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The Curious Case of Alcee Hastings

Alan I. Baron*

At 10:00 a.m. on October 20, 1989, the final act in a proceeding unique in American history began to unfold as the United States Senate was called to order by Senator Robert Byrd of West Virginia.

The Senators were convening to vote on the articles of impeachment brought by the House of Representatives against Alcee L. Hastings, United States District Judge for the Southern District of Florida, the first black ever to hold that position. Hastings also was the first black federal official ever to be impeached and was the first federal official impeached after having been acquitted by a jury in a criminal trial on similar charges. The outcome of the Senate vote was in doubt.

By any standard Hastings, at 53, had a remarkable record of achievement. He was raised in Florida by his grandmother because his parents were employed as domestics by wealthy families out of state. He graduated from Florida A & M Law School in 1963 and became a member of the Florida Bar. For thirteen years he had what he described as a "y'all come" general practice. In 1977, the Governor of Florida appointed Hastings to a state court judgeship. Two years later he was appointed by Jimmy Carter to the federal bench. His general reputation as a lawyer and judge was favorable and nothing turned up in the FBI background check which would have hindered his federal appointment. He is by all accounts a dynamic, even charismatic, speaker.

In 1981, Hastings was indicted by a federal grand jury in Miami on charges of engaging in a corrupt conspiracy with a Washington, D.C. attorney named William Borders. The object of the alleged conspiracy was to solicit a bribe from two criminal defendants in a racketeering case pending before Hastings. Hastings and Borders were tried separately. Borders was convicted by a jury in March 1982. Hastings was acquitted by a jury in February 1983.

The matter did not end there. In March 1983, two of Hastings' judicial colleagues took the extraordinary step of filing a complaint alleging that Hastings had in fact engaged in a corrupt conspiracy, despite the jury

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verdict. They called for an investigation under a statute enacted in 1980¹ which gave the federal judiciary power to investigate and, to some extent, discipline its members.

A Judicial Investigating Committee made up of three circuit judges and two district judges conducted an inquiry which stretched over three years, including lengthy court battles, as Hastings challenged the Committee's right to obtain documents and testimony and attacked the constitutionality of the statute under which the Committee operated. Hastings refused to participate in the proceedings, claiming they were unconstitutional. On September 2, 1986, after hearing testimony from over 100 witnesses and receiving approximately 2800 exhibits, the Investigating Committee issued a report which concluded that there was clear and convincing evidence that Hastings had in fact engaged in a corrupt conspiracy with Borders to solicit a bribe. The Committee further concluded that Hastings had lied repeatedly at his trial and had falsified documents in order to mislead the jury.

The bedrock upon which the reputation of the judiciary rests is that the action of federal judicial officers is not for sale. Judge Hastings attempted to corruptly use his office for personal gain. Such conduct cannot be excused or condoned even after Judge Hastings has been acquitted of the criminal charges.

...
... With respect to Judge Hastings' post-indictment conduct, the Committee cannot overemphasize either its deliberateness or its seriousness.

...
... There is clear and convincing evidence that Judge Hastings sought to conceal his participation in the bribery scheme and to explain away evidence connecting him with the sale of justice and that he pursued these objectives through concocting and presented [sic] fabricated documents and false testimony in a United States District Court. Judge Hastings' conduct was premeditated, deliberate and contrived.²

On March 17, 1987, this Committee Report was adopted by the Judicial Conference of the United States. Chief Justice Rehnquist referred the matter to the House of Representatives for possible impeachment.

1. 28 U.S.C. § 372(c) (1980).

2. REPORT OF THE INVESTIGATING COMMITTEE TO THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT 338-39 (1986).

The House, faced with a jury acquittal on the one hand, and the report of the Judicial Investigating Committee on the other, undertook an independent inquiry over a period of eighteen months. John Conyers, Jr., a veteran black congressman from Detroit, chaired the subcommittee which conducted the House investigation. As the inquiry began, he openly expressed his concern that racial motivations might underlie the continued investigation of a black judge who had been acquitted by a jury. After months of investigation and seven days of hearings, however, Conyers was convinced that Hastings had conspired with Borders to take a bribe and, moreover, had lied at his criminal trial. The Judiciary Committee reported seventeen articles of impeachment against Hastings.

On August 3, 1988, Conyers rose to speak on the floor of the House in support of the articles of impeachment. He recalled how his initial skepticism had been overcome as the facts developed during the investigation pointed to Hastings' guilt. He acknowledged how hard it was for him, as an outspoken black congressman, to have to report on the corrupt activity of one of a handful of black federal judges. He could not, however, turn his back on what he regarded as overwhelming evidence of Hastings' guilt.

Conyers' voice rang out in the hushed chamber:

We did not wage [the] civil rights struggle merely to replace one form of judicial corruption for another.

. . . .

. . . The principle of equality requires that a black public official be held to the same standard that other public officials are held to. A lower standard would be patronizing, a higher standard, racist. Just as race should never disqualify a person from office, race should never insulate a person from the consequences of wrongful conduct.

After Conyers finished, there was a pause. Representative Claude Pepper of Florida, the aged dean of the House, rose slowly to his feet, turned, looked squarely at Conyers and began to applaud. In an instant, everyone in the chamber gave Conyers a standing ovation. The members recognized that his position and his statement were acts of political and moral courage rarely witnessed in public life.

The House voted in favor of the articles 413 to 3; the Senate was formally advised that articles of impeachment had been voted and was asked to initiate the process for conducting a trial. The House appointed six Congressmen to serve as managers, or prosecutors, to try the case before the Senate.

Under the Constitution, the House has the sole power to impeach; the Senate has the sole power to try a public official on impeachment articles.

Impeachment has a long history dating back to the fourteenth century when the English Parliament began its struggle with the Crown for supremacy. The English institution served as something of a model for the Founding Fathers when they drafted the Constitution. Nine members of the American Constitutional Convention had been practicing lawyers in England, and were familiar with English impeachment practice. The term “high crimes and misdemeanors,” the American constitutional standard for removal from office, was lifted directly from English law. Its first use was in 1386 when the Earl of Suffolk was impeached by Parliament.

There are certain watershed distinctions, however, between American and English impeachments. The model was not adopted wholesale. For example, in England impeachment was not limited to public officials. In the United States, only the President, Vice President and certain “public officials of the United States,” including federal judges, are subject to impeachment.

The most important distinction is the fact that in England impeachment was a criminal proceeding. One could lose one’s head as well as one’s job. Many who were not beheaded spent years imprisoned in the Tower of London. Parliament could also be quite creative in fashioning a punishment for those convicted in an impeachment. The records reflect that in the seventeenth century, a hapless individual named Floyd was impeached and convicted for disparaging the King and Queen of Bohemia. He was punished by being led through London for two days on a horse, facing backwards, while holding the horse’s tail in his hands. He was then put in the pillory, branded with a “K” and later imprisoned for life in the Tower of London.

This could not occur under the American Constitution. Only certain federal office holders are subject to impeachment; removal from office is the only sanction, with the possible additional sanction of being barred from holding federal office in the future. Impeachment in this country is a remedial process designed to protect the institutions of government and the citizens from persons unfit to hold positions of public trust. It is not designed to punish the offender. Impeachment, of course, is the only way to remove a federal judge from office because the Constitution provides for life tenure.

When Hastings and his counsel entered the Senate chamber on the morning of October 20, 1989, it was only the fifteenth time in our nation’s history that the Senate had been called upon to vote on articles of impeachment. There had been nine acquittals and five convictions; all of the latter were federal judges.

Hastings’ supporters were confident they would add another acquittal to the tally.

Two days prior to the vote, the Senators had heard nearly four hours of argument from the parties. Hastings had addressed them personally, proclaiming his innocence of any wrongdoing. Congressman John Bryant of Texas, the lead Manager for the House, had argued forcefully that Hastings was corrupt and a liar who had violated his position of public trust.

The following day the Senate deliberated behind closed doors for seven hours. Although the details of the debate are not public, several reports have surfaced. According to one source, the first four Senators to speak came out for acquittal. It appeared that a steamroller in favor of Hastings was under way. At that point Senator John Kerry of Nebraska, a Democrat who had served on the fact-gathering Senate Impeachment Committee, reportedly made an impassioned and persuasive argument in favor of conviction. Senator Warren Rudman of New Hampshire, a Republican and also a member of the Impeachment Committee, was said to have been a powerful advocate for conviction and convinced several Senators that Hastings had fabricated documents to defend himself. Senator Paul Sarbanes, a Democrat from Maryland, was described as an eloquent spokesman for conviction, emphasizing that the Senators were not acting as jurors in a criminal case. Senator Joseph Lieberman of Connecticut, who voted for acquittal, later stated publicly that the Senate's deliberations were "among the most thoughtful and impressive moments" of his first year in the Senate.

In order to convict, the House needed a two-thirds majority of the Senators present and voting. The number of votes necessary to convict was sixty-four because five Senators were not voting. Four were excused because they had been members of the House when the impeachment articles had been voted, and one was absent due to an earthquake in California.

The House Managers had been hearing only bad news as the vote neared. The day before the vote, Senator Arlen Specter of Pennsylvania, Vice Chairman of the Senate Impeachment Committee, issued a lengthy statement in support of his conclusion that Hastings should be acquitted. Specter, a former state prosecutor, had been one of the most active participants in the trial held before the Committee, aggressively questioning many of the witnesses, including Hastings. He knew every detail of the case, and his conclusions, made public in advance of the vote, gave Hastings a powerful ally at this critical moment.

Only moments before the vote began, Senator Lieberman was overheard saying that he would not vote for conviction. Lieberman, a former Attorney General of Connecticut, had also been very involved as a member of the Impeachment Committee. His questioning of witnesses, which came toward the end of each round of questioning because of his

status as a freshman Senator, was nevertheless keenly awaited. Soft-spoken and almost deferential in manner, Lieberman asked questions which were subtle and disarming while they probed to the core of the witness's testimony.

For the House, the worst news of all came from Senator Albert Gore of Tennessee, who told the House Managers about five minutes before the vote began that he believed a majority of Senators would vote for conviction, but that the House would fall short of the two-thirds majority required by the Constitution. That final bit of information seemed to dash any hope the House had that Hastings would be convicted. Simply put, as the House Managers headed for the well of the Senate chamber to hear the vote, they assumed Hastings was about to be acquitted.

The Senate rules require that when voting on an impeachment each Senator must rise from his seat and announce his decision "guilty" or "not guilty." It is a solemn occasion and does not permit any side conversations or wandering in and out of the cloakrooms. Majority Leader George Mitchell of Maine reminded the Senators of this requirement.

The public galleries were packed. Many there were supporters of Judge Hastings. Senator Byrd, a man of enormous personal dignity, is fiercely protective of the Senate's decorum. Sensing the tension and concerned that matters might get out of hand, he advised everyone in the chamber and in the galleries that the standing rules of the Senate gave him authority to enforce order whenever "confusion" or "demonstrations of approval or disapproval" occurred.

The clerk read the first article of impeachment. It was time to vote on Article One. Byrd proceeded:

The Chair reminds the Senate that each Senator, when his or her name is called, will stand in his or her place and vote guilty or not guilty. The question is on the first article.

Senators, how say you? Is the respondent, Alcee L. Hastings, guilty or not guilty? The roll-call is automatic. The clerk will call the roll.

<i>Mr. Adams?</i>	<i>Not Guilty</i>
<i>Mr. Armstrong?</i>	<i>Not Guilty</i>
<i>Mr. Baucus?</i>	<i>Guilty</i>
<i>Mr. Bentsen?</i>	<i>Guilty</i>
<i>Mr. Biden?</i>	<i>Not Guilty</i>
<i>Mr. Bingaman?</i>	<i>Not Guilty</i>

With Senator Jeff Bingaman of New Mexico voting not guilty, the Hastings forces were certain they had gained an acquittal. Bingaman was

the Chairman of the Senate Committee which heard the evidence. They already knew that the Vice Chairman, Senator Specter, was vigorously advocating acquittal. In their view it was unthinkable that the Senate would override the conclusions of these two men. According to one report, Hastings and his counsel put their pencils down and stopped tallying the votes. It was as good as over.

<i>Mr. Bond?</i>	<i>Guilty</i>
<i>Mr. Boren?</i>	<i>Guilty</i>
<i>Mr. Boschwitz?</i>	<i>Guilty</i>
<i>Mr. Bradley?</i>	<i>Not Guilty</i>

The first article of impeachment charged that Hastings had engaged in a corrupt conspiracy with a Washington, D.C. attorney named William Borders, to solicit a \$150,000 bribe from two racketeering defendants, the Romano brothers, in a case pending in Hastings' court. The Senate vote in October 1989, was the final chapter of a tale which had begun eight years earlier.

On July 20, 1981, a man named William Dredge walked into the United States Attorney's Office in Miami. Dredge told law enforcement officials that he had information concerning a bribery scheme involving Judge Hastings, a reputed organized crime kingpin named Santo Trafficante, and a Washington, D.C. lawyer who was coming to Miami the next day to meet with Trafficante. Trafficante allegedly controlled mob activities in South Florida. He was one of sixteen defendants in a major racketeering conspiracy case pending before Judge Hastings. Dredge later testified that his revelation sent a shock wave through the office; people were stunned by the information.

<i>Mr. Breaux?</i>	<i>Guilty</i>
<i>Mr. Bryan?</i>	<i>Guilty</i>
<i>Mr. Bumpers?</i>	<i>Guilty</i>
<i>Mr. Burdick?</i>	<i>Not Guilty</i>
<i>Mr. Burns?</i>	<i>Guilty</i>
<i>Mr. Byrd?</i>	<i>Guilty</i>
<i>Mr. Chafee?</i>	<i>Guilty</i>
<i>Mr. Cochran?</i>	<i>Guilty</i>
<i>Mr. Cohen?</i>	<i>Guilty</i>
<i>Mr. Conrad?</i>	<i>Guilty</i>
<i>Mr. Cranston?</i>	<i>Not Guilty</i>

William Dredge operated an antiques store in North Miami. He was also a fence, a burglar, and a drug dealer. His criminal record dated back to 1943. Short, stocky, and bespectacled, Dredge looked more like a professor of literature than a career criminal. In March 1981, he was the subject of a narcotics investigation in Maryland and when he entered the United States Attorney's office in Miami, he wanted to make a deal. He would provide information about the bribery scheme in return for dismissal of the drug charges in Maryland.

Dredge outlined what he had to offer. He told Special Assistant United States Attorney Martha Rogers that on July 9 and 10, 1981 he had been staying in Washington, D.C. with a friend who was a big-time gambling figure in the area. While he was there, Santo Trafficante was also staying in the apartment. The gambler, who ultimately was identified as Joseph Nesline, went to dinner with Trafficante at the Lion D'Or Restaurant in Washington. Dredge related that he accompanied Mrs. Nesline to the restaurant and they had dinner at a separate table. Dredge learned that Trafficante was in town to see a Washington lawyer about a bribe to fix the criminal case pending before Hastings.

At first, Dredge did not identify Borders by name, but he told Rogers that the D.C. attorney was coming to Miami the next day to meet with Trafficante. Dredge went on to say that this same, as yet unidentified, lawyer had contacted him about arranging for Tom and Frank Romano, two brothers who had been convicted of racketeering in Hastings' court, to pay a \$150,000 bribe to have Hastings reduce their jail sentences to probation.

The FBI set up a surveillance at the Miami Airport the next day. By reviewing the passenger lists on flights to Miami from Washington, Rogers was able to single out William Borders as the attorney Dredge refused to identify. She knew Borders because she had worked as an Assistant United States Attorney in the District of Columbia before moving to Florida.

Rogers went to the Miami Airport to identify Borders when he got off the plane. She spotted him immediately. Rogers was terrified that Borders would recognize her, but he walked past her without even glancing her way.

Borders arrived in Miami around 4:00 p.m. on July 21. The FBI followed him as he took a cab to Dredge's house. About an hour later, Dredge drove Borders to a shopping center where Borders took a cab to the Fontainebleau Hotel. Borders was observed meeting with Santo Trafficante for five to ten minutes. Trafficante then drove Borders back to the airport. Agents observed Trafficante shake Borders' hand and heard him say "did a good job." Trafficante left Borders at the airport. Borders caught a 9:30 p.m. flight to Washington from Miami.

The FBI interviewed Dredge at length on July 23, 1981. Dredge told the agents that he went to the U.S. Attorney's Office because he wanted to let people know about Judge Hastings' misconduct. He stated that although it might sound unusual coming from someone in his position, he was very upset that a federal judge would be involved in taking a bribe. He also wanted to make a deal for dismissal of narcotics charges pending against him in Federal District Court in Maryland.

Dredge went on to relate that he had known William Borders for some time because Borders had represented him in certain legal matters. According to Dredge, Borders was acting as the middle man for a bribe to be paid by Santo Trafficante, who was under indictment for conspiracy to conduct the affairs of a union through a pattern of racketeering in a case pending before Hastings.

Dredge told the FBI that he was unlikely to obtain a great deal of information regarding the Trafficante matter because Borders was dealing directly with Trafficante, and Dredge would only learn what Borders happened to tell him.

Dredge then stated that he also had information regarding another bribe scheme involving Borders, Hastings, and two brothers, Tom and Frank Romano. According to Dredge, Borders had asked him to check out the Romano brothers in order to find out what kind of people they were. Borders told him that the Romanos were due to be sentenced by Hastings. Dredge made inquiry in Florida and determined that the Romanos were "stand up guys," which in underworld parlance meant they would live up to commitments and not inform the authorities. Borders then told Dredge to get word to the Romanos that the Judge would fix their sentences for \$150,000.

<i>Mr. D'Amato?</i>	<i>Not Guilty</i>
<i>Mr. Danforth?</i>	<i>Guilty</i>
<i>Mr. Daschle?</i>	<i>Guilty</i>
<i>Mr. DeConcini?</i>	<i>Guilty</i>
<i>Mr. Dixon?</i>	<i>Guilty</i>
<i>Mr. Dodd?</i>	<i>Not Guilty</i>
<i>Mr. Dole?</i>	<i>Guilty</i>

In early April, Dredge related, he had spoken with a "representative" of the Romanos, a man named "Brother" Moscato, when the Romanos themselves were in California. Dredge told Moscato that a lawyer in Washington, D.C. could help the Romanos with their criminal case problem. Telephone records show that Moscato called the Romanos in California on April 7, 1981. According to a memorandum in the files of the Romanos'

attorney, the Romanos thought the approach might be a setup by the government, or a scam by Moscato. In any event, they did not pursue the overture.

According to Dredge, he never actually spoke with the Romanos nor did he have any further contact with Moscato. When Borders kept asking Dredge about the Romano situation, he told Borders that the Romanos already had a deal with the Judge through someone else. Borders told him that the Romanos were crazy and that they could not have a deal. He challenged their other alleged contact with the Judge to name a time and place for Hastings to appear. Borders would also name a time and place. Borders guaranteed Hastings would appear where Borders promised and thereby prove he controlled the Judge.

Borders asked Dredge to recontact the Romanos. Dredge did not contact them, but he got back to Borders and told him the Romanos said they did not have that kind of money. Borders said the Judge couldn't believe they wouldn't come up with the money to stay out of jail.

When Dredge was asked by investigators why he kept stringing Borders along, he explained that he had only tried to help Borders because Joe Nesline had asked him to do it as a favor. Dredge thought Borders was lying when he said he controlled a federal judge. As Dredge put it, he thought Borders was "smoking Ajax." Dredge figured that if he kept stalling Borders, the matter would go away, particularly since he did not believe Borders really could deliver Hastings.

According to Dredge, something then occurred which changed his view. Dredge said he received a call from Borders on May 10, 1981. Borders told Dredge that the Romanos were scheduled to be sentenced, but that Hastings was going to postpone the sentencing to give the Romanos another chance to come up with the money. In fact, on May 11, the Romanos appeared in court to be sentenced. At the hearing, their attorney asked to postpone the sentencing. No prior motion had been filed and the government vigorously opposed the continuance. Hastings granted the delay. Dredge stated that when he heard this, he became convinced that Borders could produce because there was no other way Borders could have known in advance what the Judge was going to do.

<i>Mr. Domenici?</i>	<i>Guilty</i>
<i>Mr. Durenberger?</i>	<i>Guilty</i>
<i>Mr. Exxon?</i>	<i>Guilty</i>
<i>Mr. Ford?</i>	<i>Guilty</i>

*Mr. Fowler?**Guilty**Mr. Garn?**Guilty**Mr. Glenn?**Guilty**Mr. Gore?**Guilty*

On August 18, 1981, Dredge told the FBI that Borders had called and told him that he was coming to the Miami area in the next day or so. The purpose of the visit, according to Dredge, was to work out the details of the bribery deal between Trafficante and Hastings. The FBI determined that Borders had a reservation to fly from Washington, D.C. to Miami on August 21. They had Borders under surveillance from the time he left D.C. In fact, the woman sitting next to Borders during the flight who engaged him in conversation was an FBI agent. When Borders arrived in Miami, he took a cab to the Fontainebleau Hotel. He got out of the cab, walked down the sidewalk, and got into a car which immediately headed back to the airport. The driver was Santo Trafficante. Borders and Trafficante spoke for four minutes outside the Delta Airlines terminal and then Trafficante left.

On August 31, 1981, Dredge told the FBI that he had met with Borders in Washington a few days earlier. Borders said he wanted to deal with the Romanos as soon as possible and that the price was \$150,000. According to Dredge, Borders said he would only meet with the Romanos, not a representative. Dredge also told the FBI that while in Washington he overheard a conversation which suggested that someone was delivering money to Borders on behalf of Trafficante.

Throughout the month of August and into September, Dredge continued to negotiate with the Department of Justice in order to cut a deal to have the narcotics charges against him dismissed. Ultimately, Dredge agreed to plead guilty to a single felony count; the remaining counts were to be dismissed. Dredge, in return, agreed to introduce Borders to an undercover agent who would pose as one of the Romano brothers. The objective was to record conversations with Borders to determine definitively whether Judge Hastings was part of the scheme. Dredge refused to record any conversations or to testify in any prosecution. Dredge felt that if he testified, he would be "signing his death warrant because of who was involved."

On Thursday, September 10, 1981 at 1:29 p.m., in the presence of an FBI agent, Dredge placed a call to Borders and told him the Romanos were ready to deal. Dredge and Borders agreed to meet on Saturday, September 12, at 8:00 a.m. at the Miami Airport where Dredge would introduce him to Frank Romano.

This call triggered significant alterations in the travel plans of both Borders and Hastings. Prior to Dredge's early afternoon call to Borders, Hastings was scheduled to fly from Miami at 6:50 p.m. on September 11, arriving in Washington, D.C. at 9:00 p.m. Borders was scheduled to fly out of Washington, D.C. at 7:30 p.m. on September 11, arriving in Miami at 9:45 p.m. Thus, as their plans stood prior to Dredge's call to Borders on September 10, it would have been impossible for the two men to have met at National Airport.

Telephone records document that Hastings and Borders spoke late in the afternoon of September 10. Thereafter, Hastings canceled his existing flight plans and reserved a flight leaving Miami which arrived in Washington at 6:00 p.m., an hour and a half before Borders was scheduled to leave the city. As it turned out, however, Hastings' flight on the 11th was delayed until 6:00 p.m. He called Borders' office twice that day from Miami to advise him of the delay. Hastings ultimately arrived in Washington at 8:00 p.m. Borders skipped his 7:30 p.m. flight, taking a 9:30 p.m. flight instead. Had Borders taken his scheduled flight, he would have been on his way to Florida by the time Hastings' delayed flight arrived. No one actually observed a meeting between Hastings and Borders on the night of September 11, but a period of time existed when both men would have been in Washington. Hastings did not check into his hotel that night until after 10:00 p.m., more than two hours after his flight arrived in Washington.

The significance of an opportunity for Borders and Hastings to meet on the night of the 11th became apparent on the morning of the 12th. Borders was at that time introduced by Dredge to "Frank Romano," impersonated by a retired FBI agent named Paul Rico. The conversation between Borders and Rico was taped by a recorder concealed on Rico's person.

Borders displayed a remarkably detailed knowledge of the Romanos' case which could only have been the result of contact with someone intimately familiar with the case. Borders himself had no basis for such familiarity. He was not counsel in the case. He was not a member of the Florida Bar. The case had not received the type of publicity which would have brought it to Borders' attention in Washington. Nevertheless, Borders knew that the Romanos' property had been forfeited and that their criminal case was then on appeal. Borders stated to Rico that within ten days the Judge would sign an order returning a "substantial amount" of the property which had been forfeited. Thereafter, the Romanos should withdraw their appeal and their jail sentences would be reduced.

Rico then said, "How do I know . . ." whereupon Borders cut him off and responded, "Checks and balances . . . I don't get nothin', until the first

part is done . . . that will be a signal showing you that I'm, I know what I'm talking about, right?"

Borders proposed that the money be placed in escrow with Dredge and that the money be paid after the Judge issued an order reversing a substantial part of the forfeiture. Rico said he preferred not to use Dredge to hold the money.

Rico was aware that Borders claimed he could prove his influence with the Judge by having him appear at a given time and place. Rico now proposed an appearance by Hastings as a sign of his participation in the scheme. Rico asked Borders if he wanted to get back to him regarding the time and place of the Judge's appearance. Borders said that was unnecessary and immediately selected Wednesday, September 16, 1981, as the date for Hastings to show. Rico selected the main dining room in the Fontainebleau Hotel at 8:00 p.m. as the place for Hastings to appear.

Borders and Rico agreed to meet the following Saturday, September 19, at the Miami Airport, at which time Rico would make an "upfront" payment on the deal. As the meeting concluded, Borders reassured Rico, saying, "that's one hundred percent, one hundred percent, one hundred percent."

<i>Mr. Gorton?</i>	<i>Guilty</i>
<i>Mr. Graham?</i>	<i>Not Guilty</i>
<i>Mr. Gramm?</i>	<i>Guilty</i>
<i>Mr. Grassley?</i>	<i>Guilty</i>
<i>Mr. Harkin?</i>	<i>Not Guilty</i>
<i>Mr. Hatch?</i>	<i>Not Guilty</i>
<i>Mr. Hatfield?</i>	<i>Guilty</i>
<i>Mr. Heflin?</i>	<i>Not Guilty</i>

In the eyes of the House Investigators, Borders' statement that a "substantial amount," rather than all of the forfeited property, would be returned gives rise to a subtle but weighty inference supporting Hastings' involvement in the scheme. In order to understand the significance of that remark, one must review the history of the Romanos' prosecution.

Thomas and Frank Romano were indicted by a federal grand jury on twenty-one counts of racketeering, fraud, embezzlement, and false tax filings. The indictment also charged violations of the Racketeer Influenced Corrupt Organization statute ("RICO") which, under certain circumstances, could result in the forfeiture of property connected with illegal racketeering activity. The case was assigned to Judge Hastings within the first week he was on the bench.

In December 1980, the case was tried before Judge Hastings and a jury. In the course of the trial, the prosecution proved that the Romanos had

looted a construction project of over a million dollars. In addition, the government made a proffer to Judge Hastings, out of the presence of the jury, that the Romanos had a history of making payoffs. On December 23, 1980, the jury found the Romanos guilty on all counts.

The parties agreed to try the forfeiture issues separately to the Judge, without a jury. Judge Hastings heard part of the prosecution's proof on forfeiture on December 30. He then adjourned the hearing until February 20, 1981. Hastings concluded the evidentiary hearing on that date and asked the parties to submit memoranda of law and proposed findings of fact. On May 4, 1981, Hastings entered an order adopting the prosecution's position in its entirety, thereby forfeiting property owned by the Romanos worth \$1,162,016. The forfeiture statute under which Hastings had acted, however, would soon be modified.

On June 19, 1981, a panel of the Fifth Circuit Court of Appeals decided the case of *United States v. Martino*.³ At issue was an interpretation of the RICO statute's provisions concerning the definition of an interest in property that was subject to forfeiture. The appellate court held that the term did not include income, profits, or receipts from racketeering activity.

This rather esoteric statutory issue had major implications for the forfeiture aspect of the Romano case. Application of the *Martino* decision, which was binding on Hastings, required the return of approximately \$845,000 in property from the original forfeiture of more than a million dollars. At a hearing on July 8, 1981, there was extensive argument regarding the impact of *Martino* on the Romano forfeiture order. The defense sought to have Hastings reconsider his order of May 4, 1981. Hastings stated that he was familiar with *Martino* and had read the briefs. Counsel for the Romanos argued that, under *Martino*, \$845,939 of the original forfeiture had to be vacated and the property returned to the Romanos. The government was reduced to arguing that *Martino* was wrongly decided. Hastings had also received a memorandum on the issue from his law clerk before going on the bench to conduct the hearing. At the conclusion of the hearing on July 8, Hastings stated from the bench that he was reaffirming his decision of May 4, 1981, requiring forfeiture of over a million dollars in property, despite the holding in *Martino*.

It is a reasonable inference that, on September 12, 1981, when Borders told the undercover agent that a substantial amount of the property would be returned, he could only have known that from a contact with Judge Hastings. Only the Judge could issue an order in the case. Borders was

3. 648 F.2d 367 (5th Cir. 1981).

therefore making a commitment which directly involved Hastings' personal participation. Moreover, as of September 12, 1981, when Borders told the agent that Hastings was going to reverse his earlier order, there had been no hearings, briefs or arguments by counsel since July. When Hastings ultimately did issue an order on October 6, reversing the earlier decision, the government prosecutor in the case was stunned. There had been no forewarning that Hastings would change what he had decided in open court nearly three months earlier. Finally, Borders' representation that the Judge would return a substantial amount of the property rather than all of it, reflects a familiarization with the *Martino* decision and its esoteric reading of the RICO statute which Borders was unlikely to have acquired independently.

When Borders finished his meeting with the undercover agent, he flew from Miami to West Palm Beach and drove to a long-planned family reunion. He had told a friend he was going to spend the weekend at the reunion but, in fact, he stayed only briefly. He made a series of reservations and cancellations of airline flights back to Washington and ultimately flew from Orlando to Baltimore-Washington International Airport, on Saturday, September 12, 1981, arriving at 8:58 p.m.

Hastings was spending that weekend in Washington at the Sheraton Hotel. Jesse McCrary, a mutual friend of Hastings and Borders, was registered in the room next to Hastings. On Saturday night, Hastings, McCrary, and three women were in the Judge's room. According to the testimony of two of the women, the group postponed dinner at Judge Hastings' suggestion because they were waiting for someone. One of the women testified specifically that they were waiting for Borders. At around 10:00 p.m., Borders knocked on the door of the Judge's room. The group then went to dinner. Hastings testified at his criminal trial that Borders' appearance was a surprise and not prearranged. Prosecutors contended it was a prearranged meeting to discuss Borders' contact that morning with the man he thought was Frank Romano. There is no evidence to explain how Borders knew that the two men and three women would postpone dinner and be in a hotel room until he arrived at 10:00 p.m. on a Saturday night.

<i>Mr. Heinz?</i>	<i>Guilty</i>
<i>Mr. Helms?</i>	<i>Guilty</i>
<i>Mr. Hollings?</i>	<i>Guilty</i>
<i>Mr. Humphrey?</i>	<i>Guilty</i>
<i>Mr. Inouye?</i>	<i>Guilty</i>

Borders and undercover agent Rico had agreed that Hastings would appear at the main dining room of the Fontainebleau Hotel at 8:00 p.m. on September 16 as a signal that the Judge was part of the scheme. The FBI blanketed the hotel with agents in order to keep Hastings under surveillance. At 7:45 p.m. on September 16, he arrived in the company of a woman named Essie Thompson. Hastings had invited Ms. Thompson the previous night. He made no mention to her of meeting anyone at dinner, nor did he indicate where they would dine. During the twenty-five minute drive to the hotel, Hastings did not mention Borders or anyone else joining them. According to Thompson, the Judge greeted the hostess, stated there were reservations for Hastings, and they then proceeded to a table. Hastings later testified that he expected to meet Borders at the restaurant and that he so informed the maitre d'. Ms. Thompson testified she had no recollection of Hastings making such a statement.

Hastings' explanation that he was at the hotel to meet Borders has some distinct weaknesses. At the hotel Hastings did not act as if he were expecting Borders. The maitre d' seated them at a table for four and removed two place settings without protest by Hastings. When asked during the Senate trial why he had only made reservations for two persons, Hastings replied "that's all I was going to pay for." After about fifteen minutes, Hastings left the table and walked from the main dining room into the lobby. He looked into a lounge off the lobby and then returned to the dinner table. He did not page Borders nor did he look for him in other restaurants located in the hotel. Prosecutors claimed Hastings walked around to be certain he was seen.

When Hastings entered the Fontainebleau Hotel, Borders was not within a thousand miles of Miami. For weeks he had been planning to attend the championship fight between Tommy Hearns and Sugar Ray Leonard, scheduled in Las Vegas on September 16, 1981. Borders took a female friend, Madeline Petty, with him to the fight as a birthday present to her. Airplane tickets had been purchased two weeks before the fight. These plans were not secret. Borders was known as an avid fight fan who regularly attended championship matches. Several people, including Dredge, the undercover agent Rico, and Hemphill Pride, knew Borders planned to go to the fight. If Borders was manipulating an unsuspecting Hastings by arranging a meeting in Florida without intending to show up, he had chosen a risky occasion, when Hastings could easily have discovered that Borders had planned for weeks to be nowhere near Miami.

Borders and Petty flew to Las Vegas from Washington National Airport on September 15 and did not return until Friday, September 18. When they arrived at National Airport, they parted company. Petty went home.

Borders took a 9:20 p.m. flight to Miami in order to make his scheduled meeting with the undercover agent the following morning to get his "upfront" payment. There is no evidence that anyone told Borders that Hastings had shown up at the Fontainebleau dining room on the 16th as promised. Nevertheless, Borders proceeded to Miami on the night of the 18th with apparent confidence that the sign had been given and that the upfront payment would be forthcoming.

<i>Mr. Johnston?</i>	<i>Guilty</i>
<i>Ms. Kassebaum?</i>	<i>Guilty</i>
<i>Mr. Kasten?</i>	<i>Guilty</i>
<i>Mr. Kennedy?</i>	<i>Guilty</i>
<i>Mr. Kerrey?</i>	<i>Guilty</i>
<i>Mr. Kerry?</i>	<i>Guilty</i>

On Saturday morning, September 19, 1981, Borders met at the Miami Airport with the undercover agent for the second time. Rico, still impersonating Frank Romano, was again wearing a recording device. After some banter about the fight, Rico stated "you did what you said you'd do." Borders acknowledged this statement and Rico replied, "Your man arrived and in fact he arrived a little early and, ah, you said you could do that and that's, ah, your end of the situation."

Borders got directly to the point. He asked "What's it in?" Rico replied "it" was in an envelope. He said he would put the envelope in a newspaper and give it to Borders.

Rico then stated, "Before we go any further, the last time we talked my understanding was that, ah, some property was going to be released." Borders replied that the property would be released within ten days. Borders then told Rico to file a motion for mitigation of sentence. "Just tell him [the attorney] you're tired of this appeal. Just see if the man will reduce the sentence."

Rico then left Borders to get the \$25,000 in cash which was stored in a locker. When Rico returned, he placed on the arm of a sofa a newspaper containing the envelope with the money. Borders picked up the newspaper and told Rico that the money would cover a sentence reduction for both Romanos. The two men then discussed when the balance of the bribe would be paid. Borders suggested it be paid when the order was entered returning the forfeited property. Rico proposed a second installment payment and then payment in full when the sentences were reduced. Borders objected and said this was not the deal. He again proposed that Dredge hold the money in escrow. Rico rejected that idea. They finally

agreed that the remaining \$125,000 would be paid on Saturday, October 3, 1981, after Judge Hastings issued the order. Borders then took an 11:00 a.m. flight back to Washington.

<i>Mr. Kohl?</i>	<i>Guilty</i>
<i>Mr. Lautenberg?</i>	<i>Guilty</i>
<i>Mr. Leahy?</i>	<i>Not Guilty</i>
<i>Mr. Levin?</i>	<i>Not Guilty</i>
<i>Mr. Lieberman?</i>	<i>Not Guilty</i>

The undercover agent and Borders had no further contact between September 19 and October 2, 1981. No order returning property to the Romanos was issued within ten days of September 19. The FBI obtained a court approved wiretap on Borders' business and residential phones. On Friday, October 2, Rico placed four calls to Borders' office. Borders was out of the office each time, but finally arranged to have a call patched through to him at another office. At 3:11 p.m., Rico spoke to Borders and expressed concern that nothing had happened regarding the order. Borders replied, "I think it has . . . I'll check into it." Borders suggested that the meeting scheduled for October 3 be postponed. Rico asked Borders if he knew what had gone wrong. Borders replied, "It's supposed to, ah, been done . . . the only thing I can say is a lack of communication in terms of through the mail." Borders promised he would look into the matter and told Rico to call him at home on Sunday morning.

At 4:50 that Friday afternoon, Borders' secretary phoned Judge Hastings' chambers and asked if he was available. She was told that he had left for the day. On Sunday morning, Rico called Borders as agreed and asked about the order. Borders explained, "I have not, ah, gotten an answer, 'cause I haven't been able to talk to anybody." Borders asked Rico to call again Monday afternoon.

On October 4, according to Judge Hastings' mother, Borders placed a telephone call to Hastings' home number. She testified that Hastings was not there, but she advised him of the call. There is no documented contact between Hastings and Borders on Sunday, October 4, but on Monday morning, October 5, Hastings told his law clerk, Jeffrey Miller, to do the Romano order returning a substantial amount of the forfeited property. According to Miller, Hastings specifically said, "I want the order today." Miller testified that it was unusual for the Judge to make such a request. Another law clerk who observed the conversation between Hastings and Miller stated that the Judge seemed disturbed that Miller had not completed the order. The Judge's directive was sufficiently strong that Miller left the

office and returned home, about a forty-five minute drive from the office, because the necessary papers were in his apartment. He worked on the order overnight and brought it to the office the next day to be typed.

Marilyn Carter, the Judge's deputy courtroom clerk, recalled that Tuesday evening, the 6th, Hastings stated that he was "sorry for the rush, but the order has to go out today." The order was signed by Hastings on October 6 and was mailed special delivery that evening.

In the meantime, Rico called Borders at 4:23 p.m. on Monday, October 5. Rico said he was anxious about the order. Borders said, "Okay, I understand. Look, I checked on that matter . . . and it wasn't in the mails. It was, it hadn't gone out yet . . . but that's been taken care of." Rico asked whether the order had gone out "today, then, probably." Borders replied, "It was probably today or first thing in the morning . . . I wanna give it a little time."

At 5:12 p.m. on October 5, 1981, Hastings placed a call to Borders' office. The following conversation took place between Hastings and Borders:

Borders:	Yes, my brother.
Hastings:	Hey, my man.
Borders:	Um hum.
Hastings:	I've drafted all those, ah, ah, letters, ah, for Hemp.
Borders:	Um hum.
Hastings:	[A]nd everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
Borders:	Yea.
Hastings:	Oh. Okay.
Borders:	Uh huh.
Hastings:	All right, then.
Borders:	See, I had, I talked to him and he, he wrote some things down for me.
Hastings:	I understand.
Borders:	And then I was supposed to go back and get some more things.
Hastings:	All right. I understand. Well, then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with

him. I'll send the stuff off to
Colombia in the morning.

Borders: Okay.

Hastings: Okay.

Borders: Right.

Hastings: Bye bye.

Borders: Bye.

At his criminal trial, Judge Hastings claimed that this was an innocent conversation with Borders in which they were discussing some letters Hastings was drafting to help their mutual friend, Hemphill Pride. The prosecution argued that this was a coded conversation between Borders and Hastings concerning the bribery scheme. The Judicial Investigating Committee reached the same conclusion.

On its face the conversation makes no sense. Hastings initiates a call. He tells Borders he has drafted letters for Hemp and wants to know if Borders heard from Hemp since Hastings and Borders talked. Borders replies he had talked to Hemp and Hemp wrote some things down for Borders. There is no indication what these "things" are, nor does the fact that Hemp "wrote things down" for Borders seem responsive to Hastings' inquiry. Hastings nevertheless replies "I understand." Borders then goes on to state that he was supposed to go back and "get some more things." Since Borders still has not identified what these "things" are, it is hard to understand why he was to go back and get some more of them. Nevertheless, the exchange is clear to Hastings. He again replies "I understand" and goes on to elaborate that, in view of what he has heard from Borders, "there's no great big problem at all." This is the first time anyone has suggested the existence of any "problem" and it is difficult to see how Borders' information has solved the problem, since Borders is still waiting for more "things." Nevertheless, Hastings states he will send the "stuff off to Colombia."

Evidence external to the conversation supports the conclusion that this conversation was not about letters for Hemphill Pride. Pride testified that he never asked for any letters on his behalf, had no knowledge of them, and would have regarded any such letters as meddling in his affairs. Pride says he never wrote anything down for Borders and was not supposed to get anything for Borders thereafter. Pride utterly disavowed whatever it was that Hastings and Borders were up to.

A linguist who analyzed the conversation at the request of the House also concluded that it was a code, although he was not in a position to say what in fact the conversation was about. The House investigators concluded

that the interpretation which most readily comports with the facts is that Hastings, who was about to sign the order, wanted to check with Borders to be certain that the Romano deal was still in place, even though the order was late. Accordingly, Hastings initiated the call to let Borders know that he had “drafted all those, ah, ah, letters, ah, for Hemp” (The order is drafted.), but he wanted to know “did you hear if, ah, you hear from him after we talked.” (Have you talked to Romano and is the deal still on?). Borders replies that he “talked to him and he, he wrote some things down for me.” (I have spoken to Romano. He gave me the downpayment.) Hastings acknowledges that he understands what Borders is saying and then Borders continues, “I was supposed to go back and get some more things.” (I was supposed to get the rest of the money.) Hastings replies again that he understands what Borders is saying and reassures Borders that “there’s no great big problem at all. I’ll send the stuff off to Colombia in the morning.” (The order will go out tomorrow morning.)

Rico called Borders at midday on October 7 to inquire about the status of the order. This time Borders stated, “It went out yesterday morning.” This assertion is consistent with Borders’ October 5 conversation with Hastings in which the Judge said he would “send the stuff off to Colombia in the morning.” The order was delivered on the 7th and Rico called Borders to advise him he had received the order and to arrange to make the final payment of \$125,000. They agreed that Rico would come to Washington and call Borders to arrange to make the payoff.

<i>Mr. Lugar?</i>	<i>Guilty</i>
<i>Mr. Matsunaga?</i>	<i>Guilty</i>
<i>Mr. McCain?</i>	<i>Guilty</i>
<i>Mr. McClure?</i>	<i>Guilty</i>
<i>Mr. McConnell?</i>	<i>Guilty</i>
<i>Mr. Metzenbaum?</i>	<i>Not Guilty</i>
<i>Ms. Mikulski?</i>	<i>Not Guilty</i>

The National Bar Association was holding a testimonial dinner on October 9, 1981, to honor William Borders for his service as a past president of the organization. One of the persons sponsoring the dinner was Judge Hastings. By prearrangement, Borders picked Hastings up at the airport the morning of October 9. After going to the L’Enfant Plaza Hotel to register and to contact Hemphill Pride, Borders and Hastings made several stops before arriving at Borders’ law office where a message was waiting for Borders to call “Frank” at the Twin Bridges Marriott Hotel. It was, of course, the undercover agent prepared to turn over the rest of the

money. Borders returned the call and arranged to meet "Frank" at the hotel in an hour.

The FBI assumed Borders would meet with the undercover agent in the hotel room. Cameras and microphones were strategically hidden in the room to record and film what transpired. Borders, however, refused to enter the room. He told "Frank" to "get it" because he wanted to take a ride. Borders and the agent got into Borders' car with a bag containing \$125,000 in \$100 dollar bills on the floor between them. As they started to leave the parking lot, the FBI pulled them over and arrested Borders. Rico was wearing a body recorder and Borders can be heard stating calmly, "We're busted," as sirens begin to wail in the background.

The FBI has been severely criticized for not "letting the money run" to see if Borders gave part of the money to Hastings. Hastings charged that the reason the FBI did not let the money run was that the FBI knew he was innocent and that the money was never intended for him.

A review of FBI files shows that the Bureau's scenario for the payoff never contemplated that Borders would be permitted to leave the hotel with the money. The agents planned to confront Borders with overwhelming evidence of his guilt, including the money and the tape recordings of his conversations with the undercover agent, in the hope that Borders would roll over and cooperate in order to gain lenient treatment. If Borders agreed to cooperate, the plan was to have him contact Hastings and to arrange a pass of the money under controlled circumstances.

The FBI underestimated Borders. After being confronted with the evidence, he asked for his lawyer and then refused to talk. Indeed, before the Hastings impeachment was completed, Borders, rather than testify, went to jail for contempt on two separate occasions.

At approximately 3:00 p.m. on October 9, 1981, Judge Alcee Hastings learned that his friend, William Borders, had been arrested. He was told that the charge was conspiracy to commit bribery in connection with a case connected with Judge Hastings. Hastings also learned that the FBI wanted to interview him and he was given the names and telephone numbers of the agents to contact.

Hastings was at the L'Enfant Plaza Hotel in Washington, D.C. when he heard the news of Borders' arrest. His reaction was to leave Washington immediately and return to Florida, thereby avoiding the FBI. He quickly packed a bag and left the hotel without checking out, leaving behind a suit he had sent to the hotel's valet service. The suit was retrieved by the FBI several days later.

Hemphill Pride was also staying at the L'Enfant Plaza. He offered Hastings a ride to the airport. Pride assumed that Hastings was heading for

National Airport, located about four miles and a ten-minute drive from the hotel. Hastings declined the offer and left Pride standing in the lobby. Outside the hotel, Hastings took a cab to Baltimore-Washington International Airport located thirty five miles away. The ride took an hour and cost \$50.00. Hastings did not check the flights at either airport. Had he done so, he would have learned there was a 4:30 p.m. direct flight to Miami from National Airport with fourteen seats available.

Once at the BWI Airport, Hastings engaged in a series of phone calls to Florida. At 4:37 p.m. he called his home and spoke for about four minutes. He then placed a second call to his home and spoke for about two minutes. It is likely that he spoke to his mother, with whom he shared the house. About twenty minutes later, Hastings placed a collect call from a second pay phone at the airport to the home of his girlfriend, Patricia Williams. The call lasted a minute or less. Hastings told Williams to call him back at a third pay phone, which she did. He then told her to go to a pay phone and call him again at the same number. About fifteen minutes later, she called Hastings from a pay phone located in a shopping mall near her home. This call lasted a minute or less. Hastings then called her at the mall pay phone from a fourth pay phone at the BWI Airport. This call lasted about four minutes.

Within a few minutes after his last conversation with Williams, Hastings made a reservation on a Delta Airlines flight to Miami departing at 6:30 p.m., with an intermediate stop at Fort Lauderdale. Hastings' airline ticket was altered at the departure gate by a handwritten notation crossing out Fort Lauderdale as his destination and substituting Miami. In fact, Hastings got off the plane in Fort Lauderdale. He then had to rent a car because his own automobile was in the parking lot at the Miami airport where he had left it to fly north.

A search for Hastings was initiated in Florida when the FBI could not locate him in Washington. At no time did Hastings contact the FBI. Hastings later testified at his criminal trial that upon arriving in Fort Lauderdale he first drove home and looked in on his mother. However, when FBI agents visited his home that night trying to locate Hastings, his mother said he had not been there, nor had she heard from him. It is certain that Hastings went to Patricia Williams' house. Around midnight, two FBI agents who were assigned to find and interview Hastings went to Williams' house on the chance he was there. When the agents appeared, Hastings agreed to be interviewed.

Hastings acknowledged that Borders had been a personal friend for many years and that he had been in Washington to attend a testimonial dinner in Borders' honor. He related that Borders had picked him up at the

airport, and that he had gone to Borders' law office. Borders had left the office and Hastings had gone to his hotel by taxi. According to Hastings, he had a conversation with Hemphill Pride at the hotel and had then taken a nap. He soon received a call from Pride who said Borders had been arrested and that it somehow involved Hastings. Hastings decided to return to Florida immediately because he felt he could defend himself better on his own turf. Hastings described Borders as a clandestine, cryptic individual, and he denied any involvement in a bribery scheme.

At his criminal trial, Hastings testified that he was motivated to return to Florida because he had called his mother from his hotel room in Washington, had found her hysterical, and had been asked by her to come home. The computer-generated record of long distance telephone calls from Judge Hastings' hotel room does not reflect any such call from him to his mother's home.

On December 29, 1981, a grand jury sitting in Miami returned an indictment charging Hastings and Borders with conspiracy and obstruction of justice. Borders was also charged with two counts of interstate travel to facilitate the conspiracy. The Judge and Borders were tried separately because Hastings challenged the government's right to indict a sitting federal judge. He claimed that he had to be impeached and removed from office before he could be charged. Although Hastings lost this argument, it had the effect of severing his case from Borders' case and delaying his trial for nearly a year.

After his indictment, Hastings was represented at various times by a battery of lawyers, several of whom were veterans of the criminal defense bar. Throughout the pretrial proceedings, however, Hastings declined to identify who his trial counsel would be. On the eve of trial, Hastings announced that he would be represented by Patricia Williams, who was then also his fiancée. In addition, Hastings intended to act as his own counsel. Williams had little or no prior criminal trial experience and in representing himself, Hastings was violating the most hoary of legal maxims: The lawyer who represents himself has a fool for a client. Why would Hastings do such a thing? To those who studied the trial, including the Judicial Investigating Committee, the lack of objective and detached trial counsel participating in Hastings' representation meant that the propriety of Hastings' tactics at trial were not subject to appropriate scrutiny.⁴

Hastings is a formidable witness. He is quick, articulate, even charming, and he knew every facet of his case down to the smallest details.

4. REPORT, *supra* note 2, at 356-58.

At his criminal trial, his bravura performance was sufficient to convince the jury to acquit. Both the Judicial Investigating Committee and the House investigators concluded, however, that Hastings had lied repeatedly at his trial.⁵

At his criminal trial, and at his trial before the Senate, Hastings was faced with various incriminating facts which called for explanations. He did not shrink from providing them:

- Borders was “rainmaking,” trading on Hastings’ name without the Judge’s knowledge. Hastings had nothing to do with the scheme.

- He went to the Fontainebleau Hotel on September 16 because he was supposed to meet Borders.

- He told his law clerk to complete the Romano forfeiture order on October 5 only because the law clerk was leaving at the end of October and Hastings wanted this matter completed before the clerk left.

- The telephone conversation with Borders on October 5, 1981, was in fact about letters for Hemphill Pride. At his criminal trial, Hastings even produced handwritten drafts of letters for Pride which he claimed to have written on October 5 while sitting on the bench during a jury trial. These drafts, however, did not surface in the proceedings until a month before his criminal trial and over a year after they were allegedly written. Indeed, Senator Specter during the Senate impeachment trial noted that the six pages of handwritten text were remarkable because they contained no corrections, scratch-outs, or erasures despite the fact that they were allegedly written while Hastings was on the bench, presiding at a trial.

- Hastings explained that he went to BWI Airport instead of National Airport on October 9, not to avoid the FBI, but because he thought there were no non-stop flights to Miami from National Airport. It seems clear, however, that for some period of time Hastings acted in a manner consistent with a determined effort to avoid the FBI. The reason is obvious if one accepts the conclusion that Hastings participated in the bribery scheme. When Hastings learned that Borders was arrested, he would be desperate to find out what Borders had told the authorities. Had Borders remained silent? Had he implicated Hastings? Hastings would not want to confront the authorities until he knew the answers to those questions. The cab ride to BWI and the elaborate use of pay phones at the airport may have been intended to buy time and obtain this information before Hastings faced the FBI.

5. COMMITTEE ON THE JUDICIARY, IMPEACHMENT OF JUDGE ALCEE HASTINGS, REP. NO. 810, 100th Cong., 2d Sess. 30-31 (1988).

◦ Hastings gave various explanations at his criminal trial concerning his intricate maneuvers with pay phones from the airport. On direct examination he said a baby was crying nearby which led him to move to another phone. On cross-examination he said he thought a possible government agent was “breathing down my whole existence.”

<i>Mr. Mitchell?</i>	<i>Guilty</i>
<i>Mr. Moynihan?</i>	<i>Not Guilty</i>
<i>Mr. Murkowski?</i>	<i>Guilty</i>
<i>Mr. Nickles?</i>	<i>Guilty</i>
<i>Mr. Nunn?</i>	<i>Guilty</i>
<i>Mr. Packwood?</i>	<i>Not Guilty</i>
<i>Mr. Pell?</i>	<i>Guilty</i>
<i>Mr. Pressler?</i>	<i>Guilty</i>
<i>Mr. Pryor?</i>	<i>Not Guilty</i>
<i>Mr. Reid?</i>	<i>Guilty</i>
<i>Mr. Riegle?</i>	<i>Guilty</i>

In retrospect there are several nagging questions which are certain to puzzle legal scholars and historians who study the Hastings case.

The most perplexing factual question is why, if Hastings participated in the scheme, he failed to issue the order reducing the forfeiture within ten days of September 19, as Borders had promised. The order did not go out until October 6, a week later. Surely, Hastings could have ordered his law clerk to finish the memorandum so that the schedule would have been met. The simple explanation, which is not wholly satisfactory, is that Borders and Hastings were careless and simply made an error.

This explanation is hard to accept when one considers that \$125,000 was at risk. On the other hand, it may well be that Hastings had no economic expectations arising from the deal. Senator Slade Gorton of Washington State issued a statement after the Senate vote suggesting that perhaps Hastings was helping Borders out without intending to take any money himself. Hastings may have been obligated to Borders for Hastings' appointment to the federal bench. Borders had substantial influence in such matters within the Carter administration. If Hastings had no personal economic stake in the scheme, it may explain his nonchalance in failing to issue the order by a certain date. The fact remains, however, that Hastings' failure to issue the order on time is the single most persuasive fact in support of his innocence.

<i>Mr. Robb?</i>	<i>Guilty</i>
<i>Mr. Rockefeller?</i>	<i>Guilty</i>

Mr. Roth?
Mr. Rudman?
Mr. Sanford?

Guilty
Guilty
Not Guilty

Also puzzling are certain tactical decisions on the part of Hastings and his counsel. Hastings took the stand and testified at his criminal trial. The jury acquitted. He declined to testify at the proceedings before the Judicial Investigating Committee, claiming the proceedings were unconstitutional.

Hastings' next opportunity to testify was before the Subcommittee on Criminal Justice which was investigating the matter. John Conyers, the black Congressman from Detroit who had openly expressed concern that Hastings was being pursued for racial reasons, chaired the hearings. In an effort to avoid even the appearance of unfairness, Conyers afforded Hastings extraordinary courtesies during the hearings. At times Conyers extended these courtesies over the strong opposition of fellow subcommittee members. On the first day of the hearings, for example, Conyers allowed Hastings to make an opening statement without being subject to any questioning. Hastings used it as an opportunity to attack the proceedings and grab a headline that he was "Not guilty but not free." After all the witnesses had been heard, Hastings was given an opportunity to testify on his own behalf. This time he would have been subject to cross-examination. Everyone expected Hastings to take the stand. Instead, Hastings announced that on the advice of counsel, he declined to testify.

It is hard to see this as anything other than a major tactical blunder. This opportunity to testify was Hastings' best chance to stop the impeachment process in its tracks. He had a sympathetic black Chairman in charge of the proceedings. At least one other member of the Subcommittee, Don Edwards of California, would be likely to support Conyers if he voted against impeachment. One thing was clear to anyone in touch with the political reality of the proceedings—unless Conyers supported the impeachment and, indeed, unless there was unanimity on the articles of impeachment, the matter was dead. Had Hastings testified, it does not follow that he would have avoided impeachment, but his failure to testify left the charges unanswered. It was a self-inflicted wound which left observers baffled.

This failure to recognize the value of using Hastings as a witness also occurred in the Senate. The Senate Rules Committee held a hearing in advance of the trial to consider various procedural matters, including Hastings' plea that he needed funds for his defense. The Rules Committee includes some of the most influential members of the Senate. Nearly every Committee member attended the hearing. The hearing room and the halls

outside were packed with hundreds of Hastings' supporters. Because the proceedings did not deal with the facts of his case, it was a perfect opportunity for Hastings, at no risk to himself, to make a favorable impression on men who would serve as jurors at his trial.

Incredibly, Hastings never opened his mouth. Hastings and his counsel elected instead to show an inane video tape of a local Miami talk show, recorded several months earlier, in which a juror from Hastings' criminal trial gave her thoughts on the trial and the impeachment. Hastings' counsel then launched into a long speech which had a series of paragraphs each beginning with the rhetorical refrain, "my children, your children, our fellow citizens, you and I . . ." which preached to the Senators about their constitutional obligations. Hastings' failure to speak directly to the Senators, particularly about a subject as appealing as his need for funds to defend himself, deprived him of a chance to create some rapport and gain the sympathy of an important segment of the jury. His counsel simultaneously managed to alienate Senators who did not take kindly to being lectured before a large audience about constitutional obligations of which they were well aware. Veteran trial lawyers who observed the proceedings simply shook their heads in disbelief. It is impossible to say what effect that strategy had on the final Senate vote, but clearly Hastings missed an opportunity which could only have helped him. Perhaps it is mere coincidence, but of the sixteen members of the Senate Rules Committee, thirteen voted to convict.

Mr. Sarbanes?

Guilty

Mr. Sasser?

Not Guilty

Mr. Shelby?

Not Guilty

Mr. Simon?

Guilty

From the outset, the central legal issue in the Hastings case was whether an impeachment trial after an acquittal by a jury constituted double jeopardy under the Constitution. When the House began its inquiry, the first order of business was to resolve this issue. The House concluded that principles of double jeopardy simply do not apply to impeachment. The issue turned on whether an impeachment trial is a criminal proceeding. The legal and historic precedent was overwhelmingly in favor of the proposition that impeachment in this country is remedial, rather than criminal, in nature. Its purpose is not to punish for misbehavior, but rather to remove someone from office who is deemed unfit to hold a position of public trust. If one were to accept the argument that an impeachment trial was a criminal proceeding, it would be unconstitutional to impeach a public official even

had he been convicted in a prior criminal trial. The prohibition against double jeopardy prevents a second criminal proceeding, without regard to the outcome of the first trial. This result is simply untenable.

It is true that some of the constitutional language relating to impeachment, such as "conviction" and "high crimes and misdemeanors," smacks of the criminal process. This inference stems from the fact that to some extent the Framers relied on the English impeachment model which was truly a criminal proceeding. The House was satisfied that by limiting the persons subject to impeachment to certain officeholders, and by limiting the sanction to removal from office, the Framers had changed the very nature of the process.

Hastings brought the issue before the Senate through a motion to dismiss those articles of impeachment which were related to the facts presented at his criminal trial on double jeopardy grounds. The full Senate heard arguments from both sides for two hours. The vote was against Hastings' position ninety-two to one, with Senator Howard Metzenbaum of Ohio being the lone holdout.

That vote did not entirely resolve the issue. Even if technical principles of double jeopardy were inapplicable, it is clear that the acquittal had a substantial impact on the vote. Several Senators who filed statements explaining their vote stated that while they rejected the idea that double jeopardy applied to an impeachment trial and believed that the Senate had to make an independent determination, they felt that the acquittal had to be given weight. Senator Arlen Specter of Pennsylvania, for example, concluded that the jury verdict required the House to prove its case in the Senate "beyond a reasonable doubt," the standard normally applied in criminal cases. For Senator Lieberman, on the other hand, the jury acquittal had no impact on what he regarded as the appropriate standard of proof—"clear and convincing evidence"—a middle ground between the criminal law standard and the civil standard of "preponderance of the evidence." Lieberman essentially discounted the jury verdict. It was not a finding that Hastings was innocent; it merely established that the jury had a reasonable doubt as to Hastings' complicity. Lieberman was probably the exception. It is likely that many Senators felt that the jury acquittal weighed heavily in the balance.

With the tally sixty-three guilty, twenty-four not guilty, it was now Senator Simpson's turn to cast his vote. Simpson voted guilty, and Alcee Hastings was convicted under the first article of impeachment. Hastings reached over and patted his counsel on the arm. Then he quietly wept. The final tally of sixty-nine guilty, twenty-six not guilty was enough to convict even had all one hundred Senators voted.

<i>Mr. Simpson?</i>	<i>Guilty</i>
<i>Mr. Specter?</i>	<i>Not Guilty</i>
<i>Mr. Stevens?</i>	<i>Guilty</i>
<i>Mr. Symms?</i>	<i>Guilty</i>
<i>Mr. Thurmond?</i>	<i>Guilty</i>
<i>Mr. Wallop?</i>	<i>Guilty</i>
<i>Mr. Warner?</i>	<i>Guilty</i>
<i>Mr. Wirth?</i>	<i>Not Guilty</i>

Senator Byrd announced the guilty verdict on Article One and began the process of voting on Article Two, which charged that Hastings had lied when he testified that he did not conspire with Borders to take a bribe. In light of the vote on Article One, the result of the second vote was inevitable. After Hastings had been found guilty a second time, Majority Leader George Mitchell, moved by compassion for Hastings, asked for the unanimous consent of the Senate to permit Hastings and his counsel to be excused for the remainder of the votes. Accompanied by counsel, Hastings immediately left the Senate chamber. Hastings was ultimately convicted on eight of the articles and found not guilty on three articles. The Senate did not vote on articles ten through fifteen.

One could almost have predicted that, despite his impeachment, Alcee Hastings would land on his feet. After a fiercely fought election, he is now a Congressman from South Florida, a member of the very body which impeached him as a judge. Some have observed that his charm and street smarts probably make him more suited for the political arena than the bench.

Patricia Williams, Hastings' companion and counsel at the criminal trial, has been disbarred for misuse of client funds and lying to a judicial grievance committee in matters unrelated to Hastings.⁶ She has since joined Hastings in his Washington office as staff liaison/scheduler.

William Borders was sentenced to four concurrent five-year prison terms as a result of his convictions for conspiracy, corruptly impeding the administration of justice, and two counts of unlawful travel in interstate commerce with intent to commit bribery. He began serving his term on May 25, 1983. He was released to a halfway house on December 10, 1985, and returned to the community in February 1986. Borders was disbarred as a result of his conviction. He has sought reinstatement to the bar of the District of Columbia. To date, readmission has been denied.

6. *Florida Bar v. Williams*, 604 So. 2d 447 (Fla. 1992).

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American Constitutionalism as Civil Religion: Notes of an Atheist

Duncan Kennedy*

People who study American constitutionalism refer often to religion as an analogy, or treat constitutionalism as a form of civil religion. I want to take this analogy to religion somewhat more seriously than seems to have been fashionable during the bicentennial year.

The religion analogy sometimes indicates that people “reverence” the Constitution (perhaps as an emanation of the democratic deity The People) much as they reverence the Bible as God’s word in mainstream religion, that they attribute great power to law, as a kind of analog to the Holy Spirit, an emanation of divinity, that there is an aura of spirituality to discussions of the document and of the rights that it supposedly guarantees, that the Framers are like prophets, and that the document gets exegesis in a spirit like that of biblical exegesis.

The conclusion that seems most obviously to follow from the analogy might be something like: “one should not be too rationalistic in trying to understand what the Constitution is all about and especially in trying to understand how people react to the United States Supreme Court.” The analogy might be to the cult of the British Royal Family and its role in British social and political life.

There is an implicit theory of what religion is and how it functions in social structure that makes the analogy seem interesting and important, and makes this seem a plausible conclusion to draw from it. That theory seems to be something like: a religion is a body of metaphysical beliefs, moral precepts and ritual practices, irrationally founded and self-consciously shared across some group. The role of religion in society would be something like:

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Editorial Note: Duncan Kennedy graduated from Yale Law School and has been a professor at Harvard Law School for more than two decades. His law review articles are among the most widely read (and cited) in American legal scholarship and his other publications include *Legal Education and the Reproduction of Hierarchy* (1983) and *Sexy Dressing Etc., Essays on the Power and Politics of Cultural Identity*, the latter collection published by Harvard University Press in 1993. The following essay reflects comments provided by Professor Kennedy on a speaking occasion at the time of the bicentennial of the United States Constitution. The considerable contribution made by this essay to the critique of legal realism and the continuing development of critical legal studies amply justifies its retrieval and publication here.

shared religious beliefs, precepts, and rituals define patterns of daily life, bind the members of a society together, and give the society its identity as against others, such as foreigners and internal deviants (people who profane the constitutional faith, say, like maybe communists except that they are always wrapping themselves in it). As long as everyone is being tolerant (an important proviso), religion is at worst a harmless and at best an enormously socially valuable and spiritually valid part of communal life.

But this British Royal Family model of constitutionalism as civil religion is only part of the story. We also use the analogy to understand obedience to the Supreme Court, and here its meaning is that obedience goes far beyond what one would expect if one saw it as based on rational agreement, on force, or on contract.

This notion is summed up in the juxtaposition of Justice Brewer's famous remark in the *Debs* case,¹ that the strikers dispersed voluntarily as soon as they heard that the court had decided their action was illegal, with Justice Holmes' contemporaneous remark that issues of the kind involved in that very strike ultimately came down to matters of policy about which judges of different economic sympathies might well disagree.² The idea of religion seems useful to understand the ability of the Court to command obedience to politically controversial decisions when it lacks what we think of as the standard instruments of power.

But what kind of religious belief is analogous to this aspect of constitutionalism? How does the analogy to religion help us understand the place of constitutionalism in American political culture? The Supreme Court does not fit the British Royal Family model of civil religion, because the cult of the BRF followed its loss of real political power.

The Supreme Court is, for those whose attitude we compare to that of the religious, the authoritative source of true interpretations of the Constitution, and its determinations are understood to have binding force over the members of the society. The idea of binding force clearly has both a moral component—people believe they ought to obey the law—and a practical one—decrees are backed to some extent by state coercion.

It is of course easy to see the Court as a priestly corps, so that it is like the Pope when he speaks *ex cathedra*. But then we have to add the element of state force. The correct analogy might seem to be a theocracy, say Khomeini's Iran. But here the problem is that in our usual model of theocracy, the priestly corps has all political power, whereas in our society

1. *In re Debs*, 158 U.S. 564 (1895).

2. Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

it is clear that the Court has limited power. There are some political acts we do not expect it to do, and if it tried to do them it would probably fail to impose itself on the other elements in the political system.

Another analogy would be to the Delphic oracle, which gave answers, in the form of sophisticated riddles clearly based on inside information, to political questions brought from far and wide. But here there is lacking both the coercive aspect and the crucial feature of textual interpretation, with the authority of the practitioners based on a combination of supposed reverence for the source of the text and belief in the neutral or at least impersonal character of the interpretive process.

How about the practice of divination, by looking into the entrails of animals or interpreting the flight of birds, that seems to have had an institutionalized place in the political systems of ancient Greece and Rome? The priest or priestly corps in these cases seems to be able to decisively control events through the interpretive process, without having a claim to unlimited political power. For example, I vaguely remember that it was the priests doing divination who figured out that the lack of wind preventing the Greek fleet from sailing for Troy was an expression of the anger of the gods, and that the wind would come up if the Greeks assuaged the gods by Agamemnon agreeing to sacrifice his daughter Iphigenia.

I do not know that much about divination. It might be better to use the church courts of the Middle Ages with their jurisdiction over family matters, an *imperium in imperio vis a vis* the emerging national states. My point is simply that if we want a religious analogy to the role of the Court in our society, we will have to go back a ways, and we will have to choose an analogy to a form of religious life, and a set of beliefs about what religion is, that are quite far from mainstream American Protestantism, Judaism, or Catholicism.

When we try to understand the role of, say, divination in ancient Greece, or witchcraft in traditional society, it is common (let me put this delicately) to start from the assumption that the belief of the participants in the practical, causal efficacy of their rituals and hermeneutic techniques is incorrect. In other words, in interpreting earlier stages of our own culture, and some of its present aspects as well, and in interpreting many aspects of traditional cultures, we sometimes, with more or less trepidation, just reject the claims that the participants make about what is really going on.

We reject, with more or less trepidation, their claim that the text or natural event (flight of birds) holds the secret of divine intentions, intentions that are accessible through an interpretive technique. We just “do not believe in” their gods or animist spirits, or that divinities reveal themselves through the disposition of entrails to those who have the secret of interpreta-

tion, or that they have intentions about specific, currently unfolding events, or modify their intervention in those events in response to actions like human sacrifice.

For example, we do not believe that the gods opposed the sailing of the Greek fleet to Troy. We just reject the Greek idea that there are gods of the type they believed in (if they really did believe in them). In so much as they seriously attributed events to their gods' interventions in human affairs, we tend to think they were (strong word coming) deluded. Deluded.

If we turn now to the practice of divination, we have the priestly corps making quite specific, strong claims about what it is doing. It is using an interpretive technique that will allow correct determination of the will of the gods. But if there were no gods, what were they actually doing? First, they must have been making what we cannot avoid calling mistakes. In so much as they believed that they could understand what was happening in their world through correct divination, and that correct divination was sometimes accomplished, we think they were (strong word coming) deluded.

I know I am on dangerous ground here, because the American scholarly community has no consensus about the status of claims of religious knowledge, beyond the vague injunctions to mutual toleration I have already mentioned. But I intend to press on across the dangerous ground. The question I want to pose is, how do we regard those claims of United States Supreme Court justices that look most like those of a priestly corps engaged in divination?

More broadly, how do we regard the claims, not just of judges but of the producers of American political ideology in newspapers and school textbooks, that there are correct and incorrect interpretations of the Constitution, and that one correct interpretation of the Constitution is that the Supreme Court has legitimate power to strike down legislation that violates the provisions of the Bill of Rights?

My belief is that those of us who more or less professionally study American constitutionalism carefully nurture within ourselves three quite contradictory attitudes toward this question, and that we might profit by trying to be more precise about the jurisprudence that underlies our social theory.

First, in commentary on constitutional history, the tone is often that the Supreme Court is a political institution like any other, so that one asks whether *Dred Scott*³ was wise, whether it was right or wrong in the larger

3. *Scott v. Sandford*, 60 U.S. 393 (1856).

sense of political morality, likewise *Lochner v. New York*,⁴ *Brown v. Board of Education*,⁵ the Nixon Tapes case,⁶ and so forth. In this mode, we seem to assume that the issue of “technical legal correctness” is irrelevant or insignificant or meaningless in deciding how we feel about what happened, and also in interpreting the conduct of the actors. We assume that the Court acted “politically” and is to be judged by criteria of statecraft (was the Louisiana Purchase wise or foolish?) rather than according to a conception that clearly differentiates its role from that of other political institutions.

Note that this approach is consistent with at least three underlying attitudes toward judging. 1) It might be that in some cases there is a technically correct interpretation of the law and in others there is not. In these important cases there was not—they were of “first impression,” perhaps—so that the Court had to proceed in the general mode of statesmanship. The judges’ rhetoric of legal necessity could be understood as a convention or a mystification. 2) It might be that there is never a technically correct solution, so that in all its work the Court proceeds “politically.” 3) It might be that there is always a technically correct legal solution, which moreover is entitled to some weight in the normal case, but fades pretty much into insignificance in “great cases.” Regardless of which of these attitudes one adopts, in the first mode the judge is judged not by asking whether he or she has done his or her duty by the Constitution, but whether he or she has done the right thing in the broadest sense of what is best for the polity.

A second attitude that is just as common and just as much in each of us is that the Constitution expresses the commitment of the Founders to the realization of a particular set of political ideals and principles that everyone in our society shares or ought to share. Indeed, in this view it encompasses all the ideals and principles that we as a collectivity subscribe to, so that constitutional adjudication properly done is morally as well as legally authoritative. We might say that the Constitution represents the ethical in our political life.

Ideals and principles have to be reinterpreted over time and also have always to be compromised to one extent or another in the face of “reality” or “the fact of scarcity” or “human nature as it is rather than as we would wish it to be” or “entrenched interests without ethical claims” or “practical politics.” Nonetheless, the Constitution actually has some meaning that allows its interpreter to adopt a critical attitude toward actual social practices

4. 198 U.S. 45 (1905).

5. 349 U.S. 294 (1955).

6. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).

and to find them “unconstitutional” in some other sense than just saying “speaking as a citizen participant in American life my subjective view is that this practice is morally and politically wrong.”

A crucial point about this second view is that although it treats constitutional adjudication in great cases as very different from crass everyday legislative politics, and treats the Constitution itself as an autonomous force in political culture, it places no emphasis whatever on the merely technical correctness of important decisions. Being “faithful” to the Constitution, in this view, is a matter of interpreting “broadly,” of its “spirit,” rather than of determining the “legally correct” outcome according to a method of legal hermeneutics clearly autonomous from the other types of reasoning we use in deciding whether a decision is good or bad.

Yet a third attitude is that legal reasoning (not that very vague word “law”) is distinct as a way of deciding what to do in a concrete situation from “political,” and also from “principled” or ethical decision. When a judge sets out to do legal reasoning, he or she will end up with an outcome that may or may not correspond to the one that he or she would have reached if asked to “do whatever he or she wanted,” “make the morally correct choice,” “do what is politically expedient,” and so forth. What the Supreme Court does or ought to do in constitutional adjudication is legal reasoning, based on the text and whatever other materials the “interpretive community” deems “relevant.”

This view that legally correct constitutional interpretation is possible is consistent with many mutually opposing views about constitutional law.

1) You can believe that the Constitution is just great, so that decisions that are technically correct interpretations are likely to or sure to be just what you would have wanted on general moral or political philosophical grounds. Or you can believe that the Constitution and the body of relevant materials embody a much more partial set of ideals and principles, say those of a “capitalist society” or a racialist or patriarchal society, so that correct interpretations will be authoritative only for those who share the underlying social vision.

2) You can believe in the liberal program of formal and substantive equality plus free cultural expression, or in the organicist conservative program of cultural and class hierarchy and authority, or in the atomist conservative program of libertarianism restrained only by state enforcement of a natural right to property, and still believe in correct legal reasoning, which may or may not come out the way you personally would have wished it to in any particular case.

3) You can be an activist or a passivist on the issue of how and when the Court should overrule the democratically elected legislature, and still believe in legal correctness.

4) You can believe that all or virtually all questions presented to the Court have right legal answers, meaning that there is a correct interpretation of the constitutional law of the question, or that this is true only some of the time or only occasionally.

The point is that most people most of the time hold the view that it is at least possible on some occasions to make correct and incorrect interpretations of constitutional law, and that these times are likely to be very important. This view coexists with the view that it is often or sometimes if not always all “statecraft,” and the view that it is a matter of the conflict of the ethical, of ideals and principles, with tawdry reality, in each case with the judges’ claims about the legal correctness of their interpretations best understood as convention or mystification, especially in the very important cases.

Now let us return to the perspective of divination. What might have happened in Aulis (treating the story as history)? The priestly corps interpreted the auguries to mean that the reason why there was no wind was that the Gods were angry but could be appeased by the sacrifice of Iphigenia. We believe in neither the cause nor the cure proposed by the diviners. But it does seem plausible that they did an interpretation, that they and others believed in its correctness, and that they acted accordingly, sacrificing Iphigenia, and then concluding that the ensuing wind was caused by the gods’ response to the sacrifice.

If this is what happened, there is a sense in which it was all a “mistake.” If they had understood (i.e. believed as we believe) that sacrificing her would not in fact bring the wind, then they might not have done it (there could well have been other motives for sacrificing her) or, almost certainly, would have done it in some other way.

What emerges is a discontinuity between their way and our way of understanding their history. We all agree that divination played a major role in the events, and that as a practice and an institution it was in some sense responsible for Iphigenia’s death. Their explanation of this role, let us suppose, was that a correct interpretive practice revealed a tragic conflict between loyalty to the needs of the league of cities and those of the family. Through divination Agammemnon acquired the information he needed to make the painful choice to get the show on the road, instead of having to sit puzzled until the energy for war had dissipated itself.

The structure of the argument by which the diviners claim to be taken seriously is quite clear: 1) There are awesomely powerful gods. 2) They

have intentions that are causally efficacious with regard to human affairs. 3) They are responsive to human gestures intended for them. 4) The gods express themselves through natural phenomena like the flight of birds and the arrangements of entrails. 5) We have a technique that will allow us to determine their intentions and also what human gestures will modify those intentions. 6) Any idiot can see that if we are right in what we have just said, you had better pay attention to divination. 7) It would not be at all surprising if you were to reverence us as well as paying attention to the information we provide, since we are a lot closer to the gods than you are, and what we do is pretty wonderful in itself.

We can imagine a spectrum of critical attitudes toward this piece of diviner's history, some focussed on the gods and some on the diviners' interpretive practices.

The critical move that denies the existence of the gods has a devastating impact on the whole system of thought. Is constitutionalism, treated as analogous to divination, vulnerable to a similar move? I think not, that it is indeed quite well protected. We all agree that there was a framing process and a ratification process that were historical events. It is hard to imagine that anyone will shake our faith in the existence of the framers or of the ratifying people in the way nineteenth century skeptics shook people's faith in the existence of God.

On the other hand, as Peter Gabel points out, the psychological structure of reverence and obedience seems to depend somewhat on a fantasy. People seem to believe it is meaningful to talk about, and to identify with a trans-temporal mythic People, so that they feel that the text of the Constitution is an emanation of a totality in which they participate in a way that somehow simultaneously binds and ennobles them. This looks to me like The Nation or The Chosen People, entities that might have sometimes for some people just lost their facticity. That might happen to the Constitutional People as well.

While the Constitution looks like the Bible and the People like the God of a fundamentalist religion, the situation is actually quite different. Constitutionalism as a religion weathered, during the New Deal or legal realism period, a crisis of belief in the possibility of understanding interpretation as carrying out the Original Intent of the Framers, and came back strong in the post-World War II period, with adherents of all political tendencies.

Constitutional fundamentalism, though vulnerable to crises of belief in the People or in Original Intent, seems destined to endure. But it coexists with versions of constitutional faith that have achieved varying degrees of autonomy from the Creation Myth. One such idea is that the judges are

bound not just by the Constitution but by the whole corpus of materials, including all previous un-overruled judicial interpretations. Others are that the Constitution “evolves,” and that the “general clauses” simply call on the judge to interpret “society’s fundamental values.” Although these ideas are controversial, and experienced by fundamentalists as sophistical or airily intellectual or dangerous, they are also probably stabilizing, somewhat in the manner of the reduction of modern mainstream protestantism to liberal humanist pieties.

We are now in a position to define constitutional atheism. It is the conviction that there is no human collectivity, The People, that authors and consents to constitutional law as laid down by the Supreme Court. Note that atheism is perfectly consistent with the belief that there are correct and incorrect interpretations of constitutional law.

The written document is in existence, along with the other conventionally accepted materials preceding and superseding it. These documents do not directly refer to The People in ways that would require the atheist to believe in It in order to be able to figure out what the various human authorities meant for her to do in the case before her. The interpretive process may therefore generate even in the atheist the experience of closure. A constitutional atheist could take the oath of office as a judge and promise to abide by the Constitution, even though she thought that the underlying beliefs that sustain the institution of constitutional interpretation are deluded. Contrast the far more problematic situation of a diviner who has lost his faith in the existence of the gods.

Now let us turn to the question of interpretive technique. There are a variety of critiques that we might want to direct at the diviners’ claim that they read the flight of birds correctly, as was confirmed when the wind came up after the sacrifice. We can begin with criticisms that are consistent with believing that the gods exist in the way the Greeks apparently believed they did, and that divination is possible, and then move to interpretations of what happened that presuppose atheism.

1) In fact, the diviners did it wrong. The true interpretation was that the gods were busy, not angry, and the wind would come up if the army just waited. Iphigenia was sacrificed to no good purpose, since the wind would have come up in any case. Perhaps it was an issue of skill, or of bad faith manipulation of the auguries, or of diligence. Harvard trained diviners would have done better.

2) This was an instance in which the auguries were undecidable. Applying the best possible technique, the correct answer to the question propounded was “we do not know why there is no wind and we do not know what to do about it.” The priests made a mistake in thinking they had

come up with a correct answer, and Iphigenia was sacrificed quite possibly in vain, though it is also possible that the gods were in fact angry and in fact assuaged. But if that is what happened, it was dumb luck rather than correct divining that caused it.

3) Although divination is a valid procedure, it cannot be used on just any old question. This was one of the class of cases in which, according to the correct theory of divination, divination cannot work. It cannot explain lack of wind or what to do about it. The priests were mistaken even to try to apply their procedures in this case, because it was outside their institutional competence, although of course it might in fact have been true that the gods were angry and that they were assuaged by the sacrifice. But again, if that is what happened, it was just luck rather than an outcome attributable to correct divining.

If we try to understand divination as based on a delusion about the existence of gods, or about the relationship of divine to mortal existence, a parallel set of possibilities emerges.

4) Divination was a determinate but arbitrary procedure, just as in critique number 1 above (the case where the issue is getting it right or wrong). There was a right way and a wrong way to do it, but since the bird flights or entrail arrangements interpreted were random natural events, unrelated to any will of any divinity, if you believe in a divinity or divinities, the divining process gave answers much like a coin flip, or trial by battle or by torture in medieval criminal procedure. The necessity of sacrificing Iphigenia was (let us suppose) correctly read by the diviners, but they were doing something like correctly reading a coin as coming up "heads" after it has been agreed that something will be decided by chance. (Of course, in this hypothesis the power to frame the question to be decided by chance would be extremely important.)

5) Divination was not arbitrary but rather manipulable, because the questions posed were undecidable with the technique used (as in critiques numbered 2 and 3 above). The diviners constantly and consciously manipulated the interpretive technique to validate the results they wanted on other grounds. If they said Iphigenia had to die, there was doubtless a reason, but it certainly was not that they believed they had correctly read the entrails or bird flight patterns. They did that after the fact, and given the ambiguities, gaps and conflicts within the canons, were able to do it perfectly correctly whichever way they wanted to come out.

6) Yet another possibility is that divination was not arbitrary but rather manipulable, in what I will call the naive mode. Naive manipulation occurs when the interpreter imposes a meaning on the materials without experiencing her own creative part in the process. This occurs in cases of

undecidability, like critiques 2 and 3 above. From the point of view of the outside observer, it appears that there were two possible valid interpretations within the canons, so that someone had to choose according to non-interpretive criteria which way to go. But what occurs is more complex and important than conscious manipulation, because the critic asserts that the diviners experienced interpretive closure or compulsion in deciding between the options, rather than choice.

The necessity they produced through interpretive technique was routinely false, though not experienced as such. For this reason, it is hard to see Iphigenia as the victim of a "simple error of interpretation." The interpretive practice was systematically prone to the error of deciding the undecidable. But as stated the theory does not explain why the experience of closure emerges on one side of the choice rather than the other.

This last option, naive manipulation, is the one that strikes me as most useful in understanding the role of the United States Supreme Court, although I concede that it is sometimes useful to understand the justices as proceeding in the modes of statesmanship, of the ethical and of the technical. I think that the justices are constantly engaged in naive manipulation. I am not going to try to prove this. I base it on my personal experience as a law clerk to Potter Stewart in the 1970-1971 Term, and on twenty years of studying Supreme Court opinions. Let us just pretend I have shown it to be true. What would be the consequences for our understanding of the role of the court in our society?

Let us call the combination of constitutional atheism and the belief that naive manipulation is at least common if not omnipresent CONSTITUTIONAL SKEPTICISM. If constitutional skepticism is valid, our usual understandings of American political history and culture are problematic.

The problem is if the Constitution cannot be understood as the will of The People, but rather of the humans who wrote it and got it ratified, and if naive manipulation has been common in interpreting it, then what intelligible order has the judicial process of imposing the indicated outcomes through state force brought to our political history, and how has it contributed to the warp and woof of our political culture? Big questions, but here goes.

First, it is important to see what answers are undermined through the hypothesis of skepticism. So long as we believe in the constitutional people and that the interpretive process was done correctly or incorrectly, in good faith or through conscious manipulation, we could understand our constitutional history in the modes of patriotism and morality.

Patriotism. Our Constitution expresses our particular qualities as a people, and its interpretation and enforcement against conflicting norms

sustain those qualities. Constitutional interpretation is therefore a mode of national self-determination. We can distinguish two ways in which we have a national identity that sets us apart from other nations: 1) Constitutionalism itself is peculiarly American—others do not engage in our particular form of self-determination through interpretation, preferring either violent or merely political modes instead. 2) The particular constellation of civil and personal rights and liberties we enjoy derive from our particular constitutional scheme adapted through time to our changing values. If we have been, are and, God willing always will be the freest people in the world, we achieved this by adopting a freedom-guaranteeing constitution and then interpreting and enforcing it as cases arose.

Morality. Our Constitution embodies the moral commitments of our highest, most idealistic selves. Politics is fallen Earth in relation to the Heaven of constitutional aspirations. True constitutional interpretation is therefore a kind of angelic intervention into the affairs of everyday life. We submit to it in actual, coercive fact to attain a virtue that we would not have the strength or imagination or resources to achieve if left to our normal political practices. False interpretation may be mistaken, in which case we lose this benefit, or consciously manipulative, in which case the profane invades the divine sphere, corrupting it. Constitutional history is that of the gradual extension of heavenly sway, as the court has protected but also expanded basic civil and human rights in the face of the aggressions and resistances of politics.

I will not develop the point that constitutional skepticism is pretty devastating for both the patriotic and the moralistic version of what the interpretive process does for us. Here I will simply list what seem to me some hypothetical contributions of constitutionalism that we could believe in even as skeptics.

1) Constitutionalism has had a disordering or randomizing effect on our political history. This occurs because naive manipulation is an activity open to influence by all kinds of agendas, including, obviously the political agenda of the judge. The political process puts judges in office and leaves them there, possessed of this stock of legitimacy or *mana* or religious plausibility for the mass of believers, and no way to avoid, while engaged in naive manipulation, the use of it to keep dead programs alive or create new ones. A useful analogy may be the British civil service, or the corps of prefects in France. The difference may be the bizarre impact of self-delusion on the implementation of the political agenda by the judge, and the irrational, non-dialogic, almost mechanical translation of constitutionalist faith into popular obedience. All this can be good or bad, depending on who is in charge and what he or she is trying to accomplish.

2) Constitutionalism has been a constitutive element of our political culture, not as the form for our collective self-determination but by providing one of the discourses through which actors pursue their political and ethical projects. These projects can be good or bad, depending on who is pursuing them and what they are after. Different discourses, different cultures has got to be our maxim as soon as we lose faith in the possibility of transparent language. We might very loosely analogize constitutionalism to the Sun Dance of the Sioux, which is both a ritual and the site of a discourse as well. Naive manipulation then becomes just another of the utterly culturally specific ways in which people are in bad faith.

3) Constitutionalism made legal realism possible. Conservative control of the Supreme Court in the late nineteenth century, in a context of naive manipulation, created a vested interest for the progressives in demystifying legal reason. Because the stakes were higher than in Europe, where all the roots of realism lay, the enterprise was taken much further. Just as fascism and stalinism were making the realist impulse look positively obscene in Europe, the American realists reaped the reward of their general critique of Classical legal thought, epitomized by the work of Holmes, Hohfeld, Hale, the Cohens, Arnold, and Llewellyn. The essence of this critique was that because the private law issue of how to define property rights was undecidable given the extant interpretive techniques, conservatives must renounce public law power to strike progressive legislation as unconstitutional. And of course legal realism made critical legal studies possible.

On the Differences Between Blood and Red Ink: A Second Look at the Policy Arguments for the Abrogation of the Economic Loss Rule in Consumer Litigation

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I. INTRODUCTION

The long-running debate concerning the scope of the economic loss rule¹ presents issues which are important in themselves and as illustrations

1. The significance of the economic loss rule is that a buyer seeking recovery for the loss caused by product failure must plead the cause in warranty or contract. In most jurisdictions, the buyer cannot recover if the event did not cause personal injury or damage to property other than the product itself. A recent decision of the Florida Supreme Court is representative. The plaintiff alleged flaws in concrete caused the walls and ceilings of a condominium to crack, and ultimately pieces fell, narrowly missing residents; however, there were no actual injuries. *Casa Clara Condominium Assoc., Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993). The economic loss rule prohibited recovery because the product did not cause personal injury or damage to anything other than itself. *Id.* at 1246 (citing *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)); *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992) (treating sovereign error as exception to economic loss rule); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987)); *cf. Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213, 217-18 (Wis. 1989); *Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.*, 444 N.W.2d 743, 747 (Wis. Ct. App. 1989). Note, it is sometimes suggested that a better term would be "commercial loss." See the opinion of Judge Posner in *Miller v. United States Steel Corp.*:

The Millers are attempting to use tort law to recover the cost of replacing a defective product sold to them for use in their business. This cost is called in law an "economic loss," to distinguish it from an injury to the plaintiff's person or property (property other than the product itself), the type of injury on which a products liability suit usually is founded. It would be better to call it a "commercial loss," not only because personal injuries and especially property losses are economic losses, too—they destroy values which can be and are monetized—but also, and more important, because tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law. Products liability law has evolved into a specialized branch of tort law for use in cases in which a defective product caused, not the usual commercial loss, but a personal injury to a consumer or bystander.

Miller, 902 F.2d 573, 574 (7th Cir. 1990).

of broader questions.² Litigants and commentators champion the opposing schools of thought through close analysis of precedent;³ the exchange of views as to the nature of tort law and contract law;⁴ and occasionally, economic analysis.⁵ Their heartfelt arguments reflect origins in the distinct, self-sufficient assumptions and insights characteristic of commercial and product liability law. Perhaps, as a result, neither side answers the others' contentions directly.⁶

Those who favor abolishing the rule use an account of a buyer's predicament as prelude. Once the stage is set, there follows an assertion that an otherwise dispositive point of law—a statute of limitations, or perhaps precedent as to the enforceability of waiver—should not apply to the particular case. Ultimately, references to the humanitarian purposes of

2. See *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612 (Mich. 1992); Jay M. Zitter, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 A.L.R.4TH 12 (1989).

3. See Steven G.M. Stein et al., *A Blueprint for the Duties and Liabilities of Design Professionals After Moorman*, 60 CHI.-KENT L. REV. 163 (1984) (discussing a painstaking effort to reconcile the law of professional malpractice with distinctions between contract and tort law established by Illinois case law).

4. Some courts and scholars are concerned the possible expansion of the tort system would distort the laboriously worked out balances of the U.C.C. See Sarah B. Parker, Note, *Economic Loss in Product Liability: Strict Liability or the Uniform Commercial Code*, 28 B.C. L. REV. 383 (1987) (suggesting rough categorization of those who would create a limitation to economic loss rule on the basis of the type of plaintiff and those who would do so on the basis of type of injury). A University of Pennsylvania article supports the general definition of economic loss which plaintiffs' advocates offer. See Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966). However, the author concludes on a broader issue: "[T]he tort rationale of risk distribution and the doctrine of assumption of risk, while appropriate in personal injury cases, seem wholly inappropriate when the injury is only the loss of the value of the purchaser's bargain." *Id.* at 549. The article goes on to say it would be ironic "if the tort doctrine which was evolved to rescue the personal injury area from the 'intricacies of the law of sales' were to imprison the economic loss area with inapposite tort concepts." *Id.*; see also *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 217-18 (Or. 1968), *cert. denied*, 393 U.S. 1093 (1969); Robert L. Rabin, *Tort Recovery Negligently Inflicted Economic Loss*, 37 STAN. L. REV. 1513 (1985).

5. William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731 (1990).

6. The reason for that failure of communication may be a belief on the part of plaintiffs' lawyers that the term of art, strict liability, embodies social realities so deep they are beyond debate. Conversely, the defense lawyers' instinct is that once an issue is labeled as one of "products liability" and "policy," the battle is lost.

modern product law arrive at a conclusion that contract law has given way to tort law and that the individual rule or precedent is no longer pertinent. However, on closer examination, lawyers have not demonstrated a link between premise and conclusion. Moreover, the attorney has not shown that contract law is inadequate in theory, or that the commercial system is unfair in its practical workings.

Those who defend the rule operate on a different intellectual dimension than their adversaries. Typically, the defense does not challenge their adversaries' assumptions that a change in the rule would advance the goals of product liability. Rather they finesse, by praising contract doctrines as the natural channel for business⁷ to provide the parties with an opportunity to negotiate an arrangement to satisfy the needs of each.

This article tries to narrow the gap by recasting the case for the economic loss rule in terms of the general concepts of products liability and practical litigation.

II. THE AGENDA

Taking the classic "contract" defense of the economic loss rule as a starting point, we attempt a more utilitarian and literal minded approach. Our objective is to meet the concerns which lead others to call for change head on. In the course of that effort, we urge the courts to prohibit strict liability claims for pure economic injury, even when the potential plaintiff is not a commercial entity. The economic loss rule, contract law, and the commercial system have functioned sufficient enough to let people buy and sell goods for hundreds of years. The working arrangements of everyday life should not change because of a shift in fashion among tort and contract theories.

7.

If the ultimate user were allowed to sue the manufacturer in negligence merely because an article with latent defects turned out to be bad when used in "regular service" without any accident occurring . . . manufacturers would be subject to indiscriminate lawsuits by persons having no contractual relations with them, persons who could thereby escape the limitations, if any, agreed upon in their contract of purchase. Damages for inferior quality, per se, should better be left to suits between vendors and purchasers since they depend on the terms of the bargain between them.

Trans World Airlines, Inc. v. Curtiss-Wright Corp., 148 N.Y.S.2d 284, 290 (1955).

Each suggestion rests on the following observations and contentions:

1) Those who criticize the rule should identify its specific problems and explain why existing law cannot meet their needs. Often, statutory reforms or traditional common law rulings, tailored to a specific need, would solve the problem with minimum side effects. In contrast, a sweeping pronouncement that tort law rather than contract law is to govern an undefined group of cases will saddle the lower courts with practical, doctrinal, and even constitutional problems.

2) A shift to tort liability will force manufacturing corporations to take steps in self-protection. The ideal would be for those steps to improve safety and to achieve other goals of product liability; however, there are reasons to expect different results.

3) Trigger phrases such as "compensation," are important and valid for their purpose—the identification of the goals of product liability. However, they are neither specific nor objective enough to answer questions at the heart of this debate. Plaintiffs' advocates propose a new system which depends upon a vast increase in the number of tort lawsuits for "economic loss." The court would be unable to determine whether that approach would be as efficient as the existing system or whether it would work at all.

4) The analysis of legal issues in terms of social needs and practical impact is legitimate. But judges should decide whether a particular social need exists rather than treat that central question as a background assumption settled long ago in the academic literature. To the extent the argument for reform takes on that routinized character, strict liability will expand through momentum and stylishness rather than the reasoned analysis of new circumstances.

III. AN OUTLINE OF LANDMARK CASES AND THE CLASSICAL ARGUMENTS FOR THE OPPOSING POSITION

At an early stage in the development of modern product law, the Supreme Court of New Jersey held that the purchaser could sue in strict liability for the value lost when a new rug developed a line which would not "walk out."⁸ The broader teachings of *Santor v. A & M Karagheusian*⁹ emphasizes that the economic burden of injuries from products should be

8. *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965).

9. *Id.*

distributed throughout the system¹⁰ and that the law should make it easier for the consumer-plaintiff to recover.¹¹

The California Supreme Court led the counterattack in *Seely v. White Motor Co.*¹² If any jurist grasped both the significance and limitations of the new concepts, it was the authors of the opinions in *Greenman v. Yuba Power Products, Inc.*¹³ and *Escola v. Coca Cola Bottling Co.*¹⁴ Nevertheless, Justice Traynor refused to apply strict liability to a claim for the failure of a truck to operate properly.¹⁵ Instead, he focused on the difference between the risk to physical safety and the possibility that a product will not meet the economic expectations of the buyer.¹⁶ The former danger, he wrote, is the logical province of the law of torts; the latter, the traditional subject matter of contract and the law merchant.¹⁷

Two decades later, in *East River Steamship Corp. v. Transamerica Delaval, Inc.*,¹⁸ the United States Supreme Court held there was no tort claim where a turbine failed, impairing the ship's performance, but not damaging the vessel itself or any other product. Specifically, Justice Blackmun reasoned that: 1) a claim of that nature is best understood in terms of warranty since the product did not meet the consumer's expecta-

10. The court was explicit on that point:

[W]hen the manufacturer presents his goods to the public for sale he accompanies them with the representation that they are safe for the intended use. . . . The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales.

Id. at 311-12; see Patricia A. Brown & Jay M. Feinman, *Economic Loss, Commercial Practices, and Legal Process: Spring Motors Distributors v. Ford Motor Company*, 22 Rutgers L.J. 301 (1991) (emphasizing different concepts of rational analysis).

11.

The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged person who ordinarily are [sic] powerless to protect themselves.

Santor, 207 A.2d at 312; see also Parker, *supra* note 4, at 393 (discussing cases which followed *Santor*).

12. 403 P.2d 145 (Cal. 1965).

13. 377 P.2d 897 (Cal. 1963).

14. 150 P.2d 436 (Cal. 1944).

15. *Seely*, 403 P.2d at 149.

16. *Id.*

17. Note that the Traynor opinion includes a thoughtful consideration of policy questions; many of the authors' suggestions are elaborations on those themes. See *id.* at 145.

18. 476 U.S. 858 (1986).

tions; 2) contract law is well suited to such commercial disputes because it enables the parties to define their own agreement and their respective obligations; and 3) warranty law has built-in boundaries and restraints, whereas tort law may subject the defendant to limitless damages.¹⁹

19. *Id.* at 871-74. *East River* has often been referred to as the "majority rule" in products liability cases involving the economic loss issue. The Supreme Court of Alabama adopted the *East River* rule in *Lloyd Wood Coal Co. v. Clark Equipment Co.*, 543 So. 2d 671 (Ala. 1989), in which the court denied recovery to the lessee of a front-end loader that caught fire and damaged itself. The court stated the "tort concern with safety is reduced when an injury is only to the product itself" unlike the situation in which a "person is injured, the 'cost of an injury and the loss of time or health may be an overwhelming misfortune.'" *Id.* at 673 (quoting *Escola*, 150 P.2d at 441 (Traynor, J., concurring)). The opinion urged that consequential economic loss caused by the failure of the product is more easily and readily insurable; that the parties should be free to allocate risks among themselves; and finally, that warranty law contains an adequate remedy with necessary limitations on liability, that is, privity and remoteness. *Id.* at 673-74. In his dissent, Justice Jones urged that the majority view leaves the plaintiffs "remediless" when they do not suffer personal injury or damage to the property (other than to the product itself). *Id.* at 674 (Jones, J., dissenting). In his view, "to be relegated to commercial law (breach of warranty) for their remedy is to be *without* a remedy." *Id.* (Jones, J., dissenting). Indeed, Justice Jones suggested that "[t]he manufacturer of standardized products either elects to warrant the product or not warrant the product, it can limit both the quality and the quantity of that warranty as it sees fit." *Lloyd*, 543 So. 2d at 675 (Jones, J., dissenting). In contrast, he "never heard of the purchaser of a piece of machinery having any input into either the nature or the extent of any warranty given by the manufacture." *Id.* (Jones, J., dissenting).

Justice Jones urged that:

The law should make no distinction between classes of plaintiffs whose injury or loss results from a defective product . . . [and there] is no valid policy reason for denying a cause of action in tort to those plaintiffs who, fortuitously, have not suffered personal injury or property damage other than damage to the defective product itself, but who . . . are denied an action in contract because the defective product is not covered by any form of extended warranty.

Id. (Jones, J., dissenting). This result should be compared to the Alabama Supreme Court's opinion in *Dairyland Insurance Co. v. General Motors Corp.*, 549 So. 2d 44 (Ala. 1989), in which the court reversed the trial court's decision granting the defendant's summary judgment on a negligence theory of liability. In *Dairyland*, a van caught fire while the plaintiff was driving it. Although the plaintiff was not injured, the van was totally destroyed. In reversing the negligence count, the Alabama Supreme Court held that the plaintiff set forth a "scintilla of evidence" to satisfy the Alabama proof standard to show a defect in the van. *Id.* at 46. The court applied *Lloyd* to bar the plaintiff's claims of negligent manufacture and extended manufacturer liability, yet distinguished the decision from the plaintiff's negligent repair theory wherein the plaintiff claimed he reported a problem with the van's lights to the dealer's service personnel and staff did not follow normal procedures in response to such a claim. *Id.*

The Superior Court of Pennsylvania also adopted *East River* in *Rem Coal Co. v. Clark Equipment Co.*, 563 A.2d 128 (Pa. Super. Ct. 1989), in which the plaintiff company

The New Jersey court returned to the issue in *Spring Motors Distributors v. Ford Motor Co.*²⁰ The plaintiff, Spring Motors, was a corporation in the business of selling and leasing trucks. Spring Motors purchased a

purchased a front-end loader from the defendant company to use in a strip mining business. The plaintiff company sued the seller on a strict liability theory after the loader caught fire and was severely damaged. The Pennsylvania Superior Court held that contract law defined the appropriate limits of recovery, regardless of the nature of the risk created by the malfunction. *Id.* at 133.

Three years later, in *Jones v. General Motors*, 631 A.2d 665 (Pa. Super. Ct. 1992), the Pennsylvania Superior Court extended its holding in *Rem Coal* to cover situations in which the plaintiff is an ordinary consumer, rather than a commercial enterprise. The plaintiff purchased a new Chevrolet pick-up truck, which caught fire and was destroyed while parked and empty. The court affirmed the trial court's summary judgment for the defense. *Id.* at 665. The Third Circuit decision, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981), referred to *Rem Coal* when the product defect alleged was the lack of a fire suppression system on a front-end loader. The damage to the loader occurred as a result of a sudden and calamitous fire. The Third Circuit qualified the defect as dangerous, and held the plaintiff did have a tort cause of action for the event. *Id.* at 1174. This conclusion was premised on the federal appellate court's prediction that the Pennsylvania Supreme Court, if confronted with the issue, would adopt an intermediary position between *Seely* and *Santor*. *Id.* A conclusion which would ban recovery for economic losses in general, but allow for tort recovery when the product posed a risk of injury to the person or other property of the plaintiff. *Id.* at 1168. In application, however, the Third Circuit held the plaintiff failed to state a cause of action in tort because it only alleged a non-dangerous defect and a gradual deterioration of the product, and neither involved a calamitous event. *Id.* at 1174-75.

Ultimately, *East River* led the Third Circuit to reconsider. In *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987), the purchaser of a front-end loader sued the manufacturer in breach of warranty, strict liability, and negligence when the vehicle unexpectedly caught fire and suffered damage. No other property was damaged, nor did any personal injury result from the incident. After reviewing *East River*, the Third Circuit concluded the Supreme Court's analysis was so persuasive that it would be followed by the Pennsylvania courts. *Id.* at 117. The court retreated from the intermediary position it established in *Pennsylvania Glass*, and adopted the "bright-line" test enunciated in *East River*. *Id.* In application, *East River* mandated the Third Circuit deny recovery in tort, despite the calamitous nature of the event and the potentially dangerous nature of the defect. *Id.* at 117. Similarly, in *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), potato farmers sued in tort alleging the seed potatoes they purchased were treated with Fusarex, a chemical manufactured by Hilton-Davis. The Third Circuit reversed the jury verdict in favor of the plaintiffs. *Id.* at 1048. Referring to *East River* as the majority rule, the Third Circuit determined that the distinctive issue of the economic loss rule was whether the product "injures only itself." *Id.* at 1050. The court concluded that the allegedly contaminated seed potatoes did not constitute "other property," hence, it was an instance involving only economic loss. *Id.* at 1051.

20. 489 A.2d 660 (N.J. 1985).

shipment of thirty Fords, opting for the transmissions the Clark Equipment Company supplied, rather than standard Ford equipment. When Ford and Clark Equipment were unable to eliminate malfunctions in the transmissions, the dealer had to sell the trucks at a loss. A little more than four years after the purchase, Spring Motors filed suit against Ford and Clark Equipment for breach of warranty, strict liability, and negligence. The trial court dismissed the complaint on the ground that all claims were barred by the U.C.C.'s four year statute of limitations. On appeal, the appellate division held that the six year statute of limitations for tort actions applied rather than the shorter warranty limit. After surveying New Jersey opinions on strict liability, the intermediate appellate court concluded the extension of strict liability to economic loss would be consistent with that development.²¹

The defendants did not cross-appeal. Accordingly, the issue before the New Jersey Supreme Court was whether a commercial buyer of defective goods is limited to U.C.C. remedies and is prevented from asserting claims in strict liability and negligence.²²

In the majority opinion, Justice Pollock did not retreat from the *Santor* rule insofar as a future case might involve a consumer purchaser.²³ The court held, nevertheless, that the U.C.C. governed the sale of a fleet of trucks to Spring Motors, a large dealership, and its reasoning left no doubt that the result should be the same in any litigation arising from a transaction between commercial parties which results in purely economic loss.²⁴ In his

21. *Id.* at 663.

22. *Id.* at 662.

23. The majority opinion in *Spring Motors* concluded the lack of privity would not have barred the warranty action. *See id.* The concurring opinion expresses concern regarding the effect the majority's reasoning in a case which did not arise from such a clearly commercial relationship. *Id.* at 677 (Handler, J., concurring). Each is consistent with an argument that the result should be the opposite in a pure "consumer" case.

24. Justice Pollock observed the U.C.C. "constitutes a comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods." *Spring Motors*, 489 A.2d at 665. He emphasized strict liability traditionally applied to product defects which cause physical injury, but in this case there was a lack of privity between the consumer and the manufacturer of the defective product. *Id.* at 674. The U.C.C. is designed to simplify disputes between business entities. *Id.* On that basis, the court concluded commercial parties which suffer economic losses because of defective goods are limited to their rights and remedies under the U.C.C., and may not resort to tort theories such as strict liability and negligence. *Id.*

The majority opinion further stated that the delineation of the boundary between strict liability and the U.C.C. requires appreciation not only of the policy considerations underscoring both sets of principles, but also of the role of the legislature as a coordinate branch of government. *Id.* By enacting the U.C.C., Congress adopted a carefully conceived

concurring opinion, Justice Handler approved the result in this instance, specifically because the parties maintained a long-standing commercial relationship, and it would be natural to expect the U.C.C. to govern. Nevertheless, he expressed concern that there would not always be such a clear-cut distinction between a commercial buyer and a "consumer," and that there will be instances of unequal bargaining power,²⁵ even though each participant is a commercial entity.

Our brief synopses would do an injustice if they suggested the courts ignored the policy dimension of the issue.²⁶ Yet even in the landmark decisions, the common ground fades into generalization and stylized abstraction. Those seeking to change the rule speak of steps to equalize bargaining power, but investigate neither the extent of the disparity of bargaining power nor the effects of the change. Those who would support the rule show a sturdy faith in bargaining, but say little of the numerous instances in which there was no bargaining and never could have been.

IV. HARDER QUESTIONS FOR THE DEFENSE AND SOME ANSWERS

The classic defense of the economic loss rule draws intellectual force from a faith that individuals and corporations know their own needs and that bargaining between them is an efficient method for the allocation of risks

system of rights and remedies to govern commercial transactions. *Spring Motors*, 489 A.2d at 674. Allowing *Spring Motors* to recover from Ford under tort principles would dislocate major provisions of the U.C.C. *Id.* For example, application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty, and would deprive the seller of the ability to exclude or limit its liability. In sum, the U.C.C. represents a comprehensive statutory scheme satisfying the needs of the world of commerce, and courts should pause before developing judicial doctrines that might dislocate the legislative structure.

25. The examples Justice Handler used included sales of such vehicles to:

a travelling salesperson or a small-scale trucker, or a carpenter, plumber, electrician, or landscape gardener. It does not follow automatically that if the vehicle proves to be defective, the U.C.C. shall apply as the exclusive remedy to govern recovery of direct or consequential economic loss solely because such purchaser is in business or bought the vehicle for use in business. Rather, the analysis should turn on whether a purchase made in that kind of setting, even if for a business or commercial purpose, is sufficiently distinguishable from a purchase for personal use by an ordinary private consumer to justify a difference in remedial treatment.

Id. at 679. Justice Handler went on to discuss the possibility that the remote buyer might not be able to benefit by the abolition of vertical privity if he did not receive notice of the manufacturer's disclaimer of liability. *Id.* at 680-81.

26. *Spring Motors*, in particular, represents a direct and conscientious evaluation of policy considerations. *See id.* at 671.

and burdens.²⁷ Plaintiffs respond, however, that the reasoning grows hollow when a corporation is pitted against one who does not have the sophistication or even the opportunity to negotiate.²⁸

At the least, the critics of the rule are correct that the purchaser gets no opportunity to bargain with the intermediate sellers, even those who played vital roles in the process that led to the complete product.²⁹ The answer, for the most part, must be that which the Supreme Court suggested in *East River*: harshness in some individual cases is the price for a stable commercial system.

Finding the defense of the majority view not completely satisfactory ourselves, we take consolation in exploring the countervailing unrealities of some arguments against the rule.

A. *The Lure of Oversimplification*

In *Santor*, Justice Francis indicated that the manufacturer's responsibility should be the same whether the damage is to a person or to a rug—one injury is like another if each is the consequence of a defect in a product.³⁰ The assertion was epigrammatic and forceful. But symmetry in doctrine bumps against reality. Personal injury and economic losses are not the same thing in ordinary speech, in practical effect, or in legal analysis.³¹ The

27. For example, in *Spring Motors* the court held when the action is between "commercial parties with comparable bargaining power," neither strict products liability nor negligence may be used as a basis for recovering "benefit of the bargain" or consequential loss damages. *Spring Motors*, 489 A.2d at 670-71. The disappointed commercial entity will be left to its remedies, if any, under the U.C.C. *Id.* at 674; *see also* *Scandinavian Airlines Sys. v. United Aircraft Corp.*, 601 F.2d 425, 429 (9th Cir. 1979).

28. For a recent case following the majority position on the economic loss rule, but distinguishing it on policy grounds, *see* *Detroit Bd. of Educ. v. Celotex*, 493 N.W.2d 513 (Mich. Ct. App. 1992), in which the parties did not have an opportunity to negotiate because even though the defect in the product existed from the outset, it was unknown. *Celotex* held that asbestos is unique in the law, and determined the risk was not the type to be allocated to the parties to the negotiation process. *Id.* at 518-19.

29. *Casa Clara*, 620 So. 2d at 1248 (Barkett, J., dissenting). There are a number of cases which take opposing stands as to whether the economic loss rule applies when the parties are not in privity. *See* *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1333 (7th Cir. 1985); *Hap's Aerial Enter. v. General Aviation Corp.*, 496 N.W.2d 680, 681-82 (Wis. Ct. App. 1992). These cases raise the point that the rule is appropriate only when there is a commercial relationship.

30. *Santor*, 207 A.2d at 309.

31. *But see* Rabin, *supra* note 4, at 1513-15 (arguing the opposing view).

distinctions between them are in fact central to modern products liability doctrine.

One difference lies in the demands each makes on the trial courts. Commercial cases involve numerous parties in a variety of relationships. Personal injury cases are often fearfully complex for other reasons. Nonetheless, they present more concentrated and manageable fact issues in the sense that the injury victims generally suffer harm of a single type. In the more significant of these cases such as design litigation, a decision for—or against—one claimant on the liability issue would require the same conclusion as to the others.³²

More important holdings, such as *Greenman*, arose from the human experience that the economic consequences of major personal injuries tend to devastate the individual in a way that others do not.³³

32. A commentator suggests the reason why recovery is permitted for personal injury is:

[I]n personal injury situations such as the airplane crash and building collapse, the injury victims constitute a single class—they suffer a type of harm in common. Barring recovery for any individual victim would mean barring the recovery for all victims. Putting aside the accountants' liability cases, incidents involving widespread economic loss are quite different from the cases of multiple personal injury. The chain of commercial losses triggered by the accidental closure of a plant or death of a person are "ripple effect" losses; in an important sense they implicate a secondary group of victims who suffer highly diverse types of harm.

Rabin, *supra* note 4, at 1533.

33. *Greenman*, 377 P.2d at 897. The response might be that there are many economic catastrophes which are also devastating to human victims, but that question is beyond the scope of this paper. For better or for worse, the view that personal injury damages are unique seems established.

Other differences between economic loss and personal injury involve the fact that economic loss is easily quantified in advance, and thus is easily insurable. *See Lloyd*, 543 So. 2d at 673 (holding defendant was not strictly liable for having sold front-end loader that caught fire and damaged itself). Damages which may be quantified in advance of the transaction are most efficiently handled as part of the bargain, rather than by time-consuming and expensive litigation after the fact.

Even in the case of defective automobiles—the classic situation enabling tort recovery for buyers—courts draw a clear distinction between economic losses and personal injuries. For example, in *Hiigel v. General Motors Corp.*, 544 P.2d 983, 989 (Colo. 1975), the court refused to invoke strict liability to cover lost profits resulting from a defect in a truck purchased for business use.

Lost profit is clearly more "economic" than other types of loss which have formed the basis for strict liability claims. However, the rationale distinguishing lost profit claims from personal injury claims applies equally as well to other claims for economic loss damages. *See, e.g., Prairie Prod., Inc. v. Agchem Div. Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App.

B. *Wolves in Sheep's Clothing*

Another observation is equally impressionistic, yet it has both a pedigree and a moral. Critics urge that the doctrine protects sellers at the expense of "consumers"—a value-charged phrase. But a closer look at an opinion which expresses that concern often reveals that it is a business, rather than a "hapless consumer" which pushes to change the economic loss rule.³⁴

In *Seely*, for instance, Justice Traynor observed that the complaint of overreaching by the seller had little force because the plaintiff itself was a corporation.³⁵ The working hypothesis drawn is that companies often struggle to cut back the rule and that they act rationally when they do so. The benefits of the change would flow to them as much as to individuals. Corporations, after all, are buyers as often as sellers. Equally important, they have the resources and institutional attention span to take full advantage of the change. An argument that the rule protects corporations against individuals requires a closer and more skeptical scrutiny.

The buyer who is not a corporation is not necessarily so poor or unsophisticated as the sacred texts of products liability suggest. In *Casa Clara*, for example, one of the individual claimants bought his own land and hired a general contractor and architect.³⁶ Rather being a contract of

1987) (denying recovery of lost profits to farmer who purchased pesticide that failed to eliminate corn earworms, thus, deferring to legislative framework set forth in U.C.C.); *Brown v. Western Farmers Ass'n*, 521 P.2d 537 (Or. 1974) (rejecting lost profit as basis for recovery when farmer was unable to sell chickens that ate defective feed supplied by defendant); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982) (refusing to extend strict liability recovery of lost profits for plaintiff who purchased defective clock). *But see* *Jones v. Bender Welding & Mach. Works*, 581 F.2d 1331 (9th Cir. 1978) (allowing recovery of lost profits under maritime negligence law by fishermen who purchased defective boats); *Cooley v. Big Horn Harvestore Sys., Inc.*, 767 P.2d 740 (Colo. Ct. App. 1988), *aff'd in part, rev'd in part*, 813 P.2d 763 (1991) (allowing recovery on negligence theory to dairy farmers who lost profits because grain storage system failed to prevent spoilage); *Chubb Group Ins. Cos. v. C.F. Murphy & Assocs.*, 656 S.W.2d 766 (Mo. Ct. App. 1983) (holding plaintiff entertainment companies could recover lost profits from collapse of arena built by defendants).

34. *See, e.g.*, *Mead Corp. v. Allendale Mutual Ins. Co.*, 465 F. Supp. 355 (N.D. Ohio 1979) (holding in favor of large corporation that successfully relied on precedent emphasizing the plight of individual); *American Drugstores v. AT&T Technologies*, 583 N.E.2d 694 (Ill. 2d App. Ct. 1991) (refusing to extend strict liability when several businesses sued telephone company after fire at switching station disrupted telephone service in community because no one sustained any injury or property damage).

35. *Seely*, 403 P.2d at 151-52.

36. *Casa Clara*, 620 So. 2d at 1249.

adhesion, the agreement gave him the right to attorneys' fees in the event of the seller's breach.³⁷

Even a more representative individual buyer need not be a victim *per se*. The argument against the rule frequently includes the assertion that an ordinary person is overwhelmed by contracts and fine print. Yet people cope with contracts every day; the generality is overbroad and even patronizing. True, some transactions are difficult. The purchase of a home, for example, is the largest investment the ordinary person ever makes.³⁸ Everyone knows that, and as a result, buying a house is the occasion in a lifetime when the ordinary person is most likely to hire a lawyer to represent his or her interests.³⁹ The lawyer, moreover, can do that work at an acceptable cost; this is customary in nature and the issues are well settled. If the courts open the way to novel tort-based claims, that predictability would diminish. What would this change bring the public in return?

V. THE LACK OF A SINGLE, COMPELLING OBJECTIVE

Although the debate is one of the great pieces of products liability lore, it still is unclear what the advocates of change strive to accomplish.⁴⁰ One answer, implicit in the complaints of unequal bargaining power, is they think the change would make the process of negotiation and compromise more equitable.

Even if given the chance, would the ordinary consumer dicker with dozens of suppliers over the prices and specifications of engine blocks, seat springs, shatterproof glass, and hundreds of other individual components rather than buy a complete automobile?⁴¹ To the extent the buyer would not do such a thing, the case for dismantling the commercial system to cure the supposed lack of opportunity grows more dubious.

Any initial impression of unfairness fades even more when one considers the buyer has enforceable rights against the seller of a house or of

37. *Id.*

38. *Id.* at 1247 (citing *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983)).

39. *Id.*

40. In the individual case, of course, the change could lead to a plaintiff's victory, but that is not a coherent intellectual basis for broad change.

41. In theory, if the buyer had an opportunity to bargain, the buyer could demand a written extension of warranty from the supplier of each component. The common sense response is that the possibility of product failure of one of the components sometime in the future is not enough to justify all the paperwork. However, the same possibility could not justify adding new complexities to lawsuits and imposing new burdens on the courts.

any other product.⁴² Further, the seller almost always was the buyer of components at a preceding stage.⁴³ To survive, it had to remember that its own customer might complain and even sue if any component should fail. This put pressure on the business to search for good materials and to bargain for warranty coverage, for the consumer's ultimate benefit.⁴⁴ This indirect

42. See, e.g., *Hartley v. Ballou*, 209 S.E.2d 776 (N.C. 1974) (extending implied warranty recovery against builder of house that flooded during rainy weather); *George v. Veach*, 313 S.E.2d 920 (N.C. Ct. App. 1984) (allowing recovery for breach of implied warranty by buyer of house with failed septic system against builder of house).

Recovery under implied warranty in the context of a builder's liability is traceable to the 1884 United States Supreme Court decision, *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 (1884). In *Kellogg*, the Court allowed recovery by a railroad company against the company it hired to build a bridge when the temporary supports of the bridge collapsed because the bridge company breached the implied warranty that the temporary supports would be reasonably suitable for the use contemplated by both parties. *Id.* at 118-19.

43. It is true, of course, that the intermediaries hope to keep the benefit of the bargain for themselves rather than pass it on to the purchaser of home. However, that question is the subject of the negotiations between "homeowners" and "developers" over price, warranty, and quality.

44. For example, the court may find that an oversight by the maker of a product led to a defect and the failure of a product, the maker exercised a level of prudence that precluded any claim under implied warranty, even for the initial purchaser. See, e.g., *City of Mounds View v. Waljarvi*, 263 N.W.2d 420, 424 (Minn. 1978) (refusing recovery under implied warranty against architect when plaintiff's building suffered from water seepage despite fact that builders followed architect's plans because the "inescapable possibility of error which inheres in [architectural] services"). But see *Broyles v. Brown Eng'g Co.*, 151 So. 2d 767 (Ala. 1963) (holding defendant civil engineering company liable under implied warranty for occasional failure of drainage system despite lack of evidence of negligence).

Recovery may also be precluded in situations which neither buyer nor seller could have reasonably foreseen the defect in the subject of the transaction. Compare *Witty v. Schramm*, 379 N.E.2d 333 (Ill. 3d App. Ct. 1978) (refusing to imply warranty that no subsurface waters would be present in unimproved building lots and noting neither party had superior knowledge as to existence of subsurface waters) with *Jordan v. Talaga*, 532 N.E.2d 1174 (Ind. 4th Ct. App. 1989) (allowing recovery under implied warranty for buyer of building lot who found property was in natural water course, and was therefore worthless even though seller carried out significant improvements on property, was a professional real estate developer, was in best position to forego development of the lot, and knew of the existence of the natural water course).

When a subsequent purchaser, not in privity with the maker or initial seller, seeks to recover damages caused by a defect in the product, courts may bar recovery unless the subsequent purchaser is endangered in a way that was foreseeable to the initial seller. Compare *Huang v. Garner*, 203 Cal. Rptr. 800 (1st Ct. App. 1984) (allowing recovery under negligence theory by subsequent purchaser of apartment building built by defendant) with *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284 (Wash. 1987) (refusing recovery from builder under implied warranty to owners of condominium who had no direct

protection for later purchasers is neither absolute nor inevitably sufficient. Its existence, however, calls for rebuttal from the proponents of change.

VI. SOME COSTS OF REFORM

A. *The Uncertainties in the New Body of Law*

Those who would change the rule speak as if tort theory were a fully developed body of law which the courts could transplant to the new factual matrix with little difficulty. The reality is different.

Products liability only recently became a significant branch of the law,⁴⁵ and vital doctrinal questions are still unsettled.⁴⁶ Consider the decades of wrangling over the meaning of "defect" and the extent to which recent proposals for the revision of section 402(a) of the *Restatement (Second) of Torts* have fanned the flames.⁴⁷ In addition, there are disputes as to how the jury should be instructed.

dealings with builder because the defects did not cause a violent occurrence).

45. David G. Owen, *A Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense of Product Liability Actions*, 10 IND. L. REV. 769 (1977).

The seminal cases that spearheaded the modern development of products liability law were decided in 1960 and 1963. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The predominant treatise on products liability, L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* (1976), was first published in 1960, and the first edition of the other treatise in the field, R. HURSH (now with H. BAILEY), *AMERICAN LAW OF PRODUCTS LIABILITY* (2d ed. 1974), was published one year later. The first Canadian text, S. WADDAMS, *PRODUCTS LIABILITY*, was published in 1974, and the first English text has just been published, C.J. MILLER & P. LOVELL, *PRODUCT LIABILITY* (Butterworths 1977).

Id. at 771 n.18.

46. RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 69 (1980). Professor Epstein demonstrated design liability embraces fundamentally different categories, and currently the law has not created a rigorous standard for the complex, important cases. *Id.*

Johnson v. General Motors Corp., 438 S.E.2d 28 (W. Va. 1993), is an example of the fluid and unsettled nature of the products liability doctrine. In *Johnson*, claims arising from a head-on collision required the state court to touch on the complexities of "crashworthiness:" the doctrine and the burden of proof in that context; the relationship between one view of the burden and the legislation governing the offsets of settlements; the collateral source rule; the distinction between a defendant's position under a duty to warn based on strict liability and one based on negligence; the "two issue rule;" and other matters. *Id.* at 33-42.

47. Alvin S. Weinstein et al., *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 431 (1974).

The meaning or effect of some concepts vary in the different context of tort and contract law. Nothing might seem more familiar or indisputable than the manufacturer's ability to comprehend the nature of the product's probable performance better than the consumer who happens to be hurt in an accident. When the product does not cause physical harm, however, the balance of advantage is the mirror image of those personal injury cases in which strict liability took shape. Now it is the buyer who knows where the product will be used and whether it must act in conjunction with other devices or components. The manufacturer or intermediate seller may *not* know those things; at best, its information comes from the buyer. As a result, the seller has no greater chance to predict the severity of the damage than the buyer.⁴⁸ In fact, quite often the seller has less of a chance.⁴⁹

The change would also burden routine sales with the tort concept of the duty to warn. The impact of that departure would be magnified by the judicial temptation to object to virtually any label or instruction provided for a jury review.⁵⁰ All this clashes with the contractual allocation of risk.⁵¹ Further, those new claims will overlap the warranty rights which purchasers already have.

On a more practical level, if lawyers analyze economic loss cases through the prism of tort theory, they will be encouraged to try them like tort cases. Yet it would not add to the efficiency of commercial life to import more of the theatrics of personal injury litigation.⁵² For example, the plaintiff's tactical reason for pleading tort rather than contract might be to lay the groundwork for a punitive damage count. That, in turn, would bring greater uncertainty as to whether jurors will respond to attacks on the character and morality of the defendant.

48. James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

49. *Id.*

50. It is true that sophisticated buyers often give the seller specific requirements for products, but that is an example of bargaining, the subject of contract law.

51. Courts have recognized that a buyer may consider a "defective" product to be a good bargain if the defect is apparent and reflected in the price. Holding the seller strictly liable in these situations would make these transactions unavailable to consumers and reduce the value of products with patent defects below their true market value. *See Aronsohn v. Mandara*, 484 A.2d 675 (N.J. 1984) (denying buyer of house recovery for defects discoverable upon reasonable inspection, which should have been reflected in price paid); *Meadowbrook Condominium Ass'n v. Southern Burlington Realty Corp.*, 565 A.2d 238 (Vt. 1989) (denying recovery under implied warranty to condominium purchasers, who presumably paid less for their units acquired after defects in common areas became apparent).

52. *See EPSTEIN, supra* note 46, at 107 (discussing the lack of unlimited boundaries to liability and the extent to which the duty to warn is also in the midst of development).

B. *The Burden at the Working Level*

These difficulties are not academic curiosities. If the economic loss rule was abolished, trial judges would have to revisit settled issues of contract law in light of tort principles.⁵³ The proposal, after all, is to set up a new universe of precedent. This must be parallel to contract law, but sufficiently distinct from the cases to produce different results in significant cases. Otherwise, there would be no point. Further, the promise of change gives the plaintiff's lawyer a professional duty to contest what once appeared clear.

In turn, those who manufacture and sell goods must foresee the answers courts would give to those questions. Indeed, in many instances the boundaries of the manufacturer's risk would be set by the subjective "expectations" of the purchaser as his or her lawyer chooses to reconstruct them long after the sale. This necessarily reduces the predictability and utility of limitations on warranty or waivers.

Equally important is the fact that producers would have to guess whether another court might decide that a buyer,⁵⁴ or anyone to whom that buyer might resell⁵⁵ the product, lacked "bargaining power."⁵⁶ This

53. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (illustrating the possible dangers judges might face, although the *Pennzoil-Texaco* situation arose from a different tort theory).

54. Rabin, *supra* note 4, at 1536.

When the ripple effects characteristic of widespread economic loss are involved—that is, the disruption of a heterogeneous conglomeration of commercial and financial relationships occur—the prospect of reasonable foresight is especially attenuated.

Whether this point is equally applicable to the more modest case of widespread economic loss in which physical harm to a particular individual—the running down of a pedestrian, for example—triggers a variety of collateral financial losses, ranging from the victim's boss to his barber, is a closer question. In this situation, however, the relatively weak deterrence claim is arguably outweighed by the ethical objection to extended liability for a careless act.

Moreover, because potentially widespread loss is often either uninsurable or very expensive to insure against, the superior risk-spreading capability of defendants, whether commercial or individual, is open to serious doubt.

Id. at 1536-38.

55. Or anyone else to whom the product might pass later.

56. Variations and asymmetry often exist in individual sales transactions "upstream" and "downstream" from the manufacturer. Contractual bargains up and down the line of production and distribution would be affected by application of a tort theory of liability for the failure of the product to live up to the expectations of the purchaser. Should all suppliers

problem would not be limited to large corporate vendors. Small companies would have the same risk even when they dealt with relatively wealthy individuals.

The "horrible" does not always materialize and in fact cases such as *Greenman* and *Henningsen* did not disrupt commerce.⁵⁷ The reason, however, is not that the danger was imaginary, but that the judges who developed products liability doctrine recognized that tinkering is justified only when the disparity in bargaining power is glaring.⁵⁸ Those who would do away with the economic loss rule have not defined the potential consequences their proposals.

Arguments stating that a change from contract to tort would simplify and rationalize the legal system have vigor and simplicity. But that impression fades upon closer inspection. The supposed reform would actually complicate the liability analysis in some cases.

The distinctions of the principles between strict liability and contractual liability, which is seldom clear in product disputes, grow more blurry when the economic loss case arises from a claim of design defect.⁵⁹ Potential plaintiffs urge that the jury should balance the risk, the costs, and the utility to indicate whether there is a defect. While consumers strike that balance when they decide whether to buy a product or not, jurors could not make more precise judgments after the fact. There also would be a question as to how the jury's finding of a "contract breach" differs from a finding of a defect in an instance where there is no formal agreement.

To be sure, there are important differences between the two bodies of doctrine. However, "different" is not necessarily "better."

of raw materials, contractors, distributors, etc., obtain insurance against liability, limitless in amount, scope, and time? Balancing of the kind required in sales transactions is the function of the U.C.C. and the law of sales, which provide a flexible means by which to measure the proper expectations of all of the parties.

57. Even though it is simpler and less time consuming, classification by category might be inaccurate in many instances. Putting aside the question of fairness, the alternative would be a time consuming, case by case determination of the relative buying powers of the parties. More sophisticated academic writing calls for the analysis of the relationship between the plaintiffs and a determination as to whether or not commercial results will govern. The argument is logical, but as one of its proponent's put it, it would require sophisticated analysis of a variety of cases at the trial level, thus it would be impractical.

58. However, many would argue that those legal developments have had adverse marginal effects on cost and efficiency.

59. See Brown & Feinman, *supra* note 10, at 341. Only a very significant difference between the parties' risk-bearing abilities is relevant to the court in its determination of who is the superior risk bearer. *Id.*

VII. THE UNCERTAINTY AS TO WHO WOULD GAIN, HOW, AND WHY

The tort statute of limitations is often shorter than that for contract claims. In addition, the tort action may not survive the death of a party.⁶⁰ Notions of causation are less restrictive in tort law than in contract law⁶¹ and “foreseeability,” already an amorphous concept in contract doctrine, is still less defined in tort law.⁶²

Finally, tort damage principles are often looser than contract damage principles. Contract law gives the claimant the benefit of the bargain rather than compensation for loss.⁶³ Each of the established contract principles developed as courts examined a variety of cases and refined their responses to realities. One of the resulting contract doctrines may be error; all may be mere historical artifacts. Yet before a court accepts either suggestion, it should ask more specific justification for dismantling a system which has evolved over centuries and which permits the doing of the world’s work, no matter how imperfectly.

A. *The Purchaser Without Tears*

Plaintiffs tend to speak as if there was a consensus that the change would help consumers or buyers as a class, and that this is a public benefit so great that compels the abolition of the economic loss rule.⁶⁴

The premise, beguiling so long as its not closely examined, is that a change in the law is desirable if it would make it easier for consumers, or special subcategories of that broad class, to recover for a particular

60. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 655 (5th ed. 1984).

61. Similarly, immunities such as those of municipal corporations or charities may bar tort claims, but not contract claims.

62. WILLIAM L. PROSSER, PROSSER ON TORTS §§ 42, 92 (4th ed. 1971).

63. *East River*, 476 U.S. at 873-74 n.9.

64. Dean Prosser suggests the tort remedy is often more advantageous to the injured party because it permits the recovery of larger damages, beyond the prototypical limitations of *Hadley v. Baxendale*. KEETON, *supra* note 60, § 9.2, at 665 (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)). A tort action may also allow recovery for wrongful death whereas, a contract action would not. See *East River*, 476 U.S. at 874 (placing great emphasis on the distinction between tort and contract).

injury.⁶⁵ The threshold question is whether it *should* be easier for the buyer to prevail under the particular circumstances.⁶⁶

It is debatable whether plaintiffs, as a class, need more help. Newly created implied warranties, condominium legislation and other specialized statutes already have made the balance more favorable for particular groups.⁶⁷ A "reform," giving them additional bargaining power, would help some individual members of those classes win more lawsuits, but it will not always be the plaintiff who gains from the change. For example, to demand proof that the other side was guilty of negligence could make recovery more difficult for some claimants. More generally, traditional warranty law, the U.C.C., and specialized reform statutes, such as lemon laws, provide significant protection for the broad class of "purchasers."⁶⁸ If some need more, the next question is whether the abolition of the economic loss rule is the best way for the courts to help them. Assuredly, there are other paths. Even when codified, general contract and warranty doctrines are flexible enough to allow a court to do justice in the exceptional case. A judge can refuse to enforce an unconscionable contract,⁶⁹ or more specifically, an agreement in which waivers or limitations of liability are so extreme that the remaining remedy fails its essential purpose.⁷⁰

On the other hand, the abolition of the economic loss rule might not make a significant difference to most individuals, or even to a company which has a small claim. In practice, if not in theory, a dispute which involves only property damage at the consumer level cannot often generate

65. The plaintiff's lawyer urging the change in particular cases know what they are doing. Clients would win the individual matters, but that is not enough to justify judicial action.

66. *Mitchell v. Volkswagenwerk, A.G.*, 669 F.2d 1199, 1204 (8th Cir. 1982).

67. That point may seem too obvious to be interesting. Nevertheless, even some academic writing seems to come dangerously close to saying requirements of proof should be abolished for no reason other than they work to the disadvantage of plaintiff. See Gerald F. Teitz et al., *Crashworthiness and Erie: Determining State Law Regarding the Burden of Proving and Apportioning Damages*, 62 TEMP. L.Q. 587, 621 n.21 (1989) (criticizing *Huddell* requirements of proof in "second collision" or "crashworthiness" case because, as long as they remain in force, plaintiff would have to base his or her claim on "speculation or conjecture or both" in instances where an expert can say the design caused the particular harm).

68. See *Casa Clara*, 620 So. 2d at 1247.

69. See U.C.C. §§ 2-313 (express warranty), 2-314 (implied warranty for merchantability), 2-315 (warranty of fitness for a particular purpose) (1994); JAMES L. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 406 (2d ed. 1980).

70. U.C.C. § 2-302 (1994). See generally WHITE & SUMMERS, *supra* note 69 (discussing related doctrines and remedies).

a contingent fee attractive to the specialized plaintiffs' bar. However, it seems reasonable to expect that most of these cases will be handled as they always have been, by a neighborhood lawyer or the associate who takes his wife's uncle's case in the hope that it will lead to greater things. A typical trial will be a matter of a half-day in a county court, not a venue in which a lawyer often could explore the nuances and complexities of strict liability.⁷¹

The differences will matter, of course, in other cases. Strict liability is more likely to occur in those instances where the litigants have large amounts at stake and have bargained over difficulties which each side foresaw. That brings us full circle to *Seely* and the classical insight that such disputes are the meat and drink of contract law.

VIII. THE FALSE PROMISE OF EXCEPTIONS AND DISTINCTIONS

A. *Assumed Boundaries and Their Life Expectancy*

Insofar as the objective is to shield the individual buyer, the answer might be to preserve the economic loss rule for disputes between corporations or commercial enterprises, but to abolish the doctrine where the plaintiff is an individual. That, however, would mean one rule for businesses and another for those who buy products from these businesses.⁷² The equilibrium could not be stable.

It is the nature of a sales controversy to drag commercial enterprises into what began as simple disputes between private persons or small businesses. For example, when an individual plaintiff obtains a tort verdict against a supplier, builder, or manufacturer, the defendant will usually demand contribution or indemnity from the corporate suppliers further back

71. For an example of a case discussing the complexities of strict liability see *Spring Motors*, 465 A.2d at 530. The essential argument before the Superior Court of New Jersey was that the extension of strict liability would clash with the statutory scheme and was not supported by the policies which underlie strict liability or the weight of authority. *Id.* at 533.

72. Courts more readily apply the economic loss rule in cases in which the plaintiff and defendant are both sophisticated commercial enterprises. Compare *Public Serv. Co. v. Westinghouse Elec. Corp.*, 685 F. Supp. 1281 (D.N.H. 1988) (denying tort recovery to plaintiff company, which sustained losses when steam turbine generator purchased from defendant company malfunctioned) and *Utah Int'l, Inc. v. Caterpillar Tractor Co.*, 775 P.2d 741 (N.M. Ct. App.), *cert. denied*, 772 P.2d 884 (N.M. 1989) (denying tort recovery to plaintiff company who purchased from defendant company a coal hauling machine which caught fire) with *McConnell v. Caterpillar Tractor Corp.*, 646 F. Supp. 1520 (D.N.J. 1986) (extending tort recovery for economic losses to plaintiff fisherman who purchased boat engine from defendant company).

in the chain of distribution. A comparable dynamic requires that lawyers adapt to the arguments first inspired by the plight of the individual to the needs of ever-larger clients. The cry, in fact, already has gone up that small business also lacks bargaining power.⁷³

IX. SOME DRAWBACKS TO THE "CATASTROPHIC RISK" AND "SEPARATE PRODUCT" EXCEPTIONS

A court may be more receptive to incremental adjustments in the economic loss rule than to a revolutionary change. Problems still lurk beneath the surface. The boundaries of the rule are murky⁷⁴ and they will grow less settled if each case is to require the analysis of the consequences which *might* have come to pass. The ordeal could become a perpetual motion machine, given the impact of the related argument that there should be tort recovery where a product failure is "violent" or likely to create "risks to personal safety."

Plaintiffs struggle to equate their cases to conventional tort claims, crying out against injuries that would have occurred if the product had failed in a different way, and possibly killing or maiming someone. At times, this is only lawyerly melodrama.⁷⁵

Most product failures can be characterized as involving at least a "potential" danger to human life if the plaintiff's attorney has even modest theatrical talent.⁷⁶ That is not a practical limitation on liability, nor one

73. See *Casa Clara*, 620 So. 2d at 1248 (Barkett, J., dissenting); see also *Spring Motors*, 489 A.2d at 677 (Handler, J., concurring) (stating it would not be long before plaintiffs' advocates begin to tell trial courts one company concealed information, and as a result, the other suffered because of its "relative" lack of bargaining power).

74. *East River*, 476 U.S. at 875.

75. In *Bellevue South Associates v. HRH Construction Corp.*, 574 N.Y.S.2d 165, 170 (1991), the Court of Appeals of New York denied recovery in strict products liability for the replacement of a defective floor in residential apartments. The court found no reason to adopt the *East River* rule because the plaintiff failed to meet even a less restrictive test. *Id.* The evidence did not show damage to persons or other property or even risk of such injury from the defective tiles. *Id.* Thus, they were not an inherently dangerous product and the specific failure, delamination of the tiles, was not considered an abrupt, cataclysmic event. *Id.*; see Norman L. Greene, *Away from Ideology: A Review of Product Liability Defenses in the Era of Tort Reform*, 13 PACE L. REV. 43, 75 (1993).

76. In *Casa Clara*, lower grade concrete the buyer purchased led to "spalling," cracking, and staining. It was not unreasonable to extrapolate a situation whereby homeowners found their roofs falling, subjecting innocent people to broken bones, if not death, and as a result, shattering families. The fact that injuries did not actually occur did not make the accounts less blood curdling. *Casa Clara*, 620 So. 2d at 1247.

In *Kodiak Electric Ass'n v. Delaval Turbine*, 694 P.2d 150 (Alaska 1984), the plaintiff electric company sued the maker of a generator that failed, leading to an overload that caused another to fail, and in turn caused an electrical fire. The plaintiff argued that, since it was customary for two workers to go near the unit that caught fire, and since—had they been near it at the time of the fire—they could have been injured, the failure was dangerous, and should trigger tort liability. *Id.* at 153. The Alaskan Supreme Court accepted the argument on the basis of the potential danger to persons. *Id.* at 154. This result is consistent with the Alaskan Supreme Court decision in *Shooshanian v. Wagner*, 672 P.2d 455 (Alaska 1983). Wagner, the general contractor, insulated the plaintiff's building with urea formaldehyde foam insulation ("Insulspray"). *Id.* at 457. The plaintiffs moved into the building, but months later found the Insulspray gave off noxious and malodorous fumes causing allergic reactions and creating a health hazard. *Id.* The plaintiff accused Wagner of negligently installing the insulation, and sought relief because the fumes drove customers away, reducing the value of the building to almost nothing. *Id.* The court permitted the tort claims, holding the plaintiffs' stated a claim upon which relief may be granted under the theories of both implied warranty and strict liability. *Shooshanian*, 672 P.2d at 462-64. The court reached its decision by contrasting *Shooshanian* with an earlier opinion, *Morrow v. New Moon Homes*. *Id.* at 462-64 (citing *Morrow*, 548 P.2d 279 (Alaska 1976)). In *Morrow*, the plaintiffs sued in tort, alleging the mobile home they purchased had a leaky roof, ill-fitting windows and doors, a noisy furnace, and other features that made the mobile home so poor a bargain that they should not pay. *Morrow*, 548 P.2d at 281-82. The *Shooshanian* court contrasted the "poor product" allegation of *Morrow* with the claim in the instant case because the use of the allegedly toxic substance in the building physically altered the structure in a manner rendering it harmful to the plaintiffs. *Shooshanian*, 672 P.2d at 464.

Perhaps, more insightful is the Alaskan Supreme Court's decision *Cloud v. Kit Manufacturing Co.*, 563 P.2d 248, 249 (Alaska 1977), in which dissatisfied mobile home purchasers sued, alleging the polyurethane foam rug padding provided to them as part of the mobile home package ignited, and caused the trailer to catch fire. The Alaskan Supreme Court held the resulting injury constituted "property damage" rather than unrecoverable "economic loss," even though the line between the two is "not always easy to discern, particularly when the plaintiff is seeking compensation for loss of the product itself." *Id.* at 251. The court stated that it could not "lay down an all inclusive rule to distinguish between the two categories; however . . . sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss." *Id.* (citing Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966) [hereinafter *Economic Loss*]). The court provided, as an example, a scenario in which a "defective radiator causes property damage when it results in a fire which destroys the plaintiff's store and causes economic harm because the resulting conditions are so uncomfortable it causes the loss of customer patronage." *Cloud*, 563 P.2d at 251 n.8 (citing *Economic Loss*, *supra*, at 918); *cf.* *Northern Power Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981) (categorizing failure of defective oil pressure "shutdown" mechanism that caused engine to stop working as entirely economic loss since other property was not damaged).

The result in *Hiigel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1976), is antithetical to the *East River* doctrine. The plaintiff purchased a motor home from a retailer. The trailer was manufactured and assembled by the Aspen Coach Corporation and mounted on a

Chevrolet chassis manufactured by General Motors. On several occasions, the trailer wheel lug bolts sheared off, causing the dual wheels to fall off the vehicle. Plaintiff sued in strict liability. The trial court dismissed the claim under the economic loss doctrine. *Id.* at 987. On appeal, the Colorado Supreme Court reversed, following *Santor*. *Id.* at 989. "Since under § 402A [of the *Restatement (Second) of Torts*] the burden of having cast a defective product into the stream of commerce falls upon the manufacturer, it appears inconsistent to limit his responsibility to property other than the product sold." *Id.*

In *John R. Dudley Construction Co. v. Drott Manufacturing Co.*, 412 N.Y.S.2d 512 (App. Div. 1979), a construction crane suddenly collapsed. This resulted in serious damage to the crane, but no damage to persons or other property. Holding the event constituted "property damage," the court distinguished *Santor*, reasoning that where there is no physical injury, "it could not be claimed that [the] defendant had committed the tort of marketing a product which contained a defect that made it, when properly used, dangerous to life or limb or property." *Id.* at 515; *see also* *Gainous v. Cessna Aircraft Co.*, 491 F. Supp. 1345, 1347 (N.D. Ga. 1980) (allowing negligence claim for property damage to defective chattel through analysis of analogous cases even though court found no Georgia precedent to distinguish between "economic loss" and "property damage").

In *Moorman Manufacturing Co. v. National Tank Co.*, 414 N.E.2d 1302 (Ill. 1980), *rev'd*, 435 N.E.2d 443 (Ill. 1982), focused on a drain storage tank which cracked after 10 years of use. The reviewing court determined this was not the type of sudden, dangerous occurrence best served by tort law policy, rather, the loss was seen as "commercial," a type best handled by contract. *Id.* at 450. Justice Moran expressed the majority view as follows: When "the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use" and the defect is of a qualitative nature, contract law is appropriate. *Id.* at 451. To hold the manufacturer "strictly liable in tort for the commercial loss suffered by a particular purchaser, it would be liable for business losses of other purchasers caused by the failure of the product to meet the specific needs of their business." *Id.* at 447. The majority rejected the suggestion that if there is any physical harm, all losses should be recoverable. *Id.* at 452. The concurring opinion suggested that in some instances, plaintiffs could recover, even in the absence of privity. *Moorman*, 435 N.E.2d at 456 (Simon, J., concurring). Obviously, the question does not allow for a uniform answer. The proper approach is to develop a system of warranties out of privity to protect warranty-like, that is contract-like, interests, while resorting to tort theories to protect tort interests.

In *Prairie Production, Inc. v. Agchem Division-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987), economic losses were not recoverable by a seed corn grower on the basis of a negligence claim against the manufacturer of a pesticide that failed to eliminate corn earworms leading to lost profits. The reasoning emphasized a claim for lost profits was purely economic in nature, and therefore recovery was limited to contract. *Id.* at 1304. Further, to allow recovery of economic losses in a tort-based claim would circumvent the legislative framework set forth in the U.C.C. *Id.* at 1304-05; *see also* cases cited *supra* note 72.

In *Detroit Edison Co. v. Nabco, Inc.*, 35 F.3d 236 (6th Cir. 1994), Detroit Edison, a utility company, filed suit against Dravo Corporation and Vectura Group, Inc. (collectively, "Dravo") for damages resulting from the explosion of a 40 foot section of hot reheat pipe located in a power producing unit. Dravo fabricated and supplied all of the reheat pipe to Detroit Edison. Detroit Edison sought damages in tort for over \$20 million in damages for

which sellers could evaluate in advance. A part of the truth may be that the humanitarian basis of the product liability revolution decays into bombast when the claim is only for property damage.⁷⁷

the cost of repairing or replacing the defective pipe and surrounding machinery; repairing other machinery and property damaged by the explosion; cleaning up and removing the asbestos insulation used on the reheat pipe; inspecting all of the reheat pipe; purchasing replacement power from other utility companies while the damaged power unit was repaired and inspected and while other units were operating at a reduced capacity to minimize the risk of another explosion. *Id.* at 238. Following *Neibarger v. Universal Cooperatives, Inc.*, 486 N.W.2d 612 (Mich. 1992), the trial court granted summary judgment for the defense, holding that all of Detroit Edison's tort claims were barred under the economic loss doctrine. *Detroit Edison*, 35 F.3d at 238. On appeal, the Sixth Circuit affirmed, holding:

[The rule which] emerges from *Neibarger* significantly narrows the "other property" exception while expanding the definition of economic loss. Under *Neibarger*, tort claims for damage to other property are barred by the economic loss doctrine if those losses are direct and consequential losses that were within the contemplation of the parties and that, therefore, could have been the subject of negotiations between the parties.

Id. at 241 (citing *Neibarger*, 486 N.W.2d at 620). The Sixth Circuit reasoned the Michigan Supreme Court "significantly curtail[ed] the applicability of the 'other property' exception to the economic loss doctrine, while [simultaneously] expanding the meaning of 'economic loss.'" *Id.* at 243.

77. See, e.g., *Pennsylvania Glass*, 652 F.2d at 1165 (holding seller of front-end loader liable in tort for defect that caused loader to catch fire, despite fact that it only damaged itself because fire was sudden and calamitous); *Gainous*, 491 F. Supp. at 1345 (extending tort recovery to buyer of plane which malfunctioned in midflight, necessitating emergency landing resulting in damage to only airplane); *Shooshanian*, 672 P.2d at 455 (holding tort recovery was available to buyer of product with dangerous defect, regardless of suddenness of product's failure); *Northern Power*, 623 P.2d at 324 (denying recovery to buyer of generator that seized because there was no evidence of damage to persons or property, and failure created no risk to persons or property); *Cloud*, 563 P.2d at 248 (categorizing damage resulting from fire caused by polyurethane foam rug padding included in mobile home as recoverable "property damage," and noting that sudden and calamitous damage is generally put in this category, while deterioration, internal breakage, and depreciation are generally considered economic loss); *Moorman*, 435 N.E.2d at 443 (refusing recovery under strict liability by buyer of grain storage tank that developed crack which buyer did not discover until months later, and distinguishing cases in which defect causes violence or collision with external objects); *Drott*, 412 N.Y.S.2d at 512 (holding construction crane that suddenly collapsed created "property damage," despite fact that it only damaged itself, because it was dangerous to life or property); *Economic Loss*, *supra* note 76, at 917 (arguing defective radiator that causes fire and destroys plaintiff's store causes economic harm, while radiator that creates uncomfortable conditions that leads to drop in patronage causes only economic loss).

Courts may be more inclined to treat loss which is essentially economic as property damage when the defect at issue creates severe inconvenience for the buyer, even when it threatens damage only to itself. In *Hiigel*, the Colorado Supreme Court extended tort

In other instances, however, the evidence does suggest a genuine risk. Where the injuries are tangible, it is difficult to quantify the risk in a mass-produced product. Where an accident does not occur, the risk itself becomes indistinguishable from the rhetorical effects which the attorney creates. And even here, those who would change the rule fail to trace the link between premise and conclusion.

Under traditional law, if negligence or a product defect creates a danger and yet does no harm in the specific instance, there is no tort.⁷⁸ Opening that gate would give anyone who "might" have been hurt a right to sue—an idea that courts have rejected for centuries.⁷⁹

At first glance the contention that a defective product is "separate" from other components of a building or complex machine⁸⁰ may seem to make more sense.⁸¹ But hours, if not days of threshold testimony must

recovery to the buyer of a motor home trailer that had to be tested to assess the level of torque pressure at particular intervals of mileage driven. *Hiigel*, 544 P.2d at 988.

78. See, e.g., *A.J.P. Contracting Corp. v. Brooklyn Builders Co.*, 11 N.Y.S.2d 662 (Sup. Ct. 1939), *aff'd*, 28 N.E.2d 412 (N.Y. 1940); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (refusing tort recovery when the defective product did not cause injury or property damage).

79. See *Harris v. Forklift*, 114 S. Ct. 367 (1993) (Scalia, J., concurring).

80. See, e.g., *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179 (Wis. 1991). In *Northridge*, the owners of two shopping centers brought suit against the builder of the shopping malls. Plaintiff purchased the asbestos product directly from the general contractor, not from the manufacturer. *Id.* at 180. The owners apparently thought they had some kind of warranty claim because they sued for breach of warranty, as well as under several tort theories. *Id.* Plaintiffs claimed the material was defective and unreasonably dangerous; they incurred increased expenses for inspection, testing, and removal of the material; and they suffered diminished value of the properties upon sale. *Id.* The fire coating manufacturer successfully argued the only damages claimed for economic loss arose from a perceived problem with the material itself, and thus, recovery on the tort claims was barred. *Id.* The circuit court also held that any warranty claim was barred by the statute of limitations, and it dismissed the action. *Northridge*, 471 N.W.2d at 180. The Supreme Court of Wisconsin accepted a petition for bypass and reversed. *Id.* On appeal, the plaintiffs did not argue the material failed to perform as expected, but rather the asbestos in the product contaminated the shopping centers, thereby damaging property other than the product itself. *Id.* The defendant argued that the plaintiffs did not allege any damage to such property other than the reduced economic value of the other property resulting from the mere presence of the material. *Id.*

81. In *East River*, the Supreme Court pointed out the complex nature of modern industrial products would make the rule meaningless if it were limited to individual components. *East River*, 476 U.S. at 871. *East River* was decided under admiralty law. Therefore, one might posit its holding as non-binding on state courts or even on federal courts in non-admiralty cases. Nevertheless, the opinion appears persuasive, wholly aside from Justice Blackmun's analysis beginning with the premise that admiralty law incorporated

drag by as plaintiffs try to prove the “separable” nature of each “product” or component.⁸²

general principles of product liability law. *Id.* at 863.

In *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), the Third Circuit considered the “separability” of a product under *East River*. The plaintiff farmers purchased seed potatoes which failed to germinate when they were treated by another farmer with a chemical manufactured by the defendant. *Id.* at 1049. The plaintiffs premised their tort claim on the idea that the chemical and the seed potatoes were separate products. Since the chemical damaged the seed potatoes, the “product” did not “injure only itself” for the purposes of applying *East River*. *Id.* at 1051. The jury found for the plaintiffs because Hilton-Davis failed to warn the plaintiffs of the properties of the chemical that caused the failure. *Id.* at 1049. The Third Circuit reversed, holding the relevant “product” in the context of the *East River* rule is the product purchased by the plaintiffs (the treated seed potatoes), rather than the product sold by the defendant (the chemical). *Id.* at 1051. Thus, the “product” involved in the case “injured only itself,” and under *East River*, the plaintiff farmers were limited to the warranty provided by the seller of the treated seed potatoes. *King*, 855 F.2d at 1051.

The Alaska Supreme Court rejected a separability argument in *Northern Power & Eng’g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981). In that case, a low oil pressure shutdown mechanism in a tractor failed, causing the engine to overheat and seize. The plaintiff argued the shut-down mechanism damaged another “component part” of the engine, and thus caused the property damage. The court rejected this “separate product” argument in cases where the components are provided by one supplier as part of a complete and integrated package. *Id.* at 330. “Since all but the very simplest of machines have component parts, such a broad holding would require a finding of ‘property damage’ in virtually every case where a product damages itself. . . . [and would] eliminate the distinction between warranty and strict products liability.” *Id.*

Separability issues also arise in the context of construction projects, which combine the “products” of architects, engineers, suppliers, subcontractors, and general contractors. Even the completed building may be separable from the property on which it is located, as the plaintiffs in a 1983 Montana case argued. *See Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs., Inc.*, 656 S.W.2d 766 (Mont. 1983) (allowing recovery from builders of arena under strict liability when arena collapsed because value of leasehold, a separable piece of property, reduced).

82. *Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.*, 444 N.W.2d 743, 747 (Wis. Ct. App. 1989). In *Spychalla*, a potato farmer brought a strict liability action against the manufacturer of a dust designed to prevent potatoes from rotting. As a result of applying the dust, the farmer’s potatoes petrified. The plaintiff did not claim the manufacturer’s potato dust failed to prevent the potatoes from rotting. Rather, the plaintiff claimed that the product actually injured the potatoes by causing them to petrify. The *Spychalla* court recognized an exception to the economic loss doctrine, finding it inapplicable where an allegedly defective product caused actual damage to other property. *See also D’Huyvetter v. A.O. Smith Harvestore Products*, 475 N.W.2d 587 (Wis. Ct. App. 1991). Farmers brought suit against the manufacturer and retailer of a “Harvestore” system. A “Harvestore” system is a large grain silo for preserving and storing feed for livestock. Among the plaintiffs’ claims against the manufacturer and retailer were claims of negligence and strict liability. The trial court

There would also be a less tangible cost: the decline of the moral authority of the trial system.⁸³ In a building product controversy, for example, the judge could conclude that the seller of concrete would be liable to the buyer of a house.⁸⁴ In a different court, the holding might be that

granted summary judgment for the defendants, because the only losses were economic. On appeal, the plaintiffs contended that the alleged defective nature of the Harvestore system caused damage to feed stored in the system and to their livestock. They contended this constituted damage to other property. The court rejected the plaintiffs' arguments, finding their alleged damages were economic losses not exempted by the "other property" exception. *Id.* at 595. The court stated, "[t]he expected function of the Harvestore was to enrich the feed, providing enhanced nutrition for the cows. The damages stem from the failure of the Harvestore to perform 'as expected,' . . . and not from 'injury to another person or property.'" *Id.* (quoting Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co., 444 N.W.2d 743, 746 (Wis. Ct. App. 1989)).

83. James A. Henderson, Jr., *Judicial Review of Manufacturers Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1542 (1973).

84. Commentators trace the modern basis of the builder's liability to Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884). The bridge company agreed to build a bridge for the railroad. The work began with the construction of "false work" (essentially platforms) in the river. The company contracted with Hamilton to finish the work. Hamilton paid the company for the work completed until that point. The "false work" inadequate and one platform sank under the weight of the bridge. River currents destroyed a second platform. Hamilton sued and recovered damages for the defective structures. The Supreme Court held the bridge company made no representations as to the "false work" in place, but found it portrayed itself as competent enough to build such structures. *Id.* at 117. The deficiencies in the "false work" were unknown and undiscoverable until the foundations were subjected to practical testing in the course of construction. Under those circumstances, the Court held the bridge company breached an implied warranty that the "false work" would be "reasonably suitable" for such use as was contemplated by both parties. *Id.* at 119. The *Hamilton* court relied on analogies to warranties implied in the sale of goods and treated the transaction at issue as a "sale" of the "false work" by the bridge company to Hamilton. The Court stated:

[The false work] was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify its vendee against latent defects, arising from the mode of construction, and which the latter, as the company well knew, could not, by any inspection, discover for himself.

Id.; see William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. CIN. L. REV. 1051 (1991) (suggesting Hamilton's theme was reiterated a century later in *Hartley v. Ballou*, 209 S.E.2d 776 (N.C. 1974)). In *Hartley*, the basement of the dwelling, which Hartley purchased from the builder, flooded during rainy weather. Ballou, the builder, made extensive repairs, and as a result the basement stayed dry during hurricanes and periods of extraordinarily heavy rain. The court held the buyer could recover his damages from the initial flooding, but not for damages associated with subsequent episodes. *Hartley*, 209 S.E.2d at 776. The implied warranty only

applied to latent defects, not to those which would be visible on reasonable inspection of the dwelling. Moreover, the implied warranty was not an absolute guarantee against flooding in the event of hurricanes or other extreme weather conditions. *See also* *George v. Veach*, 313 S.E.2d 920 (N.C. 1984). In *George*, the builder breached the implied warranty that a residential home would be fit for human habitation when the septic system failed. The court opined that the implied warranty imposed strict liability on the warrantor. *Id.* at 922. Professor Jones criticizes this decision, suggesting that the failure of the septic tank was no more than an “economic loss”—a diminution in the value of the purchased property not accompanied by injury to person or other property. Jones, *supra*, at 1056. While Professor Jones recognizes holdings of economic loss as an inappropriate basis for an action in tort, he urges the matter requires further analysis and not mere analogy. *Id.* Thus, he suggests the court was correct in referring to an “asymmetry” in the information available to the buyer and the seller. The seller is in a better position than the buyer to learn of the defects or the potential defects. The buyer could hire experts and conduct inspections to test the soundness of the property to be purchased, but the buyer and his experts are not normally present during the construction when most of the information about any defects is not hidden from view. Moreover, Jones suggests it is socially wasteful to impose an obligation on the buyer to do extensive tests to learn what the seller already knows or could have easily ascertained. *Id.*; *see also* *City of Mounds View v. Walijarvi*, 263 N.W.2d 420 (Minn. 1978) (refusing to apply such a warranty in suit against an architect, although recognizing the city could sue a building contractor for such a defect). The *City of Mounds* court noted that:

Architects . . . deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Id. at 424; *see also* *Huang v. Garner*, 203 Cal. Rptr. 800 (1984) (denying recovery in warranty, yet permitting recovery under negligence theory emphasizing: 1) foreseeability of harm to purchaser; 2) extent to which transaction was meant to effect plaintiff; 3) certainty that plaintiff suffered injury; 4) closeness of connection between defendant’s conduct and injury suffered; 5) moral blame attached to defendant’s conduct; and 6) policy permitting future harm); *COAC, Inc. v. Kennedy Eng’r, Inc.*, 136 Cal. Rptr. 890 (Cal. Ct. App. 1977) (holding engineer’s contract with water district made successful project bidder intended beneficiary, permitting it to sue engineer in contract for damages suffered when engineer prepared documents in late and defective manner); *Witty v. Schramm*, 379 N.E.2d 333 (Ill. App. Ct. 1979) (refusing recovery for breach of implied warranty of habitability for discovery of subsurface waters that hampered construction because neither party has such knowledge and no one was at fault); *cf.* *Broyles v. Brown Eng’g Co.*, 151 So. 2d 767 (Ala. 1963) (permitting an implied warranty claim against a civil engineer who warranted the “sufficiency and adequacy of the plans and specifications to reasonably accomplish the purpose for which they were intended” and distinguishing engineering work from the professionalism at issue in *City of Mounds*, reasoning it is far less subject to factors beyond the control of the professional); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 402-03 (Fla. 1973) (rejecting premise that design professional’s contract was intended to benefit any one other than contracting parties absent clear intent of parties as evidenced by terms of contract); *Jordan*

the seller of plywood or electrical wiring is not subject to tort claims because it is a separate product. Each ruling could follow from characteristics which one judge thought critical on that particular day and in that particular context. But the public would not have faith in a principle of law which produced different outcomes in similar transactions.

X. WHO IS THE HAND AND WHO IS THE EYE?

Whether or not it is wise, the impetus for change arises from a humane impulse. But at what point must the courts leave those profound matters to the elected branch? We add little to the vast literature on that question,⁸⁵ other than to say that product liability law is notoriously vague. The task of trial judges and intermediate appellate courts is to decide a particular case on a relatively traditional, limited nature, such as the existence of a statute of limitation, a waiver, or the particular product's failure, regarding the adequacy or inadequacy of a defect. If the economic loss rule were to vanish or weaken significantly, even these islands of certainty in the product liability sea would shrink. Judges would have to operate on a border between law, technology, and public policy. They would have no guidance other than benign emanations from earlier, different cases which had dealt with clear-cut injustices and a demonstrated need for action.

There is more at stake, remember, than technical jurisdiction. A broad shift away from contract principles must clash with the constitutional ideal of comity between the branches of the government.

In the past decade, state legislatures have enacted a wide variety of tort reform measures.⁸⁶ Their common denominator is the intent to cut back the scope of liability and to impose specific limitations on key aspects of damages. The courts would mock that legislative initiative by broadening tort liability and creating difficult new issues of damages across an already ill-defined spectrum.

v. Talaga, 532 N.E.2d 1174 (Ind. Ct. App. 1989) (holding seller breached implied warranty where it was later determined flooding was so prevalent in area that house he built was worthless and emphasizing: 1) seller had subdivided land; 2) seller was real estate development professional; 3) seller was in better position to leave lot undeveloped and, hence, absorb losses; and 4) seller knew of natural water course and was in better position to use information).

85. The courts regard controversies of that type as the constitutional prerogative of the legislative branch. *See generally* MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

86. *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987).

There are considerations of institutional expertise and resources as well. The proponents of change do not quantify the costs of their proposal, or the economic impact that the shift in the doctrine would have. For that matter, they offer little data as to the number of cases which would be decided differently,⁸⁷ or even specifics as to how the new results would be fairer, or more socially beneficial. To the extent a court accepts those arguments, it acts on the basis of predictions of social consequences which are essentially guesswork.

At some stage, even necessary guesses, educated or irresponsible, become indistinguishable from managerial or political decisions. If that lack of information were unavoidable, courts might have to act in partial ignorance for the sake of doing justice. There is no such necessity. Other constitutional branches have the resources to gather data and to assess the merits of competing solutions.

The legislative staff's function is to gather expert opinions concerning technical and economic factors.⁸⁸ Equally important, is the legislators' ability to focus on a particular question and formulate a remedy that is tailored to broad social needs rather than the plight of an isolated litigant.⁸⁹ At the level of implementation, federal and state agencies, rather than an individual attorney, can make a more realistic and fair evaluation of the costs and benefits to both individuals and the public.

XI. THE POSSIBILITY OF LESS DISRUPTIVE ALTERNATIVES

The prominent issue of contract or tort tends to obscure the important technical questions. For instance, one commentator has suggested that since building contractors are prone to bankruptcy, a shift to a tort doctrine would

87. Returning to the construction cases, plaintiffs have often brought lawsuits against their builders, general contractors, and architects. They do not tell the courts why those suits, each permissible under existing law, would not give them reasonable compensation for whatever losses they may have suffered.

88. Bills are accompanied by a statement of economic impact to aid the legislative staff in this task. *See* FLA. STAT. § 11.075 (1993).

89. If the object is to govern future conduct, the task may be accomplished better through administrative regulations or statutes, each of which expresses public goals arrived at by the public's elected representatives or their deputies. This ideal may not be achieved in every instance, but the serious question is whether the task should be entrusted to judges or even juries, neither of which are elected. Note, it is common for economic loss rule controversies to arise in the context of regulated industries. *See* Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987).

reduce the danger for the ultimate purchasers of building materials.⁹⁰ Legislators could enact statutory reform, focusing more closely on the specific problem,⁹¹ such as an increase in the performance bond requirement. That approach, tailored to the individual problem, would be both more effective and less dangerous than a sweeping change from a contract to a tort doctrine.⁹²

As another example, the objections and difficulties previously discussed might be brought under control if the reform impulse were expressed through the abolition of the vertical privity requirement in existing warranty law.⁹³ The effect would be to put the buyer in the same position as a sophisticated commercial purchaser. This would be consistent with both traditional law and the expectations which a business has in launching a product. On the other hand, the change would not undermine express waivers or limitations of warranty. Nor would it subject sellers to unmeasured damages.

The question, however, is not an easy one.⁹⁴ The authors suggest that it should be addressed only on its own merits. If treating the validity of a privity requirement is dependent upon a philosophical debate over the virtues of contract and tort law, then neither side is likely to reexamine the policy aspects of the particular question. Such an examination, supposedly, is a hallmark of modern law.⁹⁵

90. Michael D. Leider, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardoza & Coase*, 66 Wash. L. Rev. 937, 1016 (1991).

91. Compare the specific reforms in various recent tort reform statutes such as Florida's Tort Reform and Insurance Act of 1986. See *Smith*, 507 So. 2d at 1080.

92. Indeed, the California Supreme Court made precisely those limited adjustments in *Seely*. The policy in product liability analysis is to advance the interests of plaintiffs by resolving future issues in favor of the plaintiff.

93. In fact, that was the approach the New Jersey court took in *Spring Motors*. The change in existing law would not be radical. The U.C.C. is neutral as to the vertical privity requirement. See section 2-318 and the express statement in the comments to this section explaining that the provision is not meant to limit the "developing case law" which tends to diminish the requirements of privity. See *Parker*, *supra* note 4, at 410.

94. See *WHITE & SUMMERS*, *supra* note 69, § 11-5, at 463 (exemplifying buyer who obtains goods secondhand from intervening vendor to support that the question is debatable and consequential economic losses should be denied to buyer not in privity).

95. The closer the focus, the better. If the basic fact pattern is characterized as a question of privity, there are overtones of archaic learning that cut off the rights of the buyer for no practical purpose. On the other hand, when the general idea is expressed in terms of the absence of face-to-face dealings and the lack of opportunity for either side to bargain, the fundamental considerations seem more appealing.

XII. GOALS OR ANALYSIS

"General propositions do not decide concrete cases."⁹⁶ The proposal that the economic loss rule be abolished endures, in part, because judges and attorneys have been conditioned to think of the expansion of product liability as the path of the future. Moreover, they give exaggerated deference to insights which were appropriate to the pioneering decisions. In a sense, they confuse the ends of product liability law with the means. Our thesis is not that those insights are necessarily wrong or outdated, but that they cannot effectively provide the tools for the analysis of every controversy.

A. *Compensation*

To say compensation for an injured party is a traditional objective of tort law⁹⁷ is not to demonstrate that the buyer should recover in tort.⁹⁸ Rather, in its more brutally direct form, the argument is that the change would make it easier for the plaintiff to win. But that would be an effect, not a reason. The change in the balance of power cannot be a policy argument in and of itself.

There is a need for a closer and more skeptical look at the related suggestion that courts should give homeowners, fishermen, or any other category of litigant favored treatment across the board. In other fields of law, the starting point for analysis is not the status of the claimant⁹⁹ but the circumstances of the individual matter. The impulse reflects the belief that "homeowners," as well as other groups, suffer from a disparity in bargaining power. Accordingly, the courts can and should correct this imbalance. However, there are flaws in the syllogism. If it were taken literally, the contention would mean courts should find for homeowners in every other instance, regardless of facts or law. There are few cases in which the individual buyer would have "greater bargaining power" over a corporate

96. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

97. See RICHARD A. POSSNER, *ECONOMIC ANALYSIS OF LAW* § 20 (4th ed 1988).

98. See generally Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980). The author notes "risks of over deterrence are heightened when there is no certain expenses, such as the installation of known technology, that will avoid the liability with certainty." *Id.* at 25-26. Similarly, the conclusory statement that the buyer's expectations were not met does not identify a test which trial courts could apply. Often it is only a label for the result reached for other unstated reasons.

99. See *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979) (proposing that the circumstances, not the status of the claimant controls).

seller.¹⁰⁰ In any event, the leading cases agree that relative bargaining power is not the touchstone of the economic loss rule, nor even an element.¹⁰¹ And were the law different in principle, trial judges would still face difficulties.

The concept of relative bargaining power is itself indistinct and subjective. It is a function of talent, resources, luck and other intangibles inherent in a vast array of relationships. Leading cases such as *Spring Motors* and *Seely* show that judges who lead the charge for product liability can differ in their evaluation of the balance of power even where the business relationships are relatively straightforward.¹⁰²

Beyond that, reliance on "policy" combines with limitations inherent in the trial process itself to make the assessment of relative bargaining power a rudimentary exchange for lawyers' arguments based upon stereotypes. Delphic rulings by trial judges denying or granting summary judgment without explanation could offer little or no precedent for the next case, much less guidance to business.

100. The occasional Astor who lost an eye to a champagne cork would not make the generality invalid. See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) (criticizing the "one directional" nature of other arguments which frequently are offered in support of plaintiff oriented proposals for changes in products liability law); see also Edward T. O'Donnell, *Public Policy and the Burden of Proof in Enhanced Injury Litigation: A Case Study in the Dangers of Trends and Easy Assumptions*, 17 W. ST. U. L. REV. 325 (1990); David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63 (1990) (elaborating on the same theme).

101. In *Spring Motors*, the court sometimes spoke of equal bargaining power and the ability to spread the loss as prerequisites to contract. *Spring Motors*, 489 A.2d at 670-71. The New Jersey Supreme Court specified "perfect parity is not necessary to a determination that the parties have substantially equal bargaining positions," and further, a commercial purchaser "may be better situated than the manufacturer to factor into its price the risk of economic loss caused by the purchase of a defective product." *Id.* at 671. Thus, if commercial purchasers miscalculate their risk when bargaining for their contract or err in risk allocation by not purchasing appropriate insurance, the consequences are not to be borne by the manufacturer under a false or fictitious tort theory. The law of warranty is not limited to parties in a somewhat equal bargaining position. Such a limitation is not supported by the language and history of the sales act and is unworkable. Moreover, it finds no support in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

102. The fact the dealership could select a Clark transmission for the Ford trucks it bought showed significant bargaining power to some members of the court, but to another member of the court, the same facts showed the manufacturer only chose to make the component available as an option. See *Spring Motors*, 489 A.2d at 678 (Handler, J., concurring); see also Brown & Feinman, *supra* note 10, at 348-59 (discussing the thoughtful debate between the majority and concurring opinions and the academic benefits of relational analysis).

B. *Deterrence—Goal or Mirage?*

Plaintiffs suggest that giving property holders the right to sue in tort rather than contract would advance the cause of product safety. Their premise is that existing law does not give an owner reason to repair dangerous conditions before an accident occurs. On the contrary, the opposite is true. A property holder knows full well that he or she may be sued if someone is injured on the premises. In *Casa Clara*, for instance, each of the corporate amici,¹⁰³ which supported the plaintiffs, took care to assure the appellate court that its workers had repaired the roofs in dispute before the company sought legal remedies against suppliers further back in the distribution chain. There is no reason to think other businesses, equally public spirited, or just as worried about their products' reputation, would not have taken similar precautions.

On the other hand, at least one consequence of a shift from contract to strict liability is clear. The change would tell manufacturers that greater care would not be a defense.¹⁰⁴ Then, where lies the incentive for those businesses to take greater care?

One of the early critics of the economic loss rule, Justice Peters, remarked that the threat of a strict liability claim could not be a significant deterrent to businessmen who already know that they are subject to suits for negligence or breach of contract.¹⁰⁵ On similar lines, it is significant that the product liability revolution has reduced qualitative standards of proof of causation and defect.¹⁰⁶ The purpose and effect of that change is to make it easier for plaintiffs to recover. But the same dilution of proof must make it more difficult for a manufacturer to interpret society's message. The product should have been safer, but in what way and at what cost?¹⁰⁷

103. The reference is to those participants who joined in the attack on the economic loss rule.

104. Strict liability subjects the seller to judgment even if the seller "has exercised all possible care in the preparation and sale of his product . . ." RESTATEMENT (SECOND) OF TORTS § 402(A)(2)(a) (1965).

105. *Seely*, 403 P.2d at 152-58 (Peters, J., concurring in part & dissenting in part).

106. *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); Edward T. O'Donnell, *Design Litigation and Strict Liability: The Problem of Jury Instructions Which Do Not Instruct*, 56 U. DET. J. URB. L. 1052 (1979).

107. See generally Edward T. O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627 (1978).

C. *Higher Prices—The Skull Behind the Mask*

Eventually, arguments for the expansion of tort remedies will lead to the development of a system in which product liability costs can be shared among all consumers through higher product prices. Familiar and reassuring as the litany may be, it goes too far. If that were all there were to it, every product liability issue would be decided in favor of a plaintiff. The change must increase the number of lawsuits—and the costs of insurance and the products themselves—if it is to serve its doctrinal purpose. Isolated and infrequent cases could not distribute the loss effectively.

And, in ordinary speech, higher prices are not a public benefit. When prices go up, fewer people can buy goods and the manufacturer must restrict its production and lay off workers. Given that reality, it is not self-evident why hypothetical buyers need a tort remedy, in addition to the contract rights they already possess. Nor is it clear that a court would help even favored groups such as potential home owners, if it were to take steps leading to an increase in the prices of building materials. The ordinary citizen would have to make a larger down payment in order to buy a home. Many would not be able to do so.

D. *Insurance and the Sharing of Pain*

A more abstract and sophisticated variant, the concept of the manufacturer as a superior risk distributor,¹⁰⁸ has gained numbing force through repetition.¹⁰⁹ Yet Dean Prosser terms this a “make weight,” even as to personal injury.¹¹⁰ Other commentators¹¹¹ point out that the reasoning, if valid, must apply whenever anyone is injured by a superior risk-bearer, and that logic would call for a governmental compensation scheme for all

108. See *Emerson G.M. Diesel, Inc. v. Alaskan Enter.*, 732 F.2d 1468, 1474 (9th Cir. 1984); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980).

109.

The manufacturer knows the purpose for which its product is to be used and by whom. Although all purchasers are not identical, the manufacturer can determine within a reasonable range of predictability the ramifications of a product failure for the ordinary user. Having this information, the manufacturer can include in its cost the expense of adequate insurance coverage.

Emerson, 732 F.2d at 1474.

110. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966).

111. See Owen, *supra* note 100, at 707.

resulting injuries. That formulation is extreme, to the point of being a caricature, and not what the proponents of the change desire. However, bounds have not yet been set to prevent well-intentioned reforms from surging beyond their original purposes. Instead, the arguments for risk distribution dwindle toward assertions that the law could be changed without hardship.

The magical painkiller is said to be "insurance." Yet, courts have assured manufacturers and other defendants a thousand times that they will not be subjected to an insurer's liability.¹¹² That language must degenerate into incantation if judges now were to create a whole new spectrum of liabilities on the basis that defendants could buy insurance.¹¹³

To be fair, it is not only plaintiffs' advocates who have been lulled by superficial talk of insurance. In *East River*, Justice Blackmun supported his refusal to alter the economic loss rule by writing that the seller of a product could buy insurance against liability. The observation gained resonance from its seeming consistency with product liability lore. Yet on closer inspection, there is no difference between tort and contract to the extent that the question is one of theoretical insurability.¹¹⁴ Indeed, the expectation that a manufacturer will obtain coverage, or self-insure through higher prices, for personal injury liability against third parties is one of the more widely accepted premises for the expansion of tort liability.

112. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86 (Fla. 1976); *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 3d Dist. Ct. App. 1967), *cert. denied*, 211 So. 2d 214 (1968); RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. g (1965); W. Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 858 (1963).

113. There is potential for unfairness. As one example of an obvious injustice, the effect might be to subject insurers to a new form of liability long after they negotiated their rates and the state approved them—an obvious injustice. See *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700, 701-02 (Fla. 1993). See generally Owen, *supra* note 101, at 681 (demonstrating the inadequacy of the more general assumption that the expansion of tort liability can be based upon the availability of insurance).

114. If the seller of a product can buy a policy against personal injury liability, as Justice Blackmun asserts, it can insure against claims by the buyer of disappointed economic expectations. However, Brown and Feinman state insurance is not available for such a claim. Brown & Feinman, *supra* note 10, at 341. The difference may be explained by the fact that Justice Blackmun cites admiralty authorities for the availability of insurance: perhaps there are special maritime policies. That coverage is still common, even though expensive and it may be more prevalent than that against the costs attributable to the disappointed expectations of a buyer. Recent studies suggest 86% of the country's 500 largest corporations purchase some form of commercial casualty insurance. George L. Priest, *The Current Insurance Crisis in Modern Tort Law*, 96 YALE L.J. 1521, 1561 (1987).

Justice Blackmun was correct insofar as he spoke of a difference in degree. But scholars challenge the factual and logical conclusions he would draw from that distinction.¹¹⁵

As have so many others, Professor Priest deplores the high cost of tort litigation.¹¹⁶ He goes further, however, to question its practicality as a means to accomplish either insurance, compensatory, or regulatory functions.¹¹⁷

The traditional argument is that the availability of insurance justifies the expansion of tort liability. Priest's answer is that the expansion of tort

115. Some question the relative distribution power among the parties to the transaction, suggesting the buyer is in a better position to buy insurance against the loss because of the greater knowledge of the context in which the product must do the work. William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731, 765 (1990).

The standard casualty policy protects the buyer from losses associated with accidents caused by product failures, without segregation of risks or charges. The premium on such policies will be related to the value of the buyer's property and the general risk involved in the buyer's activities. These are matters about which the seller has limited knowledge and almost no control. As to such losses, the buyer is in the best position to obtain optimal coverage under its own policy, described as first party insurance. . . .

The avoidance of unnecessary transaction costs is a major advantage of having the buyer look to its own insurance company. Litigation over the liability of the seller can consume substantial resources, whether the suit is ultimately resolved in favor of the buyer or the seller.

. . . .
. . . As to the consequences of the defect, the buyer exercises significant control, both in the manner in which the product is used and in precautions taken to avoid loss (such as periodic inspections and sensitivity to signs of trouble). In sum, the problem is one of joint care. In such cases, it is not possible to devise a liability rule that is optimal in all instances. For example, the diligence of the seller may be enhanced by increasing the probability that the seller will be held accountable for losses resulting from product defects. But the enhancement of seller diligence comes at the expense of buyer caution

Id. at 765-67 (footnote omitted).

116. Putting that concern in quantitative terms, he adds that the administrative costs of tort liability amounts to about 53% of the plaintiff's net recovery of benefits, whereas comparable insurance arrangements have an expense figure closer to 10%. Priest, *supra* note 114, at 1560.

117. *Id.* Priest also suggests that the burden of the change may fall disproportionately on the poor. *Id.* They receive less benefit through litigation since pain and suffering and disability payments are highly correlated with the individual's expected future income, while the insurance premium (ultimately incorporated in the price of the product) is set for the average loss. *Id.* at 1559. Conversely, the increases in prices which are necessary to accomplish the insurance function have a severe impact on them. *Id.* at 1525.

liability in fact makes insurance less available.¹¹⁸ The commentator goes

118. Professor Priest reminds us that deterrence is different from insurance and the two functions are not necessarily consistent. Priest, *supra* note 114, at 1525. In an oversimplified outline, his analysis is that it is not the simple increase in the amount of judgments which undermines the insurance market, but the tendency for expanded liability to undermine the advantages of the scale of the ability to predict the consequences and to apply the “law of large numbers” and for the tendency for higher premiums to drive low risk insureds to become self insurers, thus reducing the size of the pool of insureds and the cost for others. That process in turn feeds on itself as the fees grow higher, making it questionable whether the next level of insureds have a reason to stay with the carrier rather than become a self insurer. *Id.* at 1525-45. The central concept is the idea that the insurance defense depends upon the attendance of risks, and that the broadening of tort liability tends to eliminate the distinctions among risks, all are thrown together into a huge pool.

Consumers who systematically face a lower injury probability are likely to find the insurance provided with the product or service not worth its added premium. Many commentators have tended to view product-or service-related injuries as occurring randomly, generating an equal injury probability to each consumer. Many product-and service-related injuries, however, are systematically associated with particular product uses. Most modern products can be employed in a wide range of diverse activities. Those consumers who use products in typically less, rather than more, risky ways are likely to drop out of the consumer pool if tort law requires the manufacturer to insure all customer uses. These consumers will shift to alternative products or services that cannot be used in equally risky ways—products which, as a consequence, will be cheaper because of the lower attendant insurance premiums.

A familiar modern example is consumers use of four-wheel drive vehicles. In recent years, the liability of manufacturers of such vehicles has been expanded under design defect and warning law and, more generally, as courts have limited the defense of contributory negligence, misuse and assumption of risk. . . .

Manufacturers must respond to this increased liability either by changing product design to protect drivers in extreme conditions or by increasing insurance coverage for the consumer set as a whole. Whether the manufacturer changes the design or merely increases insurance coverage, product costs will increase and the product price will increase. The price increase, of course, may seem desirable for consumers who drive in extreme back road conditions. But consumers who purchase four-wheel drive vehicles for any other purposes . . . [for] driving on snowy or muddy roads—may not find the increased price worthwhile. These consumers could be lured away if they were offered a four-wheel drive vehicle suitable for snow and mud, but not for extreme grades which, if only because of the lower attendant insurance premium, could be offered at a lower price. It is not surprising that many manufacturers have begun offering van and station wagon models with a four-wheel drive option.

Id. at 1564-65 (footnotes omitted); see also Bruce Chapman & Michael Trebilock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 778 (1989); Jones, *supra* note 115, at 731; Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14

on to explain that insurance rates are set by predictions of future losses and that increased tort liability tends to force low-risk participants out of the insurance pool.¹¹⁹ This, in turn, drives up premiums across a broad range, making some activities too expensive to continue.¹²⁰ He suggests, as well, that the comparative advantage which insurance companies have in the aggregation of risks—one of the theoretical foundations of the industry—is overwhelmed by the coverage obligations which tort law inflicts upon them as well as the concomitant reduction in their ability to segregate risks.

J. LEGAL STUD. 681 (1985).

119.

This process is adverse selection in the product market. . . . Because the manufacturer was prohibited by product liability law from making this additional insurance optional, low-risk consumers within the pool—those not intending to expose themselves to backcountry risks—dropped out of the pool, either by shifting to domestic four-wheels, or by declining to buy the product at all. When low risk consumers drop out, the insurance premiums added to the price of backcountry four-wheels must be increased by an ever greater amount.

The second set of low-risk consumers affected by the expansion of provider liability are the low-income or poor, who bring low risk to a liability insurance pool because of the lower damages they will receive because of their lower income and poorer future employment prospects. As the insurance premiums tied to products and services increase, these consumers also drop out because the price they must pay is increasingly greater than the value received. Such consumers will shift to substitute products . . . Again, as this set of low-risk consumers drops out, the attendant insurance premiums must be commensurately increased.

Adverse selection and consumer risk . . . also provides the only explanation of why increases in corporate tort liability compel providers to withdraw products and services from markets altogether. Again, if there were no adverse selection, increases in insurance premiums or self-insurance costs could largely be passed on to consumers. Sales may decline, as must be expected from any price increase, but there would be no reason to withdraw products from the market. There is a different effect, however, where a price increase derives from increasing risk pool variance. Increasing variance generates adverse selection by low-risk consumers who successively drop out of the pool. The pool, as a consequence, unravels. At some point, demand for the product sold with the necessary insurance premium simply disappears. There remains no set of identifiable consumers to whom the product or service is worth its price.

. . . The large number of products and services that have been totally withdrawn from markets demonstrate the severity of the effects of contemporary tort law's shift to the third-party insurance mechanism.

Priest, *supra* note 114, at 1565-67.

120. *Id.* at 1569-70 (providing asbestos production as an example).

XIII. CONCLUSION

Product liability law rests on the moral perception that the economic burdens of death or incapacitation are too much for an individual. But in *Santor v. A & M Karagheusian, Inc.*,¹²¹ that exception transformed itself into a norm for commercial transactions in which no one is injured. Disturbing in itself, the metamorphosis illustrates a recurring paradox.

The field traditionally is thought to be governed by a sense of practical justice which cuts through technical limitations and restraints. Yet as a new principle gains acceptance, advocates shove practical difficulties to the background and urge the courts to carry the approach to extremes in deference to its theoretical basis.¹²²

At least in the instance of the economic loss rule, that reasoning has grown conclusory and even circular. Ignoring the need for empirical evidence of social need and effect, courts too often react automatically to slogans of past product liability battles.

To the unfriendly eye, this is little better than the Mandarin theorizing which led Traynor and other reformers to take up arms decades ago. Over-used, the Marseillaise has decayed into Muzak.

121. 207 A.2d 305 (N.J. 1965).

122. See Dorsey D. Ellis, Jr., *Punitive Damages, Due Process and the Jury*, 40 ALA. L. REV. 975 (1989).

Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods

Kenneth Shuster*

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I. INTRODUCTION

*It is with the unfortunate, above all, that humane conduct is necessary.*¹

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1. JOHN BARTLETT, FAMILIAR QUOTATIONS 618 (13th ed. 1955) (quoting Fyodor Dostoyevsky (discussing prison life in Siberia)).

America's punishment system is not working.² In the United States, in 1991 alone, a murder was committed every twenty-one minutes, a woman was raped every five minutes, a person was robbed every forty-six seconds, and a burglary occurred every ten seconds.³ This translates into increases in rates of murder 4.3%, rape 2.7%, and robbery 6.1%.⁴ During that same year, federal prisons housed 56,696 inmates, and state correctional institutions held 732,565 prisoners.⁵ The state of New York imprisoned 57,862 individuals, close to 10% of the national total of state prisoners.⁶ As these numbers make clear, this crime increase cannot be attributed to a less than zealous use of the prisons. Indeed, during 1991, because of increases in both crime and incarcerations, American prisons operated at 16-31% above capacity.⁷ While a regime of aggressive imprisonment does not, therefore, serve as a general deterrent,⁸ rampant incarceration does not promote special deterrence.⁹ A recent study of recidivism in eleven states concluded that, during the past ten years, over 60% of released prisoners were rearrested; almost half of all prisoners released during that same period were reincarcerated.¹⁰ This prevalence of recidivism suggests that many criminals are more dangerous when they leave prison than when they enter.¹¹ Moreover, incarceration is expensive. For example, New York

2. It is quite possible that the following crime rates would be worse were it not for present crime-reduction devices such as incarceration. By "not working," it is suggested that contemporary American society, through its law enforcement mechanisms, is not deterring crime nearly as effectively as it could be.

3. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 4 (1991).

4. THE WORLD ALMANAC AND BOOK OF FACTS 948 (Mark S. Hoffman ed., 1993).

5. *Id.* at 949.

6. *Id.*

7. *Id.*

8. General deterrence is a theory of punishment that seeks to deter all potential offenders from committing crimes. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 149 (5th ed. 1989).

9. Special deterrence is a theory of punishment which seeks to prevent convicts from repeating their crimes. *Id.*

10. See David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 642 (1993).

11. *Id.* at 641-42. Prisoners may be more violent when they leave prison due to the violence that is routinely inflicted on a significant number of inmates by fellow prisoners. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 314-15 (1993) (describing prison violence); RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO 96-97 (1975) (describing prison gang rape); CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS ix (1974) (remark of then Philadelphia District Attorney, Arlen Specter, that prison violence makes prisoners "worse" when they leave prison than when they enter).

City spends \$58,000 to jail an inmate for one year.¹² Since prison is obviously not solving America's crime problems, why do we continue to incarcerate so many people?

One reason is that imprisonment is perceived as satisfying an important goal of punishment. If criminals are prevented from harming society, the argument goes, the purpose of punishment is fulfilled.¹³ To be sure, a criminal who is locked up cannot harm the majority of society.¹⁴

Another reason for the increase in incarceration rates is the determinate, minimum sentencing guidelines adopted by both the federal system and approximately one-third of the states.¹⁵ Under these guidelines, criminals who would not have been incarcerated are being imprisoned.¹⁶ Exactly how many offenders are being jailed due to the guidelines is hard to tell. What is clear is that, partly due to the guidelines, it has been estimated that by the end of 1994, United States prisons will hold about 1,000,000 Americans.¹⁷

There are at least four problems with indiscriminately using incarceration as punishment. First, incarceration is only effective as long as it lasts. Therefore, at least regarding all but the most hardened prisoners who are serving life sentences, it is more appropriate to employ punishments that will have a positive impact on a criminal even after the criminal is released. Second, while imprisonment has value when applied to dangerous criminals, it has no merit when applied to individuals who pose no direct danger to society.¹⁸ Because American law allows for the incarceration of both

12. David J. Rothman, *The Crime of Punishment*, N.Y. REV. BOOKS, Feb. 17, 1994, at 34.

13. See FRIEDMAN, *supra* note 11, at 457.

14. *Id.* ("If the crooks are behind bars, they cannot rape and loot and pillage."). Of course, violent criminals are able to terrorize fellow inmates behind bars. See *infra* notes 18, 21.

15. See Rothman, *supra* note 12, at 36. "Fixed sentences were introduced . . . both in the federal system and in roughly one third of the states. . . . They have promoted prison overcrowding. . . . The impact of these guidelines has been to increase the prison population. . . ." *Id.* at 36-37.

16. *Id.*

17. See Rothman, *supra* note 12, at 34.

18. One reason prison is inappropriate for nonviolent offenders is, given prison conditions, nonviolent inmates may experience violence that is not warranted by their offenses. See FRIEDMAN, *supra* note 11, at 314-15 (describing problems of rape, gang violence, and general despotism in American prisons); David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1550-51 (1992). Also, as a result of such violence, criminals who are not dangerous when they enter prison may become violent through experiencing prison life.

violent and non-violent individuals,¹⁹ a punishment agenda that is just as applied to all criminals is preferable. Third, as the prevalence of recidivism illustrates,²⁰ imprisonment has value only when it separates dangerous persons from mainstream society.²¹ Incarceration does not rehabilitate offenders,²² provide restitution to victims,²³ nor deter most criminals.²⁴ It would be better to replace imprisonment with punishment programs based on rehabilitative, restitutive, and deterrent perspectives.²⁵ Fourth, given the prevalence of rape and other violence in American prisons,²⁶ incarceration arguably does more both to teach inmates more efficient means of committing crime and to transform inmates into more hardened criminals than it does to deter offenders from illegal conduct. Indeed, a repeated theme of this article is that because of the dangers an inmate may face in prison, a sentence of imprisonment is a potential death sentence, and

19. The result is that two-thirds of the national male prison population are *non-violent* offenders. See Leven, *supra* note 10, at 646. The number of non-violent female inmates has also been increasing. See Clifford Krauss, *Women Doing Crime, Women Doing Time*, N.Y. TIMES, July 3, 1994, § 4, at 3; see also Mireya Navarro, *Mothers in Prison, Children in Limbo*, N.Y. TIMES, July 18, 1994, at B1 (number of female inmates has risen 55% nationally since 1984).

20. See *supra* note 10 and accompanying text.

21. Again, although incapacitation may protect mainstream society, prison communities remain exposed to overcrowding and serious violence. See EDGARDO ROTMAN, BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS 82-83 (1990). ("This . . . could lead to the . . . conclusion that some positive aspects . . . can compensate for . . . horrendous overcrowding, racial discrimination, and . . . serious prison violence.").

22. See Leven, *supra* note 10, at 641.

23. See CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION: A RESTITUTIONARY APPROACH TO CRIME AND THE CRIMINAL 4 (1984) ("[V]ictims . . . bear an unrelieved burden. The perpetrator may be punished . . . but the victim is left with his or her losses intact.").

24. See Leven, *supra* note 10, at 642.

25. An extended discussion of rehabilitation, deterrence, retribution (including incapacitation), restitution, and their interrelationship is beyond the scope of this article. For such discussion, see KADISH & SCHULHOFER, *supra* note 8, at 136-65.

26. WEISS & FRIAR, *supra* note 11, at 69-72 (describing incidents of prison violence and gang rape). Prison rape and violence are so prevalent that the Supreme Court recently ruled that officials must protect prisoners from other inmates even in the absence of a specific request for protection from the potentially victimized inmates. Linda Greenhouse, *Supreme Court Roundup: Prison Officials Can be Found Liable for Inmate-Against-Inmate Violence, Court Rules*, N.Y. TIMES, June 7, 1994, at A18.

constitutes cruel and unusual punishment²⁷ when imposed on all but the most dangerous and hardened of offenders.

Consideration of alternative punishment sanctions based on religious foundations is long overdue.²⁸ This article attempts to rectify this neglect by reviewing how talmudic²⁹ Judaism, through the halacha,³⁰ applied theories of deterrence, rehabilitation, restitution, and retribution to its punishment practices³¹ without an aggressive use of imprisonment.³²

27. The cruel and unusual punishment standard is not static but “may acquire meaning as public opinion becomes enlightened by a humane justice.” *Gregg v. Georgia*, 428 U.S. 153, 171 (1976). For another judicial expression of the flexible nature of cruel and unusual punishment mentioned in *Gregg*, see *infra* note 164 and accompanying text. See also J. Mark Lane, “Is There Life Without Parole?: A Capital Defendant’s Right to a Meaningful Alternative Sentence,” 26 LOY. L.A. L. REV. 327, 361 (1993).

28. The value of looking to religious principles to inform American legal practice is underscored by the fact that the Supreme Court has consulted religious practice to decide American law. See *Roe v. Wade*, 410 U.S. 113, 160 (1973) (citing religious authority as guidance for the doctrine that life begins at birth versus conception). By suggesting that American legal practice may be informed by talmudic thought, it is not intended that other religions, such as Christianity, Islam, or Far Eastern belief systems, cannot appropriately contribute to the manner in which American penal law is employed. This discussion is confined to talmudic and American law solely because the author’s education as a rabbi and as an American trained lawyer inhibits the expression of opinions on non-talmudic religious penal methods. For interesting treatment of how non-talmudic religious systems deal and have dealt with punishment, see 12 THE ENCYCLOPEDIA OF RELIGION 362-68 (Mircea Eliade ed. 1987).

29. The Talmud is a rabbinic commentary on the Old Testament (called “Torah” in Hebrew); “talmudic” means pertaining to the Talmud; “Talmudic Judaism” means Judaism as practiced during talmudic times. There are Babylonian and Jerusalem editions of the Talmud because when the Talmud was compiled, Jewish scholarship centered in Pumbeditha, Babylonia and Jerusalem, Israel. See PAUL JOHNSON, A HISTORY OF THE JEWS 153 (1987). Work on the Jerusalem Talmud finished by the end of the fourth century, A.D., and the Babylonian Talmud was finished during the fifth century, A.D. See Kenneth Shuster, *An Halachic Overview of Abortion*, 26 SUFFOLK U. L. REV. 641 n.2 (1992). This article cites to the Babylonian edition of the Talmud exclusively.

30. “Halacha” refers to Jewish law; “halachic” means pertaining to Jewish law. HAYIM H. DONIN, TO BE A JEW 29 (1972). For an informative description of the evolution of the halacha, see Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 n.13 (1993). “Halachic” and “talmudic” are used interchangeably throughout this article.

31. See 13 ENCYCLOPAEDIA JUDAICA 1387 (1972) (stating that “[a]ll talionic punishment . . . reflects its underlying purpose, namely the apparent restitution . . . [and] punishment [which] is inflicted . . . for the deterrence of others.”); HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 13 (1952) (“[M]ayhem . . . is a serious offense, and is punishable by . . . the law of retaliation.”); MYER S. LEW, THE HUMANITY OF JEWISH LAW 165 (1985) (“[T]he main purpose of punishment was . . . to reform the character of the

This article begins by presenting an overview of halachic punishment, examining how halacha viewed capital and corporal punishment, penal servitude, and excommunication.³³ The article then examines the extent to which American law can employ halachic methods of punishment. It is suggested that communities that enjoy spiritual values, because they will have more success implementing penal systems which actually compromise crime, are prepared to combat crime communally, and they prefer deterrence, restitution, rehabilitation, and retribution theories over incarceration. Communities that emphasize individual and collective responsibilities over individual rights are also more likely to benefit from halachic punishment schemes. American society has caused much of its present penal problems by focusing too much on imprisonment as a punishment, by promoting individual rights over individual and societal responsibilities,³⁴ and by de-emphasizing spiritual values in everyday life. Finally, the article concludes that, although constitutional considerations of slavery and cruel and unusual punishment may preclude American law from adopting halachic penal methods, halacha can inspire reforms, such as victim-oriented community

offender.”).

32. Although from the talmudic period on Judaism incarcerated criminals for serious crimes, like homicide and treason, most talmudic imprisonment tended to be detentive or coercive in nature. See 8 *ENCYCLOPAEDIA JUDAICA* 1301-02 (1972). “Detention . . . pending completion of the judicial proceedings . . . continued to be the most common form of imprisonment in this [the talmudic] period. . . . The sages interpreted the passage . . . as authority . . . to imprison a person refusing to comply with its instructions.” *Id.* at 1300; see also LEW, *supra* note 31, at 62. “[I]n the Torah we find but few references to sentences of imprisonment.” *Id.*

33. This discussion is limited to these halachic punishment methods because they provide a comprehensive survey of how Jewish law dealt with crime and because they refer to Judaism’s use of rehabilitation, deterrence, retribution, and restitution theories. For example, halachic capital punishment presents crime as an offense against both society and offender; it also provides for a deterrence and rehabilitation-oriented regime of halachic punishment. Halachic indentured servitude teaches there are offenses, such as theft, which require restitution be made to crime victims; it, therefore, shows the restitutive aspect of halachic punishment. Halachic corporal punishment further illustrates Judaism’s conception of deterrence and demonstrates that such punishment can be implemented in a humane manner. Halachic excommunication presents the thesis that because crime impacts on society, its commission warrants societal ostracism; it also is predominately based on a deterrence notion.

34. It is not suggested that individual rights are not as important as individual responsibilities, but that individual rights should not be emphasized over the duties that persons have to each other and society in general. When rights are honored more than responsibilities, people often have no incentive to behave properly—they can behave with impunity and then hide behind their rights.

service³⁵ and shaming sanctions,³⁶ which apply more humane solutions to the realities of contemporary American life.

However, it must first be ascertained whether halachic penal methods *are* more humane and *why* American society should adopt halachic punishment systems. Accordingly, halachic punishment schemes, beginning with halachic capital punishment are examined.

II. HALACHIC PUNISHMENT

A. Capital Punishment

Ancient Judaism employed four methods of execution: stoning, burning, decapitation, and strangulation.³⁷ Stoning was the most severe form of capital punishment³⁸ and was reserved for such crimes as blasphemy,³⁹ idol-worship,⁴⁰ witchcraft,⁴¹ and sabbath-desecration.⁴² Stoning

35. Such community service programs would be "victim-oriented" inasmuch as offenders would be required to repay their victims out of the offenders' earnings.

36. See *infra* text accompanying notes 218-20.

37. 3 THE BABYLONIAN TALMUD, SEDER NEZIKIN, TRACTATE SANHEDRIN 49b, at 330 (I. Epstein ed. & H. Freedman trans., 1935). "Four deaths have been entrusted . . . stoning, burning, slaying [by the sword] and strangulation." *Id.*; GOLDIN, *supra* note 31, at 141; see also 5 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at 142 (defining four methods of talmudic judicial execution as stoning, burning, slaying, and strangling).

38. See 3 THE BABYLONIAN TALMUD, *supra* note 37, 53a, at 359; GOLDIN, *supra* note 31, at 28 ("Of the thirty-six capital crimes, eighteen are punishable by stoning. . . [which was] regarded as the severest of the four methods of capital punishment.").

39. See 3 THE BABYLONIAN TALMUD, *supra* note 37, 49b, at 332. *Leviticus* 24:14 states: "Take the blasphemer outside the camp . . . and let the whole community stone the criminal." This article modifies traditional translations of biblical and talmudic passages to render them gender-neutral. For example, in the above passage, the Hebrew literally translates, "let the whole community stone *him*." However, "criminal" for "him," is substituted since biblical capital punishments applied to men and women equally. See *Deuteronomy* 17:5 (stating that "[y]ou shall take *the man or woman* who did that wicked thing . . . and you shall stone them.") (emphasis added).

40. See 3 THE BABYLONIAN TALMUD, *supra* note 37, 49b, at 332. This was based on *Deuteronomy* 17:2-5 ("If there is found among you . . . a man or woman who has affronted the Lord . . . turning to the worship of other gods . . . you shall stone them.").

41. See *Exodus* 22:8. The Talmud punishes witchcraft with stoning. See also BABYLONIAN TALMUD, *supra* note 37, 67a.

42. 3 THE BABYLONIAN TALMUD, *supra* note 37, 66a, at 448; 3 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 14, THE BOOK OF JUDGES, *Laws Concerning the Sanhedrin and the Penalties within their Jurisdiction* 15:10, at 44 (Julian Obermann et al. eds. & Abraham M. Herschman trans., 1949) [hereinafter 3 MOSES MAIMONIDES].

was accomplished by throwing stones at the criminal from a specified height;⁴³ often witnesses to the capital offense, as representatives of the Jewish community, did the stoning.⁴⁴

Burning was the second most severe form of capital punishment⁴⁵ and was reserved primarily for the sexual offenses of incest and adultery.⁴⁶ Burning was accomplished through a three-step process. First, the criminal was placed in dirt up to his or her armpits to prevent the convict from moving or falling.⁴⁷ Then a scarf was placed around the offender's neck, after which each witness seized an end of the scarf⁴⁸ and pulled until the

The hierarchy of halachic punishment underscores Judaism's theocratic perception of crime. For example, stoning, the most severe form of halachic punishment, was employed mainly to stem conduct that expressed either disbelief in God or the observance of precepts, such as the Sabbath, that symbolize divine creation. See DONIN, *supra* note 30, at 65-67.

43. BABYLONIAN MISHNEH SANHEDRIN 45a (I. Epstein ed. & Jacob Shachter trans., 1936); 5 ENCYCLOPAEDIA JUDAICA 142 (1972) (noting that "a 'stoning place' was designed from which he [the criminal] was to be pushed down to death."); Haim H. Cohn, *The Penology of the Talmud*, 5 ISRAEL L. REV. 53, 56 (1970) (Talmud established "stoning-house" two floors high from which the convict was thrown).

44. GOLDIN, *supra* note 31, at 31; see also Cohn, *supra* note 43, at 57. The Talmud required the witnesses to a capital offense be the criminal's executioners to test the veracity of the witnesses's testimony and to provide executions with a modicum of humaneness not attainable via other forms of public capital punishment. GOLDIN, *supra* note 31, at 136-37 n.17; Cohn, *supra* note 43, at 56.

45. See GOLDIN, *supra* note 31, at 34.

46. *Id.*; see also 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 143. Incest, in Jewish law, refers to sexual intercourse between ancestors and descendants, siblings of the whole or half blood, aunts and nephews, in-laws, and stepparents and stepchildren. See 8 ENCYCLOPAEDIA JUDAICA 1316 (1972). Halacha defines adultery as "[v]oluntary sexual intercourse between a married woman . . . and a man other than her husband." See 2 ENCYCLOPAEDIA JUDAICA 313 (1972). Even married men cannot commit adultery by sleeping with a single woman, *per se*, according to halacha, since Jewish men, unlike women, are biblically allowed to be married to more than one woman at the same time. See 4 ENCYCLOPAEDIA JUDAICA 986 (1972) (noting that biblically permitted polygamy was practiced throughout the talmudic period); 12 ENCYCLOPAEDIA JUDAICA 258 (1972).

47. See 3 THE BABYLONIAN TALMUD, *supra* note 37, 52a, at 349; GOLDIN, *supra* note 31, at 142.

48. Talmudic law required the testimony of at least two witnesses who both witnessed the offense at the same time, to convict a defendant, based on *Deuteronomy* 17:6 (stating that "[a]t the mouth of two witnesses . . . shall an offender worthy of death be put to death."). See 2 J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* 347 (1983).

offender opened his or her mouth.⁴⁹ At that point, molten lead was poured down the criminal's throat,⁵⁰ internally burning him or her to death.

The third most severe form of capital punishment was decapitation.⁵¹ It was reserved for homicide and communal apostasy.⁵² Israeli kings also used decapitation to execute rebellious subjects.⁵³ Strangulation, the least severe method of execution⁵⁴ was the only form of capital punishment not founded on the Old Testament.⁵⁵ The procedure for strangling was the same as that for burning,⁵⁶ except molten lead was not poured down the criminal's throat.

Regardless of the method of execution employed, the criminal had to be killed on the day he or she was sentenced.⁵⁷ This requirement was intended, in part, to reduce any anxiety the criminal might experience while awaiting death.⁵⁸ Immediately before execution, judges urged the condemned to recite a formula of contrition.⁵⁹ This practice was designed to induce the convict to repent and to underscore the rehabilitative function of

49. 3 THE BABYLONIAN TALMUD, *supra* note 37, 52a, at 349; 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 143 ("[T]wo kerchiefs were then to be . . . drawn . . . until [the offender] opened his [or her] mouth.").

50. 3 THE BABYLONIAN TALMUD, *supra* note 37, 52a, at 349-50; GOLDIN, *supra* note 31, at 143. The "[executioner] kindled the string and threw it into his [the offender's] mouth, and it went down into his stomach and burned his entrails." *Id.*

51. GOLDIN, *supra* note 31, at 36.

52. *See id.* at 36, 180; 3 THE BABYLONIAN TALMUD, *supra* note 37, 52b, at 355; 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 143 (stating that "[s]laying by the sword was the mode of executing murderers and the inhabitants of the subverted town").

53. Halacha permitted Jewish kings to execute on their own authority, without prior judicial approval; such execution was accomplished by decapitation. *See* 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 144.

54. *See* GOLDIN, *supra* note 31, at 37.

55. *Id.* Because strangulation was not founded on the Old Testament, it may be considered a rabbinic punishment.

56. *See supra* notes 47-49 and accompanying text.

57. *See* 3 MOSES MAIMONIDES, *supra* note 42, 12:4, at 36.

58. *See* 1 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 332 (1977) (mentioning immediate execution of accused to avoid agonizing suspense). For an appreciation of this sentiment in a secular context, *see* EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 524 (1934) (describing that "principal distress is due to the anticipation of death rather than to the actual execution").

59. 3 THE BABYLONIAN TALMUD, *supra* note 37, 43b, at 283. "When [the condemned] is about ten cubits away from the place of stoning, they say to him, 'confess.'" Only if the accused did not know how to repent was he or she instructed to recite "may my death be an expiation for all my sins." *Id.* at 283-84; 3 MOSES MAIMONIDES, *supra* note 42, at 37.

halachic capital punishment.⁶⁰ After the execution, the criminal's corpse was hung from a tree to heighten deterrence.⁶¹

While halachic capital punishment was geared to underscore the severity, and to deter the commission of capital crimes, it was almost never used.⁶² Procedural safeguards, such as the requirement that potential offenders be warned within a certain time before the commission of a capital offense of the penalty for the crime,⁶³ made convicting a defendant of a

60. It is difficult to appreciate how capital punishment facilitates rehabilitation, except sarcastically. See, e.g., Stephen C. Hicks, *The Only Argument for Capital Punishment in Principle—A Frank Appraisal*, 18 AM. J. CRIM. L. 333 (1991) (discussing that movie character played by W.C. Fields, about to be hanged, says "it'll sure be a lesson to me"); see also Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices's Positions*, 24 ST. MARY'S L. J. 1, 12 (1992) (noting "rehabilitation is not a goal of capital punishment"). However, rehabilitation applied to halachic capital punishment is comprehensible when it is realized that Judaism treats crime as an affront to God; a fundamental goal of all Judaic punishment is thus the expiation of sin. Cohn, *supra* note 43, at 55 ("Like all theocratic law, the laws prescribing punishments . . . their primary purpose is expiation."). Expiation may be understood, therefore, as metaphysical rehabilitation because it provides atonement thus allowing for a peaceful afterlife. See 3 MOSES MAIMONIDES, *supra* note 42, at 37 (stating confession bestows portion in World To Come). This article entertains the expiatory element in halachic punishment as manifested in halachic capital punishment, corporal punishment, and excommunication, but generally refrains from discussing the expiatory characteristic of halachic punishment. This is because any examination of halachic punishment is intended primarily to provide insights on that system's practical applications, if any, to the present American punishment regime; application of theocratic notions of punishment to a predominately secular society is inappropriate. For discussion of the theocratic and rehabilitative elements in halachic punishment, see 13 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at 1386; 2 MOSES MAIMONIDES, *THE GUIDE OF THE PERPLEXED* 534, 534-36 (Shlomo Pines trans., 1963) ("For the Law is a divine thing . . . [and] abolition of punishments . . . would be cruelty itself.").

61. See *Deuteronomy* 21:22-23 (stating "if a person [has] committed a sin worth death, and that person is put to death, and you must hang the defendant from a tree."); see also GOLDIN, *supra* note 31, at 33 and 137 n.18; 3 THE BABYLONIAN TALMUD, *supra* note 37, 45b, at 299 ("All who are stoned are [afterwards] hanged.").

62. Three famous instances of capital punishment mentioned in the BABYLONIAN TALMUD TRACTATE SANHEDRIN are: 1) the execution of a man for riding a horse on the Sabbath (SANHEDRIN 46A); 2) the execution of *Bat Tavi*, the daughter of a *cohein* (priest), for having illicit sex (SANHEDRIN 52B); and 3) the hanging of eighty witches on a single day (SANHEDRIN 45B). See BASIL F. HERRING, *JEWISH ETHICS AND HALAKHAH FOR OUR TIME* 153-54 (1984). However, even these executions were not imposed pursuant to strict halachic standards but were implemented as "temporary" deterrent measures. *Id.*

63. See 3 MOSES MAIMONIDES, *supra* note 42, 12:2, at 34; Aaron M. Schreiber, *The Jurisprudence of Dealing with Unsatisfactory Fundamental Law: A Comparative Glance at the Different Approaches in Medieval Criminal Law, Jewish Law and the United States Supreme Court*, 11 PACE L. REV. 535, 546 (1991).

capital offense nearly impossible.⁶⁴ These safeguards were so extensive that the talmudic sages referred to a Jewish court which dispensed a capital sentence only once in seventy years as “murderous.”⁶⁵

Various reasons have been advanced as to why Judaism provided for such elaborate capital punishment schemes and then minimized their use. First, it has been suggested that halachic capital punishment served not as a practical means of executing criminals, but to illustrate Judaism’s hatred of capital offenses.⁶⁶ Moreover, Judaism accomplished this illustration by establishing a hierarchy of punishment schedules,⁶⁷ with those of capital punishment being the most severe.

Another explanation is that, whereas the Torah prescribed a program of capital punishment, the rabbis made implementation of that program nearly impossible because they recognized human beings can never be absolutely certain of factual guilt and innocence, and thus innocent people may occasionally be executed.⁶⁸ They premised this position on the belief

64. See Arnold N. Enker, *Aspects of Interaction between the Torah Law, the King’s Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1139 (1991) (discussing impracticality of halachic capital punishment making conviction and execution extremely unlikely); see also Schreiber, *supra* note 63, at 546 (discussing how technical rules made it nearly impossible to execute under Jewish criminal law).

65. See 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 145. “A Sanhedrin that puts a man to death . . . is called a murderous one. R[abbi] Eleazar ben Azariah says ‘Or even once in 70 years.’” *Id.*

66. See HERBERT L.A. HART, LAW, LIBERTY, AND MORALITY 65 (1963) (providing secular expression of this sentiment) (“The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them.”); see also Gregg v. Georgia, 428 U.S. 153, 183 (1976) (“[C]apital punishment is an expression of society’s moral outrage at particularly offensive conduct.”).

67. See Enker, *supra* note 64, at 1145.

68. See Gerald J. Blidstein, *Capital Punishment—The Classic Jewish Discussion*, 14 JUDAISM 159, 163 (1985). This position is based on a famous argument among Rabbis Akiva, Tarfon, and Shimon ben Gamliel. Akiva and Tarfon testified that if they sat on the Sanhedrin, the Jewish Supreme Court, criminals would not be executed. Shimon ben Gamliel countered that without capital punishment there would be more murders among the Jewish People. See 4 THE BABYLONIAN TALMUD 7a, at 35 (I. Epstein ed. & H.M. Lazarus trans., 1935); Cohn, *supra* note 43, at 64. The positions of Akiva and Tarfon were based on the fear of executing an innocent individual. See HERRING, *supra* note 62, at 157 (Tarfon and Akiva were motivated by possibility of mistaken verdict). This fear of mistake is often cited in contemporary discussions of capital punishment. See, e.g., CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 1, 10, 14-22 (1974); HERBERT L.A. HART, PUNISHMENT AND RESPONSIBILITY 89 (1968); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 377 (1981); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 21-22, 75-81 (1987).

it is better that more factually guilty criminals be spared than it is that innocent persons be executed.⁶⁹

Yet another suggestion is that the Talmud made capital punishment impractical, not out of a fear innocent persons would be executed, but because of a reluctance to terminate even guilty lives.⁷⁰ This view was premised on the sanctity of human life and the belief that *all* killing destroys the image of God in the world.⁷¹

Another reason the talmudic rabbis rendered employment of the death penalty nearly impossible was they understood deterrence to be promoted more by the frugal use of capital punishment than by a regime of extensive execution.⁷² To be sure, the rabbis only refrained from employing capital

69. For an expression of this sentiment in a secular context, see Alan H. Goldman, *Beyond the Deterrence Theory: Comments on Van Den Haag's "Punishment as a Device for Controlling the Crime Rate,"* 33 RUTGERS L. REV. 721 (1981) (explaining why it is worse to punish the innocent than free the guilty).

70. See Blidstein, *supra* note 68, at 164.

71. *Id.* at 165.

72. See 13 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at 1387. "[I]n order to retain the deterrent effect of the death penalty, . . . the judges must do everything in their power to avoid passing death sentences." *Id.* At first blush, this appears counterintuitive—certainly, more executions would seem to deter more capital offenses. See *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (discussing decreased use of executions diminishing deterrence); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 287 (1968) (discussing how fewer uses of capital punishment diminish deterrence). Yet, the talmudic scholars may have appreciated, as other legal thinkers have, that the taking of human life, even with judicial sanction, tends to cheapen the value of life in society. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION* 182 (1993) (questioning whether capital punishment creates callousness in society); JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* xvii (1960) (quoting Clarence Darrow: "[T]he spectacle of the state taking life must tend to cheapen it."); Donnelly, *supra* note 60, at 24 (explaining Hart's statement that death penalty might actually reduce respect for life); HART, *supra* note 68, at 88-89 (stating that use of death penalty by state may actually lower respect for life). Accordingly, the rabbinic stance on deterrence and capital punishment may reflect a talmudic balancing of the ideal of capital punishment as a deterrence with the reality that such punishment often impacts negatively on society. Halacha often balances the appropriateness of observing law in its ideal state against societal realities that preclude such observance. For examples, see 3 J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS* 329-43 *passim* (1989) (discussing whether antenuptial agreements may be employed to circumvent problem of *agunot* (women who cannot remarry because they are not halachically divorced)); 7 ENCYCLOPAEDIA JUDAICA 1159 (1972) (noting no restriction may be imposed on a congregation that cannot as a practical matter observe the restriction); Cohn, *supra* note 43, at 56-58 (describing replacement of biblical stoning with rabbinic stoning out of societal need).

punishment⁷³ after becoming convinced that such punishment no longer served a deterrent function, even when practiced sporadically.⁷⁴ Biblical and rabbinic methods of capital punishment remained “on the books,” however, as pedagogical expressions of Judaic disgust with capital crime.⁷⁵

While talmudic capital punishment was more of an academic than practical concern during the talmudic period, including the period surrounding the destruction of the Jerusalem Temple,⁷⁶ Jews used the death penalty extensively when they were domiciled in the diaspora.⁷⁷ This was due to the perception by diasporic rabbis that emergency measures were needed to protect Jewish communities from assimilation and destruction by informers.⁷⁸

73. The institution of talmudic capital punishment was abolished 40 years before the Temple's destruction in 70 A.D. See Stone, *supra* note 30, at 828 n.78 (dating Jerusalem's destruction at 70 A.D.). The talmudic rabbis formally ended capital punishment 40 years before Jerusalem and its Temple were destroyed, because that is when the Romans exiled the Jewish Supreme Court (Sanhedrin) Judges from Jerusalem; biblical authority to execute criminals existed only when the Sanhedrin could convene within the Temple walls, based on *Deuteronomy* 17:8-9 (“[Y]ou shall go to the place the Lord your God shall choose . . . And you shall go to the priests, . . . and the judges who shall be in those days.”). See 3 MOSES MAIMONIDES, *supra* note 42, 14:12-13, at 41. The Talmud interpreted this passage, with its juxtaposition of priests and judges, as requiring that judges only rule when priests perform (i.e., when there is a temple in Jerusalem). See BLEICH, *supra* note 48, at 343.

74. See HERRING, *supra* note 62, at 161.

75. 10 ENCYCLOPAEDIA JUDAICA 1483-84 (1971) (describing the impact of morality on Jewish law through rabbinic use of capital punishment penalties to communicate rabbinic disgust with misbehavior).

76. See *supra* note 73.

77. See 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 812 (describing capital punishment dispensed by Jews in Spain and Poland); 13 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at 1388-89 (discussing Jewish use of death penalty in Muslim and Christian Spain on informers); see also HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 30 (1984) (noting that Jewish courts were permitted to impose even capital punishment when required by “necessities of the day”); Suzanne L. Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1198 (1991) (“To preserve communal unity . . . the Jewish community must have the ability to impose . . . capital punishment.”).

78. See HERRING, *supra* note 62, at 159 (finding that death penalty may be invoked without “conventional considerations” to safeguard Torah interests). *Id.* at 161 (explaining that the death penalty is necessary for those who inform on Jews to non-Jewish authorities). The informer who disparages Jews to the secular authorities, to receive an award or curry favor, is the most despised figure in Jewish history. To illustrate this point, the *siddur*, or Jewish prayer book, includes a supplication that God eradicate informers. See 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 1364 (addition of special blessing to counter increase of informers). For an example of the hatred Jews felt for informers, see Schreiber, *supra* note 63, at 547-48. For an interesting discussion on the impact of informers on Jewish

This cursory examination of halachic capital punishment demonstrates it was premised on four beliefs. First, the main purpose of and justification for the death penalty is deterrence; since any taking of human life, especially in public, tends to cheapen such life. Deterrence is promoted more by the frugal use of capital punishment combined with expressions of disgust concerning capital offenses, than it is by a more extensive use of the death penalty. Second, deterrence is promoted by exhibiting the convict's corpse to the public. Third, deterrence and retribution are advanced by allowing society, represented by the witnesses to the respective crime, to carry out executions. Finally, offender rehabilitation is realized through the expiatory function of capital punishment.

Having examined how the Talmud dealt with capital criminals, this article now explores how the Talmud treated thieves who were unable to repay the amount of their theft.

B. *Indentured Servitude*

Indentured servitude⁷⁹ was the biblical remedy both for those who were unable to support themselves and those who had stolen and were unable to repay for what was stolen.⁸⁰ Because indentured servitude based on an inability to support oneself was not imposed as a punishment, this article deals solely with the latter category.⁸¹

communities generally, see 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 1364-73.

79. Servitude is purposefully used instead of slavery to describe Judaic penal servitude in order to emphasize that Judaic servitude differed acutely from other forms of slavery in its humane treatment of slaves. Examples of this treatment noted in the article include the provision that ideally limited Judaic penal servitude to a maximum period of six years and the ultra humane manner in which the master had to treat the Hebrew servant. Only if the servant himself requested an extended period of servitude was servitude beyond six years permitted. See 5 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 12, THE BOOK OF ACQUISITION, *Laws Concerning Slaves* 2:2, at 249 (Leon Nemoy et al. eds. & Isaac Klein trans., 1951) [hereinafter 5 MOSES MAIMONIDES]; 14 ENCYCLOPAEDIA JUDAICA 1656 (1972). For examples of the humane treatment Judaism afforded indentured servants, see *id.* at 1656-57, 1659-60; 5 MOSES MAIMONIDES, *supra*, 1:6, at 247 (forbidden to work servant needlessly); *id.* 1:7, at 248 (forbidden to assign servant only menial tasks); *id.* 1:9, at 248-49 (master must treat slave as an equal regarding food, drink, etc.).

80. See 5 MOSES MAIMONIDES, *supra* note 79, 1:1, at 246 ("The Hebrew slave . . . refers to an Israelite whom the court sells into servitude against his will or to one who sells himself voluntarily."); 14 ENCYCLOPAEDIA JUDAICA, *supra* note 79, at 1655; GOLDIN, *supra* note 31, at 57.

81. Detailed discussion of how indentured servitude was practiced throughout Jewish history is beyond the scope of this article. For more comprehensive treatment, see COHN, *supra* note 77, at 56-63.

According to *Exodus* 22:8,⁸² a thief was obligated to pay his⁸³ victim a fine in addition to the amount of his theft. A thief, who was able to repay the theft but unable to pay the fine, could not be sold into servitude; only a thief who was unable to repay the actual theft was sold into servitude.⁸⁴ Judaic penal servitude was designed primarily to accommodate restitution on the part of and the rehabilitation of the thief, and to demonstrate that the dignity of the offender-servant need not be actively compromised to achieve those goals.⁸⁵ Because the offender-servant was sold into the service of his victim,⁸⁶ restitution, which consisted of the servant⁸⁷ working for his victim for six years,⁸⁸ was accomplished rather easily. This restitution was

82. In all charges of theft, concerning an ox, an ass, a sheep, a garment, or any other loss, both parties must come before God—whoever God declares guilty must pay the winner double [the market value of the stolen item]. “God” in this context refers to the judges who pronounce sentence. See 9 THE CODE OF MOSES MAIMONIDES (MISHNEH TORAH), BOOK 11, THE BOOK OF TORTS, *Laws Concerning Theft* 1:5, at 60-61 (Julian Obermann ed. & Hyman Klein trans., 1954) [hereinafter 9 MOSES MAIMONIDES].

83. An Israelite woman was not permitted to sell herself into servitude nor could she be sold into service to repay her theft. See 5 MOSES MAIMONIDES, *supra* note 79, 1:2, at 246.

84. See 5 MOSES MAIMONIDES, *supra* note 79, 1:1, at 246; GOLDIN, *supra* note 31, at 58. Our discussion of halachic penal servitude is limited to consideration of Jewish servants. For treatment of the laws regarding non-Jewish or so-called “alien” slaves, see 14 ENCYCLOPAEDIA JUDAICA, *supra* note 79, at 1658.

85. Of course, the very status of being an indentured servant probably lowered the self-esteem of the thief. This may have been part of the reason why the talmudic sages insisted that the servant be treated humanely.

86. See COHN, *supra* note 77, at 57 (service of slave to compensate for theft against master).

87. While the Hebrew servant had to work for his employer, the employer had to treat the servant almost as an equal; in an incredible expression of sympathy for the stigma most indentured servants experience, the talmudic scholars ruled that a master had to provide his servant with food, clothing, and shelter equal to that of the master. See 5 MOSES MAIMONIDES, *supra* note 79, 1:9.

88. *Id.* 2:2, at 249. Although Jewish law prescribed a six year period of penal servitude, there were three ways in which penal servitude could be terminated within the six years. First, a servant could free himself by paying his master the value of his remaining years of service in proportion to the purchase price the master paid for the servant. For example, if the master paid \$6000 for the servant, the servant could free himself at the end of four years by paying his master \$2000, or the value of the remaining two years that the servant owes his master. See 4 THE BABYLONIAN TALMUD, SEDER NASHIM, KIDDUSHIN 14b, at 59 (I. Epstein ed. & H. Freedman trans., 1936) [hereinafter 4 BABYLONIAN TALMUD]. Second, a servant could be freed by receipt of a “deed of redemption” delivered by the master to the servant. *Id.* 16a, at 68. Finally, an indentured servant became free on the death of his master, unless the master left male descendants, in which case, the servant was required to work for his master’s male children for the balance of the six year period. *Id.* 17b, at 77.

realized through a face-to-face encounter between thief and victim. The thief was made to appreciate that he had wronged a fellow human being, and not merely an “owner” or “possessor.” The victim was able to perceive the thief as a person, not as some impersonal monster.⁸⁹ Moreover, because Jewish law insisted the purpose of penal servitude was not merely to achieve pecuniary restitution, such servitude served to rehabilitate the offender-servant by providing him with the opportunity to progress and advance from the low level at which his conduct had placed him.⁹⁰

Unlike their continued practice of capital punishment after the destruction of the Jerusalem Temple, Jews did not practice indentured servitude from the time celebration of the jubilee year ceased.⁹¹ Halachic penal servitude demonstrates four points. First, because Judaism considered theft a crime against the victim as well as society, a thief who was sold into servitude to repay his debt had to work for his victim. Second, a servant usually had to work for his victim for six years. Third, a master was obligated to treat his servant in the most humane manner possible. Finally, a main purpose of halachic servitude was rehabilitation of the offender. These factors further illustrate that Jewish law combined restitutive and rehabilitative principles in its punishment programs. Having examined halachic capital punishment and halachic penal servitude, this article now turns to the most prevalent form of halachic punishment: corporal punishment.

89. For a secular suggestion that the absence of such victim-offender interaction is at the root of the present American prison over-population problem, see Leven, *supra* note 10, at 650-53.

90. See 14 *ENCYCLOPAEDIA JUDAICA*, *supra* note 79, at 1659-60.

91. 4 *THE BABYLONIAN TALMUD*, SEDER NASHIM, TRACTATE GITTIN 65a, at 306 (I. Epstein ed. & Maurice Simon trans., 1936); 5 *MOSES MAIMONIDES*, *supra* note 79, 1:10, at 249. The jubilee year prescribed by *Leviticus* 25:8-17 was tied to the issue of indentured servitude, inasmuch as even individuals who desired to remain servants past the mandatory six year period had to be freed at the beginning of the jubilee year. *Id.* The talmudic scholars, therefore, felt it was inappropriate to practice penal servitude once the jubilee was abolished, since at that point, an individual could theoretically remain an indentured servant forever. There is dispute as to when celebration of the jubilee actually ended. Some scholars date cessation of the jubilee at approximately 730 years before the death of Christ, while others believe that the jubilee did not end until the destruction of the Jerusalem Temple in 70 A.D. See COHN, *supra* note 77, at 61.

C. Corporal Punishment

Halachic corporal punishment,⁹² or flogging, was the standard form of punishment for crimes that did not have biblically prescribed penalties.⁹³ There were two forms of flogging, biblical and rabbinic.⁹⁴ Biblical flogging was limited to thirty-nine lashes,⁹⁵ and served as a metaphoric⁹⁶ substitute for the death penalty. Rabbinic whipping served to discipline an offender⁹⁷ who had flouted a rabbinic precept, and was not limited to a specific number of lashes. Theoretically, a candidate for rabbinic whipping could be flogged to death.⁹⁸

92. Discussion of the ways in which corporal punishment is practiced in other religions and countries is beyond the scope of this article. For a summary of how corporal punishment is administered in the countries that practice it, see Tom Kuntz, *Beyond Singapore: Corporal Punishment, A to Z*, N.Y. TIMES, June 26, 1994, § 4, at 5.

93. See 6 ENCYCLOPAEDIA JUDAICA 1348 (1972).

94. The distinction between biblical and rabbinic corporal punishment reflects the difference between biblical law and rabbinic law generally. Biblical law mainly refers to the commandments and prescriptions found in the canon known as the Old Testament (including the Pentateuch, or Five Books of Moses, Prophets, and Chronicles). Biblical law as used in talmudic parlance also refers to ordinances which the talmudic rabbis and halachic codifiers derived from biblical precedent, and to ordinances which, though deduced from passages in the Old Testament, were believed to have been revealed to Moses at the Revelation at Sinai. See DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 3-4 (1968). Rabbinic law refers both to the modification of biblical law by the talmudic rabbis and halachic codifiers, and to practices that the halachic authorities enacted to protect biblical principles. *Id.*; see also 7 ENCYCLOPAEDIA JUDAICA, *supra* note 72, at 1159.

95. See 3 MOSES MAIMONIDES, *supra* note 42, 17:1, at 47-48. Now, *Deuteronomy* 25:2-3, which provides the authority for biblical flogging, authorizes a criminal to be given 40 lashes. The talmudic scholars ruled, however, that only 39 lashes should be inflicted to prevent the possibility of exceeding the biblically authorized number of 40. *Id.* LEW, *supra* note 31, at 63; 6 ENCYCLOPAEDIA JUDAICA, *supra* note 93, at 1348; Cohn, *supra* note 43, at 71.

96. See GOLDIN, *supra* note 31, at 11-12.

97. *Id.* at 259 n.4. Rabbinic whipping is referred to in Hebrew as *makkat mardut*, or "whipping of rebellion." This underscores that such punishment was imposed to discipline. See *id.*; see also Shuster, *supra* note 29, at 644 n.18.

98. Literally, "until the defendant's soul departs." See 2 THE BABYLONIAN TALMUD, SEDER NASHIM, TRACTATE KETHUBOTH 86a-b, at 545 (I. Epstein ed. & Israel W. Slotki trans., 1936); 6 ENCYCLOPAEDIA JUDAICA, *supra* note 93, at 1350. Rabbinic lashings were not limited in number because their purpose was disciplinary; they had to be enforced until the offender resumed observation of the rabbinic precept he had disavowed. See *id.*

Once the Jewish court established that an offender deserved to be flogged,⁹⁹ the criminal was publicly whipped by a court attendant, on his or her body, and not through the clothes.¹⁰⁰ One-third of the lashes were administered on the convict's chest, and two-thirds were administered on the convict's upper back.¹⁰¹ The talmudic scholars applied three unique procedures to corporal punishment. First, all whipping candidates received a physical examination immediately before being flogged. Only those deemed physically able to withstand the beating were lashed.¹⁰² Second, halachic corporal punishment was imposed publicly to promote deterrence.¹⁰³ Third, the sentencing judges had to attend and monitor the imposition of corporal punishment. Their presence ensured both that the whipper did not whip the criminal excessively,¹⁰⁴ and, if the criminal became ill during punishment, the whipping would cease.¹⁰⁵ These requirements established that halachic corporal punishment was not intended to be, nor was it, a form of torture or cruel and unusual punishment,¹⁰⁶ but rather served to promote both general and specific deterrence.¹⁰⁷ It may be because halachic corporal punishment was considered to be both a humane act and an effective deterrent, rabbinic flogging¹⁰⁸ was extensively employed by many Jewish communities even when Jews did not have complete autonomy.¹⁰⁹ In fact, some Orthodox Jews still practice symbol-

99. To be eligible for biblical lashing, the prospective offender had to receive a warning from two witnesses immediately before committing the particular offense. *See* 3 MOSES MAIMONIDES, *supra* note 42, 16:4, at 45. The warning and witness requirements concerning halachic corporal punishment differed, however, from those pertaining to halachic capital punishment. Unlike capital cases, which required that two witnesses warn the prospective offender against commission of the crime and testify to having seen the crime performed, corporal punishment could be imposed if only one witness warned the prospective offender of the criminal nature of the contemplated crime. *See id.* 16:6, at 45-46.

100. *Id.* 16:8, at 46.

101. *Id.* 16:9, at 46.

102. *See* 6 ENCYCLOPAEDIA JUDAICA, *supra* note 93, at 1348 (citing BABYLONIAN TALMUD MAKKOT 3:11).

103. *See id.* at 1350.

104. *See* LEW, *supra* note 31, at 62-63.

105. *See* 3 MOSES MAIMONIDES, *supra* note 42, 17:2, at 48.

106. On whether halachic corporal punishment is cruel and unusual, under the Eighth Amendment, *see infra* notes 185-207.

107. *See supra* notes 8-9 and accompanying text.

108. *See supra* note 97 and accompanying text.

109. ISRAEL NUN, JEWISH LIFE IN THE MIDDLE AGES 7-8 (1981) (flogging in seventeenth century Amsterdam). *See also* 6 ENCYCLOPAEDIA JUDAICA, *supra* note 93, at 1350-51 (regarding flogging in post-talmudic times); 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 1367 (flogging by Jews in Spain); 13 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at

ic flogging on the eve of Yom Kippur (the Day of Atonement), to encourage themselves to repent.¹¹⁰

Having reviewed several physical and liberty-restrictive talmudic punishments, this article now discusses halachic excommunication, the penalty that perhaps best illustrates the halachic tenets that crime is a sin, that crime is an affront to God, and that crime requires societal ostracism to be eradicated effectively.

D. *Excommunication*

There are two forms of halachic excommunication, *niddui* and *cherem*. *Niddui* refers to the initial imposition of excommunication¹¹¹ and is reserved primarily for individuals who fail to observe rabbinic teaching, to respect court judgments, or to honor their communal obligations.¹¹² First, the offender is warned to desist from the respective inappropriate behavior. This reprimand lasts for seven days.¹¹³ *Niddui* is imposed against an offender who continues the aggravating conduct after expiration of the initial warning period and requires the offender to comport himself or herself in an uncomfortable manner.¹¹⁴ The purpose of *niddui* is to render the *menuddah* unattractive to himself or herself and to others,¹¹⁵ and thereby induce him or her to reform. *Niddui* lasts for thirty days. It is extended for another thirty days if the offender does not inform the court at the end of

1389 (flogging by Jews in Germany).

110. See SCHNEUR ZALMAN OF LIADI, *SIDDUR TEHILLAT HASHEM* (Prayer Book of the Lubavitch Chassidim) 296 (Merkos Linyonei Chinuch ed., 1978) (prescribing flogging on Yom Kippur eve) (on file with the author).

111. See 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 32, at 350-51. *Niddui* derives from *menuddah*, which means "defiled." *Id.* at 350 (*Menuddah* also refers to the excommunicant).

112. *Id.* at 350-51. These examples are merely illustrative. For a complete list of the offenses that are punishable by *niddui*, see 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 32, at 351-52; MOSES MAIMONIDES (*MISHNEH TORAH*), *HILCHOT TALMUD TORAH* at 268-72 (Eliyahu Touger trans., 1989).

113. See 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 32, at 351; *THE BABYLONIAN TALMUD*, MO'ED KATAN 16A (I. Epstein ed. & H.M. Lazarus trans., 1984).

114. For example, a *menuddah* was enjoined from washing and grooming himself, from washing clothes, from wearing shoes, from unnecessary social intercourse, and from participating in formal communal prayer. See MOSES MAIMONIDES, *supra* note 112, 7:2, at 276-78; 8 *ENCYCLOPAEDIA JUDAICA*, *supra* note 32, at 351.

115. Support for this proposition may be found in the fact that the *menuddah* was not permitted to wash or groom as if he or she were in a state of mourning. See MOSES MAIMONIDES, *supra* note 112, 7:4, at 276.

the initial thirty days that he or she will abstain from the offensive conduct.¹¹⁶ Finally, the coffin of one who dies *menuddah* is symbolically stoned.¹¹⁷

Cherem, the second and more severe form of excommunication, is placed on offenders who refuse to acknowledge wrongdoing even after the second thirty day period of *niddui*.¹¹⁸ *Cherem* differs from *niddui* in that the *muchram* can engage only in limited work and has to study alone,¹¹⁹ whereas the *menuddah* is permitted to conduct his or her regular profession and study the Torah with others.

While these restrictions demonstrate the punitive nature of both forms of halachic excommunication, *niddui* and *cherem* also have a direct impact on the offender's community. In the case of *niddui*, the rabbis issue an edict that friends and neighbors cannot interact with the *menuddah* except to study and to pray. The impact on the community of a *cherem* is greater. Every Jew is obliged to keep a prescribed distance from the *muchram*¹²⁰ when not patronizing the *muchram*'s place of business. Halachic excommunication is designed, therefore, to punish and reform the offender and to deter others from the criminal's conduct.¹²¹ Thus, it utilizes concepts of

116. See *id.* 7:6, at 278-80; 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 350-51.

117. See MOSES MAIMONIDES, *supra* note 112, 7:4, at 278; 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 351. The stoning of a *menuddah*'s coffin consisted of placing a single stone on the coffin.

118. See MOSES MAIMONIDES, *supra* note 112, 7:6, at 278-80; 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 351. *Cherem*, from the Aramaic *charama*, means to "be forbidden." See *id.* at 344. *Muchram* refers to the individual in a state of *cherem*. See *id.* at 351. Eliyahu Touger has translated *niddui*, in the passages from MAIMONIDES, *supra* note 112, as "ban of ostracism," and *cheremas* "excommunication." Rabbi Touger may have done so simply to underscore that *niddui* and *cherem* differ in severity. *Niddui* and *cherem* may both be translated into English as "excommunication" without compromising their Hebrew meaning. See BEN-YEHUDA'S POCKET ENGLISH-HEBREW HEBREW-ENGLISH DICTIONARY 29 (Ehud Ben-Yehuda & David Weinstein eds., 1961) (defining *cheremas* as "ban" or "excommunication"); *id.* at 196 (defining *niddui* as same); see also 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 350 (describing *cherem* as aggravated *niddui* and not separate punishment).

119. See 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 351; MOSES MAIMONIDES, *supra* note 112, 7:5, at 278.

120. It is forbidden to be within four cubits [six feet] of the excommunicant. See MOSES MAIMONIDES, *supra* note 112, 7:4, at 276-78. Non-family members are not allowed near excommunicants. See 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 351.

121. Of course this deterrence was predicated on the assumption the Jewish community would respect rabbinic authority enough to sanction ostracism for the disobedience of rabbinic teachings. Interestingly, this halachic reliance on communal observance permeates Jewish law. Consider the rabbinic edict that forbids a Jew to climb a tree on the Sabbath. See 3 YISROEL MEIR HA-COHEN, MISHNEH BERURAH, *Laws of Shabbos* § 336:1 (Aviel

general and specific deterrence and rehabilitation, and involves both the offender and his or her community in eradicating misconduct.

Short of death, excommunication is the most horrible censure an observant Jew can suffer. It is designed to sever the Jew's relationship with the community.¹²² Such detachment can be devastating for the religious Jew because, in contrast to other religions, interaction with other members of society is a central religious element of Judaism.¹²³ Halacha requires the Jew to pray with a *minyan* (a quorum comprised of ten Jews),¹²⁴ to contribute to charity,¹²⁵ to study Torah (preferably in public),¹²⁶ and to generally take an interest in his or her community.¹²⁷ Excommunication prevents such interaction, thus providing a most miserable and deterrence-effective condition for a practicing Jew.

Halachic excommunication was utilized from the initial post-talmudic period through the middle ages, and is still employed in certain orthodox communities.¹²⁸ Today, however, in the absence of a central binding

Orenstein ed., 1986); 14 THE CODE OF MAIMONIDES (MISHNEH TORAH), BOOK 3, THE BOOK OF SEASONS, *The Sabbath*, 21:9, at 131 (Leon Nemoy et al. eds. & Solomon Gandz & Hyman Klein trans., 1961). The rabbinic penalty for willfully climbing a tree on the Sabbath is that the offender must remain in the tree until the Sabbath ends. *See id.* at 131-32. The halachic codifiers apparently did not entertain the thought that the Jew who willfully offended a rabbinic teaching might not adhere to the penalty for that offense.

122. *See* HAROLD KUSHNER, *TO LIFE: A CELEBRATION OF JEWISH BEING AND THINKING* 12 (1993).

123. *See* 5 ENCYCLOPAEDIA JUDAICA, *supra* note 37, at 808-09; KUSHNER, *supra* note 122, at 13 (stating that the "essence of religious identity is . . . membership in a God-seeking community").

124. *See* 1 SOLOMON GANZFRIED, *CODE OF JEWISH LAW* (Kitzur Shulhan Aruh) 41 (Hyman E. Goldin trans., Hebrew Publishing Co. revised ed. 1961) (describing appropriateness of praying together with congregation described as *minyan*, or quorum, of 10 Jews).

125. *See id.* at 110.

126. *See id.* at 87.

127. *See* DAILY PRAYER BOOK (HA-SIDDUR HA-SHALEM) 486 (Philip Birnbaum trans., Hebrew Publishing Co. ed. 1977).

128. *See* 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 353-54 (describing use of *cherem* in post-talmudic Jewish history); *id.* at 1368 (discussing excommunication in medieval Eastern and Central Europe); 13 ENCYCLOPAEDIA JUDAICA, *supra* note 31, at 1389-90 (noting that *cherem* is the most severe form of post-talmudic punishment); NUN, *supra* note 109, at 52-53 (emphasizing the effect of excommunication on the offender during the middle ages); *see also* SHLOMO EIDELBERG, *JEWISH LIFE IN AUSTRIA IN THE XVTH CENTURY* 67 (1962) (noting use of excommunication in fifteenth century Poland). Excommunication may initially have been an effective deterrent against certain crimes and sins during the middle ages because of the manner in which it was celebrated. While the "lighter" reprimand and *niddui* were simply publicized by the rabbinical court, *cherem* was pronounced

halachic authority, excommunication, like other forms of halachic punishment, has lost its general deterrence value. It remains primarily as an expression of ultra-orthodox disapproval of modern, secular conduct.¹²⁹

Having presented an overview of halachic punishment, the article next compares how the halachic penal methods mentioned above compare with their counterparts in American law. This article also examines the implementation of halachic punishment methods in American law.

III. AMERICAN LAW

A. Capital Punishment

Although contemporary American capital punishment finds its origins in the Old Testament,¹³⁰ modern American capital punishment differs markedly from its biblical ancestor. First, halachic Judaism theorized that executions should be as public as possible to promote deterrence. Conversely, modern American executions are generally conducted in private.¹³¹ Second, halachic Judaism required that capital punishment occur on the same day as sentencing. In contrast, American executions often occur years after a defendant is sentenced.¹³² Third, Jewish law allowed appeal of a

in a manner intended to induce terror: a proclamation was made in the synagogue that the offender was a *muchram* (excommunicant) while all in attendance held lit candles. After the proclamation was read, the *shofar* (ram's horn traditionally blown on the Jewish New Year and at other significant national events) was blown, and the candles were extinguished, signifying the damnation of the excommunicant's soul. See 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 355. Perhaps the most famous public *cherem* of the post-talmudic era that was imposed in such a manner was the one pronounced on the Jewish philosopher Benedict de Spinoza (1632-1677) for his pantheism in Amsterdam on July 27, 1656; JOHNSON, *supra* note 29, at 288-93 (describing cause and text of Spinoza's *cherem*).

129. See 8 ENCYCLOPAEDIA JUDAICA, *supra* note 32, at 354-55 (noting that *cherem* has lost its deterrent influence, and depicting Hebrew text of modern *cherem* imposed on the owner of a television set).

130. See KADISH & SCHULHOFER, *supra* note 8, at 560; DAVID M. WALKER, THE OXFORD COMPANION TO LAW 184 (1980) (relating the origin of capital punishment and the modern justifications for capital punishment based on religion and morality); Robert A. Friedlander, *Punishing Terrorists: A Model Proposal*, 13 OHIO N.U. L. REV. 149, 151 nn.12-13 and accompanying text (1986).

131. In this context, "private" refers to the fact that American executions are not televised or otherwise made visually available to most Americans. American executions are public insofar as they are reported in various media and are often witnessed by family members and other attendants.

132. See Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990) (stating

sentence as of right as often as the defendant wished, provided the appeal was "cogent."¹³³ Others were permitted to present exculpatory evidence on the convict's behalf as often as they wished, without a prior showing of "cogency."¹³⁴ American law, after *Herrera v. Collins*,¹³⁵ only requires appellate courts to entertain new exculpatory evidence after conviction if the evidence is sufficiently competent to overcome a criminal's conviction-acquired presumption of guilt.¹³⁶ Finally, while halachic Judaism punished a host of crimes and sins with capital punishment,¹³⁷ American law reserves the death penalty primarily for aggravated homicide.¹³⁸

American executions are carried out years after an offender is sentenced primarily because of the sheer volume and frequency of executions in America today. Whereas halachic Judaism rarely sentenced a criminal to death,¹³⁹ there are over 2500 death row inmates throughout the United States.¹⁴⁰ This volume of capital convicts, most of whom receive numer-

that the average time between sentence and execution is six and one-half to eight years); Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 225 (1992) (estimating a lapse of six or seven years between sentence and execution); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1038 (1989).

133. See 3 MOSES MAIMONIDES, *supra* note 42, 13:1, at 36-37.

134. See *id.*

135. 113 S. Ct. 853 (1993). *Herrera* has generated much controversy. For discussions of the case, see Marcia Coyle, *Innocence vs. Executions*, NAT'L L.J., Dec. 27, 1993, at 1; Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 832-34 (1993); J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317, 336-38 (1993).

136. See *Herrera*, 113 S. Ct. at 860 (noting that upon conviction, criminal loses presumption of innocence and acquires presumption of guilt); *id.* at 869 (stating that because of need for finality in criminal adjudications, post-conviction claims of actual innocence must pass extraordinarily high threshold).

137. See *supra* notes 39-52 and accompanying text.

138. See Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 713 (1990-1991). While capital punishment was imposed well into the twentieth century for other crimes such as rape, most states today reserve the death penalty for intentional homicides. See BLACK, *supra* note 68, at 10 (rape was often grounds for execution); FRIEDMAN, *supra* note 11, at 318 (Supreme Court allows rape to be capitally punished); at 319 (rape can no longer be capitally punished); Pierce & Radelet, *supra*, at 713 n.5 (death penalty is no longer appropriate for rape of adult not resulting in victim's death).

139. See *supra* notes 62-65 and accompanying text.

140. FRIEDMAN, *supra* note 11, at 321; Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years after Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 417 n.124 and accompanying text (1992-1993).

ous judicial reviews of their convictions,¹⁴¹ makes delayed executions in America the norm.¹⁴² Unlike that of the halacha, the American penal system does not employ a hierarchy of capital punishments to reflect a difference between crimes. Halachic Judaism treats many sins as crimes and accordingly differentiates sins and crimes that pose significant theological dangers to Judaism's theocratic structure, from sins and crimes that compromise physical and social well-being. American law appropriately defines and punishes only the latter category of offenses as crimes. Furthermore, because American law only capitally punishes crimes it deems especially heinous, American law does not need an array of capital punishment methods to deter capital crimes. Because the death penalty is only used to combat truly egregious crime *ab initio*, the American notion of capital penal deterrence is satisfied.¹⁴³

In sum, the nature and reality of contemporary American capital punishment appropriately precludes the practice of same-day executions in contemporary America. The establishment of a hierarchy of execution methods is unnecessary in American jurisprudence, since American law only uses the death penalty to punish especially egregious crimes. Yet, other aspects of American capital punishment that differ from their halachic counterparts are infirm and can benefit from a reformation modeled after halachic practice, or at least after halachic principles.

An important example of an area where such reformation is warranted is federal habeas corpus law.¹⁴⁴ *Herrera* holds that habeas review is not required in a capital case on the basis of even newly found exculpatory evidence, unless that exculpatory evidence is competent enough to overcome the convict's conviction-acquired presumption of guilt.¹⁴⁵ To the extent *Herrera* holds even a claim of factual innocence may be incompetent to overcome a criminal's conviction-acquired presumption of guilt,¹⁴⁶ the Court implies that a naked claim of factual innocence of a convicted

141. See Garvey, *supra* note 132, at 225 n.1 and accompanying text.

142. See Powell, *supra* note 132, at 1035.

143. See Donnelly, *supra* note 60, at 34.

144. An extended discussion of habeas corpus is beyond the scope of this article. For an interesting examination of habeas corpus and its development throughout American history, see James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Note, *Successive Chances for Life: Kuhlmann v. Wilson, Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455, 457-59 (1989).

145. See *supra* notes 135-36 and accompanying text.

146. See *Herrera*, 113 S. Ct. at 860.

individual, by itself, is insufficient to save the convict from execution.¹⁴⁷ *Herrera* probably resulted from a judicial desire to secure finality in criminal proceedings, thus relieving judicial docket clogging.¹⁴⁸

However, *Herrera*, by expressing a preference for judicial economy and finality over the formulation of a standard to help avoid the execution of factually innocent persons, exemplifies the attitude that it is better to risk executing factually innocent individuals than it is to compromise rules of criminal procedure. This exemplification is disturbing considering that it may not be necessary¹⁴⁹ and that it contradicts most constitutional and philosophical theories of punishment and government.¹⁵⁰ Moreover, viable

147. Chief Justice Rehnquist, for the majority, Justice O'Connor, concurring, and Justice White, concurring in the judgment, all, one way or another, claimed to support the notion that the Constitution prohibits the execution of an individual who has made a "persuasive" showing of "actual innocence." *See id.* at 869 ("We may assume . . . that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional."). The majority noted "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* at 870 (O'Connor, J., concurring). Justice White added that "I assume that a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of petitioner." *Id.* at 875 (White, J., concurring in the judgment); *see also* Hoffmann, *supra* note 135, at 832-33. These protestations, however, amount to no more than lip service to a constitutional ideal, inasmuch as *Herrera* did not provide for how much persuasiveness is required to find actual innocence. *Herrera* also failed to define what it intended by "actual innocence." *See id.* at 832. That the above Justices may have no articulable notions of what constitutes actual innocence is suggested by their use of quotation marks, no less than nine times, when referring to petitioner's claim of actual innocence.

148. *See Herrera*, 113 S. Ct. at 869 (stating claims of actual innocence are disruptive of finality in capital cases and place an enormous burden on states); *see also id.* at 874 (noting that "[a]t some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation") (O'Connor, J., concurring); *id.* at 875 (Justice Scalia expressed concern that "we not appear to make it harder for the lower federal courts, imposing upon them the burden of regularly analyzing newly-discovered-evidence-of-innocence claims . . . which . . . will become routine.") (Scalia, J., concurring).

149. It has been suggested, for example, contrary to the Justices' protestations that rigid habeas rules are needed to prevent the glut of capital habeas petitions from worsening, the number of yearly death inmate habeas filings is quite small. *See Berger, supra* note 132, at 1669 n.23, 1671 n.40 and accompanying text.

150. Explanations as to why a preference for procedural considerations over factual guilt or innocence is philosophically wrong include, IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans., 1965), *cited in* Donnelly, *supra* note 60, at 43 n.240 and accompanying text; HART, *supra* note 68, at 4-5 (including a requirement that the offender committed an actual offense among the conditions that constitute "standard" or "central" case for punishment); *id.* at 31-52 *passim* (discussing doctrines of legal responsibility and excuse, and justification for punishment being conditioned on the commission of

alternatives to *Herrera* can be modeled after halachic penal philosophy that would facilitate reduction of the judicial backlog and promote the finality of judgments while limiting the possibility that innocent individuals are judicially murdered.¹⁵¹

One such alternative is to limit use of the death penalty to even more particularly egregious crimes than those that presently warrant capital punishment; such offenses could include homicide committed in an especially heinous manner or treason in wartime. This would help to reduce potential federal habeas backlogs by limiting the number of criminals subject to government-administered death; the fewer death row inmates there are, the fewer habeas petitions will be filed. Such a limiting of capital punishment could be premised on the halachic understanding that deterrence is best promoted when capital punishment is imposed more infrequently since frequent government executions may cheapen life in the eyes of society.¹⁵²

Another option, also modeled after halachic practice, would be to differentiate between newly found exculpatory, cogent evidence submitted by death row inmates themselves, and evidence presented by others.¹⁵³ This distinction might be realized by setting a strict cap on the number of habeas petitions a convict can bring while granting a more generous allowance to the number of habeas petitions others can present on behalf of convicts. While this alternative would not be free from abuse since family members and friends will certainly continue to bring frivolous petitions to help an accused, and while it would be difficult to precisely limit the number of habeas petitions family members or friends could bring, this

crime); NOZICK, *supra* note 68, at 380-84; Joseph L. Hoffmann, *Starting From Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 161 (1992) (execution of an innocent prisoner is so offensive to basic fairness and justice that federal habeas should be available to all colorable claims of innocence, despite potential costs of such review); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1045-46 (1993) (desire for finality is not sufficient, and human fallibility is too great to overcome need for judicial review). For other reasons as to why it is inappropriate to prefer considerations of procedure over determinations of factual guilt or innocence in the area of criminal liability generally, see *Herrera*, 113 S. Ct. at 880 (actual innocence is sufficient to obtain habeas review even after a conviction in a constitutionally perfect trial) (Blackmun, J., dissenting) (quoting Justice Powell in *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)).

151. See *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder.").

152. See *supra* note 72 and accompanying text.

153. See *supra* notes 133-34 and accompanying text.

option would at least reduce such misuse. Such a reduction could be realized by limiting the habeas petitions an accused, who has the most motivation to postpone the execution, could bring absent a demonstration that the newly found evidence is competent.¹⁵⁴

Talmudic punishment could also be instructive concerning American law's notion of capital deterrence. Presently, American law promotes capital deterrence for the most part, by moderately publicizing executions.¹⁵⁵ To further and perhaps more effectively promote deterrence, American executions, reminiscent of the ancient Judaic practice of post-execution hangings, could be televised and broadcast over radio.¹⁵⁶ The visualization of executions may have more of a deterrent effect on potential capital criminals than does the mere reading or hearing about executions.¹⁵⁷

Of course, televised executions may imbue public executions with a measure of levity and callousness like public hangings did throughout American history.¹⁵⁸ Since executions could be broadcast via television and radio, individuals could watch or listen to executions without congregating in large crowds and without access to convicts,¹⁵⁹ this could be

154. One plausible standard for determining whether newly found exculpatory evidence is sufficient to merit additional capital habeas review was suggested by Justice Blackmun in *Herrera*, 113 S. Ct. at 882-83 (Blackmun, J., dissenting). Justice Blackmun's opinion, that to obtain subsequent habeas relief, a capital defendant must demonstrate that he or she is "probably, actually" innocent, is an appropriately fair standard for two reasons. First, Blackmun's suggestion favors the state insofar as the defendant bears the post-conviction burden of demonstrating his or her innocence beyond a preponderance (which is how this author understands "probably"). Second, it favors the defense inasmuch as a defendant who can make a probable, as opposed to the majority's "extraordinarily high" showing of actual innocence (which seems to suggest a measure of "beyond a reasonable doubt"), is not estopped from bringing even numerous habeas petitions.

155. See *supra* note 131 and accompanying text.

156. For general support of this proposition, as well as arguments against televising executions, see Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381 *passim* (1992).

157. See Patrick D. Filbin, *Pictures at an Execution*, 9 COOLEY L. REV. 137, 149-50 (1992); see also *Officials Hail Effort to Offer an Alternative to Jail*, N.Y. TIMES, Jan. 2, 1994, §1, at 25.

158. See LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 95-97 (describing sentiments that public executions blunt moral sensibilities and brutalize people). The 1835 New York Committee found that "public executions . . . are of a positively injurious and demoralizing tendency." *Id.* at 116.

159. Executions may have been made private to diminish the racist implications of hanging blacks (who were hanged much more often than whites) and to keep lynch mobs

facilitated by having executions on week nights when bar and club crowds are usually not as large as they are on weekends. Televised executions do not need to appreciably promote communal levity or violence to offenders.¹⁶⁰ Furthermore, televised executions could be limited to late-night hours to prevent young children from being exposed to such violence. In any event, executions could be televised on an experimental basis and could be discontinued if studies begin to indicate that such executions are losing their deterrent effect or are promoting an indifferent attitude among the public to the loss of life.

In sum, certain aspects of the ways in which American capital punishment is carried out do not imitate halachic capital penal practice—but should, and would benefit by doing so. After analysis of some of these aspects, such as the protracted delays between sentencing and execution, this discrepancy is understandable. It is desirable that American legal punishment differs from halachic punishment in its scope. While talmudic capital sanctions were levied for theocratic-based infractions,¹⁶¹ American capital punishment constitutionally may not be applied to matters of religion and belief in a manner that would excessively entangle government with religion.¹⁶² However, other aspects of American capital punishment are infirm and can be cured by halachic example. These include *Herrera's* preference for procedural integrity over a preference for establishing a convict's factual innocence, and the relative privatization of American executions.

Having compared halachic and American capital punishment practices, this article now examines the adaptability of halachic servitude to American penal law.

from harming black criminals. See Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CONST. L.Q. 413, 418-21 (1992).

160. Moreover, recent studies have confirmed that televised executions would not have a detrimental effect on the viewing public. For an example of such findings, see RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 232 (1991) (citing a 1990 study that television execution publicity had no "brutalization nor . . . deterrent" effect on public).

161. See *supra* notes 39-42, 52 and accompanying text.

162. Secular punishment for religious or otherwise faith-based crime, intended as halachic punishment to promulgate religious truth, would involve the government in "doctrinal entanglement" with religion, in violation of the constitutionally mandated separation of church and state. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1231-32 (2d. ed. 1988); see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 529-31 (1990).

B. *Indentured Servitude*

To determine whether contemporary American society can use a system modeled after halachic indentured servitude, examining whether such servitude is barred by the Thirteenth and Eighth Amendments to the Constitution is necessary. The Thirteenth Amendment prohibits slavery and involuntary servitude, except as punishment for crime, anywhere in United States territory.¹⁶³ The Supreme Court honored the punishment exception to the Thirteenth Amendment in *United States v. Kozminski*.¹⁶⁴ Specifically, the Court held that while peonage, or the threat of criminal sanction, may not be used to induce forced labor,¹⁶⁵ involuntary servitude may be imposed to either coerce compliance with a civic duty,¹⁶⁶ or as a criminal punishment.¹⁶⁷ Based on *Kozminski*, the Thirteenth Amendment does not bar American legal application of halachic penal servitude, which was solely levied for theft.¹⁶⁸ Yet, because involuntary servitude may constitute cruel and unusual punishment, halachic indentured servitude must be examined from an Eighth Amendment perspective.¹⁶⁹

163. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

164. 487 U.S. 931, 943 (1988).

165. *Id.*

166. *Id.* at 943-44.

167. *See supra* note 163.

168. The Amendment and the Civil Rights Act of 1866 were primarily intended to abolish the inhumane treatment of African slaves at the time of the Civil War. *See Kozminski*, 487 U.S. at 942; Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 383 (1993). Halachic penal servitude always required that servants be treated with the utmost humaneness, and so does not fall into the class of slavery that the Amendment was intended to eradicate. *See supra* notes 85, 90 and accompanying text.

169. It may seem inappropriate to entertain the Eighth Amendment's ban on cruel and unusual punishment regarding slavery since the author has found that the Thirteenth Amendment does not block application of halachic servitude to American criminal law. However, unlike the mandates of the Thirteenth Amendment, what qualifies as cruel and unusual punishment varies according to the "evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); 3 THE GUIDE TO AMERICAN LAW 401-02 (1983). Accordingly, this article examines whether halachic penal servitude constitutes cruel and unusual punishment by contemporary American standards of decency; halachic servitude, while permitted by the Thirteenth Amendment, may be outlawed by the Eighth Amendment.

The Eighth Amendment's¹⁷⁰ prohibition against cruel and unusual punishment outlaws primarily penalties that are grossly disproportionate to their underlying offenses¹⁷¹ or that are unnecessary and wanton in the amount of pain they inflict.¹⁷² Applying these elements to halachic indentured servitude, the unnecessary pain ban on punishment is honored by halacha. If anything, halachic penal servitude erred on the side of humane treatment as reflected in the manner in which the halacha required masters to treat their servants.¹⁷³

Nevertheless, halachic servitude probably *does* amount to cruel and unusual punishment under the proportionality test of the Eighth Amendment. This is because halachic indentured servitude was often imposed in disproportion to its underlying offense; biblical law fixed penal servitude for a period of six years, irrespective of the amount a thief had stolen. For example, two thieves who stole \$1000 and \$100,000, respectively, were sentenced to identical periods of servitude if they were unable to repay their debts. While this fixed period of service is understandable insofar as it was designed to rehabilitate the offender as much as to compensate the victim,¹⁷⁴ such disproportionality would probably render halachic penal servitude cruel and unusual under the Eighth Amendment.

Yet, although halachic indentured servitude would probably be cruel and unusual punishment as applied to American penal law, modifications of such servitude, fashioned after the halachic principle of victim compensation, may appropriately be utilized in American society. These modifications may be achieved in numerous ways. It is important, however, to appreciate that the most important aspect of halachic indentured servitude was not the specific manner in which it was implemented, but the fact that the offender was forced to compensate his victim.

First, consider a program of community service in which the respective offender is sentenced to a prescribed number of hours or days of community

170. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

171. See *Gregg*, 428 U.S. at 173 (1976); 3 THE GUIDE TO AMERICAN LAW, *supra* note 169, at 401. For historical treatment of the Eighth Amendment's proportionality requirement, see Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 844-47 (1969).

172. *Gregg*, 428 U.S. at 173. For historical treatment of what has become the Eighth Amendment's unnecessary pain element, see Granucci, *supra* note 171, at 848-52.

173. See *supra* note 79 and accompanying text.

174. See *supra* note 90 and accompanying text.

work instead of prison.¹⁷⁵ Determining the length of service by the severity of the crime would prevent any form of victim compensation from constituting cruel and unusual punishment due to a disproportionality concern. Now, such community service could consist, for example, of counseling youths against drug use or theft; such service would amount to victim compensation in cases in which an offender has “pushed” drugs onto a youth. If necessary, the offender in such a scenario would additionally have to reimburse his or her victim’s family for any treatment costs they had to bear as a result of the offender’s drug pushing. Another example of community service would apply to offenders convicted of vandalism or other forms of property damage; such offenders would be required to restore the property they damaged as a condition of parole. Yet, in instances of private theft or property damage, for example, offenders could be allowed to work off their debts to their victims according to payment schedules determined for the most part by the victims. Should a victim not desire the offender’s company or not want his or her family exposed to the criminal, the convict could compensate the victim indirectly by having a portion of his or her salary paid to the victim. A criminal who refuses to participate in such victim restitution would have a portion of his or her income garnished to the victim. The criminal who refuses to cooperate in victim compensation even at this stage, would be incarcerated as all prisoners should be who violate their parole. Finally, criminals who are not bothered by the prospect of being imprisoned or who perceive prison as a “badge of honor”¹⁷⁶ could be employed by prison chain gangs that would work them aimlessly and arduously. Such prison work would probably have to be aimless and non-productive for two reasons.

First, psychologists have determined that most people find a certain degree of satisfaction in doing any type of productive work, or work that “involves the ego.”¹⁷⁷ Inasmuch as this proposed sanction is addressed to

175. New York’s Midtown Community Court recently began to experiment with community service punishment instead of incarceration for misdemeanors. Such community service is not limited to restitution for victims of theft, but is imposed for a host of low-level crimes. See Jan Hoffman, *A Manhattan Court Explores Service-Oriented Sentencing*, N.Y. TIMES, Nov. 27, 1993, §1, at 1. Connecticut also began to offer the options of community service and home detention as alternatives to prison. A Connecticut judge, quoted in a recent *New York Times* article, averred that such sentencing alternatives save Connecticut almost \$20,000 a year per criminal. See *Officials Hail Effort to Offer an Alternative to Jail*, supra note 157, § 1, at 25.

176. See Mimi Silbert, *Wrong Way to Get Tough*, N.Y. TIMES, Jan. 29, 1994, §1, at 19 (describing how some people “dream” of being incarcerated).

177. See GORDON R. TAYLOR, *ARE WORKERS HUMAN?* 176 (1950).

the criminal who refuses to compensate his or her victim, and who is not afraid of being imprisoned, participation in a work gang must not provide the prisoner with any degree of satisfaction—it should make prison an even more hellish experience.¹⁷⁸

Second, throughout American history, labor unions have consistently opposed organized, productive prison work.¹⁷⁹ Moreover, such opposition has been successful. During the latter part of the nineteenth century when prison work was most popular, California, Illinois, Michigan, Minnesota, New Jersey, New York, and Pennsylvania either banned specific and productive prison labor, or modified existing prison work laws to accommodate the powerful political demands of organized labor unions.¹⁸⁰

In any event, these gangs should be monitored by boards to ensure that prisoners are not being worked *beyond* what they can endure, and that prisoners in such gangs are not being discriminated against on the basis of their race, religion, or national origin. Such boards should be comprised of both whites and members of minorities to prevent such boards from being or becoming partial or racist.

Regardless of what form of victim restitution is used, the essential goal of punishment for crimes like drug-pushing and theft should be that victims and communities are somehow compensated either directly or indirectly by their criminals. Criminals who do not wish to participate in such compensation should be persuaded to do so, or at the very least, serve to inspire other convicts to do so. Therefore, incarceration as a penalty for crimes which are compensable, and which does not help to remunerate victims, is inappropriate and should be replaced by victim compensation, community service oriented solutions.

Other reasons why community service, victim compensation programs are to be preferred over the incarceration of all but the most dangerous of criminals include: 1) the wages of non-incarcerated convicts can be taxed;¹⁸¹ 2) non-incarcerated criminals can support themselves;¹⁸² 3) because individuals can usually earn more outside prison than within, non-

178. While prison labor would ideally be aimless and arduous, it would probably necessitate compensation. The Fair Labor Standards Act requires that prisoners must be paid for their labor. See 29 U.S.C. § 201 (1988 & Supp. V 1993); 42 U.S.C. § 1983 (1988); see also Joseph M. Kelly, *Prison Reform in Anglo-American Law: A Comparative Discussion of the Approaches Taken by New York State and England*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 39, 44 n.29 (1993).

179. See FRIEDMAN, *supra* note 11, at 158.

180. *Id.* at 158-59.

181. See Leven, *supra* note 10, at 654.

182. *Id.*

incarcerated persons would be able to more expediently compensate their victims;¹⁸³ and 4) because of the high incidence of (gang) rape and other violence in prisons,¹⁸⁴ a sentence of imprisonment has the potential to become an experience which none but the most dangerous and hardened of criminals deserve.

C. Corporal Punishment

Before entertaining whether American law can and should adopt halachic corporal punishment, it is emphasized that halachic corporal punishment is a method of punishment in which thirty-nine lashes are given to a criminal. This is done only after the sentencing court determines through a medical exam that the convict is physically capable of enduring a flogging, and in which the flogging is monitored by impartial judges or other officials to ensure that the criminal does not receive more than thirty-nine lashes. The flogging must cease in the event a criminal becomes ill while being lashed. The author also has in mind a punishment in which the offender is punished with a device that does not leave permanent marks or scars on the body. The author does *not* suggest, for example, that flogging be administered in an overly cruel and disproportionate manner, like the caning practiced in Singapore. Such caning is generally administered in a particularly cruel fashion, across the naked buttocks with a stick that is as much as half an inch thick.¹⁸⁵ Such caning also usually splits the skin and causes permanent scarring.¹⁸⁶ Cruel and unusual punishment under the Eighth Amendment consists of penalties that are inflicted in disproportion to their underlying offenses, and punishments that inflict unnecessary and wanton pain on criminals.¹⁸⁷ Therefore, it is apparent that halachic corporal punishment amounts to cruel and unusual punishment under American law. However, this is probably true only under the proportionality prong of cruel and unusual punishment; halachic corporal punishment is probably *not* unconstitutional under the unnecessary and wanton cruelty aspect of the standard. This is because, just as halachic indentured servitude was prescribed for a usual period of six years,¹⁸⁸

183. *Id.*

184. *See supra* notes 18, 26 and accompanying text.

185. *See Six Lashes in Singapore—Caning: A Yank in a Jam*, NEWSWEEK, Mar. 14, 1994, at 29.

186. *See id.*

187. *See supra* note 172 and accompanying text.

188. *See supra* notes 87-88 and accompanying text.

halachic corporal punishment was imposed, at least for biblical offenses, according to a fixed measure of thirty-nine lashes.¹⁸⁹ Of course, this problem could easily be obviated in American practice, by American law imposing corporal punishment according to a schedule of lashings that depend on the nature of the respective underlying crime, for example, the number of lashes a criminal receives could depend on whether his or her crime is a misdemeanor or a felony.

More problematic, of course, is whether corporal punishment constitutes unnecessary and wanton infliction of pain under the Eighth Amendment. The author submits corporal punishment, at least limited to the manner in which it was halachically imposed,¹⁹⁰ does not constitute such infliction because many of the judicially accepted capital and other punishment methods currently employed by American law seem to be much more cruel than thirty-nine lashes.

Consider electrocution which has, except for the period between *Furman v. Georgia*¹⁹¹ and *Gregg v. Georgia*,¹⁹² been judicially recognized as a constitutionally permissible form of execution.¹⁹³ Such judicial notice seems to ignore the fact that, as a result of electrocution, the capital convict is usually burnt to death through suffering 2000 to 2200 volts for sixty to ninety seconds.¹⁹⁴ Electric chairs also often malfunction necessitating multiple attempts at execution with inherent pain to criminals.¹⁹⁵ It is inconceivable that halachic whipping, limited as it was to thirty-nine lashes, preceded by a medical exam to determine the physical capacity of an offender to withstand the whipping, constitutes unnecessary and wanton infliction of pain if electrocution does not.¹⁹⁶ Now, while electrocution

189. See *supra* note 95 and accompanying text.

190. See *supra* notes 102-05 and accompanying text.

191. 408 U.S. 238 (1972) (outlawing all capital punishment as it was then being imposed).

192. 428 U.S. 153 (1976) (reactivating capital punishment with certain conditions); see, e.g., *supra* notes 171-72.

193. See Lonny J. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1040 (1992) (death penalty held constitutional from 1890).

194. *Id.* at 1055.

195. *Id.* at 1056.

196. The author does not suggest that electrocution is a constitutionally acceptable execution method, which it may not be, only that compared with electrocution, halachic corporal punishment certainly cannot be considered cruel and unusual. See Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL RTS. J. 185, 186 (1993).

is the second most common method of execution in the United States,¹⁹⁷ the nature of other methods of American capital punishment underscores the fact that halachic corporal punishment cannot cogently be considered cruel and unusual applied to American penal practice.¹⁹⁸

Consider cyanide gassing. Justices Stevens and Blackmun, dissenting in *Gomez v. United States District Court for the Northern District of California*,¹⁹⁹ provided an intricate depiction of the horrible physical pain that is incident to execution by gassing. This pain is caused by hypoxia which is defined as a lack of oxygen in the body.²⁰⁰ Hypoxia typically causes severe pain in the arms, shoulders, chest, and back, similar to the pain of a massive heart attack.²⁰¹ Hypoxia is frequently accompanied by “seizures, incontinence of stool and urine, salivation, vomiting, retching, ballistic writhing . . . [and] grimacing,”²⁰² and usually lasts for eight to ten minutes or longer.²⁰³

An objection may be made that the constitutionality of painful capital punishment methods, like execution, does not of itself, legitimize corporal punishment unless one allows that corporal punishment should only be imposed as a substitute for the death penalty. This is because, while pain incident to the implementation of a *capital* sentence may be constitutionally tolerable, the infliction of even a lesser degree of pain for a non-capital offense may be “cruel and unusual.” Yet, such an objection is without merit for two reasons.

First, the pain incident to whipping would not be as severe as the pain most prisoners experience during electrocution.²⁰⁴ Second, while this article has discovered the permissibility of corporal punishment, in part, by comparing such punishment with capital punishment, it is not suggested that corporal punishment be a substitute for the death penalty—only that corporal

197. See Hoffman, *supra* note 193, at 1039 (noting that electrocution is second only to lethal injection as a method of choice for death penalty administration). Lethal injection is not mentioned in the present discussion, since lethal injection probably does not amount to cruel and unusual punishment.

198. Other methods of capital punishment practiced in the 36 states that impose the death penalty are gassing, which is used in Arizona, California, Maryland, Mississippi, and North Carolina, and shooting, which is employed in Idaho and Utah. See PATERNOSTER, *supra* note 160, at 22.

199. 112 S. Ct. 1652, 1653-56 (1992) (Stevens & Blackmun, JJ., dissenting).

200. *Id.* at 1654.

201. *Id.*

202. *Id.*

203. *Id.*

204. See *supra* text accompanying notes 194-95.

punishment be a substitute for most instances of imprisonment. Therefore, the appropriate valuation of corporal punishment is one that balances the consequences of corporal punishment with those of incarceration. Such balancing is convincing that corporal punishment, at least as administered in halachic practice, is not cruel and unusual compared with being locked up under present prison conditions.²⁰⁵ Indeed, this author would much rather be whipped even a hundred times for a crime he did not commit than be placed for any appreciable amount of time in prison.²⁰⁶

While halachic corporal punishment should theoretically therefore be constitutional, there is sufficient Supreme Court and lower court authority to the effect that American law would probably consider any amount of whipping, imposed as punishment, to be cruel and unusual by contemporary standards.²⁰⁷

Yet, American penal practice would probably have more success eradicating crime if it displayed a true sensitivity for the sanctity of life and the value of truly proportional punishment. By implicitly holding that death is a just penalty, while a life-affirming though possibly more painful punishment is not, American law teaches that life is not as important as the absence of physical pain.²⁰⁸ Moreover, because corporal punishment would most probably be considered cruel and unusual while imprisonment with its present dangers is not, the absurd nature of the contemporary American criminal justice system is emphasized.

In sum, the author suggests that, while there *should be* nothing unconstitutional with applying corporal punishment fashioned after halachic practice to American society, in all probability, American law, at least as

205. *See supra* note 18.

206. *See supra* notes 18, 26.

207. *See Rhodes v. Chapman*, 452 U.S. 337, 345 n.11 (1981) (citing *Ingraham v. Wright*, 430 U.S. 651, 669 (1977)) (corporal penalties constitute cruel and unusual punishment when imposed as punishment); *Ingraham v. Wright*, 430 U.S. 651, 689 n.5 (1977) (White, J., dissenting) (holding that bodily punishment invades constitutionally protected liberty interest); *see also* FRIEDMAN, *supra* note 11, at 313 (citing 1965 Arkansas federal district court case which held that corporal punishment, in absence of fair safeguards, is unconstitutional). The above cases deal only with whether excessive corporal punishment is unconstitutional, since the Court has understood the Eighth Amendment to reflect the "evolving standards of decency that mark the progress of a maturing society." *See Gregg*, 428 U.S. at 173 (opining that halachic whipping, if not all corporal punishment, probably would be considered cruel and unusual punishment today).

208. This sentiment is premised on the notion that where there is life, there is hope, or that life, even with great suffering, is to be preferred over even painless death. Of course, not all agree with this, as the existence of organizations like the Hemlock Society, and the recent efforts of Dr. Jack Kevorkian make clear.

decided by the Court, would not sanction any form of whipping as a form of non-cruel and unusual punishment. Excommunication, however, may be more adaptable to American society, at least in modified form.

D. *Excommunication*

It would be extremely difficult, if not impossible, to apply halachic excommunicative punishment, as it was practiced, to American penal procedure. This is because, to begin with, halachic societies were and are extremely homogenous. Most halachic communities not only tend to be closed to all non-Jews,²⁰⁹ but were and are, for the most part, exceedingly religious.²¹⁰ Jews in halachic groups also share a commitment to daily Torah study.²¹¹ More important perhaps, all segments of the Jewish community are linked; the same Jews who shop, eat, and commerce together during the week, worship together on the Sabbath.²¹² Because of this communal closeness, the Jew always has a meaningful incentive to conform to his or her society's standards; the Jew knows that if he or she does not follow his or her community's standards, or if the Jew otherwise fails to obey a commonly-known practice, he or she will be embarrassed.²¹³ On

209. See 3 BLEICH, *supra* note 72, at 82 (noting that a halachic community (*kahal* in Hebrew) is not permitted to accept non-Jews as members).

210. See JOHNSON, *supra* note 29, at 158-60 (describing aspects of and reasons for religious communal observance).

211. See GANZFRIED, *supra* note 124, at 87-88 (describing importance of daily Torah study and establishment of societies for public Torah study).

212. See 1 BLEICH, *supra* note 58, at 34 (Jewish Sabbath-observance has been honored even through hardship).

213. It seems that all societies that effectively implemented measures akin to those of the halacha to eradicate crime as well as social and theological non-conformity were grounded on comparable notions of communal closeness and religious adhesion and valued the importance of societal ostracism in maintaining that closeness. For examples, consider colonial-American communities that practiced whipping, victim-restitution, defendant-embarrassment, indentured servitude, and capital punishment. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1881-82 (1991) (stating that methods such as whipping, branding, placing in public stocks, and victim-compensation were employed in colonial America). The social intimacy of colonial communities increased fear of disgrace. *Id.* at 1912. Another example was standing in the pillory with a sign describing the offense. *Id.* at 1913; Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 AM. J. LEGAL HIST. 107, 119 (1989). Offenses made capital under the Massachusetts Body of Liberties of 1648, such as blasphemy, witchcraft, homicide, and idolatry, closely resembled or were identical to those which were capital under the halachic system. See *id.* at 119 n.73; FRIEDMAN, *supra* note 11, at 52 ("Every colony also had a mass of indentured servants."); see also *supra* notes 37, 39-

the other hand, modern American communities tend to be extremely heterogenous,²¹⁴ because of this, most American communities do not worship, interact, or share common values enough as a community to facilitate efficient excommunicative goals.²¹⁵

Another reason why halachic excommunication would probably be an unrealistic punishment under present American jurisprudence is that contemporary American society has come to reflect what Professor Lawrence Friedman calls a "culture of rights,"²¹⁶ which places a premium on individualism. While any increase in personal freedom is better than the alternative, such freedom comes at a great price; society has become acclimated to the idea that the individual is more important than the community of which he or she is a part.²¹⁷ Such an attitude hinders effective excommunication which is premised on societal cohesiveness, or the belief that members of a community have responsibilities to each other as collectives of a shared reality, perhaps even beyond totally self-centered obligations.

The fact that halachic excommunicative procedures most probably cannot be applied to contemporary American communities, however, does not instruct that such societies cannot benefit from applying practices premised on halachic excommunication. To be sure, shame was the essence of halachic excommunication and there is no reason why shaming should not be employed as a punishment in American societies. The shaming of offenders could be achieved by a range of methods, imposed individually or in combinations. For example, convicted criminals could be required to wear, or post on their property and cars, signs, or other devices describing their crimes.

One such device that could be used to both shame criminals and put the community on notice of the propensities of the offender, is the electronic "tether" that is attached to the criminal and transmits radio signals to a receiver located in a police station or court.²¹⁸ The tether may be used to shame offenders inasmuch as others who see it will be aware of its wearer's

40, 51 and accompanying text.

214. See Massaro, *supra* note 213, at 1922-23 (referring to cultural complexity and pluralism of American society).

215. Of course, most American communities sustain places of communal worship and the like. Yet, because of the heterogenous nature of American society, these places tend to be insular, and as a result do not facilitate broad societal adhesion.

216. See FRIEDMAN, *supra* note 11, at 303, 445.

217. *Id.* at 13.

218. See Nick Jackson, *Internal Exile: A Proposal for a Federal System*, 4 DET. C.L. REV. 1085, 1098 (1990).

criminal conduct. The tether could also serve to warn the public of the criminal's disposition for misconduct.

Examples of the use of cars to effect shaming include a Florida bumper sticker program that required convicted drunk drivers to affix signs to their bumper stickers or license plates identifying themselves as drunk drivers. An Oregon judge forced a repeat child molester to post signs, at least three inches high, on his residence and car, warning children that he is a convicted sex offender.²¹⁹

For greater evils, offenders could be forced to pay for newspaper advertisements in which they apologize for their crimes. Examples of such a penalty include an Ohio judge's ordering of first-time offenders to publish apologies in local newspapers and an Oregon judge's mandate that certain criminals pay for advertisements in which they apologize for their crimes.²²⁰

For even more egregious crimes, offenders could be required to describe and apologize for their offenses on television.²²¹ That these media would be effective in shaming offenders and reducing crime, is strongly indicated by the impact these media have on the American public.²²² Nevertheless, Professor Toni Massaro, in a thorough and interesting study of the causes and effects of shame throughout American and foreign cultures,²²³ has argued that shaming is an inappropriate aim of American law for basically four reasons.

First, it is impossible to reintegrate shamed offenders into mainstream society.²²⁴ Second, because of the heterogenous nature of American society, and because criminals often belong to social classes that are different from those of their victims, there will probably not be enough of

219. See Massaro, *supra* note 213, at 1886-88; see also *Driver Must Keep 'DWI' License Plate*, N.Y. TIMES, July 8, 1994, at B4 (New York Appeals Court upholds judge's sentencing repeat drunken driver offender to post sign "Convicted DWI" on license plate).

220. See Massaro, *supra* note 213, at 1888.

221. It is suggested that televised shaming should be limited to instances of particularly heinous criminal activity, since television, through its ability to reach a broad audience, has the potential to seriously impair the offender's social integrity.

222. See Fred Graham, *Keynote Address: The Impact of Television on the Jury System: Ancient Myths and Modern Realism*, 40 AM. U. L. REV. 623, 623-24 (1991) (discussing the impact of television on society); Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media*, 40 AM. U. L. REV. 631, 635 (1991) (more than half of American households read newspapers in 1990).

223. See Massaro, *supra* note 213, at 1880.

224. *Id.* at 1884 (federal and state laws do not provide for reintegrating offenders).

an audience to actualize any shaming.²²⁵ Closely related to this objection is the proposition that shaming will frequently be ineffective in achieving any measure of deterrence since many offenders come from cultures that view crime or imprisonment as worthy of praise; in certain communities, individuals who have been incarcerated are honored more than persons who have not been.²²⁶ Third, shaming, if employed excessively, may lose its effectiveness.²²⁷ Fourth, effective shaming would amount to punishment that is disproportionate,²²⁸ unequal,²²⁹ and cruel.²³⁰

The criticism that shaming would not allow for offender-reintegration is infirm since, at least in regard to the shaming techniques which have been described above, the criminal need not be outside society to be embarrassed by his or her conduct. Rather, the criminal may, like a contrite child, be considered part of his or her social "family" while expressing remorse for his or her crime.²³¹ Of course, for a criminal to not be considered an "outsider," society must be prepared to accept the convict's contrition and not regard criminals as "different from us" or as persons with whom "we" cannot genuinely relate.

The arguments that shaming is an impractical sanction, since either the only meaningful audience to the shaming, like an offender's family, will not approve of the technique, or because the criminal or her peers may consider criminal activity and punishment to be praiseworthy, fail to consider that there are other benefits to ostracizing a convict than simply embarrassing him or her. One obvious benefit is through shaming the criminal, society

225. *See id.* at 1917, 1922 (sub-cultural variations with different definitions of shame may confound effect of shaming).

226. *See id.* at 1923 nn. 216-17 and accompanying text (prison sentence may promote status in certain cultures).

227. *Id.* at 1930.

228. *See* Massaro, *supra*note 213, at 1937-38 (shaming may offend proportionality since shaming may not be experienced equally by equally culpable offenders and effective shaming may be disproportionate to crime since it may cause irreversible stigma).

229. *See id.* at 1941 (shaming is not the result of reflective, individualized sentencing).

230. *See id.* at 1942-43 (speculating that authorizing public officials to shame offenders may create an Orwellian society).

231. In American society it is not always apparent which group constitutes an offender's "family." Frequently a criminal will live in one culture, work in another, and socialize in a third. However, sign, newspaper, and television sanctions would all ensure that a malefactor is shamed in any or all of those cultures. Consider that signs listing or apologizing for criminal conduct could be large enough to cause the criminal to suffer embarrassment in his or her immediate vicinity; use of the newspaper to shame would further expose the offender to a larger audience; finally, televised apologies would ensure that a convict was shamed before *all* of his or her associates—where he or she lives, works, and plays.

is made aware of the criminal's propensities, and is thus in a better position to either avoid his or her company or to judge for itself whether he or she poses a danger to the community.²³² This societal advantage resulting from public shaming is appropriate regardless of a particular offender's personal or class attitudes toward crime and punishment.

The goal of danger avoidance also explains why even excessive shaming procedures are valuable to contemporary American society. This is because the more that criminals are exposed to the public, the more the public can protect itself from either those criminals or from such conduct in the future.²³³ It should be noted that this theory should only be used to protect society from violent criminals or from individuals who have been convicted of crimes for which there is a high prevalence of recidivism. Professor Massaro's final contention—that effective shaming would amount to disproportionate, unequal, or cruel punishment—is initially more promising, since, as Massaro notes, it has considerable constitutional implications.²³⁴ Yet the shaming techniques advocated here²³⁵ need not be disproportionate, unequal, or cruel; at least no more so than other, more conventional punishment mechanisms. In fact, in contrast to much acceptable punishment, shaming is arguably *more* crime-proportionate, *more* equal and *more* dignified. Shaming may be said to be more dignified, for example, than imprisonment, given present violent prison conditions.²³⁶ Shaming has the potential to be a most equal penalty, since various shaming techniques can be connected to respective crimes. Such a connection can ensure that all offenders of a particular class or nature are subject to the same shaming devices.

Finally, shaming may be a proportionate sanction. For example, televised shaming, with its ability to reach large audiences, could be

232. Professor Massaro cites law enforcement officials to the effect that it is this goal of societal danger-avoidance that prompts many shaming sanctions. *See id.* at 1888 n.52 (publication of offenses warn of offender dangerousness).

233. The overwhelming majority of American criminal convictions are arrived at and dealt with in relatively private conditions. *See Massaro, supra* note 213, at 1921 nn.209-10 and accompanying text. Given the high rate of recidivism, the public should have the privilege of protecting itself from future offender-specific activity. *See supra* notes 10-11 and accompanying text.

234. *See Massaro, supra* note 213, at 1936 n.262 (whether shaming violates eighth amendment ban on cruel and unusual punishment depends on whether shaming is disproportionate, unequal, and cruel).

235. *See supra* notes 218-20 and accompanying text.

236. *See supra* note 18.

reserved for the most egregious non-violent crimes.²³⁷ Newspaper shaming could be used to punish less offensive conduct. Shaming through signs, posters, and license plates could be applied to the least offensive criminal activity. Such a shaming methodology would help to ensure that a more morally culpable actor is embarrassed to a wider extent than a less offending criminal.

Other arguments that may be made against using shame as a penal device include first, unlike more conventional and private punishment methods, the public shaming of an offender may impact adversely on the offender's immediate family as well as on the criminal. Second, in the event a convict is found to be innocent, he or she will not have the opportunity to clear his or her publicly tarnished name effectively. Yet, these complaints fail to acknowledge that penology is far from an exact or ideal science, and, in any event, any adverse impact that public shaming would impose on innocent family members and friends, will often be less than the pain, suffering, loss of income, etc., the offender has caused to innocent family members and friends of the victim.²³⁸ Also, it is only advocated that shaming sanctions serve as suitable substitutes for the incarceration of non-violent offenders; it should be obvious that even mistaken shaming will not adversely impact on innocent family members and friends to the same degree that an inmate's exposure to prison violence and H.I.V. will.²³⁹

The possibility that publicly shamed persons who are later found to be innocent will have no adequate means of clearing their names is more disturbing. Yet, the proper valuation of penalties is one that allows for the unfortunate reality that *any* penalty may sometimes unfortunately be levied against a factually innocent person in our less than perfect world. Therefore, even the argument that shaming is inappropriate because it may be administered against innocent persons, fails since many people, certainly those who are aware of the realities of prison life, would rather be wrongly accused and embarrassed than unjustly incarcerated and embarrassed.

The argument of innocent shaming also loses potency when it is appreciated that measures can be taken to at least minimize such danger;

237. See *supra* note 215 and accompanying text.

238. In fact, the danger that innocent family members and friends may be harmed by even false criminal allegations may add an appropriate measure of deterrence in the fight against crime. Potential criminals may be more hesitant to commit crimes if they realize that such conduct may result in their families and friends being embarrassed.

239. See *supra* notes 18, 26.

television time or newspaper space can conceivably be provided to unjustly accused individuals.

IV. OTHER ARGUMENTS AGAINST PENAL SERVITUDE AND SHAMING

Various arguments have been examined against proposed sanctions and modifications involving capital punishment,²⁴⁰ indentured servitude,²⁴¹ corporal punishment,²⁴² and excommunication (shaming).²⁴³ Other objections may be made regarding prison servitude and the practice of forcing offenders to wear or post signs or other advertisements as part of a shaming sanction. Because of their importance, these arguments are briefly examined separately.

A. Prison Servitude

It may seem inappropriate to advocate a program of prison servitude, notwithstanding any such program's constitutionality, when it is recalled that such servitude was consistently used to grossly discriminate against African-Americans, in the American South, until well after abolition.²⁴⁴ Even more disturbing are the facts that such discrimination was done *legally*, pursuant to the punishment exception to the Thirteenth Amendment,²⁴⁵ and such discrimination not only caused African-Americans to be treated the same as or worse than animals,²⁴⁶ but inured to the benefit of such discrimination's white perpetrators.²⁴⁷ When it is further remembered that

240. See *supra* notes 144-47, 158-62 and accompanying text.

241. See *supra* notes 163-72 and accompanying text.

242. See *supra* notes 187-90 and accompanying text.

243. See *supra* notes 223-30, 234, and *infra* notes 249-53 and accompanying text.

244. See DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 263 (1989) ("[F]actionalized racist attitudes would continue after the Thirteenth Amendment (1865) abolished slavery and, if allowed . . . would justify imposing a de facto . . . slavery status."). For expressions of northern and southern racism, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 96-100 (1988).

245. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

246. WILBERT E. MOORE, AMERICAN NEGRO SLAVERY AND ABOLITION: A SOCIOLOGICAL STUDY 113 (1971).

247. See FRIEDMAN, *supra* note 11, at 95 (describing the Black Code's consequence of free black labor benefiting white employers).

African-Americans constitute the majority of the present prison population in this country,²⁴⁸ it is apparent that most of the victims of any regime of prison servitude are going to be African-Americans, and such servitude may all too easily become a sanctioned outlet for harsh racial discrimination.

Nevertheless, there are two elements to the call for prison servitude that distinguishes such punishment from that imposed on African-American convicts in the South. First, the prison labor program advocated in this article is only intended as an eleventh hour sanction to be used when all else has failed. Unless and until a time when the American criminal justice system is prepared to write-off an entire segment of our criminal society, we must be prepared to take extraordinary steps to either deter offenders from future misconduct or, at the very least, to use non-reachable convicts to deter *other* criminals from harmful activity. Arduous prison labor should be used only on those prisoners who refuse to voluntarily compensate their victims and who are not deterred by the prospect of doing time. Yet, the intent behind such punishment may be adequate only in theory to prevent such punishment from becoming a racist nightmare. Accordingly, measures would have to be taken to prevent such prison labor from becoming a pretext to discriminate against African-Americans or other minority members in the real world.

One such measure could be to establish prison boards, comprised of both whites and members of minorities, to supervise the treatment of prison laborers. These boards would also be required to monitor the physical and mental fitness of all participant prisoners to guarantee that such prisoners are not being worked *beyond* what they can emotionally and physically endure. Another condition of such labor programs would be, instead of having to work for fixed periods of time, prisoners sentenced to hard labor for refusing to participate in victim-compensation programs would be freed from such programs as soon as they agree to compensate their victims. As such, prison labor would amount to a criminal contempt sanction.

There is still another important problem that needs to be addressed regarding prison labor, however. This article has presumed that even those prisoners who desire to leave the prison chain gang and compensate their victims will be able to do so. It is more probable that, because of the diminished status ex-convicts enjoy, such prisoners will not have a plausible shot at doing so. One solution to this dilemma would be for Congress to make it illegal for employers to discriminate against ex-convicts who have been sentenced for non-violent crimes in the same way in which it is illegal

248. *Id.* at 378.

to discriminate against prospective or incumbent employees on the basis of their race, sex, national origin;²⁴⁹ whatever punishment is imposed on and endured by an offender must be the extent of that offender's debt to society—to punish an individual beyond that is excessive and unjust. Employers will no doubt resist such innovation; many such employers will be motivated by the legitimate desire to keep bad influences and potentially disruptive persons from their businesses. Congress may be the most appropriate entity to address such concern. One possible solution could be to legally differentiate between past criminal activities; employers would only be legally allowed to discriminate against those ex-cons who have done time for violent or otherwise dangerous crimes.

Another solution to the problem of ex-convicts not being able to realistically enter the work force would involve society creating jobs for these individuals in the public sector. Examples of such employment would include cleaning and otherwise rehabilitating the aesthetic appearances of highways, parks, and municipal streets. Other forms of such service might include ex-drug offenders counseling youths against drug use, ex-drunk drivers lecturing against drunk driving, and ex-thieves teaching people how to protect themselves from criminal attack. The exact form of such community service is not as important as the need for society to provide ex-convicts with paid work; employment that somehow allows ex-criminals to use their criminal experience to benefit society (as in the above examples) would be an extra bonus to the addition of many ex-offenders to the productive work force.

In summary, the implementation of prison work forces designed to employ criminals in such a manner as to make incarceration a true deterrent, must be understood as a proposed eleventh hour solution to an otherwise intolerable problem. Aimless and arduous prison labor may be, in the absence of a judicial recognition of corporal punishment, the only way to “reach” a certain segment of violent prisoners. For non-violent prisoners it should be used only on those convicts who refuse to cooperate in victim or community compensation programs. *Something* must be done to remedy the warehousing of both violent and non-violent human beings together in dangerous, rape-conducive, and disease infested environments. Yet prison labor programs must be conducted with boards comprised of members of minorities who can ensure that such programs do not become pretenses for racial discrimination. Such programs also should be viewed as contempt

249. The 1964 Civil Rights Act prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (1988 & Supp. V 1993).

sanctions that prisoners can abandon upon demonstration of a willingness to comply with victim-restitution. Finally, society must provide means by which ex-convicts can enter the work force; such rehabilitative efforts should allow ex-convicts to use their criminal backgrounds to benefit society through counseling against various criminal activities.

B. *Sign and Advertisement Shaming Sanctions*

The author has advocated shaming of non-violent criminals through having such individuals post signs on their persons, properties, and cars, advertising their offenses to the public.²⁵⁰ The intended benefits of such a sanction are that it would embarrass offenders to a degree sufficient to deter crime, and would serve to warn the public of the inherent criminal tendencies of such offenders. Numerous cogent objections may be made against the use of sign sanctions beyond those already entertained in this article.

To begin, there is significant precedent for the reality that signs, worn or posted, can easily become tools for gross discrimination. Examples of this phenomenon in its extreme form include the yellow triangle that Jews were forced to wear,²⁵¹ and the pink triangle that homosexuals were forced to wear²⁵² by the Nazis.²⁵³ What could ensure that comparable discrimination does not result from such shaming activity today?

A crucial distinction between the yellow and pink patches and the shaming sanctions advocated, is that the advertising of criminal behavior to the public would be an activity reserved for convicted criminals. As such this punishment would not be focused on a particular *class* like whites and African-Americans or on specific types of criminals like child molesters. Instead, shaming sanctions would be imposed on offenders for whom incarceration is not necessary. This would include nonviolent criminals and offenders who stand a strong chance of being rehabilitated and deterred from future misconduct through non-incapacitating means. Second, the

250. See *supra* notes 219-21 and accompanying text.

251. See JOHNSON, *supra* note 29, at 489 (Jews had to wear a star of David that was black with a yellow background and that had the word *Jude* in the middle).

252. See FRANK RECTOR, *THE NAZI EXTERMINATION OF HOMOSEXUALS* 108 (1981).

253. Signs have been used throughout history to discriminate against individuals for their crimes or status. See FRIEDMAN, *supra* note 11, at 75. A famous literary casualty of such treatment is Hester Prynne who is forced, in Hawthorne's *The Scarlet Letter*, to wear an "A" to advertise her adultery. *Id.* at 40; see also Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing--Are They Constitutional?* 93 DICK. L. REV. 759, 774 (1989).

shaming sanctions entertained in this article would last for legislatively fixed periods and would, therefore, help reduce the likelihood of non-offense specific discrimination since such discrimination usually occurs indefinitely.

It may still be objected that even shaming sanctions that are *initially* imposed on criminals may come to be inflicted on innocent minority members. My proposals, however, are made with the assumption they will only be used in an environment that is respectful of human rights and that is opposed to invidious discrimination.

V. CONCLUSION

This article has presented an overview of halachic and American punishment methods and suggested how American law can benefit from halachic precedent in its losing battle against crime. It has been posited that halachic punishment was geared to rehabilitating offenders, compensating crime victims, and deterring crime. To be sure, halachic sanctions were based on the notion that all crime entails sin which must be expiated through punishment, and halacha viewed incapacitation as an ineffective way to control crime. Penalties designed to shame and impose responsibility on offenders were preferred over imprisonment.

Another reason why halachic societies probably did not have the crime problems that modern American communities have, is halachic societies were more community oriented, with neighbors enjoying shared beliefs and values. That reality also helps explain why certain halachic punishments, like excommunication, may be unsuitable for American society; unlike the homogenous halachic culture, most of contemporary American society is composed of diverse, heterogenous communities. Other halachic penal methods, like servitude and lashing, are not realistic alternatives for American penal practice because such practices would probably be judicially considered "cruel and unusual." However, while exact copying of halachic punishment methods by the American legislature and judiciary would be inappropriate, American society can benefit from talmudic penology by adapting sanctions modeled after the *principles* of halachic punishment.

American law could emulate halachic deterrence in its capital punishment methodology by publicizing executions and by limiting the death penalty to especially egregious capital offenses. American law could copy halachic notions of fairness and humaneness in its habeas law by allowing even questionable claims of factual innocence to be presented on behalf of a capital defendant, even after the defendant is convicted. American law could imitate halachic excommunication by shaming offenders—on a very local level through requiring nonviolent criminals to

wear and post signs describing their offenses and to a broader degree by forcing criminals to apologize to their victims and communities through the mass media. Halachic servitude could inform American penology, through the implementation of community-service programs whereby criminals could compensate their victims and communities for the adverse consequences of their crimes. Prisoners who refused to participate in such programs could be, through prison work programs, for example, encouraged to do so.

Numerous opportunities have been taken here to present the reality that prisons are violent, rape-conducive, and disease-infested environments that are grossly inappropriate for all but the most hardened and “unreachable” of criminals. Prisons do not rehabilitate offenders nor deter crime. To the contrary, prisons arguably *promote* criminal activity by perpetuating atmospheres where non-violent individuals are made violent and embittered and where hopelessness dominates. The author’s thesis that American society can compromise its crime problems through the application of halachic principals, however, may be no more than a naive optimism. This is because crime is, ultimately, probably something that the police, judges, and prosecutors cannot eradicate by themselves. Effective crime reduction must come from a voluntary and automatic compliance with law²⁵⁴ that is promoted through the view that societal responsibilities are as, if not more important, than individual rights, and that crime is a communal problem; from which all segments of society suffer. Successful crime reduction also requires that our criminal justice professionals have the courage to dismantle outmoded and ineffective punishment methods, like incarceration, for all but the most violent or repeat offenders, and replace them with more practical, humane measures. Otherwise, our crime problems are destined to remain with us.

254. See Charles E. Silberman, *Truth and Justice: Why the Best Hope In a 'War' on Crime May Be a Stalemate*, N.Y. TIMES, Jan. 30, 1994, § 4, at 1.

The Right of Publicity: A Matter of Privacy, Property, or Public Domain?

Kenneth E. Spahn*

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I. OVERVIEW

This article discusses the right of publicity, beginning in Part II with the difficulty in defining a legal right of publicity, and the resulting various legal doctrines upon which the right has been analyzed. Part III discusses four types of actions commonly involving publicity rights. Part IV presents a theoretical background, discussing four of the legal theories under which the right of publicity has been analyzed, and also the underlying policies common to copyright and publicity right protection. The application of copyright law to right of publicity cases is discussed in Part V, and Part VI discusses the two primary limitations to the right of publicity doctrine: descendibility and First Amendment conflicts. Part VII then ends with a summary, conclusion, and recommendation.

II. INTRODUCTION

The right of publicity is, basically, the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others.¹

1. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978). The right of publicity has also been described as: "a valuable proprietary right, a kind of property right in [a person's] name and image, and . . . an exclusive right to market it, to assign it, or to benefit from its use commercially." *Memphis Dev. Found. v. Factors, Etc., Inc.*, 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977), *aff'd*, 578 F.2d 1381 (6th Cir. 1978); the right giving a person "personal control over commercial display and exploitation of his personality and the exercise

Disputes involving right of publicity issues commonly arise out of the unauthorized commercial exploitation of a celebrity's name or likeness in advertisements, endorsements, or commercial merchandising of items such as T-shirts or posters.

The right of publicity has not yet been fully developed or uniformly applied as a legal doctrine. The right is not specifically recognized by the United States Constitution or the Bill of Rights, nor is there any federal codification to govern it, such as the federal copyright, trademark, and patent laws. In the absence of such federal guidelines, courts must then look to state statutes and common law to decide right of publicity cases. Many states, however, do not recognize or even address the right of publicity statutorily, and may have no substantive common law on the topic. In addition, there are few secondary sources, such as treatises, restatements, or uniform codes for the courts to turn to for guidance.² Courts are thus left with minimal standards by which to interpret publicity rights, and must often turn to other states' common law. The result is that courts are often free, or forced, to create new law, which leads to inconsistency and a lack of predictability regarding the right of publicity.

Protecting a person's likeness does not fit neatly into one specific legal category, as it involves elements of tort, copyright, property, contract, and labor law. It must also be weighed against First Amendment rights. Although the right of publicity has traditionally been analyzed under the

of his talents." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977); "the publicity value of one's name or likeness." *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978); "in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph[s] . . . here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.* 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); and "the right to be free from having one's name, likeness, and identifying characteristics expropriated for commercial purposes without consent." J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179 (1987).

2. Nimmer & Nimmer's six-volume treatise on copyright law devotes only one small subsection, under "invasion of privacy and publicity." MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.01[B][c] (1994). Neither Dean Prosser's nor Dean Keeton's renowned treatises on torts address the matter directly. *See* W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* (5th ed. 1984 & Supp. 1988) [hereinafter *PROSSER & KEETON*]; WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971). There is, however, one treatise which focuses directly on the right of publicity. *See* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY & PRIVACY* (1994).

common law right of privacy,³ courts and plaintiffs have also applied other bodies of law, such as unfair competition,⁴ misappropriation,⁵ dilution,⁶ and contract⁷ in order to recognize a protectable interest in the monetary value of names and personal features. These factors further contribute to the lack of uniformity or consistency in publicity right cases.

III. FOUR TYPES OF ACTIONS WHERE THE RIGHT OF PUBLICITY ARISES

Right of publicity issues usually involve at least one of four general types of infringements: 1) appropriation of one's name or likeness for advertising or endorsement; 2) unauthorized use of one's name or likeness on commercial products; 3) appropriation of one's unique style or characteristics; and 4) appropriation of one's performance.

A. *Appropriation for Advertising or Endorsement*

Right of publicity infringements commonly arise when a celebrity's name or likeness is used, without authorization, to advertise or endorse a product or service. This type of exploitation results in several forms of harm:

- 1) It creates a false impression that the celebrity endorses the product or has a business relation with the product or manufacturer;
- 2) It may inhibit the celebrity's ability to obtain other endorsement opportunities, especially from competing brands;
- 3) It may undermine the celebrity's credibility and, therefore, his or her marketability, especially if the celebrity becomes overexposed, or if the advertisement or the product itself arouses controversy or negative feelings;

3. See Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); see also *infra* text accompanying notes 54-64.

4. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Wyatt Earp Enter., Inc. v. Sackman, Inc.*, 157 F. Supp. 621 (S.D.N.Y. 1958); *Lone Ranger, Inc. v. Currey*, 79 F. Supp. 190 (M.D. Pa. 1948); *Fisher v. Star Co.*, 231 N.Y. 414, *cert. denied*, 257 U.S. 654 (1921).

5. See, e.g., *Zacchini*, 433 U.S. 562.

6. See, e.g., *Edgar Rice Burroughs, Inc. v. Manns Theatres*, 195 U.S.P.Q. (BNA) 159 (C.D. Cal. 1976).

7. See, e.g., *Lugosi v. Universal Pictures*, 603 P.2d 425, 433 (Cal. 1979); *infra* text accompanying notes 65-71; see also *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C. Mass. 1894); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

4) It unjustly enriches the infringer, who reaps the benefits of the celebrity's good will or fame without paying for that benefit;

5) It penalizes those sponsors who do legitimately pay for the celebrity's endorsement;

6) Most important (to the celebrity), it deprives the celebrity of fees and royalties.

A typical example of an unauthorized use of a celebrity's name in an advertisement is *Hogan v. A.S. Barnes & Co., Inc.*,⁸ where the defendant used, without authorization, golfer Ben Hogan's name and picture to help promote sales of its book. Although Mr. Hogan was successful in his challenge,⁹ other celebrities have not always received such protection. In *Carson v. National Bank of Commerce Trust & Savings*,¹⁰ for instance, comedian Johnny Carson attempted to prevent a Nebraska bank from using his name in an advertisement promoting a trip to Las Vegas. Although the bank had clearly appropriated Carson's name without his permission, Carson was still denied relief, because Nebraska law did not yet recognize a right of publicity.¹¹ Johnny Carson had better luck, however, in a later case, *Carson v. Here's Johnny Portable Toilets, Inc.*,¹² where he sought to enjoin the defendant's product name and marketing slogan, "Here's Johnny." The United States Court of Appeals for the Sixth Circuit upheld Carson's publicity rights, finding the defendant's use of "Here's Johnny" constituted an appropriation of Carson's identity.¹³

These two Johnny Carson cases exemplify the lack of consistency and predictability in right of publicity cases. The Nebraska bank blatantly used Carson's name and picture in its advertisements and brochures, which infringed upon Carson's right of publicity far more directly and extensively than the toilet company's use of the "Here's Johnny" slogan, which never even used Carson's name or picture. Carson was, however, unsuccessful against the bank, yet found relief against the toilet company. This apparent dichotomy exists not because of the factual or legal issues involved, but merely because the right of publicity was recognized as a legal cause of action in Michigan, but not in Nebraska.

8. 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957).

9. Mr. Hogan prevailed on his claim. *Id.* at 320.

10. 501 F.2d 1082 (8th Cir. 1974).

11. *Id.* at 1084-86.

12. 498 F. Supp. 71 (E.D. Mich. 1980), *vacated*, 698 F.2d 831 (6th Cir. 1983).

13. *Carson*, 698 F.2d at 836. Although Michigan law had not yet recognized the right of publicity, the Sixth Circuit, in remanding to the district court, *flushed away* the lower court decision, predicting that Michigan courts would adopt the right. *Id.* at 834, n.1.

B. *Unauthorized Use of a Name or Likeness on a Commercial Product*

Right of publicity infringements frequently involve the unauthorized use of a celebrity's name or likeness on commercial products such as T-shirts or posters. The first case to recognize the right of publicity, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,¹⁴ involved such commercial memorabilia. Other leading right of publicity cases have involved unauthorized commercial memorabilia such as statuettes¹⁵ and memorial posters of Elvis Presley,¹⁶ and plastic busts of Martin Luther King, Jr.¹⁷

C. *Appropriation of a Person's Unique Style or Characterizations*

Right of publicity protection may go beyond a person's name and likeness, and extend to his unique character, characterization, or personal style. This recognition of a person's unique style differentiates publicity rights from other more tangible intellectual properties such as copyrights, trademarks, and patents.¹⁸

The first case to apply the right of publicity to a performer's style was *Estate of Presley v. Russen*,¹⁹ where Elvis Presley's estate succeeded in stopping the defendant's stage production, "The Big El Show," which featured an Elvis impersonator who duplicated an Elvis concert.²⁰ Less than six months after the *Russen* decision, the United States District Court for the Southern District of New York recognized protection of the Marx Brothers' characters in *Groucho Marx Productions, Inc. v. Day & Night Co.*,

14. 202 F.2d 866, 868 (recognizing a common law right of publicity in photographs, specifically, photos on trading cards of professional baseball players).

15. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

16. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *rev'd*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *see infra* text accompanying notes 150-51.

17. *Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd*, 694 F.2d 674 (11th Cir. 1983); *see infra* text accompanying note 156.

18. *See* 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

19. 513 F. Supp. 1339 (D.N.J. 1981).

20. *Id.* at 1348. The plaintiffs sought to prevent the defendant from using the name "The Big El Show," as well as "the image or likeness or persona of Elvis Presley [and any of the various names by which Presley is popularly known] on any goods, in any promotional materials, in any advertising or in connection with the offering or rendering of any musical services." *Id.* at 1344.

Inc.,²¹ where a satirical musical play imitated the famous comedians. The court held the defendant's play was an infringement of the Marx Brothers' unique characteristics and style,²² concluding the play had "reproduced [the Marx Brothers'] manner of performances by imitating their *style and appearance* . . . [thus] infring[ing] the plaintiff's *rights of publicity* in the Marx Brothers characters."²³ The Laurel and Hardy characters have also received similar protection under the right of publicity. In *Price v. Hal Roach Studios, Inc.*,²⁴ the court specifically recognized the actors' publicity rights included the impersonation of their physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their voices for advertising or commercial purposes.²⁵ The *Price* holding was later relied upon in a similar case, brought by the same plaintiff to prevent unauthorized imitation of the Laurel and Hardy characters in the television show *Stan 'n Ollie*.²⁶ The court granted the injunction, again recognizing the publicity rights in the comedians' appearances and mannerisms.²⁷ California courts have also recognized the legal protection of a celebrity's style as far back as 1928, when an appellate court prevented an unauthorized imitation of Charlie Chaplin's distinct "characterizations and expressions."²⁸

More recently, courts have extended publicity rights to grant protection against unauthorized *vocal* imitations. Singer Bette Midler, for example, successfully challenged an unauthorized imitation of her voice used in a Ford Motors commercial,²⁹ and a vocal imitation of singer Tom Waits was likewise found to infringe upon his publicity rights.³⁰ It is interesting to note how the right of publicity has evolved to protect against vocal imitation, when as recently as 1971 the right of publicity did not protect

21. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982).

22. *Id.* at 493-94.

23. *Id.* at 494 (emphasis added).

24. 400 F. Supp 836 (S.D.N.Y. 1975).

25. *Id.* at 843.

26. *Price v. Worldvision Enter., Inc.*, 455 F. Supp. 252 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979).

27. *Id.* at 256.

28. *Chaplin v. Amador*, 269 P. 544 (Cal. Ct. App. 1928). *But see* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 712 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (denying singer Nancy Sinatra's claim that the defendant's television commercial, which used the music to "These Boots Are Made For Walkin'," imitated her dress, mannerisms, and style of delivery).

29. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied sub nom.* *Midler v. Young & Rubicam, Inc.*, 112 S. Ct. 1513-14 (1992).

30. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

Nancy Sinatra against the blatant imitation of her voice, dress, style, and mannerism.³¹

These holdings demonstrate how the right of publicity may be extended beyond the actors' physical traits, to protect their acting styles or fictional creations. These cases also exemplify how courts may turn to the right of publicity in order to find some protection for performers, perhaps confusing the creators with their characterizations, because other bodies of law, such as copyright or trademark, do not provide adequate protection.³²

D. *Appropriation of an Actor's Performance*

The fourth and least common type of publicity right infringement involves the unauthorized use or appropriation of the actor's live performance *itself*, rather than his or her unique style, as discussed *supra*. Because statutory copyright law does not protect a live performance which has not been fixed in a tangible medium of expression, performers turn to the right of publicity to find protection for their performances.³³ This type of appropriation was at issue in the first and only right of publicity case decided by the United States Supreme Court, *Zacchini v. Scripps-Howard Broadcasting Co.*³⁴ Plaintiff Hugo Zacchini, a human cannonball performer, alleged that the defendant had usurped his right of publicity by airing a fifteen-second broadcast of his performance on a local news telecast without his permission.³⁵ The Supreme Court ruled in favor of Mr. Zacchini, recognizing a right of publicity in an actor's performance, and further recognizing that this right was violated by the unauthorized broadcast of the performance.³⁶

Zacchini stands apart from most right of publicity cases, in that: 1) it was the first right of publicity case to be decided by the United States

31. *Sinatra*, 435 F.2d at 712 (denying relief despite the defendant's use, in a tire commercial, of a singer whose voice, style, and even boots were deliberately intended to imitate Sinatra's).

32. The usual rationale is that human characterizations cannot be copyrighted apart from some "work." See 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

33. Although section 106 of the Copyright Act of 1976 lists the right to perform a work as one of the exclusive rights held by an owner of a copyright, statutory copyright law does not protect works which are not fixed in a tangible medium of expression, such as live choreographic works, jazz improvisations, and other "unfixed" performances. Thus, if the work is the performance, it may not be protected by statutory copyright. See 17 U.S.C. § 301 (1988).

34. 433 U.S. 562.

35. *Id.* at 563-64.

36. *Id.* at 574-76.

Supreme Court; 2) it is still the only such United States Supreme Court case to date; 3) it involved appropriation of a live performance, while most publicity right cases involve infringement of a person's name, likeness, or style; 4) Mr. Zacchini was relatively unknown, where almost all other cases involve well-known celebrities; 5) Mr. Zacchini was alive and asserting his own publicity rights, whereas many other cases are brought by the estate or license holder of a celebrity who is deceased;³⁷ and 6) the First Amendment was more at issue than in most publicity cases, because this infringement involved a newscast, rather than a commercial exploitation.³⁸

IV. THEORETICAL BACKGROUND: FOUR PUBLICITY RIGHT THEORIES AND THE UNDERLYING POLICIES BEHIND COPYRIGHT AND PUBLICITY RIGHT LAW

A. *Lugosi v. Universal—Four Right of Publicity Theories*

The right of publicity was thoroughly analyzed in the 1979 landmark case, *Lugosi v. Universal Pictures*,³⁹ where the California Supreme Court proffered the four models under which the right of publicity may be analyzed. Because *Lugosi* still stands as the seminal right of publicity case,⁴⁰ a more in-depth analysis is warranted.

Bela Lugosi portrayed Count Dracula in Universal Pictures' 1931 motion picture, *Dracula*. Although the character of Dracula has been

37. Most leading right of publicity cases have been brought by the estate of a deceased celebrity, including Bela Lugosi, Elvis Presley, The Marx Brothers, Laurel and Hardy, Martin Luther King, Jr., Charlie Chaplin, and Agatha Christie. See descendibility discussion, *infra* text accompanying notes 138-56.

38. The First Amendment issue is addressed in Part VI of this article. See *infra* text accompanying notes 157-87. For a more detailed analysis of the *Zacchini* case and its implications, see generally Thomas H. Hannigan, Jr., *First Amendment Theory Applied to the Right of Publicity*, 17 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 339 (1979); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983).

39. 603 P.2d 425.

40. For a more in-depth analysis of *Lugosi* and its progeny, see generally, Jon B. Eisenberg, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 17 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 311 (1979); David R. Ginsberg, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 UCLA L. REV. 1103 (1975); Miles P. Zatkowsky, *Dracula Draws Blood from the Right of Publicity*, 15 SUFFOLK U. L. REV. 181 (1981); Stephen F. Rohde, *Dracula: Still Undead; (Unresolved Right-of-Publicity Questions Are Sure to Haunt the Courts)*, CAL. LAW., Apr. 1985, at 51-55.

portrayed in many different fashions by many different actors,⁴¹ it was Lugosi's portrayal which has defined the popular image of Dracula, and left the most memorable impression.⁴² During the early 1960s, Universal began licensing the Count Dracula character to various commercial merchandisers, resulting in a plethora of T-shirts, masks, toys, models, lunchboxes, and other items bearing Lugosi's distinct image of Dracula. Lugosi's estate⁴³ then sought injunctive relief and recovery of Universal's profits, claiming Universal was exploiting a valuable property right belonging to Bela's estate.⁴⁴ In determining whether the plaintiffs could assert a postmortem right to Bela's portrayal of the Dracula character, the Supreme Court of California delineated four different theories under which the right of value⁴⁵ to one's name and likeness may be analyzed: 1) property; 2) privacy; 3) work product; and 4) copyright.

1. Property—The Trial Court's View

The *Lugosi* trial court interpreted the right of publicity to constitute a property right.⁴⁶ The property theory recognizes the right to one's commercially valuable name and likeness as a possessory right, which accrues as the fruits of one's labor.⁴⁷ This right, therefore, belongs to its creator, who has the right to profit from, as well as manage and control the likeness and image.

The property theory was also the basis for the court's decision in *Haelan*,⁴⁸ the first case to recognize the right of publicity. *Haelan*

41. This includes Gary Oldman's portrayal in Columbia Pictures' recent (Fall 1992) Oscar-winning release, *BRAM STOKER'S DRACULA*.

42. LES DANIELS, *LIVING IN FEAR: A HISTORY OF HORROR IN THE MASS MEDIA* 130 (1975). The Lugosi character, with slicked-back black hair, rich Hungarian accent, and piercing eyes differs tremendously from the white-haired, shabby, mustachioed old man described by *DRACULA*'s author, Bram Stoker. *Id.* See also IVAN BUTLER, *HORROR IN THE CINEMA* 42 (2d ed. 1970).

43. Bela died in 1956. Apparently the actor, unlike his character, could not come back to assert his rights. Lugosi's widow, Hope Linninger Lugosi, and son, Bela George Lugosi, were awarded all causes of action belonging to the estate.

44. *Lugosi v. Universal Pictures Co., Inc.*, 172 U.S.P.Q. (BNA) 541, 542 (Cal. Super. Ct. 1972), *rev'd*, 139 Cal. Rptr. 35 (1975), and *vacated*, 603 P.2d 425 (Cal. 1979).

45. Dean Prosser is credited with creating the "right of value" term, which was used by the *Lugosi* majority. *Lugosi*, 603 P.2d at 428; see PROSSER & KEETON, *supra* note 2, § 117, at 854.

46. *Lugosi*, 172 U.S.P.Q. (BNA) at 551.

47. See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

48. *Haelan*, 202 F.2d at 866.

represents a landmark precedent in recognizing a proprietary right of publicity distinct from a privacy right:

[I]n addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph[s] . . . [H]ere, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a "right of publicity."⁴⁹

New York courts have followed the *Haelan* decision, finding the right of publicity to be a proprietary right.⁵⁰ As the *Lugosi* court recognized,⁵¹ a very significant consequence of labeling the right of publicity as a property right is that it confers two additional rights: assignability⁵² and descendibility.⁵³

2. Privacy—The Appellate Majority's View

Right of publicity issues have most often been construed under the right of privacy doctrine.⁵⁴ Rather than emphasizing the commercial right to control one's image, as the property theory does, the privacy model⁵⁵ mainly protects a person's "right to be let alone."⁵⁶ The right of privacy theory was first conceived in an 1890 law review article,⁵⁷ and was later

49. *Id.* at 868 (emphasis added).

50. *See, e.g., Price v. Worldvision*, 455 F. Supp. at 257; *Price v. Hal Roach*, 400 F. Supp. at 844.

51. *Lugosi*, 172 U.S.P.Q. (BNA) at 551; *see also Price v. Hal Roach*, 400 F. Supp. at 844.

52. *See, e.g., Haelan*, 202 F.2d at 867.

53. *See, e.g., Russen*, 513 F. Supp. at 1355. The descendibility issue is discussed in Part VI of this article; *see also infra* text accompanying notes 138-56.

54. *See, e.g., Factors*, 579 F.2d at 220; *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Roberson v. Rochester Folding-Box Co.*, 64 N.E. 442 (1902) (finding the use of a young lady's picture to advertise a product (flour), without her knowledge or permission, violated her right of privacy).

55. *See generally*, NIMMER & NIMMER, *supra* note 2, § 1.01[B]; Gordon, *supra* note 3; Victor A. Kovner et al., *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims*, in COMMUNICATIONS LAW 1994 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 400, 1994).

56. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

57. *Id.* The right of publicity was not judicially recognized, however, until 1953, in *Haelan*, 202 F.2d 866. *See* Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1581 (1979) [hereinafter Felcher

expanded by Dean Prosser, who, in his 1960 law review article, identified four distinct kinds of intrusions into a plaintiff's privacy interests which could be protected:⁵⁸

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁵⁹

The *Lugosi* appellate court relied upon the privacy model, which the Supreme Court of California majority also adopted. This analysis proved monumental, in that it directly contradicts the *Haelan* conclusion that the right of publicity is completely separate and distinct from the right of privacy.⁶⁰ The *Lugosi* interpretation results in certain benefits to the plaintiff, as privacy actions, under tort law, can offer several advantages over property law. As a tort action, a privacy infringement allows for punitive and emotional damages which may not be available through other remedies. It also provides an already developed body of case law, as well as numerous treatises and restatements⁶¹ which may provide some consistency and predictability to an otherwise murky area of law.

The advantages of the right of privacy analysis are, however, outweighed by its inherent disadvantages. First, and perhaps most important, the privacy theory does not recognize publicity rights as descendible. Under the privacy model, the exploited person's privacy rights terminate upon his or her death, and third parties, including family members, may not claim a legal interest in the deceased's emotional or dignitary interests. This weakness is particularly apparent in the right of publicity context, which tends to be dominated by actions brought by the estates of deceased celebrities.⁶²

& Rubin I].

58. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); see also PROSSER & KEETON, *supra* note 2, § 117, at 851.

59. Prosser, *supra* note 58, at 389. The fourth interest listed is the one most relevant to right of publicity actions.

60. *Haelan*, 202 F.2d at 868; see *supra* text accompanying notes 48-53.

61. See, e.g., PROSSER & KEETON, *supra* note 2.

62. See *supra* note 37. The descendibility issue is discussed further in part VI of this article; see also *infra* text accompanying notes 138-56.

Second, the “invasion of privacy” rationale may not be appropriate for celebrities, who thrive on public exposure and publicity. Infringers are quick to invoke a waiver defense, arguing that public figures assume the risk of exploitation and waive their privacy rights as part of the price of entering the public arena. The waiver defense does have some merit in certain circumstances, particularly in slander and libel cases,⁶³ but should not be used to deny anyone protection from the unauthorized exploitation of their name or likeness.

A third inherent flaw lies within the general policies underlying the two doctrines. The right of privacy is primarily meant to protect *personal* interests (i.e., a person’s mental and emotional well-being), whereas the right of publicity is, or should be, primarily intended to protect the person’s *proprietary* and *financial* interests. The privacy theory may therefore not be the appropriate way in which to interpret publicity rights.

A fourth potential weakness is that the privacy theory would deny human owners the ability to assert a right of publicity for property which has no privacy right, such as an animal, inanimate object, or institution. Yet another disadvantage is that under the privacy model, a person’s publicity rights are considered dignitary, rather than proprietary, therefore denying one the ability to transfer or assign publicity rights to others.

The inherent flaws of determining publicity rights under the right of privacy model have spawned a continuous flurry of criticism over the *Lugosi* ruling.⁶⁴ By classifying the right of publicity as a privacy right, the *Lugosi* majority has drastically limited the availability of right of publicity actions, as it essentially denies standing to all estates of deceased persons.

3. Work Product—The Concurrence’s View

The third theory elicited by the *Lugosi* court was the work product model, as espoused by Justice Mosk in his concurrence. Under the work product analysis, an actor is an employee of the studio, and is paid to create

63. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *cert. denied*, 459 U.S. 1226 (1983); *Martin Luther King*, 508 F. Supp. at 863; see also PROSSER & KEETON, *supra* note 2, § 113, at 805; RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.06 (1994).

64. See *Haelan*, 202 F.2d at 868; see also Felcher & Rubin I, *supra* note 57, at 1588-89; Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980) [hereinafter Felcher & Rubin II]; Ginsberg, *supra* note 40; Gordon, *supra* note 3, at 555-57; Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204-10 (1954); Lionel S. Sobel, *Count Dracula and the Right of Publicity*, 47 L.A.B. ASS’N BULL. 373, 377-78 (1972); Zatkowsky, *supra* note 40, at 181-90; Rohde, *supra* note 40.

a product—the portrayal of a character, which then belongs to the employer, rather than the actor. According to Justice Mosk, Lugosi did not obtain any proprietary rights in his Dracula image because the image of the *character* Count Dracula, rather than the *actor* Bela Lugosi, was marketed,⁶⁵ and an employee's creation in the course of his employment belongs to the employer, pursuant to the California Labor Code.⁶⁶ Lugosi's portrayal of Dracula was part of his employment contract with Universal, who owned the fruits of the employee's labor⁶⁷ under California labor law. As Justice Mosk concluded, "[m]erely playing a role . . . creates no inheritable property right in an actor"⁶⁸

Justice Mosk did, however, recognize that an actor may claim a right to the exclusive use of his portrayal of a character when the actor also creates that character. Thus, an inheritable property interest will vest for an actor's *creation* of a marketable character, but not for mere *performance*.⁶⁹ This philosophy has been used to protect the characters created by performers such as Groucho Marx⁷⁰ and Laurel and Hardy.⁷¹

4. Copyright—The Dissent's View

The fourth method of interpreting the right of publicity involves analyzing it under copyright law. The *Lugosi* dissent, lead by Chief Justice Bird,⁷² adopted this approach, concluding that "the right of publicity recognizes an interest in intangible property similar in many respects to

65. *Lugosi*, 603 P.2d at 431-34 (Mosk, J., concurring).

66. *Id.* at 433. California labor law provided that: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired . . . during or after . . . the term of his employment." *Id.* (citing CAL. LAB. CODE § 2860 (West 1971)).

67. *Id.* at 433. Universal's employment contract with Lugosi gave Universal the right to exploit "any and all of the artist's acts, poses, plays and appearances of any and all kinds . . . [and] to use and give publicity to the artist's name and likeness, photographic or otherwise . . . in connection with the advertising . . . of [the film]." *Id.* at 426-27 n.2.

68. *Lugosi*, 603 P.2d at 432. The trial court rejected the work product argument, finding Universal had contracted for Bela's performance, which was separate and apart from the commercial rights to his name and likeness, for which Universal had *not* contracted. *Lugosi*, 172 U.S.P.Q. (BNA) at 543-44.

69. *Lugosi*, 603 P.2d at 432.

70. *Groucho Marx Prods.*, 523 F. Supp. at 485; *see supra* text accompanying notes 21-23.

71. *Price v. Hal Roach*, 400 F. Supp. 836; *see supra* text accompanying notes 24-27.

72. Chief Justice Bird was joined in her dissent by Justices Tobriner and Manuel.

creations protected by copyright law, [and therefore] that body of law is instructive.”⁷³

A major advantage for plaintiffs through the copyright analogy is that, unlike the privacy model, the right of publicity becomes descendible unto the estate of the owner.⁷⁴ Justice Bird suggested this monopoly on the control of a person’s name and likeness should fall into the public domain after a fixed period, as does a copyright, and further suggested adopting the same term of “life of the author and fifty years after the author’s death” of copyright law as the standard time period.⁷⁵ Furthermore, the underlying policies of copyright law are compatible with the right of publicity, as discussed below.

B. *Underlying Policies of Copyright and Publicity Right Law*

1. Overall Goals and Objectives

Adopting the copyright model to the right of publicity reflects the underlying policy behind copyright law: to promote creative expression⁷⁶ while accommodating the free exchange of ideas and information.⁷⁷ Copyright law attempts to realize this goal through two general objectives: providing economic incentives to the creator, and preventing unjust enrichment. In deciding right of publicity cases, especially when adopting the copyright approach, courts give careful attention to these two objectives, balancing them against the countervailing interests of promoting free trade and preserving First Amendment protection.⁷⁸

73. *Lugosi*, 603 P.2d at 446 (Bird, C.J., dissenting).

74. Part VI of this article discusses the descendibility issue. *See also infra* text accompanying notes 138-56.

75. *Lugosi*, 603 P.2d at 446-47 (Bird, C.J., dissenting); *see also* 17 U.S.C. § 302(a) (1988).

76. U.S. CONST. art. I, § 8, cl. 8 (intending “[t]o promote the Progress of Science and useful Arts”).

77. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180-93 (1970).

78. *See, e.g., Zacchini*, 433 U.S. at 575-77; *see also supra* text accompanying notes 34-38 and *infra* notes 163-64.

2. Economic Incentive

The primary impetus behind copyright law is to encourage creative endeavor by providing economic incentives to the creator.⁷⁹ This rationale has likewise played a prominent role in most right of publicity cases. In *Zacchini*, the United States Supreme Court recognized the public interest benefit of providing financial incentives to encourage artists and entertainers in pursuing creative endeavors⁸⁰ and continuing to perform.⁸¹ The Court specifically recognized “the State’s interest [in recognizing a right of publicity] is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors”⁸² By recognizing the publicity rights in Mr. Zacchini’s performance, the Court protected his drawing power and promoted his incentive to perform.⁸³

Other courts have also specifically recognized the economic incentive policy behind protection of the right of publicity. In *Lugosi*, for example, Chief Justice Bird noted how the right of publicity “creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition.”⁸⁴ The Sixth Circuit reached a similar conclusion in *Memphis Development*, discussed in Part V, holding that “[t]he basic motivations [of performance] are . . . the desire to receive the psychic and financial rewards of achievement. . . .”⁸⁵ and “should be regarded as . . . an economic opportunity available in the free market system.”⁸⁶ In *Haelan*, the Second Circuit also noted “many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements, [or] popularizing their countenances”⁸⁷

While economic incentive is certainly a valid policy, it is not without criticism. The economic incentive argument may fall short when used in the context of an estate seeking to assert a post mortem publicity right of a

79. See generally 17 U.S.C. §§ 101-1010 (1988).

80. *Zacchini*, 433 U.S. at 567-77.

81. *Id.* at 576.

82. *Id.* at 573.

83. *Id.* at 575-76.

84. *Lugosi*, 603 P.2d at 441 (Bird, C.J., dissenting).

85. *Memphis Dev.*, 616 F.2d at 958.

86. *Id.* at 960.

87. *Haelan*, 202 F.2d at 868; see *supra* text accompanying notes 48-53; see also Gordon, *supra* note 3.

deceased celebrity, because a performer's primary incentive is usually fame and fortune *during* his lifetime, rather than the ability to pass these marketing rights onto his estate.⁸⁸

Another potential drawback is that the economic incentive rationale grants the celebrity or the celebrity's heirs a monopoly power over his or her name and image. This monopoly control can lead to a general "chilling effect," as the free and open exchange of information about the celebrity may be restricted.⁸⁹ Ironically, although it was Chief Justice Bird who propounded the free enterprise argument in *Lugosi*,⁹⁰ she also expressed this chilling effect criticism in a companion case,⁹¹ stating "prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction."⁹²

3. Prevention of Unjust Enrichment

The second economic policy of publicity right protection is to prevent infringers from unjust enrichment, i.e., "reaping what others have sown."⁹³ The United States Supreme Court in *Zacchini*, for instance, reasoned that to allow Scripps-Howard to film and broadcast Mr. Zacchini's act without compensating him would unjustly benefit the defendant at no cost beyond its relatively insignificant production expense.⁹⁴ The Second Circuit also noted that to allow the defendant in *Factors*⁹⁵ to merchandize its unauthorized Elvis posters without compensating Presley's estate would result in unjust enrichment by "grant[ing the defendant] a windfall in the form of profits from the use of Presley's name and likeness."⁹⁶ The Pennsylvania

88. See, e.g., *Memphis Dev.*, 616 F.2d at 960 (recognizing the minimal motivation of "allowing a person to pass on his fame for the commercial use of his heirs or assigns").

89. See *id.* (holding that the publicity right of a deceased performer does not outweigh the unencumbered "commercial, aesthetic, and political use of the name, memory, and image of the famous").

90. See *supra* text accompanying note 84.

91. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979).

92. *Id.* at 460, (Bird, C.J., concurring) (footnotes omitted).

93. See Samuelson, *supra* note 38, at 850 (stating that "[b]oth [copyright and publicity right] law are concerned not only with direct economic injury to the owner, but with prevention of unjust enrichment as well") (citing Kevin S. Marks, Comment, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786, 795 (1982)).

94. *Zacchini*, 433 U.S. at 575-76.

95. *Factors*, 579 F.2d at 221.

96. *Id.*

court in *Hogan*⁹⁷ reached a similar conclusion in awarding damages to Ben Hogan to compensate him for the defendant's unjust enrichment in appropriating Hogan's name.⁹⁸ Other examples where the unjust enrichment rationale has been applied to publicity rights include defendants' unauthorized publications of pictures of Muhammad Ali,⁹⁹ Cary Grant,¹⁰⁰ and author Jackie Collins Lerman.¹⁰¹

V. APPLYING COPYRIGHT LAW TO THE RIGHT OF PUBLICITY

Interpreting the right of publicity under copyright inevitably incorporates many of the aspects inherent in copyright law. First, as discussed in the preceding section, the two underlying policies behind copyright law—promoting creative endeavor and preventing unjust enrichment—also apply to the right of publicity. Second, as addressed in the following section, both doctrines potentially involve First Amendment freedom of speech conflicts.¹⁰² Finally, both doctrines fail to provide clear standards regarding the extent of protection for an actor's performance or style, including whether or not such rights are assignable or descendible. This section examines certain issues where the right of publicity may be used to fill the gaps where copyright law does not provide adequate legal protection.

A. *Protection of a Person's Likeness, Image, or Character*

Most right of publicity cases involve the exclusive right and control of a performer's image. *Memphis Development*¹⁰³ is a typical example, where the defendants marketed an unauthorized statuette of Elvis Presley. The court adopted the traditional copyright approach, considering the

97. *Hogan*, 114 U.S.P.Q. (BNA) 314; see *supra* text accompanying notes 8-9.

98. The court awarded Mr. Hogan \$5000 in compensatory damages. *Id.* at 321-23.

99. *Ali*, 447 F. Supp. at 728-29 (involving *Playgirl's* publication of an objectionable portrait of the former champion to advertise its magazine).

100. *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879 (S.D.N.Y. 1973) (involving the magazine's superimposition of a photograph of Cary Grant's head onto the torso of a model as part of an article dealing with clothing styles).

101. *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981) (involving a magazine's use of the plaintiff's name in a publication which included pictures of a nude woman who the magazine incorrectly identified as the plaintiff).

102. The First Amendment is discussed in part VI of this article; see also *infra* text accompanying notes 157-92.

103. *Memphis Dev.*, 616 F.2d 956; see *supra* text accompanying note 15.

personal interest in economic reward and societal interests in encouraging performing arts.¹⁰⁴

Copyright law protects creative *expression* when fixed in a tangible medium, but does not protect the *ideas* expressed. While this general rule is a basic precept of copyright law, it becomes very unclear when applied to a right of publicity situation. To illustrate, this rule does not provide any clear standard of distinguishing between Bela Lugosi's personal features and characteristics in his portrayal of Dracula, which could be considered proprietary, from the Dracula character itself, to which Lugosi would not have a proprietary claim.¹⁰⁵ This area of confusion presents a clear example of how a properly developed right of publicity law can help fill a void left open by copyright law.

B. *Protection of a Performance*

A second area where the right of publicity can fill certain legal gaps is the protection of an actor's *performance* itself. *Zacchini*¹⁰⁶ still stands as the seminal application of this concept, as the entire case revolved around the protection of Mr. Zacchini's human cannonball performance.¹⁰⁷ In reaching its decision, the Supreme Court strived to comply with the underlying goals of promoting artistic endeavor by providing the financial reward for the performer's investment into developing his act,¹⁰⁸ and preventing unjust enrichment to the infringer.¹⁰⁹

C. *Protection of Fictional Characters*

Fictional characters, from Mickey Mouse and Tarzan, to Barney and the Teenage Mutant Ninja Turtles, are becoming an increasingly prevalent part of American culture, and are the subject of much infringement litigation. Protection of fictional characters is usually analyzed under copyright law.¹¹⁰ Courts often employ the "story being told" standard,¹¹¹ which

104. *Id.* at 958-59.

105. *See, e.g., Factors*, 579 F.2d at 221; *Lerman*, 521 F. Supp. at 232; *Ali*, 447 F. Supp. at 728-29.

106. *Zacchini*, 433 U.S. 562; *see supra* text accompanying notes 34-38.

107. *Id.* at 563.

108. *Id.* at 576-77; *see supra* text accompanying notes 79-92.

109. *Id.* at 576; *see supra* text accompanying notes 93-101.

110. For a more detailed analysis of the legal protections of fictional characters, *see* David B. Feldman, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687 (1990); Leslie A. Kurtz, *The Independent Lives*

holds that a character may only be protected under copyright law if “the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”¹¹² Under this standard, a character cannot receive copyright protection unless the character itself is the story (i.e., the character is inseparable from the work in which it appears).¹¹³ Plaintiffs may also turn to the “protected expression” theory to protect their fictional characters. The protected expression analysis looks beyond the fictional character’s mere physical appearances, delving further into the character’s expressions. This standard was used to find that Mickey Mouse¹¹⁴ and the H.R. Puff’n’Stuff characters¹¹⁵ were protectable apart from the stories in which they appeared.

Copyright law is, however, flawed by many inherent voids in protecting fictional characters. A character may not be entitled to copyright protection if the character is not sufficiently delineated to be considered copyrightable. Even when copyright law does apply, it may protect only the entire final work,¹¹⁶ but not the individual components of that work. Fictional characters may thus be left virtually unprotected, especially as they migrate into new works and other mediums. As a result, plaintiffs and courts may

of Fictional Characters, 1986 WIS. L. REV. 429 (1986); Dan D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359 (1992); Kenneth E. Spahn, *The Legal Protection of Fictional Characters*, 9 U. MIAMI ENT. & SPORTS L. REV. 331 (1992).

111. *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945 (9th Cir.) (the Sam Spade case), *cert. denied*, 348 U.S. 971 (1954).

112. *Id.* at 950.

113. See NIMMER & NIMMER, *supra* note 2, § 2.12, at 2-175. The Nimmer treatise points out that the Sam Spade ruling denies copyright protections for all fictional characters, because it “envisage[s] a ‘story’ devoid of plot wherein character study constitutes all, or substantially all, of the work;” *Id.* Nimmer further concludes, “although the *Sam Spade* [rule] protected [the author’s] right to reuse his characters, the rule potentially relegated all fictional characters to the public domain.” *Id.*

114. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (concluding that the infringing character’s visual similarities to Mickey Mouse were substantial enough to constitute infringement). *Id.* at 756.

115. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.* 562 F.2d 1157 (9th Cir. 1977). The McDonald’s commercials featuring *McDonaldland* characters (Ronald McDonald et al.) were found to so closely resemble the “total concept and feel” of Krofft’s *Puff’n’Stuff* television program as to constitute copyright infringement. *Id.* at 1167. The decision represented an important progression in fictional character protection, because the court looked beyond the mere visual images of the characters themselves, and delved into the entire setting and feel of the characters’ environments.

116. 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

look to the right of publicity and other alternative legal doctrines to protect fictional characters.¹¹⁷

D. *Protection of "Pure" Characters*

Copyright law may provide little or no protection for creators of a "pure" character, which is a character who does not appear in an incorporated work. Because the Copyright Act protects works,¹¹⁸ a performer who creates and develops a character such as Pee Wee Herman, the Church Lady, or Hanz and Franz may not have any copyright protection in that character unless the character is itself considered a work, or is incorporated into a work of authorship, and is "fixed in a tangible medium of expression."¹¹⁹

This weakness in copyright protection was dramatically evidenced in *Columbia Broadcasting System v. DeCosta*.¹²⁰ Actor Victor DeCosta created the fictional character "Paladin," which he portrayed at public appearances, carnivals, rodeos, etc.¹²¹ Ten years after his retirement, DeCosta attempted to prevent CBS's use of an identical character in its television show, *Have Gun Will Travel*.¹²² The television character went far beyond a mere resemblance, as CBS duplicated almost every detail of DeCosta's creation. The CBS character, like DeCosta's character, was also named "Paladin," was a good guy wearing a black outfit and a mustache, came from San Francisco, used a chess knight as a trademark, and handed out business cards bearing the chess knight and the inscription, "Have Gun Will Travel, Wire Paladin, San Francisco."¹²³ Although the jury found¹²⁴ that CBS blatantly pirated almost every detail of DeCosta's character, the actor was denied relief because his pure character had never been incorporated into any copyrightable work.¹²⁵

117. See generally Feldman, *supra* note 110; Kurtz, *supra* note 110; Spahn, *supra* note 110.

118. 17 U.S.C. § 102 (1988).

119. *Id.*

120. 377 F.2d 315 (1st Cir. 1967).

121. *Id.* at 316.

122. *Id.* at 316-17.

123. *Id.* at 317.

124. *Id.* at 321.

125. 377 F.2d at 321. The court reasoned that DeCosta's public appearances did not constitute a "tangible medium," and thus were not sufficient to provide copyright protection for the character. *Id.*

The court also denied DeCosta protection because he did not take the affirmative step of copyrighting his performance, business cards, or photos.¹²⁶ Note, however, that even if DeCosta had copyrighted his cards and pictures, those copyrights would only have protected against reproductions of the actual cards or photos, not the Paladin pure character itself.¹²⁷ Also note that neither trademark nor unfair competition law would have protected DeCosta because his limited personal appearances would not have been sufficient to establish a secondary meaning or create consumer confusion between his character and the CBS show.¹²⁸

Protection of pure characters represents another area where the right of publicity can help fill in a gap left open by copyright and trademark law. The right of publicity doctrine would protect Mr. DeCosta's performance, as was done in *Zacchini*, as well as his style and character as in *Groucho Marx Productions*, *Russen*, *Price v. Hal Roach*, and *Chaplin v. Amador*.

E. Applying the Fair Use Doctrine

The fair use doctrine, which is found in the federal Copyright Act, provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."¹²⁹ Certain infringements of a copyright are thus permitted when the infringement furthers "the greater

126. *Id.* Although the business cards and photographs which DeCosta handed out did satisfy the writing requirement to warrant copyright protection, the actor had not obtained copyright on these materials, thus opening his character up to the public domain; *see also* *Compco Corp. v. Day-Bright Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

127. 17 U.S.C. § 102(a) (1988). Even if the Paladin chess knight symbol was original, it still would not "tangibly fix" DeCosta's character, which incorporates his cards, props, characterization, performances, and physical appearance. *See* Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. (ASCAP) 35, 60 (1980).

128. Federal trademark law is governed under the Lanham Act, Title 15 of the United States Code. *See* *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.* 604 F.2d 200 (2d Cir. 1979); *Eden Toys, Inc. v. Floralee Undergarment Co., Inc.* 526 F. Supp 1187 (S.D.N.Y. 1981); *DC Comics, Inc. v. Filimation Ass'n*, 486 F. Supp. 1273 (S.D.N.Y. 1980); *Tomlin v. Walt Disney Prods.*, 18 Cal. App. 3d 226 (1971); *see also* J.T. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* §§ 4, 5, 23 (2d ed. 1984); NIMMER & NIMMER, *supra* note 2, § 2.12, at 2-178.1; Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 314 (1979).

129. 17 U.S.C. § 107 (1988). Factors used to determine whether infringement falls under the fair use exception include: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect upon the potential market for or value of the copyrighted work. *Id.*

public interest in the development of art, science and industry.”¹³⁰ Fair use also establishes a privilege to use copyrighted material in a reasonable manner without the copyright owner’s consent,¹³¹ and is most commonly applied in the case of parody.¹³²

The fair use doctrine was applied to the right of publicity in *Namath v. Sports Illustrated*,¹³³ where quarterback Joe Namath claimed that an advertisement for *Sports Illustrated* magazine, featuring an issue of the magazine with his picture on the cover, had violated his publicity right. The court denied relief to Namath, finding the use of his picture was only incidental, and raised no implication of his endorsement.¹³⁴ The use of Namath’s photograph was deemed incidental and thus permissible, as compared to Scripps-Howard’s unauthorized broadcast of Mr. Zacchini’s act, which was considered far more than incidental, having taken the performer’s “entire act.”¹³⁵ The fair use doctrine was also argued by the defendants in *Groucho Marx Productions*, but was rejected by the court.¹³⁶ Also note that if the *DeCosta* court would have recognized a protectable interest in the plaintiff’s Paladin character, the fair use doctrine likely would *not* have protected CBS, because the network’s wholesale duplication of *DeCosta*’s character was clearly more than incidental.¹³⁷

130. *Berlin v. E.C. Pubs., Inc.* 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

131. Stephen S. Morrill, *Harper & Row Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests*, 79 NW. U. L. REV. 587, 610 (1984).

132. *See Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (holding that rap music group 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman,” although commercial in nature, did not create a presumption against fair use of Orbison’s copyrighted work); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980). “A parody is entitled . . . to ‘conjure up’ the original.” *Id.* at 253 n.1; *see also* Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962). *But see Groucho Marx Prods.*, 523 F. Supp. at 493 (denying fair use defense when parody goes beyond conjuring up the original, to the point of wholesale appropriation of the original’s characterizations); *supra* text accompanying notes 23-25.

133. 352 N.E. 2d 584 (1976).

134. *Id.* at 386.

135. *Zacchini*, 433 U.S. at 575.

136. *Groucho Marx Prods.*, 523 F. Supp. at 493-94; *see supra* text accompanying notes 21-23.

137. *See supra* text accompanying notes 120-28.

VI. LIMITATIONS TO THE RIGHT OF PUBLICITY DOCTRINE

As discussed in Parts IV and V, the theoretical policies behind the right of publicity are essentially analogous to those of copyright law, which can generally be applied to publicity right issues. Such application would help resolve two primary limitations on the right of publicity law as it currently exists: descendibility¹³⁸ and First Amendment conflicts.

A. *Descendibility of Publicity Rights*

One of the most debated issues concerning one's right of publicity is whether that right dies with the person, or descends to the person's heirs or estate.¹³⁹ This is particularly important, because publicity right cases often involve the exploitation of a celebrity who is deceased, and must therefore be brought by that celebrity's estate.¹⁴⁰

As with other publicity right issues, the descendibility question has no uniform standard, and the answer varies from state to state and court to court. In order to successfully assert a claim on behalf of the deceased, the estate must first establish the existence of the decedent's right of publicity, and the defendant's infringement upon that right. Even after successfully meeting this burden, the estate may still be denied relief if that jurisdiction does not recognize the right of publicity as descendible.¹⁴¹ As a general rule, publicity rights are not descendible when viewed under the privacy model, as the *Lugosi* majority held,¹⁴² because a privacy right terminates upon the death of the infringed person, and third parties, including the celebrity's family, may not assert a legal interest in another person's dignitary or emotional rights.

However, when analyzed under the property or copyright model, a person's publicity rights become his personal property, and may descend to

138. For a more in-depth analysis of descendibility under the right of privacy doctrine, see generally, Felcher & Rubin II, *supra* note 64, at 1129; Ginsberg, *supra* note 40; Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981).

139. The same analysis and arguments concerning the descendibility issue of publicity rights apply equally as well to the transferability and assignability issues. This article therefore limits its discussion to descendibility.

140. See *supra* note 37 and accompanying text.

141. See, e.g., *Factors*, 579 F.2d at 222; *Memphis Dev.*, 441 F. Supp. at 1330.

142. See *supra* text accompanying notes 54-64.

his estate upon death.¹⁴³ The *Lugosi* dissent agreed with the trial court¹⁴⁴ that publicity rights should be descendible. As Chief Justice Bird concluded, “the right of publicity recognizes an interest in intangible property similar in many respects to creations protected by copyright law . . . [and] that body of law is [therefore] instructive.”¹⁴⁵

The publicity rights of the deceased performer have been asserted most frequently by the estate of Elvis Presley. In *Russen*,¹⁴⁶ the estate was able to prevent an unauthorized stage production which mimicked an Elvis Presley concert.¹⁴⁷ The descendibility issue has, however, prevented the Presley estate from prevailing in similar actions. In *Memphis Development*,¹⁴⁸ the Sixth Circuit recognized that the defendant’s unauthorized production of Elvis statuettes violated “The King’s” publicity rights, yet still denied relief to his estate, because the law of Tennessee (the domicile of Presley at his death) did not consider publicity rights to be survivable.¹⁴⁹ Presley’s estate was also unable to prevent unauthorized production of Elvis memorial posters in *Factors*,¹⁵⁰ again because Tennessee law did not recognize the descendibility of publicity rights.¹⁵¹

The Second Circuit followed its *Factors* decision in *Groucho Marx Productions*,¹⁵² denying the Marx Brothers’ estates the right to assert the comedians’ post mortem publicity rights, because publicity rights were not survivable under the law of the Brothers’ domicile, California. Because the California court in *Lugosi* defined the right of publicity as a privacy right which terminates upon death, the New York court “conclude[d] that

143. See, e.g., *Russen*, 513 F. Supp. at 1354-55; *Price v. Hal Roach*, 400 F. Supp. at 844; see also *supra* text accompanying notes 19-20.

144. *Lugosi*, 172 U.S.P.Q. (BNA) at 551.

145. 603 P.2d at 446 (Bird, C.J., dissenting). Justice Bird further suggested adopting copyright law’s life plus fifty years time period before celebrity’s name and likeness become public domain. *Id.*; see also *supra* text accompanying note 72.

146. *Russen*, 513 F. Supp. at 1382-83; see also *supra* text accompanying notes 19-20.

147. *Russen*, 513 F. Supp. at 1382-83.

148. *Memphis Dev.*, 616 F.2d 956, *cert. denied*, 449 U.S. 953 (1980); see also *supra* note 15 and accompanying text.

149. *Id.* at 958.

150. *Factors*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); see also *supra* note 16.

151. *Factors*, 652 F.2d at 284. The Second Circuit initially granted relief to the plaintiffs, recognizing the right of publicity as descendible under New York common law, citing *Factors*, 579 F.2d 215, but then reversed its decision in response to the *Memphis Dev.* holding that Tennessee law should govern. *Id.*

152. *Groucho Marx Prods.*, 523 F. Supp. at 489-90; see *supra* notes 21-23 and accompanying text.

California would not recognize a descendible right of publicity that protects against an original play using a celebrity's likeness and comedic style."¹⁵³

Other estates have been able to successfully assert the postmortem publicity rights of a deceased celebrity, when the jurisdiction involved is one which recognizes the right of publicity as descendible. New York allowed the estates of Laurel and Hardy to assert the comedians' postmortem publicity rights in the first case to recognize a descendible right of publicity, *Price v. Hal Roach*,¹⁵⁴ and again in *Price v. World-vision*.¹⁵⁵ Georgia has also recognized publicity rights as descendible in a case involving the estate of Martin Luther King, Jr.¹⁵⁶

B. First Amendment Conflicts

The second major limitation to right of publicity protection concerns First Amendment conflicts,¹⁵⁷ as any discussion regarding the use of a person's name or likeness inherently involves freedom of speech and freedom of press issues.¹⁵⁸ Defendants who are accused of infringing upon a person's publicity rights often rely on the First Amendment as a defense, which courts must weigh against the plaintiff's personal interests. Any First Amendment issue, particularly free speech, will always invoke strong judicial deference. The United States Supreme Court has affirmed "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"¹⁵⁹ First Amendment guarantees may also extend beyond newsworthy information to protect entertainment¹⁶⁰ and citizens' privacy interests.¹⁶¹ In determining public-

153. *Groucho Marx Prods.*, 689 F.2d at 323 (footnote omitted). Although the New York court could not extend the right of publicity to the estate, it did, however, use the misappropriation doctrine to find another basis on which to enjoin the defendant's play. *Id.*

154. 400 F. Supp. at 844 (concluding that "[t]here appears to be no logical reason to terminate this right upon death of the person protected").

155. 455 F. Supp. at 266 (holding that the defendant's unauthorized *Stan 'n Ollie* television program violated the comedians' publicity rights, which passed onto their heirs).

156. *Martin Luther King*, 508 F. Supp. at 866 (allowing the estate to prevent the defendant from producing and distributing unauthorized plastic busts of Mr. King, Jr.).

157. See generally *Felcher & Rubin I*, *supra* note 57; Hannigan, *supra* note 38; Samuelson, *supra* note 38.

158. See U.S. CONST. amend. I (stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

159. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

160. Purely commercial speech receives only minimal First Amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

ity right issues, courts must weigh the publicity rights of the plaintiff against the First Amendment protection of the defendant's infringing work. This section briefly reviews the First Amendment considerations found in publicity right cases, which typically involve either commercial exploitation such as unauthorized advertisements and sale of commercial memorabilia, or unauthorized biographies.

1. Commercial Exploitation

The First Amendment balancing test was dramatically put to test in *Zacchini*,¹⁶² where the United States Supreme Court weighed the performer's right of publicity against the defendant's First Amendment protection to broadcast news. In holding for the plaintiff, the Court concluded the newscast exceeded the bounds of the First Amendment protection, as it appropriated the performer's "entire act."¹⁶³ The Court also considered that its decision would not withhold the material completely from the public, but merely determined who would benefit from its dissemination.¹⁶⁴

In *Russen*,¹⁶⁵ the New Jersey court acknowledged that First Amendment protection may override the plaintiff's infringement claims when such exploitation disseminates information or "contributes to society's cultural enrichment,"¹⁶⁶ but not when the exploitation is purely for commercial gain.¹⁶⁷ Focusing on whether the defendant's expression "serve[d] a social function valued by the protection of free speech,"¹⁶⁸ the court found *The Big El Show* to be a commercial exploitation "without contributing anything of substantial value to society."¹⁶⁹ The court concluded the show lacked its own "creative component and [did] not have a significant value as pure entertainment,"¹⁷⁰ and therefore did not merit sufficient First Amendment protection.¹⁷¹ The Second Circuit reached a similar result in *Groucho*

161. By entering the realm of public figures, however, a person's privacy interest protection under the First Amendment may be less than that afforded to private citizens. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

162. *Zacchini*, 433 U.S. 562.

163. *Id.* at 575.

164. *Id.*

165. *Russen*, 513 F. Supp. 1339; see *supra* text accompanying notes 19-20.

166. *Id.* at 1356.

167. *Id.*

168. *Id.*

169. *Id.* at 1359.

170. *Russen*, 513 F. Supp. at 1359.

171. *Id.* at 1361.

Marx Productions,¹⁷² concluding that the defendant's musical play lacked the creative component to constitute societal value,¹⁷³ and that any literary or entertainment value of the infringing play was "substantially overshadowed . . . by the wholesale appropriation of the Marx Brothers characters."¹⁷⁴

An interesting and very different decision was reached in *Paulsen v. Personality Posters, Inc.*,¹⁷⁵ when comedian Pat Paulsen mockingly declared himself a candidate for President in the 1968 presidential election. The defendants capitalized on the popularity of Paulsen's schtick by merchandising "Pat Paulsen for President" posters, which Paulsen then alleged were an unauthorized appropriation of his name and likeness.¹⁷⁶ Although the Supreme Court of New York agreed that the poster infringed upon Paulsen's publicity rights, it still refused to grant him relief. Because the poster was *political*, it warranted First Amendment protection, which outweighed the privacy and publicity rights of the plaintiff. The court reasoned that a presidential candidacy, even one that is a sham, is a newsworthy matter, warranting First Amendment protection sufficient to overcome an infringement claim.¹⁷⁷

The *Factors*¹⁷⁸ defendants relied on *Paulsen* to argue their Elvis memorial poster should also receive First Amendment protection, because the death of "The King" was protected as a privileged celebration of a newsworthy event.¹⁷⁹ This defense was, however, rejected, as the court refused to classify the defendant's Elvis poster "in the same category as one picturing a presidential candidate, albeit a mock candidate."¹⁸⁰

172. *Groucho Marx Prods.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *see supra* text accompanying notes 21-23.

173. *Id.* at 493.

174. *Id.*

175. 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968).

176. *Id.* at 503.

177. *Id.* at 507-08 (further stating "[w]hen a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. . . . sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected and 'deserving of substantial freedom'" (quoting *Berlin*, 329 F.2d at 545).

178. *Factors*, 579 F.2d 215.

179. *Id.* at 222.

180. *Id.*

2. Unauthorized Books and Biographies

As discussed above, unauthorized appropriation of one's publicity rights is generally entitled to only minimal First Amendment protection when used for purely commercial exploitation. However, when such appropriation takes the form of a *book* rather than a poster, statuette, stage production, or rebroadcast, First Amendment protection is heightened, because of the high literary value associated with (almost) any book. This issue arises most commonly in the context of an unauthorized biography of a celebrity.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹⁸¹ the defendant's unauthorized biography of the late Howard Hughes was challenged as an infringement upon the billionaire's publicity rights. The Supreme Court of New York denied relief, holding that the First Amendment protection inherent in the nonfiction book outweighed the deceased's publicity rights.¹⁸² This First Amendment protection has been extended even further to protect fictional books. In *Hicks v. Casablanca Records*,¹⁸³ the estate of mystery writer Agatha Christie challenged the defendant's fictional novel about Christie as an infringement upon the deceased author's right of publicity. In following the *Rosemont* holding, the court ruled the First Amendment protection granted to the defendant's book outweighed the plaintiff's publicity rights. As the court concluded, "[F]irst [A]mendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess."¹⁸⁴

This First Amendment deference given to books was perhaps best exemplified in *Frosch v. Grosset & Dunlap Inc.*,¹⁸⁵ where Marilyn Monroe's executor claimed that Norman Mailer's book, *Marilyn*, infringed upon the late celebrity's right of publicity. The plaintiff argued the defendant's book should not merit First Amendment protection because it was not a true biography.¹⁸⁶ The court, however, soundly rejected this argument, concluding:

181. *Rosemont Enters., Inc. v. Random House, Inc.*, 58 Misc. 2d 1 (Sup. Ct. N.Y. Co. 1968), *aff'd mem.*, 32 A.D.2d 892 (N.Y. App. Div. 1969).

182. *Id.* at 7. The court further denied the descendibility of publicity rights, noting that the "plaintiff, in any event, has no standing to assert another's right of privacy . . . such right is a purely personal one which may be enforced only by the party himself." *Id.*

183. 464 F. Supp. 426 (S.D.N.Y. 1978).

184. *Id.* at 433. Note, however, that Ms. Christie would most likely have been able to prevail under a right of *privacy* action, had she been alive when the book was published.

185. 427 N.Y.S.2d 828 (App. Div. 1980).

186. *Id.* at 829.

We think it does not matter whether the book is properly described as a biography, a fictional biography, or any other kind of literary work. It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services. The protection of the right of free expression is so important that *we should not extend any right of publicity*, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person.¹⁸⁷

Thus, under the *Frosch* holding, a court will not delve into attempting to draw a line between protected and non-protected books, but will almost routinely grant First Amendment protection to *any* kind of literary work.

Courts apply a sliding scale in balancing a defendant's First Amendment protection against the plaintiff's publicity rights. Newsworthy information, political speech, and books receive maximum First Amendment protection,¹⁸⁸ while purely *commercial* speech, which lacks the inherent values considered worthy of constitutional protection,¹⁸⁹ warrants less protection. Commercial memorabilia is entitled to even less (i.e., minimal) protection, because it is considered to be exploitative, motivated entirely by pecuniary return, and lacking any substantial informative or cultural values.

This multi-tiered standard is perhaps best exemplified by the two poster cases. The Elvis poster in *Factors* was considered pure commercial exploitation, void of any political significance, and therefore entitled to only minimal First Amendment protection. The *Paulsen* poster, however, qualified (arguably) as political speech, thereby invoking heightened First Amendment protection which outweighed the comedian's publicity rights.

In general, a defendant's First Amendment protection may prevail over the plaintiff's publicity rights when the infringement is found to contain sufficient literary or informative value,¹⁹⁰ which the courts will almost automatically find in books of any kind.¹⁹¹ An infringer's First Amendment rights may also prevail if the infringement is limited to the minimum

187. *Id.* (emphasis added).

188. *See Red Lion*, 395 U.S. at 390.

189. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia Pharmacy*, 425 U.S. at 771; *Russen*, 513 F. Supp. at 1359.

190. *See Red Lion*, 395 U.S. at 389; *Groucho Marx Prods.*, 523 F. Supp. at 493; *Russen*, 513 F. Supp. at 1359.

191. *See, e.g., Hicks*, 464 F. Supp. at 426; *Rosemont*, 32 A.D. at 892; *Frosch*, 427 N.Y.S.2d at 829.

necessary to conjure up the plaintiff's unique *character or style*, especially in the cases of parody, spoof, or satire.¹⁹²

VII. SUMMARY, CONCLUSION, AND RECOMMENDATION

A. Summary

The right of publicity may protect a person's name or likeness, his or her actual performance, and even his or her unique style or characterization, but it is still a very uncertain and murky area of law.¹⁹³ Right of publicity issues involve many diverse and often conflicting individual and societal interests. Issues such as an individual's privacy rights, whether or not publicity rights are property, the descendibility of such rights, the employer's interest in its work product, the underlying policies of encouraging creative endeavor and preventing unjust enrichment, and the promotion of free market competition must all be weighed against each other and against society's interest in free speech.

This balancing act presents a very difficult task for the courts, resulting in unclear standards and inconsistent results. In order to assert a right of publicity claim, the plaintiff must establish the existence of his publicity rights, and the infringement of these rights. After meeting these initial burdens of proof, however, the plaintiff may still be denied relief if he has not taken adequate copyright precautions, as in *DeCosta*; or when the defendant's infringement is protected by the fair use doctrine, as in *Namath*; or by the First Amendment, as in *Paulsen, Rosemont, Hicks, and Frosch*. Even after all of these obstacles have been overcome, the right of publicity may *still* not afford protection when the plaintiff's state does not recognize the right of publicity, as in *Factors, Groucho Marx Productions*, and *Carson v. National Bank of Commerce*; or, even when recognized, is not considered to be descendible, as in *Lugosi, Memphis Development, Groucho Marx Productions*, and *Factors*.

192. See *Groucho Marx Prods.*, 689 F.2d at 492; *Elsmere Music*, 623 F.2d at 252; *Russen*, 413 F. Supp. at 1359; see also *Netterville*, *supra* note 132, at 254.

193. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (stating "[t]he state of the [right of publicity] law is still that of a haystack in a hurricane"); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282-83 (S.D.N.Y. 1977) (acknowledging that many courts address the right of publicity under the guise of a right of privacy); *Eisenberg*, *supra* note 40, at 311 (stating "[t]he ultimate contours of the right of publicity are as yet unclear"); *Gordon*, *supra* note 3, at 554; *Samuelson*, *supra* note 38, at 836 (stating "[t]he right of publicity's] boundaries . . . [and] standards . . . are not yet defined").

B. Conclusion

The right of publicity reflects many of the attributes and policies found in copyright law. One major difference, however, is that copyright law is guided by a uniform national standard under the federal Copyright Act,¹⁹⁴ whereas right of publicity is inconsistent and varies by state. Some states recognize the right of publicity statutorily,¹⁹⁵ other states only through common law,¹⁹⁶ and still other states do not recognize publicity rights at all.¹⁹⁷ Even when recognized, the durational limits of publicity rights also vary from state to state.¹⁹⁸ The right is descendible in some states, but terminates upon death in other states, and is inheritable in other states only if the depicted person exercised the right during his or her lifetime.¹⁹⁹

The right of publicity exists on a continuum. On one end, the copyright theory may protect a purely fictional character such as a comic book or cartoon character, while on the other end, the privacy theory may protect the celebrity himself. A jointly created image such as Count Dracula, however, falls uncomfortably in between the two extremes. The end product is a synthesis of the actor's distinct performance, and the studio's enhancement of costume, makeup, lighting, and direction. The closer an actor's character resembles the actor himself, the less copyright protection the character will receive. This is, after all, "the penalty an author must bear for marking [his or her characters] too indistinctly."²⁰⁰ The right of publicity is bound to become a pertinent issue as the O.J. Simpson saga continues to unfold. Mr. Simpson's trial, and its ensuing media frenzy, may thus create precedent in areas of law well beyond criminal prosecution.

194. 17 U.S.C. §§ 101-1010 (1988).

195. See MCCARTHY, *supra* note 2, at §§ 6.2-15 (discussing the statutory protection provided in thirteen states: California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin).

196. *Id.* § 6.1[C] (discussing states such as Connecticut, Georgia, Hawaii, Illinois, Michigan, New Jersey, Ohio, Oregon, and Pennsylvania, which recognize a common law right of publicity).

197. *Id.* § 6.1[B] at 6-6 (stating that the right of publicity is recognized either by statute or under common law, in less than half of the states).

198. See *id.* § 6.3[A].

199. See *id.*

200. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

C. Recommendation

Right of publicity protection is currently in a state of flux, marred by a lack of uniformity and standards. The result is confusion, inconsistency, and a lack of predictability in this legal arena. Publicity rights have traditionally been considered under the privacy doctrine, which the *Lugosi* majority adopted. Applying the privacy doctrine, however, is not the right solution. The privacy model may not provide adequate protection for a public figure, is not intended to protect a person's proprietary or financial interests, and does not recognize publicity rights as descendible. The privacy doctrine should not be allowed to drift so far from its conceptual mooring as to interfere with the objectives and rationale of publicity rights. Rather, the right of publicity should be recognized as a body of law distinct and separate from the right of privacy.

A uniform standard guideline to define publicity rights, as found with federal copyright, patent, and trademark law, would provide such guidance to state courts. This national standard would provide uniformity and predictability to a murky and uncertain arena, accommodate the underlying policies behind publicity and copyright law, and reduce potential First Amendment conflicts. A uniform right of publicity doctrine, if properly developed, can provide the legal protection needed to fill the voids left open by current copyright, trademark, and privacy law. This will play a particularly important role when attempting to protect creations such as an actor's style or characterization, live performances, fictional characters, and pure characters—in essence, a performer's *identity*.

Medical Malpractice and Health Maintenance Organizations: Evolving Theories and ERISA's Impact

O. Mark Zamora*

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I. INTRODUCTION

Employers are now turning in increasing numbers to Health Maintenance Organizations ("HMO") and Preferred Provider Organizations ("PPO") to deliver health insurance benefits to their employees. The organizations provide savings to both the worker and the business owner. As with the traditional role of physicians, however, concerns have been raised regarding liability arising from the administration, implementation, and operation of HMOs throughout the United States. Courts have seen cases where parties have sought to impose liability against HMOs for malpractice based upon an HMO's member physicians with respect to services provided to members, quality assurance programs related to the HMOs, and the cost-containment mechanisms common to HMOs.

Courts (as well as legislatures) are now faced with issues presented in heretofore uncharted waters of HMO liability in the context of medical malpractice actions. The Plaintiffs' Bar has sought to graft theories of

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liability asserted in traditional malpractice cases in the context of an HMO liability action. The Defense Bar has, in turn, developed several defenses, the most significant of which is the application of the Employment Retirement Income Security Act. This article will briefly explain the structure of the HMO, outline the theories of liability used most commonly by plaintiff lawyers, and explore in detail the ERISA defense which is currently being asserted with varying degrees of success in the federal and state courts of the United States.

II. THE STRUCTURE OF HMOs

In the context of health care, the HMO systems are generally categorized into several basic structures: the staff model HMO; the Indorsement Practice Association ("IPA"); and the group model. The staff model HMO employs its own physicians who receive their salaries directly from the HMO. The IPA model usually is made up of an association of physicians which contracts separately with the HMO to provide medical services to the organization's members. The IPA, in turn, contracts with physicians who agree to provide health care to HMO members. The IPA physicians also treat patients who are not enrolled under an HMO plan. The group model HMO provides prepaid services to members who usually enroll either at work (through their employers) or through individual medical provider groups.

In addition to the three HMO models, there also exists what is known as the PPO. A PPO brings together physicians, hospitals, and other medical service providers to give discounted services to a specific patient group. A PPO subscriber will usually pay a premium to the organization. This organization then pays the providers for the services which were rendered. The benefits of belonging to a PPO include deductibles which may be lower than those found in traditional HMOs, additional levels of benefits, and other protections.

III. THE THEORIES OF LIABILITY

Claims seeking to establish HMO liability for injuries arising from medical malpractice are usually classified into two main theories: vicarious liability and direct liability.

A. *Vicarious Liability*

Vicarious liability is a theory of liability which is made up of several sub-theories: respondeat superior, ostensible/apparent agency, and nondelegable duty.

1. *Respondeat Superior*

Respondeat superior is the type of theory commonly alleged in cases against doctors in a malpractice setting. In certain instances, an HMO was held liable based upon this doctrine; in fact, this theory is considered the substantive bedrock for an HMO-based malpractice action. Courts have ruled in favor of HMO liability for physician negligence based on a respondeat superior theory.¹ In the cases where it was found that an HMO could be held liable for the malpractice of provider physicians, the courts focused on the degree of control exercised over the negligent physician and the identity of the person directly responsible for supervising the physician.

An HMO is more likely to be held liable where the supervising individual is a medical professional rather than a lay person. For example, in *Sloan v. Metropolitan Health Council, Inc.*,² the court found liability against an HMO based upon respondeat superior. The court reasoned that the HMO's staff physicians were under the control of the HMO medical director (a physician), who supervised medical services and established policy.³ Relevant to the *Sloan* decision was a state statute entitled the Professional Corporation Act of 1983 which detailed the elements of vicarious liability of a corporation. The court stated that it saw "no reason why [the HMO] should be exempt from the doctrine of respondeat superior while professional corporations are not."⁴ The court held that "where the usual requisites of agency or an employer-employee relationship exists, a corporation may be held vicariously liable for malpractice for the acts of its employee-physicians."⁵

1. *Lighterman v. Porter*, 548 So. 2d 891, 892 (Fla. 3d Dist. Ct. App. 1989); *Variety Children's Hosp., Inc. v. Perkins*, 382 So. 2d 331, 335 (Fla. 3d Dist. Ct. App. 1980).

2. 516 N.E.2d 1104 (Ind. Ct. App. 1987).

3. *Id.* at 1105. In *Sloan*, the members of the HMO paid a monthly charge in return for certain enumerated medical services. The member would choose one physician, who essentially served the role of the personal physician, directing care and referring the member to other health providers. *Id.*

4. *Id.* at 1109.

5. *Id.*

The federal courts have likewise applied respondeat superior in the context of a malpractice action. In *Schleier v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*,⁶ the court found liability based upon respondeat superior where the physician “acted neither on his own initiative nor independently of the [HMO] physician” but merely made recommendations to the HMO’s physicians.⁷

Neither the *Sloan* court nor the *Schleier* court specified the degree or manner of control necessary to find vicarious liability. The *Schleier* court, however, noted that the power to control a servant’s conduct was the only controlling factor in its test for determining whether the requisite “master-servant” relationship existed.⁸ Both the *Schleier* and *Sloan* courts found that a degree of evidence of control may be enough to find vicarious liability.

Other state courts have held likewise. In Florida, an appellate court held that “it is the *right* of control, and not *actual* control, which determines the relationship between the parties.”⁹ Therefore, evidence of actual control over the physician is not necessary to establish that an employer/employee relationship exists. Rather, it must be shown that the HMO is in a position to control the physician to establish the requisite relationship for respondeat superior.

2. Ostensible/Apparent Agency

In the absence of an actual employment relationship, apparent/ostensible agency (or agency by estoppel) may be used as a theory of liability. While the two theories have distinct and separate elements, the courts have not necessarily drawn a clear distinction between the two.¹⁰ Apparent agency is divided into three elements: a representation by the principal; reliance on the representation by a third person; and a change of position by the third person in reliance upon such representation to his detriment.¹¹

6. 876 F.2d 174 (D.C. Cir. 1989) (per curiam).

7. *Id.* at 178

8. *Id.* at 177.

9. *Nazworth v. Swire Fla., Inc.*, 486 So. 2d 637, 638 (Fla. 1st Dist. Ct. App. 1986) (citations omitted).

10. *See, e.g., Tampa Sand & Material Co. v. Davis*, 125 So. 2d 126, 127 (Fla. 2d Dist. Ct. App. 1960) (referring to actual authority and ostensible authority as two theories of liability, but not discussing estoppel).

11. *See Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491, 494 (Fla. 1983) (approving *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442 (Fla. 5th Dist. Ct. App.

The elements of ostensible agency are found in section 429 of the *Restatement (Second) of Torts*, "Negligence in Doing Work Which Is Accepted in Reliance on the Employer's Doing the Work Himself:"

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.¹²

The elements of ostensible agency in the physician/HMO relationship are: whether the patient looks to the institution, rather than the individual physician for medical care; and whether the hospital or HMO holds out the physician as its employee. Numerous cases have been decided under this theory. In Florida, one court held that a hospital would be liable for a physician's negligence where the hospital "holds out" the physician as its employee and the patient accepts treatment from the physician "in the reasonable belief that it is being rendered in behalf of the hospital."¹³

The leading case on ostensible agency in the HMO context is *Boyd v. Albert Einstein Medical Center*.¹⁴ In *Boyd*, the decedent and her husband were HMO participants. Upon enrolling, the decedent was given a directory listing the participating physicians. Restricted to this list, the decedent chose two primary care physicians. She contacted one of the doctors for treatment; he referred her to a surgeon who was also a participating HMO physician. The treatment provided by the surgeon ultimately led to her death. In the complaint it was alleged that the HMO physicians were represented to be competent, and that the decedent relied upon these representations.

In *Boyd*, the court set out the factors of ostensible agency as: "(1) whether the patient looks to the institution, rather than the individual physician for care, and (2) whether the HMO 'holds out' the physician as

1981), and setting forth the three elements in the context of a tort action, not a medical malpractice action).

12. RESTATEMENT (SECOND) OF TORTS § 429 (1965).

13. *Irving v. Doctors Hosp. Inc.*, 415 So. 2d 55, 59 (Fla. 4th Dist. Ct. App. 1982). The court referred to the theory of liability as "apparent authority," but not as ostensible agency, calling it "an admixture of the agency doctrine of apparent authority and the doctrine of estoppel." *Id.* at 57.

14. 547 A.2d 1229 (Pa. Super. Ct. 1988).

its employee.”¹⁵ The court then looked to the *Restatement (Second) of Agency*, rather than to the *Restatement (Second) of Torts* for further elucidation on ostensible agency.¹⁶ The *Boyd* court expanded the ostensible agency theory in the hospital/physician setting to the HMO/physician relationship on the rationale that the changing role of health care providers in recent years justified the extension.¹⁷

Several facts are central to an understanding of *Boyd* and its holding: the HMO covenanted to provide health care to protect and promote the health of its members; the HMO operated on a direct service rather than on an indemnity basis; doctor’s fees were paid to the HMO, not to the physician; the HMO provided a list from which patients had to choose their primary care physician; primary care physicians were screened and regulated by the HMO; a primary physician’s referral was required in order to see a specialist; and patients had no choice as to the specialist.¹⁸ The court held that these factors created the inference that the patient looked to the HMO for care, and not solely to the physicians.¹⁹

3. Nondelegable Duty

The nondelegable duty theory of liability has been utilized in actions against the HMO. Generally, courts follow the rule of law that a principal is not liable for the negligence of an independent contractor. An exception arises, however, where it is determined that the principal owes a nondelegable duty to another party regardless of who else undertakes such duty.

The law of the nondelegable duty was recognized in Florida in *Mills v. Krauss*.²⁰ The *Mills* court stated that “[i]n some circumstances duties may devolve upon an employer which he cannot delegate to another, and in such cases the employer is liable for breach or non-performance of such duties even though he employs an independent contractor to do the work.”²¹ Once the duty is established, the employer will be held liable for an employee’s negligence as a matter of law.

15. *Id.* at 1234.

16. *Id.*

17. *Id.*

18. *Id.* at 1235.

19. *Boyd*, 547 A.2d at 1235. Agency by estoppel is more difficult to prove than ostensible agency because one must show detriment or reliance upon the representation made by the principal. Under an ostensible agency theory, there is no need to show detrimental reliance on the principal’s conduct in “holding out” the agent as its employee.

20. 114 So. 2d 817 (Fla. 2d Dist. Ct. App. 1959).

21. *Id.* at 819.

In *Irving v. Doctors Hospital of Lake Worth, Inc.*,²² the plaintiffs filed a negligence claim against an emergency room physician. The court held that it was error not to instruct the jury that a party may not escape its contractual liability by delegating performance under the contract to an independent contractor.²³ The court, noting that *Mills* involved an express contract, stated that the same nondelegable duty rests with a hospital in the implied contractual relationship between a hospital and an emergency room patient.²⁴ Therefore, a hospital does not absolve itself of the duty to provide nonnegligent care to emergency room patients by contracting with a physician to provide medical treatment. The *Irving* case is instructive because the hospital/emergency room physician-patient relationship is analogous to that of the HMO physician-patient.²⁵

B. Direct Liability

Plaintiffs seek to hold the HMO directly liable for negligent behavior through application of direct liability. The main theories of direct liability are the corporate negligence doctrine and liability arising from cost-containment systems. Corporate negligence is then further divided into negligent selection/retention and negligent supervision or control.

1. Corporate Negligence

The doctrine of corporate negligence in the context of hospitals was first introduced in *Darling v. Charleston Community Memorial Hospital*.²⁶ In *Darling*, the court found liability when the defendant hospital failed to properly review the patient's treatment and require proper consultation.²⁷ The court established that a hospital had an independent responsibility to patients to supervise the medical treatment provided by medical staff.²⁸ Liability was found as to the hospital's *own* negligence, not that of the physician.

22. 415 So. 2d 55 (Fla. 4th Dist. Ct. App. 1982).

23. *Id.* at 59.

24. *Id.* at 60.

25. See William A. Chittenden III, *Malpractice Liability and Managed Health Care: History and Prognosis*, 26 TORT & INS. L.J. 451, 461 (1991).

26. 211 N.E.2d 253 (Ill. 1965).

27. *Id.*

28. *Id.* at 260-61.

In *Pedroza v. Bryant*,³⁰ the Washington Supreme Court traced the history of the corporate negligence doctrine concisely, and explained its operation and effect in plain terms. The *Pedroza* court noted that the doctrine has been used to require a hospital to exercise reasonable care to insure that those physicians selected as part of the hospital's medical staff are competent.³¹ The court viewed the corporate negligence doctrine as a theory separate and apart from others because of the "increased public reliance upon hospitals."³² Faced with the duty that a hospital independently owes to a patient, the court then defined the standard of care as the degree of care of an average, competent hospital acting in the same or similar circumstances.³³

The seminal case on corporate negligence in Florida is *Insinga v. LaBella*.³⁴ *Insinga* involved a hospital which had admitted a man impersonating a doctor (under the name of Dr. LaBella) to its medical staff with full privileges. While on the staff, LaBella admitted plaintiff's wife to the hospital where she died nearly three weeks later.³⁵ The Supreme Court of Florida adopted the corporate negligence doctrine and held that hospitals "have an independent duty to select and retain competent independent physicians seeking staff privileges."³⁶ The court, citing *Pedroza*, reasoned that hospitals are in the best position to protect their patients.³⁷ The public policy supporting the decision was phrased by the *Insinga* court as "the present day view that a hospital is a multifaceted health care facility that should be responsible for proper medical treatment on its premises."³⁸ Elaborating further, the court opined that the "hospital is in a superior position to supervise and monitor physician performance and is, consequently, the only entity that can realistically provide quality control."³⁹

Insinga encompassed both negligent supervision/control and negligent selection/retention. Negligent selection or retention requires proof of two concurrent negligent acts, the negligent selection or retention of the

30. 677 P.2d 166 (Wash. 1984).

31. *Id.* at 168; *see also* *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156 (Ct. App. 1982); *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412 (Ga. 1972).

32. *Pedroza*, 677 P.2d at 169. The *Pedroza* court noted that the role of the hospital is changing rapidly and is becoming that of a community health center.

33. *Id.* at 170.

34. 543 So. 2d 209 (Fla. 1989).

35. *Id.* at 210.

36. *Id.* at 214.

37. *Id.*

38. *Id.*

39. *Insinga*, 543 So. 2d at 214.

physician *and* the physician's malpractice.⁴⁰ The plaintiff must also show that the negligent selection or retention proximately caused the injury.⁴¹ Negligent supervision or control arises "when the hospital fails to detect physician incompetence or to take steps to correct the problems upon learning of information raising concerns of patient risk."⁴² Once again, by analogizing the relationship between the hospital and the emergency room to the relationship between the physician and patient, a plaintiff may be able to apply the doctrine to an HMO.⁴³

2. Cost-Containment Systems

Courts have also recognized the potential for liability stemming from the negligent implementation of a cost-containment system used by the HMO to pay for medical services provided to its members. In a cost-containment system medical services are reviewed prior to being provided in order to determine whether a less expensive treatment is available which would accomplish the same purpose.⁴⁴ In order to contain costs, employers turn to a PPO or HMO to furnish health care. Because of the emphasis on prospective cost containment, the HMO's involvement in a potential malpractice situation arises. An adverse determination of whether to pay for a service may result in a claim that a patient did not receive the needed medical help.

A cost-containment system was first implicated in *Pulvers v. Kaiser Foundation Health Plan*.⁴⁵ In *Pulvers*, the doctors were part of a health care plan which provided incentives to refrain from unnecessary tests and treatments. The plaintiff brought suit alleging that a death was caused by a physician's malpractice resulting from the doctor's failure to conduct proper treatment. The court noted that incentive plans were required by

40. Chittenden, *supra* note 25, at 472.

41. *Id.*

42. *Id.*

43. Other states have also followed the corporate negligence doctrine. *See, e.g.,* Tucson Medical Ctr., Inc. v. Misevch, 545 P.2d 958, 960 (Ariz. 1976); *Elam*, 183 Cal. Rptr. at 160; *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. Ct. App. 1975); *Raschel v. Rish*, 488 N.Y.S.2d 923, 924 (App. Div. 1985); *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

44. *See* Robert C. Macaulay, *Health Care Cost Containment and Medical Malpractice: On a Collision Course*, 21 SUFFOLK U. L. REV. 91 (1987) (detailing the various control costs).

45. 160 Cal. Rptr. 392 (Ct. App. 1979).

federal statutes and supported by public policy.⁴⁶ The court also intimated that in order for liability to attach, the treating physicians would have to refrain from ordering tests or treatments which the accepted standards of the medical profession would require in order to receive certain incentives.⁴⁷

The litmus test for liability resulting from cost-containment programs was explained in *Wickline v. State*.⁴⁸ In *Wickline*, no liability was attached because the third party payor did not override the treating physician's medical judgment.⁴⁹ The court addressed the responsibility of a third party payor (the State of California) for harm suffered by a patient under a cost-containment program. The court stated that "[t]hird party payors of health care services can be held legally accountable when medically inappropriate decisions result from defects in the design or implementation of cost containment mechanisms."⁵⁰ The *Wickline* court went on to say that a doctor "cannot avoid [the] ultimate responsibility for his patient's care" when he "complies without protest with the limitations imposed by a third party payor, when his medical judgment dictates otherwise."⁵¹

IV. A DEFENSE BASED UPON ERISA

As plaintiffs throughout the United States have expanded the medical malpractice horizon to include actions against HMOs, so too have new defenses been asserted. Of particular interest and significance is a defense based upon the Employment Retirement Income Security Act of 1974 ("ERISA").⁵² The successful application of ERISA effectively serves to eviscerate a malpractice action, because it eliminates any chance for a jury to consider the alleged wrongdoing and substantially narrows the recoverable damages, excluding pain and suffering as well as other consequential damages.

46. *Id.* at 394. The court did, however, rule that no malpractice was committed.

47. *Id.*

48. 228 Cal. Rptr. 661 (Ct. App. 1986).

49. *Id.* at 671. The same court, however, in *Wilson v. Blue Cross*, 271 Cal. Rptr. 876, 882-83 (Ct. App. 1990), dismissed a motion for summary judgment on a similar fact pattern based on the treating physician's testimony that the patient was dismissed because of a lack of funds to pay for a longer hospital stay. *See also* *DeGenova v. Ansel*, 555 A.2d 147 (Pa. Super. Ct. 1988) (remanding the trial court's dismissal of a suit based on the negligence of a reviewing physician when the plaintiff sought a mandatory second opinion prior to accepting health services).

50. *Wickline*, 228 Cal. Rptr. at 670.

51. *Id.* at 671.

52. 29 U.S.C. § 1001 (1988).

ERISA⁵³ was promulgated subsequent to the rapid rise of employee benefit plans used to provide health, medical, and pension-related services to employees throughout the United States.⁵⁴ The purpose of the ERISA statute is to protect the interests of participants in the plan by requiring disclosure of plan specifics and by establishing standards of responsibility and conduct, as well as providing access to the federal court system.⁵⁵ As a result, “ERISA comprehensively regulates . . . employee welfare benefit plans that, ‘through the purchase of insurance’ provide medical, surgical, or hospital care, or benefits in the event of sickness, disability, or death.”⁵⁶ ERISA’s application to a dispute is significant because of its myriad of procedural requirements, the federal law’s incorporation of trust law principles, and its elimination of the right to proceed with a jury trial.

The statute is implicated when a dispute arises which involves an employee benefit plan. As a result, most state laws and state law related claims are preempted by the terms of the statute. The preemptive effects are found in three statutory provisions.⁵⁷ ERISA provides for preemption if a state law relates to an employee benefit plan;⁵⁸ the saving clause excepts from the preemption clause laws that regulate insurance;⁵⁹ and the deemer clause makes clear that a state law that purports to regulate insurance cannot deem an employee benefit plan to be an insurance company.⁶⁰

How then does ERISA impact a malpractice action brought against an HMO? A Louisiana case provides an explanation. In *Rollo v. Maxicare, Inc.*,⁶¹ the plaintiff was injured in an accident and his dispute centered upon the subsequent medical treatment he received.⁶²

The court began by explaining that a threshold issue in a case which may implicate ERISA is whether the case involves a plan of the type

53. The statute sets out the congressional declaration of policy, *id.* § 1001(a)-(c), and sets forth regulatory provisions, *id.* §§ 1021-1030, among other things. ERISA has been called a “symbol of unnecessarily complex government regulation.” *Id.* § 1001 (quoting President Jimmy Carter in a message to Congress).

54. *Id.* § 1001(a).

55. 29 U.S.C. § 1001(a), (b) (1988).

56. *Pilot Life Ins. Co. v. Dedeux*, 481 U.S. 41, 44 (1987) (citing 29 U.S.C. § 1002(1) (1982)).

57. 29 U.S.C. §§ 1144(a), (b)(2)(A), (b)(2)(B) (1988).

58. *Id.* § 1144.

59. *Id.* § 1144(b)(1)(A).

60. *Id.*

61. 695 F. Supp. 245 (E.D. La. 1988).

62. *Id.* at 246.

contemplated by ERISA.⁶³ As noted, ERISA makes reference to a welfare benefit plan, which is “any employer program . . . which provides medical, surgical or other hospital benefits in the event of sickness, accident or disability.”⁶⁴ Notably, as in *Rollo*, a welfare benefit plan is typically involved in a medical malpractice case brought against an HMO. Thus, a cause of action involving such a plan should immediately raise a red flag as to ERISA’s application. Once it is determined that the relevant plan is of the type contemplated by ERISA, one must look to ERISA’s statutory language to determine whether the damages claim is preempted. The import of the application of ERISA is that damages are very limited. Therefore, the usual damages associated with a medical malpractice action are *not* generally recoverable.

In a traditional medical malpractice action an aggrieved plaintiff may seek, and a jury may award, economic damages such as past and future wage loss, and compensatory damages such as past and future medical expenses, including costs associated with life care plans. Further, non-economic damages based upon pain and suffering or emotional distress visited upon the plaintiff may be sought. A derivative claim sounding in consortium may also be made by the spouse of the injured plaintiff.

ERISA, however, limits or eliminates extra-contractual damages. A number of circuit courts of appeal have held that no extra-contractual money damages may be awarded.⁶⁵ Notably, courts adhere to the statutory language that requires preemption of state-promulgated extra-contractual damages that may seek to circumvent ERISA’s dictates.⁶⁶

A decision of the Fifth Circuit Court of Appeals also explains the effect of ERISA on a medical malpractice action. In *Corcoran v. United Healthcare, Inc.*,⁶⁷ the plaintiffs filed a wrongful death action against United Healthcare, Inc. and Blue Cross and Blue Shield of Alabama (“Blue Cross”), alleging that their unborn child died as a result of various acts of negligence in the administration of an employee plan from which the plaintiffs sought medical treatment for their unborn child.⁶⁸ The issue before the court was “whether ERISA pre-empts [sic] a state-law malprac-

63. *Id.* at 247.

64. *Id.* (citing 29 U.S.C. § 1002(1) (1982)).

65. *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986).

66. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

67. *Id.*

68. *Id.* at 1324.

tice action brought by the beneficiary of an ERISA plan against a company that provides 'utilization review' services to the plan."⁶⁹

In analyzing the nature of the claims, the Fifth Circuit noted that the plaintiffs alleged that Blue Cross wrongfully denied appropriate medical care and failed to oversee the medical decisions adequately.⁷⁰ Notwithstanding the state law basis of the claims, the court held that ERISA governs.

ERISA contains three provisions addressing preemption: the preemptive clause, the saving clause, and the deemer clause.⁷¹ Quoting the Supreme Court, the *Rollo* court summarized the effects of the three clauses as follows: "'If a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted [sic]. . . . The saving clause excepts from the preemption clause laws that 'regulat[e] insurance.' . . . The deemer clause makes clear that a state law that 'purport[s] to regulate insurance' cannot deem an employee benefit plan to be an insurance company.'"⁷² Congress intended the preemptive clause, and thus the language "relate to," to be broadly interpreted.⁷³ In determining whether the claim relates to the plan, one must examine the nature of the claim. Claims for personal injury, whether physical or nonphysical, resulting from design or implementation of cost-containment or claims handling systems are typically preempted by ERISA because they are based on the HMO's administration of the plan.⁷⁴ Claims for personal injuries resulting from provider malpractice, however, may withstand preemption because the connection between claims such as medical malpractice and employee benefits plans do not relate to administration. Such claims may be deemed too tenuous, remote, or peripheral to warrant preemption. The saving clause relates to the regulation of insurance.⁷⁵ Under the clause, "the state law at issue must be said to directly regulate insurance."⁷⁶ The scope of the saving clause is accordingly very narrow. It is not enough that the relevant state law have some application in an insurance context or generally impact on the business of insurance.

69. *Id.* at 1322.

70. *Id.* at 1326.

71. *Rollo*, 695 F. Supp. at 247 (citing 29 U.S.C. §§ 1144(a), (b)(2)(A), (b)(2)(B) (1982)).

72. *Id.* at 247-48 (quoting *Pilot Life*, 481 U.S. at 44-45 (quoting 29 U.S.C. § 1144 (1974))).

73. *Pilot Life*, 481 U.S. at 47.

74. Chittenden, *supra* note 25, at 487-88.

75. 29 U.S.C. § 1144(b)(2)(A) (1988).

76. *Rollo*, 695 F. Supp. at 248.

Section 1132(a) of ERISA provides for civil remedies. Outside of these listed remedies, legislative policy dictates that no other actions shall be maintained against an ERISA plan.⁷⁷ Therefore, the analysis that a plaintiff is entitled to a remedy because preemption would leave him or her without a remedy is improper.⁷⁸ The claim simply must be one included under section 1132(a) of ERISA.

Essentially, the determination of preemption of a claim depends upon the claim's relation to the plan at issue. In *Independence HMO, Inc. v. Smith*,⁷⁹ the court held that Smith's state court medical malpractice claim was not preempted by ERISA because of the claim's relation to the welfare benefit plan.⁸⁰ Smith sued Independence HMO on a theory of ostensible agency. The court reasoned that the state law based tort action did not impact upon the employee benefit plan or affect the congressional scheme in the ERISA statute, and therefore was not preempted.⁸¹ Additionally, the court held that the plan's grievance procedure could not, by virtue of its design, adequately redress state tort claims against Independence HMO.⁸² The court also held that Smith had no obligation to exhaust the available remedies under the plan before filing suit.⁸³ The court reasoned that Smith's state tort action sought a remedy that did not arise under ERISA and the action did "not depend upon her contractual entitlement to health plan benefits."⁸⁴ The court cited *Mackey v. Lanier Collection Agency & Service, Inc.*,⁸⁵ for support of its position that the claim was not preempted.⁸⁶ The *Mackey* court stated that ERISA plans may be sued for run-of-the-mill state law claims such as torts committed by an ERISA plan.⁸⁷ Thus, under the *Independence HMO* rationale, not all claims involving ERISA plans would be preempted.

77. *Pilot Life*, 481 U.S. at 54.

78. See *Corcoran*, 965 F.2d at 1338-39; see also *DeGenova*, 555 A.2d at 150 (holding that the action was only remotely related to ERISA and thus not preempted).

79. 733 F. Supp. 983 (E.D. Pa. 1990).

80. *Id.* at 989; see also *Elsesser v. Hospital of the Philadelphia College of Osteopathic Medicine, Parkview Div.*, 802 F. Supp. 1286, 1290 (E.D. Pa. 1992) (holding that claims of state medical malpractice actions are not preempted by ERISA).

81. *Independence HMO*, 733 F. Supp. at 988.

82. *Id.*

83. *Id.*

84. *Id.*

85. 486 U.S. 825 (1988).

86. *Independence HMO*, 733 F. Supp. at 989.

87. *Mackey*, 486 U.S. at 833.

In contrast to *Smith*, the Fifth Circuit held that certain state law causes of action *are preempted* by ERISA.⁸⁸ In *Corcoran*, the court held that a tort claim based upon a wrongful death cause of action was preempted.⁸⁹ The court concluded that even though the provider made medical decisions and gave medical advice, it did so for the purpose of making a determination about the availability of benefits under the plan.⁹⁰ The court found that the claim was preempted by the *Pilot Life* principle found that ERISA preempts state law claims which allege that benefit claims were improperly handled.⁹¹ The *Corcoran* court also stated that allowing such a suit to proceed could contravene Congress's policy of providing a uniform body of law relating to benefit plans.⁹²

The *Corcoran* court distinguished its case from *Independence HMO, Inc. v. Smith*.⁹³ The court stated that *Independence HMO* involved the medical decisions of a doctor made in the course of treatment, whereas *Corcoran* involved a medical decision made in connection with a cost-containment feature of a plan.⁹⁴ Although the court found it "troubling" to hold that the plaintiffs had no available remedy, it stressed that the statutory scheme of ERISA demanded such a holding.⁹⁵ Any hope for a remedy in similar cases must be created by a congressional amendment to the ERISA legislation.⁹⁶

V. CONCLUSION

The states whose courts have developed the greatest amount of case law on HMO liability are California, Pennsylvania, and Louisiana. California has opened the door to HMO liability for the negligent design or negligent implementation of cost-containment systems. The California courts have implied a willingness to hold HMOs liable when cost limitation programs corrupt medical judgment. For example, a plaintiff would stand

88. *Corcoran*, 965 F.2d at 1339.

89. *Id.* at 1331; see *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (holding that in ERISA cases, preemption defense provides sufficient basis for removal to federal court, notwithstanding the "well-pleaded" complaint doctrine).

90. *Corcoran*, 965 F.2d at 1331.

91. *Id.* at 1332; see also *Elsesser*, 802 F. Supp. at 1291 (holding that claims of negligent refusal to pay benefits are preempted by ERISA).

92. *Corcoran*, 965 F.2d at 1332.

93. *Id.* at 1333 n.16.

94. *Id.*

95. *Id.* at 1338.

96. *Id.* at 1339.

a good chance of recovering from an HMO if the plan suggested the provider physician refrain from ordering medical tests or treatment required by the accepted standards of the profession. Furthermore, California courts have also recognized the potential for liability where the HMO overrides the judgment of a plaintiff's treating physician to deny funding for diagnostic tests or for an extended hospital stay. The Pennsylvania courts are also developing HMO law which is decidedly pro-plaintiff. The Superior Court of Pennsylvania has held that a physician may be the ostensible agent of an HMO. Pennsylvania has also been hesitant to preempt claims under ERISA.

While it is generally agreed among courts that claims involving the administration of a plan are preempted, courts in different states differ as to the reach of the ERISA preemption. For example, Pennsylvania courts have held that ERISA does not preempt medical malpractice claims. Pennsylvania has also expressed a willingness to allow a claim for personal injuries when a remedy for the injury is not provided by ERISA. Allowing such claims is a liberal interpretation of Supreme Court cases addressing ERISA preemption.

Louisiana courts, on the other hand, have been more restrictive than the Pennsylvania courts in allowing claims where an ERISA plan is at issue. Louisiana courts have held ERISA preempts state medical malpractice and other state law tort claims. The Louisiana courts have noted that where Congress has explicitly exempted an area of state law, e.g., insurance, there is no reason to imply exemptions in areas which Congress did not specifically address. Had Congress intended to create further exemptions it could have drafted such exceptions into the legislation. Therefore, the Louisiana courts have stated that if a claim would interfere with ERISA's "carefully constructed scheme of legislation" then it should be preempted. It does not matter that preemption would leave the plaintiff without a remedy. The Louisiana courts have stated their preference for disallowing state law claims relating to ERISA plans, true to Congress's intent, thereby deferring to Congress in the fashioning of remedies under ERISA. Accordingly, it is relatively difficult to recover for a claim in which a welfare benefit plan is at issue in Louisiana.

Punitive Power: Securities Arbitrators Need It

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I. INTRODUCTION

If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep.¹

Arbitration is an effective alternative method to litigation which alleviates the tremendous strain currently burdening our judicial system.² Disputes submitted to arbitration are resolved by arbitrators.³ A model arbitrator is impartial, knowledgeable, and well versed in the area of controversy.⁴ A popular type of dispute frequently resulting in arbitration is securities transactions.⁵

1. *Exodus* 22:1 (King James).

2. Anthony M. Sabino, *Awarding Punitive Damages In Securities Industry Arbitration: Working For A Just Result*, 27 U. RICH. L. REV. 33, 33 (1992).

3. SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, ARBITRATION PROCEDURES, at 3 (1989).

4. *Id.*

5. *Id.*

The major advantages of arbitration are that the disputes are resolved more expeditiously and cost effectively than in court.⁶ Additionally, the arbitrator's decision is final and binding, with limited grounds for reversal.⁷ Therefore, time and money, the two most important concerns of investors and brokerage firms, are saved.⁸

Until recently, one of the uncertainties in securities arbitration was the power of the arbitrators to award punitive damages.⁹ Punitive damages are defined as compensation in "excess of actual damages" and are awarded "only in instances of malicious and willful misconduct."¹⁰ The dual purpose of punitive damages is to punish the wrongdoer and to deter similar future misconduct.¹¹ The question of whether securities arbitrators have the power to award punitive damages was decided on March 6, 1995, when the United States Supreme Court decided *Mastrobuono v. Shearson Lehman Hutton, Inc.*,¹² holding that, under the parties' agreement, arbitrators had punitive power.¹³ However, the decision, based on contractual interpretation, did not universally empower securities arbitrators with the power to award punitive damages. Rather, the Court stated that contracting parties are free to agree to include punitive damages within the arbitrable issues.¹⁴ The *Mastrobuono* decision will affect not only investors and brokerage firms, but also attorneys who practice in this complicated area of law.

This article first analyzes two recent cases which have conflicting holdings and rationales concerning the power of arbitrators to award punitive damages.¹⁵ Next, the article discusses how the United States Supreme Court seemingly resolved this conflict. Additionally, the article explains some of the policy reasons behind giving securities arbitrators the power to award punitive damages. Finally, the article concludes with

6. *Id.*

7. *See infra* note 129.

8. *See* Sabino, *supra* note 2, at 33.

9. Marilyn B. Cane, *Punitive Damages in Securities Arbitration: The Interplay of State and Federal Law (Or a Smaller Bite of the Big Apple)*, 1993 J. DISP. RESOL. 153, 153.

10. BARRON'S LAW DICTIONARY 117 (3d ed. 1991).

11. *Id.*

12. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, No. 94-18, 1995 WL 86555 (Mar. 6, 1995).

13. *Id.* at *6.

14. *Id.* at *4.

15. *See generally Mastrobuono*, 20 F.3d 713 (7th Cir.), *cert. granted*, 115 S. Ct. 305 (1994), *and rev'd*, No. 94-18, 1995 WL 86555 (Mar. 6, 1995); *J. Alexander Sec., Inc. v. Mendez*, 21 Cal. Rptr. 2d 826 (2d Ct. App. 1993), *cert. denied*, 114 S. Ct. 2182 (1994).

recommendations on how the various arbitral forums can improve the arbitration system.

II. CONFLICT AMONG THE COURTS

The Second and Seventh Circuits of the United States Court of Appeals have held that securities arbitrators do not have the power to award punitive damages.¹⁶ This was in direct conflict with the majority view, and, prior to the United States Supreme Court's decision in *Mastrobuono*, was the cause of the legal inconsistency that baffled many arbitrators, judges, and attorneys.¹⁷

A. *Mastrobuono v. Shearson Lehman Hutton, Inc.: The Minority View*

The Seventh Circuit's most recent decision concerning the issue of punitive damages in securities arbitration was *Mastrobuono v. Shearson Lehman Hutton, Inc.*¹⁸ In 1985, the plaintiff-appellants, Antonio and Diana Mastrobuono, opened a securities account with Shearson Lehman Hutton, Inc. (Shearson).¹⁹ The client agreement between the plaintiffs and Shearson provided, in relevant part: "This agreement . . . shall be governed by the laws of the State of New York [A]ny controversy arising out of or relating to [the plaintiffs'] accounts . . . shall be settled by arbitration"²⁰

In 1989, the plaintiffs sued Shearson in the United States District Court for the Northern District of Illinois, claiming unauthorized trading, churning, and breach of fiduciary duty.²¹ Plaintiffs requested compensatory as well as punitive damages;²² however, Shearson successfully moved to compel arbitration before the National Association of Securities Dealers ("NASD").²³

16. See, e.g., *Mastrobuono*, 20 F.3d at 714; *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117 (2d Cir. 1991).

17. Cf. *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991); *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6 (1st Cir. 1989); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988).

18. 20 F.3d 713.

19. *Id.* at 715.

20. *Id.* Additionally, the agreement provided the plaintiff with the choice of the arbitral forum. *Id.*

21. *Id.*

22. *Mastrobuono*, 20 F.3d at 715.

23. *Id.*

After hearing the arguments of both sides, the arbitrators awarded the plaintiffs \$159,327.00 in compensatory damages and \$400,000.00 in punitive damages.²⁴ Shearson filed a motion in the district court to vacate the award of punitive damages,²⁵ arguing that New York law, the governing law of the client agreement, denied arbitrators the power to award punitive damages.²⁶ The district court granted Shearson's motion and vacated the punitive damages award.²⁷ The plaintiffs appealed, and the United States Court of Appeals for the Seventh Circuit affirmed.²⁸

First, the court of appeals rejected the plaintiffs' argument that the district court violated the scope of review imposed by the Federal Arbitration Act ("FAA").²⁹ The court explained that "the FAA permits a court to vacate an award '[w]here the arbitrators exceeded their powers.'"³⁰ Furthermore, in order to support the decision, the court relied heavily upon the Second Circuit's rationale in *Barbier v. Shearson Lehman Hutton, Inc.*³¹ The *Barbier* court stated that when arbitrators are not empowered with the ability to award punitive damages due to a choice of law provision in the parties' agreement, then the arbitrators would exceed their powers by awarding such damages.³² Therefore, in the instant case, the court of appeals held that the lower court properly reviewed the arbitrator's authority to award punitive damages.³³

The court then examined the arbitration agreement itself and recognized that it contained a New York choice of law provision.³⁴ Under New York law, arbitrators cannot award punitive damages; this is referred to as the *Garrity* rule.³⁵ The plaintiffs' argument that the FAA preempts the *Garrity* rule, and thereby authorizes the arbitrators to award punitive damages, was rejected.³⁶ The court explained that the policy supporting the FAA "is simply to ensure the enforceability, according to their terms, of private

24. *Id.*

25. *Id.*

26. *Id.*

27. *Mastrobuono*, 20 F.3d at 716.

28. *Id.* at 719.

29. *Id.* at 716.

30. *Id.* (quoting 9 U.S.C. § 10(a)(4) (1988)).

31. 948 F.2d 117 (2d Cir. 1991).

32. *Id.* at 122.

33. *Mastrobuono*, 20 F.3d at 716.

34. *Id.*

35. *Id.* (citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976)).

36. *Id.*

agreements to arbitrate.”³⁷ Therefore, following the rationale of *Volt*,³⁸ the court enforced the parties’ agreement according to its terms, which was to arbitrate all of their controversies under New York law.³⁹

The Seventh Circuit continued its reasoning by examining a case similar to *Mastrobuono*, which was decided in the same circuit ten years earlier.⁴⁰ In *Pierson*,⁴¹ a brokerage agreement also contained a New York choice of law provision.⁴² The court reasoned that although the *Piersons* may not have realized that the wording of the arbitration clause precluded a punitive damage award, they could not “use their failure to inquire about the ramifications of that clause to avoid the consequences of agreed-to arbitration.”⁴³ Relying on *Pierson*, the *Mastrobuono* court concluded that the choice of law provision incorporated the *Garrity* rule.⁴⁴ Therefore, since New York law applied, and securities arbitrators did not have the power to award punitive damages in New York, the court found that the arbitrators exceeded their authority.⁴⁵

The *Mastrobuonos* then argued that the arbitration rules of the NASD clearly authorized arbitrators to award punitive damages.⁴⁶ The court disposed of this argument by explaining that New York law applies no matter which arbitral forum the plaintiffs happen to choose.⁴⁷ The court explained that the parties did not intend for the availability of punitive damages to vary with the plaintiffs’ choice of arbitration rules.⁴⁸ Therefore, the arbitration agreement, signed by the *Mastrobuonos*, enforced the *Garrity* rule whether the arbitration occurred at the New York Stock Exchange (“NYSE”), NASD, or any other arbitral forum.⁴⁹

The Seventh Circuit’s decision in *Mastrobuono* reinforced the minority view that securities arbitrators did not have the power to award punitive damages. The Second Circuit was the only other federal court of appeals

37. *Id.* (quoting *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989)).

38. *Volt*, 489 U.S. 468 (1989).

39. *Mastrobuono*, 20 F.3d at 717.

40. *Id.* (citing *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984)).

41. *Pierson*, 742 F.2d 334 (7th Cir. 1984).

42. *Id.* at 336.

43. *Mastrobuono*, 20 F.3d at 717 (quoting *Pierson*, 742 F.2d at 339).

44. *Id.*

45. *Id.* at 718.

46. *Id.*

47. *Id.*

48. *Mastrobuono*, 20 F.3d at 718.

49. *Id.*

which subscribed to this view.⁵⁰ Some of the possible reasons these two courts had for taking their stance against punitive damages will be explored later in this article.

The Mastrobuonos appealed to the United States Supreme Court. On March 6, 1995, the United States Supreme Court issued its decision in *Mastrobuono*, holding that the choice of law provision in the parties' client agreement covered the rights and duties of the parties, while the arbitration clause covered arbitration, thus giving the arbitrators the power to award punitive damages.⁵¹ The decision is analyzed in Part III of this article.

B. *J. Alexander Securities, Inc. v. Mendez: The Majority View*

Mendez was decided by a California state court of appeal.⁵² Although this case was decided at the state level, the opinion represents the majority view of the federal courts.⁵³ The majority holds that securities arbitrators have the power to award punitive damages, even though a New York choice of law provision is present.⁵⁴ In making its decision, the *Mendez* court relied upon the rationales of previous cases which were decided in the First, Ninth, and Eleventh Circuits.⁵⁵

In 1980, Signe Mendez, an elderly widow, opened a securities account with J. Alexander Securities, Inc., a brokerage firm located in Los Angeles.⁵⁶ Upon opening the account, Mendez signed a Cash Account Agreement which contained an arbitration clause for disputes, as well as a New York choice of law provision.⁵⁷

50. See, e.g., *Barbier*, 948 F.2d at 117.

51. *Mastrobuono*, 1995 WL 86555, at *6.

52. *Mendez*, 21 Cal. Rptr. 2d 826.

53. See generally *Todd Shipyards*, 943 F.2d at 1062 (relying on federal law, rather than New York law, the court held that the arbitrators had the authority to award punitive damages); *Raytheon*, 882 F.2d at 12 (upholding a punitive damage award rendered by a commercial arbitration panel, whereby the agreement expressly provided that all disputes would be settled by arbitration according to the rules of the American Arbitration Association); *Bonar*, 835 F.2d at 1387 (holding that a choice of law provision in an arbitration agreement does not deprive arbitrators of their power to award punitive damages).

54. E.g., *Todd Shipyards*, 943 F.2d at 1062; *Bonar*, 835 F.2d at 1387.

55. See *Mendez*, 21 Cal. Rptr. 2d at 829 (citing *Todd Shipyards*, 943 F.2d at 1062; *Raytheon*, 882 F.2d at 11; *Bonar*, 835 F.2d at 1387).

56. *Id.* at 826-27.

57. *Id.* at 827. The agreement stated, in pertinent part:

This agreement and its enforcement shall be governed by the laws of the State of New York Any dispute or controversy between us arising under any provision of the federal securities laws can be resolved through litigation in

A dispute arose in 1991, whereby Mendez claimed that the brokerage firm and the broker, Weber, had engaged in securities fraud, deceptive practices, churning, unsuitability, and unauthorized stock trading.⁵⁸ As a result, Mendez suffered substantial financial losses.⁵⁹ The parties agreed to arbitrate their dispute at the NASD, and hearings on the controversy were conducted in 1992.⁶⁰ The arbitrators awarded Mendez \$27,000.00 in compensatory damages, as well as \$27,000.00 in punitive damages against the firm only.⁶¹ The arbitrators explained that the firm failed to adequately supervise its employee, Weber, thereby, not meeting the required standards to assure compliance with applicable securities regulations.⁶²

The firm proceeded to the trial court and moved to correct the award pursuant to the California Code of Civil Procedure, on the grounds that the arbitrators had exceeded their powers by awarding punitive damages.⁶³ The trial court denied the motion and confirmed the award; however, the firm appealed.⁶⁴ The court of appeal affirmed and provided a thorough explanation.⁶⁵

The court held that the arbitrators were not precluded from awarding punitive damages by virtue of the New York choice of law provision.⁶⁶ The reasoning was based on the cash account agreement, which “evidenced a transaction in interstate commerce[;]” therefore, the FAA applied.⁶⁷ The court explained that the purpose of the FAA is to encourage arbitration, and the underlying principle is that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.⁶⁸ The court refused to follow the minority view of the Second Circuit which held that state law is not preempted by federal substantive law on the issue of

the courts if the undersigned so chooses. The undersigned also understands that arbitration is available with respect to such disputes. Additionally, all other disputes or controversies between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the [rules of the NYSE or NASD], as the undersigned may elect

Id. at 827-28.

58. *Id.* at 828.

59. *Mendez*, 21 Cal. Rptr. 2d at 828.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (referring to CAL. CIV. PROC. CODE § 1286.6(b) (1993)).

64. *Mendez*, 21 Cal. Rptr. 2d at 828.

65. *Id.* at 829.

66. *Id.*

67. *Id.* at 830.

68. *Id.* (citing *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

punitive damage awards by securities arbitrators.⁶⁹ Rather, the court concluded that the choice of law provision designates only the substantive law that the arbitrators must apply in determining whether the parties' conduct warrants an award of punitive damages; it does not deprive them of the power to award such damages.⁷⁰

The firm also contended that there was nothing in the parties' agreement which permitted punitive damages.⁷¹ The court agreed, but stated that there was also nothing in the agreement that expressly excluded the possibility of a punitive damage award either.⁷² The court held that the arbitration provision "contained in the Cash Account Agreement encompassed 'any dispute or controversy between [the parties] arising under any provision of the Federal securities laws' and 'all other disputes or controversies between [the parties] arising out of [appellant's] business or this agreement.'"⁷³ Therefore, the court found the arbitration agreement broad enough to contemplate punitive damages.⁷⁴

The appellant then argued that the agreement to arbitrate under the rules of the NYSE or the NASD, which are silent on the issue of punitive damages, exemplified that such an award was not contemplated by the parties.⁷⁵ The court rejected this argument based on public policy which was enunciated by other federal courts that punitive damage awards clearly support arbitration as an effective method of resolving disputes.⁷⁶ The court explained that the failure of the NASD to expressly state in its rules that the arbitrators have the power to award punitive damages should not bar the availability of that remedy.⁷⁷ Therefore, in the absence of an express provision in the Cash Account Agreement or an NASD rule prohibiting an award of punitive damages, the arbitrators did not exceed their powers.⁷⁸

There was a constitutional question of due process raised by the appellant which the court also rejected.⁷⁹ The appellant, relying on a

69. *Mendez*, 21 Cal. Rptr. 2d at 830 n.7 (citing *Barbier*, 948 F.2d at 122; *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 518 (2d Cir.), *cert. denied*, 502 U.S. 1120 (1992), and *aff'd*, 989 F.2d 490 (3d Cir. 1993)).

70. *Id.* (citing *Bonar*, 835 F.2d at 1387).

71. *Id.*

72. *Id.*

73. *See id.*; *see also supra* note 55.

74. *Mendez*, 21 Cal. Rptr. 2d at 831.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 832.

79. *Mendez*, 21 Cal. Rptr. 2d at 832.

United States Supreme Court case, contended an absence of constraints upon the arbitrators and a lack of judicial review.⁸⁰ Similar arguments were also rejected by the Ninth Circuit in *Todd Shipyards Corp. v. Cunard Line, Ltd.*⁸¹

In *Todd Shipyards*, the court found that the punitive damage award rendered by an arbitration panel did not violate due process because the appellant had notice that the respondent sought punitive damages, and was given the opportunity to argue its position by presenting evidence.⁸² Relying on *Todd Shipyards*, the judge explained that the appellant did not claim that it lacked notice of Mendez's claim for punitive damages, nor that it was unable to present evidence or legal theories against such an award.⁸³ Therefore, no violation of due process occurred.⁸⁴

A California case, *Baker v. Sadick*,⁸⁵ was relied upon to quickly dispose of the lack of judicial review issue.⁸⁶ *Baker* involved a punitive damage award in a medical malpractice claim which was submitted to arbitration.⁸⁷ The court in *Baker* held that although the arbitration agreement was broad, the parties had the power to control the scope of that agreement.⁸⁸ Similarly, the parties in the instant case could have expressly agreed, in the Cash Account Agreement, to no awards of punitive damages; but they did not.⁸⁹ Consequently, the lack of judicial review argument was rejected.⁹⁰ The court of appeal upheld the punitive damage award and the California Supreme Court denied review.⁹¹ The firm then filed a petition for a writ of certiorari in the United States Supreme Court, but it was denied.⁹² Nevertheless, an interesting dissent followed the denial of certiorari.⁹³

80. *Id.* (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

81. 943 F.2d 1056, 1063 (9th Cir. 1991).

82. *Id.*

83. *Mendez*, 21 Cal. Rptr. 2d at 833.

84. *Id.*

85. 208 Cal. Rptr. 676 (4th Ct. App. 1984).

86. *See Mendez*, 21 Cal. Rptr. 2d at 833.

87. *See Baker*, 208 Cal. Rptr. at 678.

88. *Id.* at 684.

89. *See Mendez*, 21 Cal. Rptr. 2d at 827.

90. *Id.* at 833.

91. *Id.*

92. *Mendez*, 114 S. Ct. 2182.

93. *See id.* (Rehnquist, C.J., & O'Connor, J., dissenting).

C. *The Mendez Dissent*

Although *Mendez* was denied certiorari, a clear and concise dissenting opinion followed, evidencing much interest in settling the conflict among the lower courts.⁹⁴ After giving a brief description of the facts in *Mendez*, Justice O'Connor recognized that the decision followed the majority view which holds that the FAA preempts state law prohibitions of punitive damages in arbitration.⁹⁵ However, she explained that the decision was directly contrary to the views of the Second and Seventh Circuits, which held that state law was not preempted by federal substantive law for the purpose of an arbitrator's power to award punitive damages.⁹⁶ Realizing that the FAA was created to avoid these differences, she would have granted certiorari to solve the recurring problem.⁹⁷

III. THE SUPREME COURT'S DECISION IN *MASTROBUONO*

One of the functions of the United States Supreme Court is to settle conflicting decisions among the lower federal courts, especially when the issue is of great public importance.⁹⁸ The cases analyzed above demonstrate a direct conflict among the federal courts concerning the power of an arbitrator to award punitive damages.⁹⁹ Additionally, since millions of dollars are awarded in punitive damages in securities arbitrations every year, the issue is of great public importance.¹⁰⁰ This placed the Supreme Court in an excellent position to rule on the issue. The Court, following the lead of Justice O'Connor and the Chief Justice, realized that it was not up to the legislature or the arbitral forums to resolve this issue; therefore, the *Mastrobuono*'s petition for certiorari was granted.¹⁰¹

On March 6, 1995, by an eight to one decision,¹⁰² the Supreme Court reversed the Seventh Circuit's ruling in *Mastrobuono* and granted arbitrators

94. See *Mendez*, 114 S. Ct. 2182 (Rehnquist, C.J., & O'Connor, J., dissenting).

95. *Id.* (citing *Todd Shipyards*, 943 F.2d at 1056; *Bonar*, 835 F.2d at 1378).

96. *Id.* (citing *Mastrobuono*, 20 F.3d at 713; *Barbier*, 948 F.2d at 117).

97. *Id.*

98. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, § 4.2, at 165 (7th ed. 1993).

99. See generally *Mastrobuono*, 20 F.3d at 713; *Mendez*, 21 Cal. Rptr. 2d at 826.

100. See generally *Punitive Award Survey*, SEC. ARB. COMMENTATOR, at 3 (May 1993) [hereinafter SAC].

101. *Mastrobuono*, 115 S. Ct. 305.

102. Justice Clarence Thomas was the lone dissenter. See *Mastrobuono*, 1995 WL 86555, at *6 (Thomas, J., dissenting).

the power to award punitive damages.¹⁰³ The majority opinion was written by Justice Stevens and the central theme was that the FAA ensures that arbitration agreements will be enforced according to their terms.¹⁰⁴ However, the New York choice of law provision contained in the parties' agreement created an ambiguity.¹⁰⁵ Applying common law rules of contractual interpretation, the Court construed the ambiguous language against the interest of the party that drafted it; in this case, as in most, that party was the brokerage firm.¹⁰⁶

The Court then examined some of the NASD rules, as well as an NASD manual given to the arbitrators which included a section permitting the consideration of punitive damages.¹⁰⁷ The holding was also based on the belief that it was unlikely that the plaintiffs were actually aware of the New York choice of law provision which prohibited punitive damages in arbitration.¹⁰⁸ However, it was noted that parties can structure their arbitration agreements as they see fit and specify by contract the rules under which that arbitration will be conducted.¹⁰⁹

Although the decision appears to be a victory for disgruntled investors, the Court's analysis left many issues unresolved. First, brokerage firms now may consider rewording their customer agreements in order to clearly state the unavailability of punitive damages. However, this could lead to the issue of whether the agreements are contracts of adhesion, thereby making the provisions unenforceable. Furthermore, the NASD rules provide, *inter alia*, that no predispute arbitration agreement shall limit the ability of the arbitrators to make any award.¹¹⁰ The Court recognized this rule; however, it was inapplicable in *Mastrobuono* because the agreement was executed before the effective date of the rule.¹¹¹

Additionally, before individuals contract away an "important substantive right" such as punitive damages, they should be made aware of the implications of what they are doing.¹¹² A related issue pertains to the

103. *Id.*

104. *Id.* at *4.

105. *Id.* at *5.

106. *Id.*

107. *Mastrobuono*, 1995 WL 86555, at *5.

108. *Id.*

109. *Id.* at *3 (citing *Volt*, 489 U.S. at 479).

110. See NATIONAL ASS'N OF SECURITIES DEALERS, RULES OF FAIR PRACTICE ¶2171, Rule 21(f)(4) (1993).

111. Rule 21(f)(4) only applies to agreements signed after September 7, 1989. See *id.* Rule 21(f)(5). The *Mastrobuonos* signed their agreement in 1985.

112. See *id.* at *5.

proper standard of review to be applied in arbitration appeals as to the scope of an arbitration.¹¹³ Considering these unanswered questions, it will be interesting to note the impact this decision will have on securities arbitration.

IV. ARBITRATOR USE OF THE POWER TO AWARD PUNITIVE DAMAGES

Many factors must be considered in empowering securities arbitrators with the authority to award punitive damages. First, the use of punitive power must be used only in instances in which the purposes of such damages are served. Next, there must be a mechanism to ensure that safeguards exist in order to prevent unjust awards. Finally, use of the punitive power must be done in a way that keeps the arbitration process fair and efficient.

A. *Accomplishing the Purposes of Punitive Damages*

Punitive damages, as stated earlier, serve two purposes: to punish the wrongdoer and to deter similar future misconduct.¹¹⁴ Members of the securities industry must fear this type of punishment in order to help reduce the amount of unscrupulous and malicious conduct that plagues this otherwise professional field.¹¹⁵

The nature of the securities industry creates a fiduciary duty bestowed upon the individual brokers and firms.¹¹⁶ The brokers give financial advice to their clients and then invest their money.¹¹⁷ These brokers are compensated on a commission basis which may cause a conflict of interest between themselves and their clients.¹¹⁸ The more frequently the client buys and sells securities based on representations made by their broker, the greater the commission the broker and his firm will earn. This conflict sometimes leads to fraudulent conduct by the broker in order to generate commissions.¹¹⁹

113. The Court recently granted certiorari on this issue in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 634 (1994).

114. See BARRON'S LAW DICTIONARY, *supra* note 10, at 117.

115. Brief for Respondent at 14, *In re Dreyfus Serv. Corp.*, 584 N.Y.S.2d 483 (1992) (No. 11629/90).

116. *Id.*

117. *Id.*

118. *Id.*

119. This type of misconduct is known as "churning."

If punitive damages are awarded against a broker or a firm for fraudulent or grossly negligent conduct, the firm will surely eliminate such behavior.¹²⁰ Conversely, if arbitrators had no authority to award punitive damages, firms would lack incentive to strictly monitor their brokers' behavior.¹²¹ Therefore, the misconduct would continue if the threat of monetary punishment were limited to the amount actually lost.¹²² Hopefully, the Supreme Court's decision in *Mastrobuono* will help in this regard.

In addition to the deterrent effect of punitive damages, the threat of such damages motivates settlement of securities disputes.¹²³ For instance, if a firm realizes that the arbitrator lacks the authority to award punitive damages, thereby only exposing the firm to limited liability, the likelihood of a fair settlement offer is poor.¹²⁴ Moreover, the firm recognizes that if the settlement offer is refused, then the investor must incur continued expenses, such as forum fees, expert witnesses, and attorney's fees.¹²⁵ These factors unfairly influence the investor in accepting a low settlement.

To the contrary, the empowerment of arbitrators with the authority to award punitive damages should motivate firms in settlement negotiations.¹²⁶ The threat of punitive damages, accompanied by the fear of the unknown amount which could be awarded, should help end the disputes in a quicker and more equitable manner.¹²⁷ Because the arbitrators now have the power to grant punitive damages, the entire arbitration process benefits, even if the power is not actually exercised.

B. *Safeguards*

The most popular argument used in opposing an arbitrator's power to award punitive damages is the lack of judicial review.¹²⁸ This stance is in response to the narrow and limited grounds for vacating an award.¹²⁹

120. Brief for Respondent at 14, *Dreyfus* (No. 11629/90).

121. *Id.*

122. *Id.*

123. *Id.* at 18.

124. *Id.*

125. Brief for Respondent at 18, *Dreyfus* (No. 11629/90).

126. *Id.*

127. *Id.* at 19.

128. See, e.g., *Mendez*, 21 Cal. Rptr. 2d at 832.

129. 9 U.S.C.A. § 10(a) (West Supp. 1994). The statute permits an award to be vacated only:

(1) Where the award was procured by corruption, fraud, or undue means.

Although this argument is sensible, no court has held that the limited judicial review given to arbitral awards denies the arbitration participants due process.¹³⁰ Therefore, this argument consistently fails.¹³¹

The fear of runaway arbitrators continuously awarding punitive damages is another argument that is frequently employed by parties who oppose the arbitrators power to award such damages.¹³² This theory evolved from the court's reasoning in *Garrity v. Lyle Stuart, Inc.*¹³³ In *Garrity*, the court observed that unpredictable punitive damage awards may occur as a result of the lack of guidelines for arbitral awards, as well as the limited judicial review of the awards.¹³⁴ Almost twenty years have passed since *Garrity*, and the statistics now show that there is no need to fear that arbitrators will abuse their power in granting punitive damages.¹³⁵

In 1991, an extensive statistical analysis on this issue was written by the Public Investors Arbitration Bar Association.¹³⁶ The study, conducted from June 1987 to December 1990, showed that out of approximately 1800 arbitration awards favoring investors, there were only forty-four punitive damage awards.¹³⁷ The low frequency of the punitive damage awards

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- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
 - (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
 - (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
 - (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

130. Reply Brief for Respondent at 6, *Dreyfus* (No. 11629/90).

131. See, e.g., *Mendez*, 21 Cal. Rptr. 2d at 832-33.

132. See, e.g., *Todd Shipyards*, 943 F.2d at 1061; *Raytheon*, 882 F.2d at 8.

133. 353 N.E.2d 793 (N.Y. 1976).

134. *Id.* at 796.

135. See generally Stuart C. Goldberg, 1991 Report Of The Public Investors Arbitration Bar Association As To The Authority Of Arbitrators To Award Punitive Damages In Securities Arbitration, 1991 PUB. INVESTORS ARB. B. ASS'N 1; see also SAC, *supra* note 100.

136. See generally Goldberg, *supra* note 135.

137. *Id.* at 109-10.

demonstrates the arbitrators' reluctance to award such damages, unless warranted by the situation.¹³⁸

Additionally, a similar study was performed by the Securities Arbitration Commentator, which was published in May of 1993.¹³⁹ This study emphasized the proportionality ratios of punitive damage awards to their compensatory damage counterpart.¹⁴⁰ The results showed that an overwhelming majority of the awards fell into the 3:1 ratio; a fair and equitable calculation.¹⁴¹ However, no exact line exists between an acceptable ratio and an unacceptable one; it is a matter of judgment.¹⁴²

No perfect formula exists in determining the size of a punitive damage award.¹⁴³ However, the Fifth Circuit Court of Appeals offered guidance in *Miley v. Oppenheimer & Co.*¹⁴⁴ The court concluded that three times the compensatory damage award is a proper guideline in determining the amount of punitive damages that should be awarded in a churning case.¹⁴⁵

Furthermore, the Supreme Court has upheld punitive damage awards that have exceeded the 3:1 ratio.¹⁴⁶ For instance, in *Pacific Mutual Life Insurance Co. v. Haslip*,¹⁴⁷ a punitive damage award which was four times the amount of the compensatory damages was upheld.¹⁴⁸ Additionally, in *TXO Production Corp. v. Alliance Resources Corp.*,¹⁴⁹ the Court upheld a \$10,000,000.00 punitive damage award when the compensatory damages were only \$19,000.00, a ratio of approximately 526:1.¹⁵⁰ Although these two cases did not involve arbitration, they directly involved due process limitations on awards of punitive damages.¹⁵¹

The Supreme Court's decision in *Mastrobuono*, based on principles of contractual interpretation, may not have alleviated all of the fears regarding

138. *Id.* at 110.

139. *See generally* SAC, *supra* note 100.

140. *Id.* at 4.

141. *Id.* at 5. Additionally, only 12% of the awards exceeded the 3:1 ratio. *Id.*

142. *Id.*

143. Goldberg, *supra* note 135, at 84.

144. 637 F.2d 318 (5th Cir.), *reh'g denied*, 642 F.2d 1210 (1981).

145. *Id.* at 332.

146. *See, e.g.*, *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

147. 499 U.S. 1.

148. *Id.* at 24.

149. 113 S. Ct. 2711.

150. *Id.* at 2723.

151. *See Haslip*, 499 U.S. at 9-15; *see also* *TXO Production v. Alliance Resources: The "Promise" Fades—Last Word on Punitives?*, SEC. ARB. COMMENTATOR, June 1993, at 2.

arbitrators abusing their power in awarding punitive damages. The court made no mention of delineating an acceptable measure of punitive damages, such as the general 3:1 ratio of punitive damages to compensatory damages.¹⁵² The studies mentioned above show that the arbitrators generally follow this guideline without expressly being told to do so.¹⁵³ The Court could have expressed its opinion of whether this practice is fair and equitable, but it did not do so.

V. RECOMMENDATIONS

Now that the Supreme Court has ruled in favor of arbitrators having the authority to award punitive damages despite the presence of a New York choice of law provision in securities client agreements, the arbitral forums should implement guidelines and procedures for all to follow.¹⁵⁴ This would help to ensure that the punitive awards do not violate due process.¹⁵⁵ Moreover, these procedures will create a realistic image that the arbitrators award such damages fairly and reasonably.¹⁵⁶

First, the forums should require that the arbitration panel write out an explanation on why it awarded punitive damages.¹⁵⁷ This will facilitate any appeal of the ruling by notifying the appellate decision-maker of the reasoning for the award.¹⁵⁸ Furthermore, the wrongdoer, as well as the public, will know exactly why the award is being rendered, and this will hopefully deter similar misconduct.¹⁵⁹ Unfortunately, this requirement has not been created by any forum, although the NASD is considering it.¹⁶⁰

152. See, e.g., *Miley*, 637 F.2d at 332.

153. See, e.g., *Goldberg*, *supra* note 135, at 110.

154. See generally NATIONAL ASS'N OF SECURITIES DEALERS, INC., NOTICES TO MEMBERS, July 1994 at 319-43 [hereinafter NASD].

155. *Id.* at 334.

156. *Id.*

157. *Id.* at 330.

158. *Id.*

159. NASD, *supra* note 154, at 330.

160. See *id.* (citing the NASD Code of Arbitration Procedure, § 41 (1992), which only requires that the awards be in writing and include the names of the parties and counsel, a summary of the issues, the relief requested and awarded, a statement of issues resolved, and other names and dates). Similarly, the American Arbitration Association only requires that the awards be in writing, signed by a majority of the arbitrators, and that they include a statement regarding the disposition of statutory claims. AMERICAN ARBITRATION ASS'N, SECURITIES ARBITRATION RULES § 42 (1987).

Next, the party against whom the punitive damages are rendered should reserve the right to appeal the punitive portion of the award.¹⁶¹ As described earlier in this article, the current arbitration system offers a limited right to appeal, which courts interpret narrowly.¹⁶² Therefore, the appeal should include not only the amount of the award, but the actual decision to award punitive damages itself.¹⁶³

This appeals process must not take place in the court system because that would circumvent the original purpose of submitting to arbitration.¹⁶⁴ Rather, the appellate body should consist of three individuals who are selected from a pool of arbitrators who are experienced in securities cases involving punitive damages.¹⁶⁵ The appellate panel should only vacate awards in which the arbitrators' decision below was clearly erroneous.¹⁶⁶ This system will serve as a check on the arbitrators' power to award punitive damages, and at the same time, uphold the integrity of the entire arbitration process.

The purpose of punitive damages is not to provide a windfall to the plaintiff or plaintiffs' counsel.¹⁶⁷ Therefore, the arbitral forums should require that a portion of each punitive damage award be given to an appropriate entity.¹⁶⁸ For instance, if fifty percent of all punitive awards were dispersed to groups in need of the money, then every year millions of dollars could be generated to help those groups tremendously.¹⁶⁹ The money received could go, for example, to the arbitral forum where the hearings took place, the state or federal courts, or even to the plaintiffs' favorite charity.¹⁷⁰ In fact, some states already have this procedure in place for punitive damages awarded in court.¹⁷¹

161. *Id.*

162. *See supra* note 129.

163. NASD, *supra* note 154, at 331.

164. *See Sabino, supra* note 2, at 33.

165. NASD, *supra* note 154, at 331.

166. *Id.*

167. *See id.* at 334 (stating that the purpose of awarding punitive damages is to punish those who purposefully harm the investing public for their own personal gain); *see also* BARRON'S LAW DICTIONARY, *supra* note 10, at 117.

168. NASD, *supra* note 154, at 334.

169. *See Goldberg, supra* note 135, at 7 (stating that over \$9,000,000 was awarded in punitive damages in securities arbitrations between June 1987 and Dec. 1990). *Id.*

170. NASD, *supra* note 154, at 334.

171. *Id.* (citing COLO. REV. STAT. § 13-21-102(4) (1992); FLA. STAT. ANN. § 768.73 (West Supp. 1993); MO. REV. STAT. § 537.675 (1991)).

Even though the Supreme Court ruled in favor of empowering securities arbitrators to award punitive damages, the arbitral forums must further recognize the need to improve and expand the system. Implementing the recommendations mentioned above would ensure equity and fairness within the arbitration process.¹⁷²

VI. CONCLUSION

The number of securities disputes submitted to arbitration every year is continuously rising.¹⁷³ This is mainly attributed to the arbitration agreements which are usually contained in customer account forms, which public investors sign upon the opening of their securities account.¹⁷⁴ In 1987, the Supreme Court, in *Shearson/American Express, Inc. v. Mc-Mahon*,¹⁷⁵ held that these agreements are legally enforceable and are supported by public policy which strongly favors arbitration.¹⁷⁶ The Supreme Court, in deciding *Mastrobuono*, apparently took into consideration the brokerage firms' success in closing the road to the courthouse and thereby detouring disgruntled customers to arbitration. Although the decision resolved the issue of whether the arbitrators in that case had the power to award punitive damages, the decision was more limited than what would have been desired.

The Court should have universally empowered the arbitrators with the authority to award punitive damages. The Court could have relied on the rationale that the punishment and deterrent purposes of such damages would be achieved, thus creating a more professional atmosphere among the numerous securities firms and their employees. Additionally, the Court could have recognized that although lacking strict guidelines, arbitrators have yet to exemplify bad faith or corruption in awarding punitive damages.¹⁷⁷

The brokerage firms will still have the ability to avoid a punitive damage award being rendered against them. The Court has held that under the FAA, "parties are generally free to structure their arbitration agreements

172. *Id.*

173. See NASD Chart, *Self Regulatory Organization Arbitration Filings*, 1980-93 (on file with author).

174. Stuart C. Goldberg, PIABA'S 1991 PUBLIC INVESTOR RECOVERY GUIDE AND ARBITRATOR SOURCE BOOK TO STOCKBROKER FRAUD AND SECURITIES ARBITRATION at ix (1991).

175. 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

176. *Id.* at 242.

177. See Goldberg, *supra* note 135, at 110.

as they see fit.”¹⁷⁸ Therefore, if the brokerage firms use plain and clear language which expressly prohibits punitive damages as a remedy under the arbitration contract, then the arbitrators would not have the ability to award such damages.¹⁷⁹

The majority view empowered arbitrators with the authority to award punitive damages, even when a New York choice of law provision was present.¹⁸⁰ The minority view, which held that arbitrators lack such powers, has apparently now been overruled by the Supreme Court’s decision in *Mastrobuono*.¹⁸¹ The Second and Seventh Circuits were the only federal circuit courts which subscribed to the minority view.¹⁸² Their jurisdiction encompasses New York and Chicago, home to many large securities firms and the markets in which they trade. Thus, the Supreme Court’s decision should have great impact on the securities industry. However, the attack on the securities arbitrators’ power to award punitive damages will continue.

Darren C. Blum

178. *Volt*, 489 U.S. at 479 (Brennan, J., dissenting).

179. E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395, 409 (1991); see also *Willoughby Roofing & Supply Co. v. Kajima Int’l, Inc.*, 776 F.2d 269 (11th Cir. 1985). However, if the parties agree to arbitrate according to the NASD rules, they will not be able to limit the arbitrators’ ability to award punitive damages. See *supra* note 110.

180. See, e.g., *Todd Shipyards*, 943 F.2d at 1062; *Bonar*, 835 F.2d at 1387; *Mendez*, 21 Cal. Rptr. 2d at 829.

181. See *Mastrobuono*, 1995 WL 86555.

182. See *supra* note 16.

Freedom of Access to Clinic Entrances Act of 1994: The Face of Things to Come?

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I. INTRODUCTION

*Abortion. It is one of the most divisive issues of our time. . . . To some it is nothing less than the slaughter of millions upon millions of the most innocent and vulnerable of all victims, and thus stands as the most monstrous moral outrage in human history. To others it tests our society's commitment to fundamental principles of individual liberty, personal autonomy, and women's welfare.*¹

Many women view the 1973 United States Supreme Court decision in *Roe v. Wade*² as the culmination of a battle for women's rights that began before the Civil War.³ However, the holding in *Roe*, that a woman's right

1. DONALD P. JUDGES, HARD CHOICES, LOST VOICES 4 (1993). For a strong feminist point of view, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984) ("Only women have abortions. Laws restricting access to abortion have a devastating sex-specific impact.").

2. 410 U.S. 113 (1973).

3. See John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77, 79 (1991) (quoting ELLEN C. DUBOIS, FEMINISM AND SUFFRAGE, THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN

to privacy includes a qualified right to abortion, did not settle the controversy concerning termination of a pregnancy in its early stages.⁴ Instead, less than twenty years later, in *Planned Parenthood v. Casey*,⁵ the Court dismantled the trimester scheme outlined in *Roe*, although it affirmed the constitutional right to abortion.⁶ Since *Casey*, access to abortion is governed by a test that condones numerous restrictions on a woman's freedom of choice.⁷

The decisions in *Casey* and *Roe* constitute the goal posts at the opposite ends of the playing field. In between, many judicial decisions delineate yards gained or lost in the ongoing struggle for unchecked access to abortion.⁸ This legal battle is kept alive by feminist groups such as the National Organization of Women ("NOW") and Planned Parenthood on behalf of women seeking abortions.⁹ Their opponents are the groups and

AMERICA 1848-1869, at 22 (1978)). DuBois enumerates two sources as providing the impetus for women to unite: women's "growing awareness of their common conditions and grievances" in the decade preceding the Civil War and the abolitionists' emphasis on universal equality. *Id.* at 79 n.16.

4. *Roe*, 410 U.S. at 153-54. The trimester test is governed by the point of fetal viability, the point at which the State's interest in the health of the mother becomes compelling. *Id.* at 163. When the Court heard the case 20 years ago, medical knowledge pinpointed viability at the end of the first trimester of the pregnancy. *Id.* Thus, the Court divided pregnancy into trimesters, leaving the decision as to abortion in the hands of the woman's physician in the first trimester; allowing the state to regulate abortion in the second trimester; and permitting abortions in the third trimester only "for the preservation of the life or health of the mother." *Id.* at 163-64.

5. 112 S. Ct. 2791 (1992).

6. *Id.* at 2818. In place of the trimester scheme, the Court instituted an "undue burden" test, specifying that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 2821. But the opinion gave little guidance as to the meaning of "undue."

7. The Court held that the following restrictions are constitutional: a 24 hour waiting period to meet an informed consent requirement; parental consent for unemancipated women under 18; and record keeping and reporting requirements for abortion facilities other than those which would require spousal notice or consent. *Id.* at 2791.

8. See *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1494, 1496 n.13 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (discussing subsequent United States Supreme Court decisions that narrowed the *Roe* holding prior to *Casey*). The decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), was perhaps the most noteworthy prior to *Casey*. The decision was pivotal because it allowed State regulation of abortion in the second trimester for protection of the fetus rather than the mother. JUDGES, *supra* note 1, at 190.

9. See John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 255 n.19 (1990). Henn and Del Monaco list cases in

individuals whose avowed purposes are to discourage pregnant women from seeking abortions and to close down abortion clinics.¹⁰ Their objective is ultimately to make it impossible for women to terminate a pregnancy legally in the United States.¹¹

To accomplish this purpose, abortion protestors, often under the aegis of the militant group known as Operation Rescue,¹² began a systematic, national campaign to obstruct access to abortion services in 1988.¹³ During the blockades, abortion protestors disrupt the provision of medical and counseling services and exhort patients, clinic personnel, and bystanders to join the illegal activity.¹⁴ In addition, the "rescuers" vandalize clinic property, often defacing signs and disrupting traffic near the clinic by spreading nails on the asphalt to deflate tires so that immobilized vehicles barricade the clinic entrances.¹⁵ Leaders of the anti-abortion movement justify these illegal activities by invoking biblical passages and comparing their mission to end abortion to the struggle for freedom and equality waged by Gandhi and Martin Luther King, Jr.¹⁶ Because the movement is nationwide, Congress has decided the solution to ensuring women's access to abortion facilities should be embodied in federal legislation.¹⁷

which courts have issued injunctions against clinic blockaders; of the 10 cases cited, at least six involved NOW or Planned Parenthood as plaintiffs. *Id.*

10. See *Operation Rescue*, 726 F. Supp. at 1487-88. The trial court found the "principal goals [of the defendant anti-abortionists] are to stop abortion and to end its legalization." *Id.* at 1487; see also *Bray*, 113 S. Ct. at 758. Writing for the majority, Justice Scalia portrays Operation Rescue, one of the petitioners, as "an unincorporated association whose members oppose abortion . . . [It] organizes antiabortion [sic] demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics." *Id.*

11. Elizabeth L. Crane, *Abortion Clinics and Their Antagonists: Protection from Protestors Under 42 U.S.C. § 1985(3)*, 64 U. COLO. L. REV. 181, 182-83 (1993).

12. See generally David Van Biema, *In Your Town, in Your Face*, TIME, July 19, 1993, at 29 (recounting Operation Rescue's history and goals). Four years earlier, the magazine described Operation Rescue protestors favorably as "crusaders" and "uterine warriors." Garry Wills, "Save the Babies:" *Operation Rescue: A Case Study in Galvanizing the Antiabortion Movement*, TIME, May 1, 1989, at 26. The group's religious roots are evidenced by its name, which comes from a passage in the Bible: "Rescue those who are being taken away." *Id.* at 28 (citing *Proverbs* 24:11).

13. Henn & Del Monaco, *supra* note 9, at 253.

14. *Bray*, 113 S. Ct. at 781 (Stevens, J., dissenting).

15. *Operation Rescue*, 726 F. Supp. at 1489-90.

16. See Whitehead, *supra* note 3, at 89, 90 n.100 ("The strategy of Operation Rescue is massive civil disobedience in the tradition of Henry David Thoreau, Mahatma Gandhi, and Martin Luther King, Jr.") (citations omitted).

17. See Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (to be codified as amended at 18 U.S.C. § 248).

This new legislation will have an impact on Operation Rescue and its supporters as parties to much of the recent litigation in the abortion controversy.¹⁸ Part II of this article begins with an overview of this high-profile anti-abortion group, and includes an analysis of *Bray v. Alexandria Women's Health Clinic*,¹⁹ the case which spurred Congress to pass the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").²⁰ Part III examines the legislative history of FACE chronicled in congressional committee reports and the Congressional Record as the Act wound through the House and the Senate. The search through the legislative record is instructive in understanding FACE and what it meant to accomplish. Part IV surveys the First Amendment arguments addressed in *Madsen v. Women's Health Center, Inc.*²¹ In *Madsen*, three members of Operation Rescue petitioned the United States Supreme Court to overturn a Florida Supreme Court decision favoring the owners of a Melbourne, Florida abortion facility.²² Despite the gradual dismemberment of the holding in *Roe v. Wade*, the latest judicial decisions have affirmed that a woman's right to an abortion is constitutionally guaranteed.²³

18. See, e.g., *National Org. for Women v. Scheidler*, 114 S. Ct. 798, 800 (1994) (describing the respondent, Joseph Scheidler, as opposing legal abortion); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) (citing as defendants both Randall Terry and Operation Rescue); *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664 (Fla. 1993), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994).

19. 113 S. Ct. 753 (1993).

20. Pub. L. No. 103-259, 108 Stat. 694; see also Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 301 (1994) (reviewing BARBARA H. CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993)) (stating that Congress intends the Act to void the Court's holding in *Bray*). The Senate sent the bill to President Clinton for signature on May 12, 1994, and the President signed it into law on May 26, 1994. See *Foes Sue Over Abortion-Protest Law*, SUN-SENTINEL, May 27, 1994, at 3A [hereinafter *Foes*]; see also 140 CONG. REC. S5628 (1994) (giving the roll call in the Senate as 69 vote for and 30 vote against passage of FACE); *Clinic Access: Senate Sends Prez Stiff FACE; Challenge Looms*, *Abortion Report*, May 13, 1994, available in LEXIS, Cmpgn Library, Abtrpt File [hereinafter *Clinic Access*].

21. 114 S. Ct. 2521 (1994).

22. *Id.*

23. *Madsen*, 114 S. Ct. at 2516; *Scheidler*, 114 S. Ct. at 798; see also *Operation Rescue*, 726 F. Supp. at 1494 n.13 (listing United States Supreme Court decisions that restricted the scope of *Roe*); *infra* note 225.

II. BACKGROUND

A. *Operation Rescue: The New Civil Disobedience*

Although one commentator maintained that “civil disobedience is in fact obedience, that it respects the law and is within the law,”²⁴ another defined it as “an illegal public protest, non-violent [sic] in character.”²⁵ Operation Rescue has devised a specific type of civil disobedience to influence governmental policy and to persuade the general public of the righteousness of its cause: preventing access to abortion clinics by forming human barricades at the doorways.²⁶ Viewed historically, the anti-abortion movement is the latest in a series of national campaigns to use civil disobedience to hasten social and political change.²⁷ Today, because of the violence of its tactics and the resulting polarization of public opinion, Operation Rescue clinic entrance blockades command considerable media coverage; the pronouncements and arrests of its organizers provide headlines for the local and national press.²⁸

24. Symposium, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 17 (1966) (section written by Harrop A. Freeman). Freeman concludes:

When [the protestor] has decided that the highest demands of law, the highest morality, the highest values of humanity require a specific law to be challenged (and particularly when there is no other *effective* way for him to do so) then the conscientious citizen *must* humbly and contritely but courageously engage in civil disobedience.

Id. at 26.

25. *Id.* at 3 (section written by Carl Cohen).

26. Henn & Del Monaco, *supra* note 9, at 251-53.

27. See Whitehead, *supra* note 3, at 89. Whitehead discusses American protest movements beginning with the colonial protest against the British Stamp Act prior to the American Revolution, and including abolition of slavery, women's rights, civil rights, anti-Vietnam protests, and anti-vivisection demonstrations. *Id.* at 77-89. Positioning Operation Rescue as the culmination of this list of milestones that helped shape the American political system perhaps clothes the anti-abortion movement in historical legitimacy it does not deserve.

28. See generally Abortion Report, *supra* note 20. The Report, updated daily, compiles news clips from major newspapers on abortion issues of national interest. For example, a summary of an editorial in the *Milwaukee Sentinel* on June 8, 1994, concerning the arrest of seven abortion protestors who blockaded the entrance to a Milwaukee abortion clinic, states that United States Attorney Thomas Schneider is “correct in his assessment that this is a clear matter for a few individuals taking it upon themselves to deny the women involved their constitutional right to an abortion.” *Id.* (daily ed. June 13, 1994) (quoting the *Milwaukee Sentinel*). The protestors were charged with violation of the newly-signed Freedom of Access

Prior to *Roe*, opponents of abortion were organized into lobbying and educational groups and were supported by the Roman Catholic Church.²⁹ The abortion protests consisted of peaceful marches; “[c]ivil disobedience was not their style.”³⁰ After *Roe*, Catholics began to sit in at clinics.³¹ Randall Terry³² met two of the leaders of these passive protests in 1986, and by 1987 he had organized Operation Rescue into a viable organization, drawing members mainly from among evangelical Protestants.³³

The first “rescue”³⁴ was on November 28, 1987, in Cherry Hill, New Jersey.³⁵ The success of the event, in which 300 rescuers participated in preventing the performance of abortions by blocking access to the clinic for the day, convinced two other clinics to shut their doors voluntarily.³⁶ Furthermore, other anti-abortion groups copied Operation Rescue’s methods

to Clinic Entrances Act. *Id.* The same issue of the Report also quoted a *New York Times* article under the heading, *Hunters Seek FACE*, the *Cincinnati Enquirer* on abortion protests in Cincinnati, as well as the *Milwaukee Journal* on the arrest of the seven clinic blockaders. *Id.*

29. Wills, *supra* note 12, at 27.

30. *Id.*

31. *Id.*

32. Terry was a high school dropout raised in New York by his mother and two aunts who were ardent feminists. Michael P. O’Brien, Note, *Operation Rescue Blockades and the Misuse of 42 U.S.C. § 1985(3)*, 41 CLEV. ST. L. REV. 145, 145 n.1 (1993) (quoting Sue Hutchison & James N. Baker, *The Right-to-Life Shock Troops*, NEWSWEEK, May 1, 1989, at 32). After moving to Texas to become a rock star, he experienced a religious conversion and became an evangelical minister. *Id.* Terry, who is now a superstar of the anti-abortion movement, began his career as an abortion protestor by talking with patients outside an abortion clinic during breaks from his job as a used car salesman. Henn & Del Monaco, *supra* note 9, at 253; Whitehead, *supra* note 3, at 89 n.98 (citation omitted); *see also* Sandra G. Boodman, *Abortion Foes Strike at Doctors’ Home Lives: Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (depicting Terry as “the nation’s best-known antiabortion [sic] leader”). The conversations with patients then escalated to picketing outside the clinic with others who objected to the performance of abortions inside the facility. Whitehead, *supra* note 3, at 89 n.98 (citation omitted). Terry eventually aligned himself with the anti-abortion movement and became a disciple of Joseph Scheidler, who heads the Pro-Life Action League and has been active in the anti-abortion movement since 1973. Boodman, *supra*, at A1; *see also* cases cited *supra* note 18.

33. Wills, *supra* note 12, at 28.

34. “In general, a ‘rescue’ is a demonstration at the site of a clinic where abortions are performed. At a ‘rescue,’ the demonstrators, called ‘rescuers,’ intentionally trespass on the clinic’s premises for the purpose of blockading the clinic’s entrances and exits, thereby effectively closing the clinic.” *Operation Rescue*, 726 F. Supp. at 1487.

35. Whitehead, *supra* note 3, at 89.

36. *Id.*

so that clinic blockades evolved into a national phenomenon.³⁷ Since 1987, their obstructionist tactics have put Operation Rescue and its supporters in the forefront of the abortion controversy.

Operation Rescue's tactics include packing rescuers around doors to abortion clinics so no one can enter or leave the facility.³⁸ The abortion protestors at a 1989 clinic blockade in California were depicted as moving "in a human sludge, on their knees, not standing," to avoid direct confrontation with the pro-choice demonstrators.³⁹ In the first year after its founding, Operation Rescue staged hundreds of such nonviolent actions, and police arrested thousands of the protestors.⁴⁰ By 1991, the group was so well-organized that it nearly paralyzed Wichita, Kansas with a clinic blockade that lasted forty-six days.⁴¹ Operation Rescue has subsequently stayed in the headlines with widespread summer protests, such as the recent "Cities of Refuge" campaign in 1993, which targeted seven urban areas.⁴²

Terry's strategy evolved into activist protest: He and his followers put aside speeches and placards in favor of trespass and other forms of civil disobedience that lead to massive arrests.⁴³ His goal is to force the government to rescind its support of the pro-abortion stance of the courts.⁴⁴ Terry designs anti-abortion demonstrations to pit modern civil disobedience against the constitutionally-sanctioned freedom of choice for women.

In the last twelve years, abortion protests have become violent, culminating in the shooting deaths of two doctors, two clinic workers, and

37. Henn & Del Monaco, *supra* note 9, at 254.

38. Wills, *supra* note 12, at 27. Wills describes the jockeying for media attention during the blockades, with the pro-choice protestors trying to dominate the TV cameras' footage of the event with their own placards: "It is a noisy scene, hymns vs. chanted slogans, with both sides resorting to bullhorns to get above the din (and the police finally adding their loudspeakers)." *Id.*

39. *Id.*

40. *Id.*; see also Whitehead, *supra* note 3, at 89 (noting that by 1989 Operation Rescue had branches in 200 cities and 35,000 members).

41. Van Biema, *supra* note 12, at 29.

42. *Id.*

43. See Henn & Del Monaco, *supra* note 9, at 254-55 & nn.19-20, 256 (listing cases granting injunctions against clinic blockaders and cases in which contempt orders were issued for violations of the injunctions).

44. "Terry has framed the issue in stark terms, asking, 'When the government has to decide between jailing tens of thousands of people and making abortion illegal again, what do you think it's going to do?'" *Id.* at 256 (quoting Michael Matza, *Throw this Man in Jail*, PHILADELPHIA INQUIRER MAG., June 26, 1988, at 20, 22).

an abortion-provider's bodyguard since March 1993.⁴⁵ Three of the five killings occurred in Pensacola, Florida.⁴⁶ David Gunn, a physician, was killed on March 10, 1993, as he arrived at the Women's Medical Services clinic in Pensacola.⁴⁷ On July 29, 1994, John Britton, a doctor who worked at The Ladies Center in Pensacola, and his voluntary escort, James Barrett, were fatally shot while sitting in the front seat of a pickup truck outside the clinic.⁴⁸ Barrett's wife, June, who was sitting in the rear of the truck, was wounded in the left arm.⁴⁹ A third physician, Dr. George Tiller, was wounded at an abortion clinic in Wichita, Kansas in August 1993.⁵⁰

The most recent violence also claimed the most victims in a single shooting spree. Two clinic staff members, Shannon Lowney and Lee Ann Nichols, were murdered and five others were wounded on December 30, 1994, in an attack on two suburban Boston, Massachusetts clinics.⁵¹ The rampage continued the next day in Norfolk, Virginia until the gunman was arrested after firing shots at a third clinic.⁵²

The person responsible for the July 1994 shooting deaths in Pensacola, Paul Hill, gained notoriety as the first offender charged with violation of FACE. On October 5, 1994, after a three-day trial, a federal jury convicted Hill of two counts for killing Britton and Barrett, a third count for the wounding of June Barrett, and a fourth count for using a firearm.⁵³ In Boston, federal prosecutors are considering whether to charge John Salvi with violations of FACE.⁵⁴ Massachusetts state attorneys are seeking life

45. "[T]he tally of violence over the past 12 years includes 123 cases of arson and 37 bombings in 33 states, and more than 1,500 cases of stalking, assault, sabotage and burglary" nationwide, according to federal statistics. Laurie Goodstein, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1.

46. Ann O'Hanlon, *Pensacola's Chain of Violence*, WASH. POST, July 30, 1994, at A4; see also *Foes*, *supra* note 20, at A3.

47. O'Hanlon, *supra* note 46, at A4.

48. William Claiborne, *Two Killed at Clinic in Florida: Radical Abortion Foe Charged in Shootings*, WASH. POST, July 30, 1994, at A1.

49. *Id.*

50. Don Phillips, *Violence Hardly Ruffled Protest Ritual: Foes, Supporters of Abortion Rights Resume Routine at Kansas Clinic*, WASH. POST, August 22, 1993, at A8.

51. Christopher B. Daly, *Salvi Denies Murder Charges in Shooting Attacks on Massachusetts Clinics*, WASH. POST, Jan. 10, 1995, at A3; Pamela Ferdinand, *Salvi Acted Alone, DA Says; Detailed Plan Alleged in Deadly Clinic Attack*, BOSTON GLOBE, Feb. 16, 1995, at 29.

52. Daly, *supra* note 51, at A3.

53. *FACE Trial: Hill Is the First Convicted Under New Act*, Abortion Report, October 6, 1994, available in LEXIS, Cmpgn Library, Abtrpt File.

54. Daly, *supra* note 51, at A3.

imprisonment for Salvi, who is charged with two counts of murder and five counts of attempted murder.⁵⁵

By passing FACE, which criminalizes the use of force, threats, or blockades to intimidate or to interfere with women seeking abortions or with abortion providers, Congress has increased the cost to protestors for obstructing access to clinics and to abortion services.⁵⁶ The government hopes to quell the rising violence of the protests without infringing the rights of the protestors. Whether this escalation of liability will deter Terry and his supporters depends on whether their judicial attacks on the law's constitutionality will succeed.⁵⁷

B. *The Bray Decision: A Misguided First*

Bray v. Alexandria Women's Health Clinic,⁵⁸ decided on January 13, 1993, was the first Supreme Court case to apply 42 U.S.C. § 1985(3)⁵⁹ to abortion clinic blockaders. The statute provides a federal cause of action to those deprived of their constitutional rights against persons conspiring to

55. *Id.*

56. 108 Stat. at 694.

57. See *Foes*, *supra* note 20, at 3A (reporting that two anti-abortion groups filed suits challenging the Act's constitutionality immediately after the Act took effect).

58. 113 S. Ct. 753 (1993).

59. The section reads as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

deprive "any person or class of persons of the equal protection of the laws."⁶⁰ *Bray* was also the first consideration by the Court of a claim based on the "hindrance clause," the second clause of § 1985(3).⁶¹

Section 1985(3) was originally enacted as section 2 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.⁶² The 1871 Act "was a response to the massive, organized lawlessness that infected our Southern States" during Reconstruction, and it contained both a criminal and a civil component.⁶³ Its modern equivalent is twofold: § 1985(3) applies to the infringement of civil rights, and 18 U.S.C. § 241 outlines the criminal sanctions available against conspirators who deprive persons of the right to equal protection.⁶⁴

The respondents in *Bray* were nine clinics that performed abortions or provided abortion counseling in the greater Washington, D.C. area, and five organizations that supported free access to abortion.⁶⁵ The petitioners were Operation Rescue⁶⁶ and six individuals who opposed the voluntary termination of pregnancy and dedicated themselves to actions that would prevent the further sanctioning of abortion.⁶⁷ The respondents sought an injunction to prevent the petitioners from trespassing on the premises of abortion clinics in or around Washington, D.C. or from preventing access to those

60. *Id.*

61. Marjorie Richter, Comment, *Blinking at Reality: An Examination of Bray v. Alexandria*, 20 HASTINGS CONST. L.Q. 905, 910-11 (1993) (containing an excellent discussion of the *Bray* case).

62. *Id.* at 911; *see also* United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 836 (1983) ("The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters."). *See generally* JUDGES, *supra* note 1, at 264 (discussing the *Bray* decision). Richter also points out that the *Bray* opinions call it "The Ku Klux Act of 1871," rather than the more common "Ku Klux Klan Act." *See, e.g., Bray*, 113 S. Ct. at 779 (Stevens, J., dissenting); Richter, *supra* note 61, at 911 n.44.

63. *Bray*, 113 S. Ct. at 779 (Stevens, J., dissenting); *see also* Richter, *supra* note 61, at 911 (detailing the statutory history of § 1985(3)). Justice Stevens explained that in deciding whether to apply the statute, the Court should consider "whether the controversy has a purely local character or the kind of federal dimension that gave rise to the legislation." *Bray*, 113 S. Ct. at 779.

64. 18 U.S.C. § 241 (1988) (sanctioning fines of up to \$10,000 and imprisonment of up to 10 years for each violation).

65. *Operation Rescue*, 726 F. Supp. at 1487.

66. *See* discussion of Operation Rescue *supra* part II.A.

67. *Operation Rescue*, 726 F. Supp. at 1488.

clinics by patients and staff.⁶⁸ The lower court granted injunctive relief, and the Court of Appeals for the Fourth Circuit affirmed its decision, adding that abortion protestors had “crossed the line from persuasion into coercion” by denying the respondents their legal rights.⁶⁹

For the Supreme Court, Justice Scalia wrote the majority opinion, in which Chief Justice Rehnquist and Justices White, Kennedy, and Thomas joined. According to the majority, the sole question presented to the Supreme Court was “whether the first clause [the “deprivation” clause] of . . . § 1985(3) . . . provides a federal cause of action against persons obstructing access to abortion clinics.”⁷⁰ Thus, as one commentator was careful to highlight, the Court limited the legal question in *Bray* to “the jurisdiction of federal courts to hear blockade cases rather than the status of abortion rights themselves.”⁷¹

Relying on two precedents⁷² for an interpretation of the statute, the majority stated that for a private conspiracy to violate the deprivation clause, a plaintiff must prove that “some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action.”⁷³ The plaintiff must also show that the goal of the conspiracy is to interfere with rights that are protected against private and governmental infringement.⁷⁴

68. *Operation Rescue*, 914 F.2d at 584; *Operation Rescue*, 726 F. Supp. at 1486, 1496-97.

69. *Operation Rescue*, 914 F.2d at 585; *Operation Rescue*, 726 F. Supp. at 1486, 1496-97. The trial court granted the injunction because of interference with the plaintiffs’ constitutional right to interstate travel and defendants’ violation of the Virginia state law prohibiting trespass and Virginia common law against creation of a public nuisance. *Id.* at 1493-95. However, the court rejected, on First Amendment grounds, the plaintiffs’ request for an injunction against the activities of abortion protestors “that tend to intimidate, harass or disturb patients or potential patients of the clinics.” *Id.* at 1497.

70. *Bray*, 113 S. Ct. at 757-58.

71. JUDGES, *supra* note 1, at 264.

72. The two cases the *Bray* Court based its opinion were *Griffin v. Breckenridge* and *Carpenters*. *Bray*, 113 S. Ct. at 758, 763 (citing *Griffin v. Breckenridge*, 403 U.S. 88 (1971) and *Carpenters*, 463 U.S. at 825). In *Griffin*, three African-American plaintiffs sued a group of whites for attacking them on a public highway. The Court held that private conspiracies could violate 42 U.S.C. § 1985(3). Richter, *supra* note 61, at 913 (citing *Griffin*, 403 U.S. at 89-92, 107). While *Griffin* broadened the scope of § 1985(3), the Court in *Carpenters* voted five to four that the statute does not cover conspiracies against economic groups and therefore cannot be applied to prejudice against non-union employees, thus narrowing the reach of the statute. *Id.* at 915 (citing *Carpenters*, 463 U.S. at 838).

73. *Bray*, 113 S. Ct. at 758 (quoting *Griffin*, 403 U.S. at 102).

74. *Id.* at 758 (quoting *Carpenters*, 463 U.S. at 833).

The Court held that the respondents met neither of these two requirements.⁷⁵ The first element, requiring a “class-based, invidiously discriminatory animus,” was not satisfied because, contrary to what the district court had found, women wanting to terminate a pregnancy are not a class within the meaning of § 1985(3).⁷⁶ Furthermore, the Court asserted that the protestors opposed abortion and not women, so that they were not motivated by gender discrimination.⁷⁷ The second element, requiring a violation of protected rights, was also unsatisfied. Of the two constitutional rights cited, the right to interstate travel and the right to abortion, the former, although protected against private conspirators, was only incidentally affected.⁷⁸ The Court held that a right not directly affected does not constitute a sufficient basis for proving discriminatory animus.⁷⁹ In addition, the right to abortion, while targeted by the petitioners, is not protected against private interference.⁸⁰ Because neither element was satisfied, the majority concluded that the respondents’ § 1985(3) deprivation claim failed.⁸¹

Even more damaging to the pro-choicers was the Court’s unwillingness to rule on the hindrance clause claim.⁸² In contrast, the three dissenting

75. *Id.*

76. *Id.* at 759. Justice Scalia maintained that although it is unclear what the term “class” encompasses beyond a class defined by the race of its members as the term was used in *Griffin*, it must mean more than a group of persons engaged in conduct of which the defendant being tried under § 1985(3) disapproves. *Id.* Because it reasoned that the protests did not target women as a class, the Court also declined to rule whether women qualify as a class for purposes of the conspiracies that § 1985(3) prohibits. *Bray*, 113 S. Ct. at 759. Thus, the Court did not interpret the hesitant “perhaps” left undefined in *Griffin* and did not shed light on whether class-based discrimination under the statute can include gender discrimination, as well as racial prejudice. *See supra* note 72 and accompanying text.

77. *Bray*, 113 S. Ct. at 759-60. Justice Scalia explained that “[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward . . . women as a class . . .” *Id.* at 760. He did not, however, list those reasons.

78. *Id.* at 762; *see also Operation Rescue*, 726 F. Supp. at 1494. In *Operation Rescue*, the trial court deliberately sidestepped the abortion issue, reasoning that the holding in *Webster* suggested that a woman’s right to abortion may no longer be constitutionally guaranteed. *Id.* (citations omitted). The court concluded that in order to resolve the instant case, “it is unnecessary and imprudent to venture into this thicket.” *Id.*

79. *Bray*, 113 S. Ct. at 762.

80. *Id.* at 764.

81. *Id.*

82. *Id.* at 764-65. Justice Scalia noted that a claim based on the second clause of § 1985(3) had never been presented to the Court for resolution. *Id.* at 767. But quixotically he proceeded to give a substantial analysis of the claim, as if it were before the Court. *Bray*, 113 S. Ct. at 765. He concluded that a close reading of the statute makes it clear that a

opinions all agreed that the petitioners had violated the second clause of § 1985(3).⁸³ The hindrance clause bans any protest which seeks to hinder the state authorities from protecting the rights of persons in the state.⁸⁴ Thus, the Court cut off access to both sections of the statute as a legal framework for putting an end to the abortion protests, “the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name.”⁸⁵

According to the dissenting justices, the majority refused to apply either clause of § 1985(3) because it erroneously assumed that the issue in dispute was the defendants’ opposition to abortion.⁸⁶ The dissenters argued vigorously that this case was only superficially about abortion. They claimed that the substantive issue before the Court was whether the government could use its authority to end a national conspiracy based on disregard for the law.⁸⁷ They further asserted that the Court could have ensured protection of a woman’s right to abortion from those who want the government to rescind that right. Instead, by reversing the district court’s decision to grant injunctive relief, the Court condoned the anti-abortionists conduct directed at preventing every woman from taking advantage of the constitutional right to terminate her pregnancy.⁸⁸ As the dissenting opinions aptly demonstrated, the majority sidestepped a historic opportunity to invoke federal jurisdiction over abortion protestors, who have become “organized and violent mobs across the country.”⁸⁹

hindrance clause claim required the same two elements as the deprivation clause claim and therefore would fail for the same two reasons: a lack of class-based animus, and the absence of a right protected against private conspiracies. *Id.* at 765-67.

83. *Id.* at 779 (Souter, J., concurring in part and dissenting in part), 795 (Stevens, J., dissenting), 805 (O’Connor, J., dissenting). Justice Souter concluded that the finding of a violation of the hindrance clause, which he called the prevention clause, required express clarification from the district court and recommended that the case be remanded for that purpose. *Id.* at 769. Justice Stevens stated his opinion more forcefully; he asserted that the respondents unquestionably proved a hindrance clause claim. *Id.* at 795 (Stevens, J., dissenting).

84. 42 U.S.C. § 1985(3) (1988).

85. *Bray*, 113 S. Ct. at 782 (Stevens, J., dissenting).

86. *Id.* at 798.

87. *Id.*

88. *Id.* at 788.

89. *Id.* at 780.

By foregoing this opportunity, the Supreme Court in *Bray* yielded its judicial lawmaking authority to the legislative branch, allowing Congress to draw the line between legal clinic picketing and illegal clinic blockades.⁹⁰

III. FACE: A LEGISLATIVE HISTORY

A. *Abortion Politics*

In the years preceding the *Roe v. Wade*⁹¹ decision, the legislative and executive branches of the federal government kept a low profile in the abortion controversy, allowing the states to regulate the issue.⁹² Since *Roe*, and until recently, although Congress initiated a remarkable number of proposals affecting abortion, “abortion politics [was] a controversy where rarely have so many public officials worked so hard to say so little about an issue on the minds of so many citizens.”⁹³

Examination of legislative records show that in the past two decades Congress has confronted the abortion issue itself only indirectly.⁹⁴ Of note are the passage of the Pregnancy Discrimination Act in 1978⁹⁵ and the enactment of the Adolescent Family Life (“AFL”) Demonstration Projects in 1981,⁹⁶ also known as the Chastity Act.⁹⁷ The ban on employer

90. See 108 Stat. 694; see also *infra* note 193 and accompanying text (distinguishing between peaceful picketing and violent obstruction).

91. 410 U.S. at 113.

92. Devins, *supra* note 20, at 294. Through the 1960s, following a 100 years of political inaction, 23 states changed their abortion legislation, four by repealing their abortion laws and 19 by liberalizing them. *Id.* (citations omitted). Devins also indicates that even when Congress acted on abortion prior to *Roe*, it did no more than “preserve the anti-abortion status quo ante.” *Id.* (citations omitted).

93. *Id.* at 295 & n.15 (citing Amy Gutmann, *No Common Ground*, NEW REPUBLIC, Oct. 22, 1990, at 43).

94. Although Congress has not acted to codify the holding in *Roe* granting women a right to abortion in the first trimester of pregnancy prior to fetus viability, a pro-choice initiative, known as the Freedom of Choice Act of 1993, was introduced in the first session of the 102d Congress. Devins, *supra* note 20, at 298 & n.23 (citing H.R. 25, 102d Cong., 1st Sess. (1991)). Currently, the initiative is pending in both the House and the Senate. Bill Tracking Report, H.R. 25 and S. 25, available in LEXIS, Legis Library, Bltrck File. The Act would prevent a state from restricting a woman’s right to choose abortion either prior to fetal viability or whenever the woman’s life or health is threatened by the pregnancy. *Id.*

95. 42 U.S.C. § 2000e(k) (1988).

96. *Id.* § 300z-10. The legislation provides that “grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.” *Id.* § 300z-10(a).

97. See generally Devins, *supra* note 20, at 301. Devins cites these two pieces of legislation as examples of Congress refraining from restricting abortion funding and defeating

discrimination against pregnant women broadened the scope of rights afforded to working women, by equating pregnancy discrimination with gender discrimination.⁹⁸ But in addition to this praiseworthy achievement, the Pregnancy Discrimination Act also allowed employers to exclude abortions from health insurance benefits.⁹⁹ The AFL Demonstration Projects legislation attempted to discourage unwanted pregnancies, and hence the need for abortions, by providing religious groups with federal funding to promote sexual abstinence among teenagers.¹⁰⁰ Under closer scrutiny, it is clear that the Pregnancy Discrimination Act encourages a woman to give birth rather than to abort the fetus, and the AFL legislation advocated abstinence, thereby averting the need for abortion.¹⁰¹ Both acts illustrate the conservative posture of Congress regarding abortion rights.

Otherwise, legislative activity has consisted mostly of placing limitations on abortion funding, although Congress has avoided legislating actual restrictions on access to abortion services. Beginning in 1976, Congress started cutting off Medicaid funds for abortions.¹⁰² Legislators stopped funding abortion services in federal programs on family planning, American assistance to foreign countries, legal aid, armed forces hospitals, and prisons, as well as limited the funds for abortions in the District of Columbia.¹⁰³ Because of this lack of federal funding, unrestricted access to abortion has receded further and further from the reach of economically disadvantaged women who are often in the greatest need of federally subsidized abortion services.

Although Congress has not shifted its position on abortion funding restriction for several reasons, the recent enactment of the Freedom of Access to Clinic Entrances Act of 1994 marks a turning point in congressional involvement in abortion politics. First, by criminalizing violence and the threat of violence at abortion clinic entrances, FACE safeguards a woman's right to receive abortion services. Second, the fact that the anti-abortion and pro-choice factions of Congress could agree on the need for FACE reveals a congressional consensus that a woman's right to choose should be free from physical intimidation. Third, by providing federal legislation, Congress has acknowledged that the problem of abortion clinic

attempts to overrule the Supreme Court holding in *Roe*. *Id.*

98. 42 U.S.C. § 2000e(k) (1988).

99. *Id.*

100. Devins, *supra* note 20, at 301.

101. *Id.*

102. *Id.* at 300 (citing material from CRAIG & O'BRIEN, *supra* note 20, at 110-37).

103. *Id.* (citing material from CRAIG & O'BRIEN, *supra* note 20, at 112-13, 131).

blockades is now a national problem that can best be handled on the national level. With the enactment of FACE, the federal legislative and executive branches have finally confronted the abortion issue squarely and discovered that a limited compromise is possible.

B. *Evolution of FACE*

A bill similar to the House of Representatives version of the enacted law was first introduced in Congress in 1992.¹⁰⁴ The House Subcommittee on Crime and Criminal Justice conducted a hearing on the proposal on May 6, 1992.¹⁰⁵ The Subcommittee heard testimony on the abortion clinic blockades and protests that had disrupted health care services both in Wichita, Kansas during the summer of 1991 and in Buffalo, New York, in the spring of 1992.¹⁰⁶ Both the violence and the national scope of these demonstrations brought obstruction of clinic access to the attention of federal lawmakers.¹⁰⁷ The House did not have the opportunity to consider enactment of House Bill 1703 in 1992, but the bill paved the way for further action in the 103d Congress. House Bill 796 was introduced on February 3, 1993, as the next version of FACE.¹⁰⁸

Although the House took initiative by introducing a bill to address the rising violence of the ongoing abortion protests, it was the Senate proposal, Senate Bill 636, which was presented to the President on May 17, 1994.¹⁰⁹ President Clinton signed the bill into law on May 26, 1994, which was entered into the Congressional Record on June 7, 1994.¹¹⁰ Senator Edward M. Kennedy introduced the bill on the Senate floor on March 23, 1993, and that same day it was referred to the Senate Labor and Human

104. H.R. REP. NO. 306, 103d Cong., 1st Sess. 1 (1993), *reprinted in* 1994 U.S.C.-C.A.N. 699, 699 (referring to H.R. 1703, 102d Cong., 2d Sess. (1992)).

105. *Id.*

106. *Id.*

107. *Id.*

108. H.R. 796, 103d Cong., 1st Sess. (1993); 139 CONG. REC. H483 (daily ed. Feb. 3, 1993); *see also* Bill Tracking Report, H.R. 796, 103d Cong., 1st Sess., *available in* LEXIS, Legis Library, BLT103 (containing a synopsis of the bill's progress through the House from its introduction on Feb. 3, 1993, to the last action taken on Mar. 17, 1994, when House Bill 796 was incorporated into Senate Bill 636).

109. S. 636, 103d Cong., 2d Sess. (1994); *see generally* Bill Tracking Report, S. 636, 103d Cong., 1st Sess., *available in* LEXIS, Legis Library, BLT103 (containing a synopsis of the bill's progress through the Senate from its introduction on March 23, 1993, to the final action taken on June 7, 1994, when the newly signed law was entered into the Congressional record).

110. Bill Tracking Report, S. 636, *supra* note 108.

Resources Committee for consideration.¹¹¹ In his remarks, the senator noted the grisly statistics in the war being waged against free access to abortion facilities: "Over 100 clinics have been torched or bombed in the past 15 years. Over 300 have been invaded and over 400 have been vandalized. Already this year, clinics have sustained more than \$1.3 million in damage from arson alone."¹¹² He then stressed that only federally enacted laws can stop the rising toll of "nationwide extremist acts" and the resulting damage to property and to the well-being of clinic patients and staff.¹¹³ The senator's statement echoed that of William S. Sessions, Director of the Federal Bureau of Investigation, who wrote prior to the enactment of FACE that current federal legislation was inadequate to handle the violent obstruction of abortion clinic entrances.¹¹⁴ Although it took another fourteen months for the bill to become law, the majority of the members of Congress eventually agreed with Senator Kennedy that the situation demanded action on the federal level.

The text of the bill printed in the record at the request of Senator Kennedy contained a section, since expunged,¹¹⁵ outlining the congressional findings,¹¹⁶ and represented the initial version of Senate Bill 636,

111. 139 CONG. REC. S3523-25 (daily ed. Mar. 23, 1993) (containing the full text of the original version of Senate Bill 636); *see also id.* at S3479 (referring the bill to the Committee on Labor and Human Resources). Senator Kennedy's introductory remarks included the following statement: "Mr. President, today we are introducing legislation to protect women, physicians, and other health personnel, and public and private health clinics, from opponents of abortion who resort to violence, blockades, and other vigilante tactics." *Id.* at S3523. The senator spoke less than two weeks after Dr. David Gunn was murdered outside a clinic in Pensacola, Florida. *See supra* note 44 and accompanying text.

112. 139 CONG. REC. S3523 (daily ed. Mar. 23, 1993).

113. *Id.* at S3524. Several months later, Senator Kennedy, in a speech to his colleagues, reiterated his plea for speedy congressional action to put a stop to the mounting violence. "It is not enough for Congress simply to condemn this reprehensible conduct. Legislation must be enacted before another doctor dies, or another clinic is blockaded or burned to the ground." *Id.* at S11,311 (daily ed. Sept. 9, 1993) (remarks entitled, *The Tragedy of Continuing Anti-Abortion Violence*).

114. *The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 5 (1993) [hereinafter *Hearing*] (letter from William S. Sessions, Director, FBI, to Sen. Tom Harkin).

115. H.R. CONF. REP. NO. 488, 103d Cong., 2d Sess., pt. 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 724 (deleting the Findings section in the Senate Bill but including some of the factual findings in the Purpose section).

116. 139 CONG. REC. S3524 (daily ed. Mar. 23, 1993). The following is a partial text of the findings:

SEC. 2. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE.

(a) Findings. -- Congress finds that --

which was to undergo four subsequent rewritings.¹¹⁷ Dated May 13, 1994,¹¹⁸ the fifth and final version incorporated House Bill 796,¹¹⁹ which had become part of Senate Bill 636 on March 17, 1994.¹¹⁹ Thus, in tracking the evolution of the Act, the development of the Senate Bill is more instructive.

For two months following the introduction of Senate Bill 636 on March 23, 1993, co-sponsors were added at subsequent congressional sessions.¹²⁰ The next significant event in the bill's evolution was the Senate Labor and Human Resources Committee hearing on May 12, 1993.¹²¹ The testimony given at the hearing¹²² formed the basis for the committee report dated

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- (1) medical clinics and other facilities offering abortion services have been targeted in recent years by an interstate campaign of violence and obstruction aimed at closing the facilities or physically blocking ingress to them, and intimidating those seeking to obtain or provide abortion services;
 - (2) as a result of such conduct, women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services;
 - (3) such conduct subjects women to increased medical risks and thereby jeopardizes the public health and safety; . . .
 - (6) such conduct operates to infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional, and burdens interstate commerce[;] . . .
 - (10) the obstruction of access to abortion services can be prohibited, and the right of injured parties to seek redress in the courts can be established, without abridging the exercise of any rights guaranteed under the First Amendment . . .

Id.

117. The fifth version was adopted by both the Senate and the House in May 1994 and was sent to President Clinton to sign. 140 CONG. REC. H3135 (daily ed. May 5, 1994), S5628 (daily ed. May 12, 1994), S5824 (daily ed. May 17, 1994); *see also* Full Text of Bills, 1994 S. 636, 103d Cong., 2d Sess., *available in* LEXIS, Legis Library, BTX103.

118. H.R. CONF. REP. NO. 488.

119. 139 CONG. REC. H1519 (daily ed. Mar. 17, 1994).

120. Bill Tracking Report, S. 636, *supra* note 108.

121. *Hearing, supra* note 114, at 1.

122. Senate Report 117 quotes extensively from the statements of two of the witnesses at the hearing, Attorney General Janet Reno and Harvard University Law Professor Laurence H. Tribe. S. REP. NO. 117, 103d Cong., 1st Sess., pts. IV & V (1993), *available in* LEXIS, Legis Library, Cmtrpt File. Attorney General Reno expressed her opinion concerning the need for federal legislation to discourage the use of violence during abortion protests. She testified as follows:

This is a problem that is national in scope. It is occurring throughout the country; on the doorstep of the Nation's Capital; in Alexandria and Falls Church in northern Virginia; in Pensacola and Melbourne in Florida; in West Hartford,

July 29, 1993 and reported in the Senate the same day “with an amendment in the nature of a substitute” of the Senate Bill.¹²³

This second version retained the congressional findings of fact outlining the necessity for such legislation and defending its constitutionality.¹²⁴ But version two of the bill added four paragraphs to the original section entitled, “Congressional Statement of Findings and Purpose.”¹²⁵ These

CT; in Wichita, KS; in Fargo, ND, and Dallas, TX, just to name a few of the more visible incidents. Moreover, much of the activity has been orchestrated by groups functioning on a nationwide scale. Because of this nationwide scope, the problem transcends the ability of any single local jurisdiction to address it.

Hearing, supra note 114, at 9 (statement of Janet Reno, Attorney General of the United States).

Professor Tribe testified concerning the ability of the Act as conceived to withstand the expected constitutional challenges from its opponents:

[N]o court in the history of this country has ever suggested that the Bill of Rights prevents Congress from limiting its prohibitions to those acts of force that are deliberately intended by the actor to interfere with the finite, congressionally specified set of activities or rights.

The first amendment just does not include any kind of ‘all or nothing’ requirement.

Id. at 91. Professor Tribe also commented on a statement made by Professor Michael McConnell regarding Senate Bill 636 that “Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view.” *Id.* at 92 (quoting Professor McConnell). He maintained that the “singling-out” argument does not apply to the bill as written:

The . . . objection . . . completely misstates what this proposed bill does. It does not select a point of view at all. What it selects is a specific lawful activity—the provision of abortion services—and then it prohibits those acts and only those acts that are intended to interfere forcibly with that specific lawful activity.

Id.

123. S. REP. NO. 117.

124. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993); *see also supra* notes 114-15 and accompanying text.

125. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993); *see also* S. REP. NO. 117, pt. V.C. (discussing the sources of constitutional authority permitting Congress to regulate clinic access). The Senate Committee on Labor and Human Resources found that:

Congress has clear constitutional authority to enact [FACE] under the Commerce Clause, which gives it authority to regulate interstate commerce.

. . . Further, once Congress finds that a class of activities affects interstate commerce, Congress may regulate all activities within that class, even if any of those activities, taken individually, has no demonstrable effect on interstate commerce.

Id. at pt. V.C.1. The Committee also found that § 5 of the Fourteenth Amendment, provides independent authority to enact the Act because § 1 of the Amendment prohibits deprivation

additional facts emphasized the national scope of the problem and clarified the connection between the operation of the clinics and interstate commerce.¹²⁶ The statement of purpose in section 2(B) also added a reference to “activities affecting interstate commerce” and empowered State Attorneys General, together with the Attorney General of the United States, to bring an action under the proposed statute.¹²⁷

In addition, the second version dropped two sections that mandated a study of the effect of the proposed legislation on national reproductive health services and that called for an investigation of past violations.¹²⁸ As a result of the latter deletion, FACE would not criminalize past offenses, but only violations occurring subsequent to its enactment. Furthermore, the second version expanded the definitions section to explain the words “interfere with,” “intimidate,” and “physical obstruction,” thus specifying the types of conduct that the bill prohibited.¹²⁹

The most significant change was the expansion of the term “abortion services” to read “abortion-related services” throughout subsequent Senate versions.¹³⁰ This alteration of the language broadened the location of the prohibited conduct to encompass clinics which counsel alternatives to abortion, as well as those that provide abortion services. Finally, the July 1993 version added a fourth section “expressly provid[ing] . . . that [the Act] will apply only to conduct occurring on or after the date of its

of “liberty” without due process and § 5 gives Congress the power to enforce the Amendment. *Id.* at pt. V.C.2. In *Casey*, 112 S. Ct. at 2791, the Supreme Court reaffirmed the holding in *Roe* that a woman’s right to choose abortion is protected by the Fourteenth Amendment. Thus, the Committee found two sources of constitutional authority to support the congressional enactment.

126. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993).

127. *Id.* at S15,656; S. REP. NO. 117, pt. X.

128. 139 CONG. REC. S15,655 (daily ed. Nov. 16, 1993) (dropping proposed § 2715(c)-(d) of version one); *see also id.* at S3524 (daily ed. Mar. 23, 1993) (setting forth text of proposed § 2715(c)-(d)). The Senate version of the Act originally proposed inclusion of the new provision ensuring clinic access in Title 42, the title governing public safety and welfare, as § 2715. *Id.* at S3523. The sponsors reasoned that because the Senate bill was modeled after the other civil rights legislation contained in this title, its rightful location would be in Title 42, as an amendment of the Public Health Service Act, alongside such laws as § 1985(3). S. REP. NO. 117, pt. V.A.1; *see discussion supra* part I.B. (discussing 42 U.S.C. § 1985(3) (1988) in the context of abortion clinic blockades); *see also* 139 CONG. REC. S3523 (daily ed. Mar. 23, 1993) (introducing the bill in the Senate as a proposed amendment to 42 U.S.C. § 300aaa).

129. 139 CONG. REC. S15,656 (daily ed. Nov. 16, 1993).

130. *Id.* at S15,655-56; *see also* S. REP. NO. 117.

enactment,” thus specifically prohibiting retroactive application of its provisions.¹³¹

The third version, dated November 16, 1993, contained several substantive changes to the previous proposal. First, a new section, unrelated to abortion services, was inserted to protect the exercise of religion “at a place of worship.”¹³² Second, an addition to the proposed section governing penalties¹³³ distinguished between violent and nonviolent offenses,¹³⁴ and reduced the maximum penalties for violations not involving force or the threat of force, as proposed by Senator Kennedy.¹³⁵ The addition also lowered the ceiling for criminal fines under Title 18 from \$100,000 for first offenses and \$250,000 for subsequent offenses to \$10,000 and \$25,000, respectively.¹³⁶ Third, an insertion in the pivotal first section, outlining the prohibited conduct, changed “obtaining or providing abortion-related

131. 139 CONG. REC. S15,656 (daily ed. Nov. 16, 1993); S. REP. NO. 117, pt. V.A.4.

132. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993). The full text of the proposed section reads:

Whoever . . . by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of worship . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . .

Id. The phrase “at a place of worship” was subsequently changed in the final version of FACE to read “a place of *religious* worship.” 108 Stat. at 694 (emphasis added).

The Hatch Amendment, adopted on November 16, 1993, would “guarantee that religious liberty is protected against Government intrusion. Through this amendment, religious liberty would also be protected against private intrusion -- in exactly the same way that S. 636 would protect abortion.” 139 CONG. REC. S15,660 (daily ed. Nov. 16, 1993) (remarks of Sen. Orrin G. Hatch). Senator Hatch was one of four senators of the seventeen-member Senate Labor and Human Resources Committee to vote against adoption of the proposed Senate Bill 636 on June 23, 1993. S. REP. NO. 117, pt. 1.

133. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

134. Proposed § 2715(b)(2) was expanded with the insertion of the following provision:
[E]xcept that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall be not more than six months, or both. for the first offense: and the fine shall be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense

139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

135. *Id.* at S15,669.

136. *Id.* at S15,728; *see also* 140 CONG. REC. S5596 (daily ed. May 12, 1994) (“Nonviolent obstructions of clinics do not warrant the same maximum penalties as violence, death threats, or destruction of property.”).

services” to “obtaining or providing *pregnancy or* abortion-related services.”¹³⁷ As in the change from the original version of Senate Bill 636 to the second version, where the term “abortion services” was changed to “abortion-related services,” this last alteration again ensures that the bill will prohibit the obstruction of clinics counseling alternatives to abortion, as well as those *performing* abortions.

In addition, the November 1993 version of Senate Bill 636 added a provision to the section specifying the Rules of Construction. The new provision addressed possible abridgement of the First Amendment rights of abortion protestors.¹³⁸ This addition specifically concerned freedom of speech and expanded the fifth Rule of Construction included in the first two versions of the bill, which states that “[n]othing in this section shall be construed or interpreted to . . . prohibit expression protected by the First Amendment”¹³⁹ This same element was repeated in an additional section, but was deleted in the enacted version of the bill.¹⁴⁰ Nonetheless, its inclusion here indicates the adamant stance of the anti-abortion legislators against the possible infringement of the protestors’ rights to free speech and the willingness of the pro-choice senators to compromise so that the bill would be enacted.

On November 18, 1993, the House of Representatives debated its latest version of House Bill 796 and added several amendments.¹⁴¹ Four months later, the House voted to substitute its November 1993 version of the bill for

137. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (setting forth text of proposed § 2715(a)(1)) (emphasis added).

138. *Id.* at S15,728. Section 2715(d)(6) reads: “Nothing in this section shall be construed or interpreted to . . . create new remedies for interference with expressive activities protected by the First Amendment to the Constitution, occurring outside a medical facility, regardless of the point of view expressed.” *Id.*

139. *Id.*

140. The additional section contained the following language:

Sec. 4. Rule of Construction.

Notwithstanding any other provision of this Act, nothing in this Act shall be construed to interfere with the rights guaranteed to an individual under the First Amendment to the Constitution, or limit any existing legal remedies against forceful interference with any person’s lawful participation in speech or peaceful assembly.

Id.

141. 139 CONG. REC. H10,093-94, H10,098, H10,109 (daily ed. Nov. 18, 1993). The full amended text can also be found in the Senate proceedings. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

the then current version of Senate Bill 636¹⁴² by a recorded vote of 237 yeas and 169 nays, with twenty-seven Representatives not voting.¹⁴³ This House amendment became the fourth version of Senate Bill 636.

During an impassioned late night¹⁴⁴ debate preceding the vote, Representative McKinney, speaking in support of the Act, declared that “[t]his bill is directed at terrorists and their malicious acts of violence. These individuals are blocking real live Americans from exercising their constitutional rights.”¹⁴⁵ Representative Hyde spoke against the Act with equal vehemence, encouraging his colleagues to “resist it because it destroys, it shreds, it does violence to the constitutional precept of equal protection of the law,” by singling out anti-abortion protestors because of their views.¹⁴⁶ These remarks highlight the sharp differences of opinion among the members of Congress.

Similarly, a comparison of the House¹⁴⁷ and Senate¹⁴⁸ bills (version three) illustrates the differences in the outlook between the two Houses. The most obvious of these are as follows: 1) The Senate bill begins with a Congressional Statement of Findings and Purpose, which is absent from the House version;¹⁴⁹ 2) the Senate bill amends Title 42 of the *United States Code* governing the public health and welfare, while the House bill appends its proposal to Title 18 of the Code, governing crimes and criminal procedure; 3) the Senate bill refers to “pregnancy or abortion-related services” throughout, while the House bill refers to “reproductive health services;” 4) the Senate proposal includes a prohibition against interference

142. See *supra* notes 130-38 and accompanying text (discussing the changes in the third version of Senate Bill 636).

143. 140 CONG. REC. H1519 (daily ed. Mar. 17, 1994).

144. Representative Schroeder, who moved to make the substitution, apologized for the lateness of the hour, and continued: “In my entire tenure I have never seen us have to go through this extraordinary procedure to go to conference on a bill that passed 69 to 30 in the other body, and on the motion to recommit it here it was defeated 246 to 182.” *Id.* at H1510. Thus, although a definitive majority in the House supported passage of the bill and the need for a conference with the Senate to work out differences concerning the specifics of the legislation, the debate dragged on as members rose to vent personal feelings. For example, Representative Bunning disclosed that four members of his immediate family were active in Operation Rescue, but he insisted that “[n]ot one of them poses any kind of threat of violence whatsoever.” *Id.* at H1500.

145. *Id.* at H1520 (daily ed. Mar. 17, 1994).

146. *Id.* at H1513.

147. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994) (text of version four of the bill).

148. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (text of version three of the bill).

149. See *supra* notes 108, 114-15 and accompanying text.

with the freedom of religion, which is absent from the House bill;¹⁵⁰ 5) the House bill does not include the distinction in penalties between violent and nonviolent physical obstruction which the Senate version incorporated; 6) the Rules of Construction in both versions explicitly refer to First Amendment protection of expression, but the Senate bill includes other guarantees such as the right “to seek other available civil remedies;”¹⁵¹ and, 7) the Senate version defines “interfere with,” as well as “intimidate.”¹⁵² Thus, a conference was necessary to reach a viable compromise between the House’s blanket approach to stopping the violence and the Senate’s more narrowly defined solution to the problem.

In an accompanying motion, the House voted 228 in favor and 166 against, with thirty-nine members not voting, to “insist on its amendments to [Senate Bill] 636 and request a conference with the Senate thereon.”¹⁵³ A month later, the Senate agreed to the House’s request for a conference.¹⁵⁴ On April 26, 1994, the conferees appointed by each chamber agreed to file a conference report.¹⁵⁵ The resulting document highlights the differences between the Senate and the House and the resolution of these differences.¹⁵⁶ This compromise led to congressional enactment of the Freedom of Access to Clinic Entrances Act of 1994 on May 26, 1994,¹⁵⁷ and provided a new impetus for the deterrence of abortion-related violence.

C. *Legislative Intent*

In their separate committee reports recommending the enactment of FACE, both the House Committee on the Judiciary and the Senate Committee on Labor and Human Resources explained the purpose of the

150. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (setting forth the text of proposed § 2715(a)(2)).

151. *Id.* (setting forth the text of proposed § 2715(d)(4)).

152. *See generally* H.R. CONF. REP. NO. 488 (listing the differences between the two versions of the legislation before explaining the compromise reached).

153. 140 CONG. REC. H1519-20 (daily ed. Mar. 17, 1994).

154. *Id.* at S4183 (daily ed. Apr. 12, 1994). Representative Mitchell requested that the House version of Senate Bill 636 be presented to the Senate. *Id.* He then requested “unanimous consent that the Senate disagree to the House amendments and agree to the request for a conference with the House on the disagreeing votes of the two Houses” This request was also granted, and the presiding officer appointed nine conferees. *Id.*

155. *Id.* at D487 (daily ed. Apr. 26, 1994).

156. *See* H.R. CONF. REP. NO. 488.

157. 140 CONG. REC. D627 (daily ed. June 7, 1994) (listing Senate Bill 636 as a new public law, Pub. L. No. 103-259).

legislation.¹⁵⁸ The House committee members intended that the Act prevent the mounting violence generated by the abortion protest movement.¹⁵⁹ In contrast, the Senate committee sought to protect a woman's right to seek an abortion.¹⁶⁰ These two divergent points of view epitomize the most significant difference between the House version of FACE and its Senate counterpart: the House version¹⁶¹ amended Title 18 of the *United States Code* addressing criminal acts, while the Senate proposal amended Title 42 of the Code safeguarding civil rights.¹⁶² Thus, the House bill emphasized the criminalization of the act of blocking abortion clinics, while the Senate bill focused on preserving women's freedom of access to clinics.

Illustrative of this dichotomy are the descriptive headings each house chose for the operative section of the bill. The House of Representatives proposed an amendment to Title 18 by the addition of section 248 entitled, "Blocking access to reproductive health services."¹⁶³ The Senate proposed an amendment to Title 42 by the addition of section 2715 entitled, "Freedom of Access to Clinic Entrances."¹⁶⁴

The compromise in the enacted legislation was twofold: First, a statement of purpose was included based on the one which appeared as a preface to section 2715 in the Senate proposal, but omitting the extensive list of congressional findings in Senate Bill 636.¹⁶⁵ Instead, the House proposed incorporation of part of the findings in the statement of purpose, which also now refers to the imposition of "Federal criminal penalties" and the provision of civil remedies for violations of the Act.¹⁶⁶ The prefatory statement also uses the word "violent" to describe the banned conduct, thus highlighting the need for criminal penalties as well as distinguishing the illegal violent conduct from legal nonviolent, peaceful activity.¹⁶⁷ Further-

158. H.R. REP. NO. 306; S. REP. NO. 117.

159. H.R. REP. NO. 306, pt. 1 ("The purpose of the . . . Act is to prevent the growing violence accompanying the debate over the continued legality and availability of abortion and other reproductive health services.").

160. S. REP. NO. 117, pt. V.C.2. ("The . . . Act seeks to protect the right to terminate a pregnancy, a right that falls squarely within the rights guaranteed by the Fourteenth Amendment.").

161. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

162. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993); H.R. CONF. REP. NO. 488, pt. 3 ("Codification"); *see also supra* notes 127-31 and accompanying text.

163. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

164. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993).

165. *Id.*; *see also* H.R. CONF. REP. NO. 488, pt. 2.

166. 108 Stat. at 694 (quoting from "Sec. 2. Purpose."); *see also* H.R. CONF. REP. NO. 488, pt. 2.

167. 108 Stat. at 694.

more, the statement echoes the use of the word “intentionally” as found in section 248(a), “Prohibited Activities,” and adds the term “intended to” to describe the banned conduct.¹⁶⁸ This addition also addresses the criminal component of the legislation by indicating that conviction under the Act requires intent.

Second, the title of the operative section is now a hybrid between the two versions. While the legislation remains located within Title 18, Crimes and Criminal Procedure, as the House favored, the inclusion of the concept “Freedom of” in its name suggests a protected civil right, more appropriately found under a Title 42 heading.¹⁶⁹

As a result of a further compromise between the two houses, the word “abortion” appears only once in the Act, as part of the fourth Rule of Construction.¹⁷⁰ The conferees agreed to replace the only reference to abortion, which appeared throughout the Senate version in the phrase “pregnancy and abortion-related services,” with the House terminology, “reproductive health services.”¹⁷¹ Furthermore, in section 248(e)(5) the phrase “including services relating to pregnancy or the termination of pregnancy” is added to the definition of “reproductive health services.”¹⁷² This substitution replaced the definition of “pregnancy and abortion-related services” in the Senate’s version of section 2715(e)(5). The phrase “reproductive health services” better expresses the conferees’ intent that FACE apply to blockages of clinics that offer counseling on alternatives to abortion, as well as clinics that provide abortion services.¹⁷³ Thus, Congress intended that the Act be perceived as evenhanded, outlawing blockades of abortion clinics by abortion protestors, as well as criminalizing similar conduct by pro-choice demonstrators.

Several other alterations of section 248(e), containing definitions of key terms, were intended to guard against challenges to the Act’s constitutional-

168. *Id.*

169. *Id.*; 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994); 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993).

170. 108 Stat. at 696 (setting forth the text of 18 U.S.C. § 248(d)(4)). According to the Conference Report, the word “abortion” was a concession to the Senate conferees for their agreement to omit a provision from § 248(a)(1) that nothing in this section shall be “construed as ‘expanding or limiting the authority of States to regulate the performance of abortions or the availability of pregnancy or abortion-related services.’” H.R. CONF. REP. NO. 488, pt. 9(d). Thus, the word “abortion” can be said to have crept back into the Act through the back door.

171. 108 Stat. 694; H.R. CONF. REP. NO. 488, pt. 4.

172. H.R. CONF. REP. NO. 488, pt. 10(a).

173. *Id.*

ity. For example, the conferees agreed to retain the Senate's inclusion of a definition of the verb "interfere with," noting that the phrase "injure, intimidate, or interfere with" is patterned after existing federal civil rights laws, and that these terms are intended to have the same meaning.¹⁷⁴ Furthermore, the conferees noted that the language in section 248(a) describing the person or class of persons against whom certain conduct is proscribed also stemmed from existing federal civil rights laws.¹⁷⁵ By carefully modeling this Act after existing legislation that has not fallen to judicial challenge, Congress meant to avert an attack on the legislation's constitutionality.

In addition, the final version of the Act retains the Senate definition of "physical obstruction" as rendering access "hazardous."¹⁷⁶ The conferees noted that this definition was taken from a Texas penal statute that has withstood a First Amendment challenge.¹⁷⁷ Moreover, in a final supplement to both versions of the bill, the House agreed to the inclusion of a severability clause to guard against defeat of the whole Act should one part be held unconstitutional.¹⁷⁸ These decisions concerning the content of FACE indicate a cautious approach to the issue of the Act's constitutionality, which has sometimes been absent in Congress' prior enactments.¹⁷⁹

In a coup for the Senate conferees, the oddly-placed prohibition against interference with religious worship remained a part of the final enactment.¹⁸⁰ But the House inserted the word "religious" before the word "worship" in the reference to "place of worship" in section 248(a)(2).¹⁸¹ Apparently, the House members of the conference committee intended to ensure that this section did not create a new cause of action and remedy for

174. *Id.* at pt. 10(c).

175. *Id.* at pt. 5.

176. 108 Stat. at 696.

177. H.R. CONF. REP. NO. 488, pt. 10(d).

178. *Id.* at pt. 11.

179. Devins, *supra* note 20, at 318-19. Devins asked, "Does elected government take seriously its responsibility as constitutional interpreter?" *Id.* at 318. He then cited legislation in which legislators did not concern themselves with the constitutionality of their legislation, e.g., the AFL Demonstration Projects, and proposals of which Congress carefully examined all the constitutional implications, e.g., the Freedom of Choice Act of 1989. *Id.* at 318-19 (footnotes omitted); *see also supra* note 93 (discussing the Freedom of Choice Act). Devins concluded that the answer is neither yes nor no, but somewhere in between. Devins, *supra* note 20, at 318.

180. 108 Stat. at 694; H.R. CONF. REP. NO. 488, pt. 6.

181. H.R. CONF. REP. NO. 488, pt. 6.

interference with worship outside a clinic.¹⁸² The final version of section 248(d)(2) repeats this caution and also states that the Act shall not be interpreted to create new remedies for interference with free speech.¹⁸³ Thus, the conferees concerned themselves with narrowing the scope of the Act to avoid creating a new federal tort, as well as broadening it to include free access to places of religious worship.

Overall, the final version of FACE is more concise than the Senate bill and more cognizant of civil rights than the House bill. For example, the lengthy Senate section on congressional findings and purpose was deleted from the final version; the six Senate Rules of Construction plus the additional section, "Rules of Construction," were pared down to four rules.¹⁸⁴ But these four constitute two more than appeared in the House version.¹⁸⁵

With respect to civil rights, the final version contains several safeguards not present in the House bill. Two examples illustrate this focus on civil rights in the Senate proposal. First, the finalized Rules of Construction include a prohibition on limiting any existing causes of action for interference with the exercise of free speech or the free exercise of religion.¹⁸⁶ This prohibition was absent from the House version.¹⁸⁷ This Rule of Construction would safeguard a person's right of access to the courts and thus his or her civil rights. Second, and more important, the House bill omitted any restriction on who may bring a private suit.¹⁸⁸ Thus, the House version may be interpreted as constraining the civil rights of the protestors, since it created a potentially larger pool of plaintiffs who could force them to defend their actions in court. In contrast, the Senate bill provided more protection for abortion protestors by allowing fewer persons the right to file a suit against them.

182. *Id.*

183. 108 Stat. at 696.

184. *Id.*

185. See 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

186. 108 Stat. at 696; see also H.R. CONF. REP. NO. 488, pt. 9(b).

187. See 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

188. *Id.* 18 U.S.C. § 248(c)(1) reads: "RIGHT OF ACTION GENERALLY—*Any person who is aggrieved by a violation of subsection (a) of this section may in a civil action obtain relief under this subsection.*" *Id.* (emphasis added). In contrast, the Senate bill limited the person who may bring a private suit to someone either obtaining services from, or providing services in, a clinic. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993) (setting forth the text of proposed 42 U.S.C. § 2715(c)(1)(A)); see also H.R. CONF. REP. NO. 488, pt. 8(a).

However, most protective of civil rights is the retention of the Senate's version of the penalties for violations of the Act.¹⁸⁹ This section distinguishes between nonviolent and violent prohibited conduct by lowering the maximum criminal fines and prison terms for nonviolent physical obstruction.¹⁹⁰ In its final version, the bill creates different categories of offenses. It punishes physical obstruction without force by fines and imprisonment and it imposes stiffer fines and longer prison terms on violent obstruction.¹⁹¹ However, it specifically excludes peaceful picketing from punishment.¹⁹² On the one hand, the bill is not meant to reach peaceful demonstrators;¹⁹³ but on the other hand, FACE contains stiff penalties for persons who use violence to express their views.

Congress' intent in passing FACE was to stop "the massive wave of violence, intimidation, and harassment directed at clinic patients and personnel across the country."¹⁹⁴ To achieve this necessary end, Congress created legislation to punish those who obstruct access to legal medical services at clinics. The need for such a law is clear because the only cure for a national campaign of violence is national legislation.¹⁹⁵

D. *The Opposition*

Throughout the congressional debate on FACE, the legislators opposing FACE repeated several reasons for their opposition to the enactment of legislation aimed at deterring abortion clinic blockades.¹⁹⁶ The foremost

189. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

190. 108 Stat. at 695; H.R. CONF. REP. NO. 488, pt. 7(a); *see also supra* notes 124-27 and accompanying text.

191. 108 Stat. at 695.

192. 18 U.S.C. § 248(d)(1) (1988).

193. 140 CONG. REC. S5596 (daily ed. May 12, 1994). According to Senator Kennedy:

Those who are picketing peacefully outside clinics, praying or singing, or engaging in sidewalk counseling and similar activities that do not block the entrances have nothing to fear from the law. Those activities are protected by the first amendment, and this legislation does not restrict them.

Nor does this legislation discriminate against any particular viewpoint. . . . The only conduct it prohibits is violent or obstructive conduct that is far outside any constitutional protection.

Id.

194. *Id.* at S5596-97 (remarks of Sen. Kennedy).

195. *Id.* at S5597.

196. *See, e.g.*, S. REP. NO. 117, pt. IX; H.R. REP. NO. 306; 139 CONG. REC. S15,719 (daily ed. Nov. 16, 1993). According to Senator Smith, who was a vocal opponent of FACE during the debate preceding the adoption of the third Senate version of the bill: "To sum up, . . . there are five reasons why [Senate Bill] 636 should be defeated. First, it is extreme.

criticism voiced by the minority was that the Act is not facially neutral and instead, discriminates against the anti-abortion movement.

First, opponents accused the supporters of the bill of targeting the movement because the current political fashion mandates a pro-abortion or pro-choice point of view.¹⁹⁷ According to Senator Hatch: "Unfortunately, [Senate Bill] 636 . . . is not really about stopping violence outside abortion clinics. It is about punishing purely peaceful civil disobedience on behalf of a cause that is not politically correct."¹⁹⁸

Second, opponents criticized the legislation as treating abortion protestors unequally. According to the dissenting views appended to House Report 306, the House bill did not protect abortion protestors, whose activities take place outside a facility.¹⁹⁹ The language of the bill protected only those persons *inside* a facility who are "obtaining or providing reproductive health services."²⁰⁰ According to Senator Smith, the result was that under the bill, a nun peacefully saying her rosary outside a clinic subjects herself to imprisonment of up to eighteen months and fines of up to \$25,000 for blocking the entrance.²⁰¹ Opponents pointed out that although the bill set lower jail terms and fines for nonviolent physical obstruction, its failure to eliminate the penalty for a peaceful blockade means that those who protest abortion are treated less favorably than owners of abortion clinics or their patients.²⁰²

Furthermore, the members of the Senate Committee on Labor and Human Resources who opposed adoption of the bill wrote in their dissent that the proposal for ending violence at clinic entrances is hostile to the anti-abortion point of view.²⁰³ They cited two examples of this hostility. First, the legislation singles out the anti-abortion movement for penalties that cannot be applied to other causes employing similar tactics.²⁰⁴ This singling-out occurs because the legislation prohibits physical obstructions only of facilities providing reproductive health services.²⁰⁵ Second, the

Second, it sets a terrible precedent. Third, it is vague. Fourth, it is hypocritical. And fifth, it is unconstitutional." *Id.* at S15,722.

197. 140 CONG. REC. S5598 (daily ed. May 12, 1994).

198. *Id.*

199. H.R. REP. NO. 306 (referring to § 248(a)(1) printed in the House report).

200. *Id.*

201. 139 CONG. REC. S15,723 (daily ed. Nov. 16, 1993).

202. 108 Stat. at 695 (referring to § 248(b)(2)).

203. S. REP. NO. 117, pt. IX.

204. *Id.*

205. 108 Stat. 694.

bill uses vague and overbroad terminology that would chill free speech.²⁰⁶ The opponents contend that both these effects render the legislation unconstitutional.²⁰⁷

Finally, opponents of the bill objected to the legislation as unnecessary. They claim that existing state laws adequately protect abortion facilities and that the Supreme Court decision in *Scheidler*²⁰⁸ provided a suitable federal remedy for clinic blockades.²⁰⁹ House Report 306 pointed to the 70,000 arrests of abortion protestors in five years as evidence that local law enforcement authorities can handle the protests without federal intervention.²¹⁰ Furthermore, the House report quoted from Justice Kennedy's concurring opinion in *Bray* and argued that existing federal statutes already provide for federal assistance to local authorities.²¹¹ In addition, opponents of the bill pointed to the Supreme Court's holding in *Scheidler* that abortion protestors violate the federal racketeering laws when they conspire to force clinics out of business.²¹² With RICO²¹³ available for use against violent clinic blockades, opponents asserted that Congress should not have enacted another federal law to solve the problem.

Supporters of the legislation pointed out, however, that state law cannot deal effectively with a phenomenon that is interstate or one in which local

206. S. REP. NO. 117, pt. IX (citations omitted). See also 139 CONG. REC. S15,723 (daily ed. Nov. 16, 1993), in which Senator Smith cited the term "physical obstruction" as unconstitutionally vague, even though the bill includes a definition of the term in 18 U.S.C. § 248(e)(4). 108 Stat. at 696.

207. "[S]peech on issues like abortion lies at the core of first amendment protections. . . . [D]ebate on public issues should be uninhibited, robust, and wide-open." H.R. REP. NO. 306 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)). The dissent concluded that any legislation that inhibits or chills free speech is unconstitutional. In addition, House Report 306 cited another case that held that the government may not single out speech because it disapproves of the topics presented. *Id.* (citing R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)). Opponents of the bill assert that any hint of this type of viewpoint discrimination would render it unconstitutional.

208. 114 S. Ct. at 798.

209. *E.g.*, 140 CONG. REC. S5598 (daily ed. May 12, 1994). According to Senator Hatch, state laws contain even more severe penalties for violent obstruction than the bill would impose. *Id.*

210. H.R. REP. NO. 306.

211. *Id.* Justice Kennedy suggested that 42 U.S.C. §§ 10501, 10502(2)-(3) are available to the states and local authorities. *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring). These statutes empower the United States Attorney General to use federal law enforcement resources at the request of a state. *Id.*

212. Marcia Coyle, *Clinics Win One: Justices Accept RICO Use Against Protesters; Free Speech Challenge Lies Ahead*, NAT'L L.J., Feb. 7, 1994, at 1.

213. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988).

authorities sometimes refuse to act.²¹⁴ According to Attorney General Janet Reno's testimony before the Senate Committee on Labor and Human Resources, "[t]he reluctance of local authorities to protect the rights of individuals provides a powerful justification for the enactment of federal protections that has been invoked previously by Congress in passing laws to protect civil rights."²¹⁵ Supporters of the bill also maintained that RICO is not a forceful deterrent to the violence of abortion clinic blockades. Under the federal racketeering laws, the clinic owners and users would have difficulty in establishing the liability of the protestors.²¹⁶ Thus, RICO would be too unwieldy a legal tool for stopping the violent obstructions and is not an adequate replacement for FACE.²¹⁷

The overwhelming support for FACE in Congress deflated the arguments of the bill's opponents against its passage.²¹⁸ Nevertheless, of all their objections to the Act, the minority argued most persuasively that the Act constitutes a breach of the protestors' right to free speech. The Supreme Court decision in *Madsen v. Women's Health Center, Inc.*,²¹⁹ handed down on June 30, 1994, declined to endorse the petitioners' free speech arguments.²²⁰ Although the context was a challenge to a state court injunction and was not based on the newly enacted FACE, as a result of the Court's decision, challengers of the new legislation may find it difficult to convince the courts to overturn FACE on these First Amendment grounds.

The *Madsen* decision, the third Supreme Court opinion on the abortion issue in eighteen months,²²¹ is also noteworthy because it represents the first judicial comment on abortion clinic blockades since the enactment of FACE. The ruling constitutes an important milestone in the Act's progress

214. H.R. REP. NO. 306.

215. *Hearing, supra* note 114, at 14 (statement of Janet Reno, Attorney General of the United States); *see also supra* note 122 (quoting Attorney General Reno on the nationwide scope of the abortion protests).

216. Coyle, *supra* note 212, at 37.

217. 140 CONG. REC. S5596 (daily ed. May 12, 1994).

218. *Id.* at S5628 (presenting results of vote in the Senate on adoption of House Conference Report 488, 69 yeas and 30 nays, with one Senator not voting); *see also id.* at H3122-23 (recording the vote in the House of Representatives on the Conference Report, 236 yeas and 181 nays, with 15 Representatives not voting).

219. 114 S. Ct. 2516 (1994).

220. *Id.*

221. The three cases heard and decided by the Supreme Court since January 1993 are *Bray*, 113 S. Ct. at 753; *Scheidler*, 114 S. Ct. at 798; and *Madsen*, 114 S. Ct. at 2516.

toward judicial validation because it involved the same conduct that FACE criminalizes: physical obstruction of abortion clinic entrances.

IV. THE *MADSEN* DECISION: THE FIRST STEP IN PRESERVING FACE

The petitioners in *Madsen*²²² challenged the constitutionality of a Florida state court injunction that banned abortion protests.²²³ The injunction restricted the time, manner, and place of demonstrations outside a health clinic in Melbourne, Florida owned by the respondents.²²⁴ The petitioners based their constitutional challenge to the court order mainly on a violation of their First Amendment right to freedom of speech.²²⁵ However, the Court rejected the petitioners' First Amendment arguments in part and upheld a provision of the injunction banning demonstrations and picketing within a thirty-six foot "buffer zone" around the clinic entrance.²²⁶

222. *Madsen*, 114 S. Ct. at 2516. The petitioners here were three of the named individual petitioners in the case heard by the Florida Supreme Court: Judy Madsen, Ed Martin, and Shirley Hobbs. See *Operation Rescue*, 626 So. 2d at 679.

223. *Madsen*, 114 S. Ct. at 2521.

224. *Id.* The Court noted that it granted certiorari because of a conflict between *Operation Rescue*, upholding the injunction, and a decision by the United States Court of Appeals for the Eleventh Circuit striking down the same injunction. *Id.* at 2523 (comparing *Operation Rescue* with *Cheffer v. McGregor*, 6 F.3d 705 (1993)). In *Cheffer*, the circuit court struck down the injunction, reasoning that "[t]he clash . . . is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights." *Cheffer*, 6 F.3d at 711.

225. *Madsen*, 114 S. Ct. at 2523. The petitioners brought several additional challenges to the injunction. First, they claimed that it was vague and overbroad because the injunction was applied to all persons or groups acting "in concert" with the petitioners. *Id.* at 2530. Second, they objected to the "in concert" provision as an unconstitutional limit on their freedom of association. *Id.*

The Court rejected the claims, reasoning that the petitioners lacked standing to sue on behalf of parties not before the Court. *Id.* The Court held that in any case the provision is neither vague nor overbroad, "but is simply directed at unnamed parties who might later be found to be acting 'in concert' with the named parties." *Id.* With respect to the restriction of the petitioners' freedom of assembly, the Court held that this First Amendment guarantee "does not extend to joining with others for the purpose of depriving third parties of their lawful rights," thus indirectly affirming that women have a legal right to seek medical services. *Madsen*, 114 S. Ct. at 2530.

226. *Id.*

To evaluate a possible infringement of the First Amendment rights of the petitioners, the Court adopted the Florida Supreme Court's interpretation of the injunction as addressing activities in a traditional public forum.²²⁷ Next, the Court followed Florida's lead in refusing to apply the strict scrutiny level of analysis required for a content-based restriction of free speech.²²⁸ Instead, it agreed with the Florida Supreme Court that the restrictions against the abortion protestors were content-neutral.²²⁹ After a detailed analysis of content-neutrality, the Court decided that the injunction was unbiased because it did not discriminate against abortion protestors based on their anti-abortion beliefs.²³⁰ Consequently, the Court concluded that it should apply a lesser level of scrutiny in judging the injunction's validity.²³¹

227. *Id.* at 2522; *Operation Rescue*, 626 So. 2d at 671. The Florida Supreme Court concluded that petitioners' protests took place on "public streets, sidewalks, and rights-of-way," all of which fall within the definition of a traditional public forum. *Id.* at 671 (citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

228. *Madsen*, 114 S. Ct. at 2522. The Florida court stated that under strict scrutiny the state must prove that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Operation Rescue*, 626 So. 2d at 671 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

229. *Madsen*, 114 S. Ct. at 2523.

230. *Id.* The Court reasoned that "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." *Id.* The Court concluded that the fact that the injunction covered only people who were against abortion did not prove it was content-based, and therefore held that it was content-neutral. *Id.* at 2524. In addition, the Court found no evidence in the record that a Florida court would not issue a similar restraint for any such conduct, whether or not related to abortion. *Id.* at 2523.

231. *Madsen*, 114 S. Ct. at 2524; *Operation Rescue*, 626 So. 2d at 671. The level of scrutiny identified by the Florida Supreme Court that covers content-neutral restrictions on activities in a traditional public forum is intermediate. *Id.* An intermediate level of scrutiny asks whether the restrictions are "narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (using the standard formulated in *Perry* for a lesser level of scrutiny).

Under the test the Court developed for a content-neutral injunction,²³² it first held that the thirty-six foot buffer zone around the clinic entrances and its driveway did not infringe on the protestors' First Amendment right to free speech.²³³ Subsequently, the Court found the limitations in the injunction on the high noise levels near the clinic to be constitutional.²³⁴

The other contested provisions of the injunction were struck down as violating the First Amendment rights of the abortion protestors.²³⁵ The provisions that did not pass muster included a thirty-six foot protest-free area on private property to the north and west of the clinic, and a 300-foot zone in which protestors could not approach persons arriving at the clinic.²³⁶ In addition, the Court struck down a provision that would have created a 300-foot zone around staff residences where protestors were banned from demonstrating or using bullhorns.²³⁷ The Court held that

232. The Court's new test for content-neutral injunctions is more stringent than the test in *Perry* adopted by the Florida Supreme Court to decide the constitutionality of the injunction. See *Madsen*, 114 S. Ct. at 2524. The Court reasoned that an injunction requires closer scrutiny than a similarly content-neutral statute because court-made orders carry a greater risk of discrimination than generally applicable statutes. *Id.* Thus, the test the Court formulated requires determining "whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest." *Id.* at 2525 (citations omitted).

Both Justices Scalia and Stevens agreed with the majority's conclusion that the injunction was content-neutral, in contrast to the holding of the Eleventh Circuit in *Cheffer* that the injunction was content-based. See *id.* at 2531 (citing *Cheffer*, 6 F.3d at 711). But both disagreed with the majority and with each other concerning the correct level of scrutiny to be applied to an injunction that does not discriminate on the basis of the expressive message of the protestors. *Madsen*, 114 S. Ct. at 2525, 2531 (Stevens, J., concurring in part and dissenting in part), 2534 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Stevens would apply a more lenient standard. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Scalia, on the other hand, ridicules the majority's standard as "intermediate-intermediate" and says it is "frankly too subtle for me to describe." *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part). Instead, he would apply strict scrutiny to the injunction because, among other reasons, discriminatory restrictions on speech are as much a risk in granting injunctive relief as in passing a statute. *Id.* Thus, according to Justice Scalia, the majority's distinction between a content-neutral injunction and a similarly content-neutral statute is irrelevant. *Id.*

233. *Madsen*, 114 S. Ct. at 2528.

234. *Id.*

235. *Id.* at 2529-30.

236. *Id.*

237. *Id.*

these provisions “sweep more broadly than necessary” to achieve the aims²³⁸ of the injunction.²³⁹

While the six to three²⁴⁰ Supreme Court decision in *Madsen* barring protestors from a thirty-six foot clinic buffer zone might constitute a temporary setback to the anti-abortion movement,²⁴¹ it does not significantly affect the anti-abortionists long-term goal of shutting down abortion clinics across the country.²⁴² More important, the reasoning in *Madsen*, though instructive as to the use of injunctive relief against abortion protestors, is presumptively not applicable to a discussion of the possible infringement of First Amendment rights in the context of a statute such as FACE. The Court itself carefully made a distinction between an injunction and a statute in deciding what level of scrutiny to apply in judging the validity of an injunction.²⁴³ As Senator Kennedy aptly pointed out a month and a half prior to the Supreme Court’s ruling in *Madsen*, its outcome has no direct bearing on the constitutionality of FACE because the two contexts differ.²⁴⁴ The *Madsen* injunction creates a speech-free buffer zone, whereas FACE provides penalties for specific protest activities.²⁴⁵

238. The Court agreed with the Florida court’s holding that the protestors’ obstruction of clinic entrances affected four significant governmental interests. *Madsen*, 114 S. Ct. at 2526. These interests included protecting a woman’s access to legal medical services, guarding the public safety, ensuring unobstructed traffic, and protecting property rights of private citizens. *Id.*; see also *Operation Rescue*, 626 So. 2d at 672 (discussing government interests).

239. *Madsen*, 114 S. Ct. at 2530.

240. Chief Justice Rehnquist wrote the majority opinion, in which Justices Blackmun, O’Connor, Souter, and Ginsburg joined. *Id.* at 2520. Justice Souter concurred in the opinion; Justice Stevens concurred in part and dissented in part; and Justice Scalia concurred in the judgement in part and dissented in part in which Justices Kennedy and Thomas joined. *Id.*

241. Craig Crawford, *Justices’ Decision Deals Abortion Foes a Setback*, SUN-SENTINEL, July 1, 1994, at 1A. The article also quoted several pro-choicers who considered the decision a victory for abortion advocates. *Id.* For example, the director of a clinic in Lauderhill, Florida that performs abortions was quoted as saying she was “very gratified” by the decision and hoped the local authorities will now enforce the laws against clinic entrance obstruction. *Id.*

242. *Operation Rescue*, 626 So. 2d at 667 n.3; see *supra* notes 10-11 and accompanying text.

243. *Madsen*, 114 S. Ct. at 2524; see *supra* note 230.

244. 140 CONG. REC. S5596 (daily ed. May 12, 1994).

245. According to Senator Kennedy, in *Madsen* the Court ruled on the constitutionality of an injunction banning *all* protest activities within a specified buffer zone, even if the activity does not block the clinic entrance. *Id.* The Senator contrasted this sweeping prohibition with the narrowly tailored ban in FACE, which only forbids the physical

Indirectly, however, any decision concerning the abortion issue is instructive as to the current position of the Supreme Court. The *Madsen* decision, reaffirming a woman's right to unobstructed access to abortion services, may indeed signal the face of things to come. As such, the Court's evolving position on the abortion issue may persuade anti-abortion groups to refrain from mounting a free speech challenge to FACE's constitutionality.

V. CONCLUSION: OPERATION RESCUE—AN EPILOGUE

Less than a week after the United States Supreme Court ruled in *Madsen* in favor of abortion advocates, leaders of Operation Rescue and two other anti-abortion groups organized what was billed as a massive protest against FACE in Little Rock, Arkansas.²⁴⁶ Instead, police officers and pro-choice supporters outnumbered anti-abortionists at the small gathering to mark the start of the three-day "Summer of Justice" demonstrations, as the challenge to FACE fizzled in the rain.²⁴⁷

The protest was the first nationally-mounted anti-abortion demonstration since the enactment of FACE, whose purpose is to stem the rising violence during abortion clinic blockades.²⁴⁸ The resulting peaceful encounter in Little Rock might have been a harbinger of the success of FACE in discouraging Operation Rescue and its followers from using force to eliminate abortion as an option for American women. More likely, however, is that the recent spate of fatal shootings at clinic entrances²⁴⁹ highlights the usefulness of FACE as a prosecutory tool and not as the deterrent to violence envisioned by its congressional sponsors.

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obstruction of entrances. *Id.* He also pointed out that the petitioners conceded the validity of the parts of the injunction that banned clinic entrance blockades. *Id.* The Senator concluded that the issue of clinic entrance blockades was not before the Court in *Madsen* and therefore its outcome would not affect the more specific prohibitions in FACE. *Id.*

246. *60 Join Protest at 2 Arkansas Abortion Clinics*, N.Y. TIMES, July 8, 1994, at A18 [hereinafter *60 Join Protest*].

247. *Id.*; see also *Arkansas: No Arrests as Pro-Life Demonstrations Begin*, Abortion Report, *supra* notes 20, 28 (daily ed. July 8, 1994). The spokesperson for the local police department commented that the anti-abortion groups did not draw enough supporters for the confrontation they planned. *60 Join Protest*, *supra* note 246, at A18. "It looks like they haven't gotten enough people here to do anything else than picket," the spokesperson said. *Id.* (quoting Lieutenant Charles Holladay).

248. See *supra* notes 157-59 and accompanying text.

249. See *supra* notes 45-55 and accompanying text.

National Depositor Preference: In an Attempt to Raise Revenue, Congress Completely Ignores a Potential Disaster

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I. INTRODUCTION

Until recently, the risk of a bank's insolvency was borne primarily by the Federal Deposit Insurance Corporation ("FDIC").¹ However, the Omnibus Budget Reconciliation Act of 1993² includes the National Depositor Preference provision³ which, for the first time, places both

1.

A federal regulatory authority that began operating in 1934 and that supervises insured state banks and provides insurance protection to both commercial banks and thrifts for deposits of up to \$100,000 in separate insured funds: the Savings Association Insurance Fund (SAIF) for savings associations and the Bank Insurance Fund (BIF) for banks.

ALAN GART, REGULATION, DEREGULATION, REREGULATION: THE FUTURE OF THE BANKING, INSURANCE, AND SECURITIES INDUSTRIES 395-96 (1994). "The FDIC was created in 1933 in response to the Great Depression to 'preserve solvency of insured banks and thus to keep open the channels of trade and commercial exchange.'" Senior Unsecured Creditors' Comm. of First Republicbank Corp. v. FDIC, 749 F. Supp. 758, 767 (N.D. Tex. 1990) (quoting Weir v. United States, 92 F.2d 634, 636 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937)).

2. Pub. L. No. 103-66, 107 Stat. 312 (1993). The Omnibus Budget Reconciliation Act of 1993 is "[a]n act to provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994." *Id.*

3. *Id.* § 3001, 107 Stat. at 336 (amending 12 U.S.C. § 1821(d)(11) (1988 & Supp. V 1993)).

insured⁴ and uninsured⁵ depositors of FDIC insured depository institutions⁶ ("banks")⁷ ahead of unsecured (general) creditors⁸ in a bank liquidation.⁹

Prior to the passing of this legislation, depositors and unsecured creditors shared a bank's liquidated assets on a pro rata basis, except for those banks located in one of the twenty-nine states that already had depositor preference laws which applied only to thrifts and state-chartered banks.¹⁰ The National Depositor Preference provision applies to all banks, and state laws governing the distribution of a failed bank's assets will be preempted if they are inconsistent with the new federal law.¹¹ The risk of a bank's insolvency is now borne by the unsecured creditors, rather than depositors of the bank.

"Though it was sold merely as an alternative to levying federal examination fees on state-chartered institutions, depositor preference . . . will have many far-reaching and numerous unintended consequences."¹² This provision effectively relieves the burden carried by both the FDIC and taxpayers when a bank fails.

4. "Subject to paragraph (2), the term 'insured deposit' means the net amount due to any depositor for deposits in an insured depository institution" 12 U.S.C. § 1813(m)(1) (1988 & Supp. V 1993).

5. "The term 'uninsured deposit' means the amount of any deposit of any depositor at any insured depository institution in excess of the amount of the insured deposits of such depositor (if any) at such depository institution." *Id.* § 1813(m)(3). Depositors with accounts containing more than \$100,000 risk losing part of their principal and interest earned if the bank holding their account becomes insolvent and its assets are liquidated.

6. "The term 'insured depository institution' means any bank or savings association the deposits of which are insured by the Corporation pursuant to this Act." *Id.* § 1813(c)(2).

7. "The term 'bank' . . . means any national bank, State bank, and District bank, and any Federal branch and insured branch;

(B) includes any former savings association that—

(i) has converted from a savings association charter; and

(ii) is a Savings Association Insurance Fund member."

Id. § 1813(a)(1).

8. An general creditor is "[a] creditor at large . . . or one who has no lien or security for the payment of his debt or claim." BLACK'S LAW DICTIONARY 368 (6th ed. 1990). A creditor at large is "[o]ne who has not established his debt by the recovery of a judgment or has not otherwise secured a lien on any of the debtor's property." *Id.*

9. Liquidation is the "process of reducing assets to cash, discharging liabilities and dividing surplus or loss" among the banks' creditors. *Id.* at 931.

10. H.R. REP. NO. 213, 103d Cong., 1st Sess. (1993).

11. *Id.*

12. Bert Ely, *Surprise! Congress Just Enacted the Core Banking System*, AMERICAN BANKER, Sept. 21, 1993, at 24.

Before the National Depositor Preference provision was enacted, the FDIC paid insured depositors up to \$100,000¹³ per lost deposit,¹⁴ and attempted to recoup the depositor insurance payout through either liquidation of the failed bank's assets or by allowing the failed institution to be acquired by another bank.¹⁵ Both secured and unsecured creditors of the bank were reimbursed from the liquidated assets of the bank before the FDIC was fully reimbursed, causing the FDIC to suffer great losses. As a result, the FDIC deposit insurance fund¹⁶ was depleted and taxpayers were forced to pick up the tab.

With this in mind, part two of this article will discuss the recent history of bank failures in the United States, providing the reader with a better understanding of the impossible task that both the FDIC and Congress face in attempting to protect taxpayers as well as the integrity of the banking system. In part three, this article will provide an overview of the historical development of depositor preference. Part four will define national depositor preference and explain why it was included as part of the budget bill. Part five will analyze the possible effect depositor preference will have on unsecured creditors. In part six, the potential effect on the banking

13. "The net amount due to any depositor at an insured depository institution shall not exceed \$100,000" 12 U.S.C. § 1821(a)(1)(B) (1988 & Supp. V 1993).

14. The term "deposit" means:

the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit or a traveler's check on which the bank or savings association is primarily liable

....

Id. § 1813(l)(1).

15. When one bank acquires another, the two banks enter into a purchase and assumption agreement. Through a purchase and assumption transaction, all deposits and other liabilities of general creditors are assumed by a new or existing bank. *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 764 n.8 (10th Cir. 1989). Therefore, despite a bank failure, all depositors and other unsecured creditors are made whole instead of simply receiving a pro rata share of the liquidated assets. *Id.* "[Since] 1960 about three-fourths of all failed commercial banks and, until Penn Square Bank, all failures over \$100 million in size [had] been handled through purchase and assumption transactions (P & As)." *Id.* (citing FDIC, *DEPOSIT INSURANCE IN A CHANGING ENVIRONMENT* 6 (1983)).

16. The bank insurance fund is the "Federal Deposit Insurance Corporation ("FDIC") unit providing deposit insurance for banks other than thrifts." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 31 (3d ed. 1991).

industry will be discussed. Finally, this article will conclude that the National Depositor Preference provision is not the solution to the bank failure problem because it only treats a symptom, rather than the cause of the problem. A national depositor preference scheme, while saving the FDIC money in the short run, will do more harm than good, especially to smaller banks and small businesses, because of the attempt by unsecured creditors to protect themselves from the possibility of losing everything if their bank fails.

II. THE TROUBLED BANKING SYSTEM AND THE FDIC

Traditional banking functions consist of accepting deposits, offering checking privileges, and making loans.¹⁷ Until recently, banks were able to make a profit by concentrating strictly on traditional banking services because federal regulation gave them a monopoly¹⁸ in those services. However, this monopoly situation no longer exists because other financial institutions¹⁹ have entered traditional banking markets. Savings are now placed into a variety of investments other than bank accounts, such as corporate,²⁰ federal and municipal²¹ bonds, purchase money mortgages,²² and other investments that offer a greater return than deposit accounts at

17. 12 U.S.C. § 1841(c)(1)(B)(i)-(ii) (1988 & Supp. V 1993).

18. A monopoly is "control of the production and distribution of a product or service by one firm" *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 259 (3d ed. 1991).

19. A financial institution is "[a]n institution that uses its funds chiefly to purchase financial assets as opposed to tangible property. . . . Nondeposit intermediaries include, among others, insurance companies, pension companies, and financial companies. Depository intermediaries include commercial banks, savings banks, savings and loan associations, and credit unions." *GART*, *supra* note 1, at 396.

20. A corporate bond is a:

debt instrument issued by a private corporation . . . [that] typically [has] four distinguishing features: 1) [it is] taxable; 2) [it has] a par value of \$1000; 3) [it has] a term maturity—which means they come due all at once—and are paid for out of a sinking fund accumulated for that purpose; 4) [it is] traded on major exchanges, with prices published in newspapers.

DICTIONARY OF FINANCE AND INVESTMENT TERMS 87 (3d ed. 1991).

21. A municipal bond is a "debt obligation of a state or local government entity." *Id.* at 264.

22. A purchase money mortgage is a "[mortgage] given by a buyer in lieu of cash for the purchase of property." *Id.* at 345.

banks.²³ Additionally, money market funds²⁴ offer checking privileges.²⁵ Finally, loans are being made by a diversity of nonbank firms.²⁶ The bank's role as a financial intermediary, providing transaction services to customers, and making a profit doing so, has been diminished because of strong competition and advances in technology.²⁷ Heavy regulation of the banking industry, while attempting to diminish the risk of bank failure, is actually restricting the banking industry's ability to compete with nonbank institutions. Subsequently, heavy regulation may actually have the adverse effect of increasing the risk of bank failure.

Bank failures are attributable to many of the same causes which result in the failure of other businesses.²⁸ If a business becomes inefficient or obsolete, it will no longer profit, and over time, it will fail.²⁹ "An obsolete firm fails because consumer demand is too low to generate a price that is . . . high [enough] to cover the firm's . . . costs. . . ."³⁰ Nonbank financial institutions are offering not only the same services as banks, but also a wide variety of other services that attract depositors and borrowers away from banks. Therefore, to a great degree, banks are becoming obsolete.³¹

23. JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 37 (1992).

24. A money market fund is a mutual fund "that invests in commercial paper, banker's acceptances, repurchase agreements, government securities, certificates of deposit and other highly liquid and safe securities, and pays money market rates of interest Such funds usually offer the convenience of checkwriting privileges." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 258 (3d ed. 1991).

25. MACEY & MILLER, *supra* note 23, at 37.

26. *Id.* For example, insurance companies, mortgage companies, pension funds, and consumer finance firms. *Id.*

27. *Id.* Technology has eroded the banks' traditional informational edge that they once had over other financial institutions. Jonathan R. Macey & Geoffrey P. Miller, *Bank Failure: The Politicization of a Social Problem*, 45 *STAN. L. REV.* 289, 294 (1992). One of the reasons that banks profited was because they had a distinct informational advantage that enabled them to make highly informed credit decisions. *Id.* Technology has given everyone access to this same information. *Id.*

28. *Id.* at 290. The article is a summary and analysis of several recent books on the failure of bank regulation. Included are: JAMES R. BARTH ET AL., *THE FUTURE OF AMERICAN BANKING* (1992); LOWELL L. BRYAN, *BANKRUPT: RESTORING THE HEALTH AND PROFITABILITY OF OUR BANKING SYSTEM* (1991); HELEN A. GARTEN, *WHY BANK REGULATION FAILED: DESIGNING A BANK REGULATORY STRATEGY FOR THE 1990s* (1991); JAMES L. PIERCE, *THE FUTURE OF BANKING* (1991).

29. *Id.*

30. Macey & Miller, *supra* note 27, at 290.

31. *Id.*

Banks and banking regulatory agencies facilitated their own destruction by creating the monopoly banks enjoyed for so many years.³² When any industry enjoys abnormally high profits, new entrants will be attracted to it until it is no longer profitable to enter the market. When too many companies enter a market, supply becomes greater than demand and only the most cost-efficient firms that offer the most attractive products survive.

In the banking industry, the new entrants that compete directly with banks are financial institutions like insurance companies, investment banks,³³ pension funds,³⁴ and credit unions³⁵ which, unlike their bank counterparts, do not have to comply with costly regulations, such as those that restrict the banks' activities.³⁶ Although banks no longer enjoy a monopoly in their market, they continue to be regulated as though they were a monopoly.³⁷ This has the effect of burdening the banking industry with all of the costs associated with heavy regulation while simultaneously prohibiting banks from competing in many profitable ventures.³⁸ Thus, rising costs and lower profits have led to increased bank failures over the last several years.

In an effort to make up lost profits resulting from the changing environment of the financial services industry, banks have increasingly invested in riskier assets. "If there is any reason the insured might prefer that an insured loss occur, or be inclined to be less careful to avoid the loss, there is said to be a *moral hazard*."³⁹ The protection of depositor funds by the FDIC has created a moral hazard that causes banks to take greater chances. If the risks pay off, the shareholders gain a great deal, and if the risks fail, the shareholders only lose up to their initial investment.⁴⁰ In

32. *Id.* Politicians created the banking cartel because of their need and desire to have banks at their disposal. *Id.* It was a very cozy arrangement.

33. An investment banker is a "firm, acting as underwriter or agent, that serves as intermediary between an issuer of securities and the investing public." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 210 (3d ed. 1991).

34. A pension fund is a "fund set up by a corporation, labor union, governmental entity, or other organization to pay the pension benefits of retired workers." *Id.* at 315.

35. A credit union is a "not-for-profit financial institution typically formed by employees of a company, a labor union, or a religious group and operated as a cooperative. Credit unions may offer a full range of financial services and pay higher rates on deposits and charge lower rates on loans than commercial banks." *Id.* at 93.

36. *Id.*

37. Macey & Miller, *supra* note 27, at 291.

38. *Id.*

39. SPENCER L. KIMBALL, *CASES AND MATERIALS ON INSURANCE LAW* 134 (1992).

40. MACEY & MILLER, *supra* note 23, at 37.

contrast, the FDIC has everything to lose and nothing to gain. Additionally, deposit insurance keeps banks viable because it enables them to attract the funds necessary for these risky investments at below market rates. Without insurance, a bank would be forced to increase the interest rate earned by depositors in order to compensate for the increased danger associated with these riskier investments. Not only are banks investing in riskier assets, but unlike nonbank financial institutions, whose assets are balanced by equity debt, a bank's assets (largely illiquid) are balanced against demand debts (highly liquid).⁴¹ Thus, if there is a run on a bank,⁴² due to a rumor of bad investments or a bank panic,⁴³ the bank will be unable to liquidate its assets to pay off its liabilities. Consequently, another bank will fail.

When a bank fails, the FDIC becomes the receiver of the failed institution and can either liquidate the bank's assets or allow another bank to enter into a purchase and assumption agreement with the failed bank.⁴⁴ If the first option is chosen, the failed bank is dissolved by the FDIC in an attempt to pay off the creditors of the bank.⁴⁵ If the assets are insufficient to satisfy the claims of creditors, insured depositors will receive up to \$100,000 per deposit, and uninsured depositors will receive a pro rata distribution of the remaining assets. After these payments are made, the unsecured creditors will be paid, if money is left.⁴⁶ Before the creation of depositor preference, unsecured creditors and depositors would receive payment, if any, from the bank's liquidated assets on a pro rata basis.

The overprotective treatment of banks by the FDIC has made the \$100,000 insurance coverage limit for insured deposits relatively unimportant.⁴⁷ "In 861 of the 1086 bank failures during the 1980s, the FDIC either found another bank to take over the operations of the failed bank through a P&A or provided financial assistance to give the bank time to recover or

41. Macey & Miller, *supra* note 27, at 296.

42. A run on a bank is a "[s]ituation in which a large number of depositors of a bank lose confidence in the safety of their deposits and attempt to withdraw their funds from the bank." GART, *supra* note 1, at 400. "A bank failure resulting from a bank run occurs when illiquid bank assets are sold at a loss to meet depositors' requests for funds." Rowena A. Pecchenino, *Risk-Based Deposit Insurance: An Incentive Compatible Plan*, 24 J. MONEY, CREDIT & BANKING 499, 501 (1992).

43. A bank panic is "[t]he simultaneous failure of many banks." GART, *supra* note 1, at 391.

44. *Id.* at 158.

45. *Id.*

46. *Id.*

47. *Id.*

arrange a merger.”⁴⁸ The result, in these instances, is that neither uninsured depositors or unsecured creditors lost any money.⁴⁹ “In the remaining 225 failures, insured deposits were transferred to another bank or were paid off up to the \$100,000 limit of coverage.”⁵⁰ Most of these banks were smaller institutions. Thus, uninsured depositors, unsecured creditors, and the FDIC suffered losses.⁵¹

Losses suffered by uninsured depositors and unsecured creditors, when a small bank fails, create a shift of funds to larger banks.⁵² Large banks are protected by the “too big to fail” doctrine, thus effectively making deposit insurance obsolete.⁵³ The underlying rationale behind the “too big to fail” doctrine is that by allowing a large bank to fail, problems would be created throughout the entire banking industry.⁵⁴ Therefore, all of the deposits at the largest banks are fully protected because if a large bank were headed toward insolvency, the FDIC would intervene.⁵⁵ Smaller banks, however, are not protected in such a manner.

In November 1990, Freedom National Bank, a relatively small, minority-owned, Harlem-based bank became insolvent as a result of numerous speculative loans that went bad. The FDIC decided to close and liquidate the bank . . . because the failure of the bank would not have any serious repercussions on the rest of the banking system. Large customers received about 50 cents on the dollar for deposits in excess of \$100,000. Charitable organizations, such as the National Urban League and the Negro College Fund, and several churches suffered losses. William Seidman, then FDIC chairman, testified before Congress that “My first testimony when I came to this job was that it’s unfair to treat big banks in a way that covers all depositors but not small banks. I promised to do my best to change that. Five years later, I can report that my best wasn’t good enough.” It is interesting to note that legislation was passed by Congress in late 1991 to eliminate “too big to fail” operations by the FDIC beginning in 1994.⁵⁶

48. GART, *supra* note 1, at 158.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 154-55.

53. GART, *supra* note 1, at 159.

54. *Id.* at 155.

55. *Id.*

56. *Id.* at 156-57.

In its attempt to make a profit, the bank may not be as concerned with the risks it takes since the FDIC bears all of the risks of any bad investments. If deposit insurance is to remain in place, insured banks must be forced back to their "traditional" role of accepting deposits and making loans.

The goal of regulation is to force banks to protect the deposits of individuals by requiring them to accumulate low-risk, marketable assets.⁵⁷ If this goal were accomplished, insured deposits and creations like the National Depositor Preference provision would not be necessary to protect deposits or to maintain people's confidence in the banking industry.

III. THE ROAD TO DEPOSITOR PREFERENCE

Throughout the modern era of banking in the United States, "[o]ne of the objects of the national bank system [has been] to secure, in the event of insolvency, a just and equal distribution of the assets of national banks⁵⁸ among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure."⁵⁹ The National Bank Act's⁶⁰ policy in a bank liquidation is to achieve "equity of equality among creditors."⁶¹ The rule against preferences was codified in the National Bank Act at 12 U.S.C. §§ 91, 194.⁶²

57. John A. Deangelis, *Riches Do Not Last Forever: Real Estate Investment by National Banks*, 1991 U. ILL. L. REV. 777, 785 (1991).

58. A national bank is a:

commercial bank whose charter is approved by the U.S. Comptroller of the Currency rather than by a state banking department. National banks are required to be members of the FEDERAL RESERVE SYSTEM and to purchase stock in the FEDERAL RESERVE BANK in their district They must also belong to the FEDERAL DEPOSIT INSURANCE CORPORATION.

DICTIONARY OF FINANCE AND INVESTMENT TERMS 269-70 (3d ed. 1991).

59. *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 55 (1936).

60. "[The] *National Banking Act of 1864* [c]reated Comptroller of Currency, which provided for the granting of federal banking charters and examination and supervision of national banks." GART, *supra* note 1, at 387.

61. *Scott v. Armstrong*, 146 U.S. 499, 511 (1892).

62. 12 U.S.C.S. §§ 91, 194 (Law. Co-op. 1984 & Supp. 1994); *Mcorp & Mcorp Fin., Inc. v. Clarke*, 755 F. Supp. 1402, 1407 n.11 (N.D. Tex. 1991). If greater distributions are made to some creditors over others, and there are insufficient assets in the receivership to provide full payment to the intrabank creditors, the agreements are void as fraudulent transfers under 12 U.S.C. § 191, and violate the ratable distribution requirements of 12 U.S.C. § 194. *Senior Unsecured Creditors' Comm.*, 749 F. Supp. at 774.

Section 91 prohibits the transfer of assets after the commission of an act of insolvency made "with a view to the preference of one creditor to another."

Historically, the courts have rejected the notion of depositor preference.⁶³ The courts have interpreted the National Bank Act as not permitting depositor preference. It is only in the past several years that both state and national banks have had depositor preferences in bank liquidations. Accordingly, when the FDIC is involved in its capacity as receiver, the National Bank Act must be read in conjunction with the Federal Deposit Insurance Act.⁶⁴

In *Downriver Community Federal Credit Union v. Penn Square Bank*,⁶⁵ the plaintiffs, certain uninsured depositors in the insolvent Penn Square Bank, disputed the priority of the depositors' claims against the insolvent bank's assets. The court reversed the district court's imposition of a constructive trust upon Penn Square's assets in favor of the plaintiff-depositors, stating that "federal law limits these depositors' recovery to their pro rata share of the assets held by the receiver."⁶⁶ Unsecured creditors of a failed bank are entitled to only their pro rata share of liquidated bank assets under the relevant provision of the National Bank Act.⁶⁷

The district court imposed a constructive trust in favor of plaintiffs because it applied state law, rather than federal law, in deciding the case. Prior to the insolvency of a national bank, state law generally governs the nature of the relationship between a national bank and its depositors.⁶⁸ The creditor rights of a depositor of a national bank are determined by the law of the state of the deposit, assuming there is no conflicting federal

Section 194 provides in part that "the comptroller shall make a ratable dividend of the money so paid over to him by the receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." These statutory provisions were originally enacted in 1866 as part of the NBA. Early decisions construing these laws arose in the context of bank liquidations and characterized the purpose of the requirements as ensuring equality of treatment among creditors in the distribution of assets of a failed bank.

Id.; see, e.g., *White v. Knox*, 111 U.S. 784, 786 (1884); *National Bank v. Colby*, 88 U.S. 609, 613 (1874).

63. See, e.g., *Downriver*, 879 F.2d at 754 (holding that federal law limits a depositor's recovery, in a bank liquidation, to a pro rata share of the assets held by the receiver).

64. *FDIC v. McKnight*, 769 F.2d 658, 662 (10th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

65. *Downriver*, 879 F.2d at 756 (including the FDIC, in its capacity as receiver of Penn Square Bank, in this dispute).

66. *Id.*

67. *Id.* (citing 12 U.S.C. § 194 (1993)).

68. See *Reno Nat'l Bank v. Seaborn*, 99 F.2d 482, 483 (9th Cir. 1938).

statute.⁶⁹ However, the role that state law plays in determining the rights of national banks is limited by the paramount authority of Congress to regulate national banks.⁷⁰

Since national banks are instrumentalities of the federal government, it is federal law that ultimately determines the liquidation preferences of unsecured creditors in a bank failure. In fact, any attempt by a state to define or control the liquidation process of national banks and any other FDIC insured banks is absolutely void.⁷¹ In addition, national banks are under federal control in a bank liquidation and the liquidation of all other FDIC insured banks is governed by the Federal Deposit Insurance Act, with liquidation preferences specifically provided for by the depositor preference provision.⁷²

Before the National Depositor Preference provision was enacted, the distribution of an insolvent bank's assets was controlled, in the case of national banks, by the National Bank Act.⁷³ The most relevant provisions of the Act were section 91, precluding payments by a bank that prefer some creditors over others, and section 194, requiring a pro rata distribution of assets among all general creditors entitled to share in the receivership estate.⁷⁴ All state laws inconsistent with the equal distribution scheme among general creditors, established by the National Bank Act, were preempted.⁷⁵

The National Bank Act was created to achieve, in case of a bank failure, "a just and equal distribution of the assets of national banks among all unsecured creditors"⁷⁶ "This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act."⁷⁷ There must be a ratable distribution of an insolvent bank's assets among all unsecured creditors, not a preference of some

69. *Downriver*, 879 F.2d at 758.

70. *Id.*

71. *See id.*

72. *See* 12 U.S.C. § 1821 (1988 & Supp. V 1993).

73. *Downriver*, 879 F.2d at 759.

74. *Id.*

75. *Jennings v. United States Fidelity & Guar. Co.*, 294 U.S. 216, 226 (1935).

76. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 284 (1896); *see also* *United States v. Lemaire*, 826 F.2d 387, 390 (5th Cir. 1987).

77. *Davis*, 161 U.S. at 284.

creditors over others.⁷⁸ The FDIC, therefore, in its capacity as receiver for the insolvent bank, must treat all unsecured creditors equitably.⁷⁹

Clearly, since the creation of the National Bank Act in 1864, the intent of Congress has been to provide equal treatment to all unsecured creditors in a bank liquidation.⁸⁰ However, with the ever increasing number of bank failures in the 1980s and early 1990s,⁸¹ the FDIC realized that treating all unsecured creditors of a failed bank equally was becoming an increasingly difficult endeavor. This is especially true now since most bank failures today no longer result in liquidation, as they did when the National Bank Act was first enacted.⁸²

Most recent bank failures are resolved through purchase and assumption agreements, rather than through the liquidation and distribution of the bank's assets contemplated by the National Bank Act.⁸³ A purchase and assump-

78. *Hibernia Nat'l Bank v. FDIC*, 733 F.2d 1403, 1407 (10th Cir. 1984).

79.

Unlike the FDIC, the Federal Savings and Loan Insurance Corporation ("FSLIC") was never subject to the ratable distribution requirements of the NBA [National Bank Act]. The FSLIC could, and indeed was obligated to, discriminate among creditors in distributing receivership assets by following the depositor preference statute set forth in federal regulations. FIRREA simply codified this result [§ 1821(i)(2)] with respect to thrifts, and did no more than preserve the status quo.

Senior Unsecured Creditors' Comm., 749 F. Supp. at 774 n.24.

80. See *Mcorp*, 755 F. Supp. at 1407.

81. Banking Failures:

<u>YEAR</u>	<u>NUMBER</u>	<u>DEPOSITS (Billions)</u>
1945-54	44	
1955-64	47	
1965-74	60	
1975-81	75	
1982	42	9.9
1983	48	5.4
1984	79	2.9
1985	120	8.1
1986	138	6.5
1987	184	6.3
1988	200	24.9
1989	206	24.1
1990	169	14.8
1991	127	53.8
1992	122	N.A.

GART, *supra* note 1, at 148.

82. *Senior Unsecured Creditors' Comm.*, 749 F. Supp. at 775.

83. *Id.*

tion agreement involves a solvent bank acquiring an insolvent bank. When a solvent acquiring bank assumes the assets and liabilities of a failed bank, with financial assistance from the FDIC, some, but not all of the failed bank's liabilities are assumed.⁸⁴ Consequently, the assumed creditors receive more on their claims than the unassumed creditors, thereby creating an unequal distribution of a failed bank's assets to creditors.⁸⁵ Thus, the courts were left to determine "whether the assumption and full payment of certain liabilities by an acquiring bank violates the rights vested by [sections] 91 and 194 in creditors whose liabilities are not assumed."⁸⁶

Most courts held that the FDIC was required to provide creditors of a failed bank with a ratable share of the bank's assets, regardless of whether the bank failure is resolved through a purchase and assumption transaction or a liquidation.⁸⁷ However, some courts did recognize "considerable force" in the FDIC's argument that purchase and assumption transactions were not contemplated under the National Bank Act, and therefore, the distribution requirements of sections 91 and 194 should be different for these transactions.⁸⁸ The FDIC argued that only the ratable distribution of the liquidated value of the unassumed creditor's claim should be required under sections 91 and 194.⁸⁹ With the creation of the National Depositor Preference provision, determining the applicability of sections 91 and 194 to purchase and assumption transactions became moot.

In 1986⁹⁰ and 1988,⁹¹ the FDIC had bills introduced in the Senate that would have created preference payments to depositors only for national bank failures, but Congress did not pass either bill.⁹² The bills were proposed because of the strain placed on the FDIC by the troubled banking industry. In the absence of a depositor preference provision, general

84. *Id.*

85. *Id.*

86. *Id.* at 775.

87. See, e.g., *FDIC v. United States Nat'l Bank*, 685 F.2d 270, 273-77 (9th Cir. 1982) (holding that a defrauded, subordinated note holder was entitled to receive a ratable distribution from assets transferred in a purchase and assumption transaction); *First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978) (holding that a purchase and assumption agreement which provided 100% payment to assumed creditors but lesser payment to unassumed creditors violated the provisions of sections 91 and 194).

88. *Senior Unsecured Creditors' Comm.*, 749 F. Supp. at 775-76.

89. *Id.* at 776.

90. S. 2592, 99th Cong., 2d Sess. § 1 (1986).

91. S. 2715, 100th Cong., 2d Sess. § 1 (1988).

92. *Mcorp*, 755 F. Supp. at 1419 n.36.

creditors normally receive full payment of their claims since the majority of bank failures are resolved by purchase and assumption agreements.⁹³

With the large number of bank failures that the FDIC handled, paying everyone in full, rather than simply a pro rata share, became a burden that the bank insurance fund was unable to bear. From 1986 through 1993, the FDIC, through the deposit insurance fund, paid out approximately \$31.93 billion for the resolution of failed banks.⁹⁴ It appears that during this same period, if depositor preference had been in effect, the deposit insurance fund would have actually grown because the assets of the failed banks, in most instances, would have been adequate to cover the deposit liabilities of the failed banks.⁹⁵

The natural step for the FDIC to take, since Congress created the agency for the protection of depositors and the integrity of the banking system, was to prefer depositors in the distribution of a bank's assets, thus granting much needed relief for the bank insurance fund. However, the FDIC's inclination to give preference to depositors, in an attempt to protect the deposit insurance fund against loss, is contrary to the congressional intent of equitable and ratable payment of all general creditors.⁹⁶ It became apparent to both Congress and the FDIC that something needed to change in order to relieve the burden placed on the deposit insurance fund while at the same time insuring the integrity of the banking system.

93. *Id.* at 1419.

94. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, 1992 BANK RESOLUTIONS-FDIC CHOSE METHODS DETERMINED LEAST COSTLY, BUT NEEDS TO IMPROVE PROCESS 2 (May 10, 1994).

95. Bank Failures:

<u>YEAR</u>	<u>NUMBER</u>	<u>TOTAL ASSETS (Billions)</u>
1986	145	7.63
1987	203	9.23
1988	221	52.62
1989	207	29.40
1990	169	15.74
1991	127	63.40
1992	122	44.23
1993	42	4.06

Id. at 10.

96. *First Empire Bank*, 572 F.2d at 1371.

IV. WHAT IS DEPOSITOR PREFERENCE?

The solution chosen by Congress on August 10, 1993 was a national depositor preference scheme, which took effect on August 13, 1993.⁹⁷

[A]mounts realized from the liquidation or other resolution of any insured depository institution by any receiver . . . shall be distributed to pay claims (other than secured claims . . .) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution⁹⁸

Depositor preference was included in the Omnibus Reconciliation Act of 1993 "as a replacement for the administration's [unpopular] proposal to raise additional [federal] revenues by charging state-chartered banks for

97. *Banking, Depositor Preference Provisions May Have Impact on Foreign Creditors*, DAILY REP. FOR EXECUTIVES, Sept. 10, 1993, at 174.

98. 12 U.S.C. § 1821(d)(11)(A) (1988 & Supp. V 1993).

(11) Depositor preference

(A) In general

Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
- (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
- (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law

(i) In general

The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

Id. § 1821(d)(11)(A)-(B)(i).

examinations conducted by the FDIC.”⁹⁹ The Conference of State Banking Supervisors (“Banking Supervisors”) proposed depositor preference as an alternative to increased examination fees which would have caused fees for state-chartered banks to increase by one billion dollars over a four year period.¹⁰⁰ The Banking Supervisors estimate that a national depositor preference scheme “could save \$300 million in the first year, and \$1.6 billion over five years”¹⁰¹ This surpasses the Clinton administration’s goal of raising \$1.37 billion over five years, through increased fees, beginning in 1994.¹⁰² By choosing a national depositor preference scheme instead of increasing examination fees, Congress accomplished its intended goal of decreasing the losses to the Bank Insurance Fund and increasing revenues. Moreover, it accomplished these goals without placing the burden on already troubled state-chartered banks. “[T]he exam fee proposal could have cost over \$2 billion in potential loans [in the first year] . . . because every dollar in capital can support \$10 in new loans.”¹⁰³

Depositor preference amends the Federal Deposit Insurance Act and gives domestic depositors a liquidation preference over all other claims, except secured claims and administrative expenses of receivers.¹⁰⁴ Consequently, in most cases, the FDIC will be fully reimbursed for its payout to depositors, and unsecured creditors of the bank will receive little or no money. Prior to the enactment of this bill, the FDIC paid depositors on a pro rata basis with all other unsecured creditors.¹⁰⁵ Since depositor preference gives both insured and uninsured depositors an advantage in a bank liquidation, the FDIC will realize tremendous savings because it is subrogated to the claims of the depositors it has indemnified.¹⁰⁶ The FDIC will be able to recoup most of the money it pays out to depositors before the first unsecured creditor receives anything. It is estimated that giving depositors preference will save the insurance fund approximately \$.9

99. *Banking, Depositor Preference Provision May Pose Some Greater Risks, Banking Experts Warn*, DAILY REP. FOR EXECUTIVES, Sept. 21, 1993, at 181 [hereinafter *Banking, Depositor Preference*].

100. Bill Atkinson, *States Push Alternatives to Hitting Their Banks with Higher Fees*, AMERICAN BANKER, Mar. 30, 1993, at 7.

101. *Id.*

102. *Banks Hope Fed Heard Cue When House Rejected Exam Fees*, 5 THOMSON’S INTERNATIONAL BANKING REGULATOR, May 17, 1993, at 3.

103. *Senate Committees Approve Banking Plan for Reconciliation, Delay Direct Lending*, BNA WASH. INSIDER, June 10, 1993, at 105.

104. H.R. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993).

105. *Id.*

106. *Id.*

billion over the 1994-1998¹⁰⁷ period.¹⁰⁸ However, the increased risk to unsecured creditors will have a profoundly negative effect on both the banking industry and unsecured creditors.

Depositor preference applies to both insured and uninsured depositors and shifts the burden of paying off depositors from the FDIC to the failed bank. By shifting the risks associated with a bank's investments to the banks themselves rather than to the FDIC, the moral hazard associated with depositor insurance is virtually eliminated. This will cause banks to more carefully choose and monitor investments, thereby reducing the risks that lead to failure.

Historically, all creditors of a failed bank were generally able to recover seventy percent to eighty-five percent of the debts owed to them by the bank.¹⁰⁹ All creditors, other than secured creditors, shared equally in any loss when the bank's liquidated assets were insufficient to pay its liabilities.¹¹⁰ Depositor preference has changed this equality, giving both depositors and the FDIC an advantage over all other unsecured creditors of a failed bank.

V. EFFECT OF DEPOSITOR PREFERENCE ON UNSECURED CREDITORS

Prior to the enactment of the depositor preference statute, senior obligations, such as letters of credit,¹¹¹ were treated the same as uninsured deposits in a bank liquidation. Now, unsecured creditors of a bank, in order to protect themselves from risk, will be forced to either turn to other financial institutions for investment and business transactions, or will assume the risk of dealing with a bank only on a collateralized basis.¹¹² Since there may only be enough assets to satisfy the claims of secured creditors and depositors, unsecured creditors risk losing everything if a bank fails.

107. *See id.*

108. *Senate Banking Committee Approves House Budget Reconciliation Package*, 60 BUREAU OF NAT'L AFFAIRS BANKING REP., June 14, 1993, § 24, at 872.

109. John L. Douglas, *Depositor Preference May Harm Banks*, THE NAT'L L.J., Aug. 23, 1993, at 19.

110. *Id.*

111. A letter of credit is a "credit instrument issued by a bank guaranteeing payments on behalf of its customer to a BENEFICIARY, normally to a third party . . . for a stated period of time and when certain conditions are met." *DICTIONARY OF BANKING TERMS* 34 (2d ed. 1993).

112. Ely, *supra* note 12, at 24.

Thus, depositor preference exposes unsecured creditors to risk that may be too great to bear.

For example, if a bank has liabilities totaling ten dollars and assets of nine dollars, the bank is insolvent and is considered a failed bank. If nine dollars of the bank's liabilities are deposits, depositors will receive nine dollars, while other unsecured creditors receive nothing. Before the creation of national depositor preference, the failed bank's assets would have been distributed on a pro rata basis. A pro rata distribution of the failed bank's assets would have resulted in all unsecured creditors receiving ninety cents on the dollar. The FDIC would have received eight dollars and ten cents, after paying out nine dollars to insured depositors (assuming all the depositors of the bank were insured), and the other unsecured creditors of the failed bank would have received ninety cents.

Adding uninsured depositors and secured creditors to the equation, under a pro rata distribution scheme, simply decreases the amount recovered by the FDIC and unsecured creditors. However, under the current depositor preference scheme, this virtually guarantees that there will be nothing left for unsecured creditors when a bank failure is resolved. Unsecured creditors have no choice but to react defensively to the new threat posed by depositor preference.

"Unsecured bank borrowings, such as uninsured bank notes, may begin to include 'acceleration clauses' that will [enable] the [creditor to] pull its money out of the bank before [the institution enters receivership]."¹¹³ Additionally, foreign depositors and unsecured creditors can: 1) "require collateral, to the extent legally allowed, to secure their extensions of credit; [2] shorten the maturity of their deposits or obligations[;] or [3] insert put options"¹¹⁴ that can be exercised when a bank's credit rating is downgraded by a rating agency. . . ."¹¹⁵

The negative impact that the depositor preference provision will have on unsecured creditors of banks will greatly affect the banking industry. Unsecured creditors of a bank will be wiped out before the FDIC and

113. *Id.* at 25.

114. A put option is:

[a] contract giving the holder the right, but not the obligation, to sell a security or financial instrument for a specified period of time at a specific price, called the EXERCISE PRICE OR STRIKE PRICE. Puts are bought by investors who believe the price of the underlying securities will go down, and they will be able to sell the securities as a higher striking price. The opposite is a CALL OPTION.

DICTIONARY OF BANKING TERMS 487 (2d ed., 1993) (emphasis omitted).

115. *Banking, Depositor Preference*, *supra* note 99, at 181.

uninsured domestic depositors suffer any loss.¹¹⁶ The most likely unsecured creditors of a bank are holders of banker's acceptances,¹¹⁷ federal funds¹¹⁸ sellers, unsecured lenders, landlords, and counterparties in swaps,¹¹⁹ options,¹²⁰ and futures¹²¹ transactions.¹²² In addition, banks are commercial enterprises that "acquire products, contract for services and deal with other financial institutions and their customers."¹²³ Commercial relationships cause a bank to "contract for various services and lease . . . equipment, . . . assume a number of contractual liabilities to employees . . . , [and] enter into long-term contracts to perform certain services. . . ."¹²⁴ All of these unsecured creditors face the increased risk placed upon them by the depositor preference scheme.

Foreign depositors are at great risk under depositor preference because the "FDIC [has] take[n] the position that foreign deposits payable only in overseas branches are not deposits for purposes of the depositor preference provisions."¹²⁵ Foreign depositors that fall into this category are lumped together with unsecured creditors and stand to lose all of their money when a bank fails, and its assets are liquidated. For this reason, foreign depositors must take the same precautions as other unsecured creditors of a bank.

116. 12 U.S.C. § 1821(d)(11) (1988 & Supp. V 1993).

117. A banker's acceptance is a "time draft drawn on and accepted by a bank With the credit strength of a bank behind it, the banker's acceptance usually qualifies as a MONEY MARKET instrument. The liability assumed by the bank is called its acceptance liability." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 3 (3d ed. 1991).

118. Federal funds are "funds deposited by commercial banks at Federal Reserve Banks Banks may lend federal funds to each other on an overnight basis . . . [and] may also transfer funds among themselves or on behalf of customers on a same-day basis by debiting and crediting balances in the various reserve banks." *Id.* at 139-40.

119. A swap is the "exchange [of] one security for another." *Id.* at 451.

120. An option is a "right to buy or sell property that is granted in exchange for an agreed-upon sum. If the right is not exercised after a specified period, the option expires and the option buyer forfeits the money." *Id.* at 297.

121. Futures contracts are contracts involving an:

agreement to buy or sell a specific amount of a commodity or financial instrument at a particular price on a stipulated future date. The price is established between buyer and seller on the floor of a commodity exchange [T]he contract [may be] sold to another before settlement date, which may happen if a trader [wants] to take a profit or cut a loss.

Id. at 168.

122. Ely, *supra* note 12.

123. Douglas, *supra* note 109, at 23.

124. *Id.*

125. *Banking, Depositor Preference Provisions May Have Impact on Foreign Creditors*, DAILY REP. FOR EXECUTIVES, Sept. 10, 1993, at 174.

The larger, "too big to fail" banks are now much more attractive to both foreign depositors and general creditors. Consequently, there may be a shift of funds away from smaller banks. This potential shift in assets may cause an increased number of smaller banks to fail over the next several years, causing an adverse effect on small business, since smaller banks tend to cater to individual and small business financing. The potential repercussions of the depositor preference provision were ignored by Congress when it enacted the new budget bill.

Depositor preference will force foreign depositors, federal funds sellers, and other creditors to extend credit to a bank only if they can protect themselves from the risk of loss associated with a bank failure.¹²⁶ They can demand that any credit extended be fully secured, thus placing them ahead of depositors in a liquidation, or they could include acceleration clauses¹²⁷ in all of their loan documents.¹²⁸ If acceleration clauses are widely used, as soon as there is even a rumor that a bank is in trouble, unsecured creditors will demand and receive the balance of any outstanding debt owed to them by the bank. Consequently, depositors may follow the lead of the more informed unsecured creditors, possibly resulting in a run on the bank and another bank failure.

VI. EFFECT ON THE BANKING INDUSTRY

The public's interest lies in secure deposits.¹²⁹ Having banks FDIC insured and regulated is perceived as a key element of maintaining deposit security. The introduction of the National Depositor Preference statute virtually guaranteed depositors that all of their deposits would be returned in case of a bank failure. The tradeoff for depositor security, however, is the increased risk of all other unsecured creditors of insured banks.¹³⁰

The long-term repercussions of depositor preference on the banking industry are still unclear. "Because the [depositor preference] provision was

126. *Banking, Depositor Preference*, *supra* note 99, at 181.

127. An acceleration clause is a "provision, normally present in an INDENTURE agreement, mortgage, or other contract, that the unpaid balance is to become due and payable if specified events of default should occur. Such events include failure to meet interest, principle, or sinking fund payments; insolvency" *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 2-3 (3d ed. 1991).

128. Ely, *supra* note 12, at 24.

129. Deangelis, *supra* note 57, at 777.

130. "The term 'insured bank' means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this Act" 12 U.S.C. § 1813(h) (1988 & Supp. V 1993).

a small amendment in a very large and complex non-banking act, it received . . . little . . . attention” from either Congress or the general public.¹³¹ Unsecured creditors will take protective actions, as discussed in part five, as a result of their increased risk. These protective measures will affect the risk position of the FDIC as insurer. The FDIC could possibly respond by:

redesign[ing] its calculation of deposit insurance premiums, to take [into] account . . . the amount of senior and junior claims as newly defined [under the depositor preference provision]; redesign[ing] its calculation of capital and capital requirements, for the same reasons; interven[ing] or clos[ing] banks more quickly, because of the greater likelihood of runs [on banks by federal funds] sellers or foreign depositor[s]; or . . . [delaying the closing of banks] because of the greater degree of insolvency necessary to inflict a loss on the insurance fund.¹³²

Additionally, banks will seek to restructure their contractual arrangements and organizations in order to reduce deposit insurance premiums that are greater than the risk to the insurance fund.¹³³ An individual bank, for example, could decrease the amount of federal funds and foreign deposits, thereby balancing the risk posed to the insurance fund and the insurance premiums charged by the FDIC. However, uninsured depositors may react to this restructuring by shifting their deposits to banks that have a greater proportion of foreign deposits and federal funds, since these banks are perceived as being safer for uninsured depositors in case of a failure.¹³⁴ Specifically, when a bank fails, uninsured depositors will be made whole before any unsecured creditors. Therefore, it is beneficial for uninsured depositors to bank where there is a large proportion of unsecured creditors. If uninsured creditors, banks, and the FDIC take reactive measures other, as yet undetermined, consequences may occur.¹³⁵

VII. CONCLUSION

The National Depositor Preference provision of the Omnibus Budget Reconciliation Act of 1993 was intended, by the Committee on the Budget, to be one part of an intricate plan to reduce the federal deficit and to raise

131. *Banking, Depositor Preference*, *supra* note 99, at 181.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

révenues.¹³⁶ Additionally, depositor preference was intended to save the insurance fund and taxpayers a great deal of money. "Only when all depositors have recovered 100 percent of losses [will] general creditors recover anything. Thus, we expect that receipts to the federal deposit insurance funds from asset sales [will] be higher, and insurance losses [will] be lower"¹³⁷ than under previous laws that divided the assets of a failed bank on a pro rata basis.

Since the enactment of the depositor preference statute, on August 10, 1993, the banking industry is healthier than it has been in thirteen years.¹³⁸ "[J]ust [thirteen] BIF-insured institutions, with \$1.6 billion in assets, failed [in 1994]."¹³⁹ In comparison, twenty-three banks were closed in the first half of 1993.¹⁴⁰ Further, the bank insurance fund is up to \$19.4 billion, which is an all-time record.¹⁴¹ Banks were earning record-high profits in 1994, with the number of problem banks "down to 383 with \$53 billion in assets, compared with 981 with \$535 billion in assets two years ago."¹⁴²

The banking industry is realizing an economic boom. One of the consequences of this, however, is that the depositor preference provision has had no impact on banks, the FDIC, or unsecured creditors. Because it has received very little attention, the negative impact that this provision will have on all parties concerned, once the rate of bank failures increases, will be immediate and dangerous. Unsecured creditors will shift to the larger "too big to fail" banks to insure the security of their money, and uninsured depositors will seek banks that have a proportionally large number of unsecured creditors to better guarantee a one hundred percent return on their deposits in case of a bank failure. This shift may create instability in the banking industry and cause even more banks to fail. Clearly, in an attempt to raise revenues in the short term, Congress has ignored the potentially devastating consequences of the depositor preference provisions.

David J. Ratway

136. H.R. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993).

137. *Id.*

138. *Banking*, L.A. TIMES, Aug. 10, 1994, at D2.

139. *The \$4 Billion Solution*, ABA BANKING JOURNAL, Feb. 1995, at 17.

140. *Banking*, *supra* note 138, at D2.

141. *See The \$4 Billion Solution*, *supra* note 139, at 17.

142. *Bank Profits Soar; Thrifts' Slip a Bit; Losses at Three Big S&Ls Hurt First-Quarter Earnings for the Nation's Thrifts. Commercial Banks Healthy*, ORLANDO SENTINEL, June 16, 1994, at C1.