *Id.*
125. *Id.*
VI. The United States Supreme Court on Recusal

In *Aetna Life Insurance Co. v. Lavoie*, the United States Supreme Court considered the constitutional limitations of state imposed rules of recusation. A brief analysis of the case follows with an in depth look at the issues presented before the Court and the constitutional principles enunciated by the Court.

A. The Facts

The case originated in Alabama and was based on an insurance company's failure to pay an appropriately filed claim by one of its insureds. The insured, upon discharge from the Mobile Infirmary Hospital, filed a claim with Aetna Insurance for $3,058.25. The local office of Aetna Insurance refused to pay the entire amount and the insured in turn filed suit against Aetna for both the payment of the remainder of the claim and punitive damages for the insurance company's bad faith refusal to pay a valid claim. The trial court dismissed the action with respect to the first party bad faith claim for failure to state a claim upon which relief can be granted. On appeal, the Alabama Supreme Court remanded the case for trial, holding that recovery on a bad faith claim is possible. On remand, the trial court awarded the insured party (Lavoie) the unpaid portion of her original claim while also issuing a summary judgment with respect to the bad faith claim.

On a second appeal, the Alabama Supreme Court reversed and remanded, holding that first party bad faith claims were now recognized in Alabama. On a second remand, the issue of the first party bad faith claim was submitted to the jury who returned an award of $3.5 million in punitive damages for Lavoie. Again, on appeal, a divided 5-4 Alabama Supreme Court affirmed the jury award in a per curiam opinion authored by Justice Embry. Upon filing a motion for rehearing, it became known that Justice Embry had personally filed two concurrent actions against other insurance carriers also claiming bad faith failure to pay claims and seeking punitive damages. It is clear from the record that, at the time of the Alabama Supreme Court's affirmance, the law in Alabama was unsettled with respect to first party bad faith claims. Prior to the decision affirmed by the Alabama Supreme Court, the cause of action was traditionally not recognized.

Counsel for Aetna, upon learning of Justice Embry's involvement in the other cases, sought recusal of Justice Embry as well as the other justices.

The motions for recusal as well as the rehearing were denied by the Alabama Supreme Court. On appeal, the United States Supreme Court dealt with the due process challenges claimed by Aetna. Specifically, Aetna asserted that its right to a fair trial was violated by the participation of the Alabama Supreme Court justices in the case.

126. *In re Amendments to Rules of Civil Procedure, 458 So. 2d 245, 247 (Fla. 1984).*
128. *Id.*
129. *Id.* at 1582.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1583.
138. *Id.* Justice Embry filed one action against Maryland Casualty Company for allegedly failing to pay for the loss of a mink coat. *Id.* The second action was filed by Justice Embry as a class action on behalf of himself and all state employees insured by Blue Cross-Blue Shield against the insurance company for failure to withhold payment on valid claims. *Id.* Subsequent to the decision rendered by the Alabama Supreme Court, Justice Embry settled his suit with Maryland Casualty for $30,000. *Id.* at 1584. The action against Blue Cross-Blue Shield was settled upon agreement of the parties to minimize problems in the future. *Id.*
faith claim.\textsuperscript{134} On a second appeal, the Alabama Supreme Court reversed and remanded, holding that first party bad faith claims were now recognized in Alabama.\textsuperscript{135} On a second remand, the issue of the first party bad faith claim was submitted to the jury who returned an award of $3.5 million in punitive damages for Lavoie.\textsuperscript{136} Again, on appeal, a divided 5:4 Alabama Supreme Court affirmed the jury award in a per curiam opinion authored by Justice Embry.\textsuperscript{137} Upon filing a motion for rehearing, it became known that Justice Embry had personally filed two concurrent actions against other insurance carriers also claiming bad faith failure to pay claims and seeking punitive damages.\textsuperscript{138} It is clear from the record that, at the time of the Alabama Supreme Court’s affirmance, the law in Alabama was unsettled with respect to first party bad faith claims.\textsuperscript{139} Prior to the decision affirmed by the Alabama Supreme Court, the cause of action was traditionally not recognized.\textsuperscript{140}

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\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1583.
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\textsuperscript{139} Id. at 1586.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 1583.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1584.
\textsuperscript{144} Id.
B. *The Issues*

1) Did Justice Embry's personal feelings of frustration and hostility directed towards insurance companies require a conclusion that the due process clause was violated by his participation in the case?\textsuperscript{145} The Supreme Court held that only in extreme cases would disqualification be constitutionally required.\textsuperscript{146} The Court further held that the personal feelings of Justice Embry directed towards insurance companies were an insufficient basis for warranting recusal.\textsuperscript{147} The Court emphasized that many claimants are surely frustrated at insurance companies regarding the payment of claims and certainly judges should not be restrained from formulating these same opinions.\textsuperscript{148}

2) Where a judge holds a direct stake in the outcome of a case, does such an interest violate the constitutional provisions of the due process clause?\textsuperscript{149}

The Supreme Court held that where such a direct interest is present, it may violate constitutional provisions.\textsuperscript{150} In citing an earlier Supreme Court case, the Court stressed that under the due process clause no judge "can be a judge in his own case or be permitted to try cases where he has an interest in the outcome."\textsuperscript{151} The Court also emphasized an earlier decision rendered in *Tumey v. Ohio*.\textsuperscript{152} There the Court held that subjecting a litigant to a judge who has a "direct, personal, substantial, pecuniary" interest in the litigation is violative of the fourteenth amendment.\textsuperscript{153} The Supreme Court stated that a general formulation for the test mandating recusal is a situation which would offer a possible temptation to the average judge to lead him not to hold the balance, "nice, clear, true."\textsuperscript{154}

From these guidelines the Supreme Court held that since Justice Embry cast the deciding vote in an area of law that was unsettled in Alabama, he was concurrently creating new law.\textsuperscript{155} The favorable judgment offered by Justice Embry in the per curiam opinion had the immediate effect of enhancing both the legal status and settlement value of his own case.\textsuperscript{156} On resolution of this issue, the United States Supreme Court therefore concluded that: 1) When Justice Embry cast his deciding opinion, he acted as a judge in his own case; 2) Justice Embry's interest was direct, personal, substantial, and pecuniary; and 3) Justice Embry's participation violated the appellant's due process right to a fair trial before an impartial judge.\textsuperscript{157}

3) Whether the decision of the Alabama Supreme Court must be vacated because of the participation of one member, Justice Embry, who had an interest in the outcome of the case?\textsuperscript{158}

The Court held that since Justice Embry's vote was decisive, and he was the author of the court's opinion, the decision must be vacated and the case remanded.\textsuperscript{159}

4) Did the participation of the other Alabama Supreme Court justices, who had marginal interests in the class action brought by Justice Embry, constitute a violation of the due process clause?\textsuperscript{156}

The Court held that such a broad proposition was insufficient as to establishing any constitutional violation.\textsuperscript{160} To hold otherwise would subject every state judge to disqualification for holding any marginal legal interests.\textsuperscript{161}

The majority concluded that due process demands only the outer boundaries of judicial disqualification.\textsuperscript{162} The Court further held that Congress and states are free to impose more rigorous standards for judicial disqualification than those mandated within this case.\textsuperscript{163}

Inquiry now turns to whether Florida law comports with *Aetna*. The following analysis will show that Florida law, in theory, is consistent with the Supreme Court's ruling. However, the analysis will further show that the actual mechanism of judicial disqualification recognized in Florida is in danger of leading to future constitutional

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 1585.

\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

\textsuperscript{152} *Aetna*, 106 S. Ct. at 1585.

\textsuperscript{153} Id. (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1920)).

\textsuperscript{154} *Aetna*, 106 S. Ct. at 1585, 1587 (quoting *Ward v. Village of Monroeville*, 409 U.S., at 60 (1972)).

\textsuperscript{155} *Aetna*, 106 S. Ct. at 1586.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 1586-67.

\textsuperscript{158} Id. at 1586.

\textsuperscript{159} Id. at 1580.

\textsuperscript{160} Id. at 1587.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id. at 1589.

\textsuperscript{164} Id.
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155. Aetna, 106 S. Ct. at 1586.
156. Id.
157. Id. at 1586-87.
158. Id. at 1588.
159. Id. at 1588, 1589.
160. Id. at 1587.
161. Id.
162. Id.
163. Id. at 1589.
164. Id.
violations.

The major thrust behind the Supreme Court's decision clarifying the due process limitations regarding recusal is that a judge may not preside over a case in which he holds a "direct stake" in the outcome. A judge cannot act as a judge in his own case and should recuse himself if he possesses a "direct, personal, substantial, pecuniary interest" in the outcome of the case.

Florida law appears to comport with these constitutional limitations as evidenced in the mechanisms dealing with recusal. Specifically, Canon 3(C)(1)(c) holds that a judge should disqualify himself if he possesses a financial interest in the subject matter or any interest that may be affected by the outcome of the proceeding. The Code of Judicial Conduct is in harmony with the Supreme Court's mandate that a judge should not hold a "direct, personal, substantial, pecuniary interest" in the subject matter and outcome of the case. Florida Rule of Criminal Procedure 3.230, Florida Rule of Civil Procedure 1.432, and Florida Statute section 38.10 allow the litigant on his own initiative to challenge a judge's partiality. In all cases, the alleged facts are taken as true with the challenged judge limited to passing only on the legal sufficiency of the motion.

Florida's guidelines and standards regarding judicial disqualification appear to be in harmony with the Supreme Court's holding.

However, a closer examination of the actual process of implementing these guidelines and standards is necessary.

A further inquiry of Aetna reveals that judicial disqualification in Alabama requires the challenged judge to determine whether recusal is appropriate. Justice Embry refused to disqualify himself despite the language governing his judicial activities. Specifically, in Alabama judicial disqualification is required where a judge possesses an interest in the litigation that could be substantially affected by the outcome of the proceeding. Certainly such language is in harmony with the Supreme Court's holding that a judge must disqualify himself if he holds a "direct, personal, substantial, pecuniary interest" in the outcome of the case. Despite the conforming language found in Alabama law regarding recusal, constitutional violations occurred.

By analogy, Florida law requires the challenged judge to determine whether recusal is warranted. The guidelines enunciated in the code and the test of legal sufficiency are applied by the challenged judge.

The crux of the problem in Aetna centers around allowing the challenged judge to determine if recusal is called for in a particular case. Rather than deal with this problem, the Supreme Court outlined more formalistic rules upon which such challenged judges will have to deal with in the future. The rules in Alabama regarding judicial disqualification certainly comport with the principles mandated by the United States Supreme Court. The constitutional problem arose on the application of these rules by the challenged judge. Since Florida law is in harmony with Alabama law in allowing the challenged judge himself to determine the legal sufficiency of a motion for recusal, it is indeed possible that the controlling rules in Florida may lead to due process questions in the future. Since the constitutional problems regarding recusal lie in the application of the rules, rather than the rules themselves, the question now turns to the possibility of an alternative to the currently recognized procedure of allowing the challenged judge to decide a motion for recusal.

165. Id. at 1585.
166. Id.
167. Id.
168. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1986). See also supra note 9.
169. Aetna, 106 S. Ct. at 1585.
170. Fla. Stat. § 38.10 (1986); Fla. R. CRIM. P. 3.230; Fla. R. CIV. P. 1.432. See supra Section II.
171. CODE OF JUDICIAL CONDUCT (1986); Fla. Stat. § 38.10 (1986); Fla. R. CRIM. P. 3.230; Fla. R. CIV. P. 1.432. See supra sections II and III.
173. Id.
174. ALABAMA CANONS OF JUDICIAL ETHICS Canon 3(C)(1)(d)(ii) (1986). Canon 3(C)(1) provides:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person;

(b) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

176. Id. at 1586-87.
177. CODE OF JUDICIAL CONDUCT (1986); Fla. Stat. § 38.10 (1986); Fla. R. CRIM. P. 3.230; Fla. R. CIV. P. 1.432.
178. CODE OF JUDICIAL CONDUCT (1986); Fla. Stat. § 38.10 (1986); Fla. R. CRIM. P. 3.230; Fla. R. CIV. P. 1.432.
in the litigation that could be substantially affected by the outcome of
the proceeding. A challenge to an otherwise impartial judge who holds
a “direct, personal, substantial, pecuniary interest” in the outcome of
the case is governed by Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580,
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| 176. Id. at 1586-87.
| 177. CODE OF JUDICIAL CONDUCT (1986); FLA. STAT. § 38.10 (1986); FLA. R.
| CRIM. P. 3.230; FLA. R. CIV. P. 1.432.
| 178. CODE OF JUDICIAL CONDUCT (1986); FLA. STAT. § 38.10 (1986); FLA. R.
| CRIM. P. 3.230; FLA. R. CIV. P. 1.432. |
VII. Alternatives — The Peremptory Challenge

Justice Frankfurter stated that, “[J]ustice must satisfy the appearance of justice.”

Current Florida law allowing a challenged judge to determine the legal sufficiency of a motion for recusal falls short of reaching this goal. The preceding section showed that the current status of Florida law regarding recusal is in danger of leading to future constitutional problems. Many states have implemented alternative procedures dealing with the recusal of judges. The purpose of this section is to propose an alternative to the current practice of allowing the challenged judge to determine the sufficiency of a recusal motion.

A. The Peremptory Challenge

The most often suggested alternative is the peremptory challenge. Such an alternative is currently used in several states. Under this system, either party may disqualify a trial judge by filing a peremptory challenge. The filing of this affidavit requires the trial judge to disqualify himself in the same fashion as a peremptory challenge disqualifies a juror. The litigant does not have to assert any specific facts constituting prejudice. The submitted affidavit must state that the litigant possesses a belief that a fair trial is not possible before the presiding judge. The filing of this affidavit is regulated by strict time requirements with each party limited to the use of one peremptory challenge. If the time restriction is met the trial judge must disqualify himself.

Under this system, the judge does not have to determine the “legal sufficiency” of a motion for recusal. Instead, the judge must determine only if the time restriction has been met. The judge is therefore not placed in the dilemma of deciding whether his personal prejudices are violating the litigant’s right to a fair trial.

If a party fails to timely file a peremptory challenge, or faces possible prejudice in an action after assignment of his case to a second judge, the only method in seeking disqualification is through a challenge for cause.

Under such a scenario, the challenge for cause is reviewed by a second judge who must determine the alleged bias with respect to the first judge.

Many objections are raised to the use of such a system. Opponents often argue that the use of the peremptory challenge encourages judge-shopping. The argument is that litigants will use the peremptory challenge as a means of seeking a judge more favorable to their interests. Opponents also argue that the peremptory challenge could be monopolistically used by attorneys against a specific targeted judge.

Another objection is that the peremptory challenge would simply lead to further delay in the trial proceedings. These arguments support Florida’s strong adherence to the current recusal practices. However, each of these arguments are easily countered.

A litigant’s use of a peremptory challenge would not promote judge shopping, for the litigant under this system possesses no choice as


183. Frank, supra note 180, at 65-66.


185. Id.

186. See, e.g., Id. The peremptory challenge must be filed five days before trial if the judge is known ten days before trial; all other circumstances require the motion to be filed upon assignment of the case for trial.


188. See, e.g., Cal. Civ. Proc. Code § 170.6(3). (West Supp. 1986), (the challenged judge is relegated to passing on the timeliness of the motion; he does not determine the “legal sufficiency” of motion as mandated by Florida law).


190. See, e.g., Id. Under this system, when a challenge for cause is alleged, the motion must submit facts alleging prejudice. The challenged judge must within ten days file an answer stating any additional facts. Another judge then determines the sufficiency of the allegations, ordering disqualification if prejudice is shown.

191. See, e.g., Davis v. Board of School Comm’rs, 517 F.2d 1044, 1050 (5th Cir. 1975), where the court stated, “Lawyers once in a controversy with a judge, would have a license under which the judge would serve at their will.”


193. Leland, Benching the Bench, 6 Calif. Law. 16, 16-17 (1986).

194. Note, Meeting the Challenge: Re-thinking Judicial Disqualifications, supra note 192, at 1472.
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If a party fails to timely file a peremptory challenge, or faces possible prejudice in an action after assignment of his case to a second judge, the only method in seeking disqualification is through a challenge for cause. 189 Under such a scenario, the challenge for cause is reviewed by a second judge who must determine the alleged bias with respect to the first judge. 190

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193. Leland, Benching the Bench, 6 Calif. Law. 16, 16-17 (1986).
194. Note, Meeting the Challenge: Re-thinking Judicial Disqualifications, supra note 192, at 1472.
to the newly assigned judge. The litigant, therefore, cannot exclusively control the actual selection process of determining which judge is to hear his case. The argument that specific judges may be targeted by conspiring attorneys and left with little or no judicial work seems to lack merit. The tremendous backlog of cases present today suggests that a disqualified judge would have an abundance of cases waiting to be tried. Further, the argument that the peremptory challenge would cause further delay in the litigation overlooks the fact that the use of the peremptory challenge is subjected to a strict time limitation.

This article has shown the problems inherent in allowing the challenged judge himself to review a motion for recusal. As discussed previously, the peremptory challenge system calls for an alternate judge to review a "challenge for cause." Opponents attack this position as being theoretically sound but difficult in application. They argue that fellow jurists would be extremely reluctant to pass judgment on one of their colleagues.

Certainly such an objection is valid. However, the use of such a system would avoid the inherent problems and possible constitutional violations evidenced in Aetna. The earlier analysis of Aetna showed that the constitutional problems arose when the challenged judge ruled on the motion for disqualification. The proposed adoption of the peremptory challenge system in Florida would reduce the possibility of constitutional violations by allowing a non-challenged member of the court to rule on the motion for disqualification. Most importantly, the adoption of this system would serve to strengthen a litigant's confidence that his right to a fair trial before an impartial judge is adequately protected and ensured. Further, this system would more adequately satisfy Justice Frankfurter's statement, "[J]ustice must satisfy the appearance of justice."

195. See, e.g., CAL. CIV. PRO. CODE § 170.6 (West Supp. 1986).
197. Id.
198. See, e.g., CAL. CIV. PRO. CODE § 170.6(2) (West Supp. 1986). See also Note, Disqualification of Federal District Judges — Problems and Proposals, supra note 196, at 634.
199. See, e.g., CAL. CIV. PRO. CODE § 170.3 (West Supp. 1986).
200. See Note, Disqualification of Federal District Judges — Problems and Proposals, supra note 196, at 637 n.129.
201. Id.
VIII. Conclusion

In surveying Florida law on recusal, this article has exposed the inadequacies of the prevailing rules. The current procedure of allowing the challenged judge to determine the “legal sufficiency” of a motion for recusal often leads to inconsistent results. Such a standard may lead to possible constitutional violations as evidenced in *Aetna.* The writ of prohibition is an uncertain vehicle for protecting a litigant’s right to a fair trial as evidenced in the different standards of review applied by the Florida appellate courts. The adoption of the peremptory challenge system in Florida would lessen the possibility of future constitutional violations. Review of a challenge for cause by an alternate judge would strengthen a litigant’s belief that his right to a fair trial is adequately protected. Further, the adoption of this system in Florida would more adequately protect a litigant’s right to a fair trial before an impartial judge.

*Louis D. D’Agostino*

203. *Aetna*, 106 S. Ct. at 1580.  
The Preservation of Florida's Public Trust Doctrine

I. Introduction

In recent years, the State of Florida found itself "embroiled in what has become the most massive sovereignty lands dispute in [its] history." The dispute emerged in Coastal Petroleum Co. v. American Cyanamid, a consolidation of three cases whose issues have been contested for over a decade. These issues involved legislative and judicial doctrine, including the application of the Marketable Record Title Act and legal estoppel to sovereignty lands contained within deeds of swamp and overflowed lands. These doctrines were applied in ways which effectively challenged ownership of one of Florida's most treasured assets, its waterways.

The following background is necessary to understand the significance of the Florida Supreme Court's decision in Coastal Petroleum. In the 1880's, the Trustees of the Internal Improvement Trust Fund

1. Final Report and Recommendations of the Marketable Record Title Act Study Commission 113 (Feb. 15, 1986).
2. 492 So. 2d 339 (Fla. 1986).
3. Board of Trustees v. Mobil Oil, 455 So. 2d 412 (Fla. 2d Dist. Ct. App. 1984); Coastal Petroleum Co. v. American Cyanamid, 454 So. 2d 6 (Fla. 2d Dist. Ct. App. 1984) (a consolidation of two cases).
5. Sovereignty lands are those lands under navigable waters, including the shore on lands between ordinary high and low water marks, conveyed by law to the state by virtue of its admission "into the Union on equal footing with the original states." State ex rel. Ellis v. Gerbing, 56 Fla. 603, 605, 47 So. 353, 355 (1908).
6. [S]wamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by non-navigable waters, or are subject to such periodical or frequent overflows of water ... (not including lands between high and low water marks of navigable streams or bodies of water, nor land covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters) as to require drainage or levees or embankments to keep out the water and thereby render lands suitable for successful cultivation.

Id. at 607, 47 So. at 357.
7. The Trustees are made up of the Governor and members of his cabinet. F.

https://nsuworks.nova.edu/nlr/vol11/iss1/15
(hereinafter referred to as Trustees), authorized by the Swamp and Overflowed Lands Act of 1850,8 conveyed to plaintiffs' predecessors in title, swamp and overflowed lands.9 Some of these deeds seem to convey sovereignty lands without any reservation of right, title or interest.10 Relying on their paper title, the plaintiffs actively mined the riverbeds within their boundaries.11 In 1946, Coastal Petroleum leased these same riverbeds from the state for mineral, gas, and oil exploration.12 Mobil Oil and American Cyanamid sought to resolve competing claims of riverbed ownership by this quiet title action.13

In this litigation, the State and Coastal Petroleum (its lessee) were in a fight against American Cyanamid and Mobil Oil over the title to tens of thousands of acres of land in west central Florida along the Peace and Alafia Rivers.14 Together, the State and Coastal Petroleum claimed money damages of more than three billion dollars.15 This claim was based on the allegation that the phosphate companies had unlawfully converted phosphate for many years, through their mining operation near and in the Peace and Alafia Rivers and their tributaries.16 The State alleged these phosphate companies mined state-owned sovereignty lands.17 However, the phosphate companies contended they had a right to the lands and minerals based on record title originating from swamp and overflowed lands deeds.18

The Florida Supreme Court resolved these issues in favor of the Trustees and Coastal Petroleum by determining that the Marketable Record Title Act and legal estoppel were inapplicable to sovereignty lands.19 This may have important ramifications with regard to title se-


22. Skively, 152 U.S. at 14; see also Bordwell, 58 Fla. at 407, 50 So. at 829.

23. Skively, 152 U.S. at 14; see also Bordwell, 58 Fla. at 407, 50 So. at 829.

24. Skively, 152 U.S. at 16; see also Bordwell, 58 Fla. at 407, 50 So. at 829.


curity as well as the preservation of Florida's public trust doctrine.\textsuperscript{20}

The purpose of this case comment is to examine the effect of Coastal Petroleum on title security and the public trust doctrine. It will focus on the inevitable problems created, those questions left unresolved, and provide a recommendation identifying the branch of government in the best position to decide those unresolved questions. A brief overview of the relevant legal theories including the public trust doctrine, the Marketable Record Title Act, and estoppel, are necessary to an understanding of this important decision.

II. The Public Trust Doctrine

Under English common law, the crown held title and authority over the beds of tidal waters in trust for the people to use for fishing, navigation, and other rights allowed by law.\textsuperscript{21} The same applied to the English colonies in America.\textsuperscript{22} After the American Revolution, these rights vested in the original thirteen states subject to the United States Constitution.\textsuperscript{23} Sovereignty lands include not only those influenced by the tide, but those nontidal waters which were "navigable in fact."\textsuperscript{24}

Although the United States Supreme Court began to establish federal law on submerged bed ownership in Martin v. Waddel,\textsuperscript{25} the "navigability in fact" standard originated in 1870 in the case of The Daniel Ball.\textsuperscript{26} In the latter case, the issue of navigability was presented to the Court when the owner of a transport steamer refused to purchase a license alleging the Grand River in Michigan was not a navigable body of water. The Supreme Court stated:

\begin{quote}
\end{quote}

\begin{quote}
22. Shively, 152 U.S. at 14; see also Broward, 58 Fla. at 407, 50 So. at 829.
23. Shively, 152 U.S. at 14; see also Broward, 58 Fla. at 407, 50 So. at 829.
24. Shively, 152 U.S. at 16; see also Broward, 58 Fla. at 407, 50 So. at 829.
\end{quote}
Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.\textsuperscript{27}

Another doctrine merges into this analysis, the equal footing doctrine.\textsuperscript{28} In Pollard's Lessee,\textsuperscript{29} the United States Supreme Court held that all states admitted into the Union have the same title to submerged lands below navigable waters as the original thirteen states.

The federal definition of navigability controls which submerged lands passed into state ownership upon statehood.\textsuperscript{30} Once the lands pass to the states, the states are free to enact their own laws regarding those lands.\textsuperscript{31} According to the Supreme Court in Oregon v. Corvallis Sand and Gravel Company,\textsuperscript{32}

Once the equal footing doctrine had vested title to the riverbed in [the state] as of the time of its admission to the Union, the force of that doctrine was spent, [second] it did not operate after that date to determine what effect on title the movement of the water might have.

Control over the property and revenues of the State is vested in that state's legislature.\textsuperscript{33} The legislature may dispose of state property, including navigable waters, in any way which will promote the public interest,\textsuperscript{34} subject to the condition that lands under navigable waters may not be disposed of if the public interest is impaired in the remaining lands and waters.\textsuperscript{35} The United States Supreme Court determined the validity of legislative grants of navigable waters beneath the ordi-

\begin{itemize}
\item \textsuperscript{27} Id. at 558.
\item \textsuperscript{28} Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).
\item \textsuperscript{29} Id. at 230.
\item \textsuperscript{30} E.g., Brewer Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922); United States v. Holt State Bank, 270 U.S. 49 (1926); United States v. Oregon, 295 U.S. 1 (1935).
\item \textsuperscript{31} See Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).
\item \textsuperscript{32} Id. at 371.
\item \textsuperscript{33} Illinois Central R.R. v. Illinois, 146 U.S. 387, 454 (1892).
\item \textsuperscript{34} Id.
\item \textsuperscript{35} See State v. Black River Phosphate Co., 32 Fla. 82, 87, 13 So. 640, 645 (1893); Illinois Central R.R., 146 U.S. at 387.
\end{itemize}
nary high-water mark in *Illinois Central R.R. v. Illinois.* In that case the Court held:

A grant of all the lands under the navigable waters of a State had never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

Therefore, although the state has some control over sovereignty lands, federal law prohibits the state from relinquishing its trust over entire properties in which the people have an interest.

A. *Florida Title*

In Florida, modern titles may be traced to one of four sources. One source is Spanish grants made before January 24, 1818, the commencement of Spanish-United States negotiations. The Treaty of Cession with Spain in 1821 conceded to the United States all Florida lands with the exception of those lands granted prior to January 24, 1818. The second source is the United States grant of lands to private individuals, the Territory of Florida, or State of Florida. The third source of title consists of conveyances to private owners by the State of lands which were granted to the State under various acts of Congress. The fourth source of title is a grant by the state of land under navigable bodies of water which the State owns by virtue of its admission into

36. The ordinary high-water mark, also referred to as the ordinary high-water line (OWHL) “is the boundary between privately-owned riparian uplands and publicly-owned sovereignty lands beneath non-tidal navigable waters.” F. Maloney, S. Plager, R. Ausness & D. Canter, *Florida Water Law* 707 (1980).
38. *Id.*
39. *Id.*
41. *Id.* at 675.
42. Broward v. Mabry, 58 Fla. 398, 409, 50 So. 826, 830 (1909).
44. *Id.* at 675.
the Union. 48 Title is held on equal footing with the original states. 49

Upon Florida's admission into the Union in 1845, all lands under

 navigable waters were granted to the state according to the equal foot-

ing doctrine. 49 However, it was not until 1850 that the swamp and

overflowed lands were granted to Florida by the United States under

the Swamp and Overflowed Lands Act. 50 Under the Act, lands below

 navigable waters were not included in the swamp and overflowed

lands. 51 Title to the swamp and overflowed lands were vested in the

Trustees under state law "for the purpose of assuring a proper applica-

tion of . . . lands and all the funds arising from the sale thereof. . . ." 52

The Trustees had almost limitless authority to convey swamp and over-

flowed lands to private individuals. 53 However, the Act did not author-

ize the Trustees to convey title to lands under navigable water. 54

This leads us to the first issue certified by the Florida Supreme

Court in Coastal Petroleum: "Do the 1883 swamp and overflowed

lands deeds issued by the trustees include sovereignty lands below the

ordinary high-water mark of navigable rivers?" 55 There are two rea-

sons that this should be answered in the negative. First, the supreme
court held that "conveyances of swamp and overflowed lands [did] not

convey sovereignty lands encompassed therein." 56 Under the Swamp

and Overflowed Lands Act, the Trustees only had the authority to con-

vey swamp and overflowed lands. 57 An enduring rule of Anglo-Ameri-

can jurisprudence is embodied in the following: nemo plus juris ad

alium transfere potest quam ipse habet — "No one can transfer more

right to another than he has himself." 58 Since title to sovereignty land

was not vested in the Trustees, they could not convey sovereignty land.

Consequently, any conveyances by the Trustees of sovereignty lands

are ineffective for lack of authority from the state[s]." 59 In addition,

"a grant in derogation of sovereignty must be strictly construed in

favor of the sovereign." 60

Second, there is no presumption that the non-meandering 61 of nav-

igable rivers in official surveys constitutes an official determination

that such lands are swamp and overflowed and their waters non-navigable. 62

The official surveys came about as a result of the Swamp and Over-

flowed Lands Act of 1850. 63 Title to sovereignty lands had already

been vested in the State by virtue of the equal footing doctrine. 64 Since

the United States no longer had title to sovereignty lands, any sub-

sequent official surveys conducted to establish title to swamp and over-

flowed lands could not change their character or even establish that

they had always been swampland. 65

To preserve Florida's public trust doctrine, there should be no pre-

sumption of non-navigability for nonmeandered rivers, lakes, or

streams. Dean Maloney rebutted this presumption:

Curiously, only about 190 of Florida's estimated 30,000 named

lakes were in fact meandered . . . [T]he process of meandering in

Florida was often an extremely difficult one. Shorelines were gener-

ally swampy and infested with dangerous snake and other hazards.

. . . . The Florida Supreme Court has held that meandering on

the original state survey is evidence of navigability, although the

final test is still whether the watercourse is navigable in fact. The

presumption of navigability raised by the fact of meandering can be

rebutted: 'If a meandered arm of the lake is not in fact naviga-

57. Martin, 93 Fla. at 573, 112 So. at 284.
58. Trustees of Internal Improvement Fund v. Caughman, 86 So. 2d 775, 786
(Fla. 1955) (This case has been familiarly cited as Board of Trustees v. Caughman).
59. Meandering is a process whereby the surveyor would walk the shoreline of a

waterbody to establish a line, called a meander line, which followed the sinuosity of

the waterbody. This was done when the surveyor determined that a lake or stream was

navigable. F. Maloney, S. Plager & F. Baldwin, WATER LAW & ADMINISTRATION

(2d ed. 1968).
60. Coastal Petroleum, 492 So. 2d at 349 (Boyd, C.J., dissenting); see also

Oken v. Delfino Corp., 341 So. 2d 977 (Fla. 1977) (majority opinion also written by

Boyd).
61. Martin, 93 Fla. at 571, 112 So. at 284; Pierce, 47 So. 2d at 839.
62. Broward, 58 Fla. at 408, 50 So. at 829; accord Shively v. Bowby, 152 U.S. 1

(1894), and Pollard's Lessee, 64 U.S. (11 How.) 212 (1845).
63. Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935); Martin.
"are ineffectual for lack of authority from the state[s]." In addition, "a grant in derogation of sovereignty must be strictly construed in favor of the sovereign."

Second, there is no presumption that the non-meandering of navigable rivers in official surveys constitutes an official determination that such lands are swamp and overflowed and their waters non-navigable. The official surveys came about as a result of the Swamp and Overflowed Lands Act of 1850. Title to sovereignty lands had already been vested in the State by virtue of the equal footing doctrine. Since the United States no longer had title to sovereignty lands, any subsequent official surveys conducted to establish title to swamp and overflowed lands could not change their character or even establish that they had always been swampland.

To preserve Florida's public trust doctrine, there should be no presumption of non-navigability for nonmeandered rivers, lakes, or streams. Dean Maloney rebutted this presumption:

Curiously, only about 190 of Florida's estimated 30,000 named lakes were in fact meandered. The process of meandering in Florida was often an extremely difficult one. Shorelines were generally swampy and infested with dangerous snake and other hazards.

The Florida Supreme Court has held that meandering on the original state survey is evidence of navigability, although the final test is still whether the watercourse is navigable in fact. The presumption of navigability raised by the fact of meandering can be rebutted: 'if a meandered arm of the lake is not in fact naviga-

57. Martin, 93 Fla. at 572, 112 So. at 285.
58. Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956) (This case has been familiarly cited as Board of Trustees v. Claughton).
59. Meandering is a process whereby the surveyor would walk the shoreline of a waterbody to establish a line, called a meander line, which followed the sinuosities of the waterbody. This was done when the surveyors determined that a lake or stream was navigable. F. Maloney, S. Plager & F. Baldwin, Water Law & Administration — The Florida Experience 40-41 (1968).
60. Coastal Petroleum, 492 So. 2d at 349 (Boyd, C.J., dissenting); see also Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1977) (majority opinion also written by Boyd, J.).
61. Martin, 93 Fla. at 571, 112 So. at 284; Pierce, 47 So. 2d at 858.
62. Broward, 58 Fla. at 408, 50 So. at 829; accord Shively v. Bowby, 152 U.S. 1 (1894), and Pollard's Lessee, 44 U.S. (3 How.) 212 (1845).
63. Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935); Martin, 93 Fla. at 545, 112 So. at 284.
ble for useful public purposes, the public has no right of access to that area.'

Failure of the original surveyors to meander a waterbody simply leaves the determination of navigability to be established by other competent evidence. The Supreme Court of Florida early held that the fact that a stream was not meandered and that lines of survey were projected over the bed of the stream did not determine or change the navigable character of the stream.44

Therefore, the contention that the non-meandering of navigable rivers in official surveys constitutes an official determination of its non-sovereign nature is effectively rebutted. Fortunately, the majority in Coastal Petroleum did not change its position with regard to the meander line and continued to recognize it as a rebuttable presumption to navigability at the time of Florida's entry into the Union under the equal footing doctrine.47

B. The Florida Navigability Issue

The Florida Supreme Court first considered the question of navigability in Bucki v. Cone, a decision pertaining to the Suwanee River. The court considered all rivers in Florida, which may be conveniently used by commercial water craft as navigable, and determined:

[W]hat constitutes a navigable river, free to the public, is a question of fact, to be determined by the natural conditions in each case. A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability . . . [I]t is not essential . . . that the stream should be continuously, at all seasons of the year, in a state suited to such floatage.66

Later, the court in Broward v. Mabry added that the potential

64. F. Maloney, S. Plager & F. Baldwin, supra, note 59, at 40-41 (footnotes omitted, emphasis added).
65. Coastal Petroleum, 492 So. 2d at 349 (Boyd, C.J., dissenting); see also Odom, 341 So. 2d at 977 (majority opinion also written by Boyd, J.).
66. 492 So. 2d at 339.
67. Id. at 342 n.1.
68. 25 Fla. 1, 6 So. 160 (1889).
69. Id. at 2-3, 6 So. at 161-62.
70. Id. at 398, 50 So. at 826.
use for commerce instead of its commercial history would determine navigability. "Whether the lake has been used for commercial purposes or not is immaterial, if it may be made useful for any considerable navigation or commercial intercourse between people of a large area." 71

The inclination of the federal and state courts to concentrate on the potential for commercial use, rather than actual use, widens the idea of navigability and dispenses with the burden of proving that a waterbody was used on the date of statehood for commercial trade. 72 Arguably, a waterbody is navigable if the minimum standard of navigability established in earlier decisions can be demonstrated. 73 Moreover, once a court or a legislature determines that a waterbody is navigable, that waterbody will remain navigable. 74

In Florida, the beds of navigable bodies of water are owned by the state and may be used by the general public. 75 However, if a body of water is not navigable, it can be privately owned, and its use restricted to the private owners and their invitees. 76 The fact that only 190 out of the 30,000 named lakes were meandered demonstrates the magnitude of public loss if navigability were conclusively established by the existence of meander lines. 77 Consequently, the ability to prove navigability and protect the public’s interest is a primary concern.

III. Estoppel

The doctrine of estoppel is not applied against the state of Florida as freely as against an individual. 78 However, it may be applied against the State when needed to prevent an unmistakeable injustice to private parties and with the restriction that its application does not interfere

71. Id. at 412, 50 So. at 831.
72. F. Maloney, S. Plager, R. Ausness & D. Canter, Florida Water Law 700 (1980); accord Odom, 341 So. 2d at 988 (the Florida Supreme Court stated that “Florida’s test for navigability is similar, if not identical, to the federal title test.” Id).
75. See State v Black River Phosphate Co., 32 Fla. 82, 88, 13 So. 640, 646 (1893); see supra text accompanying note 23.
76. Osceola County v. Triple-E Dev. Co., 90 So. 2d 600 (Fla. 1956).
77. F. Maloney, S. Plager & F. Baldwin, Water Law & Administration — The Florida Experience 40-41 (1968) (rebutable presumption that non-meandering of navigable bodies of water constitutes an official determination of its non-sovereign nature).
78. Board of Trustees v. Clauthen, 86 So. 2d 775, 789-90 (Fla. 1956).
with the exercise of governmental power.\textsuperscript{79}

Legal estoppel applies where the grantor acquires an estate or land already conveyed in a deed, which he did not own at the time of the conveyance.\textsuperscript{80} At that point, the subsequently obtained estate or land passes to the grantee by estoppel.\textsuperscript{81} The intent of the parties as expressed in the deed determines whether legal estoppel may be applied.\textsuperscript{82}

The distinction becomes clear upon reviewing \textit{Coastal Petroleum},\textsuperscript{83} where the deeds made pursuant to the Swamp and Overflowed Lands Act\textsuperscript{84} were in issue. These deeds did not convey more than swamp and overflowed lands.\textsuperscript{85} Since the intent of all parties involved at the time of the conveyance was expressed in the deeds, legal estoppel was inapplicable.

In contrast, equitable estoppel may deny the legal effect of the deed.\textsuperscript{86} It is the conduct of the parties which determines the applicability of the doctrine, not their expressed intent.\textsuperscript{87} The Florida Supreme Court has said:

\begin{quote}
An equitable estoppel, as affecting land titles, is a doctrine by which a party is prevented from setting up his legal title because he has through his act, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.\textsuperscript{88}
\end{quote}

Again, the Trustees were not estopped. With the conveyance of swamp and overflowed lands, the grantee takes with notice that sovereignty lands are not included in law.\textsuperscript{89} The Trustees had no authority to convey sovereignty lands.\textsuperscript{90} In the case of \textit{Coastal Petroleum},\textsuperscript{91} the eq-

\begin{flushright}
79. \textit{Claughton}, 86 So. 2d at 775; Trustees of Internal Improvement Fund v. Loebean, 127 So. 2d 98, 102 (Fla. 1961) (This case has been familiarly cited as Board of Trustees v. Loebean).
80. Loebean, 127 So. 2d at 102.
81. \textit{Id.}
82. \textit{Id.}
83. 492 So. 2d at 339.
85. \textit{Coastal Petroleum}, 492 So. 2d at 339.
86. Loebean, 127 So. 2d at 102.
87. \textit{Id.}
88. \textit{Id.} (quoting Florida Land Inv. Co. v. Williams, 98 Fla. 1258, 116 So. 642, 643 (1928)).
89. \textit{Martin}, 93 Fla. at 569, 112 So. at 285.
90. \textit{Gerbing}, 56 Fla. at 607, 47 So. at 357.
91. 492 So. 2d at 339.
\end{flushright}
utilities were balanced in favor of the Trustees. Not only did all grantees take with notice that sovereignty lands were not included in conveyances of swamp and overflowed lands,92 but the Peace and Alafia Rivers (the two bodies of water in issue) are obviously "navigable in fact."93 Therefore, for the court to conclude that legal title was vested in the Trustees would hardly be "contrary to equity and good conscience."94

The supreme court in Coastal Petroleum determined that the issue as to whether "the doctrine of legal estoppel or estoppel by deed applies to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands" had already been addressed in Martin v. Busch.95 The court held that conveyances of swamp and overflowed lands "without exemption of sovereignty lands do not legally estop the state from asserting title to sovereignty lands . . . ."96 Sovereignty lands must be conveyed with "clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters."97 The court relied upon the following language:

The State Trustee defendants cannot, by allegation, averment or admission in pleadings or otherwise affect the legal status of or the State's title to sovereignty, swamp and overflowed or other lands held by the Trustees under different statutes for distinct and definite purposes. . . . The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or intend to convey sovereignty lands.98

92. Martin, 93 Fla. at 569, 112 So. at 285.
93. Even though those rivers were not meandered, they have been used for commercial purposes in the latter part of the nineteenth century. A. Blakeley, The Florida Phosphate Industry: A History of the Development and Use of a Vital Mineral 18, 39-42 (1973).
94. Lobeau, 127 So. 2d at 102 (quoting Florida Land Inv. Co. v. Williams, 98 Fla. 1258, 116 So. 642, 643 (1928)).
95. Coastal Petroleum, 492 So. 2d at 343; see Martin, 93 Fla. at 569-73, 112 So. at 285-87.
96. Coastal Petroleum, 492 So. 2d at 344.
97. Id. at 343.
98. Martin, 93 Fla. at 573, 112 So. at 286-87.
It is clear that neither legal nor equitable estoppel are suitable to claims for use in connection with sovereignty lands.

IV. The Marketable Record Title Act

The final issue considered in Coastal Petroleum was whether "the Marketable Record Title Act operate[d] to divest the Trustees of title to sovereignty lands below the ordinary highwater mark of navigable rivers?" 99 The Marketable Record Title Act (hereinafter referred to as MRTA) was enacted to "simplify and facilitate land title transactions by allowing persons to rely on a record title." 100 Anyone with legal capacity to own real property may hold a marketable record title to an estate in land if that person, or his/her predecessors in title, has been vested with the estate through a recorded title transaction 101 for at least 30 years. 102 The estate claimed must be the estate actually created. 103 Any estate or interest, with certain expressed exceptions 104 is proclaimed "null and void" 105 if it predates the root of title. 106 Save for one of the expressed exceptions, any claim following the root of title is also cleared. 107

MRTA, held constitutional in City of Miami v. St. Joe Paper Co., 108 performs several functions, including that of a curative act, statute of limitations, and recording act. 109 MRTA performs as a curative act because it may relate back to past defective conveyances which would otherwise be invalid and makes them complete. 110

Since MRTA will abolish old claims unless asserted within a certain period of time, it resembles a statute of limitations. 111 However, MRTA operates against all interests whether vested or contingent, present or future. 112 The usual statute of limitations only bars vested, present interests. 113

Finally, because MRTA requires periodic rerecording of claims for their preservation, it is similar to a recording law. 114 An owner may only preserve an existing old interest by rerecording. 115

The judicial application of MRTA to extinguish state claims to sovereignty lands 116 prompted the legislature to create another exception. That exception states: "Such marketable record title shall not affect or extinguish the... (state title to lands beneath navigable waters acquired by virtue of sovereignty.") 117

The majority in Coastal Petroleum concluded that "MRTA, as originally enacted and subsequently amended in 1978, is not applicable to sovereignty lands." 118 After considering the issue as "two prong[ed]," 119 the court first determined that the legislature did not intend to "overturn the well-established law that prior conveyances to private interests did not convey sovereignty lands encompassed with swamp and overflowed lands being conveyed" unless that intent expressly appeared in the deed. 120 Since the court decided that the legislature did not intend to make sovereignty lands subject to MRTA, the second prong of the issue was not addressed. 121 That prong pertained to the constitutionality of making "an ex post facto divestment of sover-
Public Trust Doctrine

act because it may relate back to past defective conveyances which would otherwise be invalid and makes them complete.\textsuperscript{110}

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Finally, because MRTA requires periodic rerecording of claims for their preservation, it is similar to a recording law.\textsuperscript{114} An owner may easily preserve an existing old interest by rerecording.\textsuperscript{115}

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App. 1973), cert. denied, 297 So. 2d 56 (Fla. 1974).

110. St. Joe Paper Co., 364 So. 2d at 442.
111. Id.
112. Id. at 443.
113. Id.
114. St. Joe Paper Co., 364 So. 2d at 442.
115. Id.

116. The possibility first became apparent in Sawyer v. Modrall, 286 So. 2d 610 (Fla. 4th Dist. Ct. App. 1973), cert. denied, 297 So. 2d 56 (Fla. 1974), and was later endorsed by the Florida Supreme Court in Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1977).
118. Coastal Petroleum, 492 So. 2d at 344.
119. Id.
120. Id.
121. Id.
eighty lands without explicitly basing it on the public interest.\textsuperscript{128} Therefore, since no ex post facto divestment of rights was made, there was no taking.

V. Case Analysis

In the 1880's, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida conveyed certain lands as swamp and overflowed lands to the plaintiffs' predecessors in title.\textsuperscript{129} Within the physical boundaries of the land conveyed were areas of a riverbed.\textsuperscript{130} In the original deeds, the Trustees did not reserve any right, title or interest.\textsuperscript{131} Title to sovereignty lands did not vest in the Trustees until 1969, by force of the state legislature, and then the Trustees received only limited authority to convey them.\textsuperscript{132} In Coastal Petroleum, the plaintiffs sought to quiet title to these lands.\textsuperscript{133} The competing interests of the Trustees and Coastal Petroleum Co. (the lessee from the Trustees) on one side, and Mobil Oil and American Cyanamid Co. (the successors to the 1880's grantees) on the other, over the title to tens of thousands of acres of land,\textsuperscript{134} gave rise to the following three issues:

I. Do the 1883 swamp and overflowed lands deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?

II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?

III. Does the Marketable Record Title Act, chapter 712, Florida Statutes, operate to divest the trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?\textsuperscript{135}

\begin{thebibliography}{99}
\bibitem{122} ld.
\bibitem{123} Id. at 341. See also Board of Trustees v. Mobil Oil, 455 So. 2d 412 (Fla. 2d Dist. Ct. App. 1984), and Coastal Petroleum Co. v. American Cyanamid, 454 So. 2d 6 (Fla. 2d Dist. Ct. App. 1984).
\bibitem{124} Coastal Petroleum, 492 So. 2d at 341.
\bibitem{125} Id.
\bibitem{127} Coastal Petroleum, 492 So. 2d at 341.
\bibitem{128} Final Report and Recommendations of the Marketable Record Title Act Study Commission 113 (Feb. 15, 1986).
\bibitem{129} Coastal Petroleum, 492 So. 2d at 341.
\bibitem{130} ld. at 342-45.
\bibitem{131} ld. at 344-45. Although not explicitly stated, on remand the court will need to determine whether the Peace and Alafia Rivers were navigable-in-fact. This should not be difficult since there is evidence that both rivers were used for commercial navigation by the phosphate industry in the nineteenth century. See A. Blakeley, The Florida Phosphate Industry: A History of the Development and Use of a Vital Mineral, 18, 39-42 (1973).
\bibitem{132} 341 So. 2d 977 (Fla. 1977).
\bibitem{133} 399 So. 2d 1374 (Fla. 1981).
\bibitem{135} 492 So. 2d 339 (Fla. 1986).
\bibitem{136} 33 Fla. 535, 112 So. 274 (1927).
\bibitem{137} 58 Fla. 298, 50 So. 826 (1909).
\bibitem{138} 56 Fla. 603, 47 So. 353 (1908).
\bibitem{139} 341 So. 2d at 977.
\bibitem{140} Coastal Petroleum, 492 So. 2d at 344.
\bibitem{141} Id.
\bibitem{142} Final Report and Recommendations of the Marketable Record Title Act Study Commission 145 (Feb. 15, 1986).
\end{thebibliography}
The Florida Supreme Court answered all three questions in the negative. 130 In so doing, the supreme court reversed the Second District Court of Appeal and remanded the case. 131 This decision was significant for two reasons. First, it reversed the apparent direction of the law. After Odom v. Deltona Corp. 132 and Graham v. Estuary Property, Inc., 133 the Florida courts appeared to treat state proprietary interests the same as individual state property rights. 134 Not only was the individual private property owner subject to the doctrine of legal estoppel and the Marketable Record Title Act, but so was the state. Coastal Petroleum 135 changed that.

Instead of treating Odom as reflective of a trend, which the present court would change, this court relied on legislative interpretation as well as on Martin v. Busch, 136 Broward v. Mabry, 137 and State ex rel. Ellis v. Gerbing 138 as precedent. Odom 139 was factually distinguished since "no navigable waterbeds [were] at issue." 140 All discussions relating to MRTA in Odom were rendered dicta and this court determined that the applicability of MRTA to sovereignty lands was a case of first impression. 141

The decision was equally important with regard to the serious implications it had upon title security, since over two thirds of Florida's land may be subject to disputes as a result of deeds containing sovereignty lands. 142 This could result in thousands of lawsuits which may

130. Id. at 342-45.
131. Id. at 344-45. Although not explicitly stated, on remand the court will need to determine whether the Peace and Alafia Rivers were navigable-in-fact. This should not be difficult since there is evidence that both rivers were used for commercial navigation by the phosphate industry in the nineteenth century. See A. Blakeley, The Florida Phosphate Industry: A History of the Development and Use of a Vital Mineral, 18, 39-42 (1973).
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140. Coastal Petroleum, 492 So. 2d at 344.
141. Id.
142. Final Report and Recommendations of the Marketable Record Title Act Study Commission 145 (Feb. 15, 1986).
cost the taxpayers hundreds of millions of dollars. Based on this case, the state can reclaim sovereignty land which it had allegedly conveyed over one hundred years ago. Since the state had not claimed title subsequent to the conveyance, this might prejudice the grantee who has detrimentally relied on that silence without just compensation. Where a river or stream is obviously navigable at the time of statehood, as in Coastal Petroleum, so as to give notice to its sovereign nature, the grantee would not be innocent in relying on the state's silence. The court leaves for later resolution issues pertaining to lakes, rivers or streams not obviously navigable and where the grantee did rely on the state's silence to his detriment.

One way to equitably solve a problem such as that would be to distinguish Coastal Petroleum, where the waterbody was obviously navigable, from the case where the waterbody was not obviously navigable. The court could then give the grantee legal title and reserve those property interests inherent to the public trust in sovereignty lands. By reserving the public's interest in those lands, the public trust doctrine would be preserved, and the taking issue would be foreclosed since the grantee would retain legal title.

Where title remains in the state in trust for the public as in Coastal Petroleum, the state's ability to preserve all public interests in those lands is assured. Due to the tremendous number of potentially navigable waterbodies, the state would be unable to secure the public's interest through the police power alone. If fee simple absolute ownership of sovereignty lands were vested in private individuals, clearly those owners would possess a bundle of property rights. These include the right to build, the right to mine, and the right to exclude others. At some point, regulation may reduce private rights so as to constitute a taking. As examples, the refusal of the right to mine privately owned submerged land, denial of the application to fill the privately owned bottom lands of navigable rivers, as well as governmental mandates to guarantee public access all involve a public taking.

Another method which could be used to equitably solve a problem where property owners relied on their paper title to develop their property was used by the California Supreme Court in City of Berkeley v. Superior Court. That court held: "[T]he interests of the public are paramount in property that is still physically adaptable for public trust uses, whereas the interest of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes."

The grantees in Coastal Petroleum face monetary losses "in excess of three billion dollars" for making proprietary uses of the sovereignty lands by past mining operations. If the court in Coastal Petroleum applied the principles utilized by the California Supreme Court, Coastal Petroleum's result could have been less extreme. As it stands, Mobil Oil and American Cyanamid could lose money earned as well as taxes paid beyond the running of the statute of limitations. The court did not address this possibility, although it most likely considered it, as evidenced by the dissent's discussion. Several inferences may be drawn. One plausible inference is that since the Peace and Alafia Rivers are obviously navigable, the grantees had notice that the riverbeds were sovereignty lands. Because the Trustees did not have title to sovereignty lands at the time of the conveyance, clearly they could not have conveyed any title or interest. Mobil Oil and American Cyanamid...
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152. Mahon, 260 U.S. at 415.
153. Id. at 414.
154. Zabel, 171 So. 2d at 376.
156. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).
157. Id. at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.
158. Final Report and Recommendations of the Marketable Record Title Act Study Commission 113 (Feb. 15, 1986).
159. See supra text accompanying note 151. The court does not hint at how these issues could be resolved.
160. This will need to be proven on remand.
chose to gamble on the outcome of prospective litigation and opted to keep all proceeds from their mining activities. An unfavorable court judgment would not be inequitable since the grantees chose to take that risk. On the other hand, the court could decide to let all parties involved start anew, minimizing everyone’s loss.161

Justice Boyd, dissenting, addressed the unlitigated practical concerns facing the parties.

Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money. If the Board of Trustees is able on remand to succeed in showing the rivers in question to have been in fact navigable in 1845, then the [Trustees] . . . leases to Coastal Petroleum may be held valid. Contrary to suggestions of ecological concern, there is no showing that if the board [i.e., Trustees] prevails, mining will cease.162

One might wonder why Coastal Petroleum spent a decade as well as so much money fighting this case if it did not think it would be able to mine the riverbeds. One potential reason is the underlying conversion issue.163 If the Peace and Alafia Rivers were found navigable and Coastal’s lease valid, all money previously earned from Mobil Oil and American Cyanamid’s mining operations would be owed to Coastal Petroleum and the state would garner the royalties.164 Fortunately for the public, Coastal’s lease was modified in approximately 1976 to temporarily prevent the mining of the riverbeds.165 However, that does not foreclose future mining of the riverbeds if large deposits are found along the banks.166 If the riverbeds are mined, the public trust may be in jeopardy because phosphate mining effectively precludes public

161. If Coastal Petroleum’s main interest in this litigation is the underlying conversion issue where Coastal wants the money from past mining operations, then starting with a clean slate would not be beneficial to Coastal. This is especially true considering their lease was modified in approximately 1976 to prohibit mining of the riverbeds. Telephone interview with Kevin Crowley, General Counsel, Department of Natural Resources (Aug. 1, 1986).

162. Coastal Petroleum, 492 So. 2d at 349 (Boyd, C.J., dissenting).

163. Telephone interview with Kevin Crowley, General Counsel, Department of Natural Resources (Aug. 1, 1986).

164. Id.

165. Id.

166. Id.

swimming, fishing, boating or environmental protection.167 Hopefully, state administrative agencies such as the Department of Natural Resources would be able to prevent the mining of the riverbeds. However, if those administrative agencies are unsuccessful, is there recourse for the public trust?

At common law, the public trust doctrine imposes three types of restrictions on the government’s use of sovereignty lands: (1) the sovereignty lands must be useable by the general public for a public purpose; (2) the sale is prohibited; and (3) the property must be upheld for either traditional uses — i.e., navigation, recreation, or fishing — or used in a way that is natural to that property.168

As the following case illustrates, private citizens can look to the judiciary for protection by bringing an action against administrative agencies as beneficiaries of the public trust.169 In Gould v. Greylock Reservation Commission,170 the Greylock Reservation Commission and the Tramway Authority were to lease 4,000 acres of a reservation to a corporation which was to build and manage a ski development in exchange for forty percent of the profits. A statute enacted by the legislature that year had authorized the Commission to lease to the Authority “any portion of the Mount Greylock reservation.”171 The court responded:

The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and the Authority’s borrowed funds for what seems, in part at least, a commercial venture for private profit.172

167. Phosphate mining has been associated with radon which accounts for 5,000-30,000 deaths per year from lung cancer in this country. Radon, a by-product of uranium decomposition, is a naturally produced, invisible gas, found in small quantities in soil and rock, but in large quantities in phosphate, granite, and shale. Radon has been detected in the phosphate mining areas of Florida. Galen, Lawyers Grapple with Radon Issue, Nat’l L.J., July 21, 1986, at 1.


169. Id. at 493.


171. Id. at 415, 215 N.E.2d at 119.

172. Id. at 426, 215 N.E.2d at 126.
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  \item \textsuperscript{169} \textit{Id.} at 493.
  \item \textsuperscript{170} 350 Mass. 410, 215 N.E.2d 114 (1966).
  \item \textsuperscript{171} \textit{Id.} at 415, 215 N.E.2d at 119.
  \item \textsuperscript{172} \textit{Id.} at 426, 215 N.E.2d at 126.
\end{itemize}
Thus, the court created the presumption that the state would not intend to use trust properties in such a way as to lessen public uses.\textsuperscript{173} Gould illustrates how questionable projects may receive endorsement of legislative and administrative agencies.\textsuperscript{174} More importantly, that decision underscores the court’s role in preserving the public trust and affording a successful means of dealing with that type of litigation.\textsuperscript{175} In Massachusetts, courts relying on Gould have forced agencies to carry the burden of procuring open approval of proposed uses which encroach on the public trust.\textsuperscript{176}

The judiciary has a responsibility to review the legislative action both for its conformance to the sphere of regulatory power and for its harmony with the state’s particular duty to maintain the public trust.\textsuperscript{177} The role of the courts is therefore defined. In satisfying their role, courts may require that records be made and data collected to satisfy the court that all important interests were sufficiently considered.\textsuperscript{178} Alternatively, a court may require an open and express legislative decision so the proposal will come before an informed public.\textsuperscript{179} As a third alternative, a court may find that public benefits are inherently unclear in the project and will not advance the project unless it is demonstrated that the project is actually pressing or pleasing to the public’s interest.\textsuperscript{180}

\footnotesize{\textsuperscript{174} Id. at 496.}
\footnotesize{\textsuperscript{175} Id.}
\footnotesize{\textsuperscript{177} Sax, supra note 173, at 511.}
\footnotesize{\textsuperscript{178} Id. at 514.}
\footnotesize{\textsuperscript{179} Id.}
\footnotesize{\textsuperscript{180} \[\text{[The] Wisconsin Supreme Court adopted the last of these approaches. Its opinions...}
\textsuperscript{180} \] can be taken as a form of notice to the legislature and the agencies that when the public interest of a project is unclear, its proponents will have the burden of justifying the project and will not be allowed to rely on traditional presumptions of legislative propriety or administrative discretion. In adopting this position, the court does not seek a confrontation with the legislature nor does it attempt to substitute itself as an ultimate judge of the public good. Rather, it tries to identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers so that there is a grave danger that the democratic processes are not working effectively.\textsuperscript{181}}

In Florida, the Trustees are limited by statute in selling sovereignty lands.\textsuperscript{182} They can sell sovereignty lands only if the conveyance is determined by the board [i.e., Trustees] to be in the public interest, upon such prices, terms, and conditions as it sees fit. However, prior to consummating any such sale, the board shall determine to what extent . . . ownership by private persons . . . would interfere with the preservation of fish, marine and other wildlife, or other natural resources . . . and if so, in what respect and to what extent, and it shall consider any other factors affecting the public interests.\textsuperscript{183}

Therefore, if the Trustees are required by statute to protect the public trust when selling sovereignty lands, the courts could infer the same legislative intent in dealing with leases of sovereignty lands. If Coastal Petroleum were given the approval to mine the riverbeds, private citizens could successfully seek judicial aid.

Although the court’s decision in Coastal Petroleum\textsuperscript{184} to make the Marketable Record Title Act and legal estoppel inapplicable to sovereignty lands may create serious problems for those who have relied on their detriment on their paper titles, those problems may be resolved in future court decisions. On the other hand, if the court had applied MRTA and legal estoppel to sovereignty lands, the public trust doctrine in Florida would have been effectively destroyed. The preservation of our public trust doctrine is important to the people of Florida. Even though the possibility exists that Coastal Petroleum will mine the riverbeds, thereby invading the public trust, private citizens have legal recourse available to protect their interests.

\textbf{VII. Conclusion:}

The navigability of a body of water determines the public ownership of submerged lands under it.\textsuperscript{185} The public trust doctrine applies once a waterbody is found navigable through the selected navigability.
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\item \textit{Id.}\textsuperscript{181} \textsc{Fla. Stat.} § 253.12(2) (1975) (effective 1969).
\item \textit{Id.}\textsuperscript{182} \textsc{Id.}
\item 492 So. 2d 339 (Fla. 1986).
\item \textsc{F. Maloney, S. Plager, R. Ausness & D. Canter, Florida Water Law} 676 (1980).
\end{itemize}
test. In essence, the public trust doctrine establishes the rights and responsibilities associated with public ownership of lands under navigable bodies of water. Lands under navigable waters are not capable of being cultivated or improved in the same way as lands above the ordinary high-water mark, because they are of great public importance for commerce, navigation, fishing, and recreation. When private individuals are allowed to improve submerged lands, it is incidental or secondary to the public use and right. For that reason, title of submerged lands is vested in the sovereign for the benefit of everyone. The importance for the state to have dominion and control over navigable waters is first demonstrated by the necessity of title to these lands to pass to the states by virtue of its admission to the Union as a constitutional right. Secondly, the legislature has no power to strip the state of its sovereignty so that jurisdiction over navigable waters is impaired.

Since the majority of Florida’s waterbodies were unmeandered, ownership of those submerged lands could be the subject of litigation if it has not already been judicially determined. There are currently approximately one dozen quiet title or conversion cases pending which are similar to Coastal Petroleum. If the Florida Supreme Court in Coastal Petroleum had applied the Marketable Record Title Act or legal estoppel to sovereignty lands, the public trust doctrine would have been limited to the 190 meandered lands and not to the remaining 29,810. The people would have lost all rights to swim, fish, boat, or use the majority of Florida’s waterways. In light of the fact that approximately 38 million people visit Florida each year and approximately 530,000 pleasure boats and 29,000 commercial vessels are usually registered, the public’s ability to use Florida’s natural resources presents a substantial economic opportunity for the state. Where tourism is important to the economy, so is recreation. Therefore, the destruction of the public trust doctrine would seriously impede Florida’s economic future, not to mention the personal effect it would have on its citizens.

Even though the decision not to apply the Marketable Record Title Act or legal estoppel to sovereignty lands will have a negative impact on a great number of people, on an individual level as well as on the phosphate mining industry, the interests of the people as a whole are protected. Moreover, any problems which may arise from this decision may be resolved through the judiciary. There is an equitable resolution to the problem where property owners relied on their paper title to develop their property. If the lake, river, or stream was not obviously navigable, the court could distinguish that fact from Coastal Petroleum where the waterbody was obviously navigable, and give the grantee legal title reserving those property interests inherent to the public trust in sovereignty lands. Thus, while this court’s decision does not foreclose equitable solutions where a grantee has relied to his detriment, it does preserve a substantial state asset — Florida’s public trust doctrine.

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185. Id. at 677.
186. Id.
188. Id.
189. Id.
193. Telephone interview with Kevin Crowley, General Counsel, Department of Natural Resources (Aug. 1, 1986).
194. 492 So. 2d 339 (Fla. 1986).
195. See supra text accompanying note 129.
196. See supra text accompanying note 95.
197. F. Maloney, S. Plager, R. Aunness & D. Canter, supra note 192.
201. See supra text accompanying notes 145, 156-57, 169-82.
202. 492 So. 2d 339 (Fla. 1986).
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Reviewed by Johnny C. Burris²

The Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.³

Three questions came to mind while reading this book which professes to offer a critical history of the United States Constitution as interpreted by the Supreme Court. Why was this book written now? Is the methodology used and are the conclusions reached in the book intellectually sound? Should this book be considered part of legal history scholarship?

I. Why was this book written now?

There has been a revival of interest in legal history recently in legal academician circles. The revival has occurred in both public and private law fields,⁴ and is somewhat surprising. It has been noted on many occasions that legal history at least in the law school milieu was considered outside the mainstream of scholarship⁵ and teaching.⁶ Some

1. Harry N. Wyatt Professor of Law, University of Chicago Law School.
2. Assistant Professor of Law, Nova University Center for the Study of Law.
4. A special mini-workshop on the role of legal history in the basic law school curriculum was held at the Association of American Law Schools annual convention in 1986. It was attended by over two hundred law professors and other academicians from related fields of study. See also Friedman, American Legal History: Past and Present, 34 J. Legal Educ. 563 (1984); American Law and the Constitutional Order Historical Perspectives vii-ix (L.M. Friedman and H.N. Schreiber ed. 1978) (commenting on the increased interest in legal history); Essays in Nineteenth-Century American Legal History xiii (Holt, ed. 1976) (commenting on perceived renewed interest in American legal history).
6. See Woodward, History, Legal History and Legal Education, 53 Va. L. Rev. 89-95 (1967); Swindler, Legal History — Unhappy Hybrid, 55 Law Libr. J. 98, 103-
have gone even further and questioned its relevancy to legal education and scholarship and lamented that legal history was ever recognized as a discrete area of intellectual inquiry.

What is the genesis of this renewed interest? Two explanations come to mind, both of which in part provide a plausible explanation for why this book was written. First, we are entering an era of bicentennial celebrations of significant early moments in the development of our Constitution. The first will commemorate in 1987 the drafting of the Constitution in Philadelphia during the summer of 1787. Celebrations commemorating the bicentennials of the ratification of the Constitution, and the meeting of the first Congress of the new government, the

10 (1962); J. GAY, THE NATURE AND SOURCES OF THE LAW 151 (2d ed. 1921). Cf. Dower, Some Thoughts on Legal History, 3 U. W. A USTR. Ann. L. Rev. 13 (1954) (Refutation of criticism of the inclusion of legal history as a part of the basic law school curriculum in Australia); Dower, Legal History - Is It Human?, 4 Mea. U. L. Rev. 1 (1966) ("Perhaps one need not be a legal historian to appreciate the legal history of a nation... it is called upon to justify itself more frequently than any other aspect of modern legal scholarship.


12. The first Congress met on March 4, 1789, but a quorum was not present until either the House or the Senate. ENCYCLOPEDIA OF AMERICAN HISTORY 145 (R. Morris and J. Morris 5th ed. 1976).
drafting of the Bill of Rights, ratification of the Bill of Rights and Marbury v. Madison will follow. It is unlikely these 200th anniversaries will cause the type of gala, emotional, self-congratulatory celebrations we have witnessed recently for the bicentennial of the Declaration of Independence in 1976 and the centennial of the Statue of Liberty just this past summer. It will not be for a lack of effort in attempting to generate such a celebration. It is more a function of lack of commercial interest in exploiting these milestones. Yet this is not to say that there will be no commemorations. There will be local and national educational programs, sponsorship of additional scholarly research and discussions, and appropriate local commemorative activities. These types of activities in many ways are more appealing because they may cause ordinary citizens to devote some serious thought to our Constit-


13. The Bill of Rights was officially ratified as part of the Constitution on December 15, 1791. See id. at 1171-1203 (collection of materials concerning ratification of the Bill of Rights by the States).

14. 5 U.S. (1 Cranch) 137 (1803). The opinion was delivered by Chief Justice Marshall on February 24, 1803.


Similar Commissions were created in the past to memorialize important constitutional anniversaries. These Commissions met with varying degrees of success. See, e.g., U.S. Constitution Sesquicentennial Comm'n, History of the Formation of the Union under the Constitution vii, 3, 583-860 (1940).

16. See, e.g., Comm'n On The Bicentennial Of The U.S. Const., 2 We The People no. 2 (May 1986).

17. See, e.g., Nat'L Endowment For The Humanities, Initiative For The Bicentennial Of The U.S. Constitution.

tion and the governmental institutions it has generated. The heightening of this type of awareness by ordinary citizens, not just lawyers or historians, will do more than any commercial extravaganza to strengthen our society and its institutions by encouraging individuals to become active citizens. For academicians these bicentennial moments offer the combined succor of some heightened public interest in constitutional history scholarship (i.e., a large audience of readers) and some possibility of additional financial support for historically focused research efforts.

Second, the critical legal studies movement has brought about a renewed interest in legal history. One hesitates to offer any general statement of what CLS is, for it encompasses such a wide variety of perspectives and approaches to the law. I offer the following only as my own general understanding of what CLS means based upon an admittedly less than comprehensive survey of CLS literature. First, CLS views law and the legal process as central to defining the boundaries of legitimate conversation about social policy. The law plays a critical role in limiting policy alternatives a decision maker views as available in responding to societal needs. Second, the central role of law in American society has brought to offer rationales for why the irreconcilable contradictions between claims of individual freedom and interdependence inherent in the nature of relations between persons are reconcilable. What is needed is for this false sense of rational ordering to be exposed. We must face the reality that the demands for individual autonomy and freedom are irreconcilable with the necessity of functional interdependence of individuals to effectively pursue the general welfare so there will be more social goods including autonomy and freedom available for distribution. What to date has not been taken seriously enough by traditional legal commentators is how the functional interdependence of individuals which is perceived as necessary for the existence of freedom and autonomy also inherently limits such freedom and autonomy. Third, law and the legal process are concerned with decisions which are of an inherently indeterminate nature. As such, law and the legal process are seen as merely a particular and very important mode of political decisionmaking designed primarily to support the normative choices of the status quo. Fourth, many legitimate normative choices and policy alternatives are either excluded from consideration or their importance is vastly underplayed. This is especially true with regard to policy alternatives reflecting egalitarian and democratic ideals or values which are generally considered necessary for a more just society.

19. See Ackerman, The Storts Lectures: Discovering the Constitution, 93 YALE L. J. 1013, 1032-43 (1984); ACKERMAN, RECONSTRUCTING AMERICAN LAW 21-45 (1982); W. HOLDENWORTH, supra note 6, at 4 (2028) (“The study of our legal history is important to all citizens... first because it teaches them something of the mechanism of government; which they have a right and duty to maintain in working order; and secondly because some knowledge of the outline of the age-long struggle of law against manifold forms of wrong-doing... helps to create respect for the law and that law-abiding instinct, which are conditions precedent for the maintenance and improvement of the standards of a nation’s life.”). In light of the failure of its commercialization efforts some members of the Commission have adopted citizen education about the Constitution as a primary goal. Senator Edward Kennedy, a commission member, recently commented during the Commission’s first celebration, an event which was linked to the 15th anniversary of Walt Disney World in Florida, “[t]he idea of getting everyone in the country to read the Constitution would be useful and advisable. It is really a sacred document. We have to ensure that proper reverence is paid to the Constitution and that the Bicentennial Commission does not lessen or cheapen its importance with commercialization.” Sun-Sentinel, (Hollywood, Fla.), October 5, 1986, A 4, at 18, col. 1. See also Burger, Marking the Bicentennial of the United States Constitution, 15 STETSON HALL L. REV. 462, 464 (1986).

20. See supra note 17.

21. Hereafter referred to as CLS.


23. See, e.g., Kennedy, supra note 23, at 213-18, 379-82. See also R. Nozick, Anarchy, State, and Utopia 10-87 (1974) (discussing the rise of the minimalist state as a necessary intrusions on individual freedom and autonomy in the state of nature). This conflict between the collective will expressed through democratic processes and claims of individual rights is a check on the collective will is the major dilemma facing the modern liberal state. See R. Unger, LAW IN MODERN SOCIETY TOWARD A CRITICISM OF SOCIAL THEORY 166-223 (1978); Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455 (1984).

legitimate conversation about social policy. The law plays a critical role in limiting policy alternatives a decision maker views as available in responding to societal needs. 23 Second, the central role of law in American society has been to offer rationale for why the irreconcilable contradictions between claims of individual freedom and interdependence inherent in the nature of relations between persons are reconcilable. What is needed is for this false sense of rational ordering to be exposed. We must face the reality that the demands for individual autonomy and freedom are irreconcilable with the necessity of functional interdependence of individuals to effectively pursue the general welfare so there will be more social goods including autonomy and freedom available for distribution. What to date has not been taken seriously enough by traditional legal commentators is how the functional interdependence of individuals which is perceived as necessary for the existence of freedom and autonomy also inherently limits such freedom and autonomy. 24 Third, law and the legal process are concerned with decisions which are of an inherently indeterminate nature. As such, law and the legal process are seen as merely a particular and very important mode of political decisionmaking designed primarily to support the normative choices of the status quo. 25 Fourth, many legitimate normative choices and policy alternatives are either excluded from consideration or their importance is vastly underplayed. This is especially true with regard to policy alternatives reflecting egalitarian and democratic ideals or values which are generally considered necessary for a more just society. 26


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26. See, e.g., Hutchinson and Monahan, Law, Politics, and the Critical Legal Studies: The Unfolding Drama of American Legal Thought, 36 STAN. L. REV. 199,
Fifth, the current legal system needs to be reformed so the normative choices being made in the allegedly neutral and instrumental legal process are unmasked. This will permit individuals and groups to more effectively seek a just society and better understand the ordering of relationships between individuals and between individuals and the state. The reaction to CLS scholarship and other CLS tactics by more traditional legal scholars has been spirited, if not always effective. CLS has in many ways shaken complacent legal academicians to the core because it questions some of the basic premises of their professional lives — the neutrality concept and instrumentalist view of law in social order. By equating legal decisionmaking with other forms of normative policy making processes, CLS claims to have exposed the law and legal process for what it truly is, just another means of generating societal norms and rules. In doing so, CLS has threatened the concept of law as a relatively neutral tool for implementing social policy choices made by other institutions. What traditional scholars have resisted is the attempt by CLS to equate the law and the legal process with normal politics. The result has been a growing debate, in academic circles in particular, although some of it has reached the public domain, over the nature of law, legal systems and the appropriate boundaries of legitimate academic critique. This debate has been renewed in recent years because of many of the leading CLS scholars have used a historical approach to analyzing the development of legal doctrine as the means to drive home their critiques. At least in part because of


30. See Gordon, Critical Legal Histories, supra note 29. As noted by Professor Gordon, this is somewhat surprising because of the traditional role of legal history as an apologia for the current state of affairs. See also Woodward, supra note 6, at 99-
the central role of legal history in the CLS debate a new vitality has returned to the age old question of what is legal history.\textsuperscript{31}

Professor Currie's efforts can be understood as responding to both of these offered sources of intellectual stimulation. His history of how the Supreme Court has interpreted the Constitution is not avowedly designed as part of any bicentennial celebration,\textsuperscript{32} but nonetheless can be seen as part of the anticipated scholarly concerto during this bicentennial era.\textsuperscript{33} The timing of the book's release and the nature of its thesis assure that it can be used as part of consciousness heightening efforts as to the nature of our governmental institutions which one hopes the bicentennial will invoke for ordinary citizens. This book also can be read as a formalist Whiggish\textsuperscript{34} type of response to the CLS critique of the Supreme Court decisionmaking process. While not directly addressing the CLS critique this book, with its strong positivist and interpretivist approaches, offers an apologia for the current modes of

\footnotesize{113: Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEGAL HIST. 275 (1973).}

\footnotesize{31. A question to which there is no paradigmatic answer. Letter from Robert W. Gordon to William Nelson (August 26, 1985) (response to Nelson's article discussing this point) (a copy of the letter is on file with the Nova Law Review). See also Holt, Now and Then: The Uncertain State of Nineteenth-Century American Legal History, 7 IND. L. REV. 615-26 (1974).}


\footnotesize{33. Some examples of this work are: R. WIEBE, THE OPENING OF AMERICAN SOCIETY FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISSUNCTION (1984); F. MCDONALD, NOVUS ORDO SECLORUM THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); M. KAMMEN, A MACHINE THAT WOULD GO OF ITSSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); THE FOUNDERS' CONSTITUTION (P. Kurland and R. Lerner ed. to be published 1987) (5 volume set which collects the important documents from the 17th, 18th and 19th centuries linked to the intellectual heritage of our Constitution from founding of the American nation through 1830).}

\footnotesize{34. A Whiggish history is one interpreting the past in light of the present, usually conservative, societal or individual values and policy goals. See, e.g., De Montpensier, Mailand and the Interpretation of History, 10 AM. J. LEGAL HIST. 259, 264 (1966); Horwitz, supra note 30.}
II. Is the methodology used and are the conclusions reached in the book intellectually sound?

Professor Currie has written what he claims is a "critical history, analyzing from a lawyer's standpoint the entire constitutional work of the Court's first hundred years." This is a remarkably ambitious task, especially for a one-volume work. He makes his task more manageable by limiting himself to an evaluation of the Court and its Justices based upon the quality of their work product judged by: (1) the soundness of their methods of constitutional analysis and (2) their opinion writing techniques. He makes it clear at the outset that his departure point in analyzing the Court's interpretation of the Constitution is that of a committed legal positivist and interpretivist. From this perspective the Constitution is viewed as the sole source of power of all branches of the government, including the judiciary. As such, the Constitution is

35. No CLS scholar has yet attempted a systematic analysis of Supreme Court opinions on the scale of Professor Currie's efforts. However, there are CLS articles which indicate some of the significant differences in approach if such an effort was undertaken. See, e.g., Tushnet, Critical Legal Studies and Constitutional Law: An Essay in Reconstruction, 36 Stan. L. Rev. 623, 631-47 (1984); Kainen, Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantial Rights Against the State, 31 Buffalo L. Rev. 381 (1982); Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981).

36. Currie, supra note 32, at xi.

37. The multi-volume history of the Supreme Court sponsored by the Holmes device has allocated six of its planned eleven volumes to this same period. Gorbelsky, supra note 10, at xi. Cf. B. Bauer, Commentaries on the Constitution 1790-1860 (1965) (an interesting survey of learned treatises on the Constitution prior to the Civil War).

38. Currie, supra note 32, at xi.


40. U.S. Const. preamble.

41. This is the extraconstitutional judicial decision making problem which really is not a problem because the Supreme Court has virtually never taken such a position. See Sanderson, Constitutional Interpretation, 79 Mich. L. Rev. 1033 (1981).

42. Currie, supra note 32, at xii-xxiii. Of course this approach does not place much in the way of a limitation on judicial power as almost all of the important provisions of the Constitution, those that perform a checking function or grant power, are of a typically open-ended nature. Thus the important question remains, what are the legitimate boundaries of judicial interpretation? When is it legitimate for the court to "test" the legislative judgment through its interpretation? See R. Dworkin, Taking Rights Seriously 81-149 (1977); Brandeis, The Search for Objectivity in Constitutional Law in JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 172-97 (Lowy, ed. 1967). However, Professor Currie appears to reject this analysis and believes most questions of interpretation do not involve extreme examples of textually open-ended provisions of the Constitution. Rather he sees the language of the Constitution in Currie, supra note 32, at 45-55. See also R. Bork, Government by Judiciary (1987) The Transformation of the Fourteenth Amendment 1-19, 407-18 (1987).
binding on all branches of the government. The judiciary may not in the guise of interpretation add or subtract from this document which constitutes the judgment of the "People of the United States" where that judgment is fairly ascertainable. It is only in the case of textually open-ended provisions of the Constitution where a broad range of judgment has been left for the Court that it is appropriate for the Court to exercise interpretative discretion. In judging whether this interpretative discretion has been appropriately exercised, one must look to the reasons offered in the opinion of the Court and judge their persuasiveness.

In format the book is very traditional. It is divided into five parts which follow the traditional divisions by reign of Chief Justice. In each part Professor Currie does a fine job of summarizing the constitutional decisions of the Court and clearly setting forth his critique of the opinions. In the conclusion section of each part of the book he offers a succinct evaluation of the work product of the Court as a whole for the period and of each significant Justice.

There is little to disagree with in Professor Currie's summary of the cases as a matter of just reading and briefing the cases from the perspective of a modern day lawyer. But in many other ways, some of

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43. There is one exception. Professor Currie has lumped all of the work of the pre-Marshall court into part one which includes the Jay, Rutledge and Ellsworth Chief Justiceships followed by parts two through five corresponding to the Chief Justiceships of Marshall, Taney, Chase and Waite.
44. While this task may be one appropriate particularly for law students engaged
which are minor and others which are major, the arguments and conclusions of the book are flawed and unpersuasive. Professor Currie fails to address except in passing the impact of contemporary intellectual, social, ideological and economic conditions on the Court’s decision process. This is a major methodological error. The discussion of the cases was generally set forth as if there were few if any relevant sources other than the opinions themselves. Even where he does allude to events outside the Court’s opinions, usually buried in the footnotes, one is left wondering why he chose to rely so uncritically on some sources. His apparent uncritical reliance on the much criticized work and theory of the late Professor Crosskey as one of his primary sources for many of these points substantially detracts from the quality of even this limited discussion of matters not chronicled in the opinions of the Court.

This failure to consider the opinions of the Court in the context of their own contemporary societal setting is particularly frustrating because Professor Currie professes to offer an intellectual history of the interpretation of the Constitution. The efforts of Professor Currie fail in the study of constitutional law I hesitate to call it legal history let alone a critical legal history. See infra pgs. 266-70. One can also quibble with Professor Currie over some areas which he has so glided over. For example, the debate among this period and on the bench over whether there was a federal common law is virtually ignored. Yet, this was one of the most important constitutional issues in the early 1800s. See, e.g., Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003 (1985); M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 9-16 (1977). Cf. Field, Sources of Law: The Scope of the Federal Common Law, 99 Harv. L. Rev. 881 (1986) (argues the power of federal courts to create federal common law should be much broader than current doctrine permits).

At one point he cites the historical novel Burr by Gore Vidal as authority. Currie, supra note 32, at 79-80 n.118.

45. See, e.g., Goebel, Ex Parte CIV, 54 Colum. L. Rev. 450 (1954). The late Professor Goebel offered a telling critique of both Professor Crosskey’s unitary theory and the adequacy of his research. But see Jeffrey, American Legal History: 1852-1954, 1944, Survey Am. L. 866-69 (offers a much more favorable view of Professor Crosskey’s efforts).

46. W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) (2 vols.). The original two volumes have recently been reprinted by the University of Chicago Press along with the publication of the long postponed but promised third volume. 3 W. CROSSKEY AND W. JEFFREY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1980).

48. Of course at many times he relies upon respected commentary which does not suffer from the shortcomings associated with Professor Crosskey’s work. See, e.g., FERGUSON, THE DRED SCOTT CASE (1978); HYMAN AND WIECEK, EQUAL JUSTICE UNDER LAW, CONSTITUTIONAL DEVELOPMENT 1835-1875 (1982).

is this endeavor for two reasons. First, he never effectively deals with the impact of contemporary intellectual thought on the Justices and their opinion writing. The extent to which a particular mode of argument or perspective was considered a legitimate intellectual approach by one's contemporaries is a relevant consideration in evaluating the quality of judicial opinions from a historical perspective. To omit consideration of contemporary views is to impose one's own intellectual standards on another era. The result is a Whiggish version of history. Further, by ignoring this rich intellectual heritage which may have offered critical insight as to why a particular mode of argument was used, Professor Currie has missed an opportunity to help us better understand why the Court acted as it did and how this past may be relevant to issues the Court faces today. Second, Professor Currie has imposed his strong positivist-interpretivist views as the paradigm for judging the quality of judicial opinions. This results in his outright


30. It is clear that natural law philosophy is an important part of our legal heritage especially in the 18th and 19th centuries. See, e.g., L. LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE 137-73 (1938); C. HAINES, THE REVIVAL OF NATURAL CONCEPTS 49-58, 75-165 (1930); AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, 5, 7-9, 14, 72, 75, 82, 88, 100, 111-12, 159, 175-77, 187-90, 211, 221, 330, 413-14, 565-74, 606, 771, 79, 860, 900-906 (Hyemen and Lutz ed. 1983) (2 vols.) (representative collection of contemporary opinion during the founding era); MCDONALD, supra note 8, at 47, 9-10, 20, 32-33, 40, 51-66, 144-56; WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 24-28 (1978). See also STRAUSS, NATURAL RIGHT AND HISTORY (7th ed. 1978) (offering a particularly cogent explanation of the evolution of natural rights philosophy and its impact on the concepts of democratic government and natural law). Some modern commentators on constitutional law have returned to this natural law heritage to provide a partial explanation for why not all constitutional law decisions must be read strictly on the text of the Constitution. See, e.g., M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Grey, Do We Have An Unwritten Constitution?, 1 Stat. L. Rev. 703 (1975).

51. Professor Currie also agrees with the approach set forth by Justice Story in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) which he endorses as the classic statement of the paradigm for constitutional interpretation. [Perhaps, the safest rule of interpretation after all will be found to be
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rejection of other plausible modes of interpretation as illegitimate and unprincipled. With such a perspective it is little wonder that even when he avows his discussion is aimed at consideration of the impact of natural law theory on constitutional interpretation that he always concludes the explanations offered are unpersuasive.49

The book also suffers from an often internally inconsistent evaluation of the work of the Court and the Justices. For example, in discussing the work of the pre-Chief Justice Marshall Court, Professor Currie asserts the significance of the opinions of the pre-Chief Justice Marshall Court is that they "establish traditions of constitutional interpretation ... [which] influence the entire future course of [judicial] decision."50 Specifically, he concludes that the principle of judicial review of the constitutional validity of both federal and state legislative acts was established during this period.51 However, when later discussing the opinion in Marbury v. Madison52 specifically and the Marshall Court in general he is critical of Chief Justice Marshall for ignoring prior precedent which was on point.53 If Chief Justice Marshall ignored the prior relevant cases, how is it possible to conclude that these cases

[486] Book Review 263

detailed the mode of judicial decision making in this area? What evidence is there to support such a conclusion? None, unless you argue Chief Justice Marshall self-consciously excluded these prior cases which, according to Professor Currie, are seminal and critical to the issue on which Marbury was decided. If such precedent existed given the political context of the Marbury case,54 it would have been foolish for Chief Justice Marshall to ignore it.

Two more plausible explanations exist. First, Chief Justice Marshall may not have been aware of the prior cases. Marshall did not have the benefit of a major law library or even an accurate official reporting service for cases of the Supreme Court or any other courts, so it is possible at the time he wrote the opinion in Marbury that he was unaware of these prior cases.55 Second, if Chief Justice Marshall was aware of these prior decisions, perhaps he did not find them sufficiently persuasive or important to use in his argument.56 Either way, the fact that we may today view these cases as relatively important pre-Marbury decisions discussing the power of judicial review does not justify reaching the same conclusion as to their impact during the Marshall era or any other for that matter.

Professor Currie's critique of the reasoning in the Court's opinions, aside from his hostility to natural law rationale, is often distorted by other aspects of his twentieth century positivist-interpretivist views. For example, in his discussion of Chisholm v. Georgia57 he chides the Justices for failing to address the real interpretive problem, what did the framers intend?58 In doing so he ignores several important considerations. First, as noted earlier by Professor Currie there was little avail-

49. See, e.g., 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 169-268 (rev. ed. 1947); 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 50-156 (1918). Both offer insight into the politically turbulent time of the Marbury case and how the Marbury case threatened the integrity and the independence of the Court.
50. Currie, supra note 32, at 455 (commenting on the lack of adequate library and clerical assistance for the early Court).
51. Professor Currie also concluded the opinion in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) by Justice Story was important because it offered a complete and compelling explanation of why the Court constitutionally had the power to review the judgments of state courts as to matters concerning interpretation of federal law. Currie, supra note 32, at 91-96. It would seem if Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), had so clearly established the principle of judicial review of state legislative acts then the omission of the concept of judicial review to state court opinions would not have been as critical as he asserts.
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62. 2 U.S. (2 Dall.) 419 (1793).

63. D. Currie, supra note 32, at 20.
ble in the way of written records of the proceedings of the Constitutional Convention. Madison's notes on the proceedings were not published until after the death of all who had participated. Second, The Federalist Papers had not yet risen to the level of an accepted historical record of the Framers' intent, but were seen as political propaganda used in an attempt to convince the delegates to the New York ratification convention that the Constitution ought to be ratified. Third, none or very little of the inadequate written records of the state ratification conventions were available to the Court. As such, there was little in the way of published material to use even if the Justices had focused on "the unwritten understandings of those who were at the Philadelphia convention." It is an unfair and questionable practice to criticize the Court in retrospect for failing to use an interpretative technique for which the resources were not yet available. This transgression is aggravated when it is used, as Professor Currie has, to further reinforce an extremely narrow perspective of appropriate legal argument concerning questions of constitutional interpretation.

Despite these criticisms, Professor Currie's work does provide a reasoned explanation for his judgment of the quality of the work of the various Justices of the Court, if you share his positivist-interpretivist paradigm. From this perspective he does not offer any earth-shaking new evaluations or insights. Professor Currie claims, in evaluating the quality of the Chief Justices, that Chief Justice Marshall was the greatest judicial statesman. But as an opinion writer Marshall could have written more tightly reasoned opinions, avoided so much dicta, paid attention to and distinguished prior cases more effectively. Chief Justice Taney was not as an effective leader of the Court as Marshall, but as an opinion writer he was exemplary. His judicial work is effectively, clearly, and persuasively explained in the resolution of the issues before the Court. He had the great ability to reason morally about an issue [he was a con" and his opinion is persuasive in the sense that it is an opinion that is binding on the Court.

Professor Currie's evaluation of the other Justices is also very traditional. Justice Story wrote well-crafted opinions but spent most of his years on the bench during a period when his strong federalist and nationalist views were out of favor. Even if he wrote only nine majority opinions, Justice Curtis was a great Justice because of the clarity of his opinions, his ability to rally a majority of the Justices to his position, and the importance of the issues resolved. Justice Miller and

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64. See Farrand, supra note 9 (four volume definitive edition of the records of the Convention including Madison's notes).
66. JAY, HAMILTON AND MADISON, THE FEDERALIST PAPERS (Bantam ed. 1982) (originally published as newspaper articles during the debate over ratification in New York).
69. Id. at 194, 454.
70. Id. at 195-98.
as an opinion writer he was exemplary. His lucid style effectively, clearly, and persuasively explained the resolution of the issues before the Court. He had the great misfortune to overreach in *Scott v. Sanford* and his judicial reputation has suffered greatly as a result of that one opinion. But for this opinion, he would be considered a great Chief Justice. Chief Justice Chase successfully navigated the Court through the perilous times of radical reconstruction with a minimum of damage to its reputation and power, but was not a very effective opinion writer. Chief Justice Waite reestablished the prestige of the Court while aligning it with a states' rights perspective of the Civil War Amendments and a generally restrictive view of the power of the federal government. As an opinion writer he was too succinct and failed to provide an adequate explanation of why he resolved cases the way he did.

Professor Currie's evaluation of the other Justices is also very traditional. Justice Story wrote well-crafted opinions but spent most of his years on the bench during a period when his strong federalist and nationalist views were out of favor. Even if he wrote only nine majority opinions, Justice Curtis was a great Justice because of the clarity of his opinions, his ability to rally a majority of the Justices to his positions, and the importance of the issues resolved. Justices Miller and

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71. 60 U.S. (19 How.) 393 (1857). This opinion was the Supreme Court's failed attempt at providing a definitive resolution of the slavery issue. See Fehrenbacher, *supra* note 48 (most definitive discussion of the case to date).
75. *Id.* at 448-50.
76. *Id.* at 279, 454.
77. *Id.* at 279, 454. This is the one case where his evaluation of the impact and quality of a Justice's work is slightly out of step with past evaluations. See, e.g., C. Hughes, *The Supreme Court Of The United States 57-58* (1936) (characterizes Justice Curtis only as a man of keen intellect during the reign of Chief Justice Taney). But see A. Blaustein and R. Mersky, *The First One Hundred Justices* 32-51 (1978) (rates Justice Curtis as in the near great category). In part the high esteem accorded Justice Curtis by Professor Currie can be understood because of his strong rejection of a natural law based approach to interpreting the Constitution.

[When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we
Field were the intellectual leaders of the post-Civil War Court. Justice Miller was the better opinion writer, but his reasoning often suffered from the flaw of a natural law perspective. Justice Field wrote his opinions in a dry and conclusory style. He was a persuasive opinion writer only if you shared the outcome determinative assumptions which underlay his reasoning process. Other Justices who served during this period generally had little significant impact on the interpretation of the Constitution by the Court.

In short, if one agrees with Professor Currie's positivist-interpreter paradigm, then despite some internal inconsistencies and the flawed methodology he has written a wonderful book reaffirming the correctness of that perspective. If one questions or does not share Professor Currie's perspective of the role of the Court in interpreting the Constitution, then one is left with a sense of having read only one facet of a multi-dimensional argument. For these readers this book is at best a very frustrating experience.

III. Should this book be considered part of legal history scholarship?

Immediately after I finished reading Professor Currie's book I was struck by two thoughts. First, this book bears a striking resemblance in many ways to the late Professor Karl Llewellyn's brilliant book, *The Common Law Tradition Deciding Appeals*, in which he extensively examined, among other things, the styles of judicial reasoning and writing of opinions. It also reminded me of *The Supreme Court Review*, whose purpose is to provide a "sustained, disinterested and competent

have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.


78. Id. at 357-58, 449-50, 454.

79. Id. at 450. See White, supra note 73, at 84-108 (presents a much more favorable evaluation of Justice Field).

80. Justice Harlan and Chief Justice Fuller began their tenure at the close of this book's time frame. An assessment of their contributions to the Court was properly left for the next volume.


82. He broke down the nature of the opinion writing into two general categories: (1) the grand style of which he approved as a form of singing reason, and (2) the formal style of which he heartily disapproved. Id. at 37-38, 155-59, 186-88, 291-94, 464-68.


14. All such efforts to date have failed. See supra note 31; J. W. HURST, LAW AND SOCIAL PROGRESS IN THE UNITED STATES HISTORY 1-27 (1960). See generally M. CORBIN, MEANING OF HUMAN HISTORY 3-34 (discussion of the problem of definining the tasks of a historian); C. WOODWARD, THINKING BACK THE PERILS OF WRITING HISTORY (1986) (thoughful personal commentary on the dangers of indeterminacy in historical writing). While lawyers and law-focused academicians have been unable to define what legal history is, a problem linked to the philosophy of history, they have generally agreed on its function.

The true function of Legal History...is to help lawyers and legal scholars, who are essentially concerned with current problems, to be meaningfully aware of the past as a health check on our often overly - optimistic and unboundeded hopes; to provide gentle redress in our moments of frustration and disappointment; to act as an indispensable aid in drawing the ever-difficult distinction between the "temporal" and the "internal," the changing and the unchanging; and above all, to provide awareness and appreciation for the value and meaning of civilization.

Woodward, supra note 6, at 105-106.

15. R.P. ATKINSON, KNOWLEDGE AND EXPLANATION IN HISTORY 139 (1978) (Observing there are "obvious social and institutional pressures [on lawyers] not to leave everyday concepts and habits of thought too far behind"). Of course a lawyer may and does refer to other materials such as statutes, administrative regulations and rulings in his efforts to resolve a client's problem. My comments are limited to case analysis because this is the focus of Professor Currie's book; however, the same
criticism of the professional qualities of the Court's opinions."

What Professor Currie has done indirectly through his evaluation of the quality of these early Supreme Court opinions and the work of the individual Justices is to assert that there is a more correct or better style and method of reasoning for judicial opinions, something the editors of *The Supreme Court Review* believe and Professor Llewellyn believed. His discussion of the cases is written in a manner to prove how the Court has failed or succeeded in its interpretative endeavors, measured by Professor Currie's criteria. There is nothing wrong with such efforts; in fact they are an important part of legal scholarship. However, such efforts can at best be characterized as at the periphery of what is generally considered to be legal history.

It is not my intention to offer a definitive definition of legal history, but rather to offer some distinctions between traditional legal analysis and legal history which explain why Professor Currie's book is not a paradigmatic example of a legal history text.

Traditional legal case analysis involves reading cases for holdings and rationale in order to determine what they mean today, and how they bear upon the solution to a current problem or controversy.

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84. All such efforts to date have failed. See supra note 31; J.W. Hurst, Law and Social Process in the United States History 1-27 (1960). See generally M. Cohen, The Meaning of Human History 3-34 (discussion of the problem of defining the tasks of a historian); C. Woodward, Thinking Back The Perils Of Writing History (1986) (thoughtful personal commentary on the dangers of indeterminacy to historical writing). While lawyers and law focused academicians have been unable to define what legal history is, a problem linked to the philosophy of history, they have generally agreed on its function.

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erally, in this process the opinions of the Court are the sole source of information, although occasionally lawyers may refer to matters outside the opinions in order to distinguish them from the current problem or controversy. The legal historian and lawyer share to some extent a commonality of sources. Writing legal history involves a similar task of reading and understanding cases, but undertaken from a very different perspective. The critical distinction between a legal historian and a modern lawyer is that a legal historian is consciously involved in the problematic process of self-location. Self-location is the process by which a historian recognizes and attempts to deal with the problem of cultural relativism which contaminates all his or her efforts. To a legal historian a meaningful understanding of an event or a judicial opinion is seen as dependent on the particular time and place of occurrence. The legal historian must have a pseudo dual personality because of this problem. One personality must be devoted to the effort of understanding the past as clearly as possible on its own terms and in its own context. A second personality must be devoted to seeking to understand the impact or coloration of one's own time upon attitudes toward the past both as to what are the relevant facts and how their interrelationships are explained. This inexcusable linkage between the past and the present is inescapable. The result is that a legal historian must not only explain what he or she believes the past to have been, but also how the present has affected this perception. A lawyer engaged in traditional legal analysis is relatively unconcerned with this process. In fact, to engage in the process of self-location may not at all serve his short-term interests in understanding how a current court may understand these cases.

Professor Currie has resolved the problematic process of self-location by using two assumptions to moot the problem. First, he assumes that the opinions of the Court are virtually the sole source of relevant information in judging the quality of the Court's interpretation of the Constitution. Second, he assumes that the positivist-interpretivist paradigm he offers for the role of the judiciary in interpreting the Constitution has always been the norm for such an interpretative process. By limiting himself generally to only the opinions of the Court he has ignored the intellectual, social, ideological, economic, and political context in which they were written. Thus, he repeats the fundamental

difference of perspective can be found in how lawyers and legal historians would deal with these other materials.

86. It should not be assumed that opinions are necessarily an accurate source of historical information. The Supreme Court has been criticized for its distortion of legal history by using a "law office" approach to historical questions. See C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119.

87. I am not claiming this is the only major distinction between how a modern lawyer and a legal historian think about and analyze the past. For example, historians are not nearly as certain of events or facts of the past as lawyers. They recognize that knowledge of the past is inherently incomplete. For a historian this uncertainty is a major epistemological concern when offering a theory of explanation of past events. R.F. ATKINSON, supra note 85, at 39-68 (introduction to the basic epistemological concerns in the philosophy of history).

88. The Hurst School of legal historians do not even share this commonality as they primarily focus on trial court records as a source. See, e.g., J.W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); HURST, LEGAL ELEMENTS IN UNITED STATES HISTORY IN LAW IN AMERICAN HISTORY 3-92 (Fleming and Baihs ed. 1971); J.W. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 23-81 (1977).

89. See R. MARTIN, HISTORICAL EXPLANATION RE-ENACTMENT AND PRACTICAL INFERENCE 215-40 (1977); R.G. COLLINGWOOD, THE IDEA OF HISTORY 7-13 (1946). Briefly, cultural relativism is a term describing how we are all captives of our time and place. This circumstance dictates our understanding and perceptions of the past and of the present. See also W. McNIEL, MYTHISTORY AND OTHER ESSAYS (1986).

90. See, e.g., Gordon, supra note 5, at 1017; Gordon, supra note 29, at 98-99.
91. See Schuyler, Introduction in Frederic William Maitland, Historian

https://nsuworks.nova.edu/nlr/vol11/iss1/15

272
understand the impact or coloration of one's own time upon attitudes toward the past both as to what are the relevant facts and how their interrelationships are explained. This inexorable linkage between the past and the present is inescapable. The result is that a legal historian must not only explain what he or she believes the past to have been, but also how the present has effected this perception. A lawyer engaged in traditional legal analysis is relatively unconcerned with this process. In fact, to engage in the process of self-location may not at all serve his short-term interests in understanding how a current court may understand these cases.

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31-40 (Schuyler ed. 1960); supra note 89.

92. Another distinction between what a lawyer and the legal historian do is how differently each perceives what are relevant facts. Lawyers often dismiss as extraneous considerations information not contained in sources such as opinions, statutes, administrative rules or legislative history. Lawyers refer to such extra-legal matters only in an effort to distinguish an opinion or to attack the continued validity of the policy reflected in the opinion. As the future Justice, Oliver Wendell Holmes wrote,

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. Holmes, Path of the Law, 10 HARV. L. REV. 437, 469 (1897).

Legal historians generally consider reference to facts (i.e., events, etc.) outside the narrow world view of legal opinions as essential to any initial understanding of what happened and what it means. See Frederick, Law and History, 14 VAND. L. REV. 1027, 1031-33 (1961).

93. See De Montpensier, supra note 34, at 270-72.


95. In doing so he ignored the critique of the formalist approach offered by the Hurst and legal realist schools of legal historians. See, e.g., Friedman, supra note 4, at
mistake of the formalist legal historians — seeing the law as having a life independent of society." This, combined with his paradigm for interpretation, collapses his effort into solely a consideration of what a twentieth century lawyer believes these opinions mean today. The result is the book provides little insight into or explanation of the interactions of the Court’s work with its contemporary society.

By not taking the self-location question seriously the book is converted from an enterprise concerning legal history to a treatise on how a twentieth century lawyer reads these opinions. The result is a book which only marginally relates to legal history because it fails to meaningfully illuminate the past so we may better understand the present.

IV. Conclusion

Professor Currie’s book with all its flaws offers a valuable lesson for all who are trained as lawyers and aspire to write in the area of legal history. It is a demonstration of the various pitfalls which await such efforts unless one first clearly understands the difference between legal history and ordinary legal analysis.


96. Legal historians of the formalist school reflected the Langdellian concept of law as a legal science “consist[ing] of certain principles and doctrines whose causes and evolution in traceable exclusively, through the study of appellate opinions” C. Langdell, Selection of Cases on the Law of Contracts 94 (1871). This has been characterized as “technical competent, lawless history.” The problem is that it focuses exclusively on the origin and evolution of legal doctrine within the closed universe of the legal system and ignores the social, political and economic context. The formalist approach has been judged a failure because it ignored important causative factors in the evolution of legal doctrine: Friedman, supra note 4, at 66.3. See Comment, Instrumentalist and Instrumentalist: Legal Realism and Legal Theory, 73 Colum. L. Rev. 119 (1973) (discussing the impact of the Legal Realism movement in distinguishing between formalist and instrumentalist legal thought in law and the law school).

97. See, e.g., D’Alembert, The Histoire du Comte de Mirabeau 235-36 (1850); (1855) (Eng. trans. 1880-81). This commentator’s turning point in his study of the French Revolution legal historians was 1875. D’Alembert, supra note 4, at 587-88 (1855). Gordon, supra note 2; see supra note 4.

98. “History, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.” T. Carozzo, The Nature of the Judicial Process 53 (1921). “The history of what the law has been is necessary to the knowledge of what the law is.” C. Holdrege, The Common Law, 37 (1891).
POST-MODERN JURISPRUDENCE—Finally (MAYBE)


Reviewed by Fred L. Rush, Jr.**

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D’ALEMBERT: Still, in the morning I find the greater probability on my right, and in the afternoon I find it on my left.

DIDEROT: You really mean that you are dogmatically pro in the morning and dogmatically con in the afternoon.

D’ALEMBERT: And in the evening, when I recall how rapidly my judgments were made and unmade, I disbelieve both my morning’s opinion and the one I had in the afternoon.

—Diderot, _D’Alembert’s Dream_

A new book from Ronald Dworkin is more than a publication by an eminent legal philosopher; it is a signal for jurisprudential reflection, reassessment and wood-shedding. _Law’s Empire_ is a book which marks a turning point in Dworkin’s thought and, consequently, recasts the dialogue of modern analytical jurisprudence. In it, Dworkin reformulates jurisprudential questions in explicitly post-modern terms — utilizing, in the main, theories of literary criticism. To be sure, other commentators have pointed out similarities between literature and law, and the profitability of applying criterial theories to legal decisionmaking,¹ but

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This Review is dedicated to Professor Martin Feinrider, who died in June, 1986. He was a fine teacher, a challenging scholar, and a good friend.

none possess the stature and influence of Dworkin. Thus, in a sense, this union between critical theory and legal philosophy is legitimized as a proper topic of jurisprudence by Dworkin’s treatment. But the value of this book far exceeds this tacit imprimatur, for *Law’s Empire* offers a rich account of the implications of post-modern critical theory for the philosophy of law.

This Review treats two seminal aspects of the book. Part I discusses the historical importance of the work — in short, that it brings jurisprudence in line with the advances of philosophy in general since the later Wittgenstein and the “Ox-bridge” ordinary language philosophers. Part II focuses on the theoretical aims of the book, scrutinizing Dworkin’s uses (or misuses) of critical theory.

I.

Anglo-American jurisprudence has long been concerned with either embracing or repudiating one of two visions of law — the utilitarian/positivist or the rights theory/deontologist. In this respect, at least, the philosophy of law has languished behind advances in other areas of philosophy by almost a half-century. Today the old arguments run on, not because they are the enduring questions of law, but because current perspectives on the jurisprudential enterprise remain steeped in turn-of-the-century philosophical method.

Much of the focus of contemporary analytical jurisprudence has been shaped by early to middle twentieth century linguistic philosophy. H.L.A. Hart’s reformulation of Austin’s positivism is deeply indebted to the Vienna Circle of logical positivists (including Wittgenstein of the Tractatus) and, to some degree, the post-positivist writings of J.L. Austin* and the Oxford ethicalists. Reactions to Hart have been equally dependent on this mode of discourse which stresses the situationality of language. Notable exceptions to this trend are legal realists, legal economists and critical legal studies advocates.

Law and economics, in both its Chicago and Yale manifestations, can be seen as a close variant of legal positivism. As a historically descriptive venture, explaining the way judges (unbeknownst to themselves) furthered efficiency through judicial decision, law and economics is decidedly positivistic. It assumes determinacy of meaning, fixity by quantifiable criteria. As a normative enterprise, weak or strong

2. This review refers to literary theory in general as “critical theory.” This is not meant to suggest any relationship between a legal use of literary criticism and the critical legal studies movement, although CLS adherents might claim such a connection. See Note, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986) (discussing connections between Habermas and CLS).

3. There are, of course, other aspects of *Law’s Empire* which will go unmentioned in this review. I have singled out Dworkin’s use of post-modern literary theory because of its historical importance.

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5. See, e.g., J.L. AUSTIN, SENSE AND SENSIBILIA (1962); Austin, A Plea for Excuses, in PHILOSOPHICAL PAPERS 175 (J.O. Urmson & G.J. Warnock eds. 1961). Most of Austin's work was collected posthumously, which accounts for why the dates of his materials are out of step with the mainstream of ordinary language philosophy. In point of fact, Austin and Hart frequently taught joint seminars in legal philosophy at Oxford in the late 1940s to '50s.

6. This term refers to the gaggle of academic philosophers collected at Oxford and Cambridge who endlessly wrote and rewrote critiques on the first generation of British ordinary language philosophers. Along with Austin, see supra note 5 and accompanying text, the most influential of the ordinary language school were G.E. Moore, Gilbert Ryle, John Wisdom and A.J. Ayer. See, e.g., G.E. MOORE, PRINCIPIA ETHICA (1903); G. RYLE, THE CONCEPT OF MIND (1949); Wisdom, Metaphysics and Verification, 47 MIND 452 (1938); A.J. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1946). Professor John Searle of the University of California, Berkeley, is the sole original adherent to the ordinary language approach currently applying these principles. See Searle, Meaning and Speech Acts, 71 PHIL. REV. 423 (1962). For an adequate overview of twentieth century British philosophy, see C. CATON, PHILOSOPHY AND ORDINARY LANGUAGE (1963).


8. Law and economics is an attempt to describe or prescribe legal outcomes by reference to principles of wealth maximization or efficiency. Much of the early scholarship in this field can be attributed to Coase's provocative little piece, The Problem of Social Cost, 3 J. LAW & ECON. 1 (1960). The Chicago School of law and economics is characterized by a steadfast adherence to wealth maximization as the sole aim of a justly ordered society. See R. POSNER, ECONOMIC ANALYSIS OF LAW 2-8 (2d ed. 1977). The Yale School, on the other hand, does not insist that efficiency (even in its strong non-pareto sense) is the sole aim of a moral state. There are extra-economic norms which temper efficiency concerns. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 43-45 (1980) (Ackerman's two principles of neutrality).

Dworkin, among others, has forcefully criticized even the "weak" law and economics of Ackerman/Calabresi as unable to meld ideas of normative value into a predominantly economical view of the State. See R. DWORkIN, A MATTER OF PRINCIPLE 242-59 (1985).

legal economies is open to many of the telling criticisms offered against positivism — as Dworkin elsewhere has pointed out.10

American realist law, at least in its more strenuous forms, advocated indeterminacy of legal norms and principles. The "hard case" is "solved" not with reference to principle11 or rules.12 Rather, the judge exhibits a set of preferences concerning the outcome of the case and acts upon them. Thus, judicial decision making, and the legal enterprise taken as a whole, is freed from pretensions of rule-following and is seen as it truly is — indeterminate. This approach, which had its genesis in Pound's sociological jurisprudence13 and which was crystallized (insofar as that is possible) by Jerome Frank and Karl Llewellyn,14 has had its day and no longer remains a significant force in jurisprudential thought due to severe problems accompanying the indeterminacy thesis. However, one aspect of legal realism has proven central to modern legal philosophy — that is, realism's skeptical demand to critically dismantle legal shibboleths.

This critical demand of Realism seems to have found a new home. Although it is difficult to group its proponents into a unified theoretical community,15 a growing number of commentators embrace a brand of proto-realism termed Critical Legal Studies. Although at least one noted historian of the realists disavows significant contact between that school and its progeny,16 Critical Legal Studies does, at the very least, co-opt Realism's programme of demystification.17 It hardly needs to be

10. See R. Dworkin, supra note 8, at 252-59.
14. See K. Llewellyn, The Common Law Tradition: Deciding Appeals (1948); J. Frank, Courts on Trial (Atheneum ed. 1961); see also G.W. Holmes, The Common Law 5 (M. Howe ed. 1963)(the law "as any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient.")
15. See B. Ackerman, Reconstructing American Law 43 & n.13 (1983) (criticizing Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976)).
17. See Abel, Tort, in The Politics of Law: A Progressive Critique 185, 194-96 (D. Kairys ed. 1982). This insistence on removing the blinders of bourgeois

18. The phrase is Ackerman's. B. ACKERMAN, supra note 15, at 44 n.15.
19. For example, the Marxist theory of revolutionary motivation. See L. Durrell, Marx's Social Critique of Culture 65-66 (1983). If, as Marx posits, the impetus for revolutionary action is the material mechanism of capitalist economy, there is nothing to prevent individual free-rider. Of course, individuals must revolt — the idea of group revolt is meaningless without the motivation to revolt on the part of the group's constituents. Thus, it seems to many critics that Marx must allow for some motivating factor outside materialism, such as liberal indignity. To say the least, the importation of liberalism into Marxian theory is, in many ways, anathema to that theory.

Some critical legal studies advocates have recognized these difficulties in a doctrinaire Marxist stance and proposed ways to unite socialist legal theory with a theory of rights (nominally considered by Marxists a liberal ideal, since it presupposes the existence of individualized notions of property). See, e.g., Chafe, The Left on Rights: An Introduction, 62 Tex. L. Rev. 1254 (1984).
mentioned that advocates of the Ungero-Marxist\textsuperscript{18} approach stress the debilitating role of individual property and personal rights as prime obfuscations to demystified law. Major objections to this programme are rejections of certain marxian assumptions\textsuperscript{19} and the old criticisms leveled at realism.\textsuperscript{20} Several scholars have disdainfully suspended judgment on critical legal studies until its supporters offer a coherent picture of their otherwise disparate positions.\textsuperscript{21}

Of course, straight-line natural law theory\textsuperscript{22} does not depend on turn-of-the-century linguistic philosophy. Instead, it refurbishes Aquinian notions of “true law.” Dworkin’s taste for Rawls prefigures Kantian leanings, but these are not indicative of his stance on analytic problems of case decision. Dworkin’s Rawlsian ties\textsuperscript{23} only inform his


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20. See supra notes 13-14 and accompanying text.
21. E.g., B. Ackerman, supra note 15, at 44 & n.15, 102-03.
23. Dworkin’s indebtedness to Rawls is well-documented and especially present when addressing problems of distributive justice. An entire chapter of Taking Rights

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view of the substance of correct decision-making principles, not whether there are principles in the first place. Although Dworkin would rail against any complete theoretical separation between law and justice, it is clear that he relies on different philosophical traditions when discussing "analytical" as opposed to "political" issues of law and justice.

Dworkin moves main-line jurisprudential debate beyond the tired positivist/naturalist debate by invoking structuralist and deconstructionist notions of literary (and social) interpretation. Early twentieth century Anglo-American philosophy evolved from a strictly positivist enterprise into a post-positivist programme of formal (i.e., meta-logical) linguistic analysis. Continental philosophy has contemporaneously tracked a different course. Although the German logician Getleb Frege was decidedly instrumental in positivist thought and Wittgenstein was never what could correctly be termed an "Anglican" philosopher, turn-of-the-century European thought was dominated by the phenomenologists Husserl and Heidegger and, to a more fashionable degree, by those who traded on phenomenological technique for Nietzschean/Kierkegardian purposes — the Existentialists, most notably Sartre and, to a lesser degree, Merleau-Ponty. The weird chemistry Seriously involves criticism and defense of Rawls' argument of original position. R. Dworkin, supra note 11, at 150-83 (1977); see also J. Rawls, A THEORY OF JUSTICE 17-22, 60-65 (1972) (setting forth, in general terms, the original position argument for the two principles of justice in Rawls' system). The Rawlsian social contract argument is appealing to Dworkin on many levels. First, the argument from original position supports Dworkin's notion of egalitarianism as a technique of equilibrium — shared moral premises not the product of inferential or deductive logic. See R. Dworkin, supra note 11, at 159-68. Second, the idea of a social contract implicitly recognizes a right of veto exercisable by anyone not willing to be bound by its terms. Id. at 173-74, 176. Finally, Dworkin finds Rawls' reductio of justice as fairness a sufficient theoretical basis for a politics of "deep rights." Id. at 182.

Of course, Rawls' theory has received a less deferential, yet still congenial, treatment at the hands of Robit Nozick. Nozick points out, correctly I think, that a hypothetical contract cannot insure real rights by historical principle. See R. Nozick, ANARCHY, STATE AND UTOPIA 260-204 (1974).

24. Of course, the author of the Tractatus Logico-Philosophicus was firmly a logical positivist in the Frege tradition. But even during the post-investigations period, Wittgenstein maintained a guarded respect for the work of Heidegger. See Wittgenstein, Zu Heidegger, in LUDWIG WITTGENSTEIN UND DER WEINER KREIS GESPRÄCHE: AUSGEZEICHNET VON FRIEDRICH WAISMANN (B.F. McGuinness 1967) (a book that he understands what Heidegger means by Dasein ("being there") and Frucht ("dread"); see also R. Gier, WITTGENSTEIN AND PHENOMENOLOGY (1981).

25. The course of pre-structuralist European philosophy was, and still is, so a...
between the positivist and hermeneutical regimes begat structuralism — much in the same way that Hume prompted Kant. Post-modern philosophy begins with structuralism. As is often
great extent dominated by the school of phenomenology. Phenomenology, as a methodological system, was first developed by Edmund Husserl. Husserl was so committed to a "science" of philosophical investigation (much in the Hegelian sense of "science") that his writings never explored the hermeneutical edge of phenomenology. His method was to explicate the method. See, e.g., E. Husserl, IDEAS 171-328 passim (W.R.B. Gibson trans. 1972). It was left to Husserl's most brilliant pupil, Martin Heidegger, to engage the new method in "substantive" philosophical argument.

Heidegger, enamored of pre-Socratic questions of Being, turned phenomenology to the task of constructing a modern metaphysics of ontology. Drawn to Husserl's method as a means to resuscitate philosophy (and, in particular, metaphysics) from a period of skepticism led by Nietzsche and Kierkegaard, Heidegger put ontology in a preeminent position for philosophical inquiry. See M. Heidegger, INTRODUCTION TO METAPHYSICS 14-16 (R. Manheim trans. 1961) (questions of Being are the first questions of philosophy); see also Q. Laufer, PHENOMENOLOGY: ITS GENESIS AND PROSPECT 169-73 (1958); J.N. Mohanty, PHENOMENOLOGIE AND ONTOLOGY 92-107 (1970).

Regardless of Heidegger's efforts to redefine metaphysics as a science of Being, elements of the terse Nietzschean/Kierkegaardian response to German Idealism (as found in Hegel's system) remained. Initially a student under Heidegger, Jean-Paul Sartre produced a more fashionable rendering of Heideggerian ontology with ethical (or non-ethical) overtones. This became popularized as existentialism. Other proponents of phenomenology such as Merleau-Ponty took a more directly Husserlian approach, eschewing a phenomenological explication of ethics and later, as did Sartre, adopting neo-Marxist views to supplement the phenomenological endeavor. J. Bannan, THE PHILOSOPHY OF MERLEAU-PONTY 193-228 (1967).

With the incursion of Marxism into phenomenological dialogue and the rediscovered interest of phenomenology with language rather than Being, Continental philosophy began the development towards structuralism. See H. Gadamer, ESSAYS IN PHILOSOPHICAL HERMENEUTICS 173-74 (1985). Of course, this also lead to a partial reconciliation between Nietzsche and Hegel in the works of Habermas, Gadamer, and Derrida.

26. "Post-Modernism" is difficult to define. Perhaps the best way to attempt to describe the term is to get clear on its antecedent — "Modernism." Modernism can be understood both as an historical period and a description of a style of thought. In its temporal dimension, Modernism (or the Modern era) spans c. 1890-1945. It is characterized by an explosion of experimental technique pursuant to the credo "make it new." E. Found, ABC OF READING 19 (New Directions ed. 1960). In literature, this is exemplified in the experimentation by Joyce, Faulkner, Proust, and Woolf with mirroring inner impressions or subjective time-consciousness with stylistic invention. In a different vein, both Eliot's The Waste Land and Joyce's Finnegan's Wake utilize allusions and interior mythologies to give expansive significance to what would normally be considered everyday occurrences. In music, Stravinsky (Le Sacre du Printemps) and Prokofiev (Lieutenant Kije Suite) incorporated dissonance into mainstream thematic composition. See A. Hodeir, SINCE DEBUSSY: A VIEW OF CONTEMPORARY MUSIC 24-
the case, the most difficult aspect of assessing a school of thought is determining whether there is indeed a "school of thought." This is very much the case with structuralism. There are unifying elements in the work of de Saussure, Levi-Strauss, Chomsky and Piaget, yet their theories of what constitutes "structure" are in many ways, divergent. Further, writers like Barthes and Foucault straddle structuralism and deconstruction — which is, as we shall see, both the progeny and


Post-Modernism incorporates the historicity of Modernism and seeks to reestablish a historical continuum incorporating itself. Hence, Structuralism incorporated Wittgensteinian ideas on language with a return to Kantian Idealism. Music reached back to tonality, utilizing rhythmic innovations pioneered in the Modern period. See, e.g., P. GLASS, EINSTEIN AT THE BEACH (CBS Masterworks 1982). Performance artists such as Laurie Anderson have created a decidedly Post-Modernist voice through the use of multi-media. In literature, Post-Modernism has returned to relatively unadventurous prose technique, but this style belies inventive subjects for the writer — sometimes bordering on the fantastic or the surrealistic. See, e.g., G. GRASS, THE TIN DRUM (R. Manheim trans. 1961); G. GARCIA-MARQUEZ, ONE HUNDRED YEARS OF SOLITUDE (G. Rabassa trans. 1970); I. CALVINO, T ZERO (W. Weaver trans. 1969); T. PYNCHON, GRAVITY'S RAINBOW (1973), D. BARTHIELME, SADNESS (1970); A. RICE, INTERVIEW WITH THE VAMPIRE (1976). In the graphic arts, Post-Modernism recalls representationalism, but with startling results. See, e.g., W. DE KOONING, "TWO WOMEN IN THE COUNTRY" (1954); Baltus, "THE GOLDEN DAYS" (1944-46); P. Klee, "CHILD CONSCREATED IN SUFFERING" (1935). At least one commentator has likened Post-Modernism to a return to Romanticism. See, e.g., J. BAZIRE, CLASSIC, ROMANTIC AND MODERN 148-54 (Anchor ed. 1961).

27. This is certainly an arguable point, but not one made without authority. See E. CASSIRER, ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE 391-99 (1944); R. BARTHES, MYTH TODAY, in MYTHOLOGIES 109, 111-13 (A. LAVERS trans. 1973).


29. Foucault presents the clearest case of wavering between approaches. Commen...
nemesis of mainstay structuralist thought. Structuralism as a programme is perhaps best described as "Kantianism without the transcendental subject." 30 Although structuralism has had an almost universal impact on contemporary thought, for present purposes it is only necessary to grasp structuralism as a doctrine which has greatly influenced literary theory. If one were to single out a central tenet of structuralist literary theory, it would be the integrity of the text. That is, for the structuralist, the relationship of the reader to the text is determinate. 31 This position assumes two things. First, that the reader and the text are distinguishable. Second, that if they are distinguishable, then they are separate. It is only if there is a reader/text dichotomy that there can be any meaningful notion of supremacy of one over the other.

Early structuralist literary theory insisted on the integrity of the text because it was thought that any theory grounded, even in part, on the reader’s reactions to the text was doomed to fail for relativism. 32 Imagine Molly Bloom’s soliloquy in Joyce’s Ulysses or the climactic death scene in Kafka’s The Trial with the concomitant variety of readers’ responses, and one can easily see the initial appeal of the textual

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Barthes is equally at home in either school. On the one hand, Barthes was, at least in the early stages of his thought, committed to the structuralist position of viewing spoken language as primordial to language-as-system:

A language does not exist properly except in ‘the speaking mass,’ one cannot handle speech except by drawing on the language. But conversely, a language is possible only starting from speech; historically, speech phenomena always precede language phenomena (it is speech which makes language evolve), and genetically, a language is constituted in the individual through his learning from the environmental speech.


school. This form of criticism, based on fixed notions of text, engendered what is now known as the New Criticism.28 The epitome of the text/structuralist approach can be seen in the Jacobson/Levi-Strauss analysis of Baudelaire's "Les Chats."34

This mode of textual analysis quickly gained formulaic "stature" and one can easily find a structuralist critique of almost any "significant" literary text.35 However, concurrent with the apex of structuralist critique was a severe reaction against many of the presuppositions underlying the programme. Collectively, this reaction has become known as deconstructionism, its most powerful proponent being Jacques Derrida.36 Yet deconstructionism is much more than a reaction to structuralism — at least insofar as literary theory is concerned. While, in its initial stages, deconstruction was primarily concerned with questioning hypotheses of structure, it has grown into a full-blown literary theory which urges a synthetic approach to problems of reader versus text.

33. See e.g., N. FRYE, ANATOMY OF CRITICISM (1957); A. TATE, LITERATURE AS KNOWLEDGE (1941); R.P. BLACKMUR, FORM AND VALUE IN MODERN POETRY (1957).
35. See C. NORRIS, supra note 30, at 7-8.

If one would attempt to isolate central tenets of Derrida's philosophy, two propositions (positions?) present themselves. First, Derrida is expressly concerned with laying bare (deconstructing) certain presuppositions assumed by the structuralists, viz. the distinction between speech (parole) and language as object (langue). See J. DERRIDA, DISSERATION, supra, at 181-285 passim (discussion of Mallarme's "discritics.


The second major thrust of Derridean deconstruction is to lift barriers between philosophy and other modes of writing such as fiction. Ostensibly, this is the primary theme of Margins of Philosophy. Derrida's reformulation of metaphysics has been well received in the United States. For an excellent account of Derrida's influence on American philosophy and literary theory, see Godzich, The Domestication of Derrida, in THE YALE CRITICS DECONSTRUCTION IN AMERICA 20 (J. Arac, W. Godzich & W. Martin eds. 1983).

37. See S. FISHER IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 3 (1980).
38. Id. at 10-11.
39. Id. at 2.
40. Id. at 3.
41. Id. at 11.
The first step in this new theory is to deny that there is a meaningful distinction between text and reader which enables the theorist to set one against the other. Thus the reader is not the meaning, nor is the text. Rather, there exists a symbiosis of text and reader which makes critical judgments possible. Deconstructionists still speak in terms of text, author and audience — but these terms take on a fresh meaning. These factions no longer compete for critical prominence — they coexist in an interpretive community.

This challenge to the integrity of the text was spearheaded by analyzing the temporal, rather than the spatial, dimensions of the reading experience. But a return to the early view of subjective reader experience entailed a relativity of meaning which rendered critical commentary pointless. Therefore, a unity of text and reader is posited — meaning becomes an “event rather than an entity.” Some critics, however, continued to give the reader primacy in the new joint relationship. This was plainly wrong. Such an approach relied on reader/structuralist ideas which created the opposite of the result intended — a new formalism based on the reader instead of on the text.

This dilemma influenced the move among literary critics to speak in terms of “interpretive communities.” Thus, as Stanley Fish has noted, “the act of recognizing literature is not constrained by something in the text, nor does it issue from an independent and arbitrary will; rather, it proceeds from a collective decision as to what will count as literature . . . .” The stability of interpretive norms is a result of community unity — and the unity, at least some kind of community unity, is a priori. Interpretive disagreements can exist because of community stabilities. Thus, advocating a particular interpretation is not discovering the meaning, but rather showing the audience a new way to mean. Given that there is no absolutely correct reading of a slice of text, formulation and reformulation of interpretive strategies takes on a true dialectical character. The “rightness” of an interpretation is a matter of better convention — nothing more and nothing less.

Well, one might ask, what does this tangled web of post-modern literary theory do for analytical jurisprudence? Without venturing into

37. See S. Fish, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 3 (1980).
38. Id. at 10–11.
39. Id. at 2.
40. Id. at 3.
41. Id. at 11.
the subject matter of Part II of this Review, one central problem of legal philosophy springs to mind as being aided by critical principles—namely, how does a judge go about deciding hard cases with reference to precedent or a statutory reading? Parallels with problems involved in literary interpretation immediately become apparent. Take, for example, the two main views on determining what a statute means (or, at least, the two views rightly or wrongly attributed to judges): interpretivism and non-interpretivism. Interpretivism holds that judges should read a statute (or a constitution) as the legislators who drafted it intended it to be read, regardless of change in societal (community) mores. Putting aside, for the moment, nagging questions about whether the particular legislators had a singular intent, a group intent, any intent about their intent, or an opinion about whether their intent should matter to judges, this constructivist view of non-interpretation is seen, by parallel with literary theory, to be tacitly non-interpretive. The opposing school of statute reading, non-interpretivism, insists that framers' intent is not dispositive of the meaning of the statutory language at hand. Legislation should be read as a political enterprise, subject to judicial change. There are, of course, many scholars who advocate methods of reading between these two poles.44

Reliance on case law precedent invariably involves interpretation as well. The principle of stare decisis entirely begs the question of what a particular case or even a line of cases means. Here the appeal to the authors' intent is usually less strenuous, but it is, nevertheless, present. A recent line of cases in the area of federal jurisdiction may be illustrative.

In 1961, the Supreme Court decided the landmark case of Monroe v. Pape,45 which held that state judicial remedies need not be exhausted in order to bring a claim under 42 U.S.C. section 1983 in federal court. Two years later, the Court wrote McNeese v. Board of Edu-

42. I use the term "hard case" as per Dworkin. See R. Dworkin, supra note 11, at 81-130 passim (1977).
44. 365 U.S. 167 (1961).
46. The lower courts read McNeese as only addressing the question of adequacy of the particular state administrative procedures. Thus, where those procedures were found to conform with constitutional notions of due process (fair opportunity to be heard), courts upheld an exhaustion requirement. See, e.g., Eisen v. Eastman, 421 F.2d 560, 567-69 (2d Cir. 1970); see also C.A. Wright, The Law of Federal Courts § 49, at 294 (4th ed. 1983); Note, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Cin. L. REV. 537 (1974).
50. See, e.g., J.H. Elly, supra note 43a; J. Choper, Judicial Review and the National Political Process (1980); M. Perry, The Constitution, the Courts, and Human Rights (1982); L. Tribe, Constitutional Choice 121-37, 238-45 (1985); L. Lusky, By What Right? (1975). This is not to suggest that the "grand theories" are ill-founded or useless—they do not, however, provide the analytical building-blocks necessary to the interpretation of a particular text.
51. See supra notes 49-50 and accompanying text.
cation,\(^45\) which appeared to hold that it was unnecessary for a section 1983 plaintiff to exhaust state administrative remedies before proceeding in federal court. Several circuit courts disagreed with this reading of McNeese.\(^46\) Nevertheless, in dicta in several cases subsequent to McNeese, the Supreme Court relied on that case for the flat statement that exhaustion was not mandatory.\(^47\) Finally, the Court recognized the need to settle the question and Patsy v. Board of Regents\(^48\) did so — holding that there is no requirement of exhaustion of state administrative remedies prior to a federal 1983 suit.

The Monroe-Patsy line of cases demonstrates the labyrinth of interpretation that courts are faced with in construing precedent. Even the Supreme Court was treating what, in the final analysis, was dicta in Monroe as precedent. If this were not the case, the decision in Patsy must be seen as superfluous. Rather than stark appeals to original intent\(^49\) or protection of non-majoritarian virtues,\(^50\) the turn to a post-modern jurisprudence resembling current trends in literary theory affords the legal theorist the conceptual ammunition to confront primordial questions of judicial decisionmaking — the coherent explanation of the legal principles presupposing the “grand theories” of constitutional adjudication currently fashionable.\(^51\)


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50. See, e.g., J.H. ELY, supra note 43a.; J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); L. TRIBE, CONSTITUTIONAL CHOICES 121-37, 238-45 (1985); L. LUSKY, BY WHAT RIGHT? (1975). This is not to suggest that the “grand theories” are ill-founded or useless — they do not, however, provide the analytical building-blocks necessary to the interpretation of a particular text.

51. See supra notes 49-50 and accompanying text.

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II.

There is certainly more to Law's Empire than the literary interpretation/legal interpretation analogy, but I choose to solely address this section of the book because I find it the most engaging part of the work, as well as the most divergent from Dworkin's earlier thought.

I begin by mentioning that the sections of Law's Empire which treat the literary/legal interpretation analogy are, in large part, rehashes of a lively debate between Dworkin and Professor Fish initiated four years ago in a symposium on law as literature in the Texas Law Review. Fish offers several telling criticisms of Dworkin's adaptation of literary theory to law. I shall set these out and hope to expand upon them.

Dworkin begins his discussion of legal interpretation by contrasting it with "semantic" theories of law. By "semantic theories" Dworkin means ordinary language notions of what can qualify as "law" — in other words, legal positivism. This position troubles Dworkin on two counts — one philosophical, the other political. First, positivism, in its insistence on qualifying and disqualifying things as "law" or "non-law," is philosophically chauvinistic. Second, positivism can lead to a very conservative theory of interpretation (or, non-interpretation — although, as we have seen, this is a misnomer). Equally problematic for Dworkin is legal realism. He views this super-relativistic theory of legal inventionism as a judicial free-for-all — decisionmaking without the guidance of principle. Legal Realism also produces a form of interpretation unsavory to Dworkin's tastes — total reliance on the reader and hence ultimate indeterminacy. Therefore, Dworkin must arrive at a theory of how to read cases and statutes which falls between these two extremes. Whether he has done so in a coherent fashion is the question which occupies the remainder of this Review.

Dworkin first sets out what he considers to be the necessities underlying any interpretive schema. There are two prerequisites: (1) the object of the interpretation — the entity to be interpreted — must be seen by those in the interpretive community as having intrinsic value, that is, to be worthy of interpretation; (2) the object must be suscept-

52. References to Law's Empire are given by page number only.
54. Pp. 31-44.
55. Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527, 528-29 (1982).
56. P. 47.
58. P. 50.
59. Pp. 54-56.
60. Pp. 59-60; see also Dworkin, supra note 55, at 539-40. Perhaps some authors have made conscious attempts to foreclose particular interpretations of their works prior to literary criticism. This is one way to explain Eliot's footnotes to The Waste Land, see, e.g., Eliot, "The Waste Land," Preface to Footnotes (1922) (explaining the Romance). There is good authority, however, that Eliot viewed the now infamous notes as preposterous. See L. Simpson, Terry on the Tower: The Lives and Works of Ezra Pound, T.S. Eliot and William Carlos Williams 149 (1975). The director "Glen's Song" sequence of The Battleship Potemkin. See S. Eisenstein, Film Form.

The more interesting question is whether, assuming an author wants to claim
ble to interpretation. 56 Next, Dworkin distinguishes creative interpretation from scientific and conversational interpretation, and associates legal interpretation with the former. 57 The major distinguishing point here is that both legal and creative interpretation treat objects of interpretation which are created by “people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation.” 58 One can certainly quarrel with the neatness of these distinctions, but for the purposes of this Review I will grant the point. As creative interpretation, law is concerned predominantly with purposes and not with causes (as would undoubtedly be the case in scientific interpretation). Thus, Dworkin has provided the groundwork for positing interpretive communities. He then turns to the central question of interpretation — how is it possible to evaluate rival interpretations as right or wrong?

In developing his answer to this query, Dworkin first attempts to demonstrate the appropriate relationship between interpretation and author’s intention. First, it is necessary to clarify what Dworkin means by “intention.” He is very careful to disavow any psychological qualification on intent. Rather, intent is an attitude presupposed by the critical enterprise. 59 In a strict sense, the author’s intention is always part and parcel of the baggage of interpretation since an author creates a work to be interpreted. This is not to say, however, that every author contemplates a particular interpretation. Nevertheless, a writer must separate herself from the text to the extent that she recognizes the historicity of its interpretation — i.e., that it is amenable to the interpretive process, whatever its end result may turn out to be. 60 This does not

56. P. 47.
58. P. 50.
60. Pp. 59-60; see also Dworkin, supra note 55, at 539-40. Perhaps some authors have made conscious attempts to foreclose particular interpretations of their works prior to literary criticism. This is one way to explain Eliot’s footnotes to The Waste Land, See, e.g., Eliot, “The Waste Land,” Preface to Footnotes (1922) (explaining the author’s indebtedness to Frazier’s The Golden Bough and Weston’s From Ritual to Romance). There is good authority, however, that Eliot viewed the now infamous notes as superfluous. See L. SIMPSON, THREE ON THE TOWER: THE LIVES AND WORKS OF EZRA POUND, T.S. ELIOT AND WILLIAM CARLOS WILLIAMS 149 (1975). The director Sergei Eisenstein has been remarkably forward about suggesting how to interpret the “Odessa Steps” sequence of The Battleship Potemkin. See S. EISENSTEIN, FILM FORM: ESSAYS IN FILM THEORY 162-65 (J. Leyda ed. & trans. 1949).

The more interesting question is whether, assuming an author wants to stake claim
necessarily commit one to a theory of critical interpretation qua author's intent, however. Indeed, the farthest that Dworkin will go on this account is to admit that there is inherent in the interpretive enterprise an "intentional air." 61

It is clear that Dworkin's main purpose in analyzing the author's intention theory of literary criticism is to undermine strict constructionism in legal decisionmaking. Even though he will accord a modicum of deference to conservative renderings of canonical legal texts (e.g., the Constitution), 62 the "framers" intent theory of constitutional construction is still suspect. Dworkin begins this criticism of positivistic judicial decisionmaking by demonstrating fallacies inherent in creative interpretation which is author intent centered.

Dworkin demonstrates that determining an author's intention invariably proves problematic. To bring the point home, he cites Stanley Cavell's now famous example of an intention not realized yet brought to the attention of the author. 63 Cavell would have us imagine a conversation with Fellini where the director is informed that the female lead in La Strada is really an allusion to the Philemon legend. 64 What happens if this "interpretation" is recognized — legitimized — by Fellini saying "come to think of it, that is what the character means?" 65 This example certainly blurs the line between author's intent and interpretation. Dworkin recognizes this aspect of Cavell's imaginary conversation; however, he does not go far enough and admit that the example brings into question the very propriety of separating text from reader — author from interpretation. I will return to this oversight on Dworkin's part later.

If Dworkin renounces the author's intent theory of interpretation, the defences to interpretive ground, this foreclosure can ever be successful. Congress has gotten into the habit of publishing official legislative histories to important enactments in just such an attempt. These official legislative histories can present an artificially homogenous portrait of Congressional intent underlying legislation. Many times they do no justice to the fact that most legislation is forged on the anvil of dissent.

61. P. 59.
64. An unimaginary example presents itself readily. Thomas Mann, when informed of the post Howard Nemerov's reading of The Magic Mountain as a Grail epic, stated that his characterization of Hans Castorp was unconsciously one of Perceval. T. MANN, AUTHOR'S POSTSCRIPT, in THE MAGIC MOUNTAIN 717, 725-26 (H.T. Lowe-Porter trans. 1969).
65. P. 77.
67. There have been very few of these efforts — none of them worth reading. Dworkin poses to the soft-core porn Naked Came the Stranger (written serially by a number of New York Post journalists, ostensibly as a hoax to demonstrate that any thing can get published) as an example of this technique. However, the slight characters authored in that book do not suit his purposes so well, and he urges us to imagine that Dickens' A Christmas Carol was chain written. See pp. 232-37. Apparently, Dworkin uses this story as exemplar because the character of Scrooge undergoes a metamorphosis — a narrative result which would constrain a later serial writer. Perhaps a more elegant example of the same would be to imagine a Bilderdrempel such as Mann's Buddenbrooks or Maili's Young Torless so written.
68. Pp. 228-38; see also Dworkin, supra note 55, at 541-42; accord S. SONTAG.
what does he propose in its place? At this juncture in his analysis, Dworkin coins a rather opaque phrase which he maintains is determinative of the problem. An interpretation attempts to make the text the “best it can be.”68 Most of the problems with Dworkin’s idea of interpretation are attributable to conceptions underlying this phrase. If Dworkin rejects the author’s intent theory and if there can be real disagreement about whether interpretation A is better than interpretation B of a text, then he must rescue his pluralistic/democratic theory of interpretation from the grips of legal realism. For, without a substitute for author’s intent as the immovable signpost for what readings count as “right” and “wrong,” anything — literally anything — goes.

Dworkin terms the “anything goes” account of legal interpretation “external skepticism.”66 This is contrasted with internal skepticism, which is intra-community disagreement over plausible and implausible interpretations. Dworkin’s answer to this dilemma of potential indeterminacy is the Achilles heel of his interpretive theory, for he seeks refuge in the very author’s intent theory he initially turns aside. In short, Dworkin must attempt to side-step the time-honored naturalistic fallacy — attributing truth values to normative positions. Dworkin’s conundrum is amply illustrated in his account of how judges read precedent.

Dworkin likens a judge’s role as interpreter of precedent to that of a chain novelist.67 If, for instance, there are ten authors writing a particular novel in serial fashion (i.e., they do not consult with each other concerning treatment of their respective chapters), Dworkin argues that the position of each successive author is progressively distanced from a “text” so that intent becomes an attenuated issue — if it is an issue at all.68 Through the writing of these chapters — or cases, if you

65. P. 77.
67. There have been very few of these efforts — none of them worth reading. Dworkin points to the soft-core porn Naked Came the Stranger (written serially by a number of New York Post journalists, ostensibly as a hoax to demonstrate that anything can get published) as an example of this technique. However, the slight characterizations authored in that book do not suit his purposes so well, and he urges us to imagine that Dickens’ A Christmas Carol was chain written. See pp. 232-37. Apparently, Dworkin uses this story as exemplar because the character of Scrooge undergoes a metamorphosis — a narrative result which would constrain a later serial writer. Perhaps a more elegant example of the same would be to imagine a Bildungsroman such as Mann’s Buddenbrooks or Musil’s Young Torless so written.
68. Pp. 228-38; see also Dworkin, supra note 55, at 541-42; accord S. Sontag,
like — the respective authors increasingly become constrained by the history of the other authors’ prior work. That is, author five is constrained to some extent by what authors one through four have written. Thus, for example, if the narrative has stipulated in clear terms that the hero of the book is x, then the next author must either be limited by x or rewrite prior text. So it is with judges, Dworkin argues. Each is an author in a chain, constrained by what has gone before. Dworkin terms this communal constraining force in law “legal history.”

It is crucial to realize what is going on here. Judges are not only writing their own cases, they are also interpreting legal history and, as they write, they are authoring interpretations. Therefore, the idea of author’s intent as a guide-post for determining whether an interpretation is right or wrong is denuded as chimera — there is no brute fact, only interpretation.

This is the logical payoff of Dworkin’s theory of judicial decision-making, but it is an end that Dworkin himself cannot accept. Stanley Fish has poked holes in prior versions of Dworkin’s theory, holes which bear recounting and analysis. Fish contends, and I think rightly, that Dworkin starts out on the right track but cannot accept the consequences of his theory — or at least the consequences as he sees them. Thus, he retreats to an author’s intent theory and accomplishes nothing. According to Fish, Dworkin can give no account about what it would be for a particular judge to be wrong in a particular interpretation of prior case law under the chain novel analogy. In order to erect standards by which right can be separated from wrong, Dworkin must distinguish between the position of the first author in the chain and that of the later, more remote authors. This distinction is essentially one of the original or primordial intent. Thus, although Dworkin does not place the first author’s writing/interpretation of the work in an absolute posture, he does accord it primacy — a first among equals as a historically constraining factor. The first author has greater freedom than the others to adhere to or depart from narrative. This seemingly small step is fatal to Dworkin’s position. It inadverantly posits text as brute fact and commits Dworkin unwillingly to a strict constructionist reading of law.

The concept of constraining legal history does not help Dworkin either. As was the case with the text of the first author, Dworkin in-

[Against Interpretation, in A Susan Sontag Reader 96, 100 (E. Hardwick ed. 1983).
71. See Fish, Wrong Again, 62 Tex. L. Rev. 299, 300-01 (1984); see also p. 238.]
vests legal history with the status of brute fact. But this cannot be. If every chain author is interpreting and not freely intending a text, how can legal history be anything but the result of interpretation? If it is an interpretive resultant, then it is not brute fact and will not serve as a barometer for distinguishing correct from incorrect interpretations. This is the dilemma; Dworkin must embrace either legal realism and its indeterminance or positivism and its determinancy. Otherwise he, like Odysseus, would be cast against the rocks.

Dworkin has offered an answer to Fish's objections,70 but I remain unconvinced. The attempted rebuttal of Fish involves a distinction Dworkin makes between explaining and changing law. An interpretation which changes law cannot be legitimate, whereas one that merely explains law can. But this begs the question. The very measuring-stick for distinguishing change from explanation must be some notion of a fixed text.71 This later position, which appears in Law's Empire, indicates that Dworkin, for the time being, has thrown his interpretative hat to the edge of the positivist ring.

It is interesting to conjecture just how far this confusion over the base structure of interpretation undermines the later, more explicitly jurisprudential, sections of Law's Empire. My inclination is that it severely affects the later portions of the book. However, I say this with a caveat. I do not think that Dworkin's position is beyond restructuring and I think that with some reshaping the later parts of Law's Empire are indeed more forceful than they would have seemed initially — even to one who accepted Dworkin's interpretive theory.

The red herring in Dworkin's search for a pluralistic theory of interpretation which provides the basis for a liberal view of judicial decisionmaking is that determinacy, and hence correctness and incorrectness, of interpretation must be predicated on truth values. It is here that deconstructivist theory aids the theoretician. Rather than relying on "right" and "wrong" as determinative of the value of different interpretations, the judge could feel a constraining interpretive force in "persuasive" and "unpersuasive" as criteria for earmarking which interpretations to accept and which to reject. This position is consonant with the idea that one cannot shed the interpretive robe and separate text from reader, yet it does not commit one to either a positivist or a

71. See Fish, Wrong Again, 62 TEX. L. REV. 299, 300-01 (1984); see also p. 238.
realist position. True, it does not allow a judge to compartmentalize “correct” and “incorrect” interpretations, but who said that a judge’s job was easy? Moreover, such a view does little to change the role that principle, as opposed to rules and policy, play in Dworkin’s earlier jurisprudence.

Most book reviews end with a recommendation about whether to read the book or not. Everyone who is even the slightest bit interested in how judges do or should decide cases should peruse this latest offering by Dworkin. It is ingeniously crafted, cogently argued, tersely written and extremely interesting. What is more surprising is that it is remarkably accessible to the non-lawyer. The most important aspect of the book, however, is that it sets the stage for further meditations throughout the legal and philosophical communities on the theme of judicial decisionmaking. Further, it brings discussions of this topic into a decidedly updated forum. Perhaps jurisprudence has finally caught step with the rest of critical inquiry — post-modern jurisprudence, maybe.