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# The End of a Four Hundred-Year Boom: The Need for Major Constitutional Change

by Arthur S. Miller\*

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. . .man, proud man,  
Drest in a little brief authority,  
Most ignorant of what he's most assured,  
His glassy essence, like an angry ape,  
Plays such fantastic tricks before high heaven,  
As make the angels weep. . . .

*Measure for Measure*  
I.i.33

## I.

During the past four hundred years many institutions that Americans consider to be the natural order of human affairs were born: representative democracy, the private enterprise system of capitalism, and individualism, among others. Were one to ask why they appeared at roughly the same time in a quite limited geographical area, what would be the answer? Even if we accept, as we must, the view that there can be no simple *and* complete explanation of any human phenomenon,<sup>1</sup> let alone a set of them, history possibly provides a principal determinant. The basic premise of this essay in American constitutionalism is that those "natural" institutions and, indeed, the very concept of constitutionalism itself as it has been received and understood by modern constitutional scholars were in large part consequences of the Great Discoveries that began with Columbus. Wealth in theretofore untold

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1. E. NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* (1961).

amounts poured into the “metropolis”—Western Europe—and seemingly endless land became available to the hard-pressed peoples of Europe. They were thus able to escape the ecological trap, with its concomitant authoritarian institutions, that had imprisoned them in a rigid caste system throughout known human history.

With the Great Discoveries, a static society gave way—slowly and haltingly at first—to one of permanent revolution. The ancient and medieval worlds were closed. Space, rather than being infinite, was considered to be a solid sphere in which the stars were embedded. Time, too, was finite: to medieval man the world was four thousand years old and would end in a short time. Learning was limited: people believed that the final truth on all subjects had already been written, if not in the Bible then by Aristotle and Plato and Euclid and other ancients. The Bible as Holy Writ was the ultimate truth for religion and cosmology. Those who thought and wrote did so—with rare exceptions (such as Copernicus)—within a closed body of knowledge; they were confined to refining the accepted wisdom of the day. The universe was anthropocentric: earth was its center and man was the special creature of an all-knowing and all-wise God. It was an authoritarian, even totalitarian, age—in economics and politics and religion.

Then came the Discoveries (and the Copernican Revolution) and following them massive alterations in social institutions. Societal change started slowly, but accelerated; by the nineteenth century it became characteristic of the social order. Today, it is built into human affairs. We live at a time when revolution has been made a perpetual institution—not in the sense of a violent overthrow of government but, rather, as an apparently permanent feature of socio-economic, and thus of political, institutions. The underlying assumptions, the metaphysics, of society have been altered. Human life on earth—I speak here of the Western world—rather than being thought of as a prelude to heaven or hell, became an end in itself. It became possible (at least for a time) “to think of . . . the conquest of the material world in human interest, of providing the conditions for a good life on this planet without reference to any possible hereafter.”<sup>2</sup> The idea of progress flowered. Rather than living in the final age, humankind saw itself as participating in a process of progressive improvement of the human lot. People became optimistic, rather than having a “sombre melancholy.” No problem was considered to be insoluble, it being the humanistic vision that people

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2. Beard, *Introduction* to J. BURY, *THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH* xi (1955).

through applied reason could not only know, but could solve, all problems. Faith in an all-wise God was subtly transferred to faith in scientists and technologists, who were considered to be able to create technological “fixes” that would ameliorate the harshness of life. Politics changed: the nation-state replaced feudalism as the characteristic form of political order. Economics developed from mercantilism—a Statist economy—to laissez-faire private enterprise capitalism, although the State was still important as a protector of and stimulant to business. The individual human being was perceived as the basic unit of society, a belief that crept into and dominated law and legal institutions. In short, the “modern age” was born.

My point is not necessarily that a direct causal connection existed between all of those developments and the Great Discoveries, but, rather, that only after the Discoveries did the new institutions and beliefs come into existence. An environment was provided in which new ideas and concepts could flourish. Those who may think that this is an example of *post hoc, ergo propter hoc* fallacious reasoning should consider what Adam Smith wrote in 1776:<sup>3</sup>

The general advantages which Europe, considered as a great country, has derived from the discovery and colonization of America, consist, first, in the increase of its enjoyments; and secondly, in the augmentation of its industry.

The surplus product of America, imported into Europe, furnishes the inhabitants of the great continent with a variety of commodities which they could not otherwise have possessed. . . .

The discovery and colonization of America . . . have contributed to augment the industries, first, of all the countries which trade to it directly . . . and, secondly, of all those which, without trading to it directly, send, through the medium of other countries, goods to it of their own produce.

Without the wealth of the Great Discoveries, modern capitalism could not have flourished. So, too, with its political counterpart: liberal democracy. What would have been abnormal before the Discoveries became normal.

No present need exists to buttress what has been said about the new age, for Walter Prescott Webb in one of the most important, albeit little noticed, books of this century, *The Great Frontier*, has provided

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3. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 92 (1776).

ample data to show that the modern age is "an abnormal age, and not a progressive orderly development which mankind was destined to make anyway."<sup>4</sup> Building on Turner's "frontier theory" of American history,<sup>5</sup> Webb saw the Great Frontier as "one of the primary factors of modern history. . . . The sudden acquisition of land and other forms of wealth by the people of Europe precipitated a boom on Western civilization. . . . That boom lasted as long as the frontier was open, a period of four centuries." A four hundred-year boom took place, a boom that was unique in time and space. I would vary that, for the United States at least, to maintain that the boom lasted until about 1970. The world frontier closed during the first part of this century. The bulk of public lands had disappeared. An enormous increase in population has made the density per square mile, both in Europe and in the new world, on average greater than the density was in Europe in 1500. Turner had limited his scope to the American frontier only, but Webb took that analysis to its logical end.

Turner's perspective was too narrow; he concentrated on the availability of land and solely on the American experience. Webb went further: he saw that resources were as important as land and he envisaged a frontier far larger than Turner's. David M. Potter, in his study of the American character, criticizes Webb for not recognizing that "advancing technology"<sup>6</sup> went hand in hand with the bounty of nature to create what Potter saw as the distinctive American character.

There can be little question that technology had much to do with the exploitation of the resources of the Great Frontier. Potter correctly chides Webb for according too much attention to what Potter calls "geographical determinism."<sup>7</sup> That raises the question of whether the *means* by which humans can order their affairs in a humane way for everyone—by which, that is, they can create a sustainable society—are presently available. Is technology *the* answer? Rather, can it provide an answer to the problems confronting people everywhere? Can technology be harnessed in ways adequate to effect a transition to such a society? The question asks much. We do not know its answer. But what seems unassailable is this: to harness technology in the quest for a sustainable society will require a continuing cooperative effort, one that can in final

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4. W. WEBB, *THE GREAT FRONTIER* 14 (1952).

5. F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

6. D. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* 161 (1954).

7. *Id.* at 163.

analysis only be undertaken by government. Thus, the crucial constitutional question is posed: What changes in present-day politico-economic institutions are in order?

Even though his analysis is incomplete, Webb's conclusions seem to be irrefutable. Some questions that they present include: (a) do political and economic institutions that matured during the four hundred-year boom, and were adapted to those conditions, require alteration now that the frontier has closed? and (b) is there somewhere, somehow, a modern substitute for that boom? The answers, only adumbrated here, may be simply stated: (a) yes, those institutions—economic and political and philosophical—must be thoroughly examined anew to determine how they should be changed to fit a radically new, indeed unique, environment; and (b) no new frontier of comparable significance is in the offing. Outer space, whether within or without the solar system, cannot under any reasonably foreseeable set of circumstances be a substitute for the Great Discoveries. On the contrary, rather than providing new resources and new lands, space exploration and settlement (even though theoretically possible) would enormously drain existing resources. True it is that science and technology—first in the Industrial Revolution and now in the Microprocessing Revolution—have enabled some of humankind to stave off the imperatives of the end of the four hundred-year boom, mainly because of vastly improved productivity of labor, plus the invention of the art of invention. Some observers, accordingly, look upon science as an endless frontier. To the extent that science and technology can be employed to help develop a new environment, that belief is valid. The rub comes, however, because science, too, is resource-draining. It cannot create matter; that is a physical impossibility. And we have learned in recent years that entropy is a universal law that cannot be repealed. The transition to an "information society" at most means that information can be transferred without loss, without being in a zero-sum game. But information is not an end in itself; ultimately, it must deal with resources. The unavoidable "bottom line" is the humankind-resources ratio. Technology can be used to provide means to transfer information and employ resources so as to adapt the species to a new type of living—if only it will be used. Whether it will be is as yet unanswered.

In sum, then, what has seemed to be normal during most of American history—economic growth, relative peace, immense natural resources, the idea of progress and of the perfectability of man—has in our fact actually been abnormal—abnormal as compared with how *Homo sapiens* lived prior to the Great Discoveries and how it has lived

outside of Europe and a few European colonies since the Discoveries. The Golden Age of the Western world commenced about 1600 and lasted until about 1970, at which time time-honored institutions began to become unraveled. Society, ever increasingly and the world over, cannot be called "sustainable." A "sustainable society" is one in which human needs and deserts are fulfilled within the constraints of the environment. Immense strains created by burgeoning population and rapid depletion of resources have retrogressed the man-land ratio to a situation worse than it was in 1650. In the West, population density in 1500 was about 26.7 per square mile; by 1940, that figure had become 34.8 per square mile<sup>8</sup>—and it is far worse today. Only, as has been suggested, the advent of technology enabled humans to have a relatively abundant economy—and then often at the expense of the poverty-rows of the Third World. I have already suggested that I do not think that such technological "progress" can long continue, but it need not. Enough is *now* known to keep the ecological trap from closing. Whether that trap will snap shut or whether it will remain open is one of the great unanswered questions of the day.

This essay suggests the need for institutional change across the board, based on the idea that such alterations, when and if made, could help effect a transition to a sustainable society, a society that is not so much static as in relative equilibrium, a society that has human dignity for all as its *summum bonum*. A preliminary question involves the extent to which law, however and by whomever promulgated and in whatever form, can be useful in that transition. It is conceded that limits to effective legal action do exist; and that law, by itself, is a frail reed upon which to rely. We have had laws and legal institutions for millenia, and constitutionalism in the normative sense of limitations on government is central to the American ethos, but candor compels the admission that they have been relatively impotent—thus far, at least—in achieving a decent society for all. Law, of course, is not irrelevant, but it must take its place with other techniques and mechanisms—those subsumed under the broad rubric of politics—if it is to play an effective role in the time of troubles that lie dead ahead.

## II.

As the United States counts down to the 200th anniversary of its only constitutional convention, it is becoming increasingly clear that

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8. Webb, *supra* note 4, at 8 n.18.



major changes are necessary in the oldest *written* fundamental law. Social institutions—political, economic, legal—are under severe challenge, so much so that it is by no means certain that a smooth transition to a sustainable society can be made. The challenge, in sum, is even greater than the sanguinary strife of the Civil War, the only previous episode in American history at all comparable to today's time of troubles. This essay is an argument for basic constitutional alteration, not only in the Document of 1787 itself but also in the congeries of customs and practices that have grown up extra-constitutionally. Both the *formal* and the *living* (or *operative*) constitutions require thorough study and revamping. My theme comes from a recent statement by Willy Brandt: “. . . the two decades ahead of us may be fateful for mankind. . . . Many global issues will come to a head during the period.”<sup>9</sup>

“We know we are on an unsustainable path,” Dr. Lester Brown maintains. “We also know that there are no simple technological fixes.”<sup>10</sup> That is not really correct: Some, but far from all, know, and indeed many dispute, Brown's conclusion. Among opinion leaders, who should if they thought about it agree with Brown (and Brandt), a pervasive attitude of Micawberism may be detected—the sublime belief, labeled after the character in Dicken's *David Copperfield*, that something will always turn up to solve human problems and even to rescue humankind from its follies. That confidence, that faith, is, as has been suggested, the consequence of two factors—the Great Discoveries of the past four hundred years, a part of which were the seemingly inexhaustible resources of the United States; and a blind, unthinking belief that scientists and technologists can willy-nilly create technological solutions for specific problems. The age of discoveries has run its course, and the species, which exists in massive numbers today (and many more in the future—from the present 4.6 billion world population to about 6.5 billion in the year 2000), is now entering an ecological trap similar to that which existed in pre-Columbian times. Unregulated technology, furthermore, can be both boon and bane, in the sense that “second-order” consequences of new developments can have harmful side effects. Only if technology is approached systemically or holistically can there be hope that it will be an overall boon. And that, as has been suggested, can only come from government—which points up the

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9. W. BRANDT, NORTH-SOUTH, A PROGRAM FOR SURVIVAL: REPORT OF THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES 7 (1980).

10. L. BROWN, BUILDING A SUSTAINABLE SOCIETY 8 (1981).

constitutional challenge.

Can familiar societal institutions—capitalism, representative government, constitutionalism—that were developed in the four hundred-year boom perform adequately in the emergent age? Can they harness technology? The answer suggested here is a flat negative: They cannot. And that, I suggest, is so even though they have undergone and continue to undergo considerable alteration since first they appeared—as has been said, quite recently as time is reckoned, and in a limited geographical area. Each was and is a reflection of the environment in which it has existed. Those institutions were not *a priori*; rather, they were *a posteriori*. They grew, not by design but by reaction to circumstances. As such, they do not represent eternal truths about the human condition. Quite the contrary: they represent, to update Thucydides's famous comment, human situations where the strong continue to do what they can and the weak still suffer what they must.

That, it seems to me, is the way that matters have always been. To be realistic, perhaps it is the way they will always be. The argument in this essay suggests that it is not an either-or proposition. Knowledge is available by which a sustainable society *can* be built. I do not say that it *will* be realized, the capacity of humans to order their affairs with minimal decency for all is by no means certain.<sup>11</sup> Creating that society will not only require foresight and planning to a degree not before known, it will also require the strong to perceive what they have seldom done in the past—that they and the weak are in the same boat and will sink or float together. The ultimate aim is for a dynamic equilibrium between population and resources—worldwide.

Lester Brown asserts quite correctly: "Creating a sustainable society will require fundamental economic and social changes, a wholesale alternation of economic priorities and population policies." Well and good, but only so far as it goes: Brown does not say how to get there from here. He does not tackle the immensely difficult problem of institutional change; nor does he face up to the indispensable requirement that any discussion of political theory—what he is talking about—must be based upon an accurate cognizance of the nature of human nature. In final analysis, Brown is speaking about constitutional matters; the changes he calls for are those that concern what constitutions are all about: the governing institutions of society, who benefits from governmental decisions, the relationships with other governments.

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11. See D. EHRENFELD, *THE ARROGANCE OF HUMANISM* (1978).

I have suggested that a sustainable society is one in which humans everywhere have their basic needs and desires fulfilled insofar as the environment permits. That brief definition, of course, raises more questions than it answers. Such a society, at the very least, will require that an equilibrating balance be struck between *Homo sapiens* and the planet it occupies and dominates (I do not say subdued, because evidence is growing that nature is rebelling). Humankind must, contrary to the Judeo-Christian tradition and ethic, perceive that it is an integral part of nature, at one with it and not superior to it. To be contemptuous of nature is to invite disaster. The great and enduring task of modern constitutionalism is to help create such an equilibrium. Since 1787, American constitutionalism has been largely concerned with principles of balance—but only within the political order: in the separation of powers in the national government, in the federal system, in the relationship of persons to government. That limited conception is no longer sufficient to the growing need; the notion of balance, of equilibrium, must now be taken to the entire social order, and, indeed, to the entire planet. The balance is between *Homo sapiens* and nature. That poses the need for a fundamental reordering of the very concept of constitutionalism.

In politics, however, balance must give way to a concept of process, to recognition that the political, the constitutional, order follows Darwinian and Einsteinian rather than Newtonian principles. Within principles of the balance between humankind and the rest of nature, process rules. Isaac Newton likened the universe to a great clock, with interacting parts, and with the laws of cause-and-effect playing a primary role. Darwin and Einstein changed that permanently. The political order is a process; it follows the laws of evolution, not “the mechanistic world view of Cartesian-Newtonian science,” which is “outdated.”<sup>12</sup> And the Constitution has always been relative to circumstances. It is, therefore, both Darwinian and Einsteinian. As Carolyn Merchant, historian of science at the University of California, Berkeley, has put it:

In investigating the roots of our current environmental dilemma and its connections to science, technology and the economy, we must re-examine the formation of a world-view and a science which, by reconceptualizing reality as a machine rather than a liv-

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12. See F. CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY AND THE RISING CULTURE* 15 (1982).

ing organism, sanctioned the domination of both nature and women. The contributions of such founding "fathers" of modern science as Francis Bacon, William Harvey, Rene Descartes, Thomas Hobbes and Issac Newton must be re-evaluated.<sup>13</sup>

That is a relatively new insight, one that is far from totally recognized and accepted by those who study the Constitution. Indeed, it is fair to say that many constitutional scholars reject constitutional Darwinism and that most of them have not thought of constitutional Einsteinism. Throughout American history the Constitution has been viewed mainly through the eyes of lawyers as a legal document, to be treated as any other legal instrument. That simply is not adequate to the need.

American constitutionalism has been concerned mainly with the powers of government to organize itself and its relationships to the individuals and groups of society—with, that is, a combination of limitations on official power and a tacit expression of the affirmative powers of government. As lawyers and political scientists know it, constitutional law tended to be interdictory, principally exegeses on a theme of what government could not do. Until quite recent times, little was recognized about the affirmative powers of the State. (That lack of theory of the positive aspect of government was changed in the 1930s and 1940s.) Constitutional theory since the beginnings considered the natural person to be free-standing, autonomous, answerable chiefly to himself and to his God. Insofar as possible the person was to be loosed from constraints from the State, which was to assist rather than regulate. *Formal* constitutional law, the law of the books, was viewed as one of limitations or of rights. The law in action, the operative constitutional law, differed. It was one of powers.

Formal constitutional law took a significant turn about a half-century ago. It merged with the operative Constitution so as to add a layer of governmental permissiveness to the palimpsest that is the Document of 1787. At the same time, some of the limitations on government finally got judicial recognition. Not always, to be sure, but often. (The relationship between judicial cognizance of civil rights and civil liberties to constitutional Keynesianism has never been explored.) The new latitude permitted government was not the same *on specifics* as it was in the nineteenth and early twentieth centuries. Quite the contrary. For

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13. C. MERCHANT, *THE DEATH OF NATURE: WOMEN, ECOLOGY AND THE SCIENTIFIC REVOLUTION* xviii (1980).

150 years the operative Constitution permitted massive governmental aid to business, to the exploitation of the resources of well-nigh virgin continent, to suppressing internal discontent (large and small), to the expansion of the American empire. Since the 1930s government has become "positive" in nature, in the sense that it has undertaken, with Supreme Court approval, affirmative obligations to the entire populace.<sup>14</sup> Those duties are expressed in congressional statutes, which when enacted were given the imprimatur of the Supreme Court. Thus on a general level government assumed a new posture. Formal law was still apparently limitative—I say "apparently" because the Constitution has always been relative to circumstances—but in fact a Constitution of powers in a secular state came into existence. The Supreme Court, as the nation's authoritative faculty of political theory, redefined the nature of freedom from autonomous man individualistically standing alone to liberty in a social organization. Formal law, that is, acknowledged the group basis of politics and of economics; and the operative law made the individual person important only as a member of a group or groups. More recently, yet another layer is being added to the ancient parchment, one that expressly validates increasing controls upon individual behavior. Those controls emanate from both public and private governments—from, that is, the organs of the Political and of the Economic Constitutions.<sup>15</sup>

A contemporaneous development involves the judiciary. At times, but far from always, judges issue commands to other governmental officers, telling them what they *must* do (as compared with historically telling them what they could not do). In some respects, the question in some constitutional cases has become: If the natural person owes duties and obligations to the groups of the political and economic orders (which he does, principally to the nation-state), to what extent does the group owe correlative duties and obligations to the person? This small shift in judicial constitution-making should be openly recognized, assimilated into constitutional theory, and extended into a fundamental law of basic human needs and deserts. Not that the judges can do the job alone. They cannot. Such an argument, of course, entails advocacy of an exponential jump in the theory and practice of American constitutionalism. Hence the requirement, both for cooperative actions

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14. See A. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* (1968).

15. See A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982); Miller, *Toward A Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633 (1983).

among all three branches of government (as well as cooperation between the nation and the states and, of even greater significance, the nation and the governments elsewhere on the planet) and for a constitutional convention.

Law historically was based upon an assumption about the nature of man and the environment. Briefly, that assumption was the political version of Adam Smith economics—the belief that there is a “market-place” of politics in which the individual actions of persons and the groups they form result, as by “an invisible hand,” in the overall common good. Nature (the environment) was perceived through John Locke’s eyes as beneficent, not as the harsh and forbidding world of Thomas Hobbes. It has now become all too clear that humans everywhere, including Americans, are now in a Hobbesian world, in a slowly closing ecological trap thoroughly familiar to those who lived in medieval Europe but only little known in the United States. This is the “climacteric” of humankind. We live, not in a period of crisis, but at a time when a number of crises are coalescing.<sup>16</sup>

The formal Constitution, the Constitution of the books, is obsolescent, even obsolete, in substantial part, and therefore in need of substantial revision. The operative fundamental law is becoming corporatist in a fact, through a process of unannounced but portentous constitutional alteration. Tensions produced by new environmental constraints make it clear that the process of progressive updating of the Constitution by the Supreme Court and other authoritative decision-makers is no longer sufficient to the need. The resulting problem is systemic, not aberrational, and cannot be cured by a constitutional Band-Aid or quick fix. From that it follows that radical constitutional change is required. Alterations, some quite drastic, in the formal and operative constitutions are necessary, predicated on the bedrock proposition that humankind must attain a “oneness” with nature.

Enormous difficulties must be surmounted to get “there” from “here” by means of institutional change, “there” being a sustainable society and “here” being the climacteric. There are limits to effective legal action. Moreover, since “[p]olitical theory which does not start from a theory of man . . . is quite worthless,”<sup>17</sup> the question of human nature must be faced. No alteration in the nature of the species is sug-

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16. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981); F. CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY AND THE RISING CULTURE* (1982).

17. P. RHINELANDER, *IS MAN COMPREHENSIBLE TO MAN?* 1 (1973).



gested; rather, I maintain that the irreducible necessity is for those in positions of power and influence to recognize where their long-term interests lie (it being assumed that they readily perceive their short-term interests). Finally, it is recommended that a constitutional convention be convened to consider radical change in the fundamental law.

### III.

That much of what is said in this essay is controversial goes without saying. When speaking of constitutions, and particularly of the American Constitution, one deals with political theory and social ethics, and perhaps of greatest importance, with an aspect of religion—a civil or secular religion. The Document of 1787 is the basic instrument of America's civil religion, which in its totality is far more important than orthodox theological institutions and dogmas. Americans revere an ancient piece of parchment as much or more than the Bible of the Talmud. To argue that the Constitution requires rewriting cuts as close to the nerve as asking that the Bible be redrafted. The time, however, is long past for Americans to confront the demonstrable fact that Woodrow Wilson was correct when he said in 1885 that “[t]he Constitution in operation is manifestly a very different thing from the Constitution of the books”;<sup>18</sup> and therefore that today's fundamental law is only metaphorically connected to the Document of 1787. A harsh reality must be faced: that the ancient Document solidifies societal institutions, both public and private, that are positive barriers to fair, decent and efficient government. I do not suggest that a new Bible be written, although surely a persuasive case can be made for rethinking humankind's relationship to the cosmos—which is what the Bible is all about. A constitution—any constitution, written or unwritten—is concerned with how humans relate to each other, how their affairs are ordered, and how they organize themselves into collectivities. At times, those collectivities are called government, public government, but quite often they are at least nominally private. The mundane, yet immensely important, level of juristic theories of politics is the concern of this essay.

Several assumptions underlie what is said here, including the following:

1. A distinction must be made between *society* (the aggregate of essentially atomistic individuals and groups in the nation), the *State* (a

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18. W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 30 (1885).

metaphysical concept in the name of which society is governed; although it cannot be seen or touched, it is as real as any natural person—and perhaps more so), and *government* (the visible apparatus of the State). This differentiation is seldom made in the literature of constitutional law; judges and commentators alike being content to use the terms as if they are synonymous. They are not.

2. So far as political economy is concerned, however, the atomistic individual does not exist as such. A person gathers constitutional significance only in his relationship with others; he is important both politically and economically only when he combines his personal strength with members of a group. Politics, in other words, considers the group to be the basic social unit. In economics, this is the age of collective action.

3. Government is both public and private. Public governance consists of those visible organs, legislative and executive and judicial, that are usually solely considered to be government. The other dimension of private governance consists of the major pluralistic groups in the nation, of which the giant corporations are the principal exemplar. In other words, Americans are governed by both a political and an economic Constitution, which combine in an emergent corporatist Constitution.

4. The State (sometimes called the public or the national interest) is more than the arithmetical sum of the private interests of the nation. It has its own claims, as President John F. Kennedy acknowledged in a burst of candor in 1962. Answering a question about a “public interest” in collective bargaining negotiations, he said: “These companies are free and the unions are free. All we [the Executive] can try to do is to indicate . . . the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it’s even sometimes a little more. In fact, it is a little more.”<sup>19</sup> That was iterated by President Jimmy Carter in his farewell address: “the national interest is not always the sum of all our single or special interests.”<sup>20</sup> From time to time the Supreme Court has echoed that sentiment, as, for example, in Justice John M. Harlan’s 1959 opinion for the Court in *Barenblatt v. United States*.<sup>21</sup> “In the last analysis,” said Harlan, Congress’s power to investigate possible subversions rests “on the right of self-

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19. N.Y. Times, March 8, 1962, at 14, col. 5.

20. Miami Herald, Jan. 15, 1981 § A at 16, col. 1

21. 360 U.S. 109 (1959).

preservation, 'the ultimate value of any society'.<sup>22</sup> Wittingly or not (probably not), Kennedy, Carter and Harlan adopted, at least implicitly, an important Machiavellian principle: "It is not the well-being of individuals that makes cities great. . . . The common good can be realized in spite of those who suffer in consequence."<sup>23</sup>

5. The United States, the theory to the contrary notwithstanding, has always followed Machiavellian principles. That is particularly seen in the operative Constitution, but at times may also be seen in the formal Constitution as interpreted by the Supreme Court. Machiavelli, moreover, was one of the most wrongfully maligned political theorists in history. Far from the murderous Machiavel that so many have painted him, a careful reading of his best work, *The Discourses*, and even of his best-known book, *The Prince*, reveals that he preferred a republic over a prince—if it could be obtained. To assert that the United States has followed Machiavellian principles is simply to say that throughout its history it has been far more tough-minded than the myth system would have it.

6. There is what Professor David Ehrenfeld has labeled "the arrogance of humanism"<sup>24</sup>—the idea, widely held, that humans have the capacity to order their affairs with a measure of decency for all; that, in other words, man can plan and thus control the future. Although it is doubtless true that the technological future can and will be invented (with wholly unpredictable consequences), that by no means is proof that *Homo sapiens* can guide the course of social events in a reasonable adequate manner. "Every inventor," Daniel Boorstin maintains, "is a Pandora";<sup>25</sup> the first-order consequences, those which are obvious, may be easily forecast, but the problem lies in the second-order consequences. Scientists and technologists, Alvin Weinberg has said, have made a "Faustian bargain" with society. That is dangerous (how much we know not) because it involves "the mounting complexity of technology along with the staggering problems of managing the response to ecological scarcity. . . . These will require us to depend on a special class of experts in charge of our survival and well-being—a 'priesthood of responsible technologists'."<sup>26</sup>

22. *Id.* at 117-18 (quoting *Dennis v. United States*, 341 U.S. 494, 509 (1951)).

23. N. MACHIAVELLI, *THE DISCOURSES* I.6 (1974).

24. Ehrenfeld, *supra* note 11.

25. D. BOORSTIN, *THE REPUBLIC OF TECHNOLOGY: REFLECTIONS ON OUR FUTURE* 91 (1978).

26. Weinberg, *Technology and Ecology—Is There A Need for Confrontation?*

7. If Weinberg is accurate, that implies the emergence of an overt class, even caste, society. The beginnings of such a stratified society are already evident.

8. Ehrenfeld may be correct; but even so, the effort to create a sustainable society should be made. As with most of man's efforts to determine his destiny, the quest may in final analysis be futile, even absurd. We must, however, learn to live with absurdity—"or what's a heaven for?"

9. Government will remain an active—indeed, a necessary—participant in societal affairs. It will not fade away, despite the wishes of such deep-thinkers as Milton Friedman. Even if the views of Friedman and his followers were to prevail, that would merely mean that the American people would trade visible public governance for the equally and perhaps greater onerous constraints and restraints of invisible private governments.

10. Law, including constitutional law, will become more and more outwardly instrumental, rather than interdictory. It will be overtly teleological-purposive, goal-seeking.

11. The American Constitution, a politico-legal palimpsest, is always in a state of "becoming," updated by several means to meet the exigencies faced by succeeding generations of Americans. This means that government is and has always been precisely as strong as conditions required. The State has a "reserve power" that enables it, operating through government, to meet every challenge that historically confronted it.

12. That the State will do so in the future seems sure. The question is how, not if it will do so. As I have argued in *Democratic Dictatorship*,<sup>27</sup> authoritarian government seems likely. Can constitutional change stave that off? In some respects, the basic problem that constitutionalism faces is how to avoid Arnold Toynbee's doleful forecast: "In all developed countries, a new way of life—a severely regimented way—will have to be imposed by a ruthless authoritarian government."<sup>28</sup> That is an even greater constitutional challenge than the Civil War. There is no neat formula by which the shoals to a humane steady-state society can be navigated.

13. Simply because of its enormous economic and military power, the United States will continue to be a major force in world affairs.

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23 BIOSCIENCE 41, 43 (1973).

27. Miller, *supra* note 16 *passim*.

28. *Id.* at 151.

Anything that happens anywhere on the planet, and indeed in outer space, is of interest and importance to the American political order.

14. There is no such thing as totally unbiased knowledge. "Every major human activity, including the search for pure and disinterested knowledge, is norm-governed and value-oriented."<sup>29</sup> The need, therefore, is to heed Gunnar Myrdal's advice: social commentators should "face their valuations," setting them out for all to see.<sup>30</sup> Only then can there be a semblance of objectivity.

15. Burly sinners rule the world, often, to be sure, in well-pressed clothes and outwardly pleasant demeanor, but sinners nonetheless. People of thought are not nearly as important as they think or so Keynes, in a famous passage, asserted "the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually slaves of some defunct economist."<sup>31</sup> The word, not the gun, may be the symbol of authority; but word mechanics, the people of thought, are in large part thrall to those who exercise real power in society.

16. One way to control the populace is to use religion, not only as an opiate, as Marx in a famous passage said, but in its "civil" sense. He spoke about organized religion. The civil or secular religion of nationalism or patriotism or Americanism is one of the means by which people *en masse* are organized and controlled.

#### IV.

The two hundred-year odyssey of the American people has come to a crossroads. Is it the end of the beginning? Or is it the beginning of the end? Which direction will the United States take? Which *should* it take? Of one thing we can be sure: the future that looms dead ahead will not be a mere unilinear extension of the past. "The past is but prologue." But prologue to what? The American past, as we have seen, has been based on a unique set of environmental circumstances. Machiavelli viewed history as neither determined progression nor an ineluctable cycle of recurring forms. To him, history was constant

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29. Rhineland, *supra* note 17, at 93.

30. G. MYRDAL, *VALUE IN SOCIAL THEORY* (1958).

31. J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 383 (1936).

change, to which forms of government must adapt, and uncertainty to which any type of government must be adaptable. In his words:

Since . . . all human affairs are ever in a state of flux, and cannot stand still, either there will be improvement or decline, and necessity will lead you to do many things which reason does not recommend. Hence if a commonwealth be constituted with a view to its maintaining the *status quo*, but not with a view to expansion, and by necessity it be led to expand, its basic principles will be subverted and it will soon be faced with ruin. So, too, should heaven, on the other hand, be so kind to it that it has no need to go to war, it will then come about that idleness will either render it effeminate or give rise to factions; and these two things, either in conjunction or separately, will bring about its downfall.<sup>32</sup>

We may morally object to Machiavelli's implied view that war and territorial expansion are to be sought for the good of the commonwealth; but if we change the notion of war to one of economic expansion—to continued economic growth—would those same moral objections be proffered? All governments today, whether capitalist or Marxist or with mixed economies, are devoted to continual economic growth. As Professor Bernard Crick has said, "Most of his [Machiavelli's] arguments in terms of military technology are now directly translatable in terms of economic technology. Even when we stay in the same place, we have to run pretty fast to do it."<sup>33</sup> All governments claim the ability not only to maintain but to raise the scale of living, or at least the total economic product (the gross national product) of their inhabitants. Whether they can do it is at best an unanswered question; at worst, it is highly unlikely. But try governments will, as try they must, if political officers wish to remain in power.

This essay, in sum, is a preliminary foray both into posing some of the correct questions about the human condition, without which correct answers will never be forthcoming, and suggesting some possible answers. In fine, I seek to establish a framework for thinking about major constitutional change—planned change, that is, not the change that comes about routinely as each generation of Americans rewrites the Document of 1787. Mine is a radical approach—nothing less than a complete overhaul of ancient ideas of how to govern the United States. Not that the past wisdom, if that it is, can or will be discarded. Adher-

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32. Machiavelli, *supra* note 21, at 1.6.

33. *Id.* at 53.



ence to it, however, is neither a duty nor a necessity. We cannot escape the past but what the constitutional framers said is not revealed truth, not like Moses coming down from Mt. Sinai; but merely as one datum among a number of others that must be considered in evaluating American constitutionalism.

Those who wrote the Constitution of 1787 could not have failed. Everything favored the success of the new nation: an untapped continent replete with seemingly inexhaustible natural resources, protected by two oceans and the British navy, was given the unique opportunity to create something new and lasting. That very success, however, should be traced to the favorable environment in which American political institutions operated, rather than to any sort of special wisdom in the constitutional framers or in what they wrought. The United States has waxed large and strong not because of the Constitution but in spite of it. Or, as Rufus E. Miles, Jr., put it, "[t]he extraordinary affluence of the United States has been produced by a set of fortuitous, nonrepliable, and nonsustainable factors."<sup>34</sup> We now confront a totally different social milieu, and the Constitution must be changed to deal with it.

What, then, are the constitutional changes that should be given serious attention? Time and space permit only a listing of some of the more obvious.

1. Altering the separation of powers in the national government to adopt a parliamentary system, based upon but not necessarily a direct copy of the British system.

2. This would require a new way of electing the president. The electoral college should be abolished. The president would truly be head of party, subject to removal on a vote of confidence.

3. Furthermore, the presidency should be divided into one person being head of government (like a prime minister) and another being chief of state (like the King of Spain or Queen of England). It is worth special mention that the United States is the only important nation in the world that allows one person to wear both of those hats.

4. Congress should be unicameral, with not more than one hundred members.

5. The fifty states should be consolidated into not more than ten or twelve geographically contiguous regions.

6. The "private" governing power of important social groups, such as the giant corporations and the two major political parties, should be

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34. R. MILES, *AWAKENING FROM THE AMERICAN DREAM: THE SOCIAL AND POLITICAL LIMITS TO GROWTH* 224 (1976).

recognized and made a part of the formal constitutional structure.

7. Provisions should be made for cooperation in a constitutional sense of the fact that the United States exists in an interdependent world—a “global village”—and has many and growing relationships with other nations.

8. The idea of a “council of revision,” considered in the Constitutional Convention of 1787 but rejected, should be resurrected and made into a “council of state” that would be advisory to the president and Congress before important decisions are made.<sup>35</sup>

9. A “planning” function should be incorporated into the duties of government.

10. Means should be established for controlling technology, including nuclear weapons.

Time and space do not permit more than listing these possible—in my judgment, necessary—changes in the constitutional mechanism.<sup>36</sup> The fundamental idea is that the Constitution of the United States should be one of human needs and human rights, as well as one that sets forth the powers of government. In short, I propose a Constitution that, by making responsible government possible through streamlining and updating the present obsolescent mechanism, will enable the United States to meet the challenges of a zero-sum society. The four hundred-year boom has ended. The Cartesian-Newtonian paradigm, reflected in the writings of the “father” of the American Constitution, John Locke, is outdated. It is being replaced, all too slowly, by a new vision of reality: “an awareness of the essential interrelatedness and interdependence of all phenomena—physical, biological, psychological, social, and cultural.”<sup>37</sup> As Americans approach the 200th anniversary of the constitutional convention of 1787, there is no more important question confronting them than modernizing the ancient document, so as to adapt it to the new reality.

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35. See A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982).

36. The details and reasons for these, and other changes, will be set forth in the author's proposed book, *supra* note \*.

37. Capra, *supra* note 12, at 265.

## *Pinkerton v. United States* Revisited: A Defense of Accomplice Liability

by Jon May\*

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### I. Introduction

On May 4, 1982, the Florida Third District Court of Appeal upheld the robbery and kidnapping conviction of Eugene Martinez even though Martinez had not actually taken part in a robbery or a kidnapping.<sup>1</sup> What Martinez had done, however, was to introduce a prospective buyer of marijuana to two sellers who subsequently kidnapped and robbed the buyer when it came time to produce the drug. Martinez' liability for these acts was predicated solely on the legal theory which holds conspirators responsible for the natural and probable consequences of their acts.<sup>2</sup> The court stated, "[g]iving appropriate consideration to experience in this community, we think . . . that robbery and kidnapping are a foreseeable consequence of conspiracy to effect a large drug transaction. . . ."<sup>3</sup>

This principle of accomplice liability, popularly known as the *Pinkerton* rule,<sup>4</sup> has been almost universally condemned by the academic community.<sup>5</sup> Yet since the early 1970s it has been applied with increasing frequency, particularly in the context of narcotics prosecutions.<sup>6</sup> Al-

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1. *Martinez v. State*, 413 So. 2d 429 (Fla. 3d Dist. Ct. App. 1982).

2. *Id.* at 430.

3. *Id.*

4. *Pinkerton v. United States*, 328 U.S. 640 (1946).

5. Note, *Vicarious Liability For Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371 (1947); Note, *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920, 998 (1959); W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 515 (1972); Note, *Liability for Co-Conspirators Crimes in the Wisconsin Party to a Crime Statute*, 66 MARQUETTE L. REV. 344 (1983).

6. When W. Lafave and A. Scott published their HANDBOOK ON CRIMINAL LAW in 1972, they reported at page 515 that the *Pinkerton* rule had "never gained broad acceptance." This assertion is no longer correct. The *Pinkerton* rule has become entrenched in federal law. See, e.g., *United States v. Raffone*, 693 F.2d 1343, 1346 (11th

though the principle applied in *Martinez* was known at common law, it was not widely recognized until the United States Supreme Court decided *Pinkerton v. United States* in 1946.<sup>7</sup> In that case, two brothers, Walter and Daniel Pinkerton, were charged with conspiring to evade the payment of taxes on whiskey and, additionally, with numerous spe-

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Cir. 1982) (prosecution for conspiracy to possess and possession with intent to distribute marijuana. The court held that liability cannot rest upon *Pinkerton* unless jury is given a *Pinkerton* charge); *Government of Virgin Islands v. Dowling*, 633 F.2d 660, 666 (3d Cir.), *cert. denied*, 449 U.S. 960 (1980) (prosecution for conspiracy to commit bank robbery and assault occurring as a result of the bank robbery); *United States v. Rosado-Fernandez*, 614 F.2d 50, 53 (5th Cir. 1980) (prosecution for conspiracy to possess and possession with intent to distribute cocaine. The court notes that responsibility extends even to those co-conspirator acts of which the defendant has no knowledge.); *United States v. Wilner*, 523 F.2d 68 (2d Cir. 1975) (prosecution for conspiracy to possess and possession with intent to distribute marijuana. "[W]here there is a continuing conspiracy which contemplates and encompasses the illegal act performed, each conspirator is responsible for the acts of his co-conspirator." *Id.* at 72-73.); *Poliafico v. United States*, 237 F.2d 97, 116 (6th Cir. 1956) (prosecution for conspiracy to possess and possession of heroin.).

The doctrine of accomplice liability has also been widely accepted by the states. *See, e.g., Martinez v. State*, 413 So. 2d 429, 430-31 (Fla. 3d Dist. Ct. App. 1982) (defendant marijuana broker held responsible where sellers of marijuana robbed buyer of funds to be used for purchase); *State v. Barton*, 424 A.2d 1033, 1038 (R.I. 1981) (conspiracy to break into building and steal precious metals. Defendants held liable for destruction of communication lines by co-conspirators done in furtherance of the conspiracy.); *Commonwealth v. Roux*, 350 A.2d 867, 871-72 (Pa. 1976) (defendant held responsible for murder where he conspired with others to rob and beat victim); *State v. Stein*, 70 N.J. 369, 360 A.2d 347, 359 (1976) (defendant, an attorney, held responsible for robbery and assault, where he provided information to robbers for what he believed would be a burglary of an unoccupied residence); *Pendleton v. State*, 329 So. 2d 145, 149 (Ala. Ct. App. 1976) (conspiracy to commit murder. Defendant held responsible for murder based on prearrangement and presence alone); *Johnson v. State*, 482 S.W.2d 600, 605 (Ark. 1972) (defendant held vicariously liable for death of little girl during burglary attempt); *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155, 169 (1964) (presence of weapons supports inference that defendants wanted to avoid any contact with police and thus assault on police officer was a natural consequence of their unlawful agreement); *Lusk v. State*, 64 Miss. 845, 2 So. 256 (1897) (defendant held responsible for arson where he combined with two others to frighten a man and his wife away from their house); *The Anarchist's Case*, 122 Ill. 1, 12 N.E. 865 (1887) (defendant held responsible for death resulting from conspiracy to overthrow government).

North Carolina and New York have rejected the doctrine. *See State v. Small*, 272 S.E.2d 128 (N.C. 1980); *People v. McGee*, 49 N.Y. 2d 48, 399 N.E.2d 1177 (1979). Massachusetts has never ascribed to the doctrine; *see Commonwealth v. Stasium*, 349 Mass. 38, 206 N.E. 2d 672 (1965).

7. 328 U.S. 640.

cific acts of tax evasion. Although the evidence at trial established the existence of a conspiracy, there was no evidence that Daniel Pinkerton participated directly in the commission of any of the substantive offenses and, in fact, he was in jail when some of these acts took place.<sup>8</sup>

At trial the court instructed the jury that if they found that the defendants had been engaged in a conspiracy they could also find the defendants guilty of any substantive offense which was a natural and probable consequence of that conspiracy.<sup>9</sup> Daniel Pinkerton was found guilty of conspiracy and six substantive counts of tax evasion. His conviction was upheld by the Fifth Circuit<sup>10</sup> and the Supreme Court affirmed in an opinion written by Justice Douglas. The Supreme Court held that a party to a conspiracy may be prosecuted for the substantive crimes of a co-conspirator, committed in furtherance of the conspiracy, even though the person did not participate in the crime and even if he did not intend for that specific crime to occur.<sup>11</sup>

This rationale, known as the doctrine of accomplice liability, was rarely utilized until the 1970s, when it became extremely popular among state and federal prosecutors. Critics have argued that the rationale of *Pinkerton* represents an unwarranted extension of the civil doctrine of *respondeat superior* into criminal jurisprudence;<sup>12</sup> that it violates the basic tenet of criminal law which holds that persons are responsible only for their own conduct and not that of others;<sup>13</sup> that the decision itself is flawed because Justice Douglas confused a rule of evidence with a rule of criminal responsibility and relied on authorities which upon close inspection do not stand for the broad proposition for

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8. *Id.* at 648 (J. Rutledge dissenting).

9. *Id.* at 646 n.6.

10. 151 F.2d 499 (5th Cir. 1945).

11. 328 U.S. at 647-48.

12. Justice Rutledge, in his dissent in *Pinkerton*, complained that holding Daniel Pinkerton liable for the acts of his brother amounts to "vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business." *Id.* at 651.

13. "[I]t seems clear that the doctrine of *respondeat superior* must be repudiated as a foundation for criminal liability. For it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate subconscious sense of justice of the man on the street is the only sure foundation of law." Sayre, *Criminal Responsibility For The Acts of Another*, 43 HARV. L. REV. 689, 717 (1930); "[A]ny doctrine of vicarious criminal liability is repugnant to common law concepts." Note, *Vicarious Liability For Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371, 374 (1947).

which they were cited.<sup>14</sup> Finally, it has been said that no court has put forth an adequate rationale for the doctrine,<sup>15</sup> and that because of the real danger that jurors may confuse the issues in a conspiracy prosecution, the doctrine should be abandoned.<sup>16</sup>

This article argues that the critics of *Pinkerton* have confused the civil doctrine of vicarious liability<sup>17</sup> with the criminal doctrine of accomplice liability. It first explores how the common law treated various parties to a criminal act and how some courts have recently analyzed these common law precepts. It examines the relationship between these precepts and the law of conspiracy. It then addresses the various critics of *Pinkerton*, concluding that the doctrine of accomplice liability is not an aberration, but rather, a reaffirmation of some basic tenets of the common law.

## II. The Parties to a Crime

### A. At Common Law

The terms used at common law to describe the parties to a crime arise naturally from the roles played by the various participants in the commission of a criminal act. At common law there can be only three parties to a crime—the principal in the first degree, the principal in the second degree, and the accessory before the fact. Each is responsible for the natural and probable consequences of his actions. The individual most directly responsible for the commission of a criminal act is known as the *principal in the first degree*. Generally he is the person who pulls the trigger or who utters the forged instrument; “the actor,

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14. Recent Decisions, *Criminal Law - Conspiracy and Substantive Offenses - Distinctions Between Conspirators and Accomplices - Conviction of Conspirators for Substantive Offenses, Although He Did Not Actually Participate in Them*, 16 FORDHAM L. REV. 275 (1947) [hereinafter cited as Recent Decisions].

15. Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920, 998 (1959).

16. Note, *supra* note 13, at 377 (The author of this article believes that conspiracy prosecutions are likely to confuse the jury because of the greater number of defendants and the admissibility of the co-conspirator statements to show membership in the conspiracy. Attenuated theories of liability therefore increase the chances of prejudicial error.).

17. The tort doctrine of vicarious liability holds persons responsible for the acts of others solely on the basis of their relationship as principal and agent. W. PROSSER, *THE LAW OF TORTS* 467 (4th ed. 1971).



or absolute perpetrator of the crime."<sup>18</sup> At common law, an individual who employed an intermediary to commit a crime could not be considered a principal, even though he might have been the one most responsible for the crime in the sense of having originated or initiated it.<sup>19</sup> This did not mean that an individual who employed an intermediary would be without criminal liability. As an accessory or a principal in the second degree he would be subject to the same punishment as the principal in the first degree.<sup>20</sup> What it did mean, however, was that common law jurists distinguished criminal actors, not in terms of their ultimate legal or moral responsibility, but in terms of the specific acts they performed.

Frequently a principal in the first degree is present at the time that an offense is committed. Presence, however, is not required. If A employs a child to pass a counterfeit check,<sup>21</sup> or if A leaves poison for another who subsequently drinks it,<sup>22</sup> A is considered a principal in the first degree under a theory of constructive presence.<sup>23</sup> Similarly, if A and B combine together to forge an instrument, each individually forging a separate part, both are principals in the first degree, even if they were not present together when the instrument was completed.<sup>24</sup>

One who aids, counsels, commands, or encourages the principal in the first degree is a *principal in the second degree*, more frequently known as an aider and abettor.<sup>25</sup> Fundamentally, what distinguishes a principal in the second degree from a principal in the first degree is the fact that without the acts taken by the principal in the first degree, the

18. 4 W. BLACKSTONE, COMMENTARIES \*34. "A principal in the first degree may simply be defined as the criminal actor. He is the one who, with the requisite mental state, engages in the act or omission concurring with a mental state which causes the criminal result." W. LAFAVE & A. SCOTT, 496 (1972).

19. W. LAFAVE & A. SCOTT, *supra* note 18, at 496-7 (an exception to this rule is where the intermediary is a child, is insane, or has been misled as to the true nature of his acts.) See 4 W. BLACKSTONE, *supra* note 18, at 35.

20. W. LAFAVE & A. SCOTT, *supra* note 18, ("[A]ccessories shall suffer the same punishment as their principal.") 4 W. BLACKSTONE, *supra* note 18, at 39.

21. Commonwealth v. Hill, 11 Mass. 136 (1814).

22. Rex v. Harley, 172 Eng. Rep. 744 (1830).

23. W. LAFAVE & A. SCOTT, *supra* note 18, at 497; State v. Deyo, 358 S.W.2d 816, 821 (Mo. 1962); W. BLACKSTONE, *supra* note 18, at 34, 35.

24. Rex v. Bingley, 168 Eng. Rep. 890, 891 (1821).

25. W. BLACKSTONE, *supra* note 18 at 34 ("A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the act to be done." *Id.*).

conduct of the principal in the second degree would not be criminal.<sup>26</sup> Thus, if A provides B with a ride to a bank, knowing that B intends to rob the bank, A would not be guilty as an aider and abettor unless a robbery actually took place.<sup>27</sup>

It is easy to identify the principal in the second degree when one person acts while the other merely encourages. But when an individual's involvement is extensive, as where B restrains C so that A can shoot C, the distinctions become blurred.<sup>28</sup> Generally, one must be present at the commission of a criminal offense to be an aider and abettor.<sup>29</sup> Presence, however, may be constructive as well as actual. Thus, where B is in a position to alert A<sup>30</sup> or prevent others from interfering with A<sup>31</sup> or where B's actions are such as to make A's job easier,<sup>32</sup> B is held to be constructively present, no matter how far away he is from

26. *United States v. Rodgers*, 419 F.2d 1315, 1317 (10th Cir. 1969) (the government's failure to show that anyone instigated a riot precluded the defendants' convictions for aiding and abetting in the instigation of a riot); *Shuttlesworth v. City of Birmingham, Ala.*, 373 U.S. 262, 265 (1963) (where trespass conviction of principal was held to be constitutionally infirm, conviction of aider and abettor was likewise infirm); *United States v. Horton*, 180 F.2d 431, 437 (7th Cir. 1950) (the government's failure to show that the principal was not registered to distribute marijuana precluded the defendants' conviction for aiding and abetting in an unlawful distribution).

27. Today persons who engage in a conspiracy, solicit others to commit an offense, or attempt to commit an offense themselves, may be subjected to punishment even when no substantive crime has occurred; this was not so at common law. Because ancient law exacted reparations for harm done, no punishment was exacted where harm was attempted, but none occurred. Reparations consisted of a fine paid to the injured party and to the king. Thus, early criminal law shared the same purpose and origin as early tort law. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 509 (1898).

28. Consequently, most jurisdictions have abolished the distinctions between accessories and principals in the first and second degrees. *See, e.g.*, 18 U.S.C. § 2 (1981) which defines principals as "[W]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

29. *United States v. Molina*, 581 F.2d 56, 61 n.8 (2d Cir. 1978); W. LAFAVE AND A. SCOTT, *supra* note 18, at 497.

30. *Vincent v. State*, 220 Md. 232, 239, 151 A.2d 898, 903 (1959); *Mitchell v. Commonwealth*, 33 Va. (1 Gratt) 845, 867 (1880).

31. *State v. Tally*, 102 Ala. 25, 76, 15 So. 722 (1894); W. LAFAVE & A. SCOTT, *supra* note 18, at 498.

32. *Dean v. State*, 85 Miss. 40, 42, 37 So. 501, 502 (1904); *State v. Tally*, 102 Ala. 25, 76-76, 15 So. 722, 740 (1894); *State v. Poynoir*, 36 La. Ann. 572, 575 (1884); *State v. Hamilton*, 13 Nev. 386, 391 (1878).

the scene of the crime.<sup>33</sup> One who enters into an agreement which counsels, commands or encourages the commission of a crime but who is not present at the crime, either constructively or actually, is known as an *accessory before the fact*.<sup>34</sup>

What distinguishes the accessory before the fact from the principal in the second degree is primarily the lack of presence. In some circumstances, however, the two are distinguishable on the basis of the existence of an agreement.<sup>35</sup> It is always necessary for there to be an agreement between an accessory and a principal in order to hold the accessory liable.<sup>36</sup> A principal in the second degree, however, may be held liable based on his intent and his actions independent of any intercourse between him and the principal.<sup>37</sup> It is sometimes said that what the principal in the second degree shares with the principal in the first degree is a "community of unlawful intent."<sup>38</sup> But as the Fifth Circuit has observed, community of unlawful intent, while similar to an agreement, is not the same.<sup>39</sup> A defendant may voluntarily aid the principal in the commission of a criminal act and be liable as principal in the second degree, but not be liable as a conspirator or an accessory before the fact because of the absence of an actual agreement to do an unlaw-

33. W. LAFAVE & A. SCOTT, *supra* note 18, at 497-98.

34. An accessory before the fact is one "who being absent at the time of the crime committed doth yet procure, counsel, or command another to commit a crime." 4 BLACKSTONE, *supra* note 18, at 36.

35. *Sams v. Commonwealth*, 294 Ky. 393, 396, 171 S.W.2d 989, 991 (1943).

36. *See, e.g., Morei v. U.S.*, 127 F.2d 827, 830 (6th Cir. 1942) (where the absence of an agreement between the defendant and the principal led the Sixth Circuit to hold that the defendant was not responsible for the principal's sale of narcotics even though the defendant's actions enabled the buyer to contact the seller).

37. In *State v. Tally*, R. C. Ross made the fatal mistake of seducing Anne Skelton. Skelton's three brothers became enraged at what had happened to Anne and set out to murder Ross, who lived nearby. The whole community was aware of what the Skelton clan had set out to do and Ed Ross, a relative of R. C. Ross, sent him a telegram, stating, "[f]our men on horseback with guns following. Look out." John B. Tally, a judge of the Ninth Judicial Circuit of Alabama who was Anne's brother-in-law became aware of Ed's telegram and sent his own telegram to the telegraph officer who was a personal friend. "Do not let warned party get away. Say nothing." As a result of this telegram R. C. Ross never received Ed Ross's warnings. Even though the Skeltons were not aware of his assistance Tally was still held to be an aider and abettor. 102 Ala. at 70, 15 So. at 739.

38. *U.S. v. Bright*, 630 F.2d 804,813 (5th Cir. 1980).

39. *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980). *But see Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955) (where the court confuses community of unlawful intent with agreement.).

ful act. For example, where C encourages B to murder X and A decides to help B independent of any encouragement by C or communication with B and B does in fact murder X with A's aid, A is a principal in the second degree because he was present, he aided B, and he shared in B's intent. C is an accessory before the fact because he was not present and because he entered into an agreement with B. A, though present at the scene, is not a principal in the first degree because his liability is dependent upon B actually killing X.<sup>40</sup>

The distinctions made by the common law based on the roles played by the participants in a crime do not explain, however, *why* the common law treated accessories differently from principals. Although each was held equally liable for an offense, and subject to the same penalty, common law jurists erected numerous barriers to the prosecution of accessories. Some of these barriers were undoubtedly designed to limit the imposition of the death penalty, which was the punishment for all felonies at common law.<sup>41</sup> An accessory, for instance, could only be tried in the jurisdiction where the crime of accessoryship occurred.<sup>42</sup> Thus, the accessory who committed his acts in France could not be prosecuted for the resultant crime in England because venue for him lay only in France.<sup>43</sup> Similarly, an accessory could not be convicted under an indictment charging him as a principal. Where the extent of an individual's participation was unknown, this rule operated to relieve the party of any liability at all.<sup>44</sup>

The rule that an accessory could not be convicted unless the principal was also convicted probably had a different and more ancient origin. Since, at early common law, guilt or innocence was determined by a supernatural process, such as trial by water, the medieval mind could not risk the contradiction that would occur if any accessory were found guilty where the principal was found innocent.<sup>45</sup> "What should we think of the God who suffered the principal to come clean from the

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40. If A's assistance was solicited by C but his presence in no way aided B, that is, if A with no intent to aid B goes to the scene of the crime and, unknown to B, watches as B murders X, A would not be an aider and abettor. His liability, if any, would rest upon his prior agreement with A and would be that of an accessory. W. LAFAVE & A. SCOTT, *supra* note 18, at 498, 503.

41. W. BLACKSTONE, *supra* note 18, at 18.

42. *People v. Hodges*, 27 Cal. 340, 341 (1865).

43. W. LAFAVE & A. SCOTT, *supra* note 18, at 499.

44. *Id.* at 499-500.

45. 2 F. POLLOCK & F. MAITLAND, *supra* note 27, at 509.

ordeal after the accessory had blistered his hand.”<sup>46</sup> Modern legislatures, less troubled by such contradictions, have for the most part eliminated these rules. Nevertheless, most statutes still employ common-law terms to describe parties to a crime. When a statute uses a common-law term without defining it, the legislature is presumed to have intended the common law meaning.<sup>47</sup> Therefore, “it is still necessary to apply the common law rules in order to determine whether a person, who is absent when a crime is committed by another, is guilty as a principal.”<sup>48</sup>

## B. Some Modern Interpretations of the Common-Law Concepts of Parties to a Crime

In *Morei v. United States*,<sup>49</sup> a physician, Dr. Matthew Platt, was convicted of various charges arising out of the sale of heroin to an informer. Dr. Platt, who was well known for his interest in horse racing, was approached by Paul Beach, who was acting under the direction of government narcotics agents. Beach asked Platt if he would supply heroin to stimulate horses. Platt told Beach that he did not have any heroin but gave Beach the name of Louis Morei.<sup>50</sup> Platt instructed Beach to tell Morei that the doctor had sent him; and Platt assured Beach that Morei would take care of him.<sup>51</sup> On appeal to the Sixth Circuit the doctor contended that he was not guilty of any crime and the court agreed. It rejected the government’s argument that Platt was a principal because Morei could not have been in contact with Beach except for Platt’s actions. The court reasoned that this theory would open up “a vast field of offenses that have never been comprehended within the common law.”<sup>52</sup> It cited to the decision by Judge Learned Hand in *United States v. Peoni*,<sup>53</sup> and concluded that the definitions of aid, abet, induce, and procure have nothing to do with the probability that a result will flow from certain conduct.<sup>54</sup> Rather, these terms refer to the

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46. *Id.* at 509.

47. *U.S. v. Turley*, 352 U.S. 407, 411 (1957).

48. *Morei v. United States*, 127 F.2d 827, 830 (6th Cir. 1942).

49. 127 F.2d 827 (6th Cir. 1942).

50. *Id.* at 829.

51. *Id.* at 830.

52. *Id.* at 831.

53. 100 F.2d 401 (2d Cir. 1938).

54. *Morei v. United States*, 127 F.2d at 831.

specific conduct of the accused.<sup>55</sup>

There was no evidence of an agreement between Platt and Morei (which would have made Platt an accessory) nor was Platt actually or constructively present when the crime was committed (which would have made him an aider and abettor). Platt's actions, which undoubtedly contributed to the crime, were insufficient, in the eyes of the *Morei* court, to establish the doctor's criminal responsibility. Thus, in the court's view assistance alone may not be sufficient to make one accountable for the commission of an offense. Assistance must be joined with some sort of mental element. In *Morei*, Dr. Platt clearly knew that Beach wanted heroin. But the court did not believe that merely knowing that one's services or products would be used for illicit purposes was sufficient to establish liability.<sup>56</sup> To be held accountable, it ruled, the accomplice must have the same intent as the principal.<sup>57</sup>

Fundamentally, what was missing in *Morei* was any evidence of an agreement on Platt's part to aid Morei in distributing heroin. Such evidence was required since Platt was charged only with being an accessory to Morei's crime. But what if Beach had been charged with an offense? That is, what if Platt had been accused of being an accessory to Beach's crime? There were, after all, direct talks between Platt and Beach.<sup>58</sup> The Ninth Circuit faced this very situation in *Robinson v. United States*.<sup>59</sup> The defendant, Jesse Robinson, was charged as an aider and abettor to the purchase of heroin by Tom Lowe. Robinson's only involvement, however, was providing Lowe with a telephone number.<sup>60</sup> The government argued that providing the telephone number made it easier for Lowe to commit his crime.<sup>61</sup> Relying on *Morei*, the Ninth Circuit rejected this argument. According to the court, Robinson's aid was no different from the aid given Lowe by the telephone company or even by the company that manufactured Lowe's automobile.<sup>62</sup> The *Robinson* court conceded that these acts could be considered links in the chain of causation, but refused to extend criminal liability to such acts.<sup>63</sup>

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 829.

59. 262 F.2d 645 (9th Cir. 1959).

60. *Id.* at 647.

61. *Id.* at 649.

62. *Id.*

63. *Id.*

Surely there is a difference between a person who knowingly provides the telephone number of a source of heroin and a person who ignorantly provides a service to one who, in part aided by that service, goes out and commits a crime. The analogy in *Robinson* is faulty because there was no evidence that the telephone company *knew* that Lowe intended to use their equipment to purchase heroin. Where a vendor knows that his goods or services will be used for an illegal purpose his liability depends upon whether that knowledge can be equated with intent.<sup>64</sup> This is because society holds liable only those accessories who actually intend for a crime to occur.<sup>65</sup> A better rationale for absolving Robinson of responsibility would be that the act of giving Lowe a telephone number, even with the knowledge of how Lowe intended to use it, was not sufficient to show that he wanted Lowe to purchase heroin.<sup>66</sup> Lowe's actions were insufficient evidence of an agreement between the two. Where a crime occurs as the result of a criminal conspiracy, however, the situation is quite different. There, at least for some purposes, the conspirator does share the same criminal intent as the principal in

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64. *Peoni*, 100 F.2d at 403.

65. *Id.*

66. Where a vendor knowingly profits from the use of his goods or services for the commission of a crime it seems reasonable for that vendor to be subject to some form of liability. Lafave and Scott, *citing* *Jindra v. United States*, 69 F.2d 429 (5th Cir. 1934) and *Vukich v. United States*, 28 F.2d 666 (9th Cir. 1928), discuss the liability of the vendor who "sells with knowledge that the subject of the sale will be used in commission of a crime," and note that, "The earlier decisions generally held that aid with knowledge was enough. . . ." They argue, however, that the better view, as expressed in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), is that the vendor must himself wish the crime to occur. W. LAFAVE & A. SCOTT, *supra* note 18, at 508.

Not everyone subscribes to this view. *See, e.g.,* *Backum v. United States*, 112 F.2d 635 (4th Cir. 1940) ("The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun. . .") *Id.* at 637.

A compromise between these two views is reflected in the Criminal Code Reform Act of 1981. If enacted it would create a new category of offense which would punish those who knowingly (as opposed to intentionally) facilitate the commission of an offense by providing substantial assistance to the principal. This offense applies only to persons who provide substantial assistance and limits punishment to that applicable to offenses two grades below the offenses facilitated. Report of the Committee on the Judiciary, United States Senate, To Accompany § 1630, Criminal Code Reform Act of 1981, S. REP. NO. 97-307, 97th Cong., 1st Sess. (1981).

the first degree.

### III. The Law of Conspiracy

Most jurisdictions define a conspiracy as a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means.<sup>67</sup> The gist of the offense is the agreement and thus conspirators may be punished even where the purpose of the conspiracy is not achieved.<sup>68</sup> What distinguishes the accessory before the fact from the conspirator is that the accessory's liability depends upon the completion of a substantive offense while the conspirator's liability begins from the moment that he enters into an unlawful agreement.<sup>69</sup> The terms *accessory* and *principal* are therefore merely descriptive of a role played by a party to a crime, while the term *conspiracy* describes a crime itself. An accessory before the fact will always be chargeable as a conspirator although not every conspirator will be chargeable as an accessory. This fact is significant for two reasons. From the standpoint of prosecutorial discretion, it means that whenever the purpose of a conspiracy is achieved, an individual conspirator may be charged with two offenses; a substantive offense, based upon his role as an accessory to a completed crime, and a conspiracy by virtue of his entry into an unlawful agreement. From an evidentiary standpoint, it means that in establishing an individual's liability for the commission of a crime, a finder of fact may consider an individual's membership in a conspiracy in order to determine whether that individual is an accessory before the fact. In other words, liability for the commission of a substantive offense does not flow from membership in a conspiracy, but rather *evidence* of one's membership in a conspiracy may establish one's role as an accessory before the fact.

Although closely related, there exists a fundamental difference between the liability of the conspirator and that of the accessory. A con-

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67. W. LAFAVE & A. SCOTT, *supra* note 18, at 454; *United States v. Hutto*, 256 U.S. 524, 528-29 (1921).

68. W. LAFAVE & A. SCOTT, *supra* note 18, at 454; *United States v. Rabinowich*, 238 U.S. 78, 86 (1915).

69. Compare *United States v. Rabinowich*, 238 U.S. 78 (holding that a conspirator may be punished even when the purpose of the conspiracy is not achieved) and *Fiswick v. United States*, 329 U.S. 211 (1945) (noting that an overt act was not required at common law) with *United States v. Rodgers*, 419 F.2d 1315 (10th Cir. 1969) (holding that the failure to show that anyone had instigated a riot precluded the defendants' convictions for aiding and abetting).



spirator's liability attaches from the moment he enters into the conspiratorial agreement.<sup>70</sup> Although a jurisdiction may require the commission of some overt act<sup>71</sup> as a condition for a conspiracy prosecution, and although, as an evidentiary matter, the acts and statements of co-conspirators (even those occurring before the defendant joined the conspiracy) may be introduced against other co-conspirators, it is the *agreement* and nothing else which society finds offensive.<sup>72</sup> An accessory's liability, however, depends upon the completion of an *actual crime*.<sup>73</sup> Contrary to what most critics of accomplice liability maintain, an accessory is responsible only for the acts of his confederates which occurred subsequent to and as a result of the accessory's actual assistance or encouragement.

The relationship between conspiracy and accessories before the fact was recognized by the Supreme Court of Illinois in a case which arose out of the infamous Haymarket Square Massacre. In *The Anarchist Case*,<sup>74</sup> the defendants, members of a revolutionary society, convened an open air meeting near Haymarket Square in Chicago. Bombs were manufactured and distributed by one of the defendants before the meeting and speeches began.<sup>75</sup> The crowd became excited and when the police attempted to disperse them a bomb exploded, killing a large number of police. There was no evidence that any of the defendants threw the bomb.<sup>76</sup> Nevertheless, each was convicted of murder. In upholding the defendants' convictions, the court first noted that each was a member of a conspiracy which preached the overthrow of the government and which manufactured bombs to be used in the revolution.<sup>77</sup> The defendants' liability, however, did not flow from their membership in the conspiracy. Rather, the evidence of the conspiracy was used to show a common design to encourage the violence which occurred. Its purpose at trial was to establish the position of the mem-

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70. W. LAFAVE & A. SCOTT, *supra* note 18, at 459.

71. While the common law did not predicate conspiratorial liability on the commission of an overt act, *see, e.g.*, *Fiswick v. U.S.*, 329 U.S. 211, 216 n.4 (1946), many modern statutes do. *Compare* 18 U.S.C. § 371 (1981), which predicates liability on the doing of any act to effect the object of the conspiracy, *with* 21 U.S.C. § 846 (1981) which has no such requirements.

72. *U.S. v. Rabinowich*, 238 U.S. at 88.

73. *See supra* note 26.

74. 122 Ill. 1, 12 N.E. 865, *aff'd on other grounds*, 123 U.S. 131 (1887).

75. *Id.* at 100, 12 N.E. at 914.

76. *Id.*

77. *Id.* at 119-20, 133-34, 12 N.E. 923-24, 930-31.

bers of the conspiracy as accessories so that they could be found liable for the crime of murder under an accomplice liability theory.<sup>78</sup>

#### IV. An Analysis of the Pinkerton Rule

Although the evidence presented at trial in *Pinkerton v. United States*<sup>79</sup> demonstrated the existence of a conspiracy, there was no evidence to connect Daniel Pinkerton to any action taken in regard to the untaxed whiskey.<sup>80</sup> Nevertheless, the jury was instructed that if they found the defendants to be members of a conspiracy they could, on that basis alone, convict the defendants of any substantive act committed in furtherance of the conspiracy.<sup>81</sup> In upholding Daniel Pinkerton's convictions for substantive violations of the Internal Revenue Code, Justice Douglas focused upon that body of conspiracy law which holds that the overt act of one partner to a crime is attributable to all.<sup>82</sup> Since an overt act is an essential ingredient in the crime of conspiracy, the Court did not "see [any reason] why the same or other acts in furtherance of the conspiracy . . . [should not be] attributable to the others for the purpose of holding them responsible for the substantive offense."<sup>83</sup>

The Court's reliance on those authorities that attribute to all members of a conspiracy the overt acts of any one conspirator has been severely criticized.<sup>84</sup> As critics of *Pinkerton* have correctly pointed out, the purpose of the overt act rule is simply to establish that a conspiracy has passed beyond mere words; that it has reached a point where it poses a sufficiently real threat to society that sanctions should be imposed.<sup>85</sup> Its function is solely to prevent persons from being prosecuted for making assertions that they had no intention to act upon. The overt act, which may be purely innocent and lawful in itself, is wholly separate from the conspiracy.<sup>86</sup> Contrary to the dicta in *Pinkerton*,<sup>87</sup> it is

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78. *Id.* at 102, 225-26, 12 N.E. at 915, 974.

79. 328 U.S. 640 (1946).

80. *Id.* at 645.

81. *Id.* at 645, n.6.

82. *Id.* at 647.

83. 328 U.S. at 647.

84. Note, *supra* note 15, at 998; Recent Decisions, *supra* note 14, at 277.

85. Recent Decisions, *supra* note 14 at 277. *People v. McGee*, 49 N.Y.2d 48, 58, 399 N.E.2d 1177, 1182 (1979), *cert. denied sub nom. Quamina v. New York*, 446 U.S. 942 (1980).

86. Recent Decisions, *supra* note 14, at 277.

87. While the court's statement at page 647 that "an overt act is an essential

not even an essential element of a conspiracy.<sup>88</sup> To the extent that Douglas relied upon the overt act rule, the opinion is flawed. But Douglas relied as well on "[t]he rule which holds responsible one who counsels, procures, or commands another to commit a crime. . . ."<sup>89</sup> This second ground is the real authority for the *Pinkerton* rule and is merely a restatement of the common law doctrine which holds accessories liable for the natural and probable consequences of their acts.

Many critics claim that the doctrine of accomplice liability is an extension of the doctrine of vicarious liability to criminal prosecution and that this is foreign to the common law. But these two doctrines differ substantially from each other. The tort doctrine of *respondeat superior* did not develop in its present form until just prior to the end of the seventeenth century.<sup>90</sup> Between 1300 and 1700 a master's liability for the acts of his servant was confined to those situations where the master specifically commanded or authorized a servant to commit a tortious act.<sup>91</sup> After *Boson v. Sanford*<sup>92</sup> and *Turberville v. Stamp*,<sup>93</sup> the requirement of an express or implied command disappeared. From 1700 on, the doctrine was expanded to hold principals civilly liable for any tortious act of their agents committed within the scope of their employment and during the course of business.<sup>94</sup> But in 1730, not long after the development of the doctrine of *respondeat superior*, an English court determined in *Rex v. Huggins*<sup>95</sup> that this doctrine had no place in criminal law. A warden was held not to be criminally responsible for the death of a prisoner where the death resulted from the acts of a deputy warden who acted without the command or knowledge of the defendant.<sup>96</sup>

It is important to distinguish the doctrine of vicarious liability,

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ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U.S.C. § 88" was literally correct it cannot be said that this requirement bears any relation to the doctrine of accomplice liability, a doctrine which developed at a time when there was no overt act requirement.

88. It was not required at common law and it is not required under federal law unless specified by statute. *Fiswick v. United States*, 329 U.S. 211, 216 (1945); *United States v. Cuni*, 689 F.2d 1353, 1356 (11th Cir. 1982).

89. *Pinkerton v. United States*, 328 U.S. at 647.

90. Sayre, *supra* note 13, at 692.

91. *Id.* at 691.

92. 91 Eng. Rep. 382 (1689).

93. 92 Eng. Rep. 944 (1697).

94. Sayre, *supra* note 13, at 693.

95. 92 Eng. Rep. 518 (1730).

96. Sayre, *supra* note 13, at 700-01.

which holds persons responsible solely on the basis of their business relationship, from the doctrine of accomplice liability, which holds persons liable only for those events which occur as a foreseeable consequence of a criminal agreement.<sup>97</sup> Those critics of *Pinkerton* who have failed to understand this distinction have failed in part because of Judge Hand's faulty analysis in *Peoni*. Judge Hand erred when he concluded that common law jurists did not intend for accomplice liability to include results which were the probable consequence of a criminal agreement.<sup>98</sup> His conclusion appears to be based solely upon his own understanding of the words used to describe the accomplice's acts and not upon a consideration of actual cases. An examination of case law reveals that over a hundred years before the doctrine of *respondeat superior* appeared, the principle of accomplice liability was well developed.

In *Regina v. Saunders*,<sup>99</sup> decided in 1573, two individuals, Saunders and Archer, were charged with the murder of Saunders' daughter. Saunders, who wanted to kill his wife, confided in Archer, who suggested that Saunders poison her and who then procured the poison for his friend. The poison was placed in an apple intended for the wife but eaten instead by the daughter. Upholding the conviction of Saunders, the court acknowledged that he did not intend for his daughter to die. Nevertheless, ". . . it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed."<sup>100</sup> The court, however, reversed the conviction of Archer, finding that the death of the daughter was never intended by Archer and was distinct from the agreement to which he was privy.<sup>101</sup> While Judge Hand would undoubtedly have approved of this result, the court's reasoning was very different from what he would have expected. Plowden, who reported the decision in *Saunders*, analyzed the case in unmistakably causative terms, "it seems to me reasonable that he who advises or commands an unlawful Thing to be done shall be adjudged Accessory to all that follows from the same Thing, but not from any other distinct Things."<sup>102</sup>

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97. Sayre, *supra* note 13, at 703-04.

98. *United States v. Peoni*, 100 F.2d at 402.

99. 75 Eng. Rep. 706 (1573).

100. *Id.* at 708.

101. *Id.* at 709.

102. *Id.*

Nearly 125 years later *Saunders* was cited in *Rex v. Plummer*.<sup>103</sup> In *Plummer*, eight persons attempted to smuggle a quantity of wool from England to France. Before they could get this wool aboard ship, they were stopped by a company of the king's officers. A weapon was fired and one of the smugglers was killed. It was not known which of the eight fired a weapon; nevertheless Plummer was found guilty under an accomplice liability theory. In reviewing the defendant's conviction, the court noted that:

[t]he design of doing any act makes it deliberate; and if the fact be deliberate, though no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is killed by accident, it will be murder in him and all his accomplices.<sup>104</sup>

It was not known whether the smuggler was shot by a bullet meant for one of the king's men or because of some motive unconnected with the smuggling operation. The court held that it could not determine whether the killing was a natural and probable consequence of the crime, and therefore, Plummer's conviction was reversed.<sup>105</sup> It was reversed not because the common law did not view accomplice liability in terms of probabilities, but precisely because it did. It was this principle, long recognized at common law, which led the Supreme Court of Illinois in *The Anarchist Case*,<sup>106</sup> to conclude that the defendants were guilty of murder, not merely because of their membership in a conspiracy, but by virtue of their status as accessories before the fact, established through evidence of their conspiracy.<sup>107</sup>

Commentators Lafave and Scott, two of the severest critics of *Pinkerton*, claim that the main justification in support of accomplice liability lies in the fact that crimes occurring as a result of a conspiracy are frequently performed as part of a larger division of labor; by declaring allegiance to a particular common object, a conspirator has implicitly assented to the commission of foreseeable crimes in furtherance of the object.<sup>108</sup> Critical of this rationale, they argue that criminal responsibility should depend upon "something more than the attenuated connec-

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103. 84 Eng. Rep. 1103 (1701).

104. *Id.* at 1107.

105. *Id.*

106. *See The Anarchist Case*, 122 Ill. 1, 12 N.E. 865 (1887).

107. *Id.* at 915.

108. W. LAFAVE & A. SCOTT, *supra* note 18, at 514.

tion resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable. [Otherwise, the] . . . law would lose all sense of just proportion."<sup>109</sup>

[E]ach prostitute or runner in a large commercialized vice ring could be held liable for an untold number of acts of prostitution by persons unknown to them and not directly aided by them. Each retailer in an extensive narcotics ring could be held accountable as an accomplice to every sale of narcotics made by every other retailer in that vast conspiracy.<sup>110</sup>

This critique, however, assumes that a conspirator's liability for a substantive offense flows solely from his role as a member of a conspiracy. Membership in a conspiracy, however, is merely evidence tending to establish the conspirator's status as an accessory before the fact.<sup>111</sup> It serves as evidence of an agreement connecting the accessory to the principal. Absent that direct connection, one can be in a conspiracy with the principal but not be an accessory to a crime committed by the principal.

Critics of *Pinkerton* frequently misinterpret the case as having announced a doctrine of liability predicated upon one's mere membership in a conspiracy.<sup>112</sup> For example, in *State v. Small*,<sup>113</sup> the defendant

109. *Id.* (quoting from 1 National Comm'n on Reform of Federal Criminal Law Working Papers 156 (1970)).

110. *Id.*

111. *State v. Small*, 272 S.E.2d 128, 136, 139 (N.C. 1980). The National Comm'n on Reform of Federal Criminal Laws has recommended that the *Pinkerton* Rule be abandoned because it raises problems which could otherwise be avoided: (a) Is the co-conspirator liable for crimes committed before he joined the conspiracy, as he is for overt acts (a principle which serves another purpose)? (b) Do different rules of evidence apply to his liability for conspiracy and his liability for the specific offense? (c) Can he be acquitted for conspiracy and re-tried for the specific offense? (d) Should the test of withdrawal from the conspiracy be the same as for terminating liability for the specific offense?

National Comm'n on Reform of Federal Criminal Laws, Working Papers 157 (1970) as quoted in W. LAFAVE & A. SCOTT, *supra* note 18, at 514 n.14.

Each of these objections is the result of the Commission's faulty understanding of *Pinkerton*. The doctrine of accomplice liability flows from one's status as an accessory before the fact as evidenced by one's membership in a conspiracy. Properly understood, the doctrine is not susceptible to any of these objections.

112. In his dissent in *Pinkerton*, Justice Rutledge argued that the majority had violated both the letter and spirit of what Congress did when it separately defined the three classes of crime. According to Justice Rutledge, "[t]he gist of conspiracy is the

solicited someone to murder his wife. Although the defendant was not present when the killing took place, he was indicted for first degree murder. Under North Carolina law an accessory before the fact is held to be distinct from the principal in the first and second degree.<sup>114</sup> One must be specifically indicted as an accessory, and an accessory to murder can only be sentenced to a maximum of life imprisonment.<sup>115</sup> Although Small was unquestionably an accessory before the fact, the jury was charged that if they found the killing to have been in furtherance of the agreement, it was their duty to return a verdict of first degree murder.<sup>116</sup> Small was found guilty as charged and sentenced to death. On appeal, the Supreme Court of North Carolina was asked to consider whether the doctrine of accomplice liability could render a party, whose conduct would otherwise be that of an accessory before the fact, a principal in the first degree. The court said no and reversed the conviction. To the extent that *Pinkerton*, as well as its own decisions, had announced an independent principle of substantive liability, the court held that those cases were inconsistent with traditional common law limitations on liability.<sup>117</sup> Thus, under no acceptable theory could the court consider Small to be a principal. Although finding the *Pinkerton* rule to be unsound,<sup>118</sup> the court correctly held that, to the extent that

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agreement . . .” While “that of aiding, abetting or counseling is consciously advising or assisting another to commit particular offenses . . . . But when conspiracy has ripened into completed crime, or has advanced to the stage of aiding and abetting, it becomes easy to disregard their differences and loosely to treat one as identical with the other . . . .” 328 U.S. at 649.

What Justice Rutledge failed to recognize, however, is that Congress itself blurred the distinctions when it placed aiders and abettors and accessories before the fact within the same statute. See 18 U.S.C. § 2 (1981). While it is true that the gist of conspiracy is the agreement and that there are significant differences between a conspirator and an aider and abettor there is no difference between what a conspirator does and what an accessory does. A distinction arises only when a substantive crime is committed as a result of an agreement.

113. 272 S.E.2d 128 (N.C. 1980).

114. *Id.* at 132-133.

115. *Id.* at 131 n.2.

116. *Id.* at 131.

117. *Id.* at 134.

118. *Id.* at 134.

“Such a broad reading [of *Pinkerton*] leads to the rather startling result that a conspirator’s criminal liability for the act of another may be based less upon the circumstances of his personal participation than upon his presumed status as ‘partner’ in all actions which proximately result from the venture originally agreed upon. Fictions and presumption derived from

an individual's membership in a conspiracy is evidence of that individual's status as an accessory before the fact, he may be held responsible for the acts of the principal committed in furtherance of the criminal agreement.<sup>119</sup>

In a dramatic fashion *Small* demonstrates the importance of understanding the true nature of accomplice liability. At common law there are only three parties to a crime. Each party is responsible for the natural and probable consequences of his acts. A principal in the first degree is responsible for the death of any human being if that death results from his attempt to kill a specific human being. A principal in the second degree is likewise held responsible for any act done by the principal in the first degree with his assistance. An accessory before the fact is held responsible for any act taken by the principals which is a natural and probable consequence of their criminal agreement. This is the doctrine of accomplice liability. Membership in a conspiracy does not make a conspirator automatically a party to a substantive offense. Membership in a conspiracy, however, is evidence of his status as an accessory before the fact and, to the extent that he is an accessory before the fact, he is responsible for the natural and probable consequence of his actions.<sup>120</sup>

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the civil law of agency and partnership thus commingle with tort law notions of foreseeability and proximate cause to provide a stew of expanded criminal liability."

*Id.*

119. *Id.* at 136-37.

In sum, a defendant's conspiratorial involvement may often be strong evidence of his liability as a party to a crime which arose out of the conspiracy. His status as a party- whether he is to be deemed a principal or an accessory before the fact - will nevertheless turn upon his presence at or absence from the place of the crime's commission. His involvement in conspiracy itself will not alone make him a principal, or, for that matter, an accessory either. . . . For reasons stated earlier and for those which follow, we conclude that the co-conspirator rule in this state is not and has never been intended to be taken as a separate rule of substantive liability which erases the common law distinctions among criminal parties. Any indications in our case law to the contrary are expressly disapproved.

*Id.*

120. The critics of *Pinkerton* are not the only ones who have made this mistake. The Criminal Reform Act of 1981, § 1630 codifies *Pinkerton* on the belief that *Pinkerton* announced a theory of conspiratorial liability independent of the common law doctrine of accomplice liability. The Committee's conclusion that, "the *Pinkerton* rule . . . is firmly rooted in the principles underlying the law of conspiracy. . . ." Report of the Committee on the Judiciary, *supra* note 66, though understandable, is fundamentally



## V. Conclusion

*Pinkerton* does no more than restate the outer limits of criminal responsibility, limits which were explored as early as 1573. Should these limits be constricted? Lafave and Scott argue that criminal liability should not attach where a criminal act was not specifically contemplated and intended by the accused.<sup>121</sup> But there exists a fundamental difference between an individual who with knowledge of a crime provides a service to a criminal and one who intentionally enters into a criminal agreement. The argument that *Pinkerton* makes persons criminally liable as a result of their negligence ignores the fact that persons who voluntarily enter into a criminal conspiracy do not do so through any act of negligence. The *Pinkerton* rule limits liability to those acts which are done in furtherance of the criminal agreement and this provision protects accessories from the acts of principals done independently of the conspiracy.<sup>122</sup> Where, however, the principal commits an act which was both foreseeable and in furtherance of the unlawful agreement, the doctrine of accomplice liability does no more than hold the accessory accountable for initiating or maintaining an otherwise avoidable chain of events.

In *Martinez v. State*,<sup>123</sup> although the defendant may not have intended for a robbery and a kidnapping to occur, it is not likely that he would contest the observation that violence is a foreseeable consequence of a narcotics conspiracy.<sup>124</sup> Of course, foreseeability is not the same as intent, and to equate the two may be a fiction, but it is no

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flawed.

121. W. LAFAVE & A. SCOTT, *supra* note 18, at 516.

122. The felony murder rule is both a descendant and a mutation of the doctrine of accomplice liability. Where the doctrine of accomplice liability requires a jury to find that the crime was a natural and probable consequence of the criminal agreement, the felony murder rule irrebuttably presumes that death is a foreseeable consequence of certain violent felonies. Where the doctrine of accomplice liability requires a jury to find that the crime was committed in furtherance of the criminal agreement, the felony murder rule will in some circumstances hold accomplices liable for a killing done by a third party. The felony murder rule is thus susceptible to far more serious objections. W. LAFAVE & A. SCOTT, *supra* note 18, at 560.

123. *Martinez v. State*, 413 So. 2d 429 (Fla. 3d Dist. Ct. App. 1982).

124. Indeed as the Second Circuit has observed: "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent that they keep scales, glassine bags, cutting equipment and other narcotics equipment." *U.S. v. Weimer*, 534 F.2d 15, 18 (2d Cir. 1976).

more a fiction than the principle which holds one responsible for murder when the person killed was not the person intended.<sup>125</sup>

Fundamentally, where Lafave and Scott and other commentators have erred is in their attempt to apply the principle of personal responsibility to crimes committed as a result of a criminal agreement. The general rule that persons are accountable only for those acts which they intend and in which they participate makes sense when an individual takes it upon himself to bring about a certain result. But where an individual associates with others and his associates commit acts which are a foreseeable consequence of their agreement, that individual should not be permitted to hide behind his associates and escape liability. Critics who have claimed that there is no sound rationale for the *Pinkerton* rule fail to understand that society has the right to establish the highest standards of accountability. The fact that this principle of accomplice liability has been a part of our jurisprudence for over four hundred years demonstrates not only its endurance but its position as a fundamental tenet of the common law. Far from a radical departure, *Pinkerton v. United States* is a reaffirmation of this principle. The *Pinkerton* rule continues to be a viable theory of criminal liability.

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125. *Regina v. Saunders*, 75 Eng. Rep. 706 (1573).

# The Judicial System of Postrevolutionary Cuba

Luis Salas\*

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## I. Introduction

Cuban justice is a subject which has captured the attention of numerous American writers. Unfortunately, "few of them attempt to analyze Cuban legal institutions in detail and do not discuss what Cuban legal writers have said about . . . [the system] or how the new legal texts compare with the actual practice of courts and administrators."<sup>1</sup> This article examines some of the major changes which have occurred in the structure of the Cuban judicial system since the rise of Castro and how these changes have affected the courts and those who participate in the judicial system.

Cuban justice is not an isolated concept which can be understood solely in reference to institutions and codes. The Cuban revolutionary

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1. Berman and Whiting, *Impressions of Cuban Law*, 28 AM. J. COMP. L. 475, 476 (1980). See generally L. SALAS, SOCIAL CONTROL AND DEVIANCE IN CUBA (1979); Azicri, *An Introduction to Cuban Socialist Law*, 6 REV. SOC. L. 153 (1980); J. BRADY, *The Revolution Comes of Age: Justice and Social Change in Revolutionary Cuba*, CRIME, JUSTICE AND UNDERDEVELOPMENT (C. Sumner ed. 1981); Azicri, *Change and Institutionalization in the Revolutionary Process, The Cuban Legal System in the 1970's*, 6 REV. SOC. L. 164 (1980).

The only two empirical works which were based on field observations are: Kennedy, *Cuba's Ley Contra la Vagrancia: The "Law on Loafing,"* 20 U.C.L.A. L. REV. 1177 (1973); and Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969). The most promising work may be that of Douglas Butterworth who cooperated with Oscar Lewis and others in a thorough study of Cuban slums during 1969-70. Some of the material involves interviews and observations of popular courts. See D. BUTTERWORTH, *THE PEOPLE OF BUENA VENTURA* (1980).

For studies of specific institutions or laws see Brady, *Fresh Winds on Rotten Sails: Spanish Legal Reforms, American Parallels and the Cuban Socialist Alternative — A Reply to Antonio Beristain*, 9 INT'L. J. SOC. L. 177 (1981); M. Azicri, *Crime and Law Under Socialism: the 1979 Cuban Penal Code*, (Nov. 2, 1979) (unpublished paper presented at the National Conference on Cuba, Center for Cuban Studies, N.Y.); M. Tigar, *The Educative Function of Criminal Law: Cuban Reforms in Comparative Perspective*, (Nov. 3, 1979) (unpublished paper, National Conference on Cuba, Center for Cuban Studies, N.Y.); Comment, *The Socialist Constitution of Cuba (1976)*, 17 COL. J. TRANSNAT'L. L. 451 (1978).

process has been characterized by flux and internal struggle during its brief history.<sup>2</sup> A useful tool in understanding these developments is to place them within the context of the political and ideological events which have shaped them. Scholars, in their discussion of Cuban development, have adopted a number of different historical models, grouping events within different periods.<sup>3</sup> This article follows a model which divides Cuban legal progress into two major periods: the revolutionary phase, from 1959 to 1969; and the institutionalization phase, from 1970 to the present.

Changes in Cuban laws may be analyzed within two conceptual levels: those affecting the judicial infrastructure and those transforming the statutory scheme. This article concentrates on modifications to the judicial apparatus, especially those changes which sought to transform Cuban political culture by utilizing the judicial system as a tool for change.

## II. The Revolutionary Phase From 1959 to 1969: Major Judicial Innovations

The first phase of Cuban revolutionary development took place from 1959 to 1963 and was characterized by eradication of the old and consolidation of power in the hands of the new regime. As portrayed by Castro, this was a phase marked by "iconoclasm in relation to laws; we have to destroy the system, destroy its laws, destroy everything."<sup>4</sup> Struggle was the main theme during this period. Conflict permeated not only foreign relationships but was an integral part of domestic policy as well.

### A. Conflicts with the Existing Judicial System

Clashes with the traditional, multi-level judiciary began early. These centered on disputes over the exercise of power and intrusion by the executive into what were previously exclusive judicial arenas. The case that brought this conflict into the forefront was the trial, which

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2. See J. DOMINGUEZ, *CUBA: ORDER AND REVOLUTION* (1978) and C. MESA-LAGO, *CUBA IN THE 1970'S: PRAGMATISM AND INSTITUTIONALIZATION* (1978).

3. See generally C. MESA-LAGO, *supra* note 2. For a discussion of legal periods see Azicri, *An Introduction to Cuban Socialist Law*, 6 REV. SOC. L. 153 (1980).

4. Speech by Fidel Castro on the tenth anniversary of the founding of the Ministry of the Interior, VERDE OLIVO, June 13, 1971, at 4, 63.

began in February 1959, of forty-five members of Batista's air force who had been charged with genocide. The trial resulted in the acquittal of all defendants. Fidel Castro denounced the verdict publicly and called for another trial. A special review panel was convened which allowed the prosecution to lodge an appeal. The lower court's decision was subsequently reversed and a second trial resulted in the defendants' conviction. Despite protests from the judiciary and the organized bar, the conviction stood.<sup>5</sup>

After this incident the government established, and exclusively relied on, "revolutionary" courts for the trial of political cases. Its judges were selected on the basis of political commitment rather than skill and were often members of the armed forces subject to military discipline. As a result of procedural amendments these courts were not bound to the fundamental guarantees of the rights of the accused, ensuring the speed, severity and certainty of conviction.<sup>6</sup> The creation of these courts reflected a policy of parallelism and avoidance later followed in the creation of other institutions. The traditional court system was to handle civil and criminal cases while the new system was to process those cases in which the accused was charged with a direct challenge to the integrity of the regime.

Disputes also extended to the enforcement of a number of new laws affecting proprietary rights. In 1960 the Supreme Court rejected a number of appeals from The Instituto Nacional de Reforma Agraria (INRA)<sup>7</sup> and increased the reparations to be paid to expropriated landowners in several cases.<sup>8</sup> At the same time the Supreme Court upheld the constitutionality of a majority of revolutionary decrees.<sup>9</sup> The most serious disagreements arose over jurisdictional issues. The Supreme Court found unconstitutional, for example, a presidential resolution declaring the nullity of a lower court order.<sup>10</sup> It also set aside a law

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5. F. MORENO, *The Cuban Revolution v. Batista's Pilots*, in *POLITICAL TRIALS* 94 (T. Becker ed. 1971).

6. For a full treatment of the first revolutionary courts and clashes between the judiciary and the regime see INT'L COMM'N OF JURISTS, *CUBA AND THE RULE OF LAW* (1962).

7. The Instituto Nacional de Reforma Agraria (INRA) was the agency responsible for implementing land reform.

8. J. DOMINGUEZ, *supra* note 2, at 250.

9. During 1960 the Supreme Court only made one ruling of unconstitutionality not related to court organization. *Id.*

10. *La jurisprudencia al día*, sentence no. 5, February 5, 1960 (January 20, 1960).

prohibiting appeals from decisions of the Ministry of Labor and overturned rulings by revolutionary courts which invaded the ordinary jurisdiction of the courts.<sup>11</sup>

The primary tool for overcoming judicial resistance was the legislature. From January 1959 to August 1961, the cabinet amended the Fundamental Law, equivalent to the constitution, twenty-two times, or once every forty-five days.<sup>12</sup> In reviewing these amendments, the International Commission of Jurists concluded that "all of the reforms to the Fundamental Law converge in only one point: the concentration of power in the hands of the governing group."<sup>13</sup>

Judicial response to these actions was mixed. Several members of the judiciary in 1960 began a movement for judicial reform to establish independence from the other branches of the government. Others voluntarily resigned or were unable to resist the pressures imposed.<sup>14</sup> Between November 1960 and February 1961, twenty-one of the thirty-two justices of the Supreme Court resigned or were dismissed.<sup>15</sup> A similar pattern followed throughout the lower court system.<sup>16</sup> By 1961, the executive could boast that "all of the counterrevolutionary judges had been removed but the judicial system continued to function in the same manner. Its structure had not been changed."<sup>17</sup>

By 1962 Cuba was rapidly moving towards a socialist model of government. During these early years a debate ensued over possible development strategies. At the core of these discussions were the means

11. J. DOMINGUEZ, *supra* note 2, at 249-53.

12. INT'L COMM'N OF JURISTS, *supra* note 6, at 64-65.

13. *Id.* at 121-22. Some of the major modifications include authorization of the death penalty in political cases; retroactive application of new legislation; elimination of the right of habeas corpus; no appeal rights to the ordinary court system from decisions of revolutionary tribunals. The justification for many of these actions was set out by Castro:

We shall be respectful of the law but of the revolutionary law; respectful of rights but of revolutionary rights — not of the old rights, but the new rights we are going to make. For the old law, no respect; for the new law, respect. Who has the right to modify the constitution? The majority. Who has the majority? The Revolution.

Revolucion, March 23, 1959.

14. J. DOMINGUEZ, *supra* note 2, at 250.

15. *Id.* See generally INT'L COMM'N OF JURISTS, *supra* note 6.

16. J. DOMINGUEZ, *supra* note 2, at 249-53.

17. Harnecker, *Una justicia revolucionaria*, BOHEMIA, Aug. 17, 1973, at 48. See also Roca, *¿ A quienes debe servir la justicia revolucionaria?*, MEMORIA DEL SEMANARIO JURIDICO SILVIO MAYORGA 159 (1981).

by which socialism could be reached. Ernesto ("Che") Guevara, one of the primary leaders of the revolution, was the exponent of a "moral" economy with workers being motivated by moral rather than material incentives.<sup>18</sup> Confronting the Guevara position were old-time Communists who advocated centralized planning based on traditional methods of economic control, the formation of an efficient and organized bureaucratic cadre, and the development of the Communist Party.<sup>19</sup> The conflict generated by these early years had dire consequences for the regime. A substantial number of trained legal personnel fled from the island leaving the courts understaffed and without direction.<sup>20</sup> The remaining cadre were not fully trusted by the government, with suspicions being directed at both individuals and institutions.

The regime was seeking a radical transformation of Cuban political culture within a short period of time and experimentation was necessary. In order to overcome these problems the government bypassed, but did not eliminate, existing judicial institutions. A second, collateral system was established which derived its support from populist organizations.<sup>21</sup> Creating these alternative forums achieved three important short-term goals: it bought time for Castro's government to develop revolutionary institutions to replace the existing apparatus; it provided a check against concentration of power within any specific faction of the government; and finally, it allowed the experimentation thought to be necessary for the achievement of long-term goals of integration and socialization of the citizenry. Although many organizations might be discussed none is more exemplary of this than the popular courts.<sup>22</sup>

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18. See E. GUEVARA, *CUBA: UNA REVOLUCION EN MARCHA*, (1967); Roca, *Cuban Economic Policies in the 1970's: The Trodden Path*, 12 *STUD. IN COMP. INT'L DEV.* 86 (1977).

19. For a full discussion of this debate see: R. BERNARDO, *THE THEORY OF MORAL INCENTIVES IN CUBA* (1971).

20. Cruz, *It Took Only Three Years: The Destruction of a Law Firm*, 50 *A.B.A. J.* 63 (1964). See also J. DOMINGUEZ, *supra* note 2, at 249-53.

21. Mass organizations, characterized by universal memberships, were established during the beginning of the Revolution. The best known are: the Committees for the Defense of the Revolution (CDR) (see *infra* note 26), militias, worker groups, and the Federation of Cuban Women. For a review of the CDR see R. FAGEN, *THE TRANSFORMATION OF POLITICAL CULTURE IN CUBA* 69-103 (1969).

22. Another court structure created during this experimental period, largely as a result of policies advocated by "Che" Guevara, was the Labor Courts. In order to carry out the production requirements of the new economic system while remaining faithful to the ideal of moral rather than material incentives, legislation was necessary to reward and sanction labor. Eventually labor councils were established to deal with these

## B. The Development of the Popular Courts

One of the major judicial innovations introduced by the regime was the establishment of popular tribunals in 1961. These were patterned after comrades' courts in the Soviet Union and charged with educating the rural poor in correct behavioral patterns.<sup>23</sup> As expressed by Fidel Castro, the goal of these tribunals was "to recognize and resolve these problems, not with sanctions, as in the traditional style, but rather with measures that would have a profound educational spirit."<sup>24</sup>

Although their beginnings were modest, they rapidly expanded and by 1968 there were 2,221 such courts, staffed by 8,000 judges, in operation throughout the island.<sup>25</sup> The geographical areas served by these courts closely paralleled those of The Committees for the Defense of the Revolution (CDR),<sup>26</sup> with each neighborhood having a court exercising jurisdiction and staffed by an average of forty judges sitting in panels of three.<sup>27</sup>

From their inception, popular courts were staffed by part-time judges, selected from the neighborhood or factory where the tribunal presided. The presence of lawyers was discouraged and formal legal

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issues. The councils were composed of panels of five members elected by co-workers and sought to modify worker behavior, using peer pressure both as a form of general and specific deterrence. Though penal sanctions were to be avoided these tribunals came to rely on fines as their primary sanctioning tool; leading the Minister of the Interior in 1969 to complain that: "these measures do not contribute in any way to the formation of the New Man . . . , or towards the development of the concept that fulfillment of social duties is an obligation for all citizens, which is not fulfilled by money." Risquet, *La disciplina laboral es la condición indispensable para la victoria*, BOHEMIA, Aug. 15, 1969 at 70, 72. See also Perez-Estable, *Institutionalization and Worker's Response*, 6 CUBAN STUDIES 40 (1976); C. MESA-LAGO, *INVESTIGACIONES SOBRE LAS CONDICIONES DE TRABAJO: LA EXPERIENCIA CUBANA* (1963).

23. Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1347 (1969). This appears to be the best published work on these courts although it is somewhat dated. For a discussion of Soviet comrade's courts see Berman and Spindler, *Soviet Comrade's Courts*, 38 WASH. L. REV. 843 (1963).

24. Cuba, *Los Tribunales Populares*, *Verde Olivo*, Oct. 16, 1966, at 24.

25. Villares, *El pueblo administrador de justicia*, BOHEMIA, Aug. 31, 1973 at 36.

26. The Committees for the Defense of the Revolution (CDR) were first organized in September 1960. The committees were set up on every block, building or factory as a national vigilance system to combat counterrevolutionary activity. Their role has since been expanded to serve as the primary grassroots political organization. See generally R. FAGEN, *supra* note 21.

27. See generally D. BUTTERWORTH, *supra* note 1.



participation was only found in appellate panels in which an assessor, usually a law student, sat as a member of the review board.<sup>28</sup> Candidates were proposed for these positions by the workers in the area served and their candidacy was screened by mass organizations to determine their moral fitness and revolutionary commitment. Legal education was a barrier rather than an asset for selection.<sup>29</sup> After initial selection candidates attended a ten day training course at which there was further screening. Advanced studies lasting forty-five days were required prior to taking office.<sup>30</sup> All judges served on a part-time basis, without monetary recompense, and maintained outside full-time employment in other sectors.

One of the most interesting features of the popular courts is that their organizational scheme placed them outside the judicial apparatus. Meanwhile traditional courts exercised jurisdiction over much the same subject matter as the popular courts but each operated independently of the other. The jurisdiction of popular courts was ill-defined and limited largely by territorial boundaries. Thus, courts located in rural areas were primarily concerned with redistribution of land and grazing disputes, while those in urban areas concentrated on neighborhood disputes, domestic quarrels and minor criminal cases.<sup>31</sup>

While popular courts were charged with carrying out traditional judicial functions, their uniqueness lay in the integrative and educational role which they were designed to perform. They were left to their own resources and did not have legal codes to guide them. Their decisions emerged from their everyday experience and common sense. Presiding over courts in store-front buildings or outdoors to encourage attendance, the judges were to make the trial truly an educative function. Judges were encouraged to inquire into the background of participants to determine causative factors for their behavior. Sanctions were fashioned in such a way as to personalize them and to reduce the need for institutional supervision in their implementation.<sup>32</sup> Public reprimands, intended to serve as a deterrent to both defendant and spectator, were an integral part of all judicial proceedings.<sup>33</sup>

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28. Berman, *supra* note 23, at 1338.

29. Janero, ¿ *Qué son los Tribunales populares?*, *Verde Olivo*, Nov. 10, 1968, at 12.

30. Martí, *Juezas*, *MUJERES*, March 3, 1977, at 50.

31. Berman, *supra* note 23, at 1318-19.

32. *Id.* at 1329-32.

33. *Id.* at 1329. See also Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, — LAW & SOCIETY REV. — (1983).

It is difficult to fully explain the type of behavior of judges in the popular courts without giving an example. A woman complained to one such court that a neighbor had stolen her pants. The woman accused of the offense maintained that she had purchased the pants. She proffered to the court her ration booklet which indicated the acquisition of a pair of pants in May of 1968. One of the judges on the panel interrupted to state that he worked in the clothing industry and that the pants at issue were not available in May of 1968 and, therefore, the defendant was lying and had forged her ration booklet. She was found guilty and sentenced to sixty days confinement at her residence. One of the judges also pointed out that the daughter of the complainant was not attending school and ordered her to attend school even though she had never been charged with any formal offense.<sup>34</sup>

The administration of justice in popular courts differed in many important aspects from the traditional judicial process. The offender need not have been accused of a violation of the criminal code as such, but could be charged with a violation of socialist norms of conduct. These offenses were vaguely defined, allowing the court to intervene at any stage. Defendants were viewed as victims of the capitalist regime and as such subject to re-education. Re-education was to take place in a variety of ways with peer pressure being critical to the process. Formalistic procedure was a barrier to the socialization role and in most cases was the least important factor of the proceedings.

### C. Problems in Transition

While a major goal of the popular courts was integration of the citizenry into the revolutionary process, many of the policies pursued during the regime's first ten years had dislocating effects on the population and achieved results contrary to those desired.<sup>35</sup> Revolutionary legislation went beyond transformation of economic and political relationships and initiated changes which struck at the core of long-held cultural values. Facilitation of divorce and marriage, elimination of racial discrimination, challenges to religious beliefs and transformation of

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34. Berman, *supra* note 23, at 1319-20.

35. In 1969 the government was facing a serious problem of internal order. Juvenile delinquency had become a severe problem and many youngsters had dropped out of the educational system and were neither studying nor working. Absenteeism and low productivity plagued the economy and there was broad discontent with the experiments of the early years. L. SALAS, *supra* note 1 at 20.

the role of women generated emotional and psychological strains while other measures, such as the rationing of food and clothing, and geographical relocation, aggravated the situation.<sup>36</sup> One result of these changes was drastic increases in family disorganization, delinquency and neighborhood disputes.

Rising social disorder led the government to call mass meetings to consider these issues and possible remedies. During these meetings substantial criticisms were made with some of the most severe complaints being directed at the judiciary, particularly the popular courts. The following concerns were voiced: 1) inefficiency and conflict resulting from duplicity of jurisdictions; 2) diversity of sanctions being applied; 3) informality of the proceedings; and 4) lack of judicial and political control over the actions of diverse branches of the judiciary.<sup>37</sup>

The difficulties in the maintenance of order were not isolated and reflected serious problems in the economic model pursued during these years. In August of 1970, Castro formally broke with the policies advocated by "Che" Guevara and announced that Cuba was now "entering a new phase; a much more serious profound phase."<sup>38</sup> He admitted to having made a number of serious mistakes, which he attributed to revolutionary zeal, and called for reformation of the economic and political model in line with established lines of Marxist thought.<sup>39</sup> From that point, Castro declared, decisions would be made based upon pragmatic rather than ideological considerations. Planning became the watchword of the new system with jurists being called upon to "play a more important role with the advancing perfection of our State and the new mechanisms of the Economic Direction System. We shall need more jurists, better prepared and specializing in different branches of law."<sup>40</sup>

### III. The Institutionalization Phase From 1970 to the Present: Reformation of the Judicial Structure

In order to reform the judicial structure, commissions had been

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36. See generally J. DOMINGUEZ, *supra* note 2.

37. The primary complaints were voiced against the popular courts with the President and Minister of the Interior leading the charges. Del Valle, Speech at closing of First National Forum of Internal Order, VERDE OLIVO, April 27, 1969, at 24.

38. F. Castro, *Discurso en el décimo aniversario de la constitución de la Federación de Mujeres Cubanas*, GRANMA REVISTA SEMANAL, Aug. 30, 1970, at 4-5.

39. *Id.*

40. F. CASTRO, FIRST CONGRESS OF THE COMMUNIST PARTY OF CUBA (1976).

formed in 1969.<sup>41</sup> The work of these commissions gave rise in 1973 to a new law reorganizing the judicial structure.<sup>42</sup> The primary reforms were: unification of the judicial system into a pyramidal structure consisting, in ascending order, of base courts, regional courts, provincial courts, and the Supreme Court; integration of the judiciary into the political structure by making it subordinate to the Council of Ministers; collegiality of all courts which were to be integrated by law; professional judges who would all be subject to election and recall; right of appeal in all cases; reorganization of the prosecutorial apparatus; and abolishment of the private practice of law.<sup>43</sup> Further modifications were necessary in 1976 when the new Constitution was adopted<sup>44</sup> because of reforms in the politico-administrative structure.<sup>45</sup> The new changes finalized the unification process begun in 1973 by adding appellate competence to lower courts over decisions of administrative tribunals and merging the duties of base and regional courts into municipal courts.<sup>46</sup> Figures 1 and 2 provide the reader with some comparison of these changes by presenting diagrams of the Cuban judicial structure prior to 1973 and after 1977, when it took its present form.

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41. Roca, *El nuevo sistema judicial*, *Verde Olivo*, Jan. 21, 1973, at 36.

42. Ley de Organización del Sistema Judicial, GACETA OFICIAL DE LA REPUBLICA DE CUBA, June 23, 1973 at 57-58 (arts. 1-177).

43. *Id.*

44. CONSTITUCION DE LA REPUBLICA, GACETA OFICIAL DE LA REPUBLICA DE CUBA, Feb. 24, 1976. In order to comply with the political changes in the Constitution, a new law on the organization of courts was adopted in 1977. *Ley de Organización del Sistema Judicial*, GACETA OFICIAL DE LA REPUBLICA DE CUBA, Aug. 25, 1977 at 489 (arts. 1-154) [hereinafter cited as *Ley de Organización*]. For a comprehensive review see Comment, *The Socialist Constitution of Cuba (1976)*, 17 COLUM. J. OF TRANSNAT'L L. 451 (1978).

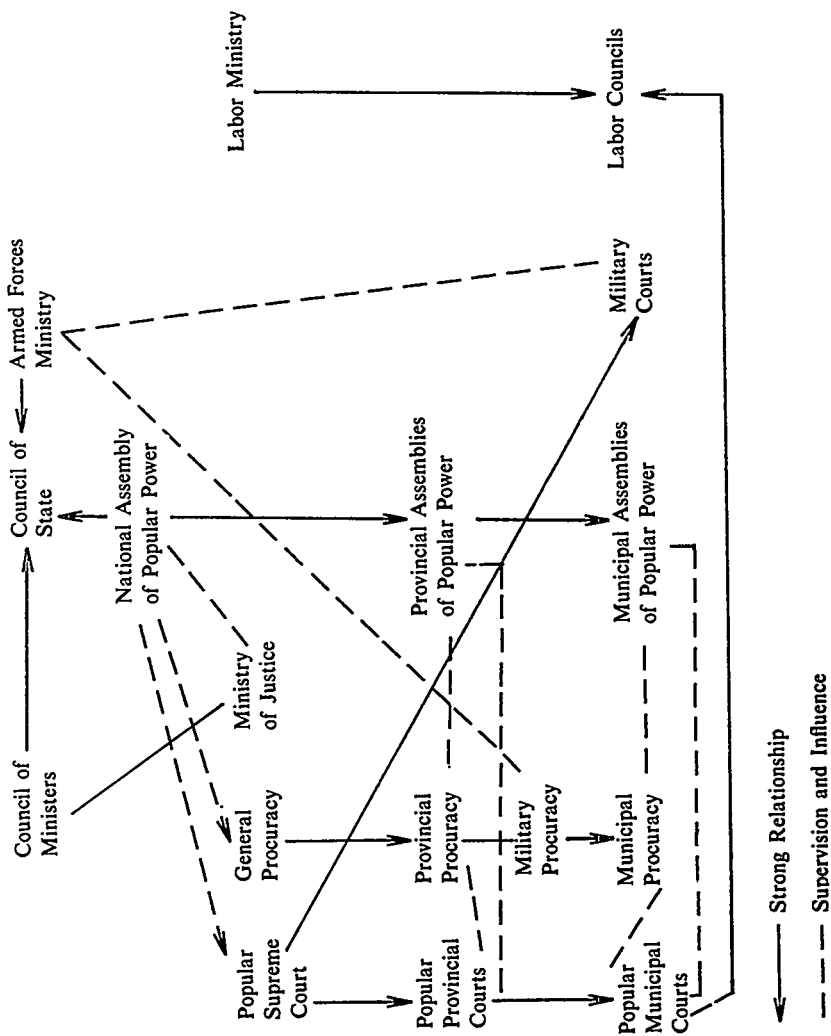
45. The new Constitution substantially changed the political structure of the country by redefining the number and types of political divisions (e.g. provinces and municipalities) within the country.

46. Ley de Organización, *supra* note 44, at arts. 33-50.



Figure 2

The Present Politico-Judicial Structure of Cuba



## A. The New Court Structure

Municipal courts are the lowest trial courts within the system and exercise jurisdiction over certain civil and criminal cases.<sup>47</sup> Trials are presided over by a three-judge panel, composed of one professional judge and two lay judges, with all members being elected by municipal assemblies from nominations made by the Ministry of Justice.<sup>48</sup> The minimum qualifications for judges differ depending on the court in which they serve. Professional judges must have practiced law for at least three years as well as fulfilling other age and general requirements.<sup>49</sup> Professional judges are expected to serve full-time while lay judges maintain other employment and serve only during two nonconsecutive one-month terms a year.<sup>50</sup>

Provincial courts are at the next level, serving as the primary trial courts for serious cases as well as exercising appellate jurisdiction over the rulings of the municipal courts.<sup>51</sup> Unlike the lower courts, which hear a variety of cases, these courts are divided into four branches: a criminal division, a civil and administrative division, a labor division and a division to deal with crimes "against the security of the State."<sup>52</sup> A plenum of all judges acts as a supervisory body over their affairs.<sup>53</sup> Provincial assemblies conduct the election of judges after they have been nominated by the Ministry of Justice. Professional judges serve five-year terms while lay judges serve two-and-one-half-year terms.<sup>54</sup>

The Supreme Court exercises ultimate judicial authority over all inferior tribunals; distributing its responsibilities among five branches,

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47. Their jurisdiction extends over criminal cases in which the maximum penalty does not exceed nine months imprisonment or fines exceeding 270 quotas, as well as indexes of precriminality and contraventions (minor crimes). *Ley de Procedimiento Penal*, GACETA OFICIAL DE LA REPUBLICA DE CUBA, August 15, 1977, art. 8 [hereinafter cited as *Ley de Procedimiento Penal*]. Civil jurisdiction is exercised over cases in which the disputed amount does not exceed 1000 pesos, family disputes, child support cases, as well as hearing appeals from decisions of Labor Councils. *Ley de Procedimiento Civil*, GACETA OFICIAL DE LA REPUBLICA DE CUBA, August 26, 1977, art. 5 [hereinafter cited as *Ley de Procedimiento Civil*].

48. Municipal assemblies are the lowest legislative bodies within the Cuban political structure.

49. *Ley de Organización*, *supra* note 44, at arts. 66-67.

50. *Id.* at arts. 68-69.

51. *Id.* at arts. 79, 83.

52. *Id.* at art. 34.

53. *Id.* at art. 36.

54. *Id.* at art. 75.

similar to those found in the provincial courts, with the addition of a military division. All the member justices, the Procurator General,<sup>55</sup> and the Attorney General,<sup>56</sup> constitute the full Court, exercising supervision over the Cuban judiciary and making recommendations to the National Assembly,<sup>57</sup> the Cuban legislature. Justices of the Court are appointed by the National Assembly upon nomination by the Ministry of Justice. The President and Vice-President of the Court however, while appointed by the assembly, are nominated by the President of the Council of State and Chief of Government. The only other exception is the judges serving in the military branch who must hold military rank and are nominated by the Armed Forces Ministry.<sup>58</sup>

In addition to these supervisory duties, the Court also exercises appellate jurisdiction over all decisions of the provincial and military courts. Original jurisdiction is accorded all cases brought against high-ranking political functionaries. These may only be pursued with the approval of the body of which the accused is a member and are heard by the full court.<sup>59</sup> All other cases are heard by randomly selected five judge panels.

## B. The New Role of the Judiciary: Lay and Professional Judges

Incorporation of the judiciary into the political structure was carried out after a great deal of thought and negotiations. Proponents of the new scheme questioned the whole notion of judicial autonomy, claiming that judicial independence arises

from their abidance with the law. After all they are independent to the effect of applying justice, that is their judicial function. But not that type of independence, in the abstract, which has been proclaimed by bourgeois idealists. . . . Here the judicial system is an organ of the State, just like any other, which has been assigned a

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55. The Procurator General heads the Procuracy, the government agency charged with upholding the law in all branches of public and private life. For further discussion, see *infra* notes 106-117 and accompanying text.

56. The Attorney General may participate but may not vote in these meetings. The Procurator General has full membership rights. *Id.* at art. 20.

57. *Id.*

58. *Id.* at art. 74.

59. The following persons are included: 1) members of the Political Bureau of the Communist Party; 2) the President, Vice-President and Secretary of the National Assembly; 3) members of the Council of State; 4) justices of the Supreme Court; and, 5) all procurators attached to the General Procuracy.



specific task to fulfill.<sup>60</sup>

New legislation achieved further control of the judiciary through new reporting procedures and sanctioning mechanisms.<sup>61</sup> Under these provisions courts must issue annual reports to their electing assembly and be ready to answer questions regarding their activities.<sup>62</sup> Assemblies may make recommendations to the courts and may remove any of its judges at any time without cause.<sup>63</sup> The judiciary may also take other actions against its own members under certain procedural rules.<sup>64</sup>

One of the major innovations introduced by the popular court movement was the concept of the lay judge. This has been retained under the new structure. The purpose of retaining lay judges in the new formalization movement is twofold: the influence which popular notions of justice might have on professional judges and the impact which participation might have on the populace, with both groups seen as educating each other.<sup>65</sup>

Cases presented before Cuban tribunals are heard by a panel of three justices, two lay judges and one professional judge.<sup>66</sup> While lay and professional judges are legislatively equal, in actuality they often are not. Professional judges serve throughout the year while lay judges only serve during two nonconsecutive one month terms. In addition, professional judges preside over all proceedings and give legal training to their lay counterparts. Indeed the term "lay judges" may be somewhat misleading. All lay judges receive some legal training prior to assuming office and must participate in continuing legal education classes

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60. Sanchez, *Participación popular en los nuevos tribunales*, BOHEMIA, July 20, 1973, at 72, 73. See also Guma, *The National Judicial System: An Integral Part of Revolutionary Power*, GRANMA WEEKLY REVIEW, September 5, 1971, at 8. The argument is settled by the Cuban Constitution, art. 122, which states that "[t]he courts constitute a system of State organs structured with functional independence from any other organ and subordinate only to the National Assembly of People's Power and the Council of State."

61. Ley de Organización, *supra* note 44, at arts. 79-82.

62. *Id.*

63. The presence of the Procurator General and Attorney General on the Supreme Court provides further checks on the judiciary.

64. Ley de Organización, *supra* note 44, at arts. 87-91.

65. Speech by Blas Roca, in 3 REVISTA CUBANA DE DERECHO 39 (1974). The emphasis on this institution is not merely rhetorical. The Cuban Constitution, for example states that "[i]n view of their social importance priority should be given to the judicial function assigned to the lay judges." CUBAN CONST. art. 127 (1975).

66. Ley de Organización, *supra* note 44, at art. 9.

during their term, with prior service being taken into consideration in assignments to higher courts.<sup>67</sup>

While the primary role of the lay judge has been to popularize the judiciary, professional judges have progressively moved toward specialization.<sup>68</sup> This is product of the need for a bureaucratic cadre within the complex structure of Cuba's new economic and political structure. Fidel Castro recognized this when he outlined the role of the judiciary as "growing with the development of our State and with the mechanisms of our new system for plannification [sic] of the national economy. We will need more judges, better prepared and specialized in the different branches of the law."<sup>69</sup> Adding impetus to professionalization has been the creation of the National Association of Cuban Jurists, formed in 1977. The organization seeks to bring within its ranks all professional judges and attorneys and to represent their interests.<sup>70</sup> The decision to exclude lay judges and the failure to establish a comparable organization for them is indicative of the difficulty in simultaneously emphasizing both the professionalism and the popularization of the judiciary. A direct result of the emphasis on popularization during the early years has been the dramatic increase of women in the judicial branch. In fact, twenty-nine percent of the organizing committee of the National Association of Jurists and thirty-five percent of the executive committee were women.<sup>71</sup>

Communist party membership is not officially required of judges but revolutionary militancy is stressed in their selection and promotion.

In the courts we have comrades who are members of the Party, we have comrades who are members of the Union of Young Communists and we have members who are not in either organizations but are simply participants in our revolutionary society, ready to work honestly in accordance with their knowledge and convictions. But all of them need to know Marxism-Leninism, whatever their beliefs may be, because Marxism-Leninism gives us the foundations to un-

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67. L. SALAS, *supra* note 1, at 232-35.

68. The major trial courts and all appellate courts are divided into specialized branches with judges serving lengthy periods in them. L. SALAS, *supra* note 1, at 221-25.

69. F. CASTRO, *FIRST CONGRESS OF THE COMMUNIST PARTY OF CUBA*, 293 (1976).

70. Jorge, *Congreso constituyente de la Unión Nacional de Juristas de Cuba*, BOHEMIA, June 3, 1977, at 22.

71. Alvarez, *La Unión Nacional de Juristas de Cuba*, VERDE OLIVO, May 30, 1976, at 16.

derstand the phenomenoms of life and the phenomena of this society.<sup>72</sup>

The foregoing raises questions as to the autonomy of the Cuban judiciary, a common criticism of Marxist regimes, and a factor which is undoubtedly applicable to political trials. While direct interference is common in such cases, the majority of Cuban cases involve common crimes in which intervention is less direct and takes place in the form of general direction rather than interference in specific cases. Actions taken by the Cuban regime are indicative of this trend. In a recent speech, Castro decried rising crime rates and called on the Cuban judiciary to impose higher sanctions. After all, "[o]ur judges are revolutionary judges. . . . [T]hey come from the people to whom they are responsible in the corresponding assemblies. [I]n the future [these judges] will sanction with the corresponding severity those who commit repugnant crimes as well as recidivists or those who maintain dangerous anti-social conduct."<sup>73</sup> The day after the speech a Supreme Court justice was interviewed in a newspaper and announced his complete agreement.<sup>74</sup>

Following the Castro speech a number of actions were taken. The Political Bureau of the Communist Party and the Council of State issued directives to the Procuracy<sup>75</sup> and the courts regarding procedural changes necessitated by the struggle against crime.<sup>76</sup> Both groups responded swiftly to these directives.<sup>77</sup> Similar results were obtained when Castro complained about the leniency of the courts in dealing with common criminals. Referring to one specific case, Castro was quick to point out that "we can't simply act in an arbitrary manner to correct an arbitrary action, we cannot commit an illegal act, especially now, when we are exhorting all of the people to obey the law."<sup>78</sup>

A review of the disposition of cases within the Cuban court system provides a better picture of the independence of the judiciary: forty-

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72. Roca, *supra* note 64, at 41.

73. Granma, January 31, 1978, at 2, col. 1 (speech by Blas Roca, president of Asamblea Nacional del Poder Popular, Jan. 27, 1978 (quoting Fidel Castro)).

74. *Id.*

75. See *infra* notes 106-117 and accompanying text.

76. República de Cuba, Asamblea Nacional del Poder Popular, *Acta: Primer Período Ordinario de Sesiones, 28, 29 Y 30 de junio, 1978*, 231-272 (hereinafter cited as *Acta*).

77. *Id.*

78. *Id.* at 216.

three percent of all cases filed by the Procuracy during 1977 were dismissed by the courts as a result of poor investigations by the police and the Procuracy.<sup>79</sup> Thirty-nine percent of those persons tried in base courts were acquitted, as were thirty-seven percent of those tried in regional courts and twenty-eight percent in provincial Courts.<sup>80</sup> The Supreme Court attributed these rates to poor preparation by the Procuracy, police and defense attorneys and refused to acknowledge judicial leniency as one of the factors.<sup>81</sup> These practices extend to appellate courts which have overturned lower court decisions in thirty-three percent of the cases.<sup>82</sup>

Judicial autonomy is not only evidenced in leniency but is also seen in those decisions by the courts which are contrary to policies espoused by government leaders. This is especially true when dealing with the pretrial release of accused persons which in turn impacts on governmental resources as well as it affects policy considerations negating the use of monetary measures. The figures released by the Procuracy for 1977 reveal that the most prevalent pretrial measure was imprisonment, being used in over fifty-one percent of the cases with less than one percent of the defendants being released on their own recognizance.<sup>83</sup> These actions prompted severe criticisms from the executive and resulted in new directives aimed at changing this trend.<sup>84</sup> The foregoing indicates considerable independence on the part of the Cuban judiciary, probably resulting from renewed emphasis on professionalism. Party interference appears to be directed at dictating broad policy decisions while attempting to remain aloof from everyday control over judicial actions.

### C. Procedural Innovations

The road followed by Cuban courts in establishing their procedural norms has been inconsistent and rocky. During the first years, procedural niceties were abandoned in favor of political necessity. Criminal law was applied retroactively. The principle of double jeopardy was violated at will. Suspension of the right of habeas corpus and

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* A comparison of statistics on reversals in U.S. appellate courts would be misleading.

83. *Id.*

84. L. SALAS, *supra* note 1, at 231.

expansion of sanctions resulted in ever increasing punishments.<sup>85</sup> In order to further expand these powers, revolutionary courts were established as a separate entity from the traditional courts and defendants' rights were further weakened.<sup>86</sup> The introduction of these popular courts signalled a move away from the formalism of the civil law system of prerevolutionary Cuba. No formal legislation was ever enacted bringing these courts into existence and the absence of formal procedure was one of its primary features. The emphasis of the popular courts on example brought these courts closer to common law tribunals than their traditional counterparts.

The 1973 and 1977 efforts to institutionalize eliminated many of the experimental features of the early years. Cuban procedure is now formalistic and adheres to traditional norms. The following safeguards, under the new code of criminal procedure, are exemplary: 1) the presumption of innocence, requiring that crimes be proven independently of statements by the accused;<sup>87</sup> 2) the public nature of court proceedings except in cases of national security or those in which the rights of the victim demand privacy;<sup>88</sup> 3) the right to appointed or retained counsel;<sup>89</sup> 4) the presence of the accused during the proceedings;<sup>90</sup> and 5) the recognition of the privilege against self-incrimination.<sup>91</sup>

Under the new Code of Criminal Procedure, the criminal proceeding is divided into two main parts: the preparatory stage and the oral trial. During the preparatory stage features of the inquisitorial system predominate, while the accusatorial system dominates the trial process. The procurator<sup>92</sup> conducts the majority of pretrial proceedings under the supervision of an investigating magistrate. A substantial modification of this system is the transfer of this judicial function from the hands of a legal functionary to a police official who plays the part of investigating magistrate.<sup>93</sup>

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85. INT'L COMM'N OF JURISTS, *supra* note 6, at 85-114.

86. H. THOMAS, CUBA: THE PURSUIT OF FREEDOM 1458-60 (1971). Revolutionary courts, staffed with military personnel established with military personnel serving as judges, were established to exercise exclusive jurisdiction over political cases. No right of appeal to traditional courts was available.

87. Ley de Procedimiento Penal, *supra* note 47, at art. 3.

88. *Id.* at art. 305.

89. *Id.* at art. 281.

90. *Id.* at art. 132.

91. *Id.* at art. 312.

92. See *supra* note 55 and *infra* notes 106-117 and accompanying text.

93. Ley de Procedimiento Penal, *supra* note 47, at art. 105.

Once the preliminary stage has been completed, a three judge panel is constituted to hear the charges against the defendant. Strict guidelines determine the order and manner of procedure within this process. The trial concludes with the sentencing stage during which the findings of fact and sanctions to be imposed must be considered. These findings must be arrived at by a majority of the court with the panel's range of judicial options limited by the crime charged and the sanction sought by the prosecution.<sup>94</sup>

Appeals take place by complaint, petition, appeal or cassation.<sup>95</sup> Complaints are interlocutory appeals from decisions made during the preparatory phase while petitions are interlocutory appeals from trial court decisions. Appeals from final decisions take the form of appeals or cassation, with the latter being the most common form of relief.<sup>96</sup> This indicates a return to procedural patterns common throughout civil law jurisdictions and the adoption of a procedural scheme which has more commonalities with prerevolutionary Cuba than with other socialist nations.

#### D. The New Role of the Courts

The role to be played by Cuban courts, within the new political structure, is similar to that of traditional courts with one significant difference: their educational purpose.<sup>97</sup> The goal of the court system extends beyond mere propagation of legal knowledge. It ultimately seeks the transformation of political culture, modifying Cuban citizens into "new men" emphasizing collectivism and unselfishness. It is the assignment of this role to the courts that makes socialist systems different from their capitalist counterparts.<sup>98</sup>

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94. *Id.* at arts. 349-58.

95. Cassation is a civil law appeal procedure which seeks to overturn a final sentence.

96. *Ley de Procedimiento Penal*, *supra* note 47, at art. 67.

97. The Constitution speaks of the following: 1) upholding socialist legality; 2) safeguarding the Marxist nature of the State; 3) protection of common and individual property; 4) safeguarding State rights; 5) while also preventing abuse of individual rights; 6) prevention of crime and reeducation of offenders; and 7) to "increase the socio-juridical awareness of the people, stressing the fact that the law must be strictly obeyed, making timely comments in their decisions aimed at educating all citizens in their conscientious and voluntary fulfillment of their duty of loyalty to the country, the cause of socialism and the standards of socialist living." CUBAN CONST. art. 122 (1976).

98. *Ley de Organización*, *supra* note 44, at art. 4 (8). *See also*: Berman, *The*

The Cuban courts accomplish this task in two ways: first, through propaganda designed to enhance popular knowledge and interest in legality; and, second, by "re-educating" those who appear before them. The first method is carried out in a fairly straightforward manner with the most active participants being members of the Procuracy. While traditional approaches such as conferences or roundtables are used to encourage popular discussion, the most innovative approaches have taken place in the usage of the mass media.<sup>99</sup> At least four radio programs weekly are devoted to discussions of legal matters with similar patterns being followed in the print media and television.<sup>100</sup> Perhaps the most imaginative concept has been the establishment of literary contests for the publication of novels which deal with crime investigation and prevention.<sup>101</sup> All of these approaches are directed both at educating the public about correct notions of legality and upgrading respect for the judicial system and its functionaries.

One of the principal mechanisms for carrying out the transformation of the political culture by the courts has been the legislative process. Every new major law is thoroughly discussed at local levels prior to implementation. The Law on Loafing, for example, was discussed by more than three million persons in over 115,000 assemblies.<sup>102</sup> Complementing these discussions are serious efforts to arrive at a final product which is easily understood by the masses.<sup>103</sup>

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*Educational Role of Soviet Criminal law and Civil Procedure*, in CONTEMPORARY SOVIET LAW: ESSAYS IN HONOR OF JOHN N. HAZARD 1 (1974).

99. During 1977 over 3,347 conferences were presented at worker and student meetings with attendance running at slightly under 110,000 persons. They were directed primarily at leaders of mass organizations with the expectations that they would return to their membership and share their experience. *Acta, supra* note 75, at 291.

100. *Id.* "Síntesis del informe a la Asamblea Popular sobre el trabajo de la Fiscalía General de la República en el año 1977," at 290-91.

101. Most of these contests are sponsored by the Ministry of the Interior. The first one was held in 1972 and has since become an annual affair. Under the rules of the contest anyone may submit a novel dealing with crime which will then be judged not only on the basis of its literary quality but also on the image which it presents of crime and functionaries. These novels have been published and distributed widely and have become extremely popular throughout the island. Dramatizations on television, movies, and radio are another source of propaganda and achieve similar results. *See L. SALAS, supra* note 1, at 280-81.

102. Kennedy, *supra* note 1, at 1186. (The Law on Loafing was a quasi-criminal law sanctioning laborers for inefficiency and absenteeism).

103. The following statement, in reference to the new law on court organization is illustrative: "we have tried to draft the Code in such a way that it becomes a legal text which can be understood by everyone, thus contributing to the struggle for socialist

In addition to mass education, the courts also seek to transform legal culture through the judicial process itself. Under Cuban law it is not only the task of the court to decide on facts but also to "formulate in their decisions opportune pronouncements aimed at the education of the citizenry in the conscious and voluntary observance of their duties. . . ." <sup>104</sup> Courts are further encouraged to make findings on the impact which the judicial process has on popular consciousness by inquiring as to the background of participants and the factors which motivated their behavior. <sup>105</sup> Courts have responded by protesting that they are not in a position to gauge judicial impact and pointing out the delicate balance which must be struck between education and safeguarding a defendant's rights. <sup>106</sup> The present emphasis on utilization of the judicial process as a central tool in popular education is reminiscent of the popular courts. It likewise faces the same obstacles. For example, while it may be desirable to hold court sessions in outdoor sites to encourage attendance, as the popular courts did, an undesirable by-product may be disrespect toward the judicial process, something which is anathema to the formalism introduced by the new court structure. While it is still too early to measure the effect which the court system has had on popular culture it is clear that the system has encountered significant barriers in achieving this goal.

#### E. The Procuracy: A New and Powerful Judicial Functionary

One of the major changes brought about by the new court system has been the creation of a new and previously unknown judicial agency, the Procuracy. Its duties extend beyond the traditional duties of attorney generals' offices; it is charged with supreme supervisory power over the execution of all laws. <sup>107</sup> A great deal of latitude has been extended to the Procuracy in carrying out this supervisory function. All adminis-

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legality. The empire of socialist legality is based on a socio-judicial consciousness, it demands that, not only there exist legal norms but that they are also widely known and that everyone be aware of what they can and cannot do without risking a sanction. It requires that everyone know and understand the law. One of the primary means of achieving these objectives is the adoption of legal codes characterized by clarity and simplicity in the language utilized by the drafters of the legislation." Roca, *supra* note 41, at 39.

104. Ley de Organización, *supra* note 44, at art. 4(8).

105. *Acta*, *supra* note 76, at 163.

106. *Id.* at 225-226.

107. Ley de Organización, *supra* note 44, at art. 108.



trative and governmental bodies fall within its jurisdiction, allowing it to review not only past conduct but also prospective actions of all organs of State power.<sup>108</sup> In some instances, as in the case of penal institutions, it has responsibility over day-to-day supervision to insure that judicial and legislative orders are being properly carried out.<sup>109</sup>

The powers of the Procuracy are even broader with respect to the judicial system. It supervises pretrial investigations and has arrest powers.<sup>110</sup> Adverse decisions by the investigating magistrate may be appealed to the Procuracy which exercises ultimate authority in these matters as well as the decision to prosecute.<sup>111</sup> The Procuracy may appeal any decision of a lower court.<sup>112</sup> In addition to its prosecutorial role, the Procuracy shares a number of supervisory functions with the judiciary. The Procurator General sits as a voting member of the plenum of the Supreme Court and is charged with drafting all new legislation.<sup>113</sup>

Another factor which adds considerable power to this office is the independence which it possesses from all other State organs. The National Assembly appoints the Procurator General upon nomination by the Council of Ministers.<sup>114</sup> To assure independence from local legislative assemblies, the office is completely centralized and responds only to the National Assembly.<sup>115</sup> Regardless of their conduct, correctional measures may be imposed on procurators only by their superiors.<sup>116</sup> The judiciary's power is limited to making recommendations alleging misconduct to the Procurator General.<sup>117</sup>

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108. Administrative agencies must forward to the Procuracy copies of all resolutions and orders for inspection and approval. If the Procuracy finds some illegality it may complain to the superior involved and demand a formal reply within twenty days. This complaint mechanism may be followed up to the Council of Ministers. *Id.* at Art. 148-50. In addition, the Procuracy is encouraged to hear citizen complaints alleging administrative misconduct or abuse. During the year 1977, for example, 48,286 complaints were lodged by citizens with some action being taken in over 10,000 of these cases. *Acta, supra* note 75, at 284.

109. *Ley de Organización, supra* note 44, at art. 106(9).

110. *Ley de Procedimiento Penal, supra* note 47, at art. 105.

111. *Id.* at arts. 250, 261.

112. *Ley de Organización, supra* note 44, at art. 106.

113. *Id.* at art. 20, 106.

114. *Id.* at arts. 119-20.

115. *Id.* at art. 108.

116. *Id.*, at art. 133.

117. *Ley de Procedimiento Penal, supra* note 47, at art. 93.

The Procuracy is primarily a Soviet innovation.<sup>118</sup> Its broad powers are dictated by the complex apparatus necessary to manage Cuba's centralized economy. Its role extends beyond traditional prosecutorial duties and is one of facilitator, ensuring that national policies are complied with while trying to maintain some function over a mammoth bureaucracy.

#### F. Attorneys: Changes in the Legal Profession

From the inception of the revolutionary takeover there were serious clashes between the legal profession and the new government. Prior to the revolution, law was one of the preferred professions for the Cuban upper class and, as in most Latin American countries, there was an abundance of trained legal technicians.<sup>119</sup> As with the judiciary,<sup>120</sup> the case which triggered open conflict between the government and the organized bar involved the Batista aviators who were accused of genocide.<sup>121</sup> A power struggle, for control of the bar association, ensued in July, 1960 when a group of lawyers, dressed as militia men, took over the offices of the bar association seeking recognition from the Supreme Court which they subsequently received.<sup>122</sup> By 1961 a substantial number of Cuban lawyers had fled the island and most law firms were depleted.<sup>123</sup>

The government's position toward lawyers was one of distrust. Numerous speeches associated lawyers with the ruling classes which the regime had deposed.<sup>124</sup> In addition to the political connotations at-

118. For a full discussion of the Procuracy's history see H. BERMAN, *JUSTICE IN THE U.S.S.R.* (1963).

119. The College of Lawyers of Havana is one of the oldest professional associations on the island, having been established more than 100 years prior to the revolutionary takeover. By 1960 it claimed more than 4,300 Havana lawyers as its members. INT'L COMM'N OF JURISTS, *supra* note 6, at 67.

120. See *supra* note 5 and accompanying text.

121. See F. MORENO, *supra* note 5.

122. INT'L COMM'N OF JURISTS, *supra* note 6, at 63-9.

123. See generally Cruz, *supra* note 20.

124. The following statement is exemplary: "The prerevolutionary bar associations, in spite of the efforts of some of its members, were not capable of even protecting the interests of individual lawyers in light of unemployment and low income. They represented the interests of the large law firms. In the dispute between the powerful rich client and a party of low or moderate means, the lawyer who represented the latter was almost sure to lose. All of the advantages of the prior regime were in favor of the wealthy and all the disadvantages were placed on the poor even though he/she were a

tached to lawyers, there were other reasons which contributed to their decline: the importance placed on technical professions by the economic demands of the "moral economy"; the view of lawyers as the consummate bureaucrats so repugnant to "Che" Guevara's policies; and, the potential threat that they posed to the political survival of the regime. As a result, enrollments in the law faculties declined from a high of 2,853 in 1958-59 to 135 in 1970-71.<sup>125</sup>

Even though the importance of the profession was downgraded during the early years, practitioners were able to adapt and even innovate. In 1965 the first attempt to discourage private law firms and establish collective ones was introduced through the Havana Bar Association as an experiment.<sup>126</sup> By 1969, twenty to thirty percent of lawyers remained in private practice and had refused to join the new law firms.<sup>127</sup> In conjunction with the new law commissions, the Ministry of Justice asked the commissions to study the possibility of establishing collective law firms throughout the island.<sup>128</sup> As a result of these meetings the new law on court organization dictated the adoption of this model.<sup>129</sup>

Under the new regulations, collective law firms were established as autonomous social organizations whose day-to-day operations are supervised by the Ministry of Justice.<sup>130</sup> Members of law firms receive salaries in accordance with employment contracts entered into between the law firm and the lawyer. This guarantees to each a minimum wage while allowing rewards based on productivity.<sup>131</sup> Fees charged vary in accordance with a fee schedule developed by the national organization and approved by the Ministry of Justice.<sup>132</sup> Although general requirements for licensure must be met, primary control over entry occurs at the law school level which demands high standards, both academic and political, of applicants.<sup>133</sup>

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lawyer." *Congreso Nacional de Bufetes Colectivos*, 3 REVISTA CUBANA DE DERECHO 64, 66 (1974).

125. J. DOMINGUEZ, *supra* note 2, at 257.

126. Resolución Número 18 del Ministerio de Justicia, GACETA OFICIAL DE LA REPUBLICA DE CUBA, February 4, 1965, at 130.

127. Berman, *supra* note 23, at 1339.

128. *Congreso Nacional de Bufetes Colectivos*, *supra* note 123, at 66.

129. Ley de Organización, *supra* note 39, at arts. 145-153.

130. *Id.* at art. 149.

131. A. PRIETO MORALES, DERECHO PROCESAL PENAL 142-45 (1976).

132. *Id.* at 142.

133. Together with the School of International Relations, supervised by the Min-

In accordance with the Cuban Constitution and Code of Criminal Procedure, all criminal defendants are entitled to the assistance of counsel.<sup>134</sup> Counsel may be appointed by the court or retained by the accused. Appointments are made on a rotating basis from the rolls of collective law firms with lawyers serving pro bono. In almost all civil cases, the Code of Civil Procedure requires that counsel be employed by a party appearing before the court.<sup>135</sup>

The role of lawyers has been redefined during different periods of revolutionary rule. By 1969 the criminal defense attorney was expected not to argue "that his client is innocent, but rather to determine if his client is guilty and, if so, to seek sanctions which will best rehabilitate him."<sup>136</sup> The new legislation demands that attorneys define "appropriately the interests that they represent, avoiding abusing appellate mechanisms and the means of defense which the law guarantees in such a way as to prevent justice from performing its social function."<sup>137</sup> This is not to say however that the defendant's interests are not represented, "not because we are afraid that these officials would use their powers incorrectly but because this departs from the adversarial system established in our procedure as a guarantee of an effective judicial system."<sup>138</sup>

At the present time Cuba is in the unique position, among Latin American countries, of having a shortage of lawyers. The earlier policies, combined with the flight of many members of the profession, have produced some unexpected results. Women, for example, are heavily represented within present ranks.<sup>139</sup> In recent years, the new emphasis on socialist legality and the need for more trained legal personnel have led to renewed interest in the profession. This has resulted in high en-

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istry of Foreign Relations, law school entrance is subject to a high degree of political scrutiny, with a great deal of emphasis being placed on the applicant's degree of "revolutionary integration."

134. CUBAN CONST. art. 58; Ley de Procedimiento Penal, *supra* note 47, at art. 281.

135. Ley de Procedimiento Civil, Administrativo y Laboral, GACETA OFICIAL DE LA REPÚBLICA DE CUBA, Aug. 20, 1977 (arts. 1-738), at art. 66.

136. BERMAN, *supra* note 23, at 1341.

137. Ley de Organización, *supra* note 44, at art. 143.

138. Speech by Armando Torres Santrayll, Congreso Nacional Constitutivo de los Bufetes Colectivos, 3 REVISTA CUBANA DE DERECHO 64, 70 (1974).

139. During the first years of revolutionary rule the importance of the legal profession was downplayed and men were encouraged to enter technical fields. Women filled many of the vacancies left by the flight of men to other professions. Salas, *supra* note 33.

rollments at law faculties and a renewed sense of professionalism.<sup>140</sup>

#### IV. Conclusion

The development of the Cuban legal system since the revolution has followed a rocky road, paralleling the establishment of the political and economic system. While the popular courts of the early days attracted many foreign admirers, they did little to contribute to the institutionalization of reforms. Modifications in procedure and judicial structure have supplanted many of the experiments of the early years resulting in a legal system reminiscent of traditional Latin American institutions.

Experimentation was only possible during the early years when the primary goals were destruction of the old and survival of the new. Once the revolution entered a stage of institutionalization, those qualities which were the mainstay of the preceeding period became anathema to the formalism and accountability which the State sought. Fidel Castro spoke of this in 1971:

In this revolutionary process there is a paradox characterized in the first phase by iconoclasm in relation to laws; we have to destroy the system, destroy its laws, destroy everything. We now have two truths: the first is that capitalist legality must be destroyed and the second is that we must establish a socialist legality.

And to us revolutionaries corresponds this dual role of abolisher of laws in one phase of the revolution and creators and defenders in another phase of the revolution. And this is in agreement with another law: the dialectic of history. So that we must all live in these very two dialectical phases: destroying first and later creating. From the first phase a certain illegal spirit which downgrades arises and this contempt is also applied as well to revolutionary laws.<sup>141</sup>

It is still too early to forecast the ultimate shape which the legal apparatus will realize but it is clear that it will not return to the turmoil and change of the revolutionary period. The leadership has

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140. The number of law students had fallen from 2,853 in 1958-59 to 135 in 1970-71. J. DOMINGUEZ, *supra* note 2, at 257. During a visit to Cuba in 1979 this author found law school enrollment to be rising quickly with more than 1,000 students enrolled.

141. Speech by Fidel Castro on the tenth anniversary of the founding of the Ministry of the Interior, *supra* note 4, at 63.

learned, at a high cost, that a judicial system cannot be counted on to rapidly, if ever, transform the political culture of the citizenry which it serves.

# Property Distribution Upon Dissolution of Marriage: Florida's Need for an Equitable Distribution Statute

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## I. Introduction

Equitable distribution is a method of dividing marital property according to the relative contributions of the partners upon dissolution of the marriage. As the name of the doctrine implies, fairness and equity in the division of property are the primary objectives. In 1980 the Florida Supreme Court handed down the landmark decision of *Canakaris*

v. *Canakaris*<sup>1</sup> which formally introduced the equitable distribution doctrine to Florida. However, for the last three years the district courts have given such an array of interpretations to *Canakaris* that it would be inaccurate to say that Florida has definitely adopted the doctrine of equitable distribution as an independent vehicle for dividing marital property. Moreover, the courts making equitable distributions are producing such diverse results that the outcome of a dissolution proceeding is practically impossible to predict.

The objective of this note is twofold. First, an analysis of the present state of Florida law in the area of property distribution will be made. The reasons underlying the current state of confusion will be discussed by reviewing the most significant decisions in this area. Second, a proposal for statutory clarification of equitable distribution will be made. The type of statute, as well as the factors and guidelines that must be included, will be proposed.

## II. Historical Perspective: Development of Traditional Vehicles for Property Distribution

Dissolution of marriage<sup>2</sup> has become an all too frequent occurrence in American society. There were one million dissolutions last year and more than one million are expected in the current year.<sup>3</sup> One of the most rapidly changing issues in the area of dissolution is property distribution. Currently the law on property distribution in Florida is in a state of confusion. The confusion is attributable to Florida's uncertain emergence from a common-law title state to an equitable distribution state.

In order to understand the development of equitable distribution in Florida, it is necessary to consider the evolution of the traditional vehicles used by the courts to distribute property and fashion dissolution decrees. The traditional vehicles are exclusive possession of property, special equities and alimony.<sup>4</sup> Far more than any other reason, the inconsistent use of these vehicles is causing confusion in the Florida

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1. 382 So. 2d 1197 (Fla. 1980).

2. In 1971 the Florida legislature changed the title of the divorce statute to "Dissolution of Marriage." FLA. STAT. ANN. § 61 (West Supp. 1983). Thus, in this note the term dissolution will be used instead of divorce in post-1971 references.

3. *Divorce American Style*, NEWSWEEK, January 10, 1983, at 42.

4. Child support is another vehicle the courts utilize to fashion divorce decrees, but consideration of it is beyond the scope of this article. Child support has the most indirect influence on the property distribution area.



courts.

### A. Alimony

At common law, the English ecclesiastical courts did not readily authorize severance of the marital bond.<sup>5</sup> Rather, the courts authorized a type of separation by allowing the husband and wife to live apart, while remaining legally married.<sup>6</sup> Despite the judicially recognized separation, the husband was not released from his duty to support the wife. Thus, as a concomitant grant of the separation, the courts awarded alimony to the wife.<sup>7</sup>

American law incorporated the practice of granting alimony as an incident to dissolution. Traditionally alimony was an award for support and maintenance,<sup>8</sup> which the wife received with such unquestioned consistency that it practically arose to the level of an undeniable right.<sup>9</sup> The criteria for an award of alimony were the wife's need and the husband's ability to pay.<sup>10</sup>

Permanent alimony is the traditional vehicle of awarding support to the wife. Unlike temporary alimony which is, "an allowance made" to a spouse "for maintenance during the pendency" of the dissolution proceeding,<sup>11</sup> permanent alimony is awarded by the final decree of dissolution. The word permanent is used in contradistinction of the word temporary to designate the character of the alimony.<sup>12</sup> The word permanent does not indicate "the amount to be paid or time during which the payment should continue."<sup>13</sup>

Not only was permanent alimony the traditional type of alimony awarded, it was traditionally made in periodic payments. The Florida Supreme Court has stated that permanent periodic alimony is "not a

5. FLORIDA DISSOLUTION OF MARRIAGE 187 (The Florida Bar Continuing Legal Education 1976).

6. *Id.* at 190.

7. H. CLARK JR., DOMESTIC RELATIONS CASES AND PROBLEMS 446 (1980).

8. *Bredin v. Bredin*, 89 So. 2d 353 (Fla. 1956); *Jacobs v. Jacobs*, 50 So. 2d 169, 173 (Fla. 1951) (alimony signifies nourishment or sustenance).

9. *Brown v. Brown*, 300 So. 2d 719, 722 (Fla. 1st Dist. Ct. App. 1974).

10. *Id.* at 722.

11. *Floyd v. Floyd*, 91 Fla. 910, 915, 108 So. 896, 898 (1926); *See also Duss v. Duss*, 92 Fla. 1081, 1087, 111 So. 382, 383 (1926) (temporary alimony is merely an interim allowance given until final decree).

12. *Soule v. Soule*, 4 Cal. App. 97, 105, 87 P. 205, 208 (Cal. Ct. App. 1906).

13. *Id.* at 105, 87 P. at 208.

sum of money or a specific proportion of the husband's estate given absolutely to the wife . . . [but] a continuous allotment of sums payable at regular periods for her support from year to year."<sup>14</sup> These periodic payments may be modified according to a significant change in circumstances<sup>15</sup> and generally terminate upon the death of either spouse or remarriage of the receiving spouse.<sup>16</sup>

In 1947 the use of lump sum payments of permanent alimony was statutorily authorized.<sup>17</sup> Lump sum payments can be in cash or property of a determined sum, on a single or multiple payment basis.<sup>18</sup> This method of payment, as distinguished from periodic payments, is final and non-modifiable.<sup>19</sup> According to the 1947 statute the court could not order both periodic and lump sum payments. A choice between the payment methods was required. This continued until 1963 when the statute was amended to allow the court to award permanent alimony in "periodic payments or payment in lump sum, or both, in its discretion."<sup>20</sup>

The Florida alimony statute remained relatively unchanged from 1963 to 1971. Then, in 1971, the Florida legislature significantly changed its divorce statute as a whole.<sup>21</sup> The new statute is titled "Dissolution of Marriage," instead of "Divorce." The prior grounds for divorce required a showing of fault, such as adultery, cruelty, impotency, or desertion.<sup>22</sup> The new statute abolishes these requirements and only requires the parties to declare that the marriage is irretrievably broken.<sup>23</sup> The no-fault concept is a recognition of the need to "preserve the

14. *Phelan v. Phelan*, 12 Fla. 449, 456 (1868).

15. *See, e.g., Ruhnau v. Ruhnau*, 299 So. 2d 61, 65 (Fla. 1st Dist. Ct. App. 1974).

16. *See, e.g., Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980).

17. Act of June 3, 1947, ch. 23894, 1947 Fla. Laws 539 (amended 1963).

18. *See, e.g., Mahaffey v. Mahaffey*, 401 So. 2d 1372, 1374 (Fla. 5th Dist. Ct. App. 1981).

19. *See, e.g., Yandell v. Yandell*, 39 So. 2d 554 (Fla. 1949).

20. Act of Sept. 1, 1963, ch. 63-145, 1963 Fla. Laws 306, *amended by* Act of June 27, 1967, ch. 67-254, § 16, 1967 Fla. Laws 560, 606-613, to delete the phrase "in its discretion." Also, the 1967 act renumbered the alimony statute from § 65.08 to § 61.08.

21. 1971 Fla. Laws 1319, ch. 71-241.

22. FLA. STAT. ANN. § 61.041 (West 1969).

23. FLA. STAT. ANN. § 61.052 (West Supp. 1983). Even though fault was removed from the statute as a ground for dissolution, fault remains a consideration in other aspects of the dissolution proceeding. *See infra* notes 180-84 and accompanying text.

integrity of the marriage"<sup>24</sup> while "promoting the amicable settlement of disputes that have arisen between the parties to a marriage. . . ."<sup>25</sup>

To be consistent with Florida's emergence as a no-fault state, the Florida legislature significantly changed its alimony statute. As changed, the statute specifically states that the court may grant alimony of a type that is either "rehabilitative or permanent in nature."<sup>26</sup> Further, the statute states that with either award of alimony, the court may order "periodic payments or payments in lump sum or both."<sup>27</sup> As evidenced by the language of this statute, the legislature recognized permanent and rehabilitative as two distinct types of alimony.<sup>28</sup> In addition the legislature specifically designated two methods of payment. Periodic and lump sum are not referred to as types or distinct categories of alimony in the statute, but rather as methods of making payments of the previously designated types of alimony, permanent or rehabilitative. However, Florida courts have not interpreted the statute precisely in this manner. In addition to designating lump sum as a pay-

24. FLA. STAT. ANN. § 61.001(2)(a) (West Supp. 1983).

25. FLA. STAT. ANN. § 61.001(2)(b) (West Supp. 1983).

26. FLA. STAT. ANN. § 61.08(1) (West Supp. 1983) reads:

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded.

27. FLA. STAT. ANN. § 61.08(1) (West Supp. 1983).

28. *Kahn v. Kahn*, 78 So. 2d 367 (Fla. 1955), has been credited with the introduction, in this state, of the concept of rehabilitative alimony. *Brown v. Brown*, 300 So. 2d 719, 723-24 (Fla. 1st Dist. Ct. App. 1974). The following statement by the *Kahn* court illustrates the belief that women no longer are dependent upon men for support:

Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus in an era where the opportunities for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has. We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.

*Kahn*, 78 So. 2d at 368.

ment method, the courts are characterizing it as a distinct type of alimony.

Although the concept of rehabilitative alimony was not new to the courts, it was not statutorily authorized until the 1971 amendment of the alimony statute. The theory underlying rehabilitative alimony is that if a means of extrinsic support is provided for a defined period of time, the receiving spouse, within that period, will develop skills which will provide the capacity for self-support.<sup>29</sup> The use of rehabilitative alimony "assumes necessarily either a previous potential or actual capacity for self-support" that has been dormant or lost during the marriage, "and should be limited in amount and duration to what is necessary to maintain that person through his training or education, or until he or she obtains employment or otherwise becomes self-supporting."<sup>30</sup>

Whether the type of alimony is permanent or rehabilitative and whether the method of payment is periodic or lump sum, the factors to be considered by the court for making a proper award are set out in the alimony statute.<sup>31</sup> These factors assist the court in determining whether the requisite need by the receiving spouse and concomitant ability by the paying spouse exist for an award of alimony.

## B. Special Equities Doctrine

The introduction of the doctrine of special equity significantly

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29. See, e.g., *Reback v. Reback*, 296 So. 2d 541, 543 (Fla. 3d Dist. Ct. App. 1974).

30. *Id.* at 543.

31. FLA. STAT. ANN. § 61.08(2) (West Supp. 1983) reads:

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of both parties.
- (d) The financial resources of each party.
- (e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

changed the law affecting property distribution. Originally the Florida Supreme Court used the idea of special equities in order to avoid the statutory rule that an adulterous wife could not be awarded alimony.<sup>32</sup> As such the use of the doctrine was "to describe a *vested interest* in property brought into the marriage or acquired during the marriage because of a contribution of services or funds over and above the normal marital duties."<sup>33</sup> As a vested interest, a special equity was entirely separate from alimony.<sup>34</sup>

However, the courts have misapplied the doctrine of special equity to justify an award of alimony, usually in lump sum.<sup>35</sup> Generally the doctrine is used incorrectly when the courts are confronted with a case in which the marital property is titled in one party's name, yet the other spouse has made significant contributions to accumulating the property. The courts recognize that the parties deserve a fair distribution of the assets accumulated during the marriage. Thus, an award of property in the form of lump sum alimony is made to the non-titled spouse, based on a finding of a "special equity." When the courts refer to this type of "special equity" a vested interest is not involved. Rather reference is being made to the general equities of the situation that justify an award of the property to the non-titled spouse. This inconsistent use of the term special equity has led to confusion among the courts. Even though the Florida Supreme Court has unequivocally stated that, "[t]he term 'special equity' should not be used when considering lump sum alimony; rather, it should be used only when analyzing a vested property interest of a spouse,"<sup>36</sup> the confusion persists.

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32. See *Heath v. Heath*, 103 Fla. 1071, 138 So. 796 (1932) (award of alimony made to adulterous wife):

The provisions of section 4987, Comp. Gen. Laws, section 3195, Rev. Gen. St., to the effect that no alimony shall be granted to an adulterous wife, do not preclude the ascertainment and allowance by the court of an amount to the wife for her special equity in property and business of the husband toward which she is shown to have contributed materially in funds and industry through a period of years while the marriage remained undissolved.

*Id.* at 1075, 138 So. at 797.

33. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1200 (Fla. 1980) (emphasis added).

34. *Id.* at 1200.

35. *Id.*

36. *Id.* at 1201.

### C. Exclusive Possession of Property

Another vehicle used by the courts in property distribution and fashioning dissolution decrees is an award of exclusive possession of property. Prior to the decision of *Duncan v. Duncan*,<sup>37</sup> the Florida Supreme Court held that an award of exclusive possession of the marital home must be for the benefit of the spouse with children and must terminate when those children reach the age of majority.<sup>38</sup> In *Duncan* the Florida Supreme Court expressly rejected this assertion because it is too inflexible. *Duncan* holds any exclusive possession award should be either directly connected to the obligation to pay support, or necessary to avoid a reduction in the property's value. An award of exclusive possession should be for a specified period of time and must serve a special purpose.<sup>39</sup> It is subject to modification upon a change in circumstances.<sup>40</sup> "The critical question is whether the award is equitable and just given the nature of the case."<sup>41</sup>

### III. Emergence of the Equitable Distribution Doctrine in Florida

Historically a common-law property state,<sup>42</sup> Florida courts examined record title to determine who should be awarded the marital property upon divorce.<sup>43</sup> If there were no record title, the courts traced the acquisition of the property. Since the husband usually worked and acquired his personal estate, while the wife worked inside the home,<sup>44</sup>

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37. 379 So. 2d 949 (Fla. 1980).

38. See *McDonald v. McDonald*, 368 So. 2d 1283 (Fla. 1979).

39. *Duncan*, 379 So. 2d at 952. See also *Richardson v. Richardson*, 315 So. 2d 513 (Fla. 4th Dist. Ct. App. 1975) (husband with custody of minor children awarded exclusive possession over wife's petition to partition); *Lange v. Lange*, 357 So. 2d 1035 (Fla. 4th Dist. Ct. App. 1978) (wife's award of exclusive possession justified by her mental problems); *George v. George*, 360 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1978) (wife with custody of a child, not a minor, awarded exclusive possession because as a result of the child's handicap he would remain dependent on wife).

40. *Duncan*, 379 So. 2d at 952.

41. *Id.*

42. FLORIDA DISSOLUTION OF MARRIAGE, *supra* note 5, at 441.

43. *Id.*

44. If examined from a historical perspective, women have been at a great disadvantage relative to property distribution. At common law the husband was regarded as the guardian of his wife. The husband acquired seisin in any estate in which the wife was seised by his right of marriage, *jure uxoris*. Upon the birth of a live child, the

this method of analysis traditionally resulted in an award of the property to the husband. The wife was typically left with an award of alimony.

Slowly, Florida courts have acknowledged the inequities of this situation. There has been a progression from the common-law view that the husband is the sole contributor to the accumulation of the marital assets, to the more contemporary view that the marriage relationship is a partnership.<sup>45</sup> As a partnership, marriage is a voluntary contract "for the mutual participation in the profits which may accrue from the property, credit, skill or industry, furnished in determined proportions by the parties."<sup>46</sup> The view of marriage as a partnership has gained momentum since the new alimony statute was passed in 1971. The emergence of equitable distribution in Florida is a logical extension of this partnership view.

#### A. *Brown v. Brown*: The Partnership Concept

The foundation for equitable distribution in Florida was laid by the First District Court of Appeal in the 1974 case of *Brown v. Brown*,<sup>47</sup> where property accumulated during a 21-year marriage was at issue. In this marriage, one partner contributed time to the home and children, while the other pursued the accumulation of material wealth. The parties entered the marital venture with no estate of material value. Shortly thereafter, the wife exchanged her career as a registered nurse for the role of housewife and mother, while the husband successfully pursued a career as an accountant. The husband accumulated the material wealth in his name.

Had the *Brown* court analyzed this marriage from the common-

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husband could use, occupy and even sell the land, free from any claim of the wife. See generally C.J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962). The Married Women's Property Act finally created equality between spouses when property was held by the entireties. *King v. Green*, 30 N.J. 395, 153 A.2d 49 (1959). However, the concept of record title still remains. The inequities are apparent.

45. In *Thigpen v. Thigpen*, 277 So. 2d 583 (Fla. 1st Dist. Ct. App. 1973) the court stated, "[t]he new concept of the marriage relation implicit in the . . . 'no fault' divorce law . . . places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in event of dissolution . . . ." *Id.* at 585.

46. LA. CIV. CODE ANN. art. 2801 (West 1952) (current version at LA. CIV. CODE ANN. art. 2801) (West Supp. 1983).

47. 300 So. 2d 719 (Fla. 1st Dist. Ct. App. 1974).

law perspective, the wife would have surely been given a blind award of alimony, while the husband would have been given a blind award of all property titled in his name. However, recognizing that marriage is a partnership, the *Brown* court declared that "a new day has been created. . . ."<sup>48</sup> The court stated that periodic alimony should no longer be awarded in an automatic fashion, "in the nature of an obligation to a stranger."<sup>49</sup> Rather, it should be awarded only upon a showing of need and ability to pay. In addition, *Brown* emphasized that special attention should be given to the advisability of an award of rehabilitative alimony, where, as here, the wife has the capacity for self-support.

Most significantly, the *Brown* court approved the use of lump sum alimony as a means of adjusting the material wealth of the parties at the time of dissolution of the marriage.<sup>50</sup> The court said, the salient factual concern is not the name in whom title is recorded, but "each spouse's contribution to the marital partnership."<sup>51</sup> Despite the fact that the property was titled in the husband's name, the court of appeal instructed the trial court to enter an award of lump sum alimony sufficient to compensate the wife for her contributions to the marriage.

*Brown v. Brown* represents a critical step toward recognizing the marriage partnership theory as it relates to distributing the material wealth of the parties in accord with equitable principles. However, by using lump sum alimony as the vehicle for distributing property, *Brown* significantly contributed to nearly a decade of confusion in the courts. The court used lump sum alimony, which had been a technical and traditional method of making alimony payments, and made it an independent vehicle for distributing property.

After *Brown*, Florida courts became more willing to take special recognition of the contributions of both parties to the marriage. The courts sometimes made awards of the marital property according to

48. *Id.* at 725.

49. *Id.*

50. *Id.*

51. *Id.* at 726. *Contra* the dissenting opinion of Judge Boyer in *Brown*. He stated:

Alimony came about during the era that women . . . were placed on a pedestal by male chauvinists. Women apparently found being worshiped on a pedestal to be distasteful and commenced a virtual worldwide drive to be removed from their place of superiority to a . . . lower position of equality . . . "Success" has been marked by loss of many heretofore existing superior rights, among them being dower and alimony as a matter of right.

*Brown*, 300 So. 2d at 727.



these contributions, yet no vehicle was consistently employed to effectuate these distributions. Some courts used the lump sum alimony vehicle.<sup>52</sup> Some courts used the special equity doctrine.<sup>53</sup> Other courts used a combination of lump sum alimony and special equity;<sup>54</sup> while still others declined to use any or all of these for the purpose of property distribution.<sup>55</sup>

## B. The Trilogy of Landmark Decisions: Introduction of Equitable Distribution

In 1980 the Florida Supreme Court handed down the landmark opinions of *Canakaris*, *Duncan*, and *Ingram*.<sup>56</sup> Examining this trilogy of cases, all of which concern the property distribution issue, the supreme court acknowledged the current state of confusion. The supreme court stated, "[t]he decisions in this subject area, both of this Court and of the district courts of appeal, are not reconcilable. It is our intent, . . . to the extent possible, [to] bring some stability to this area of the law."<sup>57</sup> The Florida Supreme Court perceptively attributed the confusion to the inconsistent uses of lump sum alimony, permanent periodic alimony, rehabilitative alimony, special equity and exclusive possession of property. In an effort to bring some stability to the area of

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52. See *Harrison v. Harrison*, 314 So. 2d 812 (Fla. 3d Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 605 (Fla. 1976) (award of \$100,000 lump sum alimony); *Linares v. Linares*, 292 So. 2d 63 (Fla. 3d Dist. Ct. App. 1974) (award of marital home as lump sum even though no special equities were shown); *Goldman v. Goldman*, 333 So. 2d 120 (Fla. 1st Dist. Ct. App. 1976) (case remanded for award of lump sum because wife shortchanged).

53. See *Hendricks v. Hendricks*, 312 So. 2d 792 (Fla. 3d Dist. Ct. App. 1975) (special equity in home due to contribution of funds by wife); *Olson v. Olson*, 321 So. 2d 462 (Fla. 3d Dist. Ct. App. 1975) (wife awarded home due to special equity based on loan made by wife to husband for pilot training, reversed and found to be within realm of ordinary duties).

54. See *In re Marriage of Arnold*, 335 So. 2d 13 (Fla. 4th Dist. Ct. App. 1976) (award of home as lump sum reversed because no special equity shown); *Cann v. Cann*, 334 So. 2d 325 (Fla. 1st Dist. Ct. App. 1976) (lump sum alimony should not be awarded unless there is a finding of special equity).

55. *Niemann v. Niemann*, 294 So. 2d 415 (Fla. 4th Dist. Ct. App. 1974), *cert. denied*, 312 So. 2d 733 (Fla. 1975) (holding courts are not allowed to simply divide assets equitably).

56. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (the most noteworthy and frequently cited of the three cases); *Duncan v. Duncan*, 379 So. 2d 949 (Fla. 1980); *Ingram v. Ingram*, 379 So. 2d 955 (Fla. 1980).

57. *Canakaris*, 382 So. 2d at 1200.

property distribution, it set forth definitions and proper uses of each vehicle.

In *Canakaris*, the trial court had awarded the wife the husband's one-half interest in the marital home using the vehicle of lump sum alimony by finding she had a special equity due to her marital contributions. The court of appeal reversed, holding the lump sum award improper because the record revealed no special equity of the wife in the marital home. The supreme court upheld the award of lump sum alimony, but stated that the application of the special equity doctrine was improper. Therefore, *Canakaris* holds the use of lump sum alimony is not limited to "instances of support or vested property interests."<sup>58</sup>

Referring to Florida's alimony statute, the supreme court stated that in granting lump sum alimony, the trial court should be guided by all relevant circumstances to ensure equity and justice between the parties.<sup>59</sup> The court established new criteria for granting lump sum alimony. "A judge may award lump sum alimony to ensure an *equitable distribution* of property acquired during the marriage, provided the evidence reflects (1) a justification for such lump sum payment and (2) financial ability of the other spouse to make such payment without substantially endangering his or her economic status."<sup>60</sup> Prior to this decision, need was the element required for lump sum alimony. Now, when using lump sum alimony to ensure an equitable distribution, only justification is required.<sup>61</sup>

This statement by the Florida Supreme Court led the majority of courts to believe that the proper vehicle for making an equitable distribution was lump sum alimony.<sup>62</sup> The *Canakaris* court did not indicate, however, that the use of lump sum as a method of making permanent alimony payments should be terminated. To the contrary, the use of lump sum payments for spousal support was upheld. The *Canakaris* court stated, "[i]n our opinion, the award of the marital home as lump sum alimony may be coupled with other lump sum alimony or permanent periodic alimony awards if justified by the evidence."<sup>63</sup> In essence, the court established two distinct criteria for the award of lump sum

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58. *Id.* at 1201.

59. FLA. STAT. ANN. § 61.08 (West Supp. 1983).

60. *Canakaris*, 382 So. 2d at 1201 (emphasis added).

61. Frumkes, *Florida's Flight to Fairness* (pt. 1), 56 FLA. B.J. 351 (1982).

62. *Id.* at 351.

63. *Canakaris*, 382 So. 2d at 1201.

alimony. One criterion permits an award of lump sum alimony on the basis of need plus ability to pay. Additionally, in the interests of equitable distribution, a further lump sum award might be made based on the criterion of justification plus ability to pay.

The newly endorsed use of lump sum alimony was to make an equitable distribution. However, permitting ability to pay to remain a criterion for making this type of lump sum award is contrary to the basic theories of the equitable distribution doctrine. The first criterion, justification, allows the court to make property distribution as justified by the relative contribution of the marital partners. In fact, justification provides for the use of guidelines to systematically determine what is equitable. On the other hand, the second criterion, ability to pay, indicates that the marital property actually belongs to one spouse who is required to give this property to the other spouse to discharge a duty of support. In the legal sense, payment is the performance of a duty or obligation by the delivery of money or other value by a debtor to a creditor.<sup>64</sup> By including the payment element the *Canakaris* court has interwoven the alimony theory into the equitable distribution doctrine. By implication, one spouse is still making a payment to the other. Arguably, this can only impede the proper use of the doctrine. Equitable distribution should be used to promote the partnership concept of marriage where property is acquired by the combined efforts of both parties and divided accordingly upon dissolution.<sup>65</sup>

### C. *Canakaris*: Confusion in the District Courts of Appeal

When *Canakaris* was first published, it was pronounced that equitable distribution had been adopted in Florida.<sup>66</sup> However, within a year, the district courts of appeal had given such an array of interpretations to *Canakaris* that there remained as much, if not more, confusion than in the pre-*Canakaris* days. In most cases, regardless of the district, it is difficult to determine whether an award of lump sum was used as alimony or in an equitable distribution of property. Also, it is difficult to determine how the courts have applied the special equities doctrine.

The First District Court of Appeal seemingly approved the doc-

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64. BLACK'S LAW DICTIONARY 1016 (rev. 5th ed. 1979).

65. Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

66. Frumkes, *supra* note 61, at 351.

trine of equitable distribution in *Conner v. Conner*.<sup>67</sup> The court stated, "[a]fter *Canakaris*, trial courts now have the discretion to use lump sum alimony to ensure an equitable distribution of property acquired during the marriage."<sup>68</sup> Similarly, the Third District Court of Appeal approved the doctrine in *Roffe v. Roffe*<sup>69</sup> asserting "the trial court's power to fashion . . . an equitable distribution of the parties' property . . . which we think has been granted by *Canakaris*. . . ."<sup>70</sup>

Initially the Second District Court of Appeal gave approval to the use of the equitable distribution doctrine. In *Neff v. Neff*<sup>71</sup> the court stated, "*Canakaris* confirms the fact that marriage may indeed be a partnership. . . . If, as often happens, the harvest resulting from mutual efforts winds up in the hands of one partner, the equitable share of the other can be allocated by a award of lump sum alimony."<sup>72</sup> However, this district ultimately announced that the equitable distribution doctrine does not constitute "an independent vehicle for an award of property in a dissolution of marriage proceedings."<sup>73</sup> Similarly, the Fifth District Court of Appeal has given both approval<sup>74</sup> and disap-

67. 411 So. 2d 899 (Fla. 1st Dist. Ct. App. 1982).

68. *Id.* at 901. *See also* *Jacobs v. Jacobs*, 400 So. 2d 141 (Fla. 1st Dist. Ct. App. 1981) (award of lump sum may be made to ensure equitable distribution if requested). *But cf.* *Drozak v. Drozak*, 424 So. 2d 120 (Fla. 1st Dist. Ct. App. 1982) (where the circuit court denied the wife's petition for either periodic or lump sum alimony. The district court reversed and remanded because "the requisite factors of the need for and ability to pay permanent alimony, either periodic or lump sum" were not respected. *Id.* at 121. The district court made no notice of the court's ability to use lump sum alimony to ensure an equitable distribution.).

69. 404 So. 2d 1095 (Fla. 3d Dist. Ct. App. 1981) (however, this court may have furthered confusion relative to the proper vehicle for making an equitable distribution by referring to the use of reciprocal lump sum awards).

70. *Id.* at 1096. *See also* *Blum v. Blum*, 382 So. 2d 52 (Fla. 3d Dist. Ct. App. 1980) (holding court can divide assets fairly between partners using alimony); *Cuevas v. Cuevas*, 381 So. 2d 731 (Fla. 3d Dist. Ct. App. 1980) (holding court can use lump sum alimony to ensure equitable distribution).

71. 386 So. 2d 318 (Fla. 2d Dist. Ct. App. 1980).

72. *Id.* at 319.

73. *Powers v. Powers*, 409 So. 2d 177, 178 (Fla. 2d Dist. Ct. App. 1982) (distribution should have been made by resort to alimony or special equities); *See also* *Hu v. Hu*, 432 So. 2d 1389 (Fla. 2d Dist. Ct. App. 1983).

74. *See, e.g.,* *Mahaffey v. Mahaffey*, 401 So. 2d 1372 (Fla. 5th Dist. Ct. App. 1981) (award of \$200,000 lump sum awarded as an equitable distribution); *Thompson v. Thompson*, 402 So. 2d 1220 (Fla. 5th Dist. Ct. App. 1981) (award of lump sum upheld as valid equitable distribution of marital property). These cases are reported as being illustrative of the cases in this district.

proval to the doctrine.<sup>75</sup>

The Fourth District Court of Appeal approved the use of equitable distribution<sup>76</sup> but later rejected its use in *Sangas v. Sangas*.<sup>77</sup> In *Sangas* the court announced that the circuit court had erred in disposing of and transforming the marital property "by use of the theory of equitable distribution as an independent vehicle for an award."<sup>78</sup> To determine the final judgment the trial court had used the vehicles of child custody, child support, alimony, and equitable distribution. The district court of appeal pronounced that property should only be disposed of by resort to the vehicles of alimony and special equities, equitable distribution being an "end or purpose rather than a vehicle or remedy."<sup>79</sup> Thus, *Sangas* defined the equitable distribution doctrine as the outcome to be achieved by the use of the established vehicles of lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property and an award of exclusive possession of property. However, *Sangas* did not clarify whether alimony, when used as a vehicle to dispose of marital property, employed the traditional use of alimony based on need and ability or the more contemporary use based on justification and ability.

The Fourth District, after approving the doctrine and then disapproving it, has now re-adopted the doctrine, in *Tronconi v. Tronconi*.<sup>80</sup> The *Tronconi* court stated:

[I]n *Sangas* we opined that *Canakaris* did not create a totally new vehicle for the division of property; however, we now think . . . that although the Supreme Court [sic] continues to quote traditional concepts in the vernacular of lump sum, periodic and rehabilitative alimony, we believe it has adopted the doctrine of equita-

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75. See, e.g., *Gorman v. Gorman*, 400 So. 2d 75 (Fla. 5th Dist. Ct. App. 1981) (where home is only substantial asset, and there is no finding of need or special equity, property law concepts should be used for distribution rather than equitable distribution doctrine).

76. See, e.g., *Bird v. Bird*, 385 So. 2d 1090 (Fla. 4th Dist. Ct. App. 1980) (lump sum alimony award upheld as equitable distribution); *Hurtado v. Hurtado*, 407 So. 2d 627 (Fla. 4th Dist. Ct. App. 1981) (when considered together, award of lump sum alimony, permanent alimony and child support upheld as equitable distribution).

77. 407 So. 2d 630 (Fla. 4th Dist. Ct. App. 1981).

78. *Id.* at 633.

79. *Id.*

80. 425 So. 2d 547 (Fla. 4th Dist. Ct. App. 1982) (en banc). This case is now pending before the Florida Supreme Court on a petition for certiorari.

ble distribution de facto if not de jure.<sup>81</sup>

Although the *Tronconi* decision puts an end to the confusion over adoption of the doctrine, at least in the Fourth District,<sup>82</sup> the question remains whether equitable distribution is "a vehicle . . . to effect equity and justice between the parties or . . . [the] goal to be achieved by awards of lump sum alimony. . . ."<sup>83</sup> *Tronconi* quotes *Canakaris* that "a judge may award lump sum alimony to ensure an equitable distribution,"<sup>84</sup> but added that an equitable distribution may "take the place of lump sum alimony or any special equity."<sup>85</sup> These two statements appear to be directly in conflict and are difficult to resolve.

Although *Tronconi* and *Canakaris* agreed that an equitable distribution must be justified, they disagreed on what criteria should be used to establish the justification. As its criteria, the *Canakaris* court quoted the last paragraph of the alimony statute that says "[t]he court may consider any other factor necessary to do equity and justice between the parties."<sup>86</sup> The *Canakaris* court indicated the trial judge has broad scope in granting lump sum consistent with this statutory mandate.<sup>87</sup> On the other hand, when *Canakaris* discussed the criteria for establishing the need requirement for permanent periodic alimony, reference was made to the elements in subsection (2)(a) through (f) of the alimony statute.<sup>88</sup> It may be assumed from this distinction that the su-

81. *Id.* at 548 (citations omitted).

82. *Contra Hu v. Hu*, 432 So. 2d 1389 (Fla. 2d Dist. Ct. App. 1983) (acknowledged the *Tronconi* decision but respectfully disagreed and held equitable distribution is not an independent vehicle for property distribution).

83. *Tronconi*, 425 So. 2d at 552 (Glickstein, J., concurring). Judge Glickstein, with whom Judge Hurley joined, suggested this precise question be certified to the Florida Supreme Court as one of great public importance: "Was the term Equitable Distribution as initially used in *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980), intended as a vehicle or device to effect equity and justice between the parties or as the concomitant goal to be achieved by awards of lump sum alimony, reciprocal and otherwise?" *Id.*

84. *Canakaris*, 382 So. 2d at 1201.

85. *Tronconi*, 425 So. 2d at 549.

86. FLA. STAT. ANN. § 61.08(2) (West Supp. 1983).

87. *Canakaris*, 382 So. 2d at 1201.

88. *Id.* FLA. STAT. ANN. § 61.08(2)(a) through (f) reads:

- (2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:
  - (a) The standard of living established during the marriage.
  - (b) The duration of the marriage.
  - (c) The age and physical and emotional condition of both parties.

preme court did not find these elements to be appropriate guidelines for determining the justification requirement for an equitable distribution. Notwithstanding the fact that the *Canakaris* court used subsection (2)(a) through (f) only as criteria for an award of permanent alimony, the *Tronconi* court said, "[w]e see no reason why the provisions of subsection (2)(a) through (f) . . . should not also be applicable to an equitable distribution. . . ."<sup>89</sup>

The *Tronconi* opinion is clear on one important issue. It is not mandatory that an equitable distribution be carried out in every case.<sup>90</sup> To this end, it is necessary for the party seeking an equitable distribution to plead it.<sup>91</sup> The court gives no guidelines as to how property should be distributed when an equitable distribution is not made.<sup>92</sup>

#### IV. Considerations for Statutory Clarification

##### A. Statutory Treatment of Equitable Distribution in Other Jurisdictions

Based on the foregoing discussion of the state of the law in Florida, it is proposed that the supreme court in the *Canakaris* decision did intend to adopt the doctrine of equitable distribution. This would be a logical conclusion concerning the fact that, according to its proponents, "'equitable distribution' is a term of art."<sup>93</sup> When "'equitable' and 'distribution' [are] placed in juxtaposition" they have a distinct mean-

(d) The financial resources of each party.

(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

89. *Tronconi*, 425 So. 2d at 550.

90. *Id.* at 549.

91. *Id.*

92. If an equitable distribution does not have to be carried out automatically in every case, does, then, the court have the authority to make an *inequitable* distribution?

93. Brief on Behalf of the Family Law Section of the Florida Bar as Amicus Curiae at 1, *Tronconi v. Tronconi*, 425 So. 2d 547 (Fla. 4th Dist. Ct. App. 1982).

ing, as do "‘special’ and ‘equity’, ‘community’ and ‘property’, or ‘contributory’ and ‘negligence’."<sup>94</sup> "To suggest that the Supreme Court of this state utilized a term employed by the courts and legislatures of . . . its sister states without realizing or recognizing that the term embodies a doctrine would be tantamount to suggesting that the Court suffers from myopia approaching total blindness."<sup>95</sup>

In order to make equitable distribution consistent throughout Florida, the state legislature should enact an equitable distribution statute. Presently, thirty-three states and the District of Columbia have provided by statute for equitable distribution of property upon dissolution.<sup>96</sup> Several of these states have enacted statutes which grant broad discretionary power to the courts.<sup>97</sup> The underlying principle for the discretionary type statute is that a statutorily prescribed set of criteria

94. *Id.* at 1.

95. *Id.* at 2.

96. The states providing for equitable distribution by statute are: ALASKA STAT. § 09.55.210 (Supp. 1982); ARK. STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); CONN. GEN. STAT. ANN. § 46-b-81 (West Supp. 1983-84); DEL. CODE ANN. tit. 13, § 1513 (1981); D.C. CODE ANN. § 16-910 (1981); HAWAII REV. STAT. § 580-47 (Supp. 1982); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 31-1-11.5-11 (West Supp. 1982-83); IOWA CODE ANN. § 598.21 (West 1981 and Supp. 1983-84); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1982); KY. REV. STAT. § 403.190 (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 722-A (1981); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-04,-05 (1980); MASS. GEN. LAWS ANN. ch. 208, § 33 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 552.23(1) (West Supp. 1983-84); MINN. STAT. ANN. § 518.58 (West Supp. 1983); MO. ANN. STAT. § 452.330 (Vernon Supp. 1983); MONT. REV. CODES ANN. § 40-4-202 (1981), amended by Act of October 1, 1983, ch. 613, 1983 LEG. REV. 121; NEB. REV. STAT. § 42-365 (Supp. 1982); N.H. REV. STAT. ANN. § 458:19 (1968) (titled alimony); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1983-84); N.Y. DOM. REL. LAW § 236(5) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20 (Supp. 1981); N.D. CENT. CODE § 14-05-24 (1981); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1982-83); OR. REV. STAT. § 107.105 (1981); PA. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1983-84); R.I. GEN. LAWS § 15-5-16.1 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-4-44 (1968); TENN. CODE ANN. § 36-825 (1977); UTAH CODE ANN. § 30-3-5 (Supp. 1981); VT. STAT. ANN. tit. 15, § 751 (Supp. 1983); WISC. STAT. ANN. § 767.255 (West 1981); WYO. STAT. § 20-2-114 (Supp. 1983).

97. See, e.g., ALASKA STAT. § 09.55.210 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 208, § 33 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 552.23(1) (West Supp. 1983-84); N.H. REV. STAT. ANN. § 458:19 (1968); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1983-84); N.D. CENT. CODE § 14-05-24 (1981); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1982-83); OR. REV. STAT. § 107.105(c)(d)(e) (1981); S.D. CODIFIED LAWS ANN. § 25-4-44 (1968); TENN. CODE ANN. § 36-825 (1977); WYO. STAT. § 20-2-114 (Supp. 1983).



may prevent the courts from making a well-founded equitable distribution. The belief is the trial judge needs to be able to fashion each distribution individually as the facts of the particular case dictates.<sup>98</sup> However, this wide discretion causes judicial inconsistency in the states adopting these statutes.<sup>99</sup>

Other states have enacted statutes that more specifically set forth guidelines for an equitable distribution.<sup>100</sup> The Uniform Marriage and Divorce Act<sup>101</sup> served as a model for many of them. Statutes of this type assist the trial judges in narrowing the issues involved in distribut-

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98. See Note, *Is There a Need for Equitable Distribution of Property Upon Divorce in North Carolina?: Leatherman v. Leatherman*, 11 N.C. CENT. L.J. 156, 161-62 (1979-81).

99. *Id.* at 162.

100. See, e.g., ARK. STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1983-84); DEL. CODE ANN. tit. 13, § 1513 (1981); D.C. CODE ANN. § 16-910 (1981); HAWAII REV. STAT. § 580-47 (Supp. 1982); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 31-1-11.5-11 (West Supp. 1982-83); IOWA CODE ANN. § 598.21 (West 1981 and Supp. 1983-84); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1982); MINN. STAT. ANN. § 518.58 (West Supp. 1983); N.Y. DOM. REL. LAW § 236(B)(5) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20 (Supp. 1981); PA. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1983-84); VT. STAT. ANN. tit. 15, § 751 (Supp. 1983); WISC. STAT. ANN. § 767.255 (West 1981).

101. UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1973). This section of the Act addresses disposition of property. The 1973 amendment to the Act divided this section into two alternatives: alternative A for common-law jurisdictions and alternative B for community property jurisdictions. Alternative A provides:

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree or dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates and the contribution of a spouse as a homemaker or to the family union.

ing property.<sup>102</sup> At the same time, the judge retains discretion to fashion the awards according to the facts.<sup>103</sup>

## B. The Separation of Equitable Distribution and Lump Sum Alimony

Florida can benefit from the experience of her sister states which have chosen to adopt equitable distribution by statute. Florida's statute should establish guidelines for making an equitable distribution, yet allow judicial discretion to provide for the unique circumstances of each dissolution.<sup>104</sup> In the current state of Florida law the trial judge has various vehicles which he may use to achieve equity between the parties. These vehicles are lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property and an award of exclusive possession of property.<sup>105</sup> The court should consider these remedies interrelated when making an equitable distribution.<sup>106</sup> "[T]o the extent of their eventual use, the remedies are

102. Note, *supra* note 98, at 162.

103. *Id.*

104. The Family Law Section of The Florida Bar suggests the following statute:

(2) In a proceeding for dissolution of marriage, the court shall order such division of marital property as is equitable. The court shall set aside to each spouse his separate property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:

(a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.

(b) The economic circumstances of the parties.

(c) The duration of the marriage.

(d) Any interruption of personal careers or educational opportunities.

(e) The contribution to the personal career or educational opportunity of the other spouse.

(f) The contribution of each spouse to the acquisition, enhancement, or improvement of the marital property and the separate property of the other party.

(g) The existing liabilities of the parties in the acquisition and maintenance of marital property.

(h) The results of any alimony awarded.

Frumkes, *Florida's Firm Foundation in Formulating the Doctrine of Equitable Distribution*, 57 FLA. B.J. 327 n.7 (1983).

105. *Canakaris*, 382 So. 2d at 1202.

106. *Id.*

part of one overall scheme.”<sup>107</sup> Statutorily adopting equitable distribution would generally leave these vehicles available to the courts. The proposed equitable distribution statute would clarify the proper use of these vehicles, and add the factors and guidelines to follow in effecting an equitable distribution.

Because of the current confusion in Florida courts regarding the use of lump sum alimony, the equitable distribution statute should explicate its appropriate use. Basically the statute would require a literal reading of Florida’s alimony statute. Therefore, courts would categorize an award of alimony as permanent or rehabilitative. In either event, the alimony award should be based on need and ability to pay, not justification and ability to pay. Further qualification of this award would be with regard to the method of payment. The judge would designate the payments as either periodic or lump sum. In fact, characterizing an award of alimony as “lump sum alimony” would be erroneous. Technically there would be no such vehicle as lump sum alimony. Instead there would be lump sum payments of permanent or rehabilitative alimony.

Reading Florida’s alimony statute in conjunction with the proposed equitable distribution statute would obligate the courts to recede from the present position that lump sum alimony may be used independently to effect an equitable distribution. Under the equitable distribution statute there would be no need for courts to employ lump sum alimony to effect an equitable distribution. An equitable distribution will be made in every case as a matter of procedure. The following discussion explicates the paramount factors and guidelines for inclusion in the proposed Florida equitable distribution statute. Because Florida’s courts and practitioners are in immediate need of clarification in this area, the Florida legislature should formerly enact an equitable distribution statute without delay. In the interim, it is hoped that the factors and guidelines as hereinafter set forth will be of help to courts and attorneys involved in dissolution of marriage cases.<sup>108</sup>

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107. *Id.*

108. These factors are presented for the purpose of practicality. It is not asserted that this discussion is exhaustive. Each factor and guideline could be the topic of an entire note.

## C. Factors to be Included in Florida's Equitable Distribution Statute

### 1. *Assets to Which Equitable Distribution Will Apply*

This factor provides the foundation for each subsequent factor in the equitable distribution process. Not all the assets owned by the parties, whether individually or jointly, will be subject to an equitable distribution. Thus, the first step the trial judge must take is to determine what property is subject to division. This has proven to be one of the most burdensome tasks for trial judges in effecting an equitable distribution.

As originally promulgated, Section 307 of the Uniform Marriage and Divorce Act<sup>109</sup> provided that "the court shall assign each spouse's property to him. It also shall divide the marital property. . . ." <sup>110</sup> Accordingly Section 307 provided:

(b) For purposes of this Act, marital property means all property acquired by either spouse subsequent to the marriage except:

- (1) property acquired by gift, bequest, devise, or descent;
- (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) property acquired by a spouse after a decree or legal separation;
- (4) property excluded by valid agreement of the parties; and
- (5) The increase in value of property acquired before the marriage.

(c) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by showing that the property was acquired by a method listed in subsection (b).<sup>111</sup>

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109. UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1970) (amended 1973).

110. UNIFORM MARRIAGE AND DIVORCE ACT, § 307.

111. UNIFORM MARRIAGE AND DIVORCE ACT, § 307(b) and (c) (1970). *See, e.g.* ARK. STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd Supp. 1983-84).

According to these provisions property must be designated as either marital or separate. The court determines what property is separate, which makes it immune from distribution, and proceeds to divide everything else equitably according to the set guidelines. States following this method of designating property are called deferred community property law systems.<sup>112</sup>

In the majority of the common-law equitable distribution states, the designation of property as marital or separate does not completely limit the court's ability to subject it to an equitable distribution.<sup>113</sup> However, property under the separate category is usually distributed to the other spouse only in very rare circumstances,<sup>114</sup> where that spouse has shown that hardship or inequities will otherwise result.<sup>115</sup> In comparison, trial judges in states following the deferred community property law system are faced with a smaller pool of assets to distribute than judges in the common-law equitable distribution states.<sup>116</sup> Consequently, judges in the common-law equitable distribution states are allowed greater judicial discretion in effectuating property distribution.<sup>117</sup>

In the current state of the law, Florida recognizes the concept of separate and marital property through the special equities doctrine. Florida cases, for example, have found a special equity where property was acquired with inherited funds of one spouse,<sup>118</sup> and where one spouse entered the marriage with possession of realty and personalty.<sup>119</sup> Further, Florida's case law appears more consistent with the common-law equitable distribution theory states than the deferred community property law states. Florida cases evidence the intent that the classification of separate property is not made for the purpose of making property immune to distribution. Florida, by use of special equities and

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112. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 3 (1978).

113. See, Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 6 N.C.L. REV. 247, 248-49 (1983).

114. *Id.* at 249.

115. See, e.g., IOWA CODE ANN. § 598.21 (West 1981) (separate property not available for distribution unless refusal to divide would be inequitable). WISC. STAT. ANN. § 767.255 (West 1981) (gifts or property exchanged cannot be subject to division unless hardship would otherwise result).

116. Sharp, *supra* note 113, at 249.

117. *Id.*

118. See, e.g., *Ball v. Ball*, 335 So. 2d 5 (Fla. 1976); *Evans v. Evans*, 398 So. 2d 943 (Fla. 3d Dist. Ct. App. 1981).

119. See, e.g., *Merrill v. Merrill*, 357 So. 2d 792 (Fla. 1st Dist. Ct. App. 1978).

lump sum alimony, has allowed separate property which should be awarded to one spouse to be awarded to the other due to exceptional circumstances.

A case in point is *Schwartz v. Schwartz*.<sup>120</sup> In *Schwartz* an award was made to the wife of a thirty percent interest in a vacation home even though it "was supplied by the husband from sources unconnected with the marital relationship."<sup>121</sup> The award was justified by the court because the wife had contributed substantial labor to making the vacation home suitable for family life. On the other hand, in *Rosen v. Rosen*,<sup>122</sup> the trial court made an award of \$125,000 in cash to the wife as lump sum alimony. Upon review, the court of appeal found no "relevant circumstances" to substantiate this award since the husband's assets "were indisputably willed or given to him"<sup>123</sup> and the wife had not made significant contributions to overcome the presumption that his assets were separate property. Therefore, where a party can show justification or exceptional circumstances, assets received by gift, inheritance, or a source unrelated to the labors of the marital party "should be a part of the pie, subject to the judicial slice."<sup>124</sup> This is similar to the more liberal view given separate property in the common-law equitable distribution states.

Thus, Florida can remain most consistent with judicial intentions evidenced by prior case law if it adopts a statute patterned after other common-law equitable distribution states. Subsections (b) and (c) from the original Uniform Marriage and Divorce Act appear appropriate for this purpose as long as one addition is made. In order to provide for the situations where designating property as separate would result in hardship, the following language should be added after the last sentence in subsection (c): unless the party against which such presumption is asserted shows by a preponderance of the evidence that by designating the property as separate, hardship or inequities will result.<sup>125</sup>

Because the concept of separate property is basically consistent

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120. 396 So. 2d 806 (Fla. 3d Dist. Ct. App. 1981).

121. *Id.* at 807.

122. 386 So. 2d 1268 (Fla. 3d Dist. Ct. App. 1980).

123. *Id.* at 1272.

124. Frumkes, *supra* note 61, at 354.

125. Thus the last sentence of the subsection would read: "The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (b)", unless the party against whom such presumption is asserted shows by a preponderance of the evidence that by designating the property as separate hardship or inequities will result.

with the theory of special equity, it is superfluous under this type of statute to retain the use of the special equity doctrine. However, the two ideas could be used interchangeably if the legislature perceives the abrogation of the special equity doctrine as inappropriate.

## 2. *Valuation of the Assets*

After the court designates the property as separate or marital, the separate property should be awarded to the appropriate spouse. All the other property will be subject to division between the parties.<sup>126</sup> Before distribution of the property can commence, the court must be presented with the net value of the marital assets.<sup>127</sup> The attorney is expected to value the assets acquired during the marriage. These assets include, but are not limited to, residential and commercial real estate, family and non-family businesses, stocks, bonds, personal property, pensions, retirement plans, professional degrees, bank accounts, and insurance policies.<sup>128</sup>

Property valuation is a highly sophisticated process. "It is necessary [for the attorney] to trace forward the assets which the parties owned before the marriage, and trace backward those assets which presently exist."<sup>129</sup> Counsel must "obtain full and complete discovery of all assets and uncover hidden sources."<sup>130</sup> The parties may stipulate to the value of all or part of the marital property.<sup>131</sup> When there is a dispute regarding value the assistance of experts becomes an integral part of the valuation process. The number and type of experts that are

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126. Of course, either spouse may invoke the proposed addition to subsection (c) of the statute which allows that party to show that a designation as separate property would result in hardship or inequities. This could be done at any point during the proceedings. Therefore, even if the judge excludes a certain property from distribution, the party may make a showing to later include it, if without it the distribution will not be equitable.

127. Note, *The North Carolina Act For Equitable Distribution of Marital Property*, 18 WAKE FOREST L. REV. 735, 750 (1982).

128. *Id.* See generally Donahue, *Trying Equitable Distribution Can Be Trying*, 5 AM. J. TRIAL ADVOC. 225 (1981-82); Mulligan, *Inside an Equitable Distribution Trial*, 8 LITIGATION 24 (1982); Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution*, 56 N.D.L. REV. 201 (1980).

129. Donahue, *supra* at 228.

130. Knight and Elser, *Critical Factors Which Influence Equitable Distribution Awards*, 55 FLA. B.J. 581 (1981).

131. Note, *supra* note 127, at 750.

involved depend on the assets involved in the particular case.<sup>132</sup> An accountant is frequently used and is most valuable for purposes of tax analysis.<sup>133</sup> They are also used as appraisers for purposes of business valuation.<sup>134</sup> Nonetheless, since business valuations vary according to the nature of the business,<sup>135</sup> specialized appraisers or financial analysts are most suitable.<sup>136</sup> A real estate appraiser should be used to value real property.<sup>137</sup> "Additional methods of valuation include truly comparable market sales, reconstruction costs and 'face value of effective insurance.' The tax value of the property has been held not to be reflective of market value."<sup>138</sup>

### 3. *Distribution of Assets: Guidelines for Equitable Distribution*

Once the property has been classified and the marital assets valued, the court will proceed to distribute the marital property. It is compulsory that the division of property is equitable, based on the particular facts of the case. The Florida courts have distinguished equitable from equal.<sup>139</sup> "The two words are not synonymous."<sup>140</sup> Yet, as the court in *Mahaffey v. Mahaffey*<sup>141</sup> recognized "an equal division of the assets . . . is a good starting point in most cases."<sup>142</sup>

The suggestion that there be a presumption of an equal division is not a suggestion that Florida become a community property state. Unlike the community property states, there is "no mandate for making an equal division of the marital acquisitions in all cases."<sup>143</sup> The judge still has the discretion to do equity according to the circumstances of the particular case.<sup>144</sup> Beginning with the presumption that the marital

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132. Donahue, *supra* note 128, at 227.

133. *Id.* at 227. For cases involving intricate tax problems, the tax attorney may be the most appropriate expert. *Id.* at 228.

134. *Id.* at 227. However, the author cautions against use of accountants to value business. "Accountants should only be used to value business or professional practices in those instances where no other expert is available." *Id.*

135. Note, *supra* note 127, at 751.

136. Donahue, *supra* note 128, at 228.

137. Note, *supra* note 127, at 751.

138. *Id.*

139. See, e.g., *Canakaris v. Canakaris*, 382 So. 2d 1197, 1204 (Fla. 1980).

140. *Tronconi v. Tronconi*, 425 So. 2d 547, 549 (Fla. 4th Dist. Ct. App. 1982).

141. 401 So. 2d 1372 (Fla. 5th Dist. Ct. App. 1981).

142. *Id.* at 1374.

143. *Bullard v. Bullard*, 385 So. 2d 1120, 1121 (Fla. 2d Dist. Ct. App. 1980).

144. *Id.* See, e.g., ARK. STAT. ANN. § 34-1214 (Supp. 1983). This statute re-



property will be divided equally, the judge will consider each element in the proposed guidelines that follow. If the facts of the case require consideration of a given guideline, the judge will adjust the division accordingly. The equal starting point gives the judge a relative basis by which to weigh each guideline.<sup>145</sup>

The following proposed guidelines are not listed in order of importance. Some factors may weigh more than others depending on the circumstances of the particular case. This list of guidelines was compiled by reviewing Florida's alimony statute and case law, as well as the statutes from the other states that have adopted equitable distribution.<sup>146</sup>

(1) "*The duration of the marriage.*"<sup>147</sup> In a long marriage the court should give weight to one spouse's dependence, economically or emotionally, on the other spouse.<sup>148</sup> Also, with a long marriage the courts will have a stronger presumption that the marital assets were accumulated through the cooperative efforts of both parties.<sup>149</sup> If it is a short marriage the court will be less likely to find either party dependent on the other.<sup>150</sup>

(2) "*The age of the parties.*"<sup>151</sup>

(3) "*The physical and emotional health of the parties.*"<sup>152</sup>

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quires the court to make an equal division unless an equal division would be inequitable. When the court deems an equal division inequitable, the court is given guidelines to determine how the property will be distributed.

145. See Note, *supra* note 127, at 752-53.

146. A more specific focus was given to the statutes of North Carolina, New York, Maine, Illinois, Iowa and the UNIFORM MARRIAGE AND DIVORCE ACT § 307. Citations to states for certain guidelines are not exhaustive, but they are felt to be representative of the general inclusion in equitable distribution statutes.

147. See, e.g., FLA. STAT. ANN. § 61.08(2)(b) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(5)(d)(2) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

148. See Note, *supra* note 127, at 755.

149. Knight and Elser, *supra* note 130, at 583.

150. See Note, *supra* note 127, at 755-56.

151. See, e.g., FLA. STAT. ANN. § 61.08(2)(c) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(5)(d)(2) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(d) (West 1981 and Supp. 1983-84).

152. See, e.g., FLA. STAT. ANN. § 61.08(2)(c) (West Supp. 1983); IOWA CODE ANN. § 598.21(1)(d) (West 1981 and West Supp. 1983-84). These statutes refer to the physical and emotional health of the parties, while others refer to the physical and mental health of the parties. See, e.g., N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981). The court should ultimately consider all areas of health; physical, emotional and mental.

(4) "*Any obligation arising out of a prior marriage.*"<sup>153</sup> When a spouse is paying alimony or child support to a previous spouse, "the court should compensate the non-paying spouse for any reduction of marital assets due to this obligation."<sup>154</sup>

(5) "*Any antenuptial agreement or property settlement entered into by the parties.*"<sup>155</sup>

(6) "*The need of a parent with" primary parental responsibility of minor children born or adopted "of the marriage to occupy or own the marital residence and to use or own its household effects."*"<sup>156</sup>

This guideline naturally overlaps the vehicle of exclusive possession of property. The judge should make an award of exclusive possession according to the established equities of the situation. Of course, the judge may order the non-custodial spouse to transfer his title to the home and contents rather than using the more temporary vehicle of exclusive possession.

(7) *The amount and sources of "income, property and liabilities of each party at the time the division of property is to become effective."*<sup>157</sup> The court should consider any loans or mortgages outstanding on marital property.

(8) "*The standard of living established during the marriage.*"<sup>158</sup>

(9) "*The vested pension or retirement rights and the expectations of non-vested pension or retirement rights.*"<sup>159</sup> As compared to other guidelines in the equitable distribution list, this one has received a great deal of judicial attention. The consensus appears to be that pension and retirement rights are "an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other de-

153. See, e.g., N.C. GEN. STAT. § 50-20(c)(2) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

154. Note, *supra* note 127, at 755.

155. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(k)(1) (West 1981 and West Supp. 1983-84).

156. See, e.g., N.C. GEN. STAT. § 50-20(c)(4) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(3) (McKinney Supp. 1982-83); IOWA CODE ANN. § 598.21(1)(g) (West 1981 and West Supp. 1983-84).

157. See, e.g., N.C. GEN. STAT. § 50-20(c)(1) (Supp. 1981).

158. See, e.g., FLA. STAT. ANN. § 61.08(2)(a) (West Supp. 1983); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

159. See, e.g., N.C. GEN. STAT. § 50-20(c)(5) (Supp. 1981) (although considered this factor is designated as separate property under this statute); N.Y. DOM. REL. LAW § 236(B)(5)(d)(4) (McKinney Supp. 1982-83) (this statute also includes the loss of inheritance).

ferred income assets.”<sup>160</sup> Unless some exceptional circumstances are shown, these assets should be included as marital property.

(10) *“Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.”*<sup>161</sup> Generally, courts do not designate a professional degree as marital property.<sup>162</sup> This is largely due to the fact that a professional degree is not a tangible asset which may be easily divided. Nonetheless, according to the partnership theory of marriage, when the marital partners work together toward a common goal they may both anticipate increased family income as the return on their efforts.<sup>163</sup> The court should consider the efforts of each party in relation to the probable future financial circumstances of each party.

(11) *“The difficulty of evaluating any component asset of any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.”*<sup>164</sup>

(12) *“The liquid or non-liquid character of all marital property.”*<sup>165</sup>

(13) *Any award of alimony to either spouse.*<sup>166</sup> The court should be guided by Florida’s alimony statute when making an award of permanent or rehabilitative alimony. The needs of each of the parties should be provided for under this guideline. Included in this consideration are the occupation, vocational skills and employability of both spouses.<sup>167</sup> The time necessary for either party to acquire sufficient education or training to enable him or her to find employment should espe-

160. *Deering v. Deering*, 292 Md. 115, 121, 437 A.2d 883, 888 (1981).

161. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(7) (Supp. 1981); FLA. STAT. ANN. § 61.08(2)(f) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1982-83).

162. *See In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

163. *See generally* Note, *The Supporting Spouse’s Rights in the Other’s Professional Degree Upon Divorce*, 35 U. FLA. L. REV. 130 (1983).

164. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(9) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(10) (Supp. 1981).

165. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(7) (McKinney Supp. 1982-83).

166. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(5) (McKinney Supp. 1982-83); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

167. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(f) (West 1981 and Supp. 1983-84).

cially be considered as it relates to rehabilitative alimony.

(14) "*Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property . . . including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.*"<sup>168</sup> The direct financial contributions of the parties are easiest to value and divide. The courts may experience much more difficulty when valuing and dividing the indirect contributions of the parties, especially as it relates to the services of a spouse as homemaker or parent. The courts use three methods to value the services of a homemaker. The most often used is the specific-task approach. It values each job performed by the homemaker according to the separate marketable value of that individual skill.<sup>169</sup> Basically "the hours per week devoted to each function is . . . multiplied by the hourly wage a person employed in that occupation would earn. . . ."<sup>170</sup> The replacement-cost approach is very similar to the specific-task method. The difference is that replacement cost is aggregated. "[T]he total hours an individual is likely to spend in home production is determined and then valued at the market wage for domestic help."<sup>171</sup> The third method is the opportunity-cost approach. It is based on computation of the wage rate multiplied by the number of hours of non-market production, resulting in the worth of the homemaker non-market services.<sup>172</sup> "This approach leads [to the conclusion] that the value of the time spent in menial chores, such as doing laundry, of an individual with high earnings is worth relatively more than the time devoted to these services by individuals who command less in the marketplace."<sup>173</sup> Whichever approach is used by the courts, there must be consideration given to the contribution made by the home-

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168. See, e.g., N.C. GEN. STAT. § 50-20(c)(6) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(5) (McKinney Supp. 1982-83); IOWA CODE ANN. § 598.21(1)(e) (West 1981 and Supp. 1983-84). See generally Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. FLA. L.R. 1 (1975). According to the Commissioner's comment to the 1973 amendment of the UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979), allowance for the contribution of homemaker services is a new concept in Anglo American law.

169. See Kiker, *Evaluating Household Services*, 16 TRIAL, February 1980, at 34.

170. Brandes, *Proving the Value of a Homemaker* (pt. 1), 2 FAIRSHARE, November 1982, at 5, 6.

171. Kiker, *supra* note 169, at 34. It should be noted, that the specific-task approach and the replacement-cost approach are used interchangeably by some authors.

172. *Id.*

173. *Id.* at 34.

maker. The idea that the homemaker's contributions are immune to monetary valuation is passé.

(15) "*The fringe benefits received by the homemaker/spouse.*"<sup>174</sup> The court should consider the benefits the homemaker spouse receives as a result of the marriage. Such considerations include room and board, health care, transportation, etc.<sup>175</sup>

(16) "*The tax consequences [of the property distribution or awards] made to each party.*"<sup>176</sup>

(17) *The cost of attorney's fees.* An award of attorney's fees may be made to avoid an inequitable diminution of the other awards made by the court.<sup>177</sup>

(18) *Any contribution by either spouse to the dissipation or depreciation of the marital assets.*<sup>178</sup> Any financial misconduct must be considered by the court to reduce the distribution to the spouse at fault. "Financial misconduct involves wasting or dissipating of marital assets."<sup>179</sup>

(19) *The value of property set apart to each spouse as separate property.* This guideline overlaps the vehicle of special equity. Usually separate property (or property awarded to a spouse as a special equity) is not subject to distribution under the guidelines. However, it may be considered when the party against which a special equity property award has been made, shows that hardship or inequities will result from the award. In this situation the court may consider the value of the separate property relative to distribution of the remaining marital

174. Knight and Elser, *supra* note 130, at 584.

175. *Id.*

176. See, e.g., N.C. GEN. STAT. § 50-20(c)(11) (Supp. 1981); IOWA CODE ANN. § 598.21(1)(j) (West 1981 and Supp. 1983-84). See generally Weissman, *Is Equitable Distribution Incident to Florida Divorce a Taxable Event Under Davis?*, FLA. B.J., Jan. 1983, at 42. See also U.S. v. Davis, 370 U.S. 65 (1964) (interpreting state law, the court ruled that a husband realized a taxable gain on the transfer of appreciated property to his wife pursuant to a negotiated property settlement). As a caveat, it should be noted that there is currently pending before the legislature a tax reform bill which, if passed, will cause significant changes in the tax ramifications of property distributions.

177. See generally Note, *supra* note 127, at 760. *Canakaris v. Canakaris*, 382 So. 2d 1205 (Fla. 1980), indicated the court should follow legislative intent and ensure that both parties have similar ability to be represented. Further, *Canakaris* held that attorney's fees may be awarded to avoid diminution of the wife's fiscal awards.

178. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 306 (1979); ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd Supp. 1983-84).

179. Note, *supra* note 127, at 760.

property.

(20) *The effect of marital misconduct on the accumulation or depletion of marital assets.* A frequently asked question since the *Canakaris* decision is whether its use of the word "justification" relative to equitable distributions reintroduces fault into dissolution proceedings.<sup>180</sup>

Since the introduction of equitable distribution most cases have only referred to fault when it is relative to the financial condition of the parties. In *Mendel v. Mendel*<sup>181</sup> the trial court excluded evidence of the husband's marital misconduct. The district court reversed, stating that adultery must be considered as it "relates to the husband's expenditures of funds and the relationship of those expenditures to the economic situation in which the parties stand before the court."<sup>182</sup> In *Hurtado v. Hurtado*<sup>183</sup> the district court considered the husband's mar-

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180. When Florida became a no-fault state, it excluded the criterion that fault be shown before a dissolution would be granted. Yet, fault was not excluded in the context of monetary awards. Abrahams, *The Effect of Marital Misconduct on Monetary Awards*, 57 FLA. B.J., Feb. 1983, at 95. Under Florida's alimony statute adultery may still be considered in determining the amount of alimony, if any, that should be awarded to the spouse asking for alimony. FLA. STAT. ANN. § 61.08(2) (West Supp. 1979). Although the statute refers to adultery only in relation to the spouse seeking alimony, the courts have not retained this limited view. See, e.g., *McClelland v. McClelland*, 318 So. 2d 160 (Fla. 1st. Dist. Ct. App. 1975) (persistent adultery of husband relevant even though he did not petition for alimony); *Pro v. Pro*, 300 So. 2d 288 (Fla. 4th Dist. Ct. App. 1974); *Claughton v. Claughton*, 344 So. 2d 944 (Fla. 3d Dist. Ct. App. 1977) (husband's marital misconduct was considered since he attempted to use wife's misconduct as defense to alimony). Generally, adultery has been considered whenever the court feels it is necessary to do justice between the parties. The latest Florida Supreme Court decision to consider this issue was *Williamson v. Williamson*, 367 So. 2d 1016 (Fla. 1979). The Williamson court denied a general consideration of marital misconduct in dissolution cases. The court said:

Whether such an inquiry [into marital misconduct] is proper will depend upon the circumstances of each case. Today we hold only that where an analysis of the need of one spouse and the ability of the other to pay demonstrates that both parties will suffer economic hardship as a result of any division of available resources the court might make, the court may then consider, as an equitable circumstance under section 61.08(2), Florida Statutes (1975), any conduct of either party which may have caused the difficult economic situation in which they stand before the court.

*Williamson*, 367 So. 2d at 1019. This decision gave the trial judge broad discretion when considering adultery.

181. 386 So. 2d 627 (Fla. 4th Dist. Ct. App. 1980).

182. *Id.* at 628.

183. 407 So. 2d 627 (Fla. 4th Dist. Ct. App. 1981).

ital misconduct to the extent that he was paying rent on the apartment he shared with his mistress.

Under this equitable distribution statute marital misconduct should be considered only as it affects the spouse's financial contribution to the marital partnership. If the fault affects the accumulation or depletion of the marital assets, an appropriate adjustment should be made in the relativ, if any, that should be awarded to the spouse asking for alimony. FLA. STAT. ANN. § 61.08(2) (West Supp. 1979). n620] to the distribution of the marital assets.

(21) *Any other factor necessary to do equity and justice between the parties.*<sup>185</sup> The guidelines are not meant to be "inflexible rules of law which unduly restrict the trial judge in determining what is equitable and just."<sup>186</sup> This catch-all guideline allows the judge to fashion each judgment as the particular facts dictate, keeping in mind the previously prescribed guidelines and the ultimate goal of making an equitable distribution.

Finally, the court should state its basis and reasons for dividing the property as it has deemed equitable.<sup>187</sup>

## V. Conclusion

For several years, Florida has recognized the partnership concept of marriage. Under this concept, the contributions of both parties in accumulating the marital assets are considered. Equitable distribution is a logical extension of the partnership view, as it requires a fair division of the marital assets according to the relative contributions of both partners.

Florida has taken definite, yet enigmatic, advancements in *Brown*, *Canakaris*, and *Tronconi*, towards judicially adopting the doctrine of equitable distribution. However, the courts have fallen far short of transforming Florida from a common-law title state to an equitable distribution state.

Working within the constraints of the existent legislative enactments relative to property distribution and alimony, the courts have

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184. Brief on Behalf of the Family Law Section of the Florida Bar as Amicus Curiae, *supra* note 93, at 6.

185. See, e.g., FLA. STAT. ANN. § 61.08(2) (West Supp. 1983); N. C. GEN. STAT. § 50-20(c)(12) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1982-83).

186. *Duncan v. Duncan*, 379 So. 2d 949, 951 (Fla. 1980).

187. Cf., ARK. STAT. ANN. § 34-1214(a)(1) (Supp. 1983).

most frequently used the vehicle of lump sum alimony to effect an equitable distribution. At the same time, the courts continue to use lump sum as a payment method of permanent alimony. When making an award of permanent alimony in lump sum payments, the courts require a showing of need and ability to pay. When making an equitable distribution by using the vehicle of lump sum alimony, the courts require justification rather than need. To exasperate the confusion over lump sum alimony, the same criteria are being utilized to determine need and justification, which are two inherently opposed principles. In addition, the interrelation of the special equities doctrine in the process of equitable distribution is difficult to ascertain.

Accordingly, Florida is in immediate need of clarification on two issues. First, courts and counsel need a pronouncement as to whether Florida is truly an equitable distribution state. In December, 1983, the Florida Supreme Court will hear oral arguments on the *Tronconi* appeal.<sup>188</sup> The supreme court should accept the invitation this case offers to definitively adopt the doctrine of equitable distribution. Second, courts and counsel require clarification on the appropriate factors and guidelines to follow in effectuating an equitable distribution. The Florida legislature must prescribe these by statute, as have sixty-six percent of its sister states. Generally, the statute should provide that a trial judge do the following in a dissolution proceeding:

(1) The judge must provide for the needs of any minor children. The vehicles available and appropriate for this priority are child support and/or an award of exclusive possession of property to the parent with whom the children live.

(2) The judge may provide for the support of a needy spouse. The appropriate vehicles available are alimony and/or exclusive possession of property. An award of alimony should be made only if it is set out in the pleadings and only upon the required showings of need and ability. An alimony award should be made according to the types and payments set out in Florida's alimony statute. Thus the judge may award rehabilitative alimony in periodic or lump sum payments, or both; or the judge may award permanent alimony in periodic or lump sum payments, or both.

(3) The judge must distribute, as separate property, the property and material wealth in which one spouse possesses a vested interest.

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188. The Florida Supreme Court has scheduled oral arguments for December 6, 1983. Attorney for appellant is Ira Marcus, P.A., Fort Lauderdale. Attorney for Appellee is Philip Michael Cullen, III, Fort Lauderdale.



The appropriate vehicle for this is a special equity. A finding of a special equity requires that the property was acquired or brought into the marriage by a source independent of the efforts of the marital partnership, or that it was acquired by contributions of one marital partner which are considered to be clearly over and above the normal marital duties. Thus a special equity will not be found when the contributions are considered to be required in the normal course of a marital relationship.

(4) After the awards of child support, alimony, exclusive possession of property and special equities are made, the court must divide and distribute the property and wealth acquired in the course of the marriage. To do this, the court will use the factors and guidelines established for effectuating an equitable distribution.

*Melinda S. Gentile*

# The Current State of Computer Software Protection: A Survey and Bibliography of Copyright, Trade Secret and Patent Alternatives

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## I. Introduction

Our society is becoming more "computer-conscious" by the minute. Whereas only a short time ago the computer was a monstrous, expensive curiosity used behind the closed doors of major corporations, today it is not uncommon for a family to own one or more. Computers are no longer only for experienced professionals, as even children are learning to manipulate them as tools for learning and playing. Microcomputer sales will reach an estimated \$15 billion by 1987, with software sales increasing tenfold to \$4.8 billion.<sup>1</sup> In light of the awesome changes experienced by the computer industry in recent years, it is not surprising that the legal aspects of computer trade are undergoing an evolution of their own.

Behind every computer there is a "brain." This brain, or computer program, is defined by the Copyright Act as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."<sup>2</sup> In the same way that human language is capable of numerous combinations to express the same idea, the instructions given to a computer to bring about the desired result can vary. In this sense, the embodiment of the idea in the form of a program is creative expression. By the volume of programs on the market today for home use alone, we see that the fruits of that creativity are in demand. The ease with which programs can be copied has sparked an

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1. *Getting Tough on Software Theft*, BUS. WK., May 31, 1982, at 28, 29. Some terms with which the reader may not be familiar will be defined throughout this note. Software is "[a] set of programs, procedures, rules and possibly associated documentation concerned with the operation of a data processing system." Data Processing is "the execution of a systematic sequence of operations performed upon data." R. DORF, *COMPUTERS AND MAN* 482, 471 (1977).

2. Copyright Act of 1976, 17 U.S.C. § 101 (Supp. V 1981) (*as amended by* Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10(a), 94 Stat. 3028). For a discussion of the treatment of software under federal copyright law, see generally text accompanying notes 11-87.

active interest in the search for adequate insulation from piracy. Computer clubs allegedly make hundreds of copies of programs for use by their members.<sup>3</sup> Persons claiming to be authors have sold infringed copies of programs to unsuspecting software distributors who in turn manufacture them for widespread sale. This illegal copying is costly for original producers, some of whom estimate a loss of half their sales to piracy.<sup>4</sup> Accordingly, these computer programs, known as software, constitute proprietary information that requires legal protection.

Legal protection for computer software is most visible in the form of copyrights, trade secrets, and patents. The world is witnessing the historical development of this area of intellectual property protection, while a legal system that cautiously expands its limits grapples with an exploding technology bound only by creative genius. Considering that setting, this note will present the latest developments in the areas of copyrights, trade secrets and patents as they relate to software protection.

In particular, it will be shown how the latest court decisions have construed recent legislation to conclude that a computer program's machine-readable object code<sup>5</sup> is protectable by copyright law. In addition, the Copyright Office is seriously considering a change in deposit requirements which would allow a computer program to be copyrighted while remaining a trade secret.<sup>6</sup> Regarding the application of patent law to computer programs, the distinction drawn by the United States Supreme Court between patentable processes and mathematical algorithms is being questioned.<sup>7</sup> It is intriguing that these various forms of protection are each applicable, under certain circumstances, to computer software. Article I, section 8 of the United States Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."<sup>8</sup> As a result, exclusive rights were granted to authors for their writings through the enactment of the Copyright Act,<sup>9</sup> and to inventors for their discov-

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3. Morgan, *How Can We Stop Software Piracy?*, BYTE, May 1981, at 6, 10.

4. *Getting Tough on Software Theft*, *supra* note 1, at 28.

5. *See infra* note 24.

6. *See infra* text accompanying note 114.

7. *See generally* text accompanying notes 135-56.

8. U.S. CONST. art. I, § 8, cl. 8.

9. 17 U.S.C. §§ 101-810 (Supp. V 1981). *See infra* note 12 for the statutory period of the exclusive right granted to authors.

eries by the creation of the Patent Act.<sup>10</sup> The unique character of a computer program allows it to be considered as the written expression of a programmer/author, or under the right circumstances as a new, non-obvious invented process. Consequently, the software developer needs guidance as to the best available protection for his work. This note outlines the requirements for software protection under the laws of copyrights, trade secrets and patents. In addition, it discusses how the courts view computer programs as fitting into the scheme of intellectual property protection.

## II. Copyright Protection

### A. Statutory Construction

In 1964, the Copyright Office announced its position that copyright registration for computer programs was permissible under the Copyright Act.<sup>11</sup> In order to meet the requirements for registration, the program had to be the "writing of an author," the reproduction of which had to be a "copy" acceptable for registration. Acknowledging the inconclusiveness of these criteria, while upholding its policy of resolving doubtful issues in favor of registration, the Copyright Office presented the following guidelines which would place computer programs in a class with books:

- (1) The elements of assembling, selecting, arranging, editing, and literary expression that went into the compilation of the program . . . [must be] sufficient to constitute original authorship.
- (2) The program . . . [must have] been published, with the required copyright notice; that is, 'copies' (i.e., reproductions of the program in a form perceptible or capable of being made perceptible to the human eye) bearing the notice [must] have been distributed or made available to the public.
- (3) The copies deposited for registration [must] consist of or include reproductions in a language intelligible to human beings. If

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10. 35 U.S.C. §§ 1-376 (Supp. V 1981). An inventor is granted an exclusive right over the use, manufacture, and sale of his invention for a period of 17 years. 35 U.S.C. § 154 (Supp. V 1981).

11. *Copyright Registration for Computer Programs—Announcement from the Copyright Office*, 11 COPYRIGHT SOCIETY OF THE U.S.A. - BULLETIN 361 (1964). The law in effect in 1964 was the original Copyright Act of 1909, 17 U.S.C. §§ 1-32 (1964).

the only publication was in a form that cannot be perceived visually or read, something more (e.g., a print-out of the entire program) would also have to be deposited.<sup>12</sup>

The final words of the Copyright Office announcement indicated that the procedure regarding computer programs would necessarily evolve "over a period of time, on the basis of experience."<sup>13</sup>

In 1976, a major revision of the Copyright Act was enacted with an effective date of January 1, 1978.<sup>14</sup> The new act eliminated common-law copyright, simplified procedure, and facilitated the curing of "mistakes" in publications without a copyright notice. Under the new law, statutory copyright takes effect as soon as the writing is complete, rather than when publication with notice occurs, as with the 1909 Act.<sup>15</sup>

Where a "copy" for registration purposes used to be "a written or printed record of . . . [the work of authorship] in intelligible notation,"<sup>16</sup> the 1976 Act defines "copies" as

material objects, other than phonorecords, in which a work is *fixed* by any method now known *or later developed*, and from which the work can be perceived, reproduced, or otherwise communicated, either directly *or with the aid of a machine or device*. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed.<sup>17</sup>

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12. *Copyright Registration for Computer Programs*, *supra* note 11, at 361. The benefit received from securing registration is that a limited monopoly, through a grant of exclusive rights, is obtained for a statutory period. (That statutory period is, in general: life of the author plus 50 years; for joint works: life of the last surviving author plus 50 years; anonymous/ pseudonymous/works for hire: 75 years from date of first publication or 100 years from creation, whichever expires first. 17 U.S.C. § 302 (1976). For works created but not published or copyrighted before January 1, 1978 see 17 U.S.C. § 303.) The rationale behind the grant of an exclusive right is that the rents obtained from it reward innovation and encourage innovators to create and market new products. Stern, *Present Copyright Law—Little Protection Against Unlicensed Use of Proprietary Compilers*, IEEE MICRO, Feb. 1983, at 67.

13. *Copyright Registration for Computer Programs*, *supra* note 11, at 361.

14. 17 U.S.C. §§ 101 (1976). Sections 118, 304(b) and Chapter 8 took effect Oct. 19, 1976.

15. P. HOFFMAN, *THE SOFTWARE LEGAL BOOK II-B-1* (1982).

16. This definition was used by the Supreme Court in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) and adopted by the 1909 Copyright Act.

17. 17 U.S.C. § 101 (Supp. V 1981) (emphasis added). Under section 101, "[a]

This terminology also appears in section 102(a) of the Copyright Act,<sup>18</sup> which defines what works are subject to copyright protection.

To appreciate the potential effect of this language, it is important to understand the phases that comprise a computer program.<sup>19</sup> When a problem is presented for a computer to solve, a flow chart,<sup>20</sup> or schematic diagram, is made, which indicates the logical steps involved in solving the problem. This chart aids in the development of a source program,<sup>21</sup> written in one of the many source, or high-level languages<sup>22</sup> in which the programmer gives the computer instructions. These source programs are readable by humans. They follow a specific syntax which can be interpreted by a compiler,<sup>23</sup> which in turn translates the instructions into machine-readable code, otherwise known as the object pro-

work is 'fixed' . . . when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* Thus, only the written or "fixed" *expression of an idea* can be copyrighted, and not an idea itself.

18. 17 U.S.C. § 102(a) (Supp. V 1981).

19. A computer program is "[a] detailed set of instructions telling the computer what types of input data it will receive, exactly what operations to perform on it and in what order, and what type of output to produce." M. HARRIS, *INTRODUCTION TO DATA PROCESSING: A SELF-TEACHING GUIDE* 300 (1979).

20. A flow chart is "[a] graphic representation of the definition, analysis, or solution of a problem, in which symbols are used to represent [such things as] operations, data, flow, [and] equipment. . ." Dorf, *supra* note 1, at 473. In essence it is "a 'picture' of a computer program and how it is intended to operate." Harris, *supra* note 19, at 298.

21. A source program is "[a] computer program written in a symbolic language." Harris, *supra* note 19, at 300.

22. Examples of high-level languages are ALGOL (Algorithmic-Oriented Language), APL (A Programming Language), BASIC (Beginner's All-purpose Symbolic Interchange Code), COBOL (Common Business-Oriented Language), FORTRAN (FORmula TRANslating System), PL/1 (Programming Language One), and RPG (Report Program Generator). *See generally* Dorf, *supra* note 1, and Harris, *supra* note 19. There are a variety of types of languages in existence, such as algebraic manipulation languages, associative languages, authoring languages, command and job control languages, formal languages, list processing languages, macrolanguages, metalanguages, nonprocedural languages, problem-oriented languages, procedure-oriented languages, and string processing languages. For an explanation as to the function of each, see A. RALSTON, *ENCYCLOPEDIA OF COMPUTER SCIENCE* (1976).

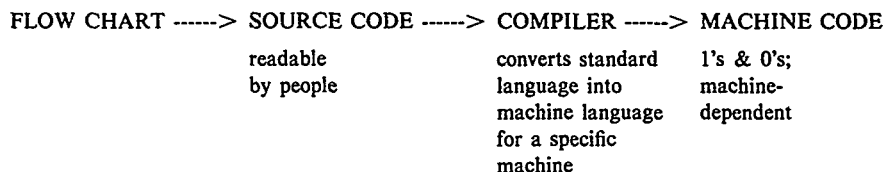
23. A compiler is [a] program that "prepare[s] a machine language program from a . . . [source] program by making use of the overall logic structure of the program, [and/]or [by] generating more than one machine instruction for each symbolic statement." Dorf, *supra* note 1, at 469.

gram.<sup>24</sup> Originally, communications with a computer were done by manually entering the binary machine language.<sup>25</sup> Today, through the use of high-level languages, the process of translating to object code occurs within the machine by way of the operating system<sup>26</sup> in a compiler program. As a result, there is no longer a reason to program at the machine-language level.<sup>27</sup> Object code has thus been considered by some courts to be unintelligible to—or not directed toward—humans, and therefore cannot be protected by copyright under the 1909 Act.<sup>28</sup>

The words “with the aid of a machine or device” appear, at first blush, to correct any deficiency in the 1909 Act with regard to object code. The House Report<sup>29</sup> addressing this language expressed the intention that this language be read broadly, so as to “avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*<sup>30</sup> . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.”<sup>31</sup>

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24. An object program is “[a] program in absolute machine language,” which is “the language that is understood by a computer; each statement has two parts: a storage address and operation code.” Harris, *supra* note 19, at 297 and 299. A simplified diagram of the process described is as follows:



While the advent of source programming is a tremendous advancement for computer science, the qualities which make these programs adaptable to more than one computer arguably facilitate software theft.

25. Binary code is “[a] code that makes use of exactly two distinct characters, usually 0 and 1.” Dorf, *supra* note 1, at 467. Machine language, or code, is “the language understood by a computer.” Harris, *supra* note 19, at 297.

26. An operating system is “[s]oftware which controls the execution of computer programs and which may provide scheduling, debugging, input/output control, accounting, compilation, storage assignment, data management and related services.” *Id.* at 478.

27. See *supra* note 24 and 25.

28. See *infra* text accompanying notes 43 and 57.

29. H.R. REP. NO. 1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659.

30. 209 U.S. 1 (1908).

31. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5665.

There was a problem, however, in applying the language of the revised statute to object code. At the time of the Copyright Act revision in 1976, the legislature was not ready to make a definitive statement regarding computer programs. As a result, section 117<sup>32</sup> was added to the Act, which required that no greater or lesser rights be afforded to owners of copyrights on computer programs than existed on December 31, 1977.<sup>33</sup> This allowed the revision to pass "without committing Congress to a position on the computer-related issue until more study could be undertaken."<sup>34</sup> Not affording owners of copyrights on computer programs more rights was interpreted to mean that the 1909 definition of a "copy"<sup>35</sup> had to be applied. Since this required that the "copy" be in a form intelligible to humans, machine-readable object code was not a "copy" within the meaning of the Act.

Section 117 of the Copyright Act was completely altered in 1980 to allow for back-up copying for one's own software.<sup>36</sup> However, if the

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32. 17 U.S.C. § 117 (1976), amended by 17 U.S.C. § 117 (Supp. V 1981). The section, as it existed from 1978 until 1980, was entitled "Scope of exclusive rights: Use in conjunction with computers and similar information systems." The text was as follows:

[T]his title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

*Id.*

33. *Id.*

34. FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 39, n.163 (1979) (the Commission is commonly referred to as CONTU).

35. See *supra* text accompanying note 16.

36. 17 U.S.C. § 117 (Supp. V 1981). The title of this amended section is "Limitations on exclusive rights: Computer programs," and the text reads:

Notwithstanding the provisions of § 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.



alleged infringement occurred prior to January 1, 1978—the date the 1976 Act took effect—the courts applied the 1909 Act.

## B. Judicial Application

While the statute raised many questions, most courts were willing to find support for the copyrightability of software. One concern that surfaced was whether input formats<sup>37</sup> in computers were equivalent to forms which communicate information, and which therefore could be the subject of copyright. In *Synercom Tech. v. University Computing Co.*,<sup>38</sup> a federal district court decided that input formats are copyrightable. The formats were distinguished from blank forms which do not express ideas and are not a proper subject of copyright.<sup>39</sup> It was noted that code books have been viewed as expressing ideas, thus receiving the benefit of copyright protection.<sup>40</sup> The court reasoned that the same rationale could be applied to the input format. “The litmus seems to be whether the material proffered for copyright undertakes to express. At first glance these input formats are simply devices for the assistance of the user to facilitate his task—forms. On reflection, however, one must conclude that they indeed express ideas.”<sup>41</sup>

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Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

*Id.* Section 101 was also amended in 1980 by adding the definition of a “computer program” as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101 (Supp. V 1981).

37. *Id.* An input-output routine is a “program which tells the computer how to take the information which is put into the computer by an operator in one computer language and translate that information into a more simplified “machine” language which the computer can understand.” *Tandy Corp. v. Personal Micro Computers, Inc.*, 524 F. Supp. 171, 173 (N.D. Cal. 1981). Most digital computers have five functional components: 1) input; 2) storage of the input by memory; 3) a control unit which receives data from the memory and gives instructions for the arithmetic; 4) an arithmetic which carries out the control’s commands; 5) output capability. *Synercom Tech. v. University Computing Co.*, 462 F. Supp. 1003, 1005 (N.D. Tex. 1978).

38. 462 F. Supp. 1003 (N.D. Tex. 1978).

39. *Id.*, at 1011 (citing *Baker v. Selden*, 101 U.S. 99 (1879)).

40. *Synercom*, 462 F. Supp. at 1011 (citing *Reiss v. Nat’l Quotation Bureau, Inc.*, 276 F. 717, 719 (S.D.N.Y. 1921)).

41. *Synercom*, 462 F. Supp. at 1011.

A 1979 case subscribing to the "human intelligibility"<sup>42</sup> requirement is *Data Cash Systems, Inc. v. JS&A Group, Inc.*<sup>43</sup> The court in *Data Cash* ruled that the read-only memory (ROM)<sup>44</sup> object code of the plaintiff's program was not protected by copyright, even though the source program was marked correctly. Copying the ROM was held not to be actionable, since Judge Flaum determined that a program in ROM does not constitute a true copy within the 1909 Copyright Act. He determined that "[o]bject programs, which enter into the mechanical process itself, cannot be read without the aid of special equipment and cannot be understood by even the most highly trained programmers."<sup>45</sup>

Judge Flaum's determination was not entirely accurate. He was compelled, by the existence of the original 17 U.S.C. § 117,<sup>46</sup> to apply the standards of the 1909 Copyright Act requiring human intelligibility. But according to a group of technical experts, object code can be read by man:

Object code in binary form is often intelligible to skilled assembly- or machine-language programmers. This is certainly true on an instruction-by-instruction basis. We feel that object code is no more obscure in the U.S. than languages such as Arabic or Sanskrit. A sequence of several thousand bytes of 8080 code, for example, could be converted byte by byte to an assembly-language source listing that could be protected by U.S. copyright laws. . . .

Object code does communicate in fixed messages to humans. Duplicated object code will always be understood in the same way as the original code by an individual who knows the machine code and the computer instruction set to which it belongs.<sup>47</sup>

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42. See *supra* text accompanying note 16.

43. 480 F. Supp. 1063 (N.D. Ill. 1979).

44. Read-only memory is "a photochemically imprinted silicon chip which stores information in the form of minute 'bits.' Bits are simply on-and-off switches. The pattern, sequence and frequency with which these switches are activated gives (sic) instructions to the machine and causes (sic) it to function in its various modes." *Apple Computer, Inc. v. Formula Int'l, Inc.*, 562 F. Supp. 775, 778 (C.D. Cal. 1983). The memory is permanently stored on the silicon chip and is, for all practical purposes, immutable.

45. *Data Cash*, 480 F. Supp. at 1065.

46. See *supra* note 32.

47. Stern and Squires, *Can We Stop Software Theft?* IEEE, MICRO, Feb. 1982, at 13, noting comments on memo submitted in response to the International Trade

On appeal,<sup>48</sup> the trial court's decision was affirmed on different grounds. Because of this, and perhaps due to the difficulty in reconciling the notion of "human intelligibility" with the 1976 Copyright Act, *Data Cash* has not received much of a following in the courts. However, it is an oft-cited case, mostly by alleged copyright infringers in search of relief.

In *Tandy Corp. v. Personal Micro Computers, Inc.*<sup>49</sup> the requirement of human readability was rejected by a California district court. The court, following the 1976 Copyright Act, found a computer program to be the required "work of authorship," while the silicon chip served as the "tangible medium of expression."<sup>50</sup> The court seized the opportunity to apply the language of 17 U.S.C. § 102(a) regarding the fixing of words in media "from which they can be perceived . . . either directly or with the aid of a machine or device."<sup>51</sup> In support of the court's application of this statutory language to the object code controversy, legislative history was cited to clarify "the all-inclusive nature of the definition of 'fixed' form:"

Under the bill it makes no difference what the form, manner or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'<sup>52</sup>

The question of object code copyrightability was still not fully resolved. The defendant, charged with copying a ROM chip, asserted that section 117 required the court to determine whether it was a copy within the meaning of the copyright laws by applying the law as it existed before January 1, 1978. The court made it clear that to do so would be

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Commission's request for public comment (46 Fed. Reg. 26,589 (1981)).

48. 628 F.2d 1038 (7th Cir. 1980). The judge hearing the case of *Apple Computer, Inc. v. Franklin Computer Corp.* acknowledged that the district court's holding in *Data Cash* was weakened (since it was affirmed on different grounds), and suggested that the circuit court's affirmance may have revealed its belief that ROMs may be copyright protected as long as copyright formalities have been satisfied.

49. 524 F. Supp. 171 (N.D. Cal. 1981).

50. *Id.* at 173.

51. See *supra* text accompanying note 17.

52. *Tandy*, 524 F. Supp. at 173 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52, reprinted in, 1976 U.S. CODE CONG. & AD. NEWS 5659, 5665.)

an incorrect application of the law:

It was not intended to provide a loophole by which someone could duplicate a computer program fixed on a silicon chip. It did not refer to the unauthorized duplication of a silicon chip upon which a properly copyrighted computer program is imprinted. Such a *duplication* of a chip is not the use of a copyrighted program 'in conjunction with' a computer; it is simply the copying of a chip. Moreover, any other interpretation would render the theoretical ability to copyright computer programs virtually meaningless.<sup>53</sup>

Less than one year after the *Tandy* decision, the United States District Court for the Northern District of Illinois specifically stated that the ROM<sup>54</sup> of plaintiff's videogame was protected by copyright. In *Midway Mfg. Co. v. Artic Intern, Inc.*,<sup>55</sup> the plaintiff's motion for a preliminary injunction was granted. This prohibited Artic from distributing its videogame, the architecture for which had been structured around an infringed copy of Midway's ROM chip. Initially, the decision would seem to overrule *Data Cash*, which was argued in the same court. But where the rationale in *Data Cash* was based on application of the 1909 Copyright Act, the *Midway* decision clearly centered on the language found in the revised Copyright Act in conjunction with the 1980 amendment. To further support the decision, district court Judge Decker stated that "a work is no less a motion picture (or other audio-visual work) because the images are embodied in a video tape, video disc, or any other tangible form."<sup>56</sup>

In July 1982, four months after the *Midway* decision, the United States District Court for the Eastern District of Pennsylvania decided the case of *Apple Computer, Inc. v. Franklin Computer Corp.*<sup>57</sup> Judge Newcomer refused to issue a preliminary injunction sought by Apple to restrain Franklin "from using, copying, selling, or infringing in any other way Apple's registered copyrights on fourteen computer programs that are contained in or sold with the Apple II personal com-

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53. 524 F. Supp. at 175 (emphasis in original).

54. See *supra* note 44.

55. 547 F. Supp. 999 (N.D. Ill. 1982).

56. *Id.* at 1013 (quoting NIMMER ON COPYRIGHT § 2.09[D], in quote of Memorandum from the General Counsel of the Int'l Trade Comm'n to The Commission 7 (June 8, 1981)).

57. 545 F. Supp. 812 (E.D. Pa. 1982).

puter.”<sup>58</sup> Although no conclusion was reached on the copyrightability question, Judge Newcomer’s opinion on the preliminary injunction issue expressed doubt as to the extent of protection afforded by the copyrights. In his opinion, Apple failed to show a reasonable probability of success on the merits, or that it would suffer irreparable harm. On the contrary, Judge Newcomer indicated that Apple’s economic superiority in the marketplace made it better suited to withstand the burden of litigation. If Franklin were precluded from selling its major product pending litigation, the consequences would be devastating.<sup>59</sup>

Judge Newcomer presented some interesting arguments for both camps. In support of Apple’s position, he noted that

[o]bject code may be said to be the language used by a programmer in the same way Hemingway may be said to have used English to write *For Whom the Bell Tolls*. A ROM may be considered a ‘*tangible medium of expression*,’ fixing an original work much as a book, record or motion picture film fix a literary work, a musical work or a motion picture.<sup>60</sup>

In addition to the “tangible medium of expression,” an “original work of authorship” is needed to satisfy the requirements of copyright registration. But in the transition from flow chart to source program to object code, major transformations take place in the structure of the program. Judge Newcomer opined that it was not clear at which stage the program author’s design was in its original form, therefore qualifying as a work of authorship.<sup>61</sup> As noted earlier, programmers can communicate with a computer in object code. However, they no longer need to do so since the computer is capable of making its own “translation” from the source program. Apple thus argued that the “automatic translation of source to object code established a predictable one-to-one relationship between the two codes that preserved the programmer’s original force of authorship.”<sup>62</sup>

The court introduced one issue discussed by the Commission on New Technological Uses of Copyrighted Works (CONTU), the body created by Congress to aid in the Copyright Act revision of 1976.<sup>63</sup> The

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58. *Id.* at 812.

59. *Id.* at 825.

60. *Id.* at 819-20 (emphasis added).

61. *Id.* at 820.

62. *Id.* at 822.

63. See generally CONTU’s final report, *supra* note 34.

contention was that object code embodied in a ROM is a mechanical device and is therefore not copyrightable. This was not to suggest, however, that no protection should be available. Rather, a ROM may be characterized as firmware, or a combination of software and hardware<sup>64</sup> that operate together to control a computer, which may, if other aspects satisfy statutory criteria, be protectable under patent law.<sup>65</sup>

Judge Newcomer agreed that it is not illogical to treat object code as an expression, but he added that "[i]f the concept of 'language' means anything, it means an ability to create human interaction." He submitted that a limit must be set in place. Otherwise, the court would ultimately be providing "copyright protection to the programs created by a computer to run other computers. With that, we step into the world of Gulliver where horses are 'human' because they speak a language that sounds remarkably like the ones humans use. It is an intriguing analogy but false."<sup>66</sup> Judge Newcomer's analysis is interesting, but the code at issue is still the result of a human's creativity.

A mere three days after *Franklin* was decided, the United States Court of Appeals for the Third Circuit ruled on *Williams Electronics, Inc. v. Artic Int'l, Inc.*<sup>67</sup> The Third Circuit, which is the same court that would soon hear the *Franklin* appeal, upheld a permanent injunction enjoining Artic (the same Artic that was sued by Midway), from infringing Williams Electronics' copyrighted program. Artic, relying on *Data Cash*, unsuccessfully argued that ROM was not intelligible to humans, and therefore not a proper subject for copyright. The Third Circuit, however, relied on section 101 of the Copyright Act for their decision:

By this broad language, Congress opted for an expansive interpretation of the terms 'fixation' and 'copy' which encompass technological advances such as those represented by the electronic device in this case. We reject any contention that this broad language should nonetheless be interpreted in a manner which would severely limit the copyrightability of computer programs which Congress clearly intended to protect. We cannot accept defendant's suggestion that would afford an unlimited loophole by which in-

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64. Hardware is "[p]hysical equipment, as opposed to the program or method of use; for example, mechanical, magnetic, electrical, or electronic devices." Dorf, *supra* note 1, at 474.

65. *Id.* at 824. See generally text accompanying notes 135-56.

66. *Id.* at 825.

67. 685 F.2d 870 (3d Cir. 1982).

fringement of a computer program is limited to copying of the computer program text but not to duplication of a computer program fixed on a silicon chip.<sup>68</sup>

In the year following the *Franklin* and *Williams* decisions, commentators have attempted to find some justification for the divergent opinions. But in August 1983, the Third Circuit reversed the *Franklin* district judge's refusal to grant a preliminary injunction to Apple. The court of appeals declared that Apple's copyrights are indeed valid, despite Franklin's argument that a "process," "system" or "method of operation" cannot be copyrighted. The court predictably relied upon its decision in *Williams*, thereby continuing the trend toward accepting the copyrightability of operating systems and programs embodied in ROM.<sup>69</sup>

In February 1983, another district court was faced with the issue of object code copyrightability. The court in *Hubco Data Products Corp. v. Management Assistance, Inc.*<sup>70</sup> determined that the certificate of registration on copyrighted levels of the program served as *prima facie* evidence of the validity of the copyright. However, a question still remained as to the uncopyrighted levels. The court declared that Management Assistance had the burden of showing that their object code was an "original work of authorship" under the Act, for which copyright registration is not required in order to benefit from protection.<sup>71</sup> In response to defendant's argument that the code is used commonly throughout the industry, it was determined that the originality required here meant "independent creation," and not "novelty." In other words, "a work is original and may command copyright protection even if it is completely identical with a prior work provided it was not copied from such prior work but is rather a product of the independent efforts of its author."<sup>72</sup>

An argument similar to Franklin's<sup>73</sup> was asserted in a California district court by Formula International in *Apple Computer, Inc. v.*

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68. *Id.* at 877.

69. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983). See also Freiberger, *Apple Has Ace in the Hole with ROM*, INFOWORLD, Sept. 26, 1983, at 1; Gillen, *Ruling Seen Definitive: Court Upholds Apple's ROM Copyright Suit*, COMPUTERWORLD, Sept. 12, 1983, at 5.

70. COPYRIGHT LAW DECISIONS (CCH) 18,100 (D. Idaho Feb. 3, 1983).

71. *Id.* at 18,104 (citing 17 U.S.C. § 408(a) (1976)).

72. *Hubco* at 18,104.

73. See *supra* text accompanying note 57.

*Formula Int'l, Inc.*<sup>74</sup> Formula took the position that programs which were integral to the operation of the machine, and which did not directly produce visual communication, were not copyrightable. Judge Hill disposed of that argument by suggesting that there was no statutory authority to sustain different treatments for functionally different computer programs.<sup>75</sup> The opinion included an analysis of *Franklin*, where Judge Hill submitted that Judge Newcomer misunderstood CONTU's position. Judge Newcomer had cited CONTU's report on the 1976 Copyright Act revision to support his determination that object code is not copyrightable. In support of his conclusion, Judge Hill stated that the *Franklin* decision was undermined by the *Williams* case, since the Third Circuit, in *Williams*, took a point of view opposite from that of the district court, in *Franklin*, only a few days later.<sup>76</sup> Additionally, Judge Hill noted that *Franklin* did not present a clear holding on the object-code question, and was decided under different state injunction standards.<sup>77</sup>

Formula asserted that the grant of a preliminary injunction would constitute an impediment to free competition. The court disagreed, claiming that it would in fact be to Apple's advantage to have more software available for owners of its computer. The defendant would still be free to create compatible programs, but a byte by byte copy would not be tolerated. The court stated:

Apple seeks here not to protect *ideas* (i.e., making the machine perform particular functions) but rather to protect their particular *expressions* of those ideas in the form of specific programs. And Formula wants the privilege of using and marketing those expressions without having to invest the millions of dollars and thousands of manpower hours necessary to develop them. Simple economics suggests that Formula's strategy would hinder, not promote, competition and innovation in the computer market. Few companies are going to invest the time and resources to develop new programs if their products can be freely duplicated by anyone. Such 'competitors,' who could undersell the originator simply because they don't have its development costs, would destroy the market which any innovator needs to recoup his investment.<sup>78</sup>

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74. 562 F. Supp. 775 (C.D. Cal. 1983).

75. *Id.* at 780.

76. See *supra* text accompanying note 67.

77. *Formula*, 562 F. Supp. at 785.

78. *Id.* at 783.



The court did not see this, however, as the final word in software protection. In fact, Judge Hill submitted that copyright may not even be the best form of protection for computer programs. He noted that perhaps a hybrid or an entirely new form of protection would need to be devised, but that the legislature, not the court, would be the proper forum for such a determination. "To the extent [the court] is free to express public policy, its choice is to place computer programs into an existing category of legal protection as against affording them no protection at all."<sup>79</sup>

### C. Current Methodology and Considerations for the Future

The language in *Formula* adds credence to the indications that there are strong policy justifications for protecting computer programs. Apparently, there are a number of persons who agree, for efforts are being made to enact a more comprehensive amendment to the Copyright Act as it relates to computer programs. "A Bill to Improve the Protection Afforded to Computer Software" was introduced in August 1982 at the request of the Association of Data Processing Service Organizations (ADAPSO).<sup>80</sup> The 1980 definition of "computer program" would be revised, and definitions would be provided for "program description," "supporting material," and "computer software." Section 102(a) of the Copyright Act, which gives a non-comprehensive list of copyrightable subject matter, would be appended with "computer software." Sections 401(b)(1) and 408(b), concerning the copyright symbol (©) and registration, would be amended to accommodate programs. Section 301, on preemption with respect to other laws, would resolve any conflicts which can arise through the combined use of copyrights and trade secrets.<sup>81</sup>

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79. *Id.*

80. Stern, *Protecting Computer Software - The ADAPSO Bill*, IEEE MICRO, April 1983, at 58. The amended sections would be §§ 101, 102(a), 301, 401(b) and 408(b).

81. 'A computer program' means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. . . . A 'program description' means a complete procedural representation in verbal, schematic, or other form, in sufficient detail to determine a set of instructions constituting a corresponding computer program. . . . 'Supporting material' means any material, other than a computer program or a program description, created for

An alternative has been suggested that would require compulsory licensing for those distributing programs to the public for private use, and stiffer penalties for known infringers.<sup>82</sup> Another recommendation calls for an alternative form of protection altogether, that being a regulatory statute under the Commerce Clause which would render copying of object code unfair as offending public policy.<sup>83</sup> On the other hand, it is arguable that the available laws already provide adequate protection.

Considering the present state of copyright law, simple measures can be taken to assure the best available protection. Each physical embodiment of the software should be stamped with the copyright symbol followed by the year the program was first distributed to the public. Although copyright takes effect when the writing is completed, early registration can make a difference in the amount of damages available to a prevailing plaintiff in the event of a suit. Programmers can further safeguard their work by imbedding "dummy" data into their programs to aid in detecting an infringement;<sup>84</sup> likewise, encrypting the code may serve to deter a would-be infringer.

Copyrights are now the most common form of protection available for software today, due to the ease with which registration can be secured, as well as the reasonable \$10.00 filing fee. Circular "R61," entitled "Copyright Registration for Computer Programs," is readily available from the Copyright Office.<sup>85</sup> The applicant is advised that "[c]opyright protection extends to the literary or textual expression contained in the opinion. Copyright protection is not available for ideas, program logic, algorithms, systems, methods, concepts, or lay-

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aiding the understanding or application of a computer program, for example, problem descriptions and use instructions. 'Computer software' means any or several of the literary works referred to in the definitions of computer program, program description, and supporting material. Stern, *supra* note 80, at 59.

82. Note, *Software Piracy and the Personal Computer: Is the 1980 Software Copyright Act Effective?* 4 COMPUTER/LAW J. 171 (1983).

83. Stern, *Can We Stop Software Theft?*, *supra* note 13.

84. Brown, *Software Protection Battle Rages On*, ELECTRONICS, Nov. 17, 1982, at 24. Dummy data is information imbedded into a program which is not essential to the program's successful performance. Its appearance in a suspect program aids in proving the likelihood of an infringement.

85. U.S. Government Printing Office: 1983-381-279:572. Forms can be obtained by writing to Information and Publications Section, LM-455, Copyright Office, Library of Congress, Washington, D.C. 20559, or by calling the Forms Hotline on (202)287-9100.

outs.”<sup>86</sup> It also includes the definition of a computer program, deposit requirements and instructions on placing the copyright notice, both for visually perceptible copies and works reproduced in machine-readable copies. While source programs are recommended for deposit, it is noted that “registration will proceed under our RULE OF DOUBT policy upon receipt of written assurance from the applicant that the work as deposited in object code contains copyrightable authorship.”<sup>87</sup>

Since the 1964 announcement by the Copyright Office, copyright registration for computer software has metamorphosed from a mere position taken on validity to a relatively well-defined procedure backed by legislation and case law. While more changes will surely be seen in the near future, copyrighting can be expected to remain an important force to be considered when evaluating the alternatives in legal protection for software.

### III. Trade Secret Protection

#### A. The Basis for Trade Secret Protection

There are programs that do not meet the statutory requirements for patents, or whose authors wish to protect their idea so as to market it while a patent application is pending. There are others who desire to protect their very ideas, and not only the embodiment of those ideas, rendering copyright protection insufficient. For these purposes, trade secret protection serves a useful function. Unlike patents and copyrights, trade secrecy is a state doctrine. In many states it exists only through common law,<sup>88</sup> and arises from taking precautions to keep one's idea or methodology a secret. It is commonly secured through contractual arrangements, with the owner putting the user on notice that the information being transferred is not to be disclosed, except as may be authorized. Trade secrecy offers a broad scope of protection which covers the concept and the expression, it protects against disclosure, and continues in effect until the idea enters the public domain.<sup>89</sup>

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86. *Id.*

87. Form TX, for published and unpublished nondramatic literary works, is the correct form to be filed for the registration of computer programs. U.S. Government Printing Office: 1983:381-278/101.

88. *See infra* text accompanying note 94.

89. The information need not be “generally known to the public for trade secret rights to be lost,” but may be known within the industry, or available to the public in print. UNIFORM TRADE SECRETS ACT § 1 comment 5, 14 U.L.A. 537, 541 (1980).

"Trade secret" is characterized by the Restatement of Torts:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.<sup>90</sup>

This definition has been employed by courts in their discussion of trade secret protection for software,<sup>91</sup> as well as by the United States Supreme Court in cases regarding the validity of a proclaimed trade secret.<sup>92</sup> The official comment to the Restatement of Torts acknowledges that there exists no exact definition of "trade secret," but provides factors which help determine whether a trade secret has been established by the product owner. Those factors are:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly ac-

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90. RESTATEMENT OF TORTS § 757 comment b (1939). The text of section 757 reads:

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

- (a) he discovered the secret by improper means, or
- (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
- (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
- (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

RESTATEMENT OF TORTS § 757 (1939).

91. See, e.g., *Videotronics, Inc. v. Bend Electronics*, 564 F. Supp. 1471 (D. Nev. 1983) (see *infra* text accompanying note 128), and *J & K Computer Systems, Inc. v. Parrish*, 642 P.2d 732, 735 (Utah 1982) (see *infra* text accompanying note 98).

92. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

quired or duplicated by others.<sup>93</sup>

The Uniform Trade Secrets Act was approved in 1979 by the National Conference of Commissioners on Uniform State Laws,<sup>94</sup> but as of 1983 it had only been adopted in Indiana, Kansas, Louisiana, Minnesota and Washington.<sup>95</sup> The act more broadly defines trade secrets as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of the efforts that are reasonable under the circumstances to maintain its secrecy.<sup>96</sup>

Applying either definition, it is clear that computer programs do constitute trade secret subject matter.<sup>97</sup> Recent case law confirms this, while attempting to identify the extent of protection offered to trade secret owners.

## B. Case Law

In *J & K Computer Systems, Inc. v. Parrish*,<sup>98</sup> J & K sued its former employees and their corporation, alleging wrongful appropriation of proprietary information. Parrish had made an electronic copy of a program he developed while an employee of J & K, and continued to use it, in defiance of his employment contract, after he left the com-

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93. RESTATEMENT OF TORTS § 757 comment b (1939). These criteria were noted by the court in *M. Bryce & Associates, Inc. v. Gladstone*, 107 Wis. 2d 241, 319 N.W.2d 907 (1982). See *infra* text accompanying note 102. The Restatement Second of Torts (1978) did not incorporate section 757, but the language of the first Restatement is still controlling, as is evident in the cases cited *supra* notes 91 and 93.

94. UNIFORM TRADE SECRETS ACT § 1, 14 U.L.A. 537, 539 (1980). The Act was proposed by a special committee pursuant to recommendations by the Patent Law Section of the American Bar Association. The committee's work was done in conjunction with the Antitrust, Banking and Business, Corporation, and Patent Law sections of the American Bar Association. *Id.* at 538-39.

95. UNIFORM TRADE SECRETS ACT, 14 U.L.A. 206 (Supp. 1983).

96. UNIFORM TRADE SECRETS ACT, 14 U.L.A. 537, 542 (1980).

97. For a discussion of trade secrets and computer programs, see Bender, *Trade Secret Protection of Software*, 38 GEO. WASH. L. REV. 909 (1969).

98. 642 P.2d 732 (Utah 1982).

pany. Parrish asserted that the program was not confidential so as to constitute a trade secret. The Utah Supreme Court, however, disagreed with Parrish's assertion, noting that the program was unique in that it could not be found in any text or source book.<sup>99</sup> This established the requirement that the information sought to be protected not be known throughout the industry.<sup>100</sup> Parrish further argued that the program had been revealed to certain customers and could not therefore be deemed secret. This argument was rejected by the court, since J & K had taken steps to inform employees and customers of the secret nature of programs they had been authorized to use. In addition, the programs themselves were marked as being proprietary to J & K, and usable by license agreement only. "That a few of the plaintiff's customers had access to the program does not prevent the program from being classified as a trade secret where the plaintiff was attempting to keep the secret and the program is still unavailable to the computer trade as a whole."<sup>101</sup>

In the 1982 case of *M. Bryce & Associates, Inc. v. Gladstone*,<sup>102</sup> a non-disclosure agreement was signed by persons attending a demonstration of M. Bryce's management information system. Though no sale resulted from the demonstration, the persons to whom the system was shown used the information disclosed to reproduce the system. In the suit that followed, the defendant asserted that there had been no misappropriation since the product he issued was not an exact duplicate of plaintiff's system. The court disagreed, noting the trial court's instruction to the jury, adopted from the Restatement of Torts, as to a "use" of a trade secret:

To subject a person to liability for use of another's trade secret, there is no requirement that he use it exactly in the form that he received it. He may be liable even if [he] uses it with modification—modifications or improvements upon it affected by his own efforts.

Differences in detail do not preclude liability if substantially the process used by the actor is derived from the other's secret in breach of a relationship of trust and confidence.

The liability is avoided only when the contribution by the other's secret is so slight that the actor's process can be said to be

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99. *Id.* at 735.

100. *See supra* note 89.

101. *J & K Computer Systems*, 642 P.2d at 735.

102. 107 Wis. 2d 241, 319 N.W.2d 907 (1982).

derived from other sources.<sup>103</sup>

The defendant also argued that since information pertaining to the system had been offered to the public in advertisements, trade-secret status was lost. The court noted, however, that the advertisement showed the reader "what" the product was, and not "how" it was put together.<sup>104</sup>

For many companies, policy regarding employee conduct may be the only way to keep information secure. In March 1983, the district court of Hawaii upheld Honeywell Information Systems' firing of two employees who formed a computer company while working for Honeywell.<sup>105</sup> The dismissed employees argued that their business did not compete with Honeywell's market, since Honeywell did not sell a certain type of computer in Hawaii.<sup>106</sup> The court's response was that direct competition was not necessary for a finding of conflict:

Honeywell is undoubtedly in possession of valuable trade secrets, such as software programs, marketing techniques, market studies, and other valuable information developed perhaps at great cost to the company. The employment policy here seems to be a reasonable means to prevent the improper and unauthorized use of such information by persons or businesses which may unjustly benefit themselves with such information.<sup>107</sup>

Company policies are frequently embodied in a written contract between the employer and the employee. In this manner, the employee is on notice that information learned as an employee is to be maintained in confidence. International Business Machines Corp., for example, requires newly-hired employees to sign an "Agreement Regarding Confidential Information and Intellectual Property."<sup>108</sup> The agreement forbids disclosure of confidential information *during and after* their employment; the employee assigns to the corporation his

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103. *Id.* at 252, 319 N.W. 2d at 912. The trial court's instructions to the jury came from RESTATEMENT OF TORTS § 757 comment c (1939).

104. 107 Wis. 2d at 250, 319 N.W.2d at 911.

105. *Moore v. Honeywell Information Systems, Inc.*, 558 F. Supp. 1229 (D. Hawaii 1983).

106. *Id.* at 1233.

107. *Id.*

108. IBM form, "Agreement Regarding Confidential Information and Intellectual Property" (Rev. 6/80).

entire right, title and interest in any idea, invention, design of a useful article (whether the design is ornamental or otherwise), computer program and related documentation, and other work or authorship . . . conceived . . . or written wholly or in part by . . . [the employee], whether or not such . . . [works] are patentable, copyrightable or susceptible to other forms of protection . . . [which are] created within the scope of . . . [his] employment.<sup>109</sup>

Trade secrets have proven effective for a wide variety of products, such as soft drink formulae, and the process of manufacturing orchestral cymbals.<sup>110</sup> Once proper precautions have been taken to guard the trade secret, products of this nature are put on the market for widespread distribution. Other manufacturers attempt to imitate successful products. But as long as the producer has taken steps to prevent disclosure, the actual process involved in making the original product will remain a secret. When computer programs are marketed by licensing them to individual users, the contractual agreement protects the owner in case of infringement. However, it is impractical to have that type of arrangement when widespread distribution is desired. The software manufacturer can distribute his system while taking steps to keep his methodology secret, such as limiting knowledge of the process involved to his employees. Unlike many other products, however, computer applications may not receive adequate protection from trade secrecy, due to the scope of protection afforded. Trade secret status guards against discovery by "improper means."<sup>111</sup> "Improper means" does not include independent development or reverse engineering. Reverse engineering is "a technique by which the product of a secret formula or process is analyzed, first to retrace the steps essential to its creation and then to recreate the formula or process itself."<sup>112</sup> In the case of many computer programs, reverse engineering may not be difficult. The result may be a

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109. *Id.*

110. One process for manufacturing cymbals has been maintained a family secret for hundreds of years. J. POOLEY, *TRADE SECRETS: HOW TO PROTECT YOUR IDEAS AND ASSETS* 18-19 (1982). Other examples noted are such divergent things as "[a] process for extracting alcohol from empty whiskey barrels, . . . [t]he seminar technique of a group nonsmoking clinic, . . . [d]esigns for automatic toll collection equipment [and] [e]mployee benefit information." *Id.* at 19. In effect, anything maintained secret which can comply with the requirements set forth in the Restatement (*see supra* text accompanying notes 90 and 93), qualifies for trade secret protection.

111. RESTATEMENT OF TORTS § 757 (1939).

112. P. GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 157 (1981).



loss of one's proprietary information:

This freedom to create or recreate independently means that any number of unrelated firms within a particular industry may eventually come to possess a single trade secret. Once this possession becomes general, and the information becomes widely known in the industry, the secrecy requisite is no longer met and, under the rule usually followed, even those to whom the secret was imparted in confidence may use the information freely.<sup>113</sup>

### C. Current Problems: Trade Secrets on Copyrighted Computer Programs

The issue today is not whether computer programs can receive trade secret protection, but rather whether trade secret protection can be used in conjunction with federal grants of exclusive rights on intellectual property. There is a problem inherent in copyrighting a program while maintaining that it constitutes a trade secret. Though the Copyright Act no longer requires immediate registration, once a copy of the program is furnished to the Copyright Office it is a matter of public record. This is obviously inconsistent with the basic requirement of secrecy with trade secrets. Yet, many program owners are treating programs as trade secrets while affixing the copyright symbol to their work. It is an attempt to secure protection for both the expression and the idea, and to have copyright protection available as a backup should secrecy be lost.<sup>114</sup>

Court decisions reflect the confusion that exists with the attempt to combine trade secrets with copyrights. In 1974, the Supreme Court determined that patentable inventions could be protected by state trade secret doctrines, since federal intellectual property law does not preempt state trade secret protection.<sup>115</sup> "The only limitation on the States is that in regulating the area of patents and copyrights they do not

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113. *Id.* at 157-158. There may be a problem of proof involved in determining whether a program has been independently created, analyzed and recreated, or simply unfairly acquired. For a discussion on how to recognize a copy, see Dakin and Higgins, *Fingerprinting a Program*, DATAMATION, April 1982, at 133.

114. See generally Lucarelli, Jr., *The Supremacy of Federal Copyright Law over State Trade Secret Law for Copyrightable Computer Programs Marked with a Copyright Notice*, 3 COMPUTER/LAW J. 19 (1981).

115. *Kewanee*, 416 U.S. at 470.

conflict with the operation of the laws in this area passed by Congress. . . ."<sup>116</sup>

Courts have seized on this language to hold both ways. In *Synercom Technology, Inc. v. University Computing Co.*,<sup>117</sup> the federal district court refused to grant relief on a state theory of unfair competition for the use of computer input formats and instruction manuals. Since relief had already been granted for copyright infringement, the court expressed its belief that enforcement of the state doctrine would significantly interfere with federal policy. The court thus declared the state misappropriation doctrine preempted by federal patent and copyright laws.<sup>118</sup> Two years later, a district court in Texas took the opposite view in deciding *Warrington Assoc. v. Real-Time Eng. Systems*.<sup>119</sup> The court found that Warrington Associates' common-law trade secret claim was not preempted by the federal Copyright Act, and thus denied Real-Time's motion for summary judgment. While noting that copyright disclosure could "strip the underlying idea of its confidentiality, and thus its status as a trade secret,"<sup>120</sup> the court acknowledged that the two could be interactive. In addition, "the trade secrets tort is premised on concepts of breach of trust and confidentiality, and not copying,"<sup>121</sup> therefore not compelling preemption.

In *Technicon Med. Info. v. Green Bay Packaging*,<sup>122</sup> the Seventh Circuit likewise refused to find a conflict between the federal and state laws. In a user's manual for Technicon's computer software, a legend was included, noting that the disclosed information was proprietary "and shall not be duplicated, used or disclosed, in whole or in part, except with the expressed permission of the owner."<sup>123</sup> In addition, a copyright symbol was affixed. The defendant argued that the symbol represented publication, which negated the existence of a trade secret. Technicon's claim was that there was no publication,<sup>124</sup> and that the

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116. *Id.* at 479.

117. 474 F. Supp. 37 (N.D. Tex. 1979).

118. *Id.* at 44.

119. 522 F. Supp. 367 (N.D. Ill. 1981).

120. *Id.* at 368.

121. *Id.* at 369.

122. 687 F.2d 1032 (7th Cir. 1982) (cert. denied) \_\_\_\_ U.S. \_\_\_\_, 103 S. Ct. 732 (1983).

123. *Id.* at 1033 n.1.

124. The court quoted 1 NIMMER ON COPYRIGHT § 4.04 (1981) to note the difference between the two types of publication:

A general publication 'occurs when by consent of the copyright owner the

symbol was "included for protection in the event that an inadvertent publication occurred."<sup>125</sup> The court agreed with Technicon's argument, and declared that affixing the copyright notice as a deterrent constituted correct usage of the symbol. It was further noted that advancing alternative theories—i.e., copyright or trade secret—was permissible under the Federal Rules of Civil Procedure.<sup>126</sup> Enforcement of both, however, could present a conflict.<sup>127</sup>

That the law in this area is far from settled is further evidenced in an opinion issued by the United States District Court for the District of Nevada.<sup>128</sup> In what seems to be a reversal of the trend away from preemption since *Synercom*,<sup>129</sup> the court found that federal copyright law preempted the application of the state common-law doctrines of misappropriation and trade secrecy. The court acknowledged that evidence clearly established that the defendant copied the plaintiff's video game,<sup>130</sup> which included software. Despite this, the plaintiff could not avail itself of state doctrines since the programs involved were eligible for copyright protection.

Apparently, the desire to take advantage of both trade secret and copyright protection on computer programs is widespread. Many copyright owners, especially authors of computer programs, have requested that the Copyright Office consider special deposit provisions for works containing trade secrets.<sup>131</sup> The Copyright Office normally requires that

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original or tangible copies of a work are sold, leased, loaned, given away or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner if a sale or other such disposition does not, in fact, occur.'

*Id.* at 1035. This was contrasted with the definition of a limited publication, found in *White v. Kimmel*, 193 F.2d 744 (9th Cir.) cert. denied 343 U.S. 957 (1952). "'A limited publication [is one] which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale. . . .'" *Technicon*, 687 F.2d at 1035 (quoting *Data Cash*, 628 F.2d at 1042).

125. *Technicon*, 687 F.2d at 1034.

126. FED. R. CIV. P. 8(e)(2).

127. *Technicon*, 687 F.2d at 1038.

128. *Videotronics, Inc. v. Bend Electronics*, 564 F. Supp. 1471 (D. Nev. 1983).

129. See *supra* text accompanying note 114.

130. *Videotronics*, 564 F. Supp. at 1473.

131. Notice of Inquiry Deposit of Computer Programs and Other Works Containing Trade Secrets, 48 Fed. Reg. 22,951 (1983), reprinted in *New Developments: Comments Requested on Deposits Containing Trade Secrets*, 11 COPYRIGHT LAW REPORTS (CCH) 20,229 (1983).

two copies of the work be submitted for registration. The deposit then becomes a matter of public record, which would destroy any trade secret that might be included. In response to the concerns expressed, the Copyright Office published a request for comments in May 1983.<sup>132</sup> The request notes in its section on policy considerations that many applicants have requested the same treatment that secure tests<sup>133</sup> receive. In such instances, one complete copy is received as a deposit instead of two. After examination the copy is returned to the applicant, the Copyright Office retaining some portion or description to serve as a record of deposit.<sup>134</sup> In this manner trade secret status would not be nullified by virtue of a copy being made available for public viewing through deposit with the Copyright Office. Alternative deposit suggestions for computer programs containing trade secrets have been solicited, and in particular, answers have been requested to twelve detailed questions. The notice makes it clear that the policy decisions the Office intends to formulate, with the aid of responses received, will shape the future of copyright registration.

#### IV. Patent Protection

Patent protection offers the software producer a combination of the most attractive features of copyright and trade secret security. In addition to being protected against copying and disclosure, the patent holder is shielded from independent creation and reverse engineering.<sup>135</sup>

The federal government's power to grant a patent is derived from article I of the United States Constitution.<sup>136</sup> The benefit conferred upon the patent owner is the legal right "to exclude others from making, using, and selling an invention" for a period of 17 years.<sup>137</sup> This

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132. *Id.* See generally 37 C.F.R. § 202.20 (1982) for deposit requirements.

133. A secure test is a "nonmarketed test administered under supervision and specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration." 37 C.F.R. § 202.20(b)(4) (1982)).

134. 48 Fed. Reg. 22,951, 22,952 (*citing* 37 C.F.R. § 202.20(c)(vi) (1982)).

135. See *supra* text accompanying note 112.

136. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. As explained in the text accompanying note 8, *supra*, the power to grant copyrights is also derived from this clause.

137. Blumenthal, *Lifeforms, Computer Programs, and the Pursuit of a Patent*,

statutory period of protection encourages inventors of patentable subject matter to disclose their work, since they need not fear infringement.<sup>138</sup> It would appear, then, that patent protection is the ideal route to computer program protection. However, due to the great degree of protection offered, the requirements for patent eligibility are stringent.<sup>139</sup> To meet the requirements, it must first be determined whether the program sought to be patented constitutes patentable subject matter. To do so, the item must be a "new and useful process,<sup>140</sup> machine, manufacture, or composition of matter, or any new and useful improvement thereof."<sup>141</sup> Further conditions are that the subject matter, once established as patentable, be novel<sup>142</sup> and non-obvious.<sup>143</sup>

The issue of patentability of computer programs has already reached the United States Supreme Court.<sup>144</sup> The programs in question

86 TECH. REV., Feb./Mar. 1983, at 26, 29.

138. [A] patent system provides an incentive to invent by offering the possibility of reward to the inventor and to those who support him. This prospect encourages the expenditure of time and private risk capital in research and development efforts.

[A] patent system stimulates the investment of additional capital needed for further development and marketing of the invention. In return, the patent owner is given the right, for a limited period, to exclude others from making, using or selling the invented product or process.

[B]y affording protection, a patent system encourages early public disclosures of technological information, some of which might otherwise be kept secret. Early disclosure reduces the likelihood of duplication of effort by others and provides a basis for further advances in the technology involved.

[A] patent system promotes the beneficial exchange of products, services, and technological information across national boundaries by providing protection for industrial property of foreign nationals.

Goldstein, *supra* notes 15-16 (quoting REPORT OF THE PRESIDENT'S COMMISSION ON THE PATENT SYSTEM 1-3 (1966)).

139. These requirements are outlined in the Patent Act, 35 U.S.C. §§ 100-104 (Supp. V 1981).

140. The word "process" is defined as a "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." 35 U.S.C. § 100 (1976).

141. 35 U.S.C. § 101 (Supp. V 1981).

142. 35 U.S.C. § 102 (Supp. V 1981).

143. A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

35 U.S.C. § 103 (1976).

144. *Diamond v. Diehr*, 450 U.S. 175 (1981); *Parker v. Flook*, 437 U.S. 584

were part of a "useful process,"<sup>145</sup> as required for subject matter qualification. But if the process contained a program described as consisting of a mathematical formula or algorithm, it was considered a law of nature, and therefore not patentable.<sup>146</sup> "The rule that the discovery of a law of nature cannot be patented rests, not on the notion that natural phenomena are not processes, but rather on the more fundamental understanding that they are not the kind of 'discoveries' that the statute was enacted to protect."<sup>147</sup> However, in the 1981 case of *Diamond v. Diehr*,<sup>148</sup> the Supreme Court saw the program in question as part of an industrial process, and not as an attempt to patent a mathematical formula. As a result, processes will now not automatically be precluded from being considered as patentable subject matter due to the inclusion of an unpatentable algorithm.<sup>149</sup>

While one author hailed the decision as "the end of some twelve years of litigation concerning the patentability of computer programs,"<sup>150</sup> there are no clear-cut guidelines on exactly what will pass muster. In fact, the language used in drafting a patent claim may make a difference as to the final determination:

[A]ssuming that the claims do define a mathematical algorithm, if the implementation of the algorithm is couched in terms which either define the structural relationship between physical elements in a claimed apparatus or refine or limit steps in the process for which the patent is being sought, the claim will probably be patentable.<sup>151</sup>

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(1978); *Gottschalk v. Benson*, 409 U.S. 63 (1972).

145. See *supra* text accompanying notes 139 and 140.

146. *Parker*, 437 U.S. at 593.

147. *Id.* "[A] scientific principle, such as that expressed in respondent's algorithm, reveals a relationship that has always existed." *Id.* at 593, n.15. The court notes one author's analogy to the fact that the law of gravity existed even before Newton's formulation of the law. That the law has been recognized affords no rights to exclude others from its use. "Patentable subject matter must be new (novel); not merely heretofore unknown." *Id.*, quoting P. ROSENBERG, *PATENT LAW FUNDAMENTALS* 13 (1975). The courts typically exclude scientific principles, laws of nature, ideas and mental processes. In *Re Meyer*, 688 F.2d 789, 794 (C.C.P.A. 1982).

148. 450 U.S. 175 (1981). For a number of articles discussing this case and those leading up to the decision, see section D of the bibliography accompanying this note.

149. Note, *Algorithm Patentability after Diamond v. Diehr*, 15 IND. L. REV. 713, 732 (1982).

150. *Legal Times of Washington*, May 4, 1981, at 27, col. 1, 28, col. 4.

151. Rose, *Protection of Intellectual Property Rights in Computers and Computer Programs: Recent Developments*, 9 PEPPERDINE L. REV. 547, 557 (1982). Rose

In a paper presented at the Second Annual Software Protection Conference in 1981, one author suggested that "the distinction the Supreme Court has attempted to draw between patentable processes and mathematical algorithms is confusing and unnecessary,"<sup>152</sup> as well as "illogical and artificial."<sup>153</sup> The suggestion is that the statutory requirements be applied to algorithms as with any other item sought to be patented.

The discussion on algorithms was continued by the Delaware district court in the 1983 case of *Paine, Webber, Jackson & Curtis, Inc. v. Merrill-Pierce, Fenner & Smith, Inc.*<sup>154</sup> The court began with the premise that computer programs are patentable, but that they must meet the same statutory requirements as do other inventions. A fair portion of the opinion on the issue discussed the confusion caused by the lack of a standard, acceptable definition of the term "algorithm." The court ultimately accepted a narrow definition so as to enable the claim presented to constitute a methodology, and not a restatement of a mathematical formula.<sup>155</sup> While the court determined that the process involved constituted patentable subject matter, it is clear that congressional action is needed for uniformity.

Patent protection is ideal if the program qualifies. One drawback, however, is that the application procedure is lengthy,<sup>156</sup> which can delay the entry of a product into the market. Trade secret protection can be used until a patent application is approved in two or three years, but the extent of protection, as seen, is not as comprehensive as that provided by a patent.

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is discussing a two-step test for patentability outlined by the Court of Customs and Patent Appeals (C.C.P.A. 1978) and *In Re Walter*, 618 F.2d 758 (C.C.P.A. 1980). On October 1, 1982, after 53 years of existence, the C.C.P.A. joined with the U.S. Court of Claims to become the U.S. Court of Appeals for the Federal Circuit (C.A.F.C.). Milde, *Life after Diamond v. Diehr: The CCPA Speaks Out on the Patentability of Computer-Related Subject Matter*, 64 J. PAT. OFF. SOC'Y 434, 434 (1982).

152. Gemignani, *Should Algorithms be Patentable?*, 22 JURIMETRICS J. 326, 334 (1982).

153. *Id.* at 335.

154. 564 F. Supp. 1358 (D. Del. 1983).

155. *Id.* at 1368.

156. A patent was issued for a system of computer programs for retrieving data and producing reports on stocks and bonds ten years after the application was made. The delay was due to the confusion on rules governing patent protection for computer programs. N.Y. Times, June 12, 1982, at 44, col. 1. In another case, an issue of statutory qualification was finally decided in favor of the claimant twelve years after his application was filed. *In Re Pardo*, 684 F.2d 912 (1982).

The essential thing to remember, when considering the viability of patenting a computer program, is that the program as a process must be entirely new. The flow chart designed must be entirely novel, and the overall process must be non-obvious.

## V. Conclusion

It is clear that computer programs constitute proprietary information deserving of legal protection. Until congressional action is taken, designating an all-encompassing form of protection to adequately safeguard software owners' rights, the public must rely upon the present systems. While the courts and legislature are slowly molding the law to accommodate our rapidly-changing, computer-permeated lifestyle, expertise is needed to determine which avenue best serves a client's needs. While the general legal practitioner should be familiar with the available means of protection for computer software, it is recommended that advice be sought from an experienced patent attorney who has dealt extensively with the subject matter.

New technological developments will undoubtedly uncover issues not conceived of only a short time ago. As a result, some important and exciting changes will be witnessed as software developers seek legal protection for their creativity, which is in ever-increasing demand.

*Batya Roth Inofuentes*

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## Florida Statutes Section 627.727: Is the Statutory Right to Reject Uninsured Motorist Coverage Really a "Right" At All?

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### I. Introduction

In 1961, Florida joined the ranks of the growing majority of states to mandate uninsured motorist coverage. This legislation resulted from consumer outcry over the numerous hardships befalling accident victims injured by uninsured motorists. The Florida uninsured motorist statute requires that an uninsured motorist endorsement be issued with all liability insurance policies for the protection of persons injured by financially irresponsible motorists.<sup>1</sup> The statute, now designated section 627.727, does afford the insured the right to reject the uninsured motorist coverage.<sup>2</sup> However, unless the insured knowingly rejects the uninsured motorist protection, the insurer is deemed to provide this coverage regardless of whether an extra premium is actually paid.<sup>3</sup>

Despite the obvious good intentions of this legislation, the Florida uninsured motorist statute has been beset with problems from its inception. In particular, the insureds' statutory right to reject has produced extensive litigation on the issue of what constitutes a valid rejection. In such cases, insurers generally claim that the insured has rejected the coverage. Policy holders, on the other hand, maintain that they were never offered this protection or never effectively rejected it. The statute provides no guidelines in this area whatsoever, and the courts have struggled to be just in deciding the continual flood of uninsured motorist cases.

The ability of this statute to protect consumers has been rendered highly questionable in light of certain practices of the insurance industry, the naivete of insureds, and the marked confusion in the Florida courts. Insurers do not favor uninsured motorist protection, as evi-

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1. FLA. STAT. § 627.727 (Supp. 1982). The uninsured motorist statute was originally enacted as section 627.0851, but, in 1970 was changed to the current section number. FLA. STAT. § 627.727 (Supp. 1970).

2. FLA. STAT. § 627.727 (Supp. 1982). *See* Appendix for entire text of the statute.

3. FLA. STAT. § 627.727 (Supp. 1982). *See, e.g.,* *Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1972).

denced by their use of policies slanted toward discouraging such coverage, their failure to adequately explain the protection, and their attempts to exclude or limit the coverage as much as possible. The frequently mistaken assumptions of insureds regarding the nature and scope of uninsured motorist coverage further compound the problem. As presently applied, the "right" of rejection is really no right at all, but merely a means utilized by the insurance industry to escape the mandatory inclusion of uninsured motorist coverage in auto liability policies. Florida courts have been reluctant to aggressively address these various problems, apparently preferring purely legislative reform. The latest legislative response was the Sunset Act of 1982 which amended Florida Statutes section 627.727 by requiring that the rejection of this coverage be in writing.<sup>4</sup> This requirement, however, is but one step toward clarifying the uncertainties surrounding the statutory right of rejection. The legislature and the courts of Florida must work together to develop standards and policies to effectuate the intent of this statute, and help rather than hinder those parties suffering from the negligence of financially irresponsible motorists.

This note examines the statutory development of uninsured motorist coverage in Florida and focuses specifically on various trouble spots concerning the statutory rejection. The purpose of this note is to demonstrate the seriousness of this situation and to offer specific guidelines to help clarify the vagueness of this subject.

## II. Origin of Uninsured Motorist Coverage

In the prosperity following World War II, the manufacture and sale of automobiles was considerably expanded. Not surprisingly, there was a rise in auto accidents contemporaneous with the increased number of vehicles on the nation's highways. Unfortunately, the innocent accident victim was often virtually without remedy where a tortfeasor neither carried insurance nor possessed sufficient assets to discharge his obligations arising from his tort liability.<sup>5</sup>

Although this problem became increasingly evident during the

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4. FLA. STAT. § 627.727(1) (Supp. 1982).

5. See generally 3 R. LONG, *THE LAW OF LIABILITY INSURANCE*, § 24.01-24.05 (revised ed. 1983); P. PRETZEL, *UNINSURED MOTORISTS* 1-5 (1972); 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 23.01 (revised ed. 1983); A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 3-17 (1970); Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUNCIL J. 57 (1967).



1940s and 1950s, it had nevertheless existed since the advent of the automobile many years earlier. The initial legislative response consisted of the enactment of financial responsibility laws.<sup>6</sup> These laws, enacted as early as 1925, typically required a motorist to establish proof of future financial responsibility following an auto accident or face revocation or suspension of his driving privileges.<sup>7</sup> The inadequacy of these laws soon became evident: they allowed the irresponsible motorist one "free" accident, and left the victim of the first accident without compensation. For the next thirty years, state legislatures attempted to formulate methods to resolve the inequities in the financial responsibility scheme. Various forms of insurance legislation engineered to compensate those injured by uninsured motorists proved unsatisfactory as the numbers of uninsured motorists escalated in the post World War II era. Increasing pressure was imposed upon state legislatures to implement further remedial measures.<sup>8</sup> Suggested solutions included compulsory insurance laws, unsatisfied judgment funds, and state-sponsored compensation funds. The insurance industry was vehemently opposed to such reforms and actively lobbied against them.<sup>9</sup> These pronounced efforts "to prevent 'further socialization of insurance' and government intervention" was most noticeable in the 1953-54 debates in the New York legislature.<sup>10</sup>

By 1954, the New York legislature had gained recognition as the nation's focal point on the financially irresponsible motorist problem. The insurance industry feared the precedential effect New York's resolution might have on the rest of the country and for almost a year succeeded in stymieing the passage of a compensatory automobile insurance program. Nevertheless, the industry was undoubtedly aware that this was not a problem that would bury itself and that compulsory automobile insurance might soon become a reality. Thus, after a year-long deadlock in the legislature, the insurance industry introduced a new endorsement to the standard auto liability policy.<sup>11</sup> Through the proposed endorsement offered on an optional basis, insureds would be

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6. See *supra* note 5.

7. *Id.* Connecticut was the first state to enact such a law. 1925 Conn. Pub. Acts ch. 183 (repealed 1927). New Hampshire followed this lead and passed a similar law one year later. 1926 N.H. Laws ch. 54.1.

8. See *supra* note 5.

9. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 11 (1970).

10. 3 R. LONG, THE LAW OF LIABILITY INSURANCE, § 24.04 at 24-7 (revised ed. 1983).

11. See *supra* note 9, at 12, 13.

indemnified for losses perpetrated by uninsured motorists. If an insured was without fault and injured he would be compensated when the tortfeasor was either uninsured, underinsured, or a hit-and-run driver.<sup>12</sup> The majority of states adopted this form of coverage although, only two years following these debates, New York enacted a compulsory insurance requirement.<sup>13</sup> In subsequent years, the National Bureau of Casualty Underwriters made this coverage, commonly known as Uninsured Motorist Coverage or Family Protection Insurance, available throughout the United States.<sup>14</sup> State legislation has made the coverage mandatory in almost all jurisdictions, but often the insured is granted the statutory option to reject the coverage.<sup>15</sup>

In light of the significant amount of litigation in this area, the fact that the insurance industry itself created and promoted this type of uninsured motorist coverage should be kept in mind.<sup>16</sup> The insurance industry was wary that consumer-backed legislation might adversely affect its prosperity, and thus devised this new coverage to appease the appetites of concerned legislatures. Over the years it has become apparent that uninsured motorist protection has neither gained favor nor been encouraged by the industry and insurers continually attempt to deny or curtail this coverage through manipulation of statutory vagueness. The problems that this statutory vagueness has spawned are illustrated in the remainder of this note. The Florida legislature's response is examined in the following section.

### III. Florida Legislative History

Case law has served to flesh out the ambiguities and inadequacies that have appeared and often reappear in the amendments to the uninsured motorist statute. The Florida legislature has responded by taking a piecemeal approach in trying to remedy the various controversies as they arise. The legislature has complacently withheld pronouncement on those uninsured motorist issues receiving attention in the courts until a legislative response is absolutely imperative. This section explores the substantive legislative amendments affecting uninsured motorist coverage and illustrates the legislature's somewhat tedious, step-by-step

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12. 12-A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45:620 (2d ed. 1981).

13. A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 14 (1970).

14. *Id.* at 14, 15.

15. *Id.* at 127-129.

16. *Id.* at 16, 17.

approach in developing answers to uninsured motorist problems.

In 1961, Florida Statutes section 627.0851 introduced uninsured motorist coverage in Florida by providing that no automobile liability insurance would be delivered or issued for delivery in Florida unless coverage was "provided therein or supplemental thereto, in not less than the limits described in section 324.021(7) . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles."<sup>17</sup> The statute also provided that this required coverage would be inapplicable if any insured named in the policy rejected the coverage.<sup>18</sup> The 1961 law, less than one-half the length of the present statute, left many areas of uninsured motorist coverage statutorily undefined. Although the statute granted the insured the right to reject the protection, it was silent as to the elements and form of the rejection. Furthermore, the statute contained no provisions regarding the available amounts of coverage in excess over the statutory minimum or the applicability of the coverage requirements to renewal policies. In the years to follow legislative amendments focused on these areas.

In 1963, Florida Statutes section 627.0851 was amended to further provide that, absent a written request by the insured, uninsured motorist protection need not be provided in or made supplemental to a renewal policy if the named insured had previously rejected the coverage in an earlier policy issued by the same insurer.<sup>19</sup> Thereafter, a steady increase in litigation concerning uninsured motorist coverage renewal policies resulted, peaking in the late 1970s and early 1980s.<sup>20</sup>

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17. FLA. STAT. § 627.0851 (1961). This act was effective July 1, 1961. Florida Statutes section 324.021(7) referred to in the statute is the Florida Financial Responsibility Law. In 1961, it required proof of financial responsibility in the amount of \$10,000 for bodily injury or death to one person, \$20,000 for the injury or death of two or more persons, and \$5,000 for injury to or destruction of property to others.

18. FLA. STAT. § 627.0851(1) (1961).

19. 1963 Fla. Laws ch. 63-148.

20. The conflict involving renewal policies arose when the insured added a vehicle or replaced or substituted a vehicle. A new rejection was not required unless there was a material change in the policy. However, courts often found that changes constituted material differences making a new rejection necessary. *See, e.g., Hartford Accident & Indem. co. v. Sheffield*, 375 So. 2d 598 (Fla. 3d Dist. Ct. App. 1979). In *Hartford*, the insurer issued the insured a liability policy with the minimum limits, at which time she executed a written rejection of uninsured motorist coverage. Near the end of the policy period the insured complained of high premiums. The insurer responded by offering to change the policy limits due to the legislature's intervening amendment lowering the minimum limits. The insured executed a policy change request and was is-

The confusion arose because the district courts were not uniform in their determinations of what constituted a renewal policy. The 1980 amendment halted the extensive litigation on this subject by expanding this exception to encompass any policy that extends, changes, supercedes, or replaces any existing policy.<sup>21</sup>

sued a second policy without being offered, or rejecting, the uninsured motorist protection. Subsequently, the insured was injured and the issue arose as to whether the second policy was a renewal or a new policy. The court relied on *United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672 (Fla. 4th Dist. Ct. App. 1977), in holding that it was not a renewal policy because of differences in premium and coverage. The *Van Iderstyne* court had held that an endorsement to a policy adding an automobile for an additional premium was a "separate and severable contract" requiring a new offering of uninsured motorist coverage. *Id.* at 673. *Cf.* *State Farm Mut. Auto. Ins. Co. v. Glover*, 202 So. 2d 106 (Fla. 4th Dist. Ct. App. 1967). Thus *Hartford* established the test that "if the original policy has been changed in any material respect then the policy is new rather than a renewal." *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367, 371 (Fla. 4th Dist. Ct. App. 1981) (quoting *Hartford Accident & Indem. Co. v. Sheffield*, 375 So. 2d 598 (Fla. 3d Dist. Ct. App. 1979)). In situations involving replacements or substitutions of vehicles the trend was to follow *State Farm Mut. Auto. Ins. Co. v. Bergman*, 387 So. 2d 494 (Fla. 5th Dist. Ct. App. 1980), *petition for rev. denied*, 394 So. 2d 1151 (Fla. 1981), *per curiam aff'd*, 408 So. 2d 1043 (Fla. 1982), which held that once an insured rejected full coverage under the uninsured motorist portion of a policy he need not reject such coverage again when he buys a replacement vehicle. *See United States Fidelity and Guar. Co. v. Waln*, 395 So. 2d 1211 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 407 So. 2d 1106 (Fla. 1981); *Kenilworth Ins. Co. v. McCormick*, 394 So. 2d 1037, 1039 (Fla. 1st Dist. Ct. App. 1981). Applying the *Hartford* test, such a policy change was not considered material and the policy was merely a "renewal" rather than a "new" policy. *Waln*, 395 So. 2d at 1214.

The results were not as consistent in cases involving additions of vehicles. There was a divergence of authority between the Fourth District and the other districts. The Fourth District Court of Appeal relied on *Van Iderstyne*, *Hartford*, and *Waln*, and held that an addition of automobiles with a commensurate increase in premiums constituted a material change and therefore was outside the renewal exception of the statute. *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367, 370-371 (Fla. 4th Dist. Ct. App. 1981), *modified*, 8 Fla. L. W. 479 (Dec. 9, 1983) (No. 62,267). *See also* *Kobert v. Zarem*, 437 So. 2d 730 (4th Dist. Ct. App. 1983). The First District rejected *Van Iderstyne* and held that the addition of a vehicle by endorsement is not the issuance of a new policy. *Maxwell v. United States Fidelity & Guar. Co.*, 399 So. 2d 1051, 1053 (Fla. 1st Dist. Ct. App. 1981). The Fifth District followed *Maxwell* in *Sentry Ins. A Mut. Co. v. McGowan*, 425 So. 2d 98 (Fla. 5th Dist. Ct. App. 1982). *See also* *Rhodes v. Aetna Casualty & Sur. Co.*, 437 So. 2d 155 (Fla. 2d Dist. Ct. App. 1983); *Cote v. American Fire & Casualty Co.*, 433 So. 2d 590 (Fla. 2d Dist. Ct. App. 1983).

21. 1980 Fla. Laws ch. 80-396. *See* House Comm. on Insurance, Bill Analysis on Uninsured Motorists Coverage, House Bill 1175 (sponsored by Rep. Gallagher) (April 17, 1980); stating that once enacted, this amendment would effectively overrule

It was not until ten years after the enactment of the original statute that a provision specifying maximum coverage limits was added. Unfortunately, the language adopted by the legislature was susceptible to two interpretations regarding the actual amounts of the limits. Consequently, the courts had to wrestle with yet another ambiguity in the statute.<sup>22</sup> This 1971 amendment required minimum coverage in an amount that was set forth in the financial responsibility law and also required coverage be provided "in an amount up to one hundred percent (100%) of the liability insurance purchased by the named insured for bodily injury."<sup>23</sup> Thus, the required limits were raised to 100% of the bodily injury limits and the named insured could reject the entire coverage or a portion thereof. Furthermore, the amendment provided that a long term lessee who is named insured in a policy or on a certificate of a master policy issued to the lessor shall have the sole right to

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*Hartford.*

22. 1971 Fla. Laws ch. 71-88 stated in part:

No automobile liability insurance . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto, in not less than limits described in 324.021(7), and in amount up to one hundred percent (100%) of the liability insurance purchased by the named insured for bodily injury. . . .

After the 1971 Act went into effect, courts found the new coverage requirements ambiguous as to the amount of coverage an insured was actually entitled to unless rejected. The problem was in determining the meaning of the phrase "in an amount up to." In *Garcia v. Allstate Ins. Co.*, 327 So. 2d 784, 786 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977), the court interpreted these terms as providing a minimum (the financial responsibility limits) and a maximum (the bodily injury limits). However, the majority of courts in construing the statute as a whole, held that it provided uninsured motorist coverage *equal* to the bodily injury limits absent an offer or rejection. *First State Ins. Co. v. Stubbs*, 418 So. 2d 1114 (Fla. 4th Dist. Ct. App. 1982), *petition for rev. denied*, 426 So. 2d 26, 29 (Fla. 1983); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978); *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978); *Allstate Ins. Co. v. Baer*, 334 So. 2d 135 (Fla. 3d Dist. Ct. App. 1976). To construe the amendment otherwise, noted Judge Anstead concurring in *Lumbermen's*, would create no change in the statute "other than to impose a limitation on the amount of such insurance that could be written." *Lumbermen's*, 355 So. 2d at 445. Furthermore, this interpretation would "be completely contrary to the legislature's action in requiring uninsured motorist coverage in all policies written in Florida and would pose serious constitutional questions." *Id.* Arguably, in retrospect this interpretation was correct: the 1973 amendment clarified the coverage requirements which conform to the holdings of the majority.

23. 1971 Fla. Laws ch. 71-88.

reject the uninsured motorist coverage.<sup>24</sup>

Two years later, the legislature amended the coverage requirements; obviously in response to the frustration courts were experiencing in interpreting the meaning of the coverage requirements as set forth in the 1971 statute. Under the 1973 statute the language was simplified; the amendment required coverage not less than the limits of the liability insurance purchased and also provided that the named insured could select lower limits.<sup>25</sup>

Many uninsured motorist statutes contain provisions for the purchase of optional uninsured motorist coverages which are in excess of the standard limits. In 1976, Florida adopted such a provision. Prior to the amendment, the insurer had to offer uninsured motorist coverage at least equal to the bodily injury limits. Effective October 1, 1976, the insurer was required to make available "limits up to \$100,000. each person, \$300,000. each occurrence, irrespective of the limits of the bodily injury liability purchased"<sup>26</sup> at the written request of the insured.

24. 1971 Fla. Laws ch. 71-88 states in part:

where a vehicle is leased for a period of one (1) year or longer and the lessor of such vehicle by the terms of the lease contract provides liability coverage on the leased vehicle in a policy wherein the lessee is a named insured or on a certificate of a master policy issued to the lessor, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist's coverage. . . .

*See Padron v. H.W.G. Leasing, Inc.*, 436 So. 2d 983 (Fla. 3d Dist. Ct. App. 1983); *Liberty Mut. Ins. Co. v. Dwyer*, 421 So. 2d 587 (Fla. 3d Dist. Ct. App. 1982), *petition for rev. denied*, 431 So. 2d 989 (Fla. 1983); *Midland Ins. Co. v. Hochberg*, 394 So. 2d 449 (Fla. 3d Dist. Ct. App. 1981), *petition for rev. denied*, 402 So. 2d 611 (Fla. 1981).

The 1971 statute limited "uninsured motorist and insolvent insurers coverage to the excess over and not duplicative of benefits available from those liable for the accident, auto liability, or medical coverage, or from workers compensation." Staff of Senate Comm. on Insurance, Staff Analysis on Automobile Liability Insurance; Senate Bill 225, companion to House Bill 276, (sponsored by Sen. Thomas). *See also* 1971 Fla. Laws ch. 71-88.

25. 1973 Fla. Laws ch. 73-180. The statute was not retroactive. *Allstate Ins. Co. v. Baer*, 334 So. 2d 135 (Fla. 3d Dist. Ct. App. 1976).

26. 1976 Fla. Laws ch. 76-266 read:

(2) The limits of uninsured motorist coverage shall not be less than the limits of bodily injury liability insurance purchased by the named insured or such lower limit complying with the company's rating plan as may be selected by the named insured, but in any event, the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the company's rating plan.

From the time of the passage of the 1963 amendment creating the renewal exception to the mandatory coverage requirement until 1980, the courts attempted to decipher the difference between a new and a renewal policy. The results during this seven-year period were highly inconsistent. Apparently, the legislature concluded that this matter could not be resolved in the courts and thus included in the 1980 amendment a provision which by its very terms served to clarify the legislative intent as to the treatment of renewal policies. Prior to this amendment, coverage need not have been provided in or supplemental to a renewal policy. This act further extended this exception to apply to "any other policy which extends, changes, supersedes, or replaces an existing policy issued to him by the same insurer."<sup>27</sup> Furthermore, effective October 1, 1980, the insurer was required to notify the named insured annually of his options as to the statutorily required coverage. Notice was to be part of the premium and "shall provide for a means to allow the insured to request such coverage and shall be given in a manner approved by the Department of Insurance."<sup>28</sup>

The most recent legislation on uninsured motorist coverage was the Sunset Act of 1982.<sup>29</sup> Three substantive changes affecting Florida Statutes section 627.727 were made. Most importantly, this amendment introduced the requirement that rejections of uninsured motorist coverage must be in writing.<sup>30</sup> This provision is another legislative re-

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27. 1980 Fla. Laws ch. 80-396. For a discussion on the case law development which led to the passage of this amendment see *supra* note 20.

28. 1980 Fla. Laws ch. 80-396. See *Ferrigno v. Progressive Am. Ins. Co.*, 426 So. 2d 1218 (Fla. 4th Dist. Ct. App. 1983).

29. 1982 Fla. Laws ch. 82-243.

30. *Id.* at 627.727(1). The requirement of a written rejection of uninsured motorist coverage is clearly in response to the extensive litigation concerning whether an oral or written rejection was required. In 1978, the First District, in *Glover v. Aetna Ins. Co.*, 363 So. 2d 12 (Fla. 1st Dist. Ct. App. 1978), held that an oral rejection of uninsured motorist coverage was sufficient due to the absence of any statutory requirements as to its specific form. The court noted that although the State Insurance Department had issued Bulletin 586 requiring a written rejection, this regulation was not effective when the policy in *Glover* had been written. On the Federal court level, the Fifth Circuit Court, in *Harris v. United States Fidelity & Guar. Co.*, 569 F.2d 850 (5th Cir. 1978), had previously upheld the regulation but the *Glover* court noted that no state court had yet considered its validity. *Glover*, 363 So. 2d at 13. Following *Glover* and *Harris* there was a wide split of authority on this issue. A number of courts elected to mandate a written requirement. See *Decker v. Great Am. Ins. Co.*, 392 So. 2d 965, 966 (Fla. 2d Dist. Ct. App. 1980), *petition for rev. denied*, 399 So. 2d 1143 (Fla. 1981); *Cohen v. American Home Assurance Co.*, 367 So. 2d 677 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 342 (Fla. 1979); *American Motorist Ins. Co. v. Wein-*

sponse to an ambiguity in the statute. For several years preceding this amendment courts throughout the state were divided on the issue of whether an oral rejection was statutorily sufficient. The amendment also expanded upon the notice requirements originally set forth in the 1980 amendment and further required that the insurer annually notify the insured of the availability of uninsured motorist coverage and the new excess coverage. Additionally, the Act created a new coverage referred to as "Excess Underinsured Motorist Coverage."<sup>31</sup> As long as the insured has damages to justify recovery, he may collect the entire amount of his excess underinsured coverage in addition to, but not reduced by, the other party's liability coverage. This coverage is a type of uninsured motorist coverage but is not to be construed as uninsured motorist coverage on excess policies. Lastly, the Act extended the period offering protection against the insolvency of the liability insurer from one year to four years to conform with the statute of limitations for negligence.<sup>32</sup>

#### IV. Practices Which Frustrate the Statutory Purpose

Pursuant to Florida Statutes section 627.727, uninsured motorist coverage is included in every auto liability policy unless it is specifically rejected in clear terms by an insured named in the policy.<sup>33</sup> However,

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garten, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978). Other courts did not require a written rejection where the absence of coverage was not disputed by the insurance carrier and the contracting insured. *See Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d 115 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. dismissed*, 407 So. 2d 1105 (Fla. 1981); *Liberty Mut. Ins. Co. v. Wright*, 406 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 413 So. 2d 877 (Fla. 1982). Many courts followed the lead of *Glover*. *See Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086, 1088 (Fla. 1982), *aff'd*, 428 So. 2d 254 (Fla. 1982); *Lane v. Waste Management Inc.*, 432 So. 2d 70 (Fla. 4th Dist. Ct. App. 1983); *Richmond v. Liberty Mut. Ins. Co.*, 420 So. 2d 360 (Fla. 5th Dist. Ct. App. 1982), *petition for rev. denied*, 426 So. 2d 28 (Fla. 1983); *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981). It is relevant to note that in *Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d at 115, the court stated that if there was a "statutory or other administratively imposed obligation to secure a written rejection, certainly the named insured can waive this requirement which was designed for its protection. Statutory rights can be waived." *Id.* at 116.

31. 1982 Fla. Laws ch. 82-243 at 627.727(4).

32. *Id.* at 627.727(2).

33. FLA. STAT. § 627.727 (Supp. 1982). *See Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1972). This rule applies to excess or umbrella poli-



aside from requiring the rejection to be in writing, the statute provides no guidelines for determining what is a valid waiver or rejection of this coverage. Based on judicial interpretation, a rejection by a named insured must be knowingly made to meet the requirements of the statute.<sup>34</sup> As evidenced by the abundant and confusing case law on the issue of these rejections, the courts are unable to consistently discern what exactly is a statutorily valid rejection. Absent additional clarification, the issue as to what constitutes an informed or knowing rejection is hopelessly unclear.

### A. Elements of a Knowing Waiver

In uninsured motorist cases, the statutory rejection of uninsured motorist coverage is also referred to as a waiver of such coverage. A waiver is comprised of certain basic elements. The traditional definition of a waiver is "the intentional or voluntary relinquishment of a known right."<sup>35</sup> Therefore, one waiving a right must do so on his own accord, in the exercise of free choice, and with knowledge of the nature of the waived privilege. Consequently, the validity of the waiver or rejection necessarily relates to the content and the adequacy of the offer. "There can be no informed rejection in the absence of an informing offer."<sup>36</sup> If an insured "selects" lower limits of uninsured motorist coverage be-

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cies as well. *See* *Sirantoine v. Illinois Employers Ins. of Wausau*, 438 So. 2d 985 (Fla. 3d Dist. Ct. App. 1983); *Chicago Ins. Co. v. Dominguez*, 420 So. 2d 882 (Fla. 2d Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 450 (Fla. 1983); *American Motorists v. Bennett*, 415 So. 2d 897 (Fla. 3d Dist. Ct. App. 1982); *Aetna Casualty & Sur. v. Fulton*, 362 So. 2d 364 (Fla. 4th Dist. Ct. App. 1978); *Aetna Casualty & Sur. Co. v. Green*, 327 So. 2d 65 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 336 So. 2d 1179 (Fla. 1976).

34. FLA. STAT. § 627.727 (Supp. 1982). Judicial interpretation of the statutory rejection requires it to be informed or knowingly made. *See* *Government Employees Ins. Co. v. Mitchell*, 433 So. 2d 579 (Fla. 5th Dist. Ct. App. 1983); *Realin v. State Farm & Casualty*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982); *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d 367 (Fla. 4th Dist. Ct. App. 1981); *Brown v. American Motorists Ins. Co.*, 368 So. 2d 597 (Fla. 1st Dist. Ct. App. 1978), *cert. denied*, 368 So. 2d 1363 (Fla. 1979); *Wilson v. National Indem. Co.*, 302 So. 2d 141 (Fla. 1st Dist. Ct. App. 1974).

Generally, a knowing rejection is a factual issue for the jury. *Petrou v. South Carolina Ins. Co.*, 435 So. 2d 316 (Fla. 4th Dist. Ct. App. 1983).

35. BLACK'S LAW DICTIONARY 1751 (4th ed. 1968).

36. *Spaulding v. American Fire & Indem. Co.*, 412 So. 2d at 371, *quoted in* *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d at 432; *Lustig v. Colonial Penn Ins. Co.*, 406 So. 2d 543, 544 (Fla. 4th Dist. Ct. App. 1982).

cause the insurer failed to offer a higher amount equal to the liability coverage and the insurer concedes it would not write the policy for the higher amount even if requested, it can not be said that the rejection was voluntary.<sup>37</sup> In these situations, the insured is not only uninformed but is also deprived of his freedom of choice and is forced to accept the policy on the insurer's terms or have no coverage at all. Thus, "take it or leave it" offers by insurers cannot be met with statutory valid rejections by insureds.<sup>38</sup> Likewise, if the insurer furnishes the insured with false information as to the nature of the coverage, the purported rejection is ineffective.<sup>39</sup>

## B. Failure of Insurer to Explain Coverage

A large percentage of laypersons applying for auto liability insurance have very little or no knowledge as to the nature and importance of uninsured motorist protection. To many insureds, this vague and uncertain coverage simply means payment of an extra premium. Absent a full and adequate oral or written explanation by the insurer, the insured too often blindly rejects this valuable and relatively inexpensive coverage.<sup>40</sup>

The Florida courts have been reluctant to respond to this problem. In *Lopez v. Midwest Mutual Insurance Co.*,<sup>41</sup> a fifteen year old minor sued to rescind a written rejection of uninsured motorist coverage executed by him as part of an insurance application. The plaintiff claimed that the rejection was ineffective because he did not understand the coverage involved, and because it was not explained to him. The waiver provision in the application did not contain language which defined or apprised the insured of the protection he was waiving, but was merely a

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37. *Aetna Casualty & Sur. Co. v. Fulton*, 362 So. 2d at 364.

38. *Id.* at 365.

39. *Wilson v. National Indem. Co.*, 302 So. 2d at 141.

40. Frequently uninsured motorist waiver provisions are short statements on the insurer's form reciting the relevant portion of the uninsured motorist statute requiring this protection unless rejected. The voluminous case law on this issue indicates the widespread confusion present in the judiciary in interpreting the statutory language. Arguably it is unreasonable to expect an ordinary insured to adequately understand this legislation and its extensive ramifications based on this technically formal language found in most applications.

41. *Lopez v. Midwest Mut. Ins. Co.*, 223 So. 2d 550 (Fla. 3d Dist. Ct. App. 1969).

single statement of rejection.<sup>42</sup> The Third District Court of Appeal ruled in favor of the insurance company, stating that "the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation."<sup>43</sup>

Other states have responded to this situation by either judicially or statutorily adopting certain objective standards to ensure a more knowing rejection. For example, some courts have held that the rejection should contain a definition of uninsured motorist coverage which will "clearly and specifically apprise the insured of the nature of the right he is relinquishing"<sup>44</sup> in plain terms understandable to the layperson. A single line on the carrier's form was held insufficient on its face to fulfill the requirement of a valid rejection.<sup>45</sup> Other courts simply require the rejection to expressly refer to the concept of uninsured motorist protection.<sup>46</sup> The judicial rulings most effective to protect the insured are those which require the insurer to orally explain the coverage and record the substance of the conversation as evidence.<sup>47</sup>

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42. A block near the bottom of the application stated: "UNINSURED MOTORIST COVERAGE: MUST BE INCLUDED WITH LIABILITY OR PACKAGE POLICY AT ADDITIONAL PREMIUM OF \$10.00, UNLESS REJECTED." The applicant was to sign for the total premium. Above the line for signature were the words: "IN APPLYING FOR THIS INSURANCE I SPECIFICALLY REJECT INSURED MOTORIST COVERAGE, UNLESS INCLUDED IN THE PREMIUM ABOVE." *Id.* at 551.

43. *Id.* at 552. The *Lopez* rule has been followed in a number of other cases. *See* *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982); *General Accident Fire & Life Assurance Ltd. Corp. v. MacKenzie*, 410 So. 2d 558 (Fla. 4th Dist. Ct. App. 1982), *petition for rev. denied*, 419 So. 2d 1197 (Fla. 1982); *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855 (Fla. 3d Dist. Ct. App. 1982); *Alejano v. Hartford Accident & Indem. Co.*, 378 So. 2d 104 (Fla. 3d Dist. Ct. App. 1979); *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d 634, 638 (Fla. 2d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 351 (Fla. 1979).

44. *Dufresne v. Elite Ins. Co.*, 26 Cal. App. 3d 916, 924, 103 Cal. Rptr. 347, 352 (1972). *See* *Bohlert v. Spartan Ins. Co.*, 3 Cal. App. 3d 113, 83 Cal. Rptr. 515 (1969); *Johnson v. Concord Mut. Ins. Co.*, 450 Pa. 614, 300 A.2d 61, 65 (1973). For similar statutory requirements, *see* CAL. INS. CODE § 11580.2(a)(2) (Deering Supp. 1983); DEL. CODE ANN. tit. 18, § 3902(a) (Supp. 1982); IOWA CODE ANN. § 516A.1 (West Supp. 1983); MICH. COMP. LAWS ANN. § 500.3010 (repealed October 1, 1973 by no fault law).

45. *Johnson v. Concord Mut. Ins. Co.*, 300 A.2d at 61.

46. *Aldcroft v. Fidelity & Casualty of New York*, 106 R.I. 311, 259 A.2d 408 (1969).

47. *See* *Dufresne v. Elite Ins. Co.*, 26 Cal. App. 3d 916, 103 Cal. Rptr. 347 (1972); *Hagar v. Elite Ins. Co.*, 22 Cal. App. 3d 505, 99 Cal. Rptr. 423 (1971). *See also* *Johnson v. Concord Mut. Ins. Co.*, 300 A.2d 61 (1973).

The Florida courts have not implemented any rule requiring an insurer to explain this coverage and the *Lopez* holding is still followed.<sup>48</sup> Furthermore, the present statute imposes a duty on the insurer only to inform the insured of his statutory options regarding the amount of uninsured motorist coverage.<sup>49</sup>

### C. Mistaken Assumptions, Slanted Policies, and Exclusions

While providing an element of choice, the statutory opportunity to reject uninsured motorist coverage simultaneously fosters many potential pitfalls for the insurance applicant. For example, insureds are often under the mistaken impression that an insurance broker is an agent of the insurance company. The general rule is that an insurance broker is the agent of the insured rather than the insurer even though the broker receives compensation out of the premium from the insurer.<sup>50</sup> Thus, even if the broker improperly rejects coverage<sup>51</sup> or selects lower limits in signing for the insurance,<sup>52</sup> the insured is still bound by the rejection regardless of whether the signature was authorized.

Another trap for insureds may lie in the policy application itself. Frequently, insurance applications are slanted to discourage the purchase of uninsured motorist coverage or to limit its scope by exclusions.<sup>53</sup> A common method used is to describe the coverage as "additional" insurance requiring an "additional" premium. In *Lopez*,<sup>54</sup> the

48. See *supra* note 43.

49. FLA. STAT. § 627.727 (Supp. 1982). *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981). If the insured has contracted for insurance in amounts less than the highest limits available, it must be shown that he was offered the higher limits in order for him to have effectively rejected them. *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982). "The application, by itself, is not evidence that the higher limits were offered." *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169, 1170 (Fla. 5th Dist. Ct. App. 1982); *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978). But see *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978).

50. *Empire Fire & Marine Ins. Co. v. Koven*, 402 So. 2d 1352 (Fla. 4th Dist. Ct. App. 1981); *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d 634 (Fla. 2d Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 351 (Fla. 1979).

51. *Empire Fire & Marine Ins. Co. v. Koven*, 402 So. 2d at 1352.

52. *Auto Owner's Ins. Co. v. Yates*, 368 So. 2d at 634.

53. 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(3) at 23-12, 23-13 (revised ed. 1983).

54. *Lopez v. Midwest Mut. Ins. Co.*, 223 So. 2d 550 (Fla. 3d Dist. Ct. App. 1969).

application in issue contained several boxes which could be checked by the applicant to select the coverages desired. An additional block at the bottom of the application had to be checked if uninsured motorist coverage was requested. Furthermore, the insured himself was required to add the additional premium for the uninsured motorist coverage to the package policy applied for.<sup>55</sup>

The Third District Court of Appeal acknowledged that these provisions encouraged the applicant to order insurance without the uninsured motorist coverage and that the provisions demonstrated to the applicant that he would pay less by rejecting the coverage. The *Lopez* court stated that the provisions would better effectuate the purpose of the statute if the premium and the uninsured motorist coverage were added automatically (unless a rejection were made), but upheld the rejection in the absence of statutory language requiring such provisions.<sup>56</sup> The court commented that regulation of insurance companies, including the establishment of requirements concerning the provisions of insurance applications, is not primarily a concern of the judicial branch of government.<sup>57</sup> The court's attitude in *Lopez* is typical of the unwillingness of the judiciary to become involved in devising regulations and standards that might better protect the insured and effectuate the purpose of the statute.

This judicial reluctance was also evident in the more recent case of *Daly v. Industrial Fire & Casualty Insurance Co.*<sup>58</sup> In *Daly*, the insurer's standard underwriting practice was to prepare a form for the applicant's signature, on which form the uninsured motorist coverage was already rejected. This was done prior to any discussion with the applicant and required him "to reject the rejection"<sup>59</sup> if this coverage was desired. The Fourth District Court of Appeal upheld the rejection but stated that this practice violated the intent of the statute and appealed to the Department of Insurance and the legislature for attention to this matter.<sup>60</sup> A response to these situations from such agencies is certainly warranted. In the interim, the courts should hold similar prac-

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Daly v. Industrial Fire & Casualty Ins. Co.*, 422 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1982). For another example of a "less than above board technique" used by the insurer, see *Realin v. State Farm Fire & Casualty Co.*, 418 So. 2d 431 (Fla. 3d Dist. Ct. App. 1982).

59. *Daly*, 422 So. 2d at 1094.

60. *Id.*

tices and provisions void as contrary to public policy and the intent of the statute.

Insurance policies often attempt to exclude from uninsured motorist coverage certain individuals<sup>61</sup> and vehicles.<sup>62</sup> The exclusions are often couched in fine print and ambiguous language. In these cases, courts should not read them as to exclude coverage. The purpose of the statute is to protect persons injured by uninsured motorists who are unable to make the injured party whole.<sup>63</sup> The protection is designed for the injured or damaged person and not for the benefit of insurance companies or negligent motorists.<sup>64</sup> In light of this purpose, courts must avoid a construction of the statute which would defeat coverage.<sup>65</sup> Furthermore, they must liberally construe policies in favor of the policyholder, and strictly construe them against the insurer.<sup>66</sup>

## V. "Full Coverage"

Another serious problem occurs when the insured claims he requested "full coverage."<sup>67</sup> To most insureds, "full coverage" means un-

61. *Salas v. Liberty Mut. Ins. Co.*, 272 So. 2d 1 (Fla. 1972); *Mullis v. State Farm Mutual Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971); *Liberty Mut. Ins. Co. v. Marino*, 370 So. 2d 397 (Fla. 3d Dist. Ct. App. 1979); *Forbes v. Allstate Ins. Co.*, 210 So. 2d 244 (Fla. 3d Dist. Ct. App. 1968); *First Nat'l. Ins. Co. of America v. Devine*, 211 So. 2d 587 (Fla. 2d Dist. Ct. App. 1968).

62. *Progressive Am. Ins. Co. v. Glenn*, 428 So. 2d 367 (Fla. 3d Dist. Ct. App. 1983); *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981); *Hartford Accident & Indem. Co. v. Mason*, 210 So. 2d 474 (Fla. 3d Dist. Ct. App. 1968).

63. *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d 429 (Fla. 1971).

64. *Id.* at 430.

65. *First National Ins. Co. of Am. v. Devine*, 211 So. 2d 587 (Fla. 2d Dist. Ct. App. 1968).

66. *Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567 (Fla. 1975); *National Merchandise Co. Inc., v. United Service Auto Ass'n*, 400 So. 2d 526, 530 (Fla. 1st Dist. Ct. App. 1981); *Zautner v. Liberty Mut. Ins. Co.*, 382 So. 2d 106, 107 (Fla. 3d Dist. Ct. App. 1980); *Quick v. National Indem. Co.*, 231 So. 2d 22 (Fla. 4th Dist. Ct. App. 1970).

67. *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855 (Fla. 3d Dist. Ct. App. 1981); *MacKenzie v. Avis Rent-a-Car Systems Inc.*, 369 So. 2d 647 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 379 So. 2d 202 (Fla. 1979), *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978); *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978); *United States Fidelity & Guar. Co. v. Darden*, 338 So. 2d 37 (Fla. 3d Dist. Ct. App. 1976), *cert. dismissed*, 353 So. 2d 680 (1977), *Garcia v. Allstate Ins. Co.*, 327

insured motorist coverage in an amount at least equal to the liability coverage. However, cases indicate that when the insured requests full coverage, the insurer often omits the uninsured motorist coverage from the policy. An insured's mistaken belief that he has this coverage is sometimes reinforced by a coincidental increase in the policy premium. Generally, the insured is ignorant of the fact that he is not covered because when he signs the contract for coverage he is often unaware that he is also rejecting the uninsured motorist coverage.<sup>68</sup>

The law is unsettled on the question of whether a request for full coverage will render the insurer liable for the optional uninsured or underinsured coverages. A Kentucky court of appeal has held that a request for full coverage did not require the insurer to provide the optional coverages.<sup>69</sup> The Kentucky uninsured motorist statute, like the Florida statute, only required the insurer to provide the additional coverage when requested by the insured. The court held that the request lacked specificity since there were numerous types of optional coverages available such as fire, theft, or towing.<sup>70</sup> Nevertheless, this case has been strongly criticized because the court failed to distinguish a request for the aforementioned peripheral optional coverages, which lack the public policy interest in encouraging their purchase, from a request for optional uninsured motorist coverages included in the statutory financial responsibility scheme.<sup>71</sup> A request for the former unrelated coverages would not obligate the insurer to furnish them.<sup>72</sup> However, as one commentator has stated, public policy concerns would support a finding that a request for full coverage would require the inclusion of the optional uninsured and underinsured coverages.<sup>73</sup>

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So. 2d 784 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977).

68. See, e.g., *General Ins. Co. of Florida v. Sutton*, 396 So. 2d 855. Such a situation also raises the issue of the applicant's duty to read. Generally, "an applicant may not contest his signed rejection of coverage by contending that he signed the rejection without reading it." *Id.* at 856. See also *Barnes v. Mangham*, 153 Ga. App. 540, 265 S.E.2d 867 (1980). Arguably, in many cases the insurer never offered the coverage and thus the applicant's failure to read the application or policy and discover the absence of the coverage is immaterial. Additionally, certain waiver provisions are not adequate to apprise the insured of the nature of the coverage and thus the insured cannot knowingly reject the protection.

69. *Flowers v. Wells*, 682 S.W.2d 179 (Ky. App. 1980).

70. *Id.* at 180, 181.

71. 2. I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(2) at 23-21. (revised ed. 1983).

72. *Id.*

73. *Id.* Cf. *Parker v. Amica Mut. Ins. Co.*, 395 A.2d 507, 510 (N.H. 1978).

The interpretation of "full coverage" was an issue presented in *Riccio v. Allstate Insurance Co.*; <sup>74</sup> the Florida Third District Court of Appeal reversed a directed verdict in favor of the plaintiff's insurer in an action for a declaratory decree. The court held that a jury question was presented as to whether the insurer's undertaking to give the insured full coverage included an obligation to provide uninsured motorist coverage. However, in dictum, the court stated that pursuant to the 1972 statute that required uninsured motorist coverage in an amount up to 100% of the liability insurance, full coverage would mean uninsured motorist coverage equal to the liability limits. <sup>75</sup>

In the recent case of *Miller v. Liberty Mutual Ins. Co.*, <sup>76</sup> the plaintiff's employer had instructed its insurer to "fully cover" the leased vehicles which the employees used in their business. Following the accident, the total amount of uninsured motorist' coverage was determined to be only \$10,000. since the employer had limited this coverage to \$10,000/\$20,000. without notifying its employees. The Third District Court of Appeal reversed a summary judgment in favor of the insurer and interpreted the phrase "fully covered" as including the "maximum limit of uninsured motorist coverage available under the statutes of this state which under the particular policy, . . . would be \$500,000." <sup>77</sup>

Other states have adopted certain practices which can be used to eliminate these problems. For example, statutory requirements have

74. *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420 (Fla. 3d Dist. Ct. App. 1978).

75. *Id.* at 422. This particular statute gave rise to some controversy over the phrase "in an amount up to one hundred percent of the liability limits." *Id.* at 422, 423. While *Riccio* interpreted this to mean uninsured motorist coverage equal to the bodily injury limits, the court in *Garcia v. Allstate Ins. Co.*, 327 So. 2d 784 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977), held that "full coverage" was any amount of uninsured motorist coverage *between* the financial responsibility limits and the bodily injury limits; one being a minimum, the other a maximum. In light of the 1973 amendment clarifying the coverage requirements, *Riccio* is the correct interpretation. That statute, as well as the present one, requires uninsured motorist coverage *not less* than the bodily injury limits. The present statute, however, requires the insurer to make available limits up to \$100,000/\$300,000 irrespective of the amount of bodily injury limits purchased if requested in writing. FLA. STAT. § 627.727 (Supp. 1982). Although *Riccio* was remanded for a jury trial on this issue, the court's dictum interpreting the meaning of "full coverage" should be given weight under the language of the present statute.

76. *Miller v. Liberty Mut. Ins. Co.*, 438 So. 2d 939 (Fla. 3d Dist. Ct. App. 1983).

77. *Id.*



been imposed mandating that the coverage shall be called to the attention of the named insured at the time the policy is issued.<sup>78</sup> Some California courts require the waiver agreement to be entirely separate from the policy and require an additional signature on the agreement.<sup>79</sup> These rulings evidence judicial approval and encouragement of the purchase of uninsured motorist protection and a desire to ensure that the applicant is aware of all his rights and understands the consequences of his actions.

## VI. Available Optional Coverages

The Florida uninsured motorist statute provides that "the insurer shall make available, at the written request of the insured, limits of up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased."<sup>80</sup> This is an optional coverage which is included in many of the states' uninsured motorist statutes. Once again, the Florida statute offers little from which one can discern the respective rights and duties of the insured and insurer as conferred by this provision.

Where a statute requires the insured to request the optional coverage from the insurer, it is logical to "read into the statute an assumption that the insurer must first advise the insured that such coverage is available."<sup>81</sup> This analysis would avoid placing an undue burden on the insured to keep apprised of changes in insurance legislation. Once informed of the optional coverage, the insurer should obtain a written rejection if the insured chooses not to select the additional limits. However, if the insurer fails to make known to the insured the availability of the increased limits, the issue is whether the insured will automatically be entitled to the optional coverage. A determination that such coverage would be included would be consistent with the intent of the statute. Nevertheless, the Fourth District Court of Appeal in *Lustig v. Colonial Penn Insurance*<sup>82</sup> indicated that such a finding would not be

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78. ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1983). See *Koenig v. Mission Ins. Co.* 106 Ariz. 75, 471 P.2d 271 (1970), *Maryland Casualty Co. v. Wilson*, 6 Ariz. App. 470, 433 P.2d 650 (1967).

79. See, e.g., *Hendricks v. Meritplan Ins. Co.* 205 Cal. App. 2d 133, 22 Cal. Rptr. 682 (1962).

80. FLA. STAT. § 627.727 (Supp. 1982).

81. 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE*, § 23.04(1) at 23-20 (revised ed. 1983).

82. *Lustig v. Colonial Penn Ins. Co.*, 406 So. 2d 543 (Fla. 4th Dist. Ct. App.

the proper result. In *Lustig*, the insurer provided the insured with a brochure which indicated that the uninsured motorist coverage could not be higher than the bodily injury limits which were \$50,000./\$100,000. The insured was not informed that uninsured motorist limits of \$100,000./\$300,000. were available upon written request. The court observed that despite the insurer's error, this would not entitle the insured to a judgment finding his coverage to be \$100,000./\$300,000. without a written request, or without a showing that the coverage would not have been provided even if requested.<sup>83</sup>

Many states' statutes have been interpreted to impose a duty on the insurer to inform the insured of the availability of the optional coverage.<sup>84</sup> This explanation should contain information regarding the advantages, nature, and scope of the optional coverage, as well as its purpose and the cost it would entail. Even absent a statutory requirement to communicate this information to the insured, it has been held that the insurer has a duty to "make a commercially reasonable attempt to explain the availability and operation of such coverage to their insureds."<sup>85</sup>

Additionally, while there are no cases to date, the new statutory requirement of written rejections should equally apply to rejections of the optional coverage. Because the statute requires that the insurer "shall make available" limits in excess of the standard coverage upon written request, he is once again in the position of the offeror. Therefore, it is arguable that once the insurer offers the optional coverage and the insured elects not to contract for the higher amount, the insurer should still secure a written rejection to satisfy the statute. Absent a written rejection, the insured should be entitled to the maximum coverage allowed by the law.

## VII. Persons With Statutory Authority to Reject

The Florida uninsured motorist statute contains a provision rendering the requirement of uninsured motorist coverage inapplicable

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1981).

83. *Id.* at 544 n.2.

84. *See, e.g.*, DEL. CODE ANN. § 3902(b) (Supp. 1982); OKLA. STAT. ANN. § 3636(F) (Supp. 1983). *See also* 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, § 23.04(1) at 23-18 (revised ed. 1983).

85. 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, § 23.04(3) at 23-23 (revised ed. 1983) (quoting *Smedvig v. St. Paul Ins. Co.*, Henn. County Dist. Ct. (Minn. 2/9/80), file No. 745876 (Per Hon. Wm. S. Posten)).

when any insured named in the policy rejects the coverage in writing.<sup>86</sup> In interpreting the statute, courts have drawn a distinction between the designation "persons insured thereunder" and "named insured" or "insured named."<sup>87</sup> The section of the statute creating coverage contains the phrase "persons insured thereunder" which as interpreted has a broad meaning to extend coverage. On the other hand, that portion of the statute authorizing rejection uses the term "any insured named" which has a very limited meaning and is only applicable to those persons named in the policy.<sup>88</sup> Courts have tended to liberally construe the former portion regarding the extent of coverage and to narrowly construe the latter portion regarding rejection, as it detracts from public policy considerations.<sup>89</sup>

Thus, the named insured alone has the power to accept or reject the uninsured motorist coverage. Furthermore, "the decision of the named insured accepting or rejecting uninsured motorist coverage is binding on any additional insureds under the policy."<sup>90</sup> This rule has been viewed as simply practical in light of the waiver problem; to hold otherwise would require the insurer to obtain rejections from all additional insureds and permissive users.<sup>91</sup> While this analysis may be valid, the rule nevertheless works a hardship on those additional insureds who assume the existence of this coverage. When injured, these insureds suddenly discover that this protection has been waived by the policy holder.

The statute contains no provisions for notice to the additional insureds; therefore, there is no duty to communicate a waiver of the uninsured motorist protection to additional insureds.<sup>92</sup> Generally, in a family situation, this will not pose much of a problem because of the close relationship. There is a likelihood that a consensus was reached among

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86. FLA. STAT. § 627.727 (Supp. 1982).

87. *Weathers v. Mission Ins. Co.*, 258 So. 2d 277 (Fla. 3d Dist. Ct. App. 1966); *Kohly v. Royal Indem. Co.* 190 So. 2d 819 (Fla. 3d Dist. Ct. App. 1966), *cert. denied*, 200 So. 2d 813 (Fla. 1967).

88. *Weathers v. Mission Ins. Co.*, 258 So. 2d at 277; *Kohly v. Royal Indem. Co.*, 190 So. 2d at 819.

89. *See, e.g., Protective v. National Ins. Co. of Omaha v. McCall*, 310 So. 2d 324 (Fla. 3d Dist. Ct. App. 1975); *Weathers v. Mission Ins. Co.*, 258 So. 2d at 277.

90. *Whitten v. Progressive Casualty Ins. Co.* 410 So. 2d 1086 (Fla. 1982).

91. 12-A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 45:627 (2d ed. 1981).

92. *Darnaby v. Greenstein Trucking Co.*, 425 So. 2d 656 (Fla. 4th Dist. Ct. App. 1983); *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d 510 (Fla. 3d Dist. Ct. App. 1976).

the insureds in the selection of coverage or there is at least an awareness as to the contents of the policy.<sup>93</sup> However, in a commercial setting the rule can have unfair results. The most common cases involve corporations and car rental agencies. In the former instance, employers frequently waive the protection for their employees who are usually engaged in an occupation requiring the use of a vehicle. In the car rental situations, the rented vehicle is typically insured for liability, but lessees are commonly unaware that uninsured motorist coverage has been previously rejected by the lessor.<sup>94</sup> Since the waiver is typically not communicated to the employee or lessee, there is not an opportunity for the individual to obtain additional protection through an agreement with the named insured or through a collateral policy. Once again, the usual judicial response is to acknowledge the problem but to avoid ruling on the issue, instead calling for legislative action.<sup>95</sup>

Arguably, in the absence of requirements for communication of the rejection and guidelines for the form of notification, the logical alternative to eliminating this and numerous other problems plaguing the rejection issue is to eliminate the right to reject entirely.<sup>96</sup> Courts have stated that "[t]he statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists,"<sup>97</sup> yet apparently this is exactly what is happening. Mandatory coverage may be the best solution to preserving the original purpose and intent of this

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93. *Lancaster Oil Co. Inc. v. Hartford Accident & Indem. Co.*, 486 F.Supp. 399 (N.D. Fla. 1980); *Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d 115 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. dismissed*, 407 So. 2d 1105 (Fla. 1981); *Maxwell v. United States Fidelity & Guar. Co.*, 399 So. 2d 1051 (Fla. 1st Dist. Ct. App. 1981); *Continental Ins. Co. v. Roth*, 388 So. 2d 617 (Fla. 3d Dist. Ct. App. 1980); *Glover v. Aetna Ins. Co.*, 363 So. 2d 12 (Fla. 1st Dist. Ct. App. 1978).

94. *Darnaby v. Greenstein Trucking Co.*, 425 So. 2d at 656; *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d at 510; *Kohly v. Royal Indem. Co.*, 190 So. 2d at 819; *Morpurgo v. Greyhound Rent-A-Car*, 339 So. 2d 718 (Fla. 1st Dist. Ct. App. 1976); *MacKenzie v. Avis Rent-A-Car Systems, Inc.*, 369 So. 2d 647 (Fla. 3d Dist. Ct. App. 1979), *cert. denied*, 379 So. 2d 202 (Fla. 1979).

95. *Kohyl v. Royal Indem. Co.*, 190 So. 2d at 819; *Guardado v. Greyhound Rent-A-Car*, 340 So. 2d at 510. *See also* *Riccio v. Allstate Ins. Co.*, 357 So. 2d 420, 421-422 (Fla. 3d Dist. Ct. App. 1978).

96. *See* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE at 285 (1970), stating that "so long as the present system is maintained, it seems both justifiable and desirable to eliminate the right to reject this coverage in order to assure protection for those classes of insureds who do not exercise a knowledgeable waiver of the protection." *Id.*

97. *See, e.g., First Nat'l Ins. Co. of America v. Devine*, 211 So. 2d 587, 589 (Fla. 2d Dist. Ct. App. 1968).

statute, namely, to protect insureds who fall victims to negligent and financially irresponsible motorists.

### VIII. What Constitutes Adequate Proof of Rejection?

Generally, whether the insurer offered the applicant the full amount of uninsured motorist coverage and whether the insured has knowingly rejected uninsured motorist protection or opted for coverage in an amount less than his liability limits are issues for the trier of fact.<sup>98</sup> Nevertheless, it is not uncommon for these cases to be resolved by summary judgment or directed verdict without submitting the issue to a finder of fact. For example, in *Travelers Insurance Co. v. Spencer*,<sup>99</sup> the issue before the First District Court of Appeal was what type of evidence was sufficient to raise a genuine issue of material fact as to whether the insurer had met the statutory requirement of offering the insured uninsured motorist coverage. The *Spencer* court stated that "[w]hen a statute commands that its provisions can only be met by following a specific method, and the evidence reveals that its requirements were not observed, summary judgment is appropriately entered because the controversy is considered one of law and not one involving a disputed issue of material fact."<sup>100</sup> The statute requires an "affirmative, informed rejection by an insured of his right to UM protection."<sup>101</sup>

Without extrinsic evidence, an informed rejection cannot be implied merely from an insured's signature on the application for uninsured motorist coverage to lower the limits of this coverage.<sup>102</sup> The court's opinion in *Southeast Title & Insurance Co. v. Thompson*<sup>103</sup> implies that a rejection of uninsured motorist coverage may be inferred from acceptance by the insured of a policy containing an endorsement

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98. The issue of a knowing selection of uninsured motorist coverage is a matter for the jury and not to be decided by summary judgment. *New Hampshire Ins. Co. v. Conner*, 435 So. 2d 275 (Fla. 2d Dist. Ct. App. 1983).

99. *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st Dist. Ct. App. 1981).

100. *Id.* at 360.

101. *Id.* at 361.

102. *Zisook v. State Farm Mutual Auto. Ins. Co.*, 8 Fla. L. W. 2654 (Fla. 3d Dist. Ct. App. November 11, 1983) (No. 82-1972). *Aetna Casualty & Sur. Co., v. Fulton*, 362 So. 2d 364 (Fla. 4th Dist. Ct. App. 1978); *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d 821 (Fla. 1st Dist. Ct. App. 1978). *See also* *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d 441 (Fla. 4th Dist. Ct. App. 1978), *cert. dismissed*, 362 So. 2d 1054 (Fla. 1978).

103. *Southeast Title & Ins. Co. v. Thompson* 224 So. 2d 718 (Fla. 3d Dist. Ct. App. 1969), *rev'd*, 231 So. 2d 201 (Fla. 1970).

which excludes all policy coverage for certain accidents although it does not specifically mention uninsured motorist coverage. Such an implication can be easily avoided by requiring the insured to reject the coverage in specific terms. This would demonstrate that the insured had at least been offered the coverage and would also satisfy the requirement of written rejection.

In *Kimbrell v. Great American Insurance Co.*,<sup>104</sup> the Florida Supreme Court stated that "the making of an express offer . . . is not dispositive of the question of whether there was a knowing selection of coverage limits."<sup>105</sup> The court noted that it may already be within the insured's knowledge that such coverage is available without an express offer by the insurer. Additionally, although it is relevant that the insurer maintains evidence of an offer, it is not critical in determining whether a knowing selection was made.<sup>106</sup>

Frequently, the insurer will attempt to prove a rejection by testimony of his unailing practice to offer uninsured motorist coverage pursuant to Florida Statutes section 627.727, or of his general routine of mailing notices to the policyholder of changes in the law.<sup>107</sup> Such evidence is admissible under the Florida Evidence Code.<sup>108</sup> However, the general rule as set forth in *Jarrard v. Associates Discount Corp.* by the Florida Supreme Court is that:

in order to constitute *proof* of performance of an act on a specific occasion, it is not sufficient merely to prove the habit, practice, or custom, but there must also be proof that the practice was followed in the particular instance in issue, and the evidence should show performance of the practice by those then charged with it.<sup>109</sup>

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104. *Kimbrell v. Great Am. Ins. Co.*, 420 So. 2d 1086 (Fla. 1982), *aff'd*, 428 So. 2d 254 (Fla. 1982).

105. *Id.* at 1088.

106. *Id.* at 1089. *See Liberty Mut. Ins. Co. v. Wright*, 406 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1981), *petition for rev. denied*, 413 So. 2d 87 (Fla. 1982).

107. *Nationwide Mut. Ins. Co. v. Jones* 414 So. 2d 1169 (Fla. 5th Dist. Ct. App. 1982); *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *Aetna Casualty & Sur. Co., v. Fulton*, 362 So. 2d at 364; *American Motorist Ins. Co. v. Weingarten*, 355 So. 2d at 821. *See also Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d at 441.

108. FLA. STAT. § 90.406 (Supp. 1982).

109. *Jarrard v. Associates Discount Corp.* 99 So. 2d 272 (Fla. 1957) (emphasis added). *See also Scatigno v. State Farm Auto. Ins. Co.*, 425 So. 2d 217 (Fla. 2d Dist. Ct. App. 1983); *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d at 1169; *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *American Motorists Ins. Co. v. Weingarten*, 355 So. 2d at 821; *Bernstein v. Liberty Mut. Ins. Co.*, 294 So. 2d 63 (Fla. Dist. Ct. App.

In light of this rule, courts generally hold as a matter of law that the statutory requirements are not met when evidence of a knowing rejection is founded on such testimony of routine practice.<sup>110</sup>

In *Nationwide Mutual Insurance Co. v. Jones*,<sup>111</sup> the Fifth District Court of Appeal went so far as to find that the insurer's testimony of general routine was not only admissible pursuant to the evidence code but was also sufficient proof under the rule in *Jarrard*. Apparently, the only distinguishing factor present in *Nationwide* was that the insurer alleged that, in addition to his custom of advising applicants of such coverage, he was certain that he followed that procedure in that case. He could not recall the exact language of the conversation but was sure he had followed his routine. Thus, because the evidence code does not require corroboration, the court found that this added assertion provided the necessary proof that the practice was followed in the particular instance.<sup>112</sup> The 1982 statute requiring a written rejection will alleviate situations where the question is whether the insured actually rejected the coverage and arguably, such practices should not be permissible.

## IX. Conclusion

The Florida uninsured motorist statute section 627.727 has been considerably expanded over the more than twenty years since its origin in 1961. In the area of rejection of uninsured motorist protection, uncertainty still exists in spite of numerous amendments. Admittedly, the recent 1982 amendment requiring written rejections is a step in the right direction. Although rejections of uninsured motorist coverage must now be in writing, litigation will continue to revolve around the intricacies of the required "knowing rejection." The availability of additional forms of optional coverages and the apparent need to obtain knowing rejections for these coverages as well, will in all likelihood aggravate the problem. Nevertheless, as uninsured motorist litigation maintains its steadily increasing pace, it is obvious that much more legislative and judicial structuring of the rejection procedure is needed. In

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1974).

110. *Travelers Ins. Co. v. Spencer*, 397 So. 2d at 358; *American Motorists Ins. Co. v. Weingarten*, 355 So. 2d at 821. *But see* *Lumbermen's Mut. Casualty Co. v. Beaver*, 355 So. 2d at 441.

111. *Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d at 1169.

112. *Id.* at 1169, 1170.

all cases, it must be remembered that the purpose of the statute is to protect those injured through the negligence of irresponsible motorists. The statute does not inure to the benefit of either the uninsured motorist or the insurer. With the abundant confusion in this area caused by insufficient guidelines governing the offer-rejection procedure, this legislative intent is frustrated too often.

The existence of uninsured motorist coverage in serious accident cases can be crucial. Damages are frequently in the six-digit range and lack of insurance can have devastating effects. Because many misunderstandings between insureds and insurers stem from ignorance and lack of adequate explanations regarding uninsured motorist protection, a statutory duty should be imposed upon the insurer to fully explain this coverage, including its purpose, benefits, and cost. It may be impractical to require an insurer to sacrifice valuable time in order to orally explain the fundamentals of this coverage, however, a written explanation on the insurer's form would be a reasonable alternative. If after reading this explanation the insured had any questions, the insurer would be obligated to help answer his inquiries. Such a requirement would place no undue burden on either party. This requirement could be effected by adoption of the following proposed amendment to Florida Statutes section 627.727:

The coverage under this section shall be determined by a written selection of each coverage signed by any named insured under the policy. This selection of desired coverage shall be contained in a separate agreement in which both the nature and scope of uninsured and underinsured motor vehicle coverage and the options are explained in clear and understandable terms. The agreement shall explain that this coverage gives the insured the same rights as if he had been struck by someone with liability coverage. The agreement shall inform the insured that the benefits of such coverage include compensation for pain and suffering, loss of enjoyment of life, and loss of earning capacity, as well as medical expenses and lost wages. The amounts of the premiums for the available coverages shall also be contained in the insurer's uninsured/underinsured motorist agreement. The agreement shall inform the insured of the available limits of these coverages and, absent a selection to the contrary, shall require the insured to reject each and every coverage option. Additionally, the insured must separately select either, or reject both, uninsured and excess underinsured motorist coverage.

Although legislative amendments can undoubtedly cure part of the



dilemma, this is not an area of purely legislative reform. In order to do full justice to the statute's intent, Florida courts must follow the lead of numerous states that have recognized the chaos and disorder inherent in the statutory right of rejection, and which have implemented reforms to correct the disparities. The task of the judiciary to interpret and apply laws handed down to them in conformity with their expressed purpose has been well established. Thus, when the legislative purpose is clear, courts must resolve cases in a manner which furthers that objective. For example, when it is evident that certain insurance industry methods, such as the use of slanted insurance policies, thwart this legislative intent the judiciary should not hesitate to condemn and invalidate these practices. The courts should not display any reluctance in dealing with this well-acknowledged problem, but should initiate the imposition of standards and restrictions to further ensure the fair and just resolution of the vast amount of uninsured motorist cases. Legislative amendments coupled with judicial cooperation will hopefully lead to more definite meetings of the minds between insured and insurer.

*Karen E. Roselli*

## APPENDIX

627.727 Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.

(1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing. When a motor vehicle is leased for a period of 1 year or longer and the lessor of such vehicle, by the terms of the lease contract, provides liability coverage on the leased vehicle in a policy wherein the lessee is a named insured or on a certificate of a master policy issued to the lessor, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist coverage. Unless the named insured, or lessee having the privilege of rejecting uninsured motorist coverage, requests such coverage in writing, the coverage need not be provided in or supplemental to any other policy which renews extends, changes, supersedes, or replaces an existing policy issued to him by the same insurer, when the named insured or lessee had rejected the coverage in connection with a policy previously issued to him by the same insurer. Each insurer shall at least annually notify the named insured of his options as to coverage required by this section. Such notice shall be part of the notice of premium,

shall provide for a means to allow the insured to request such coverage, and shall be given in a manner approved by the department. The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under automobile medical expense coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident. Only the underinsured motorist's automobile liability insurance shall be set off against underinsured motorist coverage. Such coverage shall not inure directly or indirectly to the benefit of any workers' compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or similar law.

(2)(a) The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the named insured; but in any event the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person and \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the rating plan of the company.

(b) In addition, the insurer shall make available, at the written request of the insured, excess underinsured motor vehicle coverage, providing coverage for an insured motor vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess underinsured motor vehicle coverage. Such excess coverage shall provide the same coverage as the uninsured motor vehicle coverage provided in subsection (1), except that the excess coverage shall also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage. The amount of such excess coverage shall not be reduced by a setoff against any coverage, including liability insurance. An insurer shall not provide both uninsured motor vehicle coverage and excess underinsured motor vehicle coverage in the same policy.

(3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:

(a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or

(b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.

(4) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect when the liability insurer of the tortfeasor becomes insolvent within 4 years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

(5) Any person having a claim against an insolvent insurer as defined in s. 631.54(5) under the provisions of this section shall present such claim for payment to the Florida Insurance Guaranty Association only. In the event of a payment to any person in settlement of a claim arising under the provisions of this section, the association shall not be subrogated or entitled to any recovery against the claimant's insurer. The association shall, however, have the rights of recovery as set forth in chapter 631 in the proceeds recoverable from the assets of the insolvent insurer.

(6) If an injured person or, in the case of, death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer, then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded; however, in such action, the liability insurer's coverage, shall first be exhausted before any award may be entered against the underinsured motorist insurer, and any such award against the underinsured motorist insurer shall be excess and subject to the provisions of subsection (1). Any award in such action against the liability insurer's insured shall be binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits.

(7) The legal liability of an uninsured motorist coverage insurer shall not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in one or more of paragraphs (a) through (d) of s.627.737(2).

(8) The provisions of s.627.428 do not apply to any action brought pursuant to this section against the uninsured motorist insurer unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident.

# The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor?

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## I. Introduction

The Truth in Lending Simplification and Reform Act of 1980 became effective October 1, 1982.<sup>1</sup> The purpose of the Act was to make the statute and regulation governing all credit disclosures simpler.<sup>2</sup> The changes were designed to ease creditor compliance and to help consumers shop more intelligently for their credit transactions.<sup>3</sup> The Act has aided in deregulating the credit industry, but the question remains whether the consumer is being adequately protected, especially in the area of residential mortgage loans.

Deregulation has created a more complex real estate market than has ever existed before. It is ironic that when the consumer most needs to receive adequate information about the available mortgages, he may not be receiving that information because of the recent simplification of Truth in Lending. The paramount problem that faces today's residential mortgagor is one of timing. The mortgagor needs information about all his alternatives before he obligates himself on a contract to purchase or mortgage his home. Neither the old Truth in Lending statute nor the new Truth in Lending Simplification and Reform Act adequately addresses the issue of what type of information the consumer should receive. A related issue is when should the consumer receive the needed information. The final question to be resolved is who should be responsible for giving the consumer the necessary information when he needs it.

To answer these questions, this note will first illustrate the com-

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1. 15 U.S.C. § 1602 (Supp. V 1981). The Truth in Lending Simplification and Reform Act of 1980 is Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 STAT. 132. The Depository Institutions Deregulation and Monetary Control Act of 1980 includes other legislation to deregulate the credit industry.

2. 1980 U.S. CODE CONG. & AD. NEWS at 251, Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980. [Hereinafter referred to as DIDMCA of 1980].

3. *Id.*

plexity facing today's mortgagor by briefly examining some of the various new mortgages. Second, this note will focus on the changes made to the disclosure laws by the new Truth in Lending Simplification and Reform Act as they pertain to what information is necessary to the residential mortgagor and how the new laws could be improved. Third, the effect of the Truth in Lending Simplification and Reform Act on the requirements of when disclosure is made is examined. Alternatives to the new laws will also be discussed. Finally, the problem of who should be responsible for disclosure is discussed with an emphasis on the available alternatives.

## II. Changing Market Conditions

Since the Depression, the fixed rate mortgage has been the mainstay for residential mortgagors.<sup>4</sup> The mortgage market had been relatively stable until the recent deregulation. Now, the fixed rate mortgage is less popular with both lenders and consumers. A combination of market and regulatory changes introduced a myriad of new types of mortgages from which the residential mortgagor may select.

### A. Reasons for the changes

In the traditional mortgage market, thrift lenders lend long and borrow short<sup>5</sup> from savings depositors. In a relatively stable inflation-free economy, this practice works.<sup>6</sup> However, when there is persistent inflation, the process fails. As market interest rates rise in response to inflation, lenders are forced into charging higher rates to compensate for the below-market mortgages kept in their portfolios.<sup>7</sup> To add to the problem, many states have maximum usury ceilings which prevent lending at market rates.<sup>8</sup> When disintermediation<sup>9</sup> is added to the mar-

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4. Guttman, *Types of Adjustable Rate Mortgages and Their Lien Priority*, 55 FLA. B.J. 552 (1981).

5. Landers and Chandler, *The Truth-in-Lending Act and Variable-Rate Mortgages and Balloon Notes*, 1976 AM. FOUND. RESEARCH J. 35, 38.

6. Walleser, *Balancing the Interest: The Changing Complexion of Home Mortgage Financing in America*, 31 DRAKE L. REV. 1, 3 (1981-1982).

7. L. VIDGER, BORROWING AND LENDING ON RESIDENTIAL PROPERTY 226 (1981).

8. Landers and Chandler, *supra* note 5, at 39.

9. *Id.* Disintermediation is defined as "[w]hen free market interest rates exceed the regulated interest ceiling for time deposits, some depositors withdraw their funds

ket, the lender is faced with lending at higher, unattractive rates to protect itself.

While the market was operating under the burden of inflation in the 1970s,<sup>10</sup> lenders looked for alternative mortgages they could offer to compensate for the inherent shortcomings of the fixed rate mortgage. In the past, the thrift lenders were not authorized to offer mortgages where the monthly payment rates changed.<sup>11</sup> The Federal Home Loan Bank Board, which regulates the thrift lenders, asked Congress twice to change the regulation so that a variable rate mortgage could be offered.<sup>12</sup> Finally in 1978, the Federal Home Loan Bank Board authorized the lending of variable rate mortgage.<sup>13</sup>

Since 1978, there has been a flood of measures enacted to further deregulation of the credit industry: *April 1981*: The Federal Home Loan Bank Board permitted federally chartered savings and loan associations to offer a variety of adjustable rate mortgage loans;<sup>14</sup> *July 1981*: The National Credit Union Administration permitted credit unions to make adjustable rate mortgages;<sup>15</sup> *July 1981*: The Federal Home Loan Bank Board amended the adjustable rate mortgage regulation so that a graduated payment feature could be offered with the available loans;<sup>16</sup> *August 1982*: The Federal Home Loan Bank Board replaced the various existing regulations with one that broadly authorized federally chartered savings and loan associations to make a variety of mortgage loans;<sup>17</sup> *October 1982*: The Garn-St. Germain Depository Institutions Act of 1982 authorized state chartered lenders to make similar alternative mortgage loans that federally chartered institutions were already authorized to make;<sup>18</sup> *December 1982*: The Office of the

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and invest them elsewhere at a higher interest rate." BLACK'S LAW DICTIONARY 421 (5th ed. 1979).

10. Walleser, *supra* note 6, at 2.

11. Hyer and Kearl, *Legal Impediments to Mortgage Innovation*, 6 REAL EST. L.J. 211, 214 n.10 (1978). The thrift lenders could not make variable mortgages according to an interpretation of a regulation governing them.

12. *Id.*

13. 12 C.F.R. § 545.6-2(a), (c) (1979). Variable rate mortgage was defined as a mortgage which had an "interest rate . . . tied to a reference index; thus, actual future payments are not known at the time of loan origination." *Id.* This was an attempt by Congress to alleviate the credit industry of the problem created by persistent inflation.

14. 46 Fed. Reg. 24,148 (1981) (codified in 12 C.F.R. § 545.6-4 (1982)).

15. 46 Fed. Reg. 38,669 (1981) (codified in 12 C.F.R. § 701.21-6B (1982)).

16. 46 Fed. Reg. 37,625 (1981) (codified in 12 C.F.R. § 545.6-4B (1982)).

17. 47 Fed. Reg. 36,612 (1982) (codified in 12 C.F.R. § 545.6 (1983)).

18. Garn-St. Germain Depository Institutions Act of 1982, Title VIII, Pub. L.

Comptroller of the Currency made the adjustable rate mortgage regulations apply to state chartered banks by amending 12 C.F.R. section 29;<sup>19</sup> and *March 1983*: 12 C.F.R. section 29 was further revised allowing national banks greater flexibility in the provisions of adjustable rate mortgage. The revised regulation eliminates limits on the frequency of interest rate and payment adjustments, limits on the magnitude of the interest rate adjustment, and the cap on negative amortization.<sup>20</sup> The requirement that the monthly payments be reset to a level sufficient to amortize the outstanding principal balance at least once every five years to no later than during the twenty-first year of the mortgage was also modified.<sup>21</sup>

More flexibility results from these recent changes. It is now possible to obtain a completely individualized mortgage. The mortgage market has become a grocery store of different mortgage instruments, which tends to create confusion in the minds of consumers.<sup>22</sup> A survey conducted by the Federal National Mortgage Association in March and April 1982 found that "most of the consumers who are aware of the newer types of mortgages do not understand how these instruments work."<sup>23</sup> Today's borrower must be educated not only as to what is available, but also as to how his selection will affect his future ability to purchase and to resell his home.

## B. Alternative Mortgage Loans

Besides the traditional fixed rate mortgage, the residential mortgagor can, as a result of the steps described above, choose from another group of mortgages: alternative mortgage loans. An alternative mortgage loan is defined as "a single, long-term obligation on which the interest rate may be adjusted over the life of the loan in accordance with an interest rate index agreed on in advance by the borrower and lender and specified in the loan document."<sup>24</sup> The residential mortgagor

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No. 97-320.

19. 47 Fed. Reg. 55,911 (1982) (codified in 12 C.F.R. § 29.11 (1983)).

20. 48 Fed. Reg. 9,506 (1983) (to be codified at 12 C.F.R. § 29).

21. *Id.*

22. Werthan, *Alternative Mortgages and Truth-in-Lending*, 69 FED. RESERVE BULL., 327 (1983).

23. *Id.*

24. Browne, *The Development and Practical Application of the Adjustable Rate Mortgage Loan: The Federal Home Loan Mortgage Corporation's Adjustable Rate Mortgage Loan Purchase Program and Mortgage Loan Instruments*, 47 MO. L. REV.

is confronted with a myriad of different mortgages, each with its own acronym. A brief examination of some of the available alternative mortgage loans illustrates the variety and complexity that faces the consumer.

### 1. *Adjustable Rate Mortgage (ARM)*

One of the most common alternative mortgage loans offered is the ARM, generally sponsored by national banks. An ARM is defined as "any loan made to finance or refinance the purchase of and secured by a lien on a one- to four-family dwelling . . . , where such loan is made pursuant to an agreement intended to enable the lender to adjust the rate of interest from time to time."<sup>25</sup>

The interest rate of an ARM consists of two components: a margin and an index. The margin is generally a percentage point or points added to the index to increase the lender's yield or profit. The margin varies according to the borrower.<sup>26</sup> The second factor comprising the interest rate is the index. An index is "a ratio or other number derived from a series of observations and used as an indicator or measure."<sup>27</sup> To be a valid index for interest rate purposes, it must meet two criteria before it can be used: 1) it must be beyond the lender's control, and 2) it must be ascertainable by the mortgagor.<sup>28</sup> There are a vast number of indices available that fulfill the two requirements. Some common indices are: 1) the Federal Home Loan Bank Board's index of national average contract interest rate on the purchase of previously occupied dwellings,<sup>29</sup> 2) the weekly or monthly average auction rates on the United States Treasury bills,<sup>30</sup> and 3) the weekly or monthly average yields on United States Treasury securities.<sup>31</sup> To be fully informed about the type of mortgage he is choosing, the consumer needs to know

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179, 184 (1982).

25. 12 C.F.R. § 29.2 (1983).

26. For example, one of the ARM plans offered by the Federal National Mortgage Association adds 2.9 percentage points to the index for the investor mortgagor. The margin varies daily. To obtain the margin for a particular day, one would have to call the Federal National Mortgage Association for a specific plan. FNMA ARM plan 6a as of June 10, 1983.

27. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 427 (1967).

28. 48 Fed. Reg. 9,512 (1983) (to be codified at 12 C.F.R. § 29.3).

29. 12 C.F.R. § 29.4(a) (1983).

30. 12 C.F.R. § 29.4(c) (1983).

31. 12 C.F.R. § 29.4(b) (1983).



where to obtain information on the potential indices and, more importantly, the historical trends for each index. The historical trends will show the volatility or stability of the selected index. Knowledge about the index is imperative to accurately evaluate which index is better for the consumer's needs, especially when the consumer is offered a number of loans that appear to be similar.<sup>32</sup>

Once the index is selected, the next question to be addressed is the effect of an interest rate change. A change in the interest rate can affect the outstanding principal balance, the monthly payment, or a combination of the two.<sup>33</sup> Negative amortization will occur if the rate changes but the payment rate and the maturity date remain constant. This could seriously jeopardize the homeowner's equity if negative amortization continues for a lengthy period of time.<sup>34</sup>

Since these adjustments are negotiable, the borrower must know the options and the ramifications of his choice. To be adequately informed, the borrower must know at least: 1) how the interest rate is determined, 2) how adjustments are made if the interest rate changes, 3) how any resulting change may affect his payments, and 4) how any resulting change will affect him if he resells.

There are advantages to ARMs, both for the lender and the consumer. ARMs provide more diversity to the mortgage market<sup>35</sup> while allowing more mortgage money to be available because lenders will have a "hedge" on inflation. Lenders and borrowers receive the advantage of potentially lower initial interest rates because the lender does not have to compensate for the low fixed rate mortgages in his portfolio by charging higher rates.<sup>36</sup>

Because of the existence of ARMs, borrowers may find it relatively easier to obtain financing through ARMs when interest rates are changing or money is tight.<sup>37</sup> Lenders will not have to exercise a due-on-sale clause to increase the interest rate to market rates when the home is sold because an interest rate change is part of the mortgage

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32. Walleser, *supra* note 6, at 33.

33. 12 C.F.R. § 29.2, 29.5(4) (1983).

34. For example, if a borrower made a \$50,000, 30-year loan at 12% but was making monthly payments at an effective rate of 4.9% with annual adjustments for a period of ten years, at the tenth year the borrower would owe \$57,697.10. Negative amortization, therefore, would increase the principal by \$7,697.10.

35. Walleser, *supra* note 6, at 17.

36. *Id.* at 18, (quoting Cowan and Foley, *New Trends in Residential Mortgage Finance*, 13 REAL PROP. PROB. & TR. J. 1075, 1081 (1978)).

37. *Id.*

contract. An ARM borrower may encounter fewer difficulties in selling his home because a qualified buyer will find it easier to assume the loan than a comparable fixed rate mortgage.<sup>38</sup> Most ARMs do not have a prepayment penalty, facilitating resell or refinance.<sup>39</sup> Also, borrowers will be able to take advantage of declining interest rates without refinancing,<sup>40</sup> if rates go down.

## 2. *Graduated Payment Mortgage (GPM)*

This mortgage begins with initial payments lower than that necessary to fully amortize the loan by the maturity date. The payments gradually increase at designated intervals until the level necessary to amortize the loan is reached.<sup>41</sup> A graduated payment feature can be used with any loan. A graduated payment feature is attractive because qualification is based on a lower, more affordable payment.<sup>42</sup> However, the borrower faces a negatively amortized mortgage since his beginning payments are lower than is required to fully amortize the mortgage.

## 3. *Growing Equity Mortgage (GEM)*

This mortgage has a fixed interest rate but there are scheduled annual increases in the monthly payment which allow the final maturity to be shortened considerably than a comparable fixed rate mortgage.<sup>43</sup>

## 4. *Reverse Annuity Mortgage (RAM)*

The borrower benefits with this mortgage because he receives monthly payments from the lender instead of having to pay them. The borrower essentially purchases an annuity<sup>44</sup> with a loan against the ac-

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38. *Id.* at 17.

39. 12 C.F.R. § 29.6 (1983).

40. Scheuerman, *Adjustable Rate Mortgages: Fundamental New Directions in Residential Mortgage Lending, Part II*, 55 FLA. B.J. 737, 740 (1981).

41. Marcis, *The Shakeout in Alternative Mortgage Instruments*, REAL EST. REV., Spring 1983, at 29, 30.

42. Werthan, *supra* note 22, at 327.

43. Marcis, *supra* note 41, at 30.

44. Annuity is defined as "[a] fixed sum payable to a person at specified intervals for a specified period of time or for life." BLACK'S LAW DICTIONARY 82 (5th ed. 1979).

cumulated equity in his home.<sup>45</sup> Reverse annuity mortgages are advantageous to the mortgagor with a large accumulation of equity in his home.

### 5. *Pledged Account Loan (PAL)*

This plan requires the borrower to place his down payment into an interest-bearing escrow account with the lender.<sup>46</sup> The borrower makes lower monthly payments while the lender supplements these payments with funds from the borrower's pledged savings account.<sup>47</sup> The borrower essentially subsidizes himself with the help of the lender.

### 6. *Reserve account mortgage*

This mortgage is similar to the Pledged Account Loan and has just been introduced by the Federal National Mortgage Association.<sup>48</sup> It also requires that the down payment be placed in an interest-bearing escrow account with the lender.<sup>49</sup> However, the funds are contributed by someone other than the borrower, such as the builder, seller, or some third party.<sup>50</sup>

There are potential advantages for all involved with this plan. First, the borrower purchases the property with no money down.<sup>51</sup> Second, the lender is secure in the event of foreclosure because it has temporary control over the down payment.<sup>52</sup> Finally, the funds will be returned to the contributor as early as three years from the date of the sale.<sup>53</sup>

However, the reserve account mortgage illustrates the dangers facing the uninformed borrower. The interest rate of this mortgage is tied to the Federal National Mortgage Association's three- and five-year ARMs.<sup>54</sup> The lender has made it extremely difficult for the borrower to

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45. *Id.*

46. Iezman, *Alternative Mortgage Instruments: Their Effect on Residential Financing*, 10 REAL EST. L.J. 3, 18 (1981).

47. *Id.*

48. The Miami Herald, Sept. 25, 1983, at 18H, col. 1.

49. *Id.* at col. 2.

50. *Id.*

51. *Id.* at col. 3.

52. *Id.* at col. 2.

53. *Id.*

54. *Id.* at col. 3.

determine the make-up of his interest rate since it is based on an index which is itself based on an index. The borrower must determine which index or indices the underlying three- and five-year ARMs are tied to. Also, the lender receives double profits because it has added a margin to both the underlying ARM interest rate, which serves as an index, and the reserve account mortgage.

Because of the potential pitfalls, as shown by the brief introduction into the reserve account mortgage and other types of alternative mortgages, today's residential mortgagor must be armed with sufficient information to understand and evaluate the alternatives without being overwhelmed by the complexity and variety inherent in the new mortgages.<sup>55</sup> This is the designated task of the disclosure laws.

### III. Disclosure Laws

#### A. The Truth in Lending Act: Background & Problems

The legislation governing disclosure requirements for all credit transactions, including residential mortgage loans, is commonly referred to as the Truth in Lending Act<sup>56</sup> and its implementing regulation as Regulation Z (referred to as Reg. Z).<sup>57</sup> The Truth in Lending Act is considered as one of Congress' most ambitious consumer protection efforts to date.<sup>58</sup> The purpose of the Truth in Lending Act is to provide consumers with "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . ."<sup>59</sup> It was Congress' hope that credit competition and economic stability would be a by-product of Truth in Lending.<sup>60</sup>

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55. The specific plans mentioned in the note are not an exhaustive list. For example, there are rollover mortgages (ROM), shared appreciation mortgage (SAM), dual rate variable rate mortgages (DRVRM), and constant payment factor variable rate mortgages (CPFVRM), to name a few. An in-depth discussion of all the alternative mortgages available is beyond the scope of this note. See Iezman, *supra* note 46 and Marcis, *supra* note 41 for discussion of the different mortgages.

56. The Truth in Lending Act, 82 STAT. 146 (1968) (codified as amended in 15 U.S.C. § 1601-1693(r) (1976 and Supp. V 1981)).

57. 12 C.F.R. § 226.1-226.29 (1983).

58. Landers & Chandler, *supra* note 5, at 60.

59. 15 U.S.C. § 1601(a) (1976).

60. *Id.*

The Truth in Lending Act has had a number of problems that Congress has tried to resolve over the years. One problem resulted from ambiguous drafting of the original act.<sup>61</sup> The poor drafting led to conflicting results in the courts and the Federal Reserve Board, which governs Reg. Z.<sup>62</sup> Since courts required strict compliance with the technical requirements of the Truth in Lending Act,<sup>63</sup> lenders were forced to constantly update disclosure forms to comply with new court rulings or Federal Reserve Board advisory opinions. The constant revision of disclosure forms increased the chance that the disclosure given would not be in compliance with the law.<sup>64</sup> The cost of creditor compliance and operational inefficiency, though never evaluated,<sup>65</sup> had to be phenomenal.

The consumer did not escape from the impact of the complexity of the Truth in Lending Act. The general feeling is that the consumer has suffered from an "information overload" under the old Truth in Lending Act.<sup>66</sup> "Too often implementation of the Act's provisions resulted not in a better informed, credit conscious consumer, but in an overwhelmed consumer who ignored all disclosures and failed to attempt to digest the information provided."<sup>67</sup> There is evidence, for example, that consumer awareness of the prevailing annual percentage rate has increased,<sup>68</sup> but there have been no studies to measure specifically whether consumers understood the significance of the annual percent-

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61. Woocher & Geltzer, *Legislative Background to Truth in Lending Simplification and Reform Act*, 54 N.Y. St. B.J. 506, 508 (1982).

62. *Id.* 46 Fed. Reg. 20,942 (1981) citing Administrative Office of the U.S. Courts. The Truth in Lending cases represent 2% of the federal civil caseload. By 1980, Reg. Z had been interpreted more than 1,500 times and there had been more than 13,000 lawsuits filed. *Id.*

63. *Id.* at 509.

64. *Id.*

65. 46 Fed. Reg. 20,944 (1981).

66. Woocher & Geltzer, *supra* note 61, at 508.

67. *Id.* at 509.

68. S. Rep. No. 368, 96th Cong., 2d Sess. 16, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 236, 252.

age rate and whether they actually used it when mortgage shopping.<sup>69</sup>

## B. Trend Toward Simplification: The New Truth in Lending Act

With Congress' growing awareness of the inherent problems, it became apparent that the Truth in Lending Act needed to be modified.<sup>70</sup> It was not until the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980<sup>71</sup> that Congress "simplified" the Truth in Lending Act. As part of the simplification process, the Federal Reserve Board was instructed to redraft Reg. Z.<sup>72</sup> Until October 1982, creditors had the option of complying with the old Truth in Lending Act or the new Truth in Lending Simplification and Reform Act of 1980.<sup>73</sup>

The Simplification Act was enacted with both the consumer and the creditor in mind. For the consumer, Congress decreased the possibility of information overload by reducing the number of required items for disclosure.<sup>74</sup> Clarity, economy, and simplification became the standard instead of the former lengthy, detailed disclosure statements.<sup>75</sup> However, the changes made in the disclosure laws by the Simplification Act are decidedly in favor of the creditor. One of its main goals was to make creditor compliance easier.<sup>76</sup> The decrease in the number of required disclosure items and an increase in the tolerances for numerical errors were perceived to facilitate creditor compliance.<sup>77</sup> Reg. Z's redraft included model forms which aid creditors<sup>78</sup> and increase standardization in the market. A commentary has been added to Reg. Z,

69. Werthan, *supra* note 22, at 329.

70. 46 Fed. Reg. 20,942 (1981).

71. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat. 132) 252. The Truth in Lending Simplification & Reform Act of 1980 is Title V of this Act.

72. Woocher & Geltzer, *supra* note 61, at 536.

73. International Banking Facility Deposit Insurance Act, title III, 95 Stat. 1513, 1515 (1981) (*amending* DIDMCA of 1980, *supra* note 2, § 625(a)). Creditor compliance became effective October 1, 1982.

74. Woocher & Geltzer, *supra* note 61, at 537.

75. Boyd, *The Truth-in-Lending Simplification and Reform Act-A Much-Needed Revision Whose Time Has Finally Come-Part I*, 23 ARIZ. L. REV. 1, 5 (1981).

76. DIDMCA of 1980, *supra* note 2, at 251.

77. 46 Fed. Reg. 20,942 (1981).

78. 15 U.S.C. § 1604 (1981); 12 C.F.R. § 226 (Appendix H, 1983).

replacing the formal and informal advisory opinions issued by the Federal Reserve Board.<sup>79</sup> Any amendments or interpretations that require form changes will become effective October first of each year with at least six months' notice to the creditors.<sup>80</sup> Congress estimates that the Simplification Act "could result in a one year savings of \$600 million by creditors and substantial additional savings from anticipated decreases in litigation."<sup>81</sup>

Besides making creditor compliance easier, the Simplification Act and the new Reg. Z have weakened sanctions for creditors' violations relating to certain material disclosure items.<sup>82</sup> Enforcement of creditor compliance has been shifted from the private sector to administrative agencies.<sup>83</sup> Creditors are required to reimburse borrowers for certain types of disclosure errors.<sup>84</sup> Creditors may substitute state and/or other federal agencies' disclosure in alternative mortgages for that required by the Simplification Act and the new Reg. Z when the forms chosen offer greater protection.<sup>85</sup>

The Simplification Act and the new Reg. Z have been criticized from their inception. The harshest criticism emanates from the fact that Congress made no "systematic attempt to identify and agree on the fundamental goals of the Act."<sup>86</sup> Congress did not adequately analyze the current mortgage market when it redrafted the statute.<sup>87</sup> Critics note faulty execution, political compromise, and the inability of the statute to cure the marketplace ills.<sup>88</sup>

### C. Specific Changes in the Simplification Act and Regulation Z

The Simplification Act and the new Reg. Z are designed to give residential mortgagors a basic outline of certain material credit infor-

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79. 12 C.F.R. § 226 (Supp. I, 1983). The commentary is incorporated in what is referred to as a supplement of Reg. Z.

80. 46 Fed. Reg. 20,942 to 20,943 (1981).

81. DIDMCA of 1980, *supra* note 2, at 271.

82. 46 Fed. Reg. 20,943 (1981). See *supra* text accompanying notes 93-126 for discussion of material items.

83. *Id.*

84. *Id.*

85. 12 C.F.R. § 226.18(f) n.43 (1983).

86. Rohner, *Truth in Lending "Simplified": Simplified?*, 56 N.Y.U. L. REV. 999 (1981).

87. *Id.* at 1000.

88. *Id.*

mation. Material terms are the annual percentage rate, finance charge, the method and balance which the finance charge is computed, amount financed, total of payments, and payment schedule.<sup>89</sup> Material terms must be disclosed "clearly and conspicuously."<sup>90</sup> Certain items, such as annual percentage rate, finance charge, amount financed, and total of payments must be segregated from non-related information.<sup>91</sup> A brief examination into the new requirements for the items disclosed in the Federal Box<sup>92</sup> illustrates the need for further refinement in the disclosure laws. Suggestions for further modification in the legislation will be advanced.

### 1. *Annual Percentage Rate (APR)*

Annual percentage rate was designed as a tool for credit shopping.<sup>93</sup> Reg. Z defines APR as "a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of the payments made."<sup>94</sup> The descriptive explanation of APR is "the cost of your credit as a yearly rate."<sup>95</sup>

The rules for computing APR are more easily stated than applied. APR computations have been labeled as complex and mysterious for both the creditor and the consumer.<sup>96</sup> The Simplification Act revised the rules and equations for APR,<sup>97</sup> but they remain as complicated as before. There are two basic methods for determining APR: 1) the actuarial method, and 2) the United States Rule method.<sup>98</sup> The appendix to Reg. Z contains examples for both methods.<sup>99</sup> The same results will be obtained under either method when the payments are at equal intervals

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89. 15 U.S.C. § 1602(u) (Supp. V 1981).

90. 15 U.S.C. § 1632(a) (Supp. V 1981).

91. 12 C.F.R. §§ 226.17(a)(1), (2) (1983).

92. J. GLAZIER, RMIC's GUIDE TO THE FEDERAL RESERVE BOARD'S NEW TRUTH IN LENDING REQUIREMENTS 23 (1982). Some lenders refer to this segregation as the "Federal Box" since the information is generally enclosed in a box. The items in the Federal Box must also have a descriptive explanation for each term. 15 U.S.C. § 1638(a)(8) (Supp. V 1981).

93. DIDMCA of 1980, *supra* note 2, at 252.

94. 12 C.F.R. § 226.22(a) (1983).

95. 12 C.F.R. § 226.18(e) (1983).

96. Boyd, *supra* note 75, at 56.

97. 12 C.F.R. § 226.22 (Appendix J 1983).

98. 12 C.F.R. § 226.22(a) (1983).

99. 12 C.F.R. § 226.22 (Appendix J 1983).



or for regular loans.<sup>100</sup> However, when computing APR for payments made for irregular loans, such as an alternative mortgage loan, the two methods will produce different results.<sup>101</sup> The Federal Reserve Board has two volumes of APR tables to aid creditors in APR calculations. If the creditor uses these tables, it is deemed in compliance with the statute and regulation even though the result obtained by using the Federal Reserve Board tables will be different from the two methods specified in Reg. Z.<sup>102</sup> This tolerance for discrepancies undermines the credibility of using APR as a valid shopping tool since the consumer cannot be assured of its accuracy.

Reg. Z is not only tolerant of variances that result from using different methods of computing APR, but it is also tolerant of the degree of accuracy with which the calculations are made. The Simplification Act now requires that the APR be disclosed within  $\frac{1}{8}$  of 1% of the actual rates for regular loans<sup>103</sup> instead of the previous  $\frac{1}{4}$  of 1%. For irregular loans, the acceptable variance is even larger:  $\frac{1}{4}$  of 1% of the actual rate.<sup>104</sup> To allow the lender to disclose at different margins of error depending on the type of loan robs the borrower of an effective method for comparing a fixed rate mortgage to an alternative mortgage.

As credit information is disseminated today, the consumer may still not understand what APR means. A frequently asked question by a borrower at closing is what is his simple or note rate. The question indicates that the borrower does not understand the significance of the APR disclosure or may be confused by assuming that the APR affects the amount of his monthly payment. To alleviate this confusion, the simple or note interest rate should be disclosed with the APR to give the borrower a basis for comparison.

The disclosure of APR is deceptive as it is used now. APR expresses the cost of credit as a yearly rate. However, a number of items that make up APR are paid only at closing and are not part of the yearly credit cost. If Congress wanted to give consumers helpful information, it would require that the APR be disclosed at two different time periods. First, consumers would receive an APR based on the maturity date of the mortgage, which is the method presently used. The

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100. 12 C.F.R. § 226.22(a) (Supp. I 1983).

101. *Id.*

102. 12 C.F.R. § 226.22(b) (1983).

103. 12 C.F.R. § 226.22(a)(2) (1983).

104. 12 C.F.R. § 226.22(a)(3) (1983).

second APR would be the yield if the consumer sold the house within five years from the date of purchase. The second figure would be a more accurate standard for measuring the cost of credit for the consumer as the average home is owned for that period.<sup>105</sup>

If Congress modifies the Simplification Act to implement these proposals, arguably creditors will object to disclosing the simple interest rate or the second APR. Creditors will probably be concerned that disclosing the actual cost to the consumer during the first five years of the mortgage, which is very high, will scare borrowers away from buying houses. This is the same line of reasoning lenders used when the Truth in Lending Act was first enacted. First mortgage loans were exempt from disclosure of the total of payments because creditors were afraid that disclosure of the high cost of a dwelling over the life of the loan would frighten the borrower.<sup>106</sup> However, there seems to be little effect on the market since lenders began giving disclosure of the total of payments.

## 2. *Finance Charge*

The descriptive explanation given by the new Reg. Z for the finance charge is "the dollar amount the credit will cost you."<sup>107</sup> Finance charge includes any cost charged to the borrower which he would not pay if he had paid cash for the dwelling.<sup>108</sup> Costs such as late charges, seller's points, and fees for title examination, abstract, survey, title insurance, credit reports, and escrow deposits are not included in the finance charge.<sup>109</sup>

## 3. *Amount Financed*

Amount financed is defined as "[t]he net amount of credit extended"<sup>110</sup> to the borrower. The descriptive explanation provided in the Federal Box is "the amount of credit provided to you or on your behalf."<sup>111</sup>

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105. Landers & Chandler, *supra* note 5, at 62.

106. *Id.* at 63.

107. 12 C.F.R. § 226.18(d) (1983). The amount financed and finance charge are needed to calculate the APR.

108. 12 C.F.R. § 226.4(a) (1983).

109. 12 C.F.R. §§ 226.4(c)(1) to (8), 226.4(d) (1983).

110. 12 C.F.R. § 226.18(b)(1) (Supp. I 1983).

111. 12 C.F.R. § 226.18(b) (1983).

Creditors are not required to itemize the amount financed,<sup>112</sup> as they were under the old the Truth in Lending Act. The creditor may inform the borrower that an itemization of the amount financed can be obtained upon written request or give the "itemization as a matter of course."<sup>113</sup> If the loan comes under the Real Estate Settlement Procedures Act,<sup>114</sup> which requires a "good faith estimate," then the creditor is exempt from complying with the itemization requirement of Reg. Z.<sup>115</sup> This exemption is applicable even when the "good faith estimate" discloses different items and the timing for disclosure is different from that under the Simplification Act and Reg. Z.<sup>116</sup> Congress felt that eliminating itemization of amount financed would give consumers more meaningful disclosure while easing the potential for "information overload."<sup>117</sup>

However, an explanation of the amount financed to the borrower will frequently prompt the question of what is the loan amount. This question indicates that the borrower is confusing the term amount financed with loan amount. To prevent this confusion, the loan amount should be included when disclosure is given. The inclusion of this item may prompt the borrower to request an itemization of amount financed to determine what, if any, is different between the loan amount and amount financed.

#### 4. *Total of Payments and Other Disclosure Items*

The descriptive explanation of the total of payments is "the amount you will have paid when you have made all scheduled payments."<sup>118</sup> It is calculated by adding together the amount financed and the finance charge.<sup>119</sup>

There are additional required disclosure items which do not have to be segregated and disclosed conspicuously as is required of those in the Federal Box.<sup>120</sup> The balance of the items for disclosure consists of: 1) the name of the creditor, 2) reference to variable rate feature, if

112. 12 C.F.R. § 226.18(c)(2) (1983).

113. 12 C.F.R. § 226.18(c) (Supp. I 1983).

114. 12 U.S.C. §§ 2601-2617. The Real Estate Procedures Settlement Act is referred to as RESPA.

115. 12 C.F.R. § 226.18(c) n.39 (1983) and (Supp. I 1983).

116. 12 C.F.R. § 226.18(c) (Supp. I 1983).

117. DIDMCA of 1980, *supra* note 2, at 266.

118. 12 C.F.R. § 226.18(h) (1983).

119. 15 U.S.C. § 1638(a)(5) (Supp. V 1981).

120. 12 C.F.R. § 226.17(a) (1983).

applicable, 3) payment schedule, 4) demand feature, if applicable, 5) prepayment options, 6) late payments, 7) security interest, 8) insurance information, if applicable, 9) certain security interest charges, 10) contract reference, 11) information on the assumption policy, and 12) required deposits, if applicable.<sup>121</sup> For residential mortgage loans, the creditor must disclose whether the mortgage loan is assumable.<sup>122</sup> This information is very helpful to the borrower as it is a major consideration when credit shopping.

The Simplification Act and Reg. Z allows creditors, at their option, to disclose the entire monthly payment, including escrow deposits.<sup>123</sup> However, creditors often will list only the principal and interest and the monthly mortgage insurance premiums, if applicable, when disclosing the monthly payment.<sup>124</sup> This practice is misleading since the consumer's natural tendency is to think that the payment disclosed is his entire monthly payment. This is incorrect. Generally, the consumer must also pay escrow deposits monthly. This problem can be easily remedied by requiring the creditor to make some reference to the fact that escrow deposits need be added to the principal and interest payment to obtain the monthly payment, or list the monthly payment with a notation that the figure includes escrow deposits that may vary over the life of the loan.

Besides the required items, the creditor can add items "as applicable."<sup>125</sup> The "applicable" terms may be combined or listed separately.<sup>126</sup> Having the flexibility to add other terms will make it easier for the creditor to comply with the Simplification Act and Reg. Z as well as with state and other Federal agency regulations.

## D. Timing of Disclosure

### 1. *Traditional or Transactional Method*

The old Truth in Lending Act required that disclosure be given "before the credit [was] extended. . . ."<sup>127</sup> The old Reg. Z determined that disclosure was required when there was a "creation of a contrac-

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121. 12 C.F.R. § 226.18(a) to (r) (1983).

122. 12 C.F.R. § 226.18(g) (Supp. I 1983).

123. RMIC, *supra* note 92, at 26.

124. 12 C.F.R. § 226.18(q) (1983).

125. 12 C.F.R. § 226.18(1) (Supp. I 1983).

126. *Id.*

127. 15 U.S.C. § 1638(b)(1976).

tual relationship, a matter normally determined by reference to state law."<sup>128</sup> When the Simplification Act was enacted and Reg. Z redrafted, consummation of the credit transaction determined the time of disclosure.<sup>129</sup> This is a major shift away from the test of economic suffering or payment of a non-refundable fee requirements to that of whether there is a contractual obligation.<sup>130</sup>

There is an inherent problem in using consummation as the focal point for determining when disclosure should be given because disclosure made at consummation is too late. By the time of consummation of the credit contract, the borrower has already negotiated the details of the purchase of his home and is "psychologically committed to the transaction and unlikely to go credit shopping."<sup>131</sup> Yet, encouraging credit shopping is one of the primary purposes of the Simplification Act and Reg. Z disclosure.<sup>132</sup> The borrower needs disclosure prior to being obligated on the sales contract. Alternatives to the traditional method of disclosure are examined in the following sections with suggestions for changes to solve the consumer's problem.

## 2. Early Disclosure

There was no special provision for early disclosure under the old Truth in Lending Act and Reg. Z.<sup>133</sup> The Simplification Act and the new Reg. Z add a provision requiring that certain residential mortgage transactions give early disclosure.<sup>134</sup> To come within the early disclosure requirement, the loan must be both a "residential mortgage transaction" under the Simplification Act and Reg. Z<sup>135</sup> and be a federally related mortgage under the provisions of RESPA.<sup>136</sup>

If the residential mortgage transaction meets the two-part test,

128. 12 C.F.R. § 226.2(a)(13)(1) (Supp. I 1983).

129. 12 C.F.R. § 226.2(13) (1983). Consummation is defined as "the time that a consumer becomes contractually obligated on a credit transaction." *Id.*

130. *Id.*

131. Rohner, *supra* note 86, at 1021.

132. 15 U.S.C. § 1601 (1976); 12 C.F.R. § 226.1(b) (1983).

133. 46 Fed. Reg. 20,881 (1981).

134. 15 U.S.C. § 1638(b)(2) (Supp. V 1981); 12 C.F.R. § 226.19 (1983).

135. Residential mortgage transaction is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w) (Supp. V 1981).

136. 12 U.S.C. § 2602(1) (1976).

then initial disclosure must be made within three days of receipt of the written application by the lender.<sup>137</sup> The initial disclosure is made by giving the RESPA "good faith estimate," which now complies with the provisions of the Simplification Act.<sup>138</sup> Estimates used in the "good faith estimate" must be disclosed as such.<sup>139</sup>

If subsequent events create a situation where the APR is no longer within the tolerable rate for variances, new disclosures must be made no later than consummation.<sup>140</sup> The creditor can comply by either redoing the entire disclosure statement or only the affected portion.<sup>141</sup> However, if a term other than the APR changes, such as the assumption policy,<sup>142</sup> redisclosure is not required. Arguably, the Simplification Act and Reg. Z should be modified so that any change of the information required on the Truth in Lending disclosure statement would necessitate redisclosure for those loans requiring early disclosure.

Problems occur when the consumer relies on the estimates he received when early disclosure is required, only to discover at settlement that the estimates were dramatically different from reality. The consumer in this situation may find himself without a remedy since there is no liability for a creditor when it uses estimates if the information necessary to make accurate disclosure is not available at the time disclosure was given.<sup>143</sup>

### 3. *Alternative Methods of Disclosure*

A proposed solution to the consumer's need for early information was considered by the Federal Reserve Board when Reg. Z was being redrafted. The Federal Reserve Board suggested that an "alternative shopping disclosure"<sup>144</sup> be used to provide consumers with credit information at a time when they were more likely to be credit shopping.

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137. 12 C.F.R. § 226.19(a) (1983).

138. *Id.*

139. 12 C.F.R. § 226.17(c)(2) (Supp. I 1983).

140. 12 C.F.R. § 226.17(f) (1983).

141. 12 C.F.R. § 226.17(f)(3) (Supp. I 1983).

142. Assumption is defined as "[t]he undertaking or adoption of a debt or obligation primarily resting upon another, as where the purchaser of real estate 'assumes' a mortgage resting upon it, in which case he adopts the mortgage debt as his own and becomes personally liable for its payment." BLACK'S LAW DICTIONARY 133 (5th ed. 1979).

143. 12 C.F.R. § 226.17(e) (1983).

144. 45 Fed. Reg. 29,703 (1981).

Basically, the creditor would have chosen to disclose either by the transactional or traditional method or by the alternative shopping disclosure.<sup>145</sup> If the creditor chose the alternative shopping disclosure, then disclosure could be done by using preprinted forms with general credit information for typical mortgage plans being offered.<sup>146</sup>

Disclosure made with the alternative shopping disclosure could be done at the time of application or as soon as possible thereafter.<sup>147</sup> If a subsequent change rendered the APR inaccurate, redisclosure would be required<sup>148</sup> as it presently is for RESPA mortgages. However, the proposal received a number of unfavorable responses from creditors, and the idea was dropped.<sup>149</sup>

The alternative shopping disclosure could easily have been, in the Federal Reserve Board's words, "the single most effective mechanism for achieving the statutory goal of fostering the informed use of credit."<sup>150</sup> It is still possible for the alternative shopping disclosure to be used without changing the existing regulation or statute. If the consumer received disclosure of the available mortgage plans when he began shopping for his home, the lender could comply with the statute and regulation by using the early RESPA disclosure provisions,<sup>151</sup> while providing the consumer with the information when he needs it.

#### E. Disclosure Laws for Alternative Mortgage Loans

There are two periods when a mortgagor making an alternative mortgage needs disclosure of certain information: 1) prior to deciding which alternative mortgage loan, if any, to choose and, 2) after the loan is made, but prior to a payment change.<sup>152</sup> The consumer needs the disclosure information at each of these times to evaluate his options intelligently. For pre-loan disclosure, lenders are required to disclose either: 1) no later than when the loan application is made or at the borrower's request, under the Federal Home Loan Bank Board's regulations,<sup>153</sup> or 2) no later than three days after loan application as re-

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145. 45 Fed. Reg. 29,724 (1980).

146. *Id.* at 29,722.

147. *Id.*

148. *Id.* at 29,723.

149. 45 Fed. Reg. 80,676 (1980).

150. *Id.* at 29,702.

151. 12 C.F.R. § 226.19(a) (1983). *See also* Rohner, *supra* note 86, at 1022.

152. Wallerer, *supra* note 6, at 23.

153. 12 C.F.R. § 545.6-4(g) (1982).

quired by the RESPA for the new Reg. Z.<sup>154</sup>

Under the new Reg. Z, a lender making an alternative mortgage loan is required to disclose the following: 1) the circumstances surrounding a rate change, 2) "the limitations on the increase," if any, 3) "the effect of an increase," and 4) an example of what the payment would be if there is an increase.<sup>155</sup>

However, the pre-loan disclosure requirements are inadequate for the consumer in a number of ways. First, the consumer receives the information after he has become contractually obligated to the seller, which is too late for him to evaluate his choices. Second, the borrower obtaining an alternative mortgage needs to know what the comparable costs are for both the loan he is making and a fixed rate mortgage.<sup>156</sup> The consumer needs to know such information as the alternative mortgage's "potential cost; the cost of a comparable SMI [standard mortgage instrument] securing the same principal; minimum and maximum rates of interest charge permitted; frequency of rate change; and available methods for implementing the rate change."<sup>157</sup> The lender is not required to give a "'worst case' example of rate and payment increases" or to give a historical trend of the index selected.<sup>158</sup> Yet, without the disclosure of this information the consumer cannot shop intelligently.

After the loan is closed, but prior to a change in the monthly payment, the consumer needs disclosure of the new payment rate and the outstanding principal balance in sufficient time for the borrower to budget for the impending change or to consider the possibility of refinancing. The new Reg. Z is silent as to what constitutes adequate notice for imminent payment changes, though the Office of the Comptroller of the Currency has promulgated regulations which require national banks to give the borrower notice "[a]t least 30 days and no more than 45 days before any interest rate change. . . ."<sup>159</sup> Since the laws governing alternative mortgages are not uniform, the borrower must be sensitive to this factor when deciding on which mortgage plan is best

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154. 12 C.F.R. § 226.19(a) (1983).

155. 12 C.F.R. § 226.18(f)(1) through (4) (1983).

156. Walleiser, *supra* note 6, at 23.

157. *Id.*

158. Scheuerman, *Adjustable Rate Mortgages: Fundamental New Directions in Residential Mortgage Lending, Part I*, 55 FLA. B.J. 649, 653 (1981).

159. 12 C.F.R. § 29.8(b) (1983).



for him.

#### IV. Responsibility of Disclosure: On Whom it Should Rest

##### A. Real Estate Brokers and Agents

The disclosure laws have been modified to make compliance easier for the creditor and to avoid information overload by the consumer, yet the Simplification Act fails to adequately address the basic question of who should be required to give disclosure. Congress must examine the issue and determine whether the law should be changed to require someone other than the lender to give disclosure, such as the real estate broker or a mortgage information broker, or whether existing requirements for disclosure by the creditor should be stricter. An examination into this issue and suggestions for changes follow.

The logical person to be responsible for the pre-loan disclosure is the real estate broker or agent. In today's market, most buyers use realtors to help them find homes. During their time together, the buyer and realtor develop a relationship of trust; the realtor is the buyer's "agent" in many respects. It is only natural for the buyer to turn to the realtor for financial advice. The realtor is in the best position to help the buyer grapple with the complexity of today's real estate market. There is a growing trend toward recognizing the realtor as an agent for the buyer. Traditionally, the principal of *caveat emptor* applied and the buyer was strictly on his own.<sup>160</sup> Now, the realtor generally owes the buyer a duty of honesty and good faith.<sup>161</sup> In California, Florida, Louisiana and Connecticut, the courts have adopted a "public interest" approach<sup>162</sup> when dealing with the realtor's duty to the buyer. The essence of the public interest approach is that, because realtors deal with the public and their function is "affected with the public interest . . . , [it is] proper to impose a duty on brokers in favor of purchasers and prospective purchasers which would not exist under the traditional rules of agency,"<sup>163</sup> thus giving a realtor a duty to the public that

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160. Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1345 (1972).

161. Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 23 U. FLA. L. REV. 655, 665 (1981).

162. Sinclair, *The Duty of The Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260, 266 (1981).

163. *Id.*

would not be found in traditional agency laws.<sup>164</sup>

Another theory that the courts have developed to protect the buyer, but avoid problems with agency law, is the malpractice approach.<sup>165</sup> Under this theory, "the broker owes all persons a duty of disclosure and explanation as to the implications and consequences of certain legal documents, while he owes his principal [the seller] even more. . . ."<sup>166</sup>

To more effectively deal with the problem, other solutions have been proposed such as "alternative brokers"<sup>167</sup> or "buyer's brokers." The buyer's broker works for the buyer for a flat fee or on an hourly basis.<sup>168</sup> Part of the broker's duty to his client is "[n]egotiating the terms of the purchase, providing the buyer with appropriate protections in the contract, and selecting the best financing alternative[s]. . . ."<sup>169</sup> One of the advantages of having a buyer's broker is that the broker will closely advise the buyer in two key areas: 1) pre-loan disclosures, and 2) the types of mortgages available.<sup>170</sup> Another is that the possibility of a conflict of interest disappears when the concept of the buyer's broker is used.<sup>171</sup> Also, the broker would have an incentive to show all property, including that for sale by owner, since he would be working in the buyer's interest.<sup>172</sup>

The relationship between the buyer and his broker would have to be made very clear. Generally, the law recognizes the broker as the seller's agent.<sup>173</sup> To implement the idea of a buyer's broker, existing multiple listing agreements will have to be rewritten deleting the section making a cooperative broker the subagent of the seller.<sup>174</sup> Even if

164. *Id.*

165. Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 790 (1978). Arizona allows real estate brokers to prepare certain legal documents in connection with the closing. *Id.* at 767.

166. *Id.* at 792.

167. Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U.L. REV. 379, 382 n.20 (1982).

168. *Id.*

169. Levine, *Does The Home Buyer Need His Own Broker?*, 13 REAL EST. REV. 98, 100 (1983).

170. Comment, *supra* note 167, at 381.

171. Levine, *supra* note 169, at 99.

172. *Id.*

173. Currier, *supra* note 161, at 660. An in-depth discussion of agency law and its effects on the broker-buyer-seller relationship in real estate transactions is beyond the scope of this note.

174. Comment, *supra* note 167, at 399.

the common law and custom changed to permit the buyer's broker concept, there would be obstacles to be removed before it could be required that realtors give disclosure. There would be a natural resistance on the realtor's part to the increase in his duties and liabilities. Also, an affirmative obligation would be imposed on realtors to remain current on all changes in the disclosure laws, a process cumbersome even for creditors.

## B. Mortgage Information Broker

Since it appears that requiring realtors to give disclosure may not be a viable solution from a practical standpoint, another possible answer is to have a mortgage information broker. The borrower could go to the mortgage information broker before he begins to shop for his new home. The information broker would be responsible for being up-to-date on all the various mortgage plans. With this information, the information broker would analyze the buyer's liabilities and assets to determine which type of mortgage would be most suitable for him. The information broker could advise the buyer which of the various complex financing plans would be best not only for him, but also for the seller.<sup>175</sup> This information is necessary for the consumer, not only to shop adequately for credit, but to negotiate the best contract with the seller.

Arguably, there are problems with using a mortgage information broker to disclose information to the consumer. First, the mortgage information broker must be paid by the buyer, which increases the cost of obtaining financing. Second, the mortgage information broker may have a difficult time keeping current information on all the available plans offered by all of the mortgage companies. Unless the mortgage companies were required by statute to provide this information, the mortgage information broker could disclose only the information he could obtain. Finally, there is the possibility that a mortgage information broker may direct all of his business to a particular lender, thus frustrating the Truth in Lending Act's goals of promoting credit competition.

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175. For example, the mortgage information broker could indicate which plans take the least amount of time to process or incur the least amount of cost in such items as discount points.

### C. Creditors

If the real estate broker or the mortgage information broker is not the best alternative for disclosing the needed credit information to the consumer, then who is? The creditor is the logical choice and it should retain responsibility for the disclosure.

The creditor has received tremendous benefits from the Simplification Act. The disclosure procedure has been simplified, with the creditor obviously in mind. To be fair, the creditor should be responsible for giving disclosure of the necessary information to the borrower when he needs it, when the consumer is credit shopping. The creditor should be required to analyze the consumer's needs and provide him with information on the best plans offered by that mortgage company. Then the borrower can shop for credit intelligently by going to as many mortgage companies as he wishes and obtaining information on their plans and how they differ from their competitors before he signs his sales contract. Then disclosure would be simple for the creditor and fair to the consumer.

### V. Conclusion

The old Truth in Lending Act and Reg. Z received the substantial overhaul they needed. The Simplification Act and Reg. Z are now simpler both for the residential borrower and the creditor. However, while creditor compliance has been made easier, there has not been great strides towards protecting borrowers. The content of disclosure needs to be modified to protect the residential mortgagor adequately. The mortgagor needs to know his simple interest rate and the rate he pays in five years, as well as the annual percentage rate. The amount financed means nothing to the borrower without knowing the loan amount. The borrower receives some disclosure now, but it is still not adequate. The residential mortgagor is still inadequately protected, especially in the area of timing of disclosure. The professed purpose of the Simplification Act and Reg. Z is to give borrowers the necessary information so they can shop for credit intelligently.<sup>176</sup> To shop intelligently, the credit information must come before the borrower is obligated on the sales contract, not the credit contract.

Disclosure could be made by the real estate broker, a mortgage information broker, or the creditor. There are problems of requiring

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176. 15 U.S.C. § 1601(a) (1976); 12 C.F.R. § 226.1(b) (1983).

any of these to give disclosure. However, the logical choice is the creditor. It is only fair that the creditor, who has received so many benefits from the recent simplification of the Truth in Lending Act, should be required to disclose the information needed by the borrower and the Simplification Act should be amended accordingly.

*Elizabeth J. Keeler*

# Transferable Development Rights: An Innovative Concept Faces an Uncertain Future In South Florida

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## I. Introduction

Once hailed as a novel and exciting land management concept, transferable development rights<sup>1</sup> have met with limited success. The doctrine, which recognizes the severability of development potential from land,<sup>2</sup> has not generally met expectations. Beginning in 1977, several South Florida counties and municipalities implemented TDR zoning ordinances.<sup>3</sup> These regulations<sup>4</sup> were enacted primarily to preserve environmentally sensitive lands.<sup>5</sup> However, only in Collier and Dade Counties have sales of development rights been reported, and only in Collier County have development rights actually been used. Therefore, Florida planners who once recommended the TDR approach as a method of preserving historic landmark sites, land in environmentally sensitive regions, open space, and farmland now speak in more cautious terms. This note will analyze some of the obstacles encountered in im-

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1. Transferable development rights will be referred to throughout this note by their common acronym, TDRs.

2. See generally J. COSTONIS, *SPACE ADRIFT* (1974) [hereinafter cited as *SPACE ADRIFT*]; *THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION* (J. Rose ed. 1975) [hereinafter cited as *TDR*]; Merriam, *Making TDR Work*, 56 N.C.L. REV. 77 (1978) [hereinafter cited as *Making TDR Work*].

3. A zoning ordinance in which TDRs are granted to landowners in conjunction with restrictive zoning placed on their properties is the usual mechanism for implementation of a TDR program.

4. Six South Florida regulations have been evaluated: Dade County, Fla., Ordinance 81-122 (Jan. 1, 1982); Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981); Collier County, Fla. Ordinance 82-2 § 9 (Jan. 5, 1982); Pinellas County, Fla., Zoning Reg. § XXXIII-D(1)(d) (Dec. 16, 1980); ST. PETERSBURG, FLA., CODE art. II, § 64.09 (1977); HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978).

5. The State of Florida has also employed the concept as a preservation technique but uses a different approach. Florida Statute § 193.501 provides a mechanism whereby the owner of environmentally sensitive land may convey to the state or local government the development right of that parcel or covenant with the government that the "land shall not be used by the owner for any purpose other than outdoor recreational or park purposes." Fla. Stat. § 193.501 (1) (1981). In return, the state agrees to reduce the tax assessment on that property. Fla. Stat. § 193.501 (3) (1981).

plementation of TDR ordinances and will attempt to explain why South Florida regulations have enjoyed only minimal acceptance.

## II. Principles of Transferable Development Rights

Land may be viewed as an assemblage or bundle of rights.<sup>6</sup> According to TDR theory, the right to develop one's property may be severed from the land and sold, much in the same way as mineral rights are severed and sold.<sup>7</sup> But while mineral rights do not "leave" the land, TDRs are separated from their land source and re-established on a designated recipient site. The usual vehicle for implementation of a TDR program is a zoning ordinance. Such a regulation empowers the local government entity which has responsibility for zoning to grant TDRs to landowners, along with use restrictions placed on their properties. The restrictions generally dictate that development on the transfer site be kept to a marginal level.

Although several variations of the TDR scheme exist,<sup>8</sup> four basic steps are involved. First, land which the local government wishes to preserve must be identified and placed in a restrictive zoning classification. Second, a determination of the number of rights which will be granted to owners in the preservation area must be made and assigned.<sup>9</sup> Third, recipient sites to which development rights can be transferred must be identified. Fourth, the actual sale and transfer of rights must take place.<sup>10</sup> Additional development is then precluded at the transfer

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6. Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL EST. L.J. 330, 331 (1975).

7. For a discussion of the legal precedents for development rights transfer, see Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974), excerpts reprinted in TDR, *supra* note 2, at 27.

8. See, e.g., Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972), excerpts reprinted in TDR, *supra* note 2, at 95; J. COSTONIS & R. DEVOY, *THE PUERTO RICAN PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHT TRANSFER* (1974), excerpts reprinted in TDR, *supra* note 2, at 200 [hereinafter cited as PUERTO RICAN PLAN]; *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972) [hereinafter cited as *New York City*].

9. See *infra* text accompanying notes 81-82. See, e.g., Collier County, Fla., Ordinance 82-2 § 9.1(h)(5) (Jan. 5, 1982) which provides for the assignment of one half of a residential unit per acre of preservation zone land.

10. The rights are treated as an interest in real property and, therefore, must comply with recording statutes. See, e.g., Dade County, Fla., Ordinance 81-122 §§ 4, 5F (Jan. 1, 1982). The landowner may choose to use the rights himself on the recipient

site. This is accomplished by means of a restrictive covenant placed on the preserved land after its development rights have been sold or used by the landowner on a recipient site. Title to preserved land may be retained by its owner or dedicated to the government.<sup>11</sup>

While the South Florida TDR programs evaluated allow rights to be purchased and sold directly on the open market,<sup>12</sup> more elaborate schemes exist. For instance, local government may act in an intermediary capacity for the purchase and sale of rights. The landowner, in the absence of a private purchaser, may sell his rights to the government which maintains a rights "bank."<sup>13</sup> The advantage to the seller is apparent: he has an immediate market for his rights. However, the local government must then expend funds to purchase those rights. Once the rights are sold by government, some commentators maintain that the system operates at no cost to anyone.<sup>14</sup>

Because the property owner is compensated for his inability to develop his property, TDRs have been advocated as an answer to "wipeout."<sup>15</sup> The landowner is wiped out by the economic loss suffered when his property is either downzoned<sup>16</sup> or frozen in a low zoning classification. While payment for downzoning is not required in the absence of a taking,<sup>17</sup> TDRs function to ameliorate the harshness of such regulation.

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site or sell them to another, or he may hold them and not utilize them. Thus far, in South Florida, only Collier and Dade Counties have reported transfers of rights. See *infra* text accompanying notes 111-115.

11. See, e.g., FLA. STAT. § 193.501 (1981) which provides for retention of the title by its owner.

12. No government rights bank system exists in the six South Florida regions evaluated.

13. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 87 (1973) [hereinafter cited as *An Exploratory Essay*]. Cf. PUERTO RICAN PLAN, *supra* note 8, at 208, 209 (buyer is required to purchase through government "bank").

14. Shlaes, *Who Pays for Transfer of Development Rights?*, 40 PLAN., July 1974, at 7-9, reprinted in TDR, *supra* note 2, at 330, 336 [hereinafter cited as Shlaes]. But see *infra* text accompanying notes 96-97.

15. Hagman, *Windfalls and Wipeouts* in THE GOOD EARTH OF AMERICA, excerpts reprinted in TDR, *supra* note 2, at 265, 273. Windfall and wipeout refer to the gains and losses in value of real property its owner incurs as a result of government regulation. For example, a single zoning change could cause appreciation in value in one parcel (windfall) while causing depreciation in another (wipeout).

16. Downzoning refers to the assignment of a lower zoning classification to a parcel which acts to further restrict its use and/or density.

17. See *infra* text accompanying notes 20-24.



Successful uses of TDRs produce numerous benefits: vital land is preserved; the landowner receives compensation for his inability to further develop his property; development is directed toward a more desirable location;<sup>18</sup> and land preservation is accomplished without financial outlay on the part of government.<sup>19</sup> While the TDR concept appears disarmingly simple, the complexity in implementation soon becomes evident.

### III. Constitutional Considerations

#### A. The Taking Issue: Compensatory Aspects of TDRs

A local government's ability to regulate private property derives from its constitutionally implied police power. This power is limited in that any ordinance in which "provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare"<sup>20</sup> will be declared unconstitutional. When regulation so restricts private property as to deprive its owner of all reasonable beneficial use, a landowner may bring suit in inverse condemnation; the court must then determine if a taking has occurred.<sup>21</sup> The usual judicial remedy for excessive regulation is to invalidate the ordinance rather than to compel compensation to the landowner under the power of eminent domain.<sup>22</sup> Courts generally hesitate to extend the

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18. See Wilson, *Precedent Setting Swap in Vermont*, 61 AM. INST. ARCHITECTS J. 51 (1974), reprinted in TDR, *supra* note 2, at 256; Lynch, *Controlling the Location and Timing of Development by the Distribution of Marketable Development Rights* (June, 1973) (unpublished mimeo), reprinted in TDR, *supra* note 2, at 259, 260.

19. See *supra* note 14.

20. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

21. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125, 136 (1978).

Compensation is required if a "taking" has occurred. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . ." FLA. CONST. art. X, § 6(a).

The federal "taking" clause is applied to the states through the fourteenth amendment to the Constitution which provides "nor shall any State deprive any person of life, liberty, or property without due process of law."

22. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The California Supreme Court had held that a landowner could not sue in inverse condemnation when challenging the constitutionality of a zoning ordinance. In the event the ordinance constitutes a taking, the California court ruled that the only remedies available are mandamus and declaratory judgment; damages are not recoverable. *Id.* at 259, 263. On appeal to the

"taking" language of the fifth amendment to include burdensome regulations.<sup>23</sup> Instead, excessive restrictions imposed by zoning regulations have been described by one court as deprivation of property rights without due process of law,<sup>24</sup> a noncompensable violation requiring invalidation of the enactment.

The argument has been made that it is sometimes necessary for government to regulate private property by means of harsh zoning enactments.<sup>25</sup> For example, government may seek to preserve property by placing strict limitations on development.<sup>26</sup> By granting TDRs to the landowner in conjunction with harsh use restrictions on his property, the government body acquires a basis for defending its zoning ordinance against an inverse condemnation challenge.<sup>27</sup> According to this rationale, the landowner is not deprived of all reasonable beneficial use of his property once TDRs are granted.<sup>28</sup>

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United States Supreme Court, the Court found that no "taking" had occurred and thus refused to consider what the appropriate remedy for excessive regulation should be. *Id.* at 263.

But see *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (inverse condemnation) in which the United States Supreme Court held that since no final judgment had been entered, the taking issue would not be addressed. *Id.* at 630, 633. The *San Diego* dissent, written by Justice Brennan, argued that a final judgment had been entered and, further, that a regulatory taking demands that government pay just compensation for the period during which the taking occurred. *Id.* at 646, 647, 653. Justices Stewart, Marshall, and Powell joined the dissent. Justice Rehnquist, in his concurring opinion, stated that if this were an appeal from a final judgment, he would agree with much of what was said in the dissenting opinion. Arguably, therefore, five of the nine justices believe that just compensation is mandated for a regulatory taking, but the dissent is not yet the law.

23. See *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 593, 594, 350 N.E.2d 381, 384, 385, 385 N.Y.S.2d 5, 8 (1976).

24. *Id.*

25. See generally Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, (1975) [hereinafter cited as "Fair" Compensation].

26. Noted commentator, John Costonis, has advocated that where government enacts burdensome zoning regulation, the landowner should receive *fair* compensation for his economic injury, a new judicial standard. *Id.* at 1022. Rather than evaluating compensation based on the parcel's highest and best use, a traditional assessment made under eminent domain proceedings, Costonis proposes a standard keyed to a lesser economic return. Fair compensation may be paid in "dollars or by some non-dollar but market worthy alternative." *Id.* Transferable development rights fulfill the requirements for fair compensation. *Id.*

27. *Id.* at 1044, 1045, 1051.

28. *Id.*

The New York Court of Appeals addressed this issue in *Fred F. French Investing Co., Inc. v. City of New York*.<sup>29</sup> In *French*, the mortgagee of a Manhattan residential complex sued to have a New York zoning amendment which applied only to his property declared unconstitutional. The resolution rezoned his private parks, which were part of a residential complex, from a high density residential and office building classification to a "Special Park District,"<sup>30</sup> thus precluding on-site development. The regulation provided the property owner with TDRs usable elsewhere in Manhattan but did not identify a specific parcel as the recipient site. Affirming the decisions of the trial and appellate courts, the New York Court of Appeals held that the zoning amendment was unconstitutional since "it deprive[d] the owner of all his property rights, except the bare title."<sup>31</sup> The court chose to invalidate the ordinance rather than force the city to compensate the land owner.<sup>32</sup> Under the facts of the case, the granting of TDRs was not sufficient to uphold an excessively burdensome zoning ordinance against an inverse condemnation challenge.

In evaluating the economic injury to the landowner, the court examined the compensatory aspect of the TDRs granted. Viewing them as a "potentially valuable . . . commodity [which] may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property,"<sup>33</sup> the *French* court said, "in this case, [they] fall short of achieving a fair allocation of economic burden."<sup>34</sup> However, in dicta, the court recognized that where a landowner is able to sell his interests to an existing rights bank and is paid "instantly and in money . . . he is paid just compensation for them in eminent domain."<sup>35</sup> In sum, while acknowledging that development rights are valuable, the *French* court indicated that they are not the equivalent of just compensation in the absence of an immediate dollar

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29. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

30. *Id.* at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 7.

31. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

32. The *French* court regarded excessive regulation as frustration of property rights without due process of law as opposed to a compensatory taking. Thus, the court regarded invalidation, rather than just compensation, as the appropriate remedy. *Id.* at 593, 594, 350 N.E.2d at 384, 385, 385 N.Y.S.2d at 8. *Cf. supra* note 22 (California Supreme Court's holding that for a regulatory taking, damages are not recoverable).

33. *Fred F. French Investing Co., Inc.*, 39 N.Y.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

34. *Id.* at 600, 350 N.E.2d at 389, 385 N.Y.S.2d at 13.

35. *Id.* at 598, 599, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

exchange, and could not, therefore, sustain the excessive zoning regulation.

The United States Supreme Court addressed the concept of transferable development rights in *Penn Central Transportation Co. v. New York City*.<sup>36</sup> Grand Central Terminal, because of its age and architectural features, had been designated a landmark site under New York City's Landmark Preservation Law.<sup>37</sup> According to the law, no exterior structural changes could be made to the building without obtaining the city's permission. The ordinance also provided that owners of landmark sites who had not utilized the maximum density permitted under current zoning laws were allowed to transfer development rights to specified parcels. The rights were equivalent to the difference in square feet between the permitted density, if the site were not a landmark, and the existing density.<sup>38</sup>

Penn Central had contracted to construct a multi-story office building above the terminal, but the city rejected two consecutive plans for aesthetic reasons and denied permission to build. Penn Central brought suit against the City of New York, alleging a taking had occurred.<sup>39</sup> Although Penn Central prevailed in the trial court, that decision was reversed by the Appellate Division. The New York Court of Appeals sustained the ruling in favor of the city, firmly rejecting Penn Central's argument that Grand Central Terminal was not providing a reasonable economic return.<sup>40</sup>

On appeal to the United States Supreme Court, the validity of the New York Landmark Preservation Law was upheld. The Court determined that no taking had occurred in view of Penn Central's concession to the Court that Grand Central Terminal could indeed earn a reasonable return.<sup>41</sup> This had been the focus of intense litigation in the state courts.<sup>42</sup> In essence, Penn Central conceded the taking issue. The

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36. 438 U.S. 104 (1978).

37. New York City adopted its Landmark Preservation Law in 1965. See N.Y.C. AD. CODE ch. 8-A § 205-1.0 (1976).

38. For example, if the landmark site contains 75,000 square feet of office space (existing density) and the property, if unrestricted by the landmark law, were zoned for 100,000 square feet, the TDR value would equal 25,000 square feet.

39. *Penn. Central Transportation Co.*, 438 U.S. at 119. Penn Central sought a declaratory judgment, injunctive relief barring the city from using the Landmark Law, and damages. *Id.*

40. *Id.* at 104, 105.

41. *Id.* at 129 n.26, 138 n.36.

42. *Id.*

Court, therefore, avoided determining whether transferable development rights afforded just compensation under the fifth amendment. However, the Court did recognize that the rights were valuable, stating "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and . . . are to be taken into account in considering the impact of regulation."<sup>43</sup>

There are few cases subsequent to *Penn Central* which discuss TDRs; however, the concept was judicially approved in Florida by the Fourth District Court of Appeal in *City of Hollywood v. Hollywood, Inc.*<sup>44</sup> At issue was the validity of a zoning ordinance which contained a TDR provision. Under the ordinance, a narrow strip of undeveloped beachfront was zoned for single family density. The western portion of the land, separated from the beach by a road, was zoned multiple-family. The beachfront area had a transfer of development rights proviso which would have permitted the developer, at his option, to build an additional 368 condominium units to the west<sup>45</sup> in return for dedicating the beachfront to the city.

The trial court invalidated the ordinance, stating that although the regulation was nonconfiscatory, it was arbitrary since (1) its density cap was predicated on an erroneous traffic study and (2) it was unreasonable to assign single-family zoning to beachfront property.<sup>46</sup> Further, it stated that "the transfer of development rights concept as contained within this ordinance is unsupportable in fact or law."<sup>47</sup>

The Fourth District reversed the trial court's ruling, citing additional controlling factors besides the traffic study which were considered when the ordinance was written. Further, the court found the application of the single family zoning classification to the beachfront

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43. *Id.* at 137.

44. 432 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1983).

45. See *infra* text accompanying notes 83-92 where the related issue of density is discussed.

46. *City of Hollywood*, 432 So. 2d at 1334.

47. *Id.* (quoting the trial court). Lack of familiarity with the TDR concept is an ever present problem. In the instant case, the Fourth District noted that both parties had failed to cite in their briefs the Florida statute which provides for transfer of development rights, FLA. STAT. § 193.501 (1981). See *supra* note 5. Perhaps the difficulty arose because the statute appears under "Assessments." The court, in regarding the absence of the statute from the briefs, commented, this "leaves us nothing short of mystified." *Id.* at 1337.

parcel to be "compatible [and] fairly debatable,"<sup>48</sup> i.e., reasonable and not arbitrary. The court then examined the TDR segment of the ordinance and had "no trouble upholding the particular provision employed."<sup>49</sup> Applying the taking criteria set forth in *Penn Central Transportation Co. v. New York City*,<sup>50</sup> the court stated it had "already found the government action to be proper and reasonably related to a valid public purpose."<sup>51</sup> In its assessment of the economic impact of the ordinance on the developer, the court declared that it could not quarrel with a gain of 368 multifamily units against the loss of 79 single family units and upheld the provision. The developer contended that requiring actual transfer of title to the city "goes too far."<sup>52</sup> The *Hollywood* court responded that if the developer accepted the transfer proposal, the court would be "suspicious of any motives for keeping a hold on [the beachfront]."<sup>53</sup> Since the transfer was optional under the terms of the ordinance, the developer was still free to build the seventy-nine units permitted on the beachfront property.<sup>54</sup>

The *French*, *Penn Central*, and *Hollywood* decisions suggest that, in analyzing the effects of a TDR zoning regulation, courts will initially determine if the regulation is a proper exercise of the police power. The focus will then shift to remaining beneficial uses which exist on the restricted property. As long as no taking has occurred, any transferable development rights granted by the government will be regarded as mitigation or amelioration of financial loss. If the regulation has resulted in a taking, i.e., is held to be excessively restrictive, the courts most commonly will invalidate the ordinance. In the alternative, courts may up-

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48. *Id.*

49. *Id.* at 1337, 1338.

50. *Id.* at 1338. The three "taking" criteria the court applied were (1) character of the government action, (2) whether the land use restriction was related to a valid public purpose, and (3) the economic impact of the regulation on the claimant. *Id.* (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

51. *City of Hollywood*, 432 So. 2d at 1338.

52. *Id.*

53. *Id.*

54. Shortly after this case was decided, the City of Hollywood, although having won the appeal, announced it would buy the litigated property. Funds were available from the State of Florida under the "Save Our Coasts" program. Both the transfer site, i.e., the beachfront, and the recipient site, i.e., the westernmost portion of the land across the street from the beach, will be acquired. Thus, the Hollywood TDR regulation is rendered moot since it was specifically implemented for this geographical region. See HOLLYWOOD, FLA., ZONING AND LAND DEVELOPMENT CODE art. 32A (1978).

hold the regulation but require just compensation.<sup>55</sup> These cases suggest that in the event just compensation is mandated and transferable development rights have been granted to the landowner under the ordinance, courts must assess the present economic value of the TDRs so as to determine if they constitute just compensation. As the *French* court acknowledged, without the ability to immediately market the TDRs and convert them to dollars, the prospect of judicial recognition of transferable development rights as just compensation is unlikely. In conclusion, the granting of TDRs not susceptible to an immediate dollar exchange is not likely to sustain an excessive zoning regulation.

#### B. The Uniformity Issue: Do TDRs Violate State Zoning Enabling Acts and Equal Protection?

A TDR ordinance requires recipient sites to accommodate the density transferred from the preservation zone.<sup>56</sup> According to the Standard State Zoning Enabling Act, the act on which state zoning enabling legislation is based, "all zoning regulations shall be uniform for each class or kind of building through each district."<sup>57</sup> Allegations that TDR ordinances violate this uniformity requirement and constitute spot zoning stem from the fact that some buildings in the recipient zone will be afforded greater densities than others due to the acquisition of development rights. Commentators give little weight to this objection, applying the rationale that all property owners in the receiving zone have the same opportunity to purchase rights.<sup>58</sup> In the event landowners in the recipient zone do not have a reasonable opportunity to acquire development rights, the TDR ordinance could fall as violative of the constitutional requirement of equal protection.<sup>59</sup> Since commentators agree that "the statutory requirement of uniformity is simply duplicative of the constitutional requirement of equal protection,"<sup>60</sup>

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55. See *supra* notes 22, 32.

56. See *supra* text accompanying notes 8-11.

57. ADVISORY COMMITTEE ON ZONING, DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 2 (rev. ed. 1926), quoted in SPACE ADRIFT, *supra* note 2, at 158.

58. SPACE ADRIFT, *supra* note 2, at 158, 159. See also Marcus, *A Comparative Look at TDR, Subdivision Exactions, and Zoning as Environmental Panaceas: The Search for Dr. Jekyll Without Mr. Hyde*, 20 URB. L. ANN. 3, 45-48 (1980) [hereinafter cited as *A Comparative Look*].

59. SPACE ADRIFT, *supra* note 2, at 158.

60. *Id.*

they are treated as "single in nature."<sup>61</sup> Therefore, assuming no court would invalidate TDR ordinances based on equal protection objections, it is likely that objections based on the uniformity requirement would also be unsuccessful. Further, the claim that TDRs effectuate spot zoning,<sup>62</sup> can, according to one commentator, "be overcome . . . upon a showing that the special treatment accorded the landowner involved is reasonably necessary to further the efforts of the municipality in implementing its comprehensive plan."<sup>63</sup>

#### IV. Pragmatic Considerations: Problems in Implementing and Administering South Florida TDR Ordinances

While TDR systems have been advocated for many purposes,<sup>64</sup> it is beyond the scope of this article to examine all of their applications. The focus of this section will be limited to the three uses of TDRs in South Florida: preservation of environmentally sensitive land and open space, preservation of farmland, and preservation of historic landmark sites.<sup>65</sup>

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61. *Id.*

62. *A Comparative Look*, *supra* note 58, at 52.

63. *Id.*

64. See generally *SPACE ADRIFT*, *supra* note 2 (preservation of historic landmark sites); *TDR*, *supra* note 2 (preserving landmarks, open space and fragile ecological resources; as a primary system of land use regulation; as a method of encouraging low and moderate income housing; as a method of regulating location and timing of community growth); Daniels and Magida, *Application of Transfer of Development Rights to Inner City Communities: A Proposed Municipal Land Use Rights Act*, 11 *URB. LAW.* 124, 129 (1979) (transfer of parking rights, transfer of rights to erect outdoor advertising, transfer of uses permitted by local zoning ordinances but unexercised, transfer of various licenses and easements).

65. The six south Florida regulations evaluated provide for the following purposes: Dade County, Fla., Ordinance 81-122 (Jan. 1, 1982) (preservation of environmentally and ecologically sensitive lands, specifically the East Everglades wetlands); Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981) (preservation of agricultural and environmentally sensitive land); Collier County, Fla., Ordinance 82-2 § 9 (Jan. 5, 1982) (preservation of environmentally sensitive lands and historic sites); Pinellas County, Fla., Zoning Reg. § XXXIII-D(1)(d) (Dec. 16, 1980) (preservation of environmentally sensitive areas and open space); ST. PETERSBURG, FLA., CODE art. II, § 64.09 (1977) (preservation of environmentally and ecologically sensitive land); HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978) (preservation of North Beach and West Lake areas, i.e., preservation of environmentally sensitive lands in these specific locations).



### A. Identification of Land in the Preservation Zone and Establishment of Program Goals

The first step in any TDR program is the identification of land for preservation coupled with the determination of the goals of the program. If the land identified for preservation is unimproved, the TDR ordinance should allow for some margin of development in order to survive judicial challenge in inverse condemnation actions.<sup>66</sup> Where land is already improved so that a reasonable beneficial use is easily established, courts will be more apt to sustain the ordinance as nonconfiscatory.<sup>67</sup>

When the goal of community planners is preservation of historic landmarks, the regulation necessarily concerns improved property. The owner usually retains the reasonable beneficial use of his property and the regulation should survive a taking challenge. From a conceptual framework, this system is easier to implement than others because it deals with density values that are certain. Since planners know exactly how much development would be allowed on the landmark site under present zoning, they know exactly how much density must be transferred.<sup>68</sup> Moreover, a relatively small number of buildings are involved; under urban TDR ordinances, development occurs in the same general area as the preserved site.<sup>69</sup> In South Florida, only the Collier County ordinance provides for the granting of TDRs to owners of historic landmark sites.<sup>70</sup> Thus far, no rights have been transferred for this purpose.

On the other hand, in South Florida environmental and open space preservation programs, land is usually undeveloped or marginally developed. Where no prior development has taken place, a zoning ordinance which seeks to preserve land by precluding all development on it, thus leaving its owner with no reasonable beneficial use, is likely to be

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66. See *supra* text accompanying notes 29-35. But see *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972) (limited use of private property to its "natural use").

67. See *supra* text accompanying notes 36-43.

68. See *supra* note 38.

69. E.g., Elliott and Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56, 72-78 (1972). Under the New York City Landmark Preservation Law, development rights could only be transferred to contiguous sites. The law was later amended to allow transfer to designated non-contiguous lots within a radius of a few blocks. *Id.* at 72, 73.

70. Collier County, Fla., Ordinance 82-2 § 9.1(a) (Jan. 5, 1982).

deemed confiscatory. This appears to be true regardless of the issuance of TDRs to the regulated landowners.<sup>71</sup> Therefore, when government's preservation goals require *barring* all development on unimproved land, as opposed to simply placing limits on its development, direct government purchase by means of eminent domain actions may prove the better way.<sup>72</sup> Direct purchase eliminates the risks inherent in enacting excessively restrictive zoning regulation, namely, the taking challenge that burdened landowners will surely raise and the possibility that the regulation will be struck down by the courts, thus opening the way for undesirable development. Application of a TDR ordinance to unimproved property should be limited to situations where development is to be restricted rather than precluded altogether.

An added consideration is that in South Florida, typically much of the land designated as environmentally sensitive has poor development potential. Frequently these areas consist of swamp or mangrove or are subject to flooding. Often, other environmental restrictions have already been placed on the land. Implementing a TDR program to preserve land of this kind has met with objection.<sup>73</sup> Existing physical conditions and legal restrictions already minimize development in these areas. Arguably, providing these landowners with TDRs is to accord them development rights for land with no development potential, a result contrary to espoused TDR principles.<sup>74</sup> In essence, such landowners are getting something for nothing. Some community planners fear that developers who bought swampland incapable of development for a small investment will reap a windfall by exchanging it for valuable de-

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71. See *supra* text accompanying notes 29-35, 55.

72. TDRs and condemnation under the power of eminent domain are by no means the only preservation techniques available. See generally Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land Use Agreements*, 14 REAL PROP., PROB. TR. J. 541 (1979) (use of easements, covenants and equitable servitudes); Marcus, *A Comparative Look*, *supra* note 58, at 20, 27 (use of subdivision exactions, natural area zoning); Carlo and Wright, *Transfer of Development Rights: A Remedy for Prior Excessive Subdivision*, 10 U.C.D.L. REV. 1 (1977) [hereinafter cited as Carlo] (use of downzoning, service moratoria); *Making TDR Work*, *supra* note 2, at 78-80 (use of conventional zoning, density zoning, tax relief); Markham, *Selling Mother Nature*, Miami Herald, July 17, 1983, at H1, col. 1 (use of density and construction techniques to preserve environmentally sensitive area).

73. See *A Comparative Look*, *supra* note 58, at 44-45.

74. See, Rose, *The Transfer of Development Rights: An Interim Review of an Evolving Concept*, reprinted in TDR, *supra* note 2, at 14, 15 [hereinafter cited as *An Interim Review*] (Sonoma County, California TDR plan provides that no development rights are granted to land incapable of supporting development).

velopment rights. These fears have been realized in Collier County where mangrove has been exchanged for rights to build residential condominium units.<sup>75</sup> A moratorium on the use of TDRs has been effected in Collier County so as to allow for analysis of the program.<sup>76</sup>

An area where TDR ordinances are purportedly more likely to be successful is in the preservation of agricultural land.<sup>77</sup> Land which is actively farmed provides its owner with a reasonable beneficial use. By locking farmland into an agricultural zoning designation and providing its owner with TDRs, government can accomplish its preservation purpose while compensating the landowner today for loss of speculative profits. At the same time, the farmer is allowed to continue using his land productively. Palm Beach County enacted a TDR ordinance primarily for preservation of agricultural land.<sup>78</sup> However, to date no rights have been transferred. Farmland in Palm Beach County is both expensive and physically capable of supporting development. Where land possesses both of these attributes, owners have expressed reluctance to relinquish development potential. This is due in part to a lack of confidence in the continued existence of the TDR system.<sup>79</sup> Landowners believe that by retaining their rights without using or selling them, they are retaining the development potential of their farmland. They maintain that at some later date the zoning law will change, and development will be permitted to greater intensity.<sup>80</sup>

Transferable development rights solve few preservation problems. South Florida planners must be reasonable in their expectations and realistic in identifying the purposes which such an ordinance might fulfill. The physical characteristics of the preservation zone land and its

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75. See Spagna, *Transfer of Development Rights: The Collier County Experience*, FLA. ENVTL. URB. ISSUES, Jan.-Feb., 1979, at 7, 9 (owner of a 70 acre "mangrove island" dedicated the island to the county in exchange for rights to build an additional 353 condominium units on other land he owned).

76. Another factor for consideration is that once land in Collier County is designated as a "special treatment" district, i.e., preservation zone, its tax assessment is greatly reduced which represents a sizeable tax loss to the county. *A Comparative Look*, *supra* note 58, at 19.

For a detailed discussion of the personal tax consequences of purchase and sale of rights, see Note, *Tax Consequences of Development Rights Transfer: An Exploratory Essay*, 33 TAX LAW. 283 (1979).

77. See Richman and Kendig, *Transfer Development Rights - A Pragmatic View*, 9 URB. LAW. 571 (1977) [hereinafter cited as *A Pragmatic View*].

78. Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981).

79. See *infra* text accompanying notes 111-115.

80. *Id.*

level of development will dictate whether application of a TDR ordinance is practicable. Where land is incapable of supporting development, TDRs should not be granted. Where land is physically capable of supporting development, experience teaches that landowners have not supported the program; they will not relinquish potential for development.

## B. Calculating Transferable Development Rights, Locating the Recipient Zone and the Density Issue

Once the preservation area has been identified, the number of rights which are to be assigned to the landowner must be calculated. By necessity, potential development rights for urban and rural transfer or preservation sites are computed differently. In the case of the urban landmark site, its TDR value is the difference between that density which presently exists in the landmark structure and the maximum allowed under current zoning if the site were not occupied by a landmark.<sup>81</sup> On the other hand, the formula for determining the TDR value of a rural site is much more complex since rights are not transferred in kind, i.e., square feet are not transferred as square feet.<sup>82</sup> The acreage of preservation zone parcels must be converted into dwelling units or square feet of commercial space transferable to the recipient site.

The ultimate goal, however, is to effect the transfer of development rights without an increase in the overall combined allowable density of the transfer and recipient zones.<sup>83</sup> Thus, a loss of fifty dwelling units from the transfer site should, in theory, result in an increment of no more than fifty dwelling units at the recipient site.<sup>84</sup> While the ex-

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81. See *supra* note 38.

82. Several formulas have been proposed: distribution based on the number of acres of land owned irrespective of value; distribution based on the proportionate value of the owner's land to the total value of all land preserved; assignment of value "factors" to land based on proximity to center of development. *An Interim Review*, *supra* note 74, at 4. See also *Making TDR Work*, *supra* note 2, at 115, 116 (calculation of rights based on the difference in value of a parcel with and without development rights; calculation based on the value of land alone).

83. See *An Exploratory Essay*, *supra* note 13, at 88 n.57; Schnidman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND & WATER L. REV. 339, 348 (1976) [hereinafter cited as Schnidman].

84. Chavooshian, Norman and Nieswand, *Transfer of Development Rights: A New Concept in Land Use Management*, RUTGERS U. COOP. EXTENSION SYCE. (1974), excerpts reprinted in TDR, *supra* note 2, at 173 [hereinafter cited as Chavooshian].

pressed goal is maintenance of a constant overall density, the effect of the increased density occurring at the recipient site must be evaluated.

In preservation programs in which density is transferred to moderately developed recipient sites, planning efforts are usually made to accommodate the increased bulk<sup>85</sup> and to avoid conferring hardship on those occupants already in the transfer zone. But, when the recipient zone is located in a highly developed region such as an urban area, even small increments in density can strain the existing infrastructure.<sup>86</sup> Ideally, the recipient site for TDRs should be limited to undeveloped or moderately developed regions in which planning efforts have been made to support the increased bulk.<sup>87</sup>

Planners do not always adhere to espoused TDR principles with regard to density considerations. Disregard of the constant density goal is illustrated in application of the City of Hollywood's TDR ordinance.<sup>88</sup> Under the regulation, an owner-developer was offered the rights to build 368 additional condominium units on the receiving site in exchange for the loss of 79 single family units from the beachfront transfer site.<sup>89</sup> The transfer site was located across the street from the recipient site. The mathematics of this transfer suggest that the number of rights were calculated on the basis of the owner's economic loss rather than in an attempt to keep density constant.

Landowners have objected to using a density per acre formula as a basis for calculating the number of TDRs allocated to the preservation zone when its real estate is recognized as extremely valuable.<sup>90</sup> In an attempt to overcome this objection, some planners have suggested mar-

*But see* City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1983) (right to build 79 single family units in preservation zone exchanged for TDRs to build 368 condominium units at recipient site).

85. Schnidman, *supra* note 83, at 350.

Often the bulk established by the zoning ordinances for the recipient site is deliberately reduced so as to allow for an increase through the TDR mechanism. *See* Chavooshian, *supra* note 84, at 173.

86. *New York City*, *supra* note 8, at 365-367.

87. *See, e.g.,* Palm Beach County, Fla., Ordinance R-81-28-30 § 1A(4), 1B (Nov. 23, 1981) which allows rights to be transferred to specific recipient zones within the urban service area. *But see* Dade County, Fla. Ordinance 81-122 § 5(B) (Jan. 1, 1982) which allows rights to be transferred to any portion of unincorporated Dade County designated for urban development.

88. HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978).

89. City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, 1338 (Fla. 4th Dist. Ct. App. 1983).

90. *See Making TDR Work*, *supra* note 2, at 115, 115 n.234, 116.

ket value as an alternative to density for computing the number of rights allocated.<sup>91</sup> To do so, however, would result in a highly objectionable increase in overall density. As previously stated, if zoning law dictates that a developer could build one hundred units on his preservation zone property, under TDR theory, he should be granted rights for no more than one hundred units. However, the developer argues that this does not adequately reflect his financial loss if the recipient site is not as valuable as his transfer site, i.e., his profitability will be less because of its less desirable location. Therefore, it has been suggested that a developer in this situation receive an increment in rights above that density which his preservation zone property could support under present zoning. The effect is to increase the overall combined density of the transfer and recipient sites which is an objectionable result.<sup>92</sup>

Transferable development right ordinances based on economics deserve close public scrutiny. Public acceptance of the TDR concept is not likely when it promises one thing, constant density, but delivers another.

### C. Valuation of Rights, Marketability, and Administrative Costs

It is generally recognized that to have a successful TDR program the rights must be readily marketable.<sup>93</sup> In times of an uncertain real estate market and a weak economy, immediate sale of rights is unlikely. Additionally, recognition of development rights as just compensation is judicially doubtful in the absence of a ready purchaser and/or a specific transfer site.<sup>94</sup> In response to these problems, it has been suggested that local government administer a rights bank which would purchase any rights that a preservation zone landowner could not use himself or sell privately.<sup>95</sup> The government would recoup its funds when such rights were sold to developers in the recipient zone.

Several problems are inherent in this approach. The most significant is cost. One of the primary advantages of the TDR concept is that TDRs allow government to preserve land with no financial outlay.<sup>96</sup> To

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91. *Id.* at 115, 116.

92. *Id.* at 115 n.234.

93. *Id.* at 116. See *A Comparative Look*, *supra* note 58, at 11.

94. See *supra* text accompanying notes 29-35.

95. See *supra* notes 12-13 and accompanying text.

96. Rose, *Psychological, Legal, and Administrative Problems of the Proposal to*

place government in the position of maintaining a bank would divert funds from other needed areas. Government, too, is subject to the uncertainties of the real estate market, and the prospect of holding rights for long periods of time, as well as administering the system, could prove very costly.

A further consideration in assessing the marketability of development rights is the selling price of the rights. The seller, of course, would like to receive the highest price possible, but does not know how to assess the value of his rights.<sup>97</sup> The buyer, however, knows the limitations of his pocketbook. A buyer-developer selling luxury units with presumably greater profitability can afford to pay more for a right than a developer of less expensive units. Since the seller may not know the exact location of the recipient site of his rights or the type of development the buyer has planned, he is uncertain as to what to ask a prospective purchaser.

Although the difficulty in obtaining a purchaser may be circumvented by the use of the government rights bank, ascertaining a fair price remains problematic. If rights are sold by the government at fixed prices, developers of luxury units may be reaping large windfalls. Equating land cost per unit with the cost of a right per unit, it is possible that the luxury developer may be paying considerably less per unit for those obtained through the TDR mechanism than he is for his other units. Although TDRs are advocated as a way around the "windfall-wipeout" dilemma,<sup>98</sup> this arrangement simply shifts the windfall. If rights are sold at variable prices, the seller may not realize fair compensation for his burdened land and the potential for abuse is present.<sup>99</sup> In sum, a rights bank would unquestionably support the TDR system, but, considering costs and administration, it may be seen as replacing one set of problems with another.<sup>100</sup> No South Florida TDR program provides for a rights bank.

#### D. Rigidity of the System and Potential for Abuse

In order to enjoy support of developers, the TDR system must be

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*Use the Transfer of Development Rights As a Technique to Preserve Open Space*, 6 URBAN LAW 919 (1974), reprinted in TDR, *supra* note 2, at 293 [hereinafter cited as *Psychological, Legal, and Administrative Problems*]; Shlaes, *supra* note 14, at 336.

97. See *A Comparative Look*, *supra* note 58, at 17.

98. See *supra* note 15 and accompanying text.

99. *Id.* at 15-17.

100. *Id.*

rigid. If the additional density planned for at the recipient site can readily be obtained by means of a variance or zoning bonus,<sup>101</sup> the market for rights will suffer.<sup>102</sup> Therefore, exceptions to density limits should be granted only in cases of hardship<sup>103</sup> or where planned in conjunction with the sale of TDRs.<sup>104</sup> The public tends to look at zoning ordinances in general and variances in particular with a jaundiced eye.<sup>105</sup> Lack of familiarity with the TDR concept feeds the skepticism which exists,<sup>106</sup> but the potential for abuse is present and is not lightly regarded by the public.<sup>107</sup>

In Dade County where TDRs have been granted to landowners in the flood prone East Everglades area, the first sale of rights has been reported.<sup>108</sup> Prior to this sale of rights, the State of Florida, for purposes of preservation, announced its intention to purchase a portion of the Everglades wetlands.<sup>109</sup> This raises the possibility of the State

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101. A zoning bonus is an increase in density granted to a developer in exchange for his providing an amenity such as a plaza or walkway to the building he is constructing.

102. SPACE ADRIFT, *supra* note 2, at 160.

103. Although "hardship" is recognized as the statutory requirement for granting a variance, it is frequently ignored. *Id.* See also Zaldivar and Lowe, *Zoning Laws Like Putty to Developers*, City, Miami Herald, May 22, 1983, at A1, col. 1 (hardship standard ignored in granting variances; politically appointed zoning board overturned 91% of planning department's recommendations that variances be denied).

104. *Psychological, Legal, and Administrative Problems*, *supra* note 96, at 298.

105. See *supra* note 103. See also Zaldivar and Lowe, *Miami Zoning: Growing Without a Plan*, Miami Herald, May 22, 1983, at A1, col. 1; May 23, 1983, at A1, col. 1; May 24, 1983, at A1, col. 1; May 25, 1983, at A1, col. 2; May 26, 1983, at A1, col. 2 (five part expose of City of Miami's zoning practices which revealed (1) Zoning Board and City Commission ignore laws in granting exceptions from zoning restrictions, (2) land development industry is largest single source of campaign money for incumbent city commissioners, (3) variances are routinely granted without regard to hardship).

106. See *Psychological, Legal, and Administrative Problems*, *supra* note 96, at 294, 295.

107. See generally *New York City*, *supra* note 8, at 361-367 (attempt to amend zoning ordinance to permit builders of high rises to exceed bulk limitations by purchasing development rights which would be assigned to old townhouses); *Id.* at 361 n.124 (attempt by New York to sell air rights belonging to federal government); *Meakin v. Steveland, Inc.*, 68 Cal. App. 3d 490, 137 Cal. Rptr. 359 (1977) (sale by city of public street to developers for purpose of allowing developers to use street's air rights to construct additional bulk on their abutting building sites).

108. *Rights to Use of Land Are Sold*, Miami Herald, Oct. 16, 1983, at H20, col. 3.

109. *Id.*



purchasing land for which development rights have already been sold, an occurrence which is purportedly eliminated when a TDR program is implemented.<sup>110</sup> According to TDR theory, once rights are sold, the land is sufficiently restricted so that direct government purchase is unnecessary. Preservation is accomplished without financial outlay on the part of government. If Florida purchases land for which development rights have already been sold, Dade County residents will be burdened twice: one time when the residents must accommodate the increased density at recipient sites and a second time, when as state taxpayers, they must pay for the acquisition of the title to the preserved land.

#### E. Permanency of Zoning Classification: Reason for Success or Failure?

Traditionally, the right to develop one's property is integrally related to the land itself. When one purchases land, he purchases location. Conceptually, it is difficult for the landowner to sever development from its earthly source. Such an abstraction is offensive to many and explains in part the lack of acceptance of the TDR concept. More significant, however, is that according to TDR doctrine, once the landowner sells his development rights, he is forever precluded from further development on that parcel.<sup>111</sup> Some TDR provisions are more flexible; rather than preclude development altogether, they severely restrict development on the transfer site.<sup>112</sup> Under either circumstance, it is the element of permanency which prevents many landowners who possess development rights from selling them.

Landowners lack confidence in the continued existence of the TDR system. Many believe it will be abolished in the future, and the landowner who has not sold his rights can once again develop his property to greater intensity than presently permitted. Reluctance to give up potential for development has been cited most frequently as the reason for unwillingness to sell development rights in South Florida.<sup>113</sup>

Where, however, the preservation zone consists of land with questionable development potential, for example, land in the flood prone East Everglades area of Dade County or mangrove areas of Collier

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110. See *supra* text accompanying notes 18-19.

111. See *An Interim Review*, *supra* note 74, at 9; Carlo, *supra* note 72, at 3.

112. See, e.g., *A Pragmatic View*, *supra* note 77, at 582, 583.

113. This information was obtained in phone conversations with planning officials in Palm Beach and Pinellas Counties and the City of St. Petersburg.

County, owners have been more willing to actively participate in the TDR system.<sup>114</sup> Presumably, these landowners recognize that the possibility of development is limited at best and are motivated to realize whatever profit they can as quickly as possible. But where land is capable of supporting development, as in the case of Palm Beach farmland, its owners will not part with its potential.<sup>115</sup>

## V. Conclusion

A TDR zoning ordinance is a tool used by local government to further its land preservation goals. Development rights are granted to landowners in conjunction with the restrictive zoning regulation imposed. The restrictions limit development of the land; the TDRs granted to the landowner mitigate the economic injury caused by these restrictions. However, the zoning ordinance is only the preliminary step in preserving the regulated property. It is not until after the landowner uses his rights on a recipient site or sells them to another that a restrictive covenant is placed on the land. The property may then be viewed as permanently limited in its development. Therefore, when South Florida landowners refuse to use or sell their rights, the TDR system is in jeopardy. Communities may be forced to abandon this alternative for land preservation.

Drafters of TDR zoning ordinances must allow for some margin of development on the regulated property to survive a judicial challenge in inverse condemnation actions. Case law indicates that TDRs are not the equivalent of just compensation in the absence of an immediate dollar exchange. Therefore, the granting of TDRs will not be sufficient to sustain an excessively burdensome regulation against a taking challenge.

Adherence to TDR principles is essential to realize the goals of the program and develop public confidence. Calculation of rights based on market value of preservation zone land, as in the City of Hollywood's regulation, results in objectionable density increments and violates the

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114. See *supra* notes 75-76 and accompanying text. In Dade County, where TDRs have been granted to landowners in the flood prone East Everglades area, rights to portions of 17,280 acres of land have been bought by the mortgagee of the property. He, in turn, has sold an option to purchase the rights to a major North Dade County motel operator. *Rights to Use of Land Are Sold*, Miami Herald, Oct. 16, 1983, at H20, col. 3.

115. No rights have been transferred in Palm Beach County. Palm Beach County's TDR ordinance is primarily for preservation of agricultural land.

goal of constant density. Government purchase of land for which development rights have been sold is abusive and should be avoided; the State of Florida should not purchase land for preservation which is already restricted by covenant. Transferable development rights should not be granted to land incapable of supporting development. In South Florida, transfers of rights have been effected for properties incapable or marginally capable of supporting development such as mangrove areas in Collier County and the flood prone East Everglades region in Dade County. These landowners are reaping a windfall. Where land is capable of supporting development, planners have seriously overestimated the willingness of property owners to sell their rights; these property owners will not relinquish potential for development.

Legal and administrative problems can be overcome; problems inherent in changing commercial realities are infinitely more difficult. The TDR concept in South Florida has experienced a disappointing past and faces an uncertain future.

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